‘Barriers to Justice within the Employment Tribunal System: The Applicants’ Perspective’

Application for Pilot Stage Funding

Project Synopsis

The research proposal is designed to gain an understanding of the barriers to justice as perceived by applicants to employment tribunals. The overall project consists of three stages: (1) background research (secondary desktop research completed May-August 2008); (2) a pilot study (December 2008-May 2009); (3) in-depth tracking of a number of employment tribunal cases (June 2009-December 2010). Funding has been awarded for the pilot study (although to complete the pilot study the researchers require approx £500 which is being sought from other sources).

For the pilot study, suitable interviewees will be identified with the assistance of the Citizens Advice Bureaux (CAB) in Glasgow and Bristol; semi-structured interviews will be conducted which will then be transcribed and analysed. Successful completion of the pilot study will inform the further development of the project to stage 3, which will involve in-depth case-tracking of a number of applicants to the ETs in Bristol and Glasgow through interviews and observation.

Background and Aims

The overall project seeks to explore the perceptions and experiences of applicants and potential applicants to employment tribunals. The focus will be on the process from a user’s perspective with the overall aim being to identify barriers to justice. The premise of this research is that the highly formalised procedures and processes adopted by the employment tribunal (ET) service are no longer appropriate for the type of employee who would wish to use the ET to resolve a dispute. This formalisation is leading to a perception on the part of many applicants that the ET system is unable to deliver on promises of access to justice with many potential applicants unable to reach the hearing stage because of the formalised nature of the process, or fear of losing due to a lack of representation and then being required to pay the employer’s costs if they lose. Even those who reach the hearing stage can be severely disadvantaged because the formalised system means that the employer is likely to be represented by highly skilled legal counsel practiced in both the appropriate law and tribunal procedure.

The ET system was introduced to the UK in an era when the employment landscape in Britain was very different from now, at a time when the majority of workers were unionised and employed in permanent, full-time jobs. Today, a high proportion of the workforce is employed on a part-time basis and there is a growing casualisation of working arrangements with increases in the numbers of agency workers engaged through tripartite arrangements and/or on fixed-term contracts. These highly significant changes to the UK labour market caused by increased global competition and corresponding deregulation could be said to have amounted to a revolution in
the composition of the workforce.\(^1\) Corresponding changes have taken place with
regard to trade union density which has declined from a peak of 57% in 1979 to 30% in 1995\(^2\) to 28% in 2007\(^3\). These changes have been accompanied by a shift in the
regulation of employment disputes since the 1970s which has moved the emphasis
away from a base of collectively held rights towards an increased focus on the rights
of the individual. This has intensified the relationship between individual employers
and employees and irreversibly changed the nature of industrial relations in the UK,
yet no corresponding amendments have been made to the mechanisms surrounding
the conduct of ETs.

**Survey of previous research**

Despite these significant developments, there has been little empirical research
focused on the experiences of applicants to the ET. The last significant empirical
academic study was published in 1985\(^4\) and predates many of the legislative
changes that have been made to the system of employment law.

The wider contextual civil justice environment within which the ET Service is situated
has been analysed in the studies by Genn\(^5\) and Genn and Paterson.\(^6\) Some of the
issues relating to the ET system raised by these studies could be further explored
through empirical research. It is therefore timely and appropriate to revisit the issue
of applicant experience within this context.

In 2006, Genn et al\(^7\) carried out research for the Department of Constitutional Affairs
which studied ‘access, expectations, experiences and outcomes of tribunal hearings
from the perspective of tribunal users in three tribunals: the Appeals Service,
Criminal Injuries Compensation Appeals Panel, and Special Educational Needs and
Disability Tribunal’ (id, i). This study was specifically designed to compare the
experiences of black, white and ethnic minority users and establish whether there
was any direct or indirect discrimination in the tribunal service. It involved focus group
discussion with members of the general public to explore ‘knowledge and attitudes to
seeking redress for administrative disputes and Grievances’; its general findings will
therefore be relevant to this study. However, the Genn et al study did not examine
the ET service, and focused on the tribunal stage, whereas our proposed study is
designed to explore perceptions about barriers that arise from the point at which a
person considers the possibility of a tribunal application.

---

   2007, available at [http://www.berr.gov.uk/employment/research-evaluation/trade-union-
   statistics/index.html](http://www.berr.gov.uk/employment/research-evaluation/trade-union-
   statistics/index.html)
   Publishing).
   *Tribunals for Diverse Users*, DCA Research Series 1/06
**Jurisdictional comparisons**

As well as being original, the current proposal to conduct empirical research at two sites is innovative as the locations (Glasgow and Bristol) have been specifically selected in order to explore the impact of devolution and jurisdictional difference. This will enable comparisons to be made between applicants' experiences of two tribunal offices in cities sharing many common features (historical development, economic base, population size, sectoral employment breakdown) but which operate in different jurisdictions under a common system of employment law.

**Methodology: Pilot Stage**

The purpose of the pilot stage is to

i) gain an understanding of ET applicants' perceptions of the purpose of the ET, the processes of the ET, and barriers to achieving what they would consider to be a just outcome;

ii) identify and resolve any problems that might occur in devising and managing a longitudinal case-tracking study in two sites, across two different jurisdictions, by researchers at two institutions;

iii) identify the problems that will be encountered in locating sufficient ET applicants who would be willing and able to take part in a longitudinal study of their ET case up to the point of resolution. Previous research with similar groups of disadvantaged, relatively powerless individuals appealing decisions made by powerful, bureaucratic organisations has demonstrated that there is a low rate of appeal, and even where applicants feel they have a strong case, the stress of the appeal process produces a high drop-out rate.8

This pilot study will involve:

- Identifying potential interviewees through the Glasgow and Bristol CABs. Each CAB will ask clients who apply to the Bureau for help in submitting a claim to the Employment Tribunal (form ET1) if they would be willing to take part in this research, requesting permission to pass on contact details to the researchers. Research already carried out at Bristol CAB has identified that the number of clients seen over the last year whose case has been identified by a CAB adviser as involving 'Employment Tribunals and Appeals' is 147 [Jul-Sept 2007: 36; Oct-Dec 2007: 34; Jan-March 2008: 30; Apr-Jun 2008: 47].

- Semi-structured interviews with up to 20 CAB clients across the two case study areas (ideally split 50:50). Interviews will explore the interviewee’s experience of applying to the ET, the role played by their CAB adviser, whether they had access to other forms of support (e.g., did they attempt to obtain legal advice? What was the response? What were barriers to obtaining legal advice?). If applicable, the interview will explore the applicant’s experience of arbitration through ACAS. To encourage participation in the research, interviewees will be offered interviews in their own homes. An alternative accessible venue will be available (either in the offices of the CAB

---

or in the Bristol study, in university offices). A fee of £25 will be paid to each interviewee to cover time donated to the research project and any out-of-pocket expenses.

- Interviews will be recorded (subject to the interviewee’s agreement) and transcribed professionally. The transcriptions will be analysed by both researchers using pre-identified codes and codes grounded in the interview data. In the stage 3 research it is intended to use a software tool (such as NVivo) to code data. This pilot stage will identify and overcome any difficulties likely to occur in using such software across more than one institution.

**Ethical considerations:** The research methodology will be designed to comply fully with the ethical codes of the Universities of Stirling and Bristol. Potential interviewees will be informed of the aims and objectives of the research project, and will only be interviewed once their signed consent to taking part in the project has been obtained. All data will be fully anonymised and the researchers will be careful in selection of quotes to ensure that it is not possible to identify any interviewees. The payment of a fee to interviewees has become standard practice in social science research. £25 is a modest sum given that interviewees will be asked to give up at least an hour and a half of their time, may incur out of pocket expenses (eg. for travel and subsistence) and may be required to make arrangements for dependents to be cared for whilst the interview is being conducted.

**Outputs:**

**Publications:** A report of the pilot study will be published on the research websites of the Schools of Law of the University of Bristol and Stirling University. The pilot study results will be used to inform a bid to the Nuffield Foundation for stage 3 of the research (case tracking). The results of the whole research project will be publicised to advisers, other practitioners and policy makers through, for example, articles in *The Adviser* (Citizens Advice journal) and *Legal Action*. It is anticipated that two academic articles will result from the overall project, one in a socio-legal journal examining methodological and administrative justice issues, and another in the *Industrial Law Journal* focussing on specific employment law issues. None of these will result in remuneration to the researchers.

**Stage 3 application:** It is expected that this stage of the project will produce interesting and new findings in its own right. This pilot study is also to be used as a springboard to enable an application to the Nuffield Foundation under their ‘Access to Justice’ research programme for the longitudinal case-tracking study described in Q5 above. The pilot study is essential to the design of the next stage for three principal reasons. First, it is anticipated that it will be difficult to identify applicants to the ET whose cases are likely to proceed to settlement either through arbitration or through an ET hearing. This stage enables the researchers to make contact with CAB clients whose case could potentially be followed through in the next stage, and to identify what proportion of CAB clients are likely to be suitable research subjects. Second, the data from the interviews will be used to devise interview questionnaires for the next stage. Third, this pilot enables the research team to identify and resolve any difficulties in managing research across two different jurisdictions, by researchers at two institutions.
**Budget**

Transcribing fees for 20 interviews each 90 mins £1332\(^9\)
Payment to each person interviewed @ £25 per interview £ 500\(^10\)

Total £1832

**The Research Partners**

**Morag McDermont, Senior Lecturer, University of Bristol:** PhD awarded Jan 2005; lecturer of public law since August 2004; Mar-Sept 2005, co-researcher on empirical research project examining the role of the governing body of a housing association; Jan-Dec 2007, co-researcher and (for part of the project) acting Principal Investigator on ESRC-funded research project examining the process of nominating housing applicants from local authorities to housing associations. Both projects involved qualitative research case-study methods. Morag has been a participant in the ESRC Seminar series on Administrative Justice, and is co-authoring a chapter in *Treating Citizens Fairly*, edited by Mike Adler to be published by Hart Publishing. Morag brings to the research an academic knowledge of administrative justice, the role of the tribunals system and alternative dispute mechanisms, along with experience of designing and managing empirical research involving interviewing, observational research and analysis of quantitative data.

**Nicole Busby, Senior Lecturer, University of Stirling:** Nicole’s research background is in employment and European law with a specific focus on issues of equality and equity within an increasingly individualised system of employment rights. Her work has been published widely in peer-reviewed journals. Nicole’s contribution to the current project will be her expertise in the field of employment law and her knowledge of the employment tribunal system which have informed the project design and which will also be utilised at the interview and analysis stages of the pilot study.

**Bristol Citizens’ Advice Bureau:** potential interviewees will be identified through the Bristol CAB. A CAB volunteer (herself a retired solicitor who specialised in Employment casework) will make contact with clients of the CAB who have sought support in making an ET claim, asking if they would take part in the research, and making arrangements for interviews to take place. Working in partnership with the Bristol CAB will enable the dissemination of the research findings to a much wider audience: material from press releases by the Bristol CAB regularly feature in the local media (newspapers and radio); Citizens Advice (the national umbrella organisation) produces regular ‘evidence briefings’ of research, and publishes *The Adviser*, a bimonthly magazine for the advice sector.

**Glasgow CAB:** Access to the Glasgow CAB is still being negotiated. It is envisaged that an arrangement similar to that which already exists with Bristol CAB will be put in place before commencement of the pilot study. This would build on an existing relationship between the Glasgow Central CAB and Nicole Busby.

---

9 Based on current professional transcription rates @ £7.40/ 10 mins of interview.
10 This fee to cover the interviewee’s time and any other out-of-pocket expenses; it is standard practice in social research to pay such a fee.
Appendix: Note on sampling methods

1. All CABx use a database (called CASE) to input information gained from clients in the course of interview(s). The database is maintained by Citizens Advice (the national organisation). Clients' enquiries are classified using a nationally-agreed set of categories. This enables CABx staff and volunteers to interrogate the database to identify all cases seen within a given timeframe where the query relates to a specific matter. For the purposes of this research we are interested in cases that have been classified as concerning ‘Employment Tribunals and Appeals’.

2. A Bristol CAB volunteer will identify from the database cases where the client was seen by the Bureau Jan-Mar 2008 where the person has been advised that they probably had a case to take to an ET and were either issued with an ET application form and/or advised to see a solicitor. Clients seen more than once by a CAB advisor could be of most interest to this research. If there are any indications that a client is either a health professional,11 or a vulnerable adult,12 these persons would be excluded from the sample.

3. The Bristol CAB will then send a letter to all these clients which will explain that the CAB is working with Bristol University to carry out research, will briefly explain the nature of the research, and that a CAB worker will contact them in the next few days to ask if they would take part in this research. The letter will further explain a) that if they do not want to be contacted they could reply to the Bureau saying so, b) when phoned, they can refuse to discuss or take part in the research, and c) that if they choose to take part, they will receive £25 for their time and to cover travel and other expenses. This letter will be accompanied by a short (no larger than one-side A5) leaflet explaining why the research is being carried out, what would be expected of them if they agree to take part, and details of how they can withdraw from the research should they choose at any stage.

4. A CAB volunteer will follow this letter up with a phone call. If agreement to take part in the research is received, an appointment will be made for an interview to take place in the offices of the Bristol CAB.

5. It is likely that this process will not produce the required 10 interviewees. That being the case, the process will be repeated for clients seen in the period April-June, etc until 10 interviews have been carried out.

6. **Interview process:** Should it become apparent to the interviewer during an interview that the interviewee falls within any of the categories of ‘vulnerable’, the interview would not be terminated, but would be drawn to a close in a natural way, unless this is deemed to be impossible in which case closing the interview will be done as sensitively as possible. If the interviewer considered that the interviewee might not be able to give informed consent to taking part in the research, then all material from that interview would then be immediately destroyed.

---

11 Health professional is defined here as any person whose profession is regulated by the Health Professions Council, i.e. Arts therapists, Biomedical scientists, Chiropodists/podiatrists, Clinical scientists, Dietitians, Occupational therapists, Operating department practitioners, Orthoptists, Paramedics, Physiotherapists, Prosthetists/orthotists, Radiographers, Speech and language therapists (see [http://www.hpc-uk.org/aboutus/](http://www.hpc-uk.org/aboutus/)); and doctors regulated by the BMA.

12 That is, a person who has either i) a learning or physical disability; ii) a physical or mental illness, chronic or otherwise, including an addiction to alcohol or drugs; or iii) a reduction in physical or mental capacity.