Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings

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ABSTRACT

This paper reports on pilot study research which sought to explore perceptions and experiences of vulnerable employees who attempted to use the Employment Tribunal (ET) system to resolve disputes. We interviewed clients of a Citizens Advice Bureau seeking to explore the concerns of those for whom the system potentially poses the greatest barriers—those who cannot afford legal advice and/or are not trade union members. We conclude that the ETs, and the mediating role played by Acas, produce barriers to justice for vulnerable employees. Furthermore, the role played by Citizens Advice is critical in reclaiming labour law’s public law function, by which private disputes between individuals are translated into matters of public concern.

1. INTRODUCTION

Business Secretary Vince Cable has recently called for ‘radical reform to the employment law system’.1 The justification for such reform is the perception that the current system is ‘far too costly, time-consuming, and complex’ for employers and that ‘it is too easy [for employees] to make unmerited claims’.2

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1See his speech to the Engineering Employers’ Federation, 23 November 2011, at http://www.bis.gov.uk/news/speeches/vince-cable-reforming-employment-relations, accessed 21/05/12, in which proposals were announced, inter alia, to increase the qualifying period for unfair dismissal claims to two years, to consult on the introduction of fees for lodging a tribunal claim and for taking the claim to a hearing, and to refer all employment claims to Acas for pre-claim conciliation.

2Ibid. In addition to the range of proposed measures, Mr Justice Underhill has been asked to carry out a fundamental review of employment tribunal rules. For the terms of reference, see
The vulnerable workers we interviewed for this research tell another story. They see highly formalised, court-like procedures that discourage participation. Facing legal teams of well-financed employers, such workers experience Employment Tribunals (ETs) as barriers to justice. Settlements reached pre-Tribunal leave them without jobs, inadequately compensated and often traumatised by the experience. This paper reports on findings from a small-scale qualitative project aimed at exploring the experiences of people who had become involved with the ET system as applicants. Our research is concerned with those applicants who are likely to find the system the most problematic—those who are unable to afford legal representation and who have no access to trade union representation. To give voice to the views of those unable to afford legal representation, we conducted our research with a Citizens Advice Bureau (CAB) as they have become the most common external source of advice for employees who experience problems at work.

We started from the premise that the increasingly individualised nature of disputes, enhanced formalisation and complex administrative procedures surrounding the ET system act as potential barriers to justice for workers in precarious employment who have limited rights. Many potential claims are likely to fail, not simply through being excluded by the restrictive scope of current legal provisions but also due to complex administrative arrangements leading to many applicants perceiving that the ET system is unable to deliver on promises of access to justice. On this basis, we set out to explore vulnerable workers’ perceptions and experiences, not only of ET hearings but of the journeys travelled from work-related problem to resolution, exploring the corridors they were sent along, the blind-alleys they followed and the relationships they utilised (and created) in order to attempt resolution. We wanted to focus on resolution outside the workplace, in part


3'Success at Work: Protecting Vulnerable Workers, Supporting Good Employers: A Policy Statement for this Parliament’ (DTI 2006, at [25]) defines a vulnerable worker as ‘someone working in an environment where the risk of being denied employment rights is high and who does not have the capacity or means to protect themselves from that abuse.’ We use the term in this paper to encompass those who work in non-unionised workplaces, under contractual arrangements (such as zero-hours contracts) which make their employment precarious, and are therefore highly vulnerable because to defend themselves against employer abuse would lead to loss of employment.

because others have examined how vulnerable workers attempt resolution within the workplace,5 and partly because we were concerned with the formalisation of dispute resolution and the effect that this has on applicants’ perceptions of process. We believed that the best way to do this would be a case-tracking methodology, following workers from the point at which their problem or dispute arose. Realising that such research would require considerable resources in terms of time and funding and could present many difficulties in terms of finding (and keeping track of) suitable research participants, we carried out a pilot study.

This preliminary research provided us with insights into points of particular difficulty for unrepresented workers including concerns around pre-hearing case management phone calls and the role of Acas conciliators, which for a number of our interviewees was fraught with difficulty, as well as highlighting the importance of the role played by CAB advisers. Through drawing on legal consciousness literature, which focuses attention on everyday encounters and subjective experiences of law, we see the interactions between advice agency and client, worker and Acas negotiator, applicant and judge, as providing points at which to identify the ‘social action’ of law. These preliminary findings suggest an urgent need for further research to explore how vulnerable workers can become genuine participants in processes aimed at resolving workplace disputes. Subsequently, we used our findings to identify a research agenda for which we have now received funding.6 Our pilot study highlighted the significant difficulties encountered in reaching and engaging with vulnerable workers and has helped us shape our methodology. We present this paper in part because we believe the preliminary findings are themselves important, in part to engage in a dialogue with scholars in the field that will help our future research programme.

2. BACKGROUND

There is little empirical research which looks at the experiences of applicants to ETs that is independent of the government departments


6European Research Council Starter Grant, Project no 284152.
responsible for employment relations (DTI/BERR/BIS) or Acas. The Survey of Employment Tribunal Applications (SETA) published since 1987 by the government department responsible for employment relations (currently Department of Business, Innovation and Skills (BIS)) consists of a random sample of employee applicants and employer respondents in ET cases. These surveys tend to paint a fairly rosy picture: SETA 2008 reported that three-quarters of claimants were satisfied with the workings of ETs, and 7 out of 10 believed that the hearing gave each party a fair chance to make their case. Significantly, the 2008 survey showed a marked decrease in the number of claimants who had received representation, from 40% in 2003 to 32% in 2008.

However, smaller-scale, in-depth qualitative research reveals a different picture. Research examining the experiences of individuals claiming discrimination on the grounds of sexual orientation or religion or belief concluded, in line with earlier studies on race claimants, that claimants found the ET system and its processes ‘bureaucratic, confusing and legalistic’. Here, the picture is far from rosy: those surveyed talk about the stress of making a claim, the detrimental impact it had on their lives and work, and in some cases the ‘severe damage to mental health and a long-lasting impact’.

A 2008 quantitative project examined the characteristics of 345 claimants to the ET service and explored their feelings both before and during the hearing and whether and how the panel members put them at ease. Although this research was fairly positive about the experience and success

7The last significant empirical academic study predates many significant legislative changes; see L. Dickens et al, Dismissed: A Study of Unfair Dismissal and the Industrial Tribunal System (Oxford: Basil Blackwell, 1985).
9Ibid., 70.
10Ibid., 69.
13Ibid., 136–9.
of an ET hearing without representation—which seemed to make little difference to whether the hearing was perceived as successful\(^{15}\)—survey respondents were not necessarily vulnerable workers.

The ET service’s wider civil justice environment has been the subject of a number of important studies\(^{16}\) which, we would argue, throw little light on the experiences of the most vulnerable of workers. Likewise, the findings from the large-scale SETA surveys that three-quarters of claimants were satisfied with the ET system reveals nothing about the one-quarter who were dissatisfied nor about those who refused to take part in the research. Given the trauma felt by those making discrimination claims,\(^{17}\) it is likely that those who experience the ET system as most traumatic may not want to subject themselves to re-living this experience by relating it to researchers. This absent group would, perhaps, tell a very different story.

3. THE RESEARCH PROCESS

Our review of existing literature identified a gap: little research has sought to understand the experiences of vulnerable workers resolving employment disputes beyond the workplace, including the barriers they encountered in getting advice, putting advice into practice and in dealing with the ET system itself. Given the complexity of the system, and the possibilities of finding resolution through different avenues, we decided that the most appropriate method would involve tracking cases from encounters with advisers to resolution. We knew, however, this would lead to methodological problems: for example, from others’ research on complaints by disadvantaged and relatively powerless individuals, we anticipated that there would be low appeal rates and high drop-out rates.\(^{18}\) Our initial small-scale pilot study, therefore, aimed to identify and resolve practical difficulties locating and retaining sufficient research subjects to ensure credible and sufficiently rigorous results

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\(^{15}\) At [4.4].


\(^{17}\) See n.11 and 12 above.

in a case-tracking study, and to understand the perspectives of vulnerable workers engaging with the ET system to help design such research.

We chose to identify our subjects through the CAB because of this organisation’s central role in advice provision. However, getting advice from a Bureau is not easy as demand outstrips supply many times and many are turned away. A bureau’s clients, we surmised, would be the most desperate, with no other possible way of gaining advice and support, no trade union and insufficient means to pay for legal advice. Potential interviewees were contacted (by letter and follow-up phone call) by CAB volunteers from their client records.

Interviews were semi-structured, employing a narrative approach; interviewees were asked to tell the story of how they came to approach the CAB and of what ensued. The interviewer frequently had to ask specific questions in order to piece together the narrative and gain necessary factual information. At the end of the interview, interviewees were asked how they felt about their contact with the ET system. This direct questioning often elicited a more positive response than had come out in their stories.

The pilot study identified a number of difficulties that would influence the design of the future case-tracking study. Firstly, despite the seemingly large number of employment-related issues dealt with by CABs each year, identifying 10 interviewees was far more problematic than anticipated. CAB statistics for the Bureau we were working with for July 2007–June 2008 identified 147 issues coded by advisers as concerning ‘Employment Tribunals and Appeals’. However, detailed examination of the records found that only a small proportion of these appeared to result in submission of an ET1, and follow-up phone calls identified that in a number of these cases the ET1 had not been submitted or that the clients were no longer contactable. An 18-month search produced 10 interviewees. Table 1 sets out the profiles of our 10 interviewees and their claims.

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19Our survey is not intended to be representative. To attempt to construct a ‘representative sample’ of those approaching the ET system without representation would be neither possible nor desirable.


21Interviewees each received a payment for out-of-pocket expenses in attending. Confidentiality has been ensured by (i) using false names for employers; (ii) identifying interviewees by number only and omitting any details that might make it possible to identify a particular dispute.
4. SOME PRELIMINARY FINDINGS

Our data were supplemented with an interview with the Bureau adviser specialising in employment issues. On completing the research, we produced a project report for the CAB; what follows takes account of resulting feedback from the employment specialist at Citizens Advice’s national office and an Acas Regional Director. In the remainder of this paper, we report our findings using broad themes which, we suggest, provide the focus for future research.

Although aware of the limitations of this study due to its small sample size and the preliminary nature of its findings, we believe that it is worthy of dissemination. It certainly highlights the need for further follow-up research. More importantly, in contrast to pre-existing large-scale surveys, narrative-style interviews allowed an in-depth consideration of the whole process and related experiences, albeit of a few respondents, with surprisingly consistent...
results. During the period of our research, we became increasingly aware, through media reports, of a rising backlash against the ET system with allegations that it encourages and rewards vexatious litigation on the part of employees. This view has, in recent months, gained political attention culminating in the Government’s comprehensive review of employment law22 and, although mindful of the need to avoid drawing wide-sweeping conclusions at this stage of our research, we nevertheless hope that our findings might have some influence over certain aspects of this debate as well as informing a forward-looking research agenda.

5. THE CAB ADVISOR

In 1998, Abbott argued that Citizens Advice had become a new actor in UK industrial relations due to the decline of unions and the growth in small and non-unionised firms.23 Employment-related queries to CABs have increased dramatically, becoming the third largest category of queries after debt and social security matters.24 In 2008 research for the Department of Business, Enterprise & Regulatory Reform (BERR), CABs were the most commonly cited external providers of advice to employees.25 However, CAB expertise in the field of employment relations is geographically varied.26 Some bureaus have received funding to provide specialist employment support, including representation in negotiations with Acas and at hearings. Others have members of staff who specialise in employment matters providing support to volunteer advisers, but are unable to provide representation at hearings or in negotiations with Acas; this was the case in our case study Bureau.

Research demonstrates a relatively low awareness of breaches of employment rights among those approaching CABs for advice,27 and that

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25Ibid. n.4, at 3.
27Ibid. n.4 at 14: of 646 definite and possible breaches of rights recorded by CAB advisers, clients were recorded as ‘knowing’ of a perceived breach in 29% of cases and ‘suspecting’ in 45%.
most of those raising race discrimination claims had become aware of
ETs through seeking external advice (mostly through CABs). 28 This was
also the case with our interviewees, for whom their appointment with
the CAB adviser was usually the point at which they became aware of
the possibility of using the legal forum of an ET. In the absence of trade
unions, the encounter between advice agency and client is often the point
at which a personal issue becomes realised as a legal matter as the cli-
ent is advised that there might be some resolution in law to his or her
grievance.

Understanding how the interaction between the agency and its clients
is part of a development of a consciousness of law, its power and its pos-
sibilities is an important step in understanding the role of advice agencies
as a separate and different shaping factor distinct from lawyers. The influ-
ence of ‘legal consciousness’ is increasing in socio-legal studies in the UK,29
having been part of the US Law and Society scholarship for some time.30
Related studies seek to understand the ‘web of legality’, through common-
place events and transactions, ‘conceiving of law not so much operating to
shape social action but as social action’.31 Interactions between advice agen-
cies and clients can provide a point at which we can see, on the surface, the
‘social action’ of law. The legal consciousness literature focuses attention on
everyday encounters, on ‘subjective experiences, rather than, for example,
law and its effects on society’.32

In our study, as well as raising the possibility of entering into the legal
system as a means of dispute resolution, the CAB advisers became transla-
tors—that is, of the procedures and language of the ET system into formul-
tions that could be understood by clients. One of our interviewees had a law
degree from another European country, but even he felt he could not have
navigated the system without the CAB support:

. . . if I didn't have any explanations before from the Bristol Citizens’ Advice
Bureau, it would have been complicated.

28Aston et al, ibid., n.11, at 41.
Review, 928–58.
30See P. Ewick and S. Silbey (1993), ibid., n.22; L.B. Nielsen, ‘Situating Legal Consciousness:
Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment’ (2000) 34
Law and Society Review, 1055; S. Silbey ‘After Legal Consciousness’ (2005) 1 Annual Review of
Law and Social Science, 323–68, for a review of legal consciousness research.
31P. Ewick and S. Silbey, ibid., n.22, at 34–5, emphasis added.
32D. Cowan, ibid., n.31, at 929.
However, for some, just receiving explanations of how the system worked was insufficient. Interviewees were most positive when they had received help in completing the ET1 and related correspondence. Those who completed the ET1 themselves found this a daunting experience. One couple suggested:

You need someone, or a facility for someone to check the forms before you put them in. When you get a passport, you go to the Post Office nowadays, and they can check your forms to make sure they're correct.

This need for translation continued throughout our interviewees’ encounters with the ET system and, critically, when attempting to understand the procedures for the enforcement of Tribunal decisions. One interviewee had attended a hearing accompanied by a solicitor supplied by another CAB, at which she was made an award. However, the employer only made a partial payment and she was left not knowing how to follow this up. The papers she received following the decision were unintelligible to her, which meant she had to seek further advice from the CAB. She brought copies of the documents sent to her by the ET to the interview. The Employment Tribunal’s Interest Order 1990 was particularly difficult to comprehend, written in highly technical legal language. Once again, the CAB workers had to perform a translation and supported her in obtaining the remainder of her settlement.

This role of ‘translating’ for clients is part of a web of translations that organisations such as Citizens’ Advice become involved in. Through their social policy work, they aggregate these personal issues into matters of public concern, using statistics from their CASE system and personal stories from casework to advocate changes in policy and practice at local and national level.

6. THE TRIBUNAL AND ITS JUDGES

Our research produced limited material on experiences of the ET. Only one interviewee had attended a hearing; two others had experienced case

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33CABs provide differing levels of support. Some have funding to support clients up to and including representation at ET hearings.


35We do not deal with enforcement; our findings correspond with CAB report Justice Denied (October 2008) at: www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_employment/justice_denied, accessed at 21/05/12,
management phone calls with a Tribunal judge, and in two further cases default judgements had been made in favour of the claimants (as the defendant employer failed to respond to the ET and/or attend a hearing). Nevertheless, the interviews provide interesting insights.

A. Case Management Phone Discussions

For one claimant, this aspect was the most positive part of the process, as the judge was:

...100%, probably 110%, behind me, which was, that was the only time I felt, wow...someone believes what I’m saying...if it did go to court, I think I would a had his support, because he was actually telling the other guys that he thought it was pathetic. [Interviewee 1]

However, for Interviewee 2, the experience was very intimidating. She felt that the circumstances were unequal; the employer was represented by a solicitor, and so she too should have had a legal representative. She was intimidated by the language used by the employer’s solicitor:

...she would say, ‘Yes, sir,’ or ‘Yes, something,’...You know like they’ve got to use, they talk a certain way, and they use certain words and stuff. Of course, I just felt like, oh my God, I’m going to lose this case!

Many of our interviewees expressed feeling of powerlessness; the feelings of intimidation of interviewee 2 are likely to be common. For many, these feelings may be compounded by the medium used—telephone. Professionals such as solicitors use the phone to conduct business on a daily basis; for some, using a phone is a more alien experience. Interviewee 2 did not have her own landline, so had to go to her daughter’s home to receive the call. She recounted answering the phone with grandchildren milling around, trying to find a quiet corner to conduct the discussion. It is not just the medium of language through which power differentials between claimant and employer are established; the social spaces in which these encounters take place—the solicitor in her well-ordered office, probably with a secretary to answer the phone, contrasted with the grandmother surrounded by the everyday noise and chaos of any household with young children—creates an unseen, but nevertheless felt, power dynamic between employer and claimant.

which resulted in the Ministry of Justice announcing in May 2009 that High Court Enforcement Officers would take on recovery of awards granted by ETs or in out-of-court settlements.
The case management phone call can play an important role in decisions regarding whether the case progresses. Our data indicate that the symbolic role of the judge can influence relationships with, and between, participants in unexpected ways. Although this aspect has been considered in pilots of judicial mediation in employment disputes, we would argue that there is a need for further qualitative research, from the claimant’s perspective, into the role judges play in the informal, pre-hearing settlement of disputes.

B. Representation

Knowing that the employer would have legal representation at the Tribunal in itself was sufficient to deter one interviewee, who cancelled his hearing when his solicitor said he could not continue with his case. He was asked if he considered representing himself at the Tribunal:

Interviewee 9: Someone told me I could come and represent myself, but . . . I said myself, it looks stupid if I go and represent myself. And uh, the company got, got this solicitor, and I’d be tied into knots. So therefore, I thought no . . . I’ll just cancel the whole thing . . .

The interviewee who did attend a hearing had started her case in a bureau which had resources to provide support throughout the whole process. This included dealing with all related correspondence and negotiating with Acas on the client’s behalf. However, on the day of the hearing, her CAB worker had been unable to attend and this gave her considerable anxiety—she felt that she would not be able to represent herself—and was very happy when the CAB found a pro-bono solicitor to represent her. However, even with representation, the hearing was not a good experience for her. Both she and her solicitor felt that the Tribunal Chair was on the side of the employer:

Interviewee 5: even this lady who represented me, she said, you can feel that she likes my employer. She’s like kind of, giving him advices and stuff during all this case . . . She was like, saying to him, ‘Alright, so here you have to take this and this document, brought by this and this law,’ . . . She was kind of saying in her opinion that he’s done everything good, just only one bad thing was that he didn’t have

36 SETA 2008 report makes no reference to this part of the process; it was based on research predating the introduction of the CMPC.
right documents now, and because of that he’s losing case. So I felt kind of, wait, why do you think he’s done good if, maybe I’ve done good?

7. THE ROLE OF ACAS

Early in the interview process, it became clear that Acas played a critical role for most of our interviewees. This led us to investigate further to understand the nature of Acas involvement in individual employment dispute resolution.

Acas plays multiple roles in industrial relations in the UK. Its establishment has been described as ‘hiving-off’ conciliation, arbitration and decisions about trade union recognition to an organisation that was state-funded but could be seen as independent through its tripartite board.38 Whilst having been set up primarily as a player in collective dispute resolution, a significant shift has taken place over the last 35 years towards individual dispute resolution. In 1975, Acas received 2,564 requests for collective conciliation; by 2010/11 this was 1,054. In the same time period, individual conciliation cases have increased dramatically, from 29,100 cases in 1975 to 74,620 in 2010/11.39

All but one of our interviewees had some involvement from an Acas conciliation officer; for three, it had been through Acas that their case had been resolved. In effect, Acas’s involvement in conciliation is a site of alternative dispute resolution (ADR). We would suggest that there are two rationales for Acas becoming a key player in the ETs, one ideological, the second pragmatic. First is the belief that informalism is a more appropriate mechanism for dispute resolution; second (and often in tension with the first) is the necessity to meet managerial demands for efficiency and value for money. We discuss these two rationales in turn in the context of our research findings, considering how they may be shaping Acas’s role.40

39Source: Acas Annual Reports.
8. THE INFORMAL, IMPARTIAL CONCILIATOR

For supporters of ADR, one of its advantages is its ability to reframe the dispute outside of the context of a legal claim which may be viewed as an obstacle to settlement as the parties’ needs may ‘differ or go beyond legally justifiable claims’. Furthermore, informal dispute resolution mechanisms may allow for resolution even where parties do not have a legal right.41

This translation from rights to needs can be problematic, particularly for those parties with little social, political or economic power who rely on legal rights for protection against more powerful parties.42 For the workers in our research, this re-framing is highly significant. Our interviewees were those with least resources to become actors in the legal arena. It could be argued that without Acas many would never achieve any form of settlement as they would be unable or unwilling to enter the highly legalistic forum of a tribunal hearing. Indeed, one of our interviewees withdrew from his hearing when his lawyer decided he could not continue with the case.43 By the time this interviewee approached the CAB for help, it was not possible to revive his case.

However, evidence from our interviews suggests that interviewees did not feel empowered by the Acas conciliation process. The feeling of powerlessness, we would argue, resulted in part from the perceived ‘impartiality’44 of the conciliator which was the cause of much confusion. Theoretically, conciliation is voluntary but our interviewees did not appear to have a clear understanding of what Acas was or of its role—one person thought it was ‘a company’. Conciliators themselves feel that parties are confused about the role of Acas, some perceiving it to have a ‘policing’ role, or to be likely to impose a settlement or to be biased towards one of the parties.45

43It was difficult to understand why this interviewee’s solicitor had withdrawn. It looked as if he had taken on the case on a no-win, no-fee basis and had reassessed the possibilities of winning, but this was only our assumption based partly on an understanding of normal practice in the legal profession. One reason for wanting to follow a case-tracking methodology would be to gain a fuller understanding of the processes and experiences of applicants.
44Clearly considered an important element of the conciliator’s role as the term appears several times in the Acas Discussion Paper.
Interviewees criticised Acas officers for their lack of active support. The neutrality of the mediation role meant that some saw Acas simply as a go-between, relaying messages from one side to the other:

she didn’t do anything. She was just passing them my information, and passing from them to me their information. But it wasn’t anything to do with her, and it was very clear that, she goes, ‘I’m doing my job. It’s not, it’s like, it’s kind of, it’s nothing to do with me’.

Alternatively, this was experienced as an imbalance of power between the interviewee and the employer. In this context, Acas conciliation often did not appear as neutral but instead gave interviewees the impression that the officer was on the side of the employer:

She was always there, but she was never 100% behind me. . . . We used to get off the phone, and we used to say, ‘Well it sounds like she works for [the employer]’ . . . And she did have a lot a lot of correspondence with [the employer] . . .

She did give us quite a lot of advice. Sometimes we did feel that when we were speaking to her, that she was on their side. That’s in my words, but, it’s like, she was sticking up for what they were saying, and in so many ways saying it was my fault.

Such concerns about the neutrality of Acas are echoed in qualitative research concerning race discrimination claims: interviewees, particularly claimants, had ‘mixed feelings about the neutrality of Acas, perceiving a bias in the conciliation officer towards the employer’.46 However, like the move from rights to relationships, impartiality (or neutrality) also appears as a central tenet of much of the ADR literature, making it difficult to challenge. One can see the requirement of impartiality/neutrality as a translation from the legal sphere, where it has ‘become something of a ground norm for lawyers and society more generally’.47 However, our data raise questions about whether impartiality/neutrality is possible or even desirable as a goal to be striven for no matter how unobtainable. Others have questioned the impartiality norm, arguing that it is a ‘myth’,48 and that mediators selectively filter the issues for discussion, steering the parties to a particular outcome.49

46Ibid., n.11, at [10].
Merry concluded that ‘[p]ower lies in the ability to establish one or other interpretation of events and to make it stick with the rest of the group’, placing the mediator/conciliator in a critical position to shape the naming of the problem within a narrow set of parameters. Dickens, in her analysis of the Acas conciliation role, similarly concluded that officers were seen as shapers of perceptions.

We would argue that the sidelining of rights and the paramount need for impartiality in the mediator/conciliator role leads to a de-politicising of disputes. In the context of vulnerable workers, this may lead to disempowerment and, in turn, to agreements to settle for less than may have been possible if legal rights had been pursued. Like Mulcahy, we would argue that politicisation of a dispute by a third party can make the source of the dispute public: ‘the processing of disputes is inextricably linked to larger considerations of social and political legitimacy’.

9. MANAGERIALISM

In the Acas intervention, the ideological function of impartiality is overlaid by pragmatic rationalities of managerialism. Increasing demand on the ET service enmeshes access to justice in programmes of cost reduction. Value for money comparisons demonstrate that it is cheaper for cases to be resolved through Acas than by a hearing: Acas estimates the average cost per case to the employer (excluding compensation) as £5200, compared to the cost of £262 for a case settled or withdrawn through Acas. Such concerns are translated into performance targets. Conciliators become driven by the short time-scales to achieve a settlement and move on to the next case; tactics used to resolve cases quickly may often feel like bullying to the unrepresented claimant. Acas documents talk about the key measures of success being the

51L. Dickens (2000), ibid., n.42, but see A. Denvir et al (2007), ibid., n.12, at [149–150]; Acas conciliators were seen to be largely uninvolved in settlements.
52Ibid., n.49, at [521].
54Acas Annual Report 2009/10, at [42].
55The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004 No 1861, introduced fixed periods for conciliation: a ‘short period’ of seven weeks for claims such as breach of contract, unlawful pay deductions and redundancy claims, and a ‘standard conciliation period’ of 13 weeks for most other claims, including unfair dismissal. In its Policy Discussion Paper 2006, no 3, at [2], Acas stated that ‘individual conciliation must be
positive clearance rate (the proportion of cases settled or withdrawn) and the speed of resolution. Disputes become figures; the identities of parties that should be listened to and brought together are lost. The dispute is crystallised into one issue: the negotiation of a financial compensation package which is seen as the most likely route to a positive result. The highly complex legal issues and related remedies disappear from the dispute; for example, one of our interviewees claimed that his dismissal was discriminatory and unfair and so he wanted his job back as well as compensation and had indicated both outcomes when completing the ET1. He was very unhappy with the settlement negotiated with Acas support even though he had obtained compensation of £5,000 as he also wanted his job back. After obtaining the compensation, he assumed that Acas would move onto negotiating his return to work as its representative had seen the form, but there was never any discussion about this matter. A successful negotiation for reinstatement is so unlikely that it played no part in the Acas conciliation, and even CAB volunteers are told to warn against pursuing this line at the initial interview with the client. So managerialism further strengthens a move away from the language of rights, this time towards the language of the possible; the outcome is the same, the de-politicisation of employment disputes.

Our interviewees’ experiences demonstrated the limitations managerialism placed on the process. They had trouble getting hold of their Acas officer. There was never any face-to-face contact, instead they were given a telephone number and often found they had to leave several messages before the officer would respond.

The priority of Acas conciliators to achieve a settlement and thus minimise the number of cases reaching Tribunal can be felt by claimants as a pressure to settle at all costs and a lack of interest in the positive aspects of their case. One interviewee felt that the conciliator attempted to negotiate afforded time if the real benefits are to be realised:

These time periods were withdrawn by the Employment Act 2006, s 6. However, they are likely to have impacted on the cases of those we interviewed in the first half of 2009, some of which were dealt with by Acas during 2008. Interviews took place between February and June 2009, discussing cases that had been ‘live’ in 2008.

Ibid., at [9].


with the employer when he considered it to be fruitless, raising the question of how ‘voluntary’ the process is. His experience was that Acas’ intervention had prejudiced his case, causing delays which left him unable to submit his documents to the ET in time for papers to be sent to the other side. This aspect of our research is particularly salient given the repeal of the statutory disciplinary and grievance procedures by the Employment Act 2008 and the reinstatement of the prior provision of early voluntary settlement.\footnote{Brought about by the Gibbons Review (DTI (2007) \textit{Better Dispute Resolution}) which advocated, \textit{inter alia}, greater use of ADR. The new arrangements are underpinned by a revised ACAS Code of Practice (ACAS April 2009) which encourages the use of a mediator or third party (see Foreword).}

10. CONCLUSIONS: THE FUTURE DIRECTION OF LABOUR LAW RESEARCH ON THE TRIBUNAL SYSTEM

We acknowledge that our study is based on a small sample which limits the scope and range of its findings. However, in contrast to the larger-scale surveys commissioned by Acas and the DTI/BERR/BIS, by asking a few respondents to relate their stories we were able to elicit valuable data on which to draw some interesting, albeit tentative, conclusions. The research confirmed our initial premise: namely that a system of dispute resolution which treats all parties as if they have the same capital—social, cultural and economic—will frequently fail in providing access to justice for the most vulnerable of workers.

We would argue that the ethnographic methods of case-tracking could provide important insights into the experiences of the most vulnerable workers that are not revealed in larger-scale generalist research or user satisfaction surveys. Such an endeavour is a small step in the important path towards reclaiming the traditional function of labour law which incorporates its public law dimension, providing a means of regulating private disputes between individuals, alongside converting such disputes into matters of public concern. However, for the vulnerable workers in our survey, this may only be possible through the continued involvement of advice agencies in their dual role as advisers/advocates and through making things public. As our experience shows, the difficulties inherent in identifying, locating and accessing such workers mean that their voices often go unheard, even where research is focused on claimants’ experiences. Nevertheless, we suggest that overcoming such obstacles is essential in considerations of processes intended to provide access to justice.