

‘FUTURE WORLD OF WORK AND RIGHTS OF WORKERS’ INQUIRY BY THE BUSINESS, ENERGY AND INDUSTRIAL STRATEGY SELECT COMMITTEE

WRITTEN EVIDENCE SUBMITTED BY SHEFFIELD CITIZENS ADVICE

Executive summary

- Employment rights are only as useful as their means of enforcement. There is little point in proposing more without addressing this issue and we urge the Committee to include it. Our experience shows that workers often find it impossible to exercise their existing rights, even when they clearly have a sound case.
- The imposition of Employment Tribunal fees, in particular, has resulted in a dramatic drop in workers pursuing claims in this way, and the Justice Committee describes this as having “an unacceptable impact on access to justice”.
- Alternative means of exercising employment rights do not work for many of our clients, low-paid workers in particular, due to high costs, unacceptable financial risks and lack of representation. Many such workers are not well-equipped to understand or deal with the complexity of legal matters.
- Organisations supporting workers in exercising their employment rights, in both the public sector and third sector, are poorly-resourced.
- Agency workers face particular challenges in asserting their rights at work and are typical of all those in the so-called gig economy in that they carry the additional risk of being denied the opportunity for further work, where there is little or no contractual obligation on the employer to provide any.

Our interest in the inquiry

Sheffield Citizens Advice provides free, impartial advice in 16 locations around the city, including foodbanks and hospitals. We are also active in campaigns and social policy, locally and nationally – for example, securing a change in the law on Personal Independence Payment for terminally ill people earlier this year.

We help about 20,000 people each year, of whom about 8% asked for help with employment problems. However, we know that unfairness and poor practice in work are often a significant contributing factor for clients whose ‘headline’ issue is with debt, benefits or tax credits.

We share the Committee's implied concerns about modern employment patterns and welcome this inquiry. This brief submission sets out the key issues and priorities in this sphere as we see them, based on our rich evidence base of our clients' real-life experiences, and on the perspective of our specialist employment caseworker based in our Legal Services Team.

We use the word "worker" throughout this submission, and focus on agency workers as these form a significant proportion of our caseload. Having increased by almost a third in the last five years, there are now over 800,000 people in agency jobs in the UK. While some choose the flexibility these offer, for others agency work is a last resort. Though their concerns are representative of all workers in the so-called 'gig economy', agency workers face particular challenges in the labour market. Their hourly pay is 15% lower than other workers. They are often less confident about asserting their statutory employment rights, as this may affect the amount of work their agency will offer them in future where there is little or no contractual obligation to provide work (and such a denial of opportunity may arguably amount, in itself, to a detriment in legal terms.)

1 **Rights are no use without enforcement**

Any measure for protection of workers is only as effective as the means of its enforcement. The current edition of *Butterworths Employment Law Handbook* is some three inches thick, yet every employment right listed there is entirely theoretical when an employer chooses to ignore it and the worker has neither the financial or intellectual means to enforce it. For example, for a number of agency workers, existing rights under the Agency Workers Regulations 2010 already offer a mechanism of statutory protection which is potentially sufficient, if enforced. In our experience the biggest challenges to the majority of workers seeking to exercise their *existing* statutory and contractual rights are:

- the requirement to pay Employment Tribunal (ET) fees (introduced in 2013);
- withdrawal of legal aid from ET cases (other than discrimination), making legal action unaffordable for people on modest incomes;
- the dearth of professional advice (generally due to lack of funding) to support claimants in ET proceedings and other potential routes of redress; and

- absence or inadequacy of workplace representation and the consequent inequality in bargaining power between worker and agency/end user.

1.1 **We therefore strongly urge the Committee to consider enforcement issues alongside its other interests:** any additional statutory protections or re-categorisation of status proposed would be meaningless without effective mechanisms for implementation and redress.

2 **Justice Committee’s inquiry into tribunal fees**

2.1 In its recent inquiry into the impact of court and tribunal fees, the Justice Committee concluded that, for employment claims, the charging system introduced in 2013 has had an “unacceptable impact on access to justice.” (para. 69, [Courts and tribunals fees and charges inquiry](#) Justice Committee, June 2016.) We urge the BEIS Committee to revisit paragraphs 54-80 of this inquiry report which highlight the “undisputed and precipitate drop in the number of [ET] cases brought, approaching 70%.”

2.2 The inquiry also found that, contrary to the intended effect of encouraging early conciliation of disputes, there are reduced incentives on the part of employers to settle cases which they knew a worker could not afford to take to an ET. It heard evidence that ET fees had a particular discriminatory effect on pregnant women and new mothers; that people were disproportionately discouraged from bringing cases where the likely compensation would be small because they were in low-paid jobs; and that there had been a marked decline in claims for compensation for unpaid wages, notice pay, holiday pay and unfair dismissal, these being “the types of cases brought by ordinary working people.”

2.3 The Committee noted at the time (June 2016) that the findings of the Government’s own review into the impact of tribunal fees, launched in June 2015 and originally due for publication by the end of that year, were not available to them. In December 2016 the report is still awaited.

3 **Recent Citizens Advice research and proposals**

3.1 Citizens Advice nationally has recently published research on agency workers and we recommend this to the Committee.

[Sharp practice at work: agency workers](#) (Citizens Advice, October 2016) looks at the three most common areas in which agency workers face disadvantage –

pay deductions, statutory sick pay, and equal treatment with other workers - and contrasts the theory of protection with what has happened to Citizens Advice clients in practice.

3.2 Building on this research, [Many agency workers face unfair treatment: five ways government could make a difference](#) (Citizens Advice, October 2016) proposes that Government:

- makes employers legally responsible for ensuring that the agencies with which they contract treat their workers properly;
- reduces complexity and increases transparency – e.g. by requiring agencies to provide payslips, and companies to publish data on the proportion of their workforce on different types of contract;
- creates, or designates, a Fair Work Authority, to address the confusion among workers about the roles and remits of existing players (Gangmasters and Labour Abuse Authority, Employment Agency Standards Inspectorate, HMRC NMW enforcement, Health and Safety Executive); and
- improves access to ETs by reducing costs.

3.3 To these, Sheffield Citizens Advice would add:

- a return to Wages Councils;
- greater levels of Trade Union recognition; and
- re-introduction of legal aid for cases other than those concerning discrimination.

3.4 Our experience leads us to believe that these would have a deterrent effect against bad employers who operate on the basis that their workers often have little or no real opportunity for legal redress.

4 **Too expensive; too risky; unviable alternatives**

4.1 Legal representation to conduct ET proceedings is beyond the means of people on modest incomes. The implications of fee remission (now 'Help With Fees') arguably affect only *very* low household incomes. Tribunal fees for Category A claims (for unpaid wages, for example) are £160 to submit a claim and £230 for a hearing fee; for Category B claims (which include unfair dismissal and discrimination) these costs are £250 and £950.

4.2 Paying for professional representation on an hourly rate (usually following standard County Court rates) is also beyond the means of most workers, and

these legal costs will potentially dwarf the value of most claims. In 99.25% of ET proceedings each party bears their own costs, win or lose, but costs orders are becoming more prevalent and represent another risk factor for workers to consider before starting claims. Some representatives can offer fixed fees for elements of the litigation process, but this ad hoc arrangement can often leave workers conducting hearings (often the most costly and technically difficult part of proceedings) as a claimant in person with no legal representation.

- 4.3 Workers are, of course, permitted to conduct their own claims entirely. However, the complexity of the litigation process, the nuances of the law and the demands of unfamiliar legal language are such that for most workers (particularly those not fluent in English), acting as a claimant in person is not, in practice, an option.
- 4.4 ‘No Win, No Fee’ (now Damages-Based Agreements) does not work for potential claimants in low-paid employment because it is difficult to find professional representation. Damages-Based Agreements are capped at 35% of potential compensation, calculated by reference to potential damages, litigation risk and the likelihood of the employer paying up. Low income therefore equates to modest damages which do not represent good value against professional hourly rates. In short, most representatives cannot justify, commercially, running these sorts of claims.
- 4.5 As highlighted in [The cost of a hollow victory](#) (Citizens Advice, November 2013), even where claimants succeed and are awarded compensation, this is not always paid. Research by the Department for Business Innovation and Skills ([Payment of tribunal awards](#), BIS, 2013) shows that some 35% of successful claimants had received none of the money due to them, and 16% had only been paid in part. Awareness of the chances of payment makes claimants less likely to risk attempting to enforce their rights where they also have to pay fees up-front that can only be recovered at the successful conclusion of the case.

5 **Limited availability of professional advice**

- 5.5 Access to legal advice from the third sector is reducing due to constraints on local authority budgets and central government austerity measures. For example: “Ministry of Justice research [shows] the number of not-for-profit legal advice centres fell from around 3,226 in 2005 to 1,462 by 2015. More

than half of the 700 who responded to the Ministry of Justice survey reported that they had client groups who they were unable to help due to lack of resources, expertise, or because they fell outside the centre's remit. As with public legal education, inadequate investment in advice undermines the ability of people to access justice and is not cost-effective. New Economics Foundation research estimated that the social return for advice given by law centres for complex problems could be up to £10 for every £1 spent." ([The crisis in the justice system in England and Wales](#), Bach Commission on access to justice/Fabian Society, interim report November 2016.)

- 5.6 Relevant public sector organisations are also poorly resourced, even after recent increases in funding. The HMRC team responsible for enforcing the National Living Wage received £13.2 million of funding in 2015-16, giving it 269 staff to protect the wages of over 30,000,000 people in work. ([Ensuring employers comply with National Minimum Wage regulations](#), NAO, May 2016.) Similarly, in 2013-14, Employment Agency Standards Inspectorate had a budget of £585,410 ([FOI release July 2014](#)) to protect over 800,000 agency workers.
- 5.7 The drop in ET claims has also led private sector law firms to downsize their employment teams.

6 From our Legal Services Team's caseload

6.1 From our specialist employment law advice work, a consistent theme emerges of workers placed by agencies with end-users raising concerns about:

- holiday pay
- sick pay
- notice pay
- under-payment or non-payment of wages
- imposition of umbrella companies, sometimes without their knowledge
- requirement to adopt the status of self-employment

6.2 The following accounts of recent cases are typical of the problems faced by such clients.

- Karel did two work assignments for an agency but was unable to complete a third due to ill health (and is now signed off work with stress). Agency rules stipulated that he must call in two hours before his shift started - at 6.30am, in this case - but he decided against calling his manager at

4.30am. The agency has now refused to pay him for the 50 hours work he has done so far, and alleges that, because he called in sick late, the agency lost its contract with the employer and would therefore sue him for breach of contract.

Signing up for the agency, he was given the options of working through an umbrella company as an employee/worker, or direct for the agency as a limited company. Since he chose the umbrella company he is *their* employee so technically his complaint is with them. However there is no incentive for them to try to recover his pay from the agency: financially it makes better sense to forego their cut of Karel's wages than to risk losing the agency's business.

- Deepak noticed that his wages from his new job were £25 per week lower than expected. When - after several requests - he was finally given his payslips he discovered that he had been charged a weekly fee for the company to which his employer had outsourced its payroll. His employer maintained that the deduction was nothing to do with them and he should contact the payroll company. A review of the client's paperwork suggested that he had indeed been put through the payroll under umbrella arrangements, or as self-employed. Yet he had not agreed to such arrangements, and had assumed he was an employee on PAYE - certainly, his employer had given him no documentation to suggest otherwise.

This looked like an unlawful deduction from wages and a breach of the NMW. Although he could, theoretically, pursue an ET claim, the client felt he could not face the cost or stress of this, once the process and risks were explained

- Simon had worked for a company for some six years before it went into liquidation and he was made redundant. He received a letter from the Insolvency Service saying that he was not entitled to redundancy pay because they had been unable to verify his employment details with the insolvency practitioner concerned and they could not calculate any payment due to him without this information.

The client described himself as working for the company through an agency, and was unclear about who his actual employer had been for the past six months. (This was one of two organisations which had been set up solely to fill jobs at the company concerned.) Although he had been told

that agency staff can collect from the National Insurance Fund (NIF) as direct employees can, we do not believe that to be so – in which case he would receive no redundancy pay after six years work.

- Jane, working for a teaching agency, needed help clarifying the terms of her contract, which was unclear on annual leave entitlement and holiday pay. A review of the contract showed that it also made no mention of her hourly pay rate. She had been told she would be paid a daily fee of £47.50 for 7 hours at work (including a 30 minute unpaid break) - so £47.50 for 6.5 hours work, which worked out at £7.30 per hour. However, the contract said her holiday pay was also 'rolled up' within that hourly rate, which was not commensurate with her status as an employee of the agency rather than a self-employed contractor or umbrella worker. This arrangement meant that, in effect, she was getting less than the correct National Living Wage rate, and the contract was therefore in breach of National Minimum Wage legislation.

SHEFFIELD CITIZENS ADVICE AND LAW CENTRE

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