

Impact case study (REF3)

Institution: University of Strathclyde		
Unit of Assessment: C18 - Law		
Title of case study: Improving Equality of Workers' Access to Justice		
Period when the underpinning research was undertaken: 2012-2016		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Prof Nicole Busby	Professor	02/04/2012 – 31/10/2019
Dr Emily Rose	Research Associate	18/06/2012 – present
Dr Eleanor Kirk	Research Assistant	01/10/2012 – 31/10/2018
Period when the claimed impact occurred: October 2013 – July 2020		
Is this case study continued from a case study submitted in 2014? No		
1. Summary of the impact		
<p>Research into the employment tribunal and claimants' access to justice benefited claimants and respondents, policy makers, civil society organisations, judiciary, lawyers and advice organisations in Scotland. Specifically, the equality of access and services provided to claimants, particularly litigants in person, improved. This included how employment judges approached case preparation and hearings; employment advisors' delivery of advice and case preparation; the Law Society of Scotland's abandonment of the proposal to withdraw legal aid for employment cases; UK and Scottish government policies on tribunal fees and the effectiveness of workers' rights.</p>		
2. Underpinning research		
<p><i>New Sites of Legal Consciousness</i>, a collaborative, European Research Council funded, four-year project undertaken by researchers at Strathclyde and Bristol Universities between 2012 and 2016, looked at barriers to justice for employment tribunal claimants. The Strathclyde researchers – Prof Nicole Busby and Drs Emily Rose and Eleanor Kirk – focused on extensive qualitative data collection and analysis in Scotland; the Bristol team, led by Prof Morag McDermont, concentrated on England and Northern Ireland.</p> <p>The methodology involved recruiting research participants through Citizens Advice Bureaux across multiple sites in Scotland, England and Northern Ireland, then case-tracking potential employment tribunal claimants from seeking advice about employment disputes through to outcome. Outcomes included a full tribunal hearing with a remedy, reaching a settlement, or abandoning a claim. Data on the thoughts, feelings and actions of claimants were gathered through observation of advice appointments between Citizens Advice Bureaux advisors and their clients, ongoing interaction with claimants during the course of their dispute, observation of employment tribunal hearings and final face-to-face interviews with advisors. By focusing on claimants' decision-making processes throughout their cases, the findings revealed how the tribunal system is experienced by workers who lack support, finances and other crucial resources, including legal advice and representation.</p> <p>Certain barriers to justice were identified in relation to substantive UK employment law and its operation. Claimants whose cases proceeded to full hearings often represented themselves as Litigants in Person with little knowledge of the complex and highly technical employment law on which their cases depended, and no experience of the administrative practices and procedures involved [R1, R2]. Legalese and technical terminology meant that language could also present a barrier – a problem that was exacerbated for claimants whose first language was not English.</p> <p>The research also revealed the personal toll on would-be claimants: attempting to resolve employment disputes was often detrimental to claimants' health and wellbeing, and to household finances [R3]. Without adjudication, disputes remained unresolved, leading to unpaid wages, a lack of references, and difficulties in finding further employment. Faced with such pressures, and often experiencing feelings of shame and embarrassment, many abandoned their claims or</p>		

accepted out-of-court settlements; these could be unsatisfactory, and were often tied to non-disclosure agreements [R2].

Overall, the key findings were that the tribunal system was increasingly inaccessible for many on low incomes, who are not trade union members and cannot afford legal advice and representation [R4, R2]. Government policy exacerbated and added to existing access to justice issues. For example, a fees regime imposed in 2013 saw claimants charged up to GBP1,200 for taking their case to a tribunal, which was an insurmountable barrier for many. In fact, cases in some jurisdictions fell by 80% [R5, R6].

Many other challenges were identified by the research for those attempting to navigate the system with minimal support. This was becoming particularly acute as, due to a lack of resources, third sector advice agencies were revealed as increasingly unable to offer little beyond rudimentary advice and case preparation, with no representation available.

3. References to the research (Strathclyde affiliated authors in **bold**)

R1 Busby, N and McDermont, M (2012), 'Workers, Marginalised Voices and the Employment tribunal System', *Industrial Law Journal*, 41, 2, 166–183. <https://doi.org/10.1093/indlaw/dws010>

R2 Busby, N and McDermont, M (2020), 'Fighting with the wind: claimants' experiences and perceptions of the employment tribunal', *Industrial Law Journal*, 49, 2, 159–198. <https://doi.org/10.1093/indlaw/dwz018> [Online first: 17th August 2019]

R3 Busby, N and McDermont, M (2016), 'Access to justice in the employment tribunal: private disputes or public concerns?', in Palmer, E., Cornford, T., Marique, Y., and Guinchard, A., (eds), *Access to Justice: Beyond the Policies and Politics of Austerity*. Hart Publishing. ISBN: 9781849467346. [Submitted as REF2]

R4 Rose, E and **Busby, N** (2017), 'Power relations in employment disputes', *Journal of Law and Society*, 44, 4, 674–701. <https://doi.org/10.1111/jols.12062> [Submitted as REF2]

R5 Busby, N (2015), 'Challenging employment tribunal fees: R (Unison) v Lord Chancellor and another (No. 2)', *Edinburgh Law Review*, 19, 2, 254–259. <https://doi.org/10.3366/elr.2015.0277>

R6 Rose, E, Wood, L, and Kirk, E. (2015), 'The impact of Employment tribunal Fees: A perspective from Citizens Advice advisors in Scotland'. Report by the University of Strathclyde and Citizens Advice Scotland. Accessed from: <https://www.cas.org.uk/publications/price-justice>

Notes on the quality of research: All journal articles were peer-reviewed ahead of publication; in particular, **R1**, **R3** and **R5** were rigorously peer-reviewed ahead of publication in leading journals in the field. The underpinning body of research was funded by peer-reviewed funding from the European Research Council (McDermont and Busby, New Sites of Legal Consciousness: Citizens Advice Bureaux and Employment Disputes, European Commission – FP7 – European Research Council, 01/03/2012-29/02/2016, GBP155,490).

4. Details of the impact

Extensive dissemination of the research and awareness raising activities by the Strathclyde researchers had led to significant changes to the employment tribunal systems in Scotland, England and Wales, including:

- **Improving employment tribunal systems' treatment of claimants**, through training for judges on the experiences of claimants and informing online guidance for claimants;
- **Informing employment tribunal judge recruitment**, through invited participation on recruitment panels; and
- **Influencing employment tribunal and equality policies**, through lobbying activities, collaboration with third sector organisations and appointments on advisory panels and committees.

Improving Employment Tribunal Systems' Treatment of Claimants

Prompted by reading 'Workers, Marginalised Voices and the Employment Tribunal System' [R1], the President of the Employment Tribunal Scotland invited Busby to participate in a training event for all Scottish employment tribunal judges in October 2013 [S1]. This involved approximately 30 salaried and fee-paid (part-time) judges, and the event was repeated in October 2016. Based on the research findings, the training and ensuing discussions focused largely on the experiences of Litigants in Person (LiPs) at tribunal hearings, and on what actions judges and others involved in front line delivery of the employment tribunals service could take to improve claimant experiences, particularly LiPs [S1].

The President of Employment Tribunal Scotland summed up the value of Busby's presentation to the attending judges:

'It is all too easy to assume that it will be easier and less stressful for an unrepresented claimant to take part in a case management hearing conducted by telephone than to attend a hearing in an ET hearing centre. That this is not always so was a message vividly conveyed to the Employment Judges by Professor Busby as she set out the experience of a claimant who did not have her own telephone and who had to go to her daughter's house to take part in the hearing and try to find a quiet space where she would be uninterrupted by her grandchildren playing.

It was very clear from the feedback . . . that [the session] had caused [the judges] to reflect on their practice and how they might take on board the lessons that had emerged.' [S1]

They added: '*I considered the session . . . so beneficial that I mentioned it to the then President of Employment Tribunals (England and Wales)*' [S1]. This led directly to similar training presentations delivered by Busby and McDermont to all 11 Regional Employment Judges in November 2014 and approximately 40 Employment Judges in England and Wales in May 2015. The President of Employment Tribunal Scotland reported: '*I know from subsequent discussions with the then ET President that these presentations had a similarly beneficial effect to those delivered in Scotland*' [S1].

The information provided by Busby was also used by the President of Employment Tribunal Scotland to discuss access to justice issues with employment policy officials in the Department of Business, Energy and Industrial Strategy and to inform the development of on-line guidance that Her Majesty's Court and Tribunal Service makes available to employment tribunal system users [S1]. Following the training event for employment tribunal judges, the UK guidance held on the gov.uk webpage was updated to incorporate more specific information on unrepresented litigants and to improve the use of plain English in the place of legalese, based on the research findings that LiPs were often confused and unsettled by the use of legal terminology in the guidance [R1, R7]. Though this guidance is regularly updated, changes made following Busby's sessions have been retained in the current version [S2].

Informing Employment Tribunal Judge Recruitment

In June 2017 Busby was invited onto a recruitment panel for Scottish employment tribunal judges specifically because of her research insights, which would allow her to question and assess candidates on their attitude to access to justice and approaches in dealing with LiPs [S1]. This meant that the 11 successful candidates had a better awareness of the challenges faced by claimants, and were willing and able to take appropriate action to ensure their right to a fair hearing. In March 2020 she took part in the recruitment of 14 Scottish employment tribunal judges and was again responsible for assessing their awareness of and approach to access to justice, particularly in relation to LiPs. The President of the Employment Tribunal Scotland noted: '*Being*

involved in the selection of new judges is an extremely valuable contribution to the justice system and it is a role which Professor Busby has performed to great effect.' [S1]

Influencing Employment Tribunal and Equality Policies

In July 2013 the Westminster Government introduced fees for tribunal claimants. As the research had shown that fees would exacerbate the financial difficulties experienced by claimants whilst pursuing resolution, between 2013 and 2015 Busby and colleagues actively worked to raise awareness of this and argue for fee abolition. Activities included a Westminster roundtable event; an open letter to the government co-signed by the TUC and Unite general secretaries, the UK Law Societies, Citizens Advice and others, and published in the Guardian; and collaborative research with Citizens Advice Scotland to demonstrate the effect of the fees. The report [R3] was used extensively by Citizens Advice Scotland to lobby government for the removal of fees. In their submission to the Economy, Energy and Tourism Committee's inquiry on work, wages and wellbeing in the Scottish labour market, Citizens Advice Scotland highlighted the report's findings stating that:

'there was an 81% decline in the number of cases lodged in the Employment Tribunal in January-March 2014 compared with the year before, when no fee was payable. Evidence from Scotland's citizens advice bureaux show that unfair employment is still as common as ever, but people simply cannot afford to bring their claim.' [S3]

The Committee's final report referred to this submission and noted that the Cabinet Secretary had subsequently committed to abolishing fees for employment tribunals in Scotland once anticipated devolved powers were granted [S4]. To ensure the new devolved system will meet the needs of employees, businesses and society, Scottish Government established the Employment Tribunals Stakeholders' Forum, to which Busby was appointed in October 2016 [S5]. The research was also cited by an MP in the UK Parliament's debate on employment tribunal fees, by the Senior President of Tribunals in a Justice Committee session on Courts and Tribunals Fees and Charges, and in two submissions to the UK Government's Review of Employment Tribunal Fees [S6]. The fees regime in the UK was ruled unlawful by the Supreme Court in July 2017 and subsequently abolished.

As a result of her academic expertise as in labour and equality law and her specific areas of knowledge, including access to justice, Busby was appointed to the Scotland Committee of the Equality and Human Rights Commission (2017–2020) [S7]. The principal function of this Committee is to advise the Commission on human rights matters relevant to the Scottish context. During Busby's appointment, the Committee informed the EHRC's Business Plan 2018/19 and advised on the work required to achieve its vision. With particular relevance to Busby's research, this plan included the goal *'to increase access to justice for individuals experiencing discrimination and human rights breaches by influencing the UK and Scottish governments to remove key barriers to justice in the courts and tribunals'* [S7]. In tandem with this work, in 2017, Busby was invited by the First Minister to join the newly established Advisory Group on Human Rights Leadership to make recommendations to the First Minister on the protection of employment and equality rights during and following the Brexit process [S8, S9]. This remit later expanded to include advice on the potential incorporation of UN human rights treaties with specific reference to the Convention on the Elimination of All Forms of Discrimination Against Women [S9]. In December 2018, the Advisory Group published a set of recommendations, including recommendations for an act of the Scottish Parliament which provides human rights leadership and a Scottish Government national mechanism for monitoring, reporting and implementation of human rights [S9]. In June 2019, the Scottish Government established a National Taskforce for Human Rights Leadership to take forward these recommendations. Busby was invited to become Chair of the Academic Advisory Panel to the Taskforce, continuing to advise specifically on equality rights and laws, and presenting a series of briefing papers to the Taskforce [S9]. The

Taskforce will publish its recommendations in March 2021, leading to the introduction of a Bill on human rights in the next Scottish Parliament. Independent Co-Chair of the National Taskforce highlighted the influence of Busby's expertise and the benefit of her research: *'The contribution of Professor Busby cannot be overstated. Her advice was very much appreciated by both FMAG and the Taskforce as well as personally by Scottish Government Ministers. Most significantly also, it was highly valued by civil society which recognised her demonstrable understanding of the lived experience of those whose human rights were most at risk.'* [S9]

5. Sources to corroborate the impact

- S1 Corroborating statements from President of the Employment tribunal Scotland, dated 1 November 2013 and 3 July 2020.
- S2 UK guidance for employment tribunal users. Accessed from: <https://bit.ly/3cS72Cp>
- S3 Submission from Citizens Advice Scotland to the Economy, Energy and Tourism Committee's inquiry on Work, Wages and Wellbeing in the Scottish Labour Market. <https://bit.ly/3lAHiye>
- S4 Scottish Parliament, Economy, Energy and Tourism Committee. (2016) *Taking the High Road – Work, Wages and Wellbeing in the Scottish Labour Market*. <https://bit.ly/3sYVB3f>
- S5 Invitation to participate in the Employment tribunal's Stakeholders' Forum, dated 7 October 2016.
- S6 Collated citations of the research in debates and submission relating to the UK Government.
 - a. Transcript of the UK Parliamentary debate on employment tribunal fees (01/12/2015).
 - b. Transcript of the Justice Committee Oral Evidence on courts and tribunal fees and charges (26/01/2016).
 - c. Contribution from Scottish Employment Judges to the Ministry of Justice Review of the Introduction of Employment Tribunal Fees (06/08/2015).
 - d. Contribution from President of Employment Tribunals (England and Wales) to the Ministry of Justice Review of the Introduction of Employment Tribunal Fees.
- S7 Corroborating statement from Chair of the Scotland Committee of the Equality and Human Rights Commission, dated 18 December 2020, and appended EHRC Business Plan 2018/19 (<https://bit.ly/2NS1j6D>).
- S8 Letter from the First Minister for Scotland regarding the First Minister's Advisory Group on Human Rights Leadership, dated 30 November 2017.
- S9 Corroborating statement from the Chair of the First Minister's Advisory Group on Human Rights Leadership and Independent Co-Chair of the National Taskforce for Human Rights Leadership, received 27 November 2020.