

# Tribunal trouble

How a backlogged tribunal system is  
stopping people enforcing their rights



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# Summary

After 10 years working for his employer, Jake was dismissed following a disciplinary hearing in July 2019. His informal appeal was unsuccessful so he took an unfair dismissal claim to an employment tribunal.

Delays due to tribunal staff absence meant Jake's hearing was rescheduled from September 2019 to April 2020. But when the coronavirus pandemic hit and lockdown started, he received an email informing him that the tribunals had closed. He's since been told that the earliest he could expect the tribunal hearing to take place is December 2020.

Jake lost his job over a year ago. The stress of waiting at least 15 months for an outcome is too much to handle. He's asked Citizens Advice for help withdrawing his claim.

Employment tribunal delays meant Jake was denied a route to redress for his dismissal claim. The pandemic and resulting restrictions have reduced demand for many businesses - forcing affected employers to reduce their workforce. Since March, the number of payroll employees has dropped by 673,000. And, between June and August, redundancies increased to 227,000: a quarterly record increase of 114,000 and the highest level since summer 2009. In this redundancy crisis, we need a system that can deliver timely outcomes for affected workers with valid claims. This requires effective enforcement of employment rights and accessible routes to redress.

But the latest official statistics show that coronavirus-related restrictions have also significantly reduced employment tribunals' capacity to deliver redress. Between April and June 2020:

- The number of claims closed - either through decision, settlement, withdrawal or dismissal - dropped by over half (56%) from the previous quarter to 6,400 - a record low in the last 11 years,
- The backlog of overall employment tribunal claims waiting for an outcome stood at over 450,000, and
- There were 37,000 outstanding single claims - surpassing the post-2008 financial crisis record of 36,000.

The Employment Tribunal President has warned that the swelling backlog of claims will pose "huge challenges to the ability of the employment tribunal to deliver justice within a reasonable time". Many cases due to be heard when lockdown started have been rescheduled to more than a year into the future - and some have been postponed until 2022. Like Jake, a significant proportion of claimants have concluded the delays are too long to wait.

In its current state, the employment tribunal system is not equipped for the redundancy crisis - which will bring a surge in tribunal claimants.

1 in 6 (17%) of the working population are facing redundancy<sup>1</sup>. We've seen before that rising unemployment increases demand for redress. In 2009/10, the unemployment rate went up to 7.6% compared to 5.3% in 2007/08 - and redundancy and dismissal tribunal claims rose by over half (57%) to 87,000. This redundancy crisis brings an added risk of unfair and discriminatory dismissals: disabled people, those asked to shield, parents, and carers face at least twice the risk of redundancy. Through the clients coming to us for advice, we have seen that this is at least partly driven by potentially discriminatory and unfair decision-making. Many have faced redundancy because of their clinical vulnerability to coronavirus, caring responsibilities, or for flagging health and safety concerns or whistleblowing - examples include:

- A care home assistant made redundant after providing her employer with a shielding letter from her consultant
- A manufacturing worker put on furlough due to being diabetic - now made redundant after being replaced by non-shielding colleagues
- An employee refused furlough for her childcare needs and made redundant instead
- Clients who were made redundant after refusing to work while on furlough

Our research and the clients we're seeing give an insight into the scale and unequal impact of the building redundancy crisis. This pandemic hasn't been fair to workers. But redundancy processes have to be. Most employers are following the rules at a hugely challenging time for businesses. However, where employers fail to meet their legal responsibilities, workers' rights must still be protected and enforced.

For many people made unfairly redundant in this crisis, employment tribunals will offer the sole route to being reinstated or receiving appropriate compensation. They are the only place most statutory employment rights can actually be enforced. The alternative redress options are limited and state enforcement of employment rights is ineffective. This has put long-standing pressure on employment tribunals. Before coronavirus, tribunals were already struggling with a backlog of 440,000 outstanding claims and chronic underfunding.

Now, the pandemic has created the perfect storm for employment tribunals: rising demand at a time of restricted capacity. The huge backlog and protracted waiting times will be enough to deter many potential claimants - and prompt others, like Jake, to withdraw from the process. But the people most at risk of redundancy in this crisis - and most likely to need access to employment tribunals - are even less likely to make it to a hearing. People facing increased risk of redundancy are also more likely to:

- Withdraw their claim - in the case of disabled people or people with long-term health conditions<sup>2</sup>

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<sup>1</sup> Citizens Advice, [An unequal crisis](#) (2020) Throughout this report, 'facing redundancy' is used to refer to people who have already been made redundant, are in a formal redundancy process or who have had informal discussions with their employer about redundancy.

<sup>2</sup> Department for Business, Energy & Industrial Strategy, [Survey of Employment Tribunal applications 2018](#)

- Lack the time and financial resource<sup>3</sup> needed to overcome the systemic barriers of an overloaded employment tribunal system.

Research with Citizens Advice clients published in 2018 found that 3 in 5 (61%) participants chose not to pursue an employment tribunal after they learned what the process entailed<sup>4</sup>. Those impacted by this unequal redundancy crisis face even greater barriers to redress - and an employment tribunal system experiencing a crisis of its own when they need it most.

Urgent action is needed to ensure that the employment tribunal system can cope with the pressures of the pandemic and redundancy crisis - and be an effective source of redress to those affected. The government has already recognised this and taken welcome steps - including opening three temporary 'Nightingale Courts' that are hearing employment tribunal claims and investing £5.4 million in advice charities and law centres to help people with legal issues including employment problems.

But more is needed to tackle the scale of the challenge faced. This means investing in employment tribunals and supporting claimants to access and navigate the system. And it also means addressing the inadequate redress and enforcement landscape. We're calling on the government to:

- **Increase funding for employment tribunals** so it has the resource to build its capacity for video hearings and coronavirus-secure in-person hearings where appropriate
- Fast-track plans to **create a single enforcement body** for employment rights and ensure it has the remit and resources to improve redundancy processes. This in turn would relieve the pressure on the employment tribunals reducing the number of workers needing to make claims in the first place.

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<sup>3</sup> Poll conducted on behalf of Citizens Advice by Opinium

<sup>4</sup> Eleanor Kirk, The 'Problem' with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens' Advice Bureaux, 2018

# 1. Access to redress is needed now more than ever

The pandemic has presented huge challenges to the labour market - and tough choices for employers. Government interventions throughout the crisis have offered a lifeline. The Job Retention Scheme protected millions of people's livelihoods. From November, it will be replaced by the Job Support Scheme.

Job Retention Scheme (JRS)	Job Support Scheme (JSS)
<ul style="list-style-type: none"><li>• Also known as the <b>furlough scheme</b></li><li>• Introduced in <b>March 2020</b></li><li>• Covered <b>80%</b> of wages between March and July</li><li>• From August, <b>government contributions reduced</b> with the employer picking up the difference</li><li>• Stops at the end of <b>October</b></li></ul>	<ul style="list-style-type: none"><li>• Starts <b>1 November</b></li><li>• Available where decreased business demand means <b>workers' usual hours aren't available</b></li><li>• Employees must work <b>at least one third of their hours</b></li><li>• <b>Employer</b> must pay for hours worked</li><li>• <b>Government</b> will pay for two thirds of the hours not worked</li><li>• Support extended to cover two thirds of hours for employees where their <b>workplace is closed due to government restrictions</b></li></ul>

Where businesses are not able to afford the minimum contributions required by the Job Support Scheme, they may have little option but to reduce their workforce. As the Job Retention Scheme ends, the full scale of redundancies will become clearer. For now, the latest ONS data shows the impact on the labour market has already been significant. Since March, the number of payroll employees has dropped by 673,000<sup>5</sup>. And, between June and August, redundancies increased to 227,000: a quarterly record increase of 114,000 and the highest level since summer 2009.

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<sup>5</sup> Office for National Statistics, [Labour market overview, UK](#), October 2020

## **Since the lockdown started in March, we've seen over 3.5 times the number of redundancy clients compared to the same time last year.**

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Faced with reducing their workforce, most employers will adhere to their legal obligations and endeavour to make the redundancy process as fair as possible. But the surge in job losses also increases the risk of redundancy and dismissal related problems, such as the failure to consult and unfair and discriminatory selection. This is coming through in our data: since the start of the national lockdown in March, we've seen 28,000 clients with a redundancy problem - compared to just over 7,000 in the same period last year. These growing problems are likely to bring an increased demand for redress. We've seen this before - following the financial crash, the unemployment rate rose to 7.6% in 2009/10 compared to 5.3% in 2007/08 - and redundancy and dismissal tribunal claims increased by over half (57%) to 87,000<sup>6</sup>.

The scale of this crisis cannot be an excuse for unscrupulous employers to break the rules. Employment rights and protections still apply - and ensuring meaningful access to redress is crucial, particularly in a time of economic instability. And the need becomes even more pressing when we consider the second element of this redundancy crisis: its unequal impact.

As our previous research<sup>7</sup> has demonstrated, disabled people, those asked to shield, parents, and carers are more than twice as likely to face redundancy. Through the clients coming to us for advice, we have seen that this is at least partly driven by potentially discriminatory and unfair decision-making. Many have faced redundancy because of their clinical vulnerability to coronavirus, caring responsibilities, or for flagging health and safety concerns or whistleblowing - examples include:

- A care home assistant made redundant after providing her employer with a shielding letter from her consultant
- A manufacturing worker put on furlough due to being diabetic - now made redundant after being replaced by non-shielding colleagues
- An employee refused furlough for her childcare needs and made redundant instead
- Clients who were made redundant after refusing to work while on furlough

There need to be consequences for negligent employment practices, otherwise the discriminatory and unfair redundancies we're seeing risk going unchecked. This would undo the recent progress in labour market participation from these groups, which the government has championed. Meaningful access to redress is imperative for affected workers but for many, the route to protecting their rights is limited to employment tribunals.

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<sup>6</sup> Ministry of Justice, [Employment Tribunal Statistics](#)

<sup>7</sup> Citizens Advice, [An unequal crisis](#) (2020)

## i. For many, employment tribunals currently offer the only route to redress

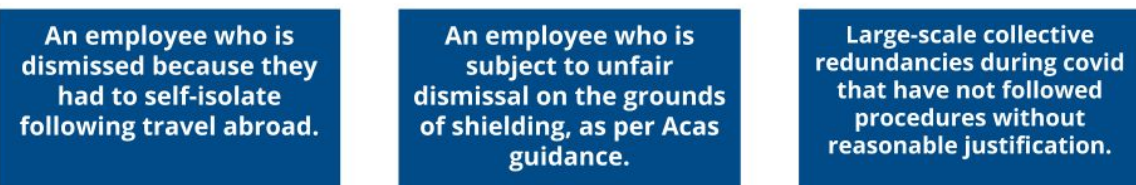
### What are employment tribunals?

- Employment tribunals handle most **legal workplace problems** - relating to employment or its termination
- Most **statutory rights** can only be enforced at tribunal
- Depending on the case, either **a single judge or a panel of three** - with two lay members - will hear the case and determine the outcome by interpreting the relevant parts of **employment law**
- Employment tribunals can order **outcomes including compensation and reinstatement** - e.g. in unfair dismissal claims

For many people affected by this redundancy crisis, employment tribunals will offer the only route to protecting their rights. This is partly because of tribunals' legal remit: most statutory employment rights can only be enforced at tribunal. And it's partly because of the outcomes available - those seeking financial compensation or reinstatement to the workplace as a consequence of their claim typically require a tribunal judgment.

Employment tribunal judges also have the expertise to interpret employment law and apply it to complex cases and new scenarios. The unprecedented nature of the pandemic has brought new responsive policies and schemes - including shielding for clinically extremely vulnerable people, travel corridors, and the Job Retention Scheme. Existing procedures such as large-scale redundancies have had to adapt to coronavirus-related restrictions - for example, by moving formal consultations online. Employment tribunals can take these contextual factors into account when applying the law.

### Figure 1. Government examples of coronavirus-related redundancy or dismissal issues where the employee could pursue an employment tribunal claim<sup>8</sup>



<sup>8</sup> Department for Business, Energy & Industrial Strategy, [Self-isolating after returning to the UK: your employment rights](#), 2020, Parliamentary written questions [52164](#) and [33673](#)










Employment tribunals have already taken welcome steps in response to the new legal questions arising from redundancies in the pandemic. Recognising the pressing public interest in returning to work safely, pandemic-related dismissal claims on health and safety grounds were prioritised from June<sup>9</sup>. This means that these cases can be fast-tracked. Some have already been decided, providing some legal clarification on where it is unfair to dismiss workers in the pandemic context - including shielding employees and those who seek help from their union after being dismissed for concerns about lack of personal protective equipment<sup>10</sup>.

For more complex cases, employment tribunals can be a crucial forum for redress - one that is valued by claimants and respected by employers. The Department for Business, Energy & Industrial Strategy (BEIS) found that 3 in 5 (60%) claimants were satisfied with the employment tribunal system - as were 64% of employers<sup>11</sup>. More widely, employment tribunal decisions on these cases are a source of legal clarity for all employers and workers.

But for many other claimants, the employment tribunal system won't necessarily be the most appropriate or effective option - but simply their only route to redress.

**Table 1. Informal redress options before pursuing a claim at employment tribunal**

Employer's internal processes	Via a trade union	Acas early conciliation
<p> <b>1st option:</b> raise a grievance or follow appeal procedure</p> <p> Not always successful: <b>9 in 10</b> (89%) employment tribunal claimants had oral/written communication with their employer before submitting their claim</p>	<p> Members can contact their trade union for <b>advice, support and representation</b></p> <p> This includes in cases of <b>collective redundancies</b></p>	<p> <b>Free process</b> that aims to resolve employment issues without going to tribunal</p> <p> Can lead to <b>quicker outcomes</b> for less complex problems</p> <p> <b>Employers</b> don't have to engage</p>

As Table 1 highlights, alternative informal options can be pursued before going to tribunal. But these options rely on the employer changing their decision or negotiating

<sup>9</sup> The Employment Tribunals in England and Wales and in Scotland, [FAQs arising from the Covid-19 pandemic](#)

<sup>10</sup> *Morales v Premier Fruits (Covent Garden) Ltd ET 2302945/2020, Reid v The Good Health Store EET 20/44*

<sup>11</sup> Department for Business, Energy & Industrial Strategy, [Survey of Employment Tribunal applications 2018](#)

with the employee. Where an employer declines to engage, these options aren't on the table.

Limited alternative routes to redress are further compounded by inadequate state enforcement of employment rights. The fragmented landscape of enforcement bodies means their responsibilities and remits are confused and unclear. In addition to insufficient resources, this limits their effectiveness to enforce employment rights. This leaves the burden on workers to initiate action where their rights are breached - and increases reliance on redress mechanisms.

Ineffective enforcement of employment rights and limited alternative routes to redress mean too many issues reach employment tribunal. The result is a needlessly formal and complex route for some claimants - and more overall demand on over-stretched tribunals.

## 2. A perfect storm for the tribunal system - just as it is needed most

As outlined in the previous section, employment tribunals are not only a crucial source of redress during this unprecedented and unequal redundancy crisis - for many they are the only place to turn. Employment tribunals were already under sustained pressure - and now the pandemic presents major new challenges to its capacity to meet its demand.

The government has recognised this and announced a series of measures aiming to ensure redress is available to employees in this crisis. This included:

- opening temporary 'Nightingale Courts' to boost capacity - three of which are currently hearing employment tribunal cases<sup>12</sup>
- making changes to tribunal procedure to speed up claims - such as allowing greater use of virtual hearings and administrative reforms so that minor errors in documentation do not lead to substantial delays<sup>13</sup>
- providing additional funding of £5.4 million to advice charities and law centres to help with a variety of legal issues in the pandemic - including employment problems<sup>14</sup>.

It is encouraging that the government has recognised urgent action is needed to address the challenges facing the employment tribunal system. But our research indicates that the people who need access to tribunals most in the wake of the redundancy crisis will face heightened barriers to redress. This section outlines the scale of the challenge the employment tribunal system and potential claimants face.

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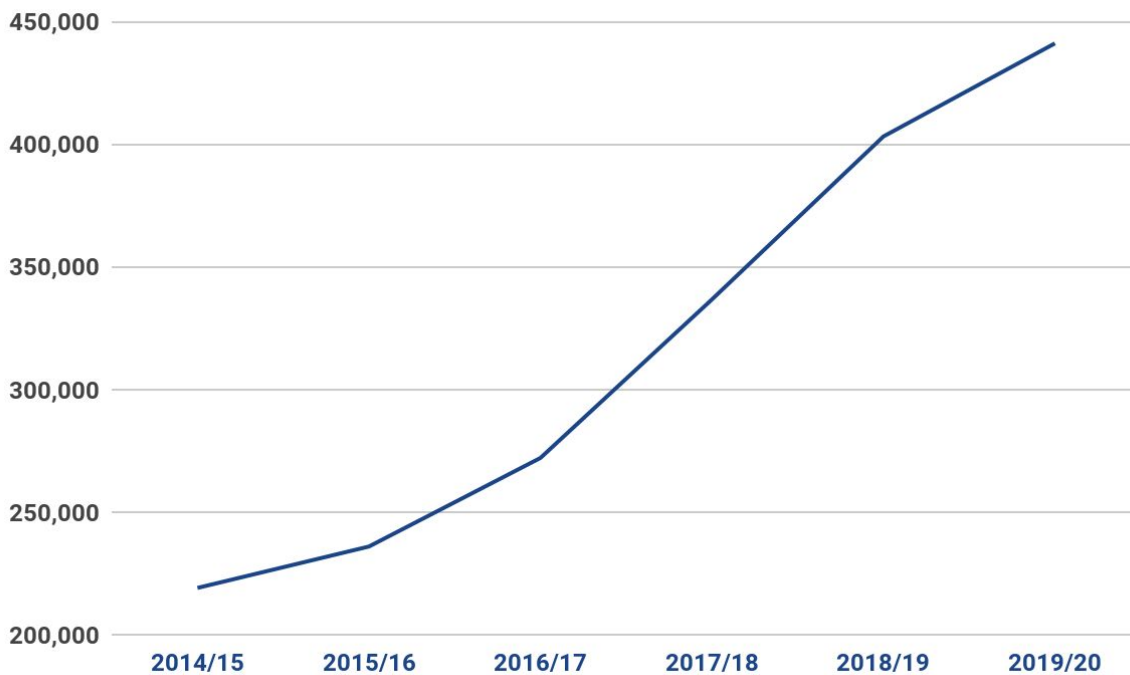
<sup>12</sup> HM Courts & Tribunals Service, [Nightingale Courts guidance](#), August 2020

<sup>13</sup> UK government, [Government to boost capacity in employment tribunal system](#), September 2020

<sup>14</sup> Ministry of Justice, [£5.4 million to support legal advice sector during the COVID-19 pandemic](#), May 2020

## i. Increased demand and coronavirus-related restrictions risk crisis point for struggling employment tribunals

Figure 2. Annual outstanding employment tribunal claims<sup>15</sup>

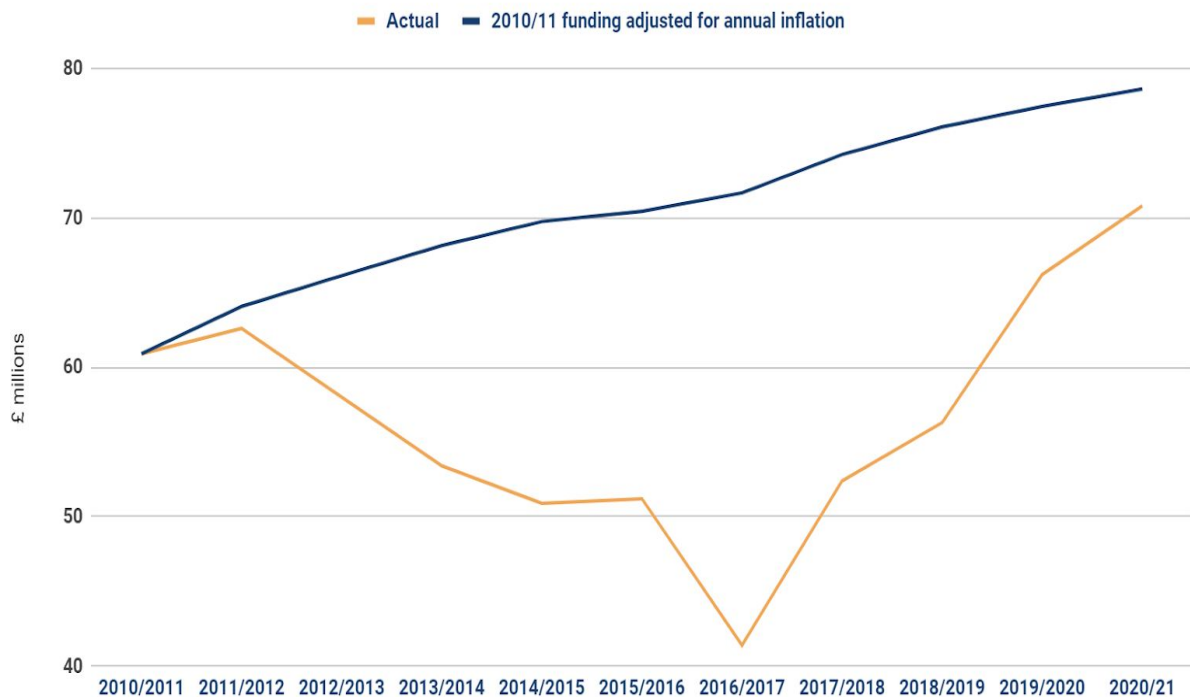


Going into the pandemic, the employment tribunal system had over 440,000 outstanding claims that had been building year-on-year since 2014/15. Funding was at its highest in the last 10 years - but, allowing for inflation, it was still 15% less than 2010/11 levels as Figure 3 illustrates.

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<sup>15</sup> Ministry of Justice, [Employment Tribunal Statistics](#)

**Figure 3. Annual gross budget for employment tribunals against 2010/11 levels adjusted for inflation<sup>16</sup>**



The pandemic introduces two new major challenges. First, employment tribunals have been subject to coronavirus-related restrictions. National lockdown meant in-person hearings were paused for 3 months at the end of March. As they begin to reopen, tribunals have been subject to health and safety restrictions, such as limited footfall to prevent spread of infection. This significantly reduces the physical capacity of tribunals: before the three Nightingale Courts opened, it was estimated that around half to two-thirds of the total employment tribunal estate was unavailable<sup>17</sup>.

Tribunals had to shift to new and unfamiliar technology - including video hearings. The National Employment Tribunal User Group<sup>18</sup> have highlighted that it is unclear the extent to which video hearings will be appropriate in all circumstances - especially where they are more complex or claimants have accessibility issues with the technology.

<sup>16</sup> [Parliamentary question for Ministry of Justice](#), September 2020

<sup>17</sup> [National Employment Tribunal User Group minutes](#), June 2020

<sup>18</sup> The National Employment Tribunal User Group is made up of stakeholders involved in the development of employment tribunals. They meet to discuss issues and concerns with the tribunal service.

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## By June, outstanding single claims had already exceeded 37,000 - surpassing the post-2008 financial crisis peak.

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The consequence of these restrictions and changes is that tribunals have been unable to hear the number of cases they normally would. The number of claims closed - either through decision, settlement, withdrawal or dismissal - dropped to 6,400 between April and June. This was a decrease of more than half (56%) compared to the previous quarter - and a record low in the last 11 years. This significantly exacerbated the backlog of outstanding claims. By the end of June, there were around 455,000 outstanding single and multiple claims - and the single claim backlog had reached 37,000, surpassing the post-2008 financial crisis peak of 36,000.

### What is the difference between a single claim and multiple claims?

A **single claim** is a case brought by one worker against their employer.

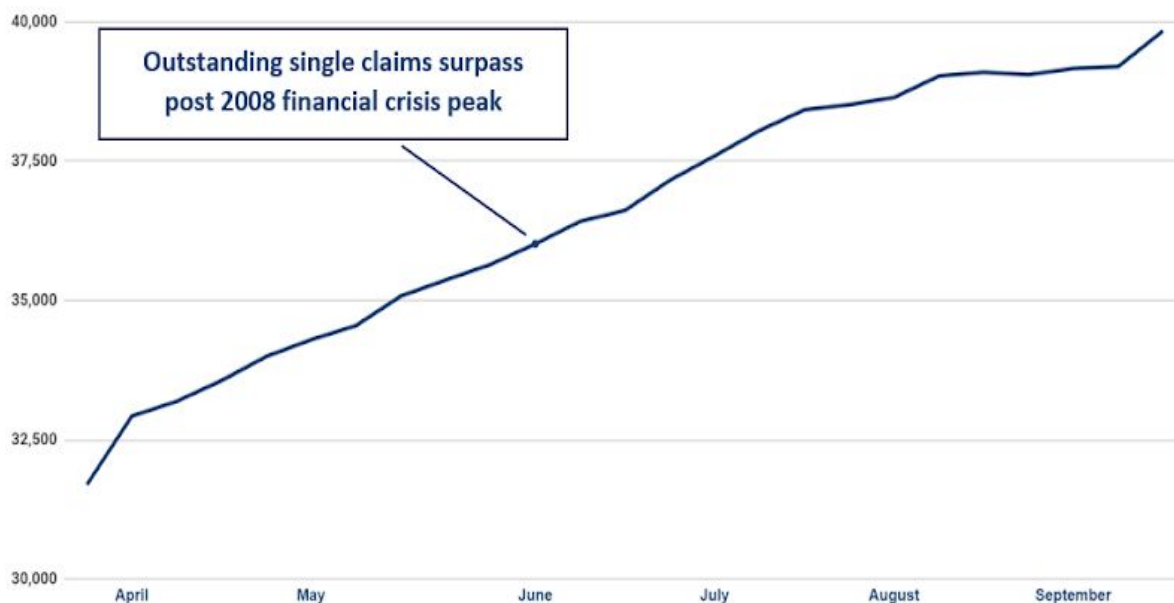
**Multiple claims** are where 2 or more workers have a claim against the same employer(s) which is either the same or very similar. The tribunal will process these cases together.

The tribunals have not yet been able to return to normal capacity. From the latest weekly management information released by the tribunal service, we know that this backlog of single claims has grown at a rate of around 1% a week throughout the pandemic - reaching almost 40,000 by the end of September<sup>19</sup>. If the same quarterly increase for single and multiple claims we saw between March and June continues, outstanding claims will surpass 500,000 by spring.

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<sup>19</sup> Her Majesty's Courts and Tribunals Service, [Weekly management information during coronavirus](#), March to September 2020

**Figure 4. 2020 Weekly outstanding single claims**



It seems likely that the gap between claims received and claims closed will persist and the backlog will grow: the second challenge the pandemic presents is increased demand. As outlined in the previous chapter, the growing redundancy crisis and creation of new coronavirus-related problems introduce a new need - and pressure - for employment tribunals. Between April and June, single claims rose by a fifth (18%) compared to the same period in 2019.

This increase has been put down to rising unemployment and the impact of Covid-19 on working conditions<sup>20</sup>. At the end of June, the President of Employment Tribunals in England and Wales predicted further claim increases relating to health and safety, whistleblowing, and unfair redundancies and dismissals<sup>21</sup>. With the record quarterly increase in redundancies between June and August - this prediction is likely to materialise throughout the rest of the year.

People experiencing employment problems in the pandemic will face substantially increased waiting times if they choose to pursue a tribunal claim. The Employment Tribunal President has stressed that the growing backlog of cases will pose "huge challenges to the ability of the employment tribunal to deliver justice within a reasonable time"<sup>22</sup>.

<sup>20</sup> Ministry of Justice, [Statistician's Comment on Tribunal Statistics Quarterly, April to June 2020](#), September 2020

<sup>21</sup> [National Employment Tribunal User Group minutes](#), June 2020

<sup>22</sup> *ibid*

As Table 2 shows, single redundancy claims closed between April and June were submitted an average of 25 weeks before. For multiple claims relating to discrimination, the average wait was 68 weeks, meaning a claim closed on 30 June 2020 would have been submitted in March 2019. Waits for tribunal were already lengthy - and now the pandemic has significantly exacerbated this: many cases due to be heard when lockdown started have been rescheduled to more than a year into the future. Some have been postponed until 2022<sup>23</sup>.

Delayed hearings and outcomes will affect claimants across the country. But pre-pandemic, there were already significant regional disparities in waiting times. For example, between January and March 2020, the national mean waiting time for a single redundancy claim was 33 weeks<sup>24</sup>. In the South East, it was 44 weeks - an additional 2.5 months wait. With no change to regional resource distribution, these variations will persist.

**Table 2. Mean waiting times (age at clearance) in Q1 2020/21 (April-June)**

	Single claims	Multiple claims
All types of claim	32 weeks	55 weeks
Redundancy	25 weeks	34 weeks
Unfair dismissal	34 weeks	40 weeks
Average of all discrimination claims	39 weeks	68 weeks

The increased delays to redress arising in the pandemic threaten to effectively deny redress altogether. Some claimants may conclude that withdrawing their case now is preferable to a lengthy limbo period and an unknown outcome at tribunal.

**Case Study: After working for his employer for over 10 years, Jake was dismissed after a disciplinary hearing. He disputed the reasons for his dismissal and came to Citizens Advice for support with an internal appeal in July 2019. It escalated to the employment tribunal stage and his hearing was due in September 2019. This was then postponed to April 2020 due to staff absence. At the start of lockdown, Jake received an email advising that the employment tribunal had closed. He was later informed that his hearing would be delayed indefinitely due to the pandemic. The earliest he could expect the hearing to take place was**

<sup>23</sup> *ibid*

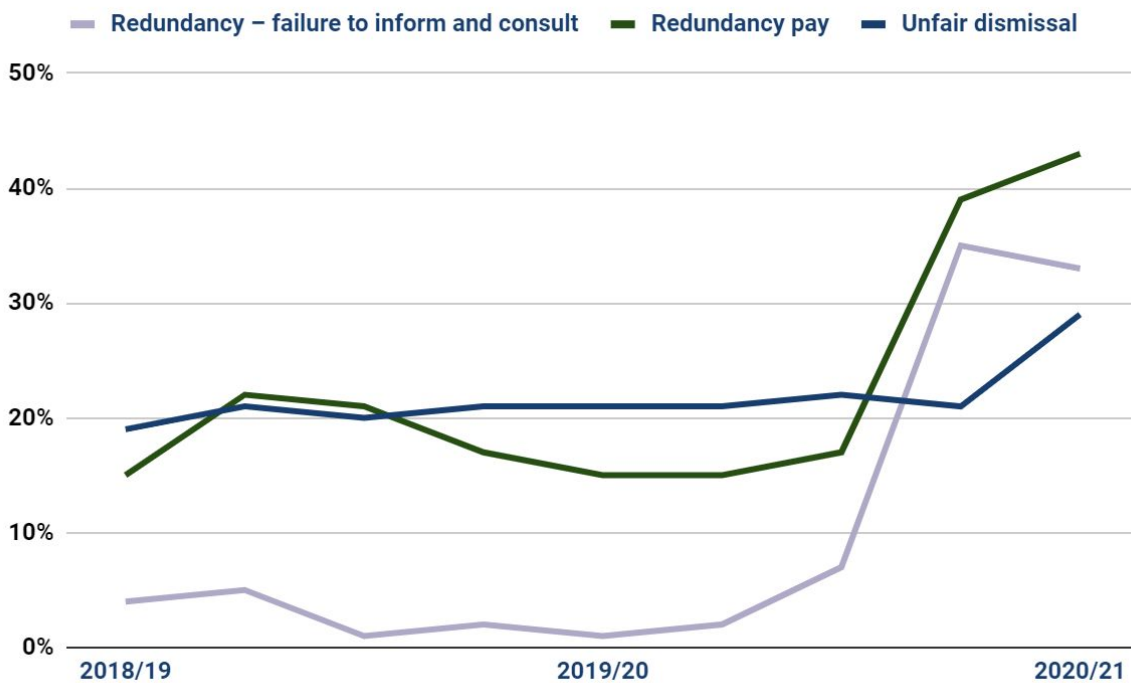
<sup>24</sup> Data from a Freedom of Information request from the Ministry of Justice



**December 2020. The uncertainty of the process - along with the stress of having lost his job and the difficulties with finding work - had taken their toll on Jake's mental health. He has contacted Citizens Advice to ask how he can go about withdrawing his claim.**

Withdrawals are already increasing. Over 1 in 4 (26%) of all claims closed between April and June were withdrawals compared with 1 in 5 (20%) the previous quarter. In both quarters coinciding with the pandemic, there were sharp increases in withdrawal rates for both redundancy and unfair dismissal claims - as shown in Figure 5. Withdrawal rates for both types of redundancy claim hit their highest quarterly level recorded in official statistics<sup>25</sup> - and 3 in 10 (29%) closed unfair dismissal claims were withdrawals.

**Figure 5. Withdrawal rates of redundancy and unfair dismissal claims**



In the first months of the pandemic, new and growing barriers to accessing employment tribunals were already enough to deter a significant proportion of redundancy and dismissal claimants. As job losses rise, the backlog and waiting times are set to soar too. This promises to prevent many more valid claims from reaching an outcome at tribunal.

<sup>25</sup> Withdrawal rates for redundancy pay complaints are available from the first quarter of 2010/11 and from the first quarter of 2013/14 for 'redundancy - failure to inform and consult' complaints

## ii. Many potential redundancy claimants will face greater barriers to accessing redress

The impact of the pandemic on the employment tribunal system threatens its capacity to deliver timely redress. This presents major systemic barriers to redress for all potential claimants. But our findings indicate that the effects could be particularly sharp for those most at risk of redundancy in the crisis.

This section outlines that many of the people facing increased risk of redundancy are also more likely to:

- Withdraw their claim - in the case of disabled people or people with long-term health conditions
- Lack the time and financial resource needed to overcome the systemic barriers of an overloaded employment tribunal system

These additional barriers will prevent people affected by unfair and discriminatory redundancies from taking valid claims to tribunal.

### **The redundancy crisis is disproportionately impacting disabled people - and they are more likely to withdraw tribunal claims**

Our polling indicated that disabled people and people advised to shield in the pandemic are at disproportionate risk of redundancy. 1 in 4 disabled people (27%) are facing redundancy - rising to 37% for those people whose disability has a substantial impact on their activities. 1 in 2 (48%) people who are clinically extremely vulnerable to coronavirus are at risk of redundancy. As we've outlined, some of our clients are facing discriminatory selection for redundancy - including on the basis of disability and health conditions.

Disabled claimants are more likely to withdraw their tribunal claim, indicating that the tribunal process could pose increased barriers to disabled people. Of the surveyed claimants who decided to withdraw their case, over 1 in 3 (36%) had a "limiting illness or disability" compared to 3 in 10 (29%) of all claimants<sup>26</sup>.

In 2020, the employment tribunal system is experiencing a growing backlog and increased delays due to coronavirus-related restrictions - which will pose further barriers to claimants. Many disabled people and people with long-term health conditions may also be clinically vulnerable to coronavirus - which could restrict their ability to attend in-person hearings where they are more appropriate in complex cases. Equally, online hearings present another barrier for those who are unable to access and utilise digital services. In 2019, nearly 1 in 5 (18%) disabled people had never used the internet compared to less than 1 in 10 (8%) of the general population<sup>27</sup>. Presidential

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<sup>26</sup> Department for Business, Energy & Industrial Strategy, [Survey of Employment Tribunal applications 2018](#)

<sup>27</sup> Office for National Statistics, [Internet users](#), 2019

Guidance published in September recognised this risk - and highlighted that a balance will need to be struck between accessibility issues with technology and delays to hearings<sup>28</sup>. In either case, these new challenges threaten to not only sustain 2018 withdrawal rates among disabled claimants and claimants with long-term health conditions - but could make them worse.

Accessibility is always crucial to effective redress. And the need is even more pressing in a redundancy crisis where disabled people are being disproportionately impacted and discriminated against.

## **Those at risk of redundancy lack the resources needed to overcome the barriers of an overloaded tribunal system**

Pre-pandemic, pursuing an employment tribunal claim could be long, draining and expensive. For claimants surveyed in 2018, the median number of days spent on a case was 14 - with 1 in 9 (12%) claimants spending 200 days or more. 3 in 5 (63%) claimants said they had incurred personal financial costs. At the time, this included employment tribunal fees which have now been abolished - removing one significant barrier to redress for claimants. But 2 in 5 (38%) claimants also reported loss of earnings<sup>29</sup>. Increased waiting times will mean further drawing out the process - at the claimant's cost.

Making it to a tribunal hearing requires time and money. For many people affected by the redundancy crisis, they won't be able to spare either to overcome the systemic barriers to accessing redress. As Figure 6 highlights, our polling shows that the time needed to withstand the employment tribunal process would take away from other non-negotiable priorities: family, finding new work in a challenging labour market, and making ends meet in the meantime.

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<sup>28</sup> Employment Tribunals (England and Wales), [Presidential Guidance on remote and in-person hearings](#), September 2020

<sup>29</sup> Department for Business, Energy & Industrial Strategy, [Survey of Employment Tribunal applications 2018](#)

Figure 6. Demands on potential redundancy claimants' time<sup>30</sup>



Financial circumstances will also pose a significant barrier. Many potential redundancy claimants face significant hardship in this crisis - as our findings in Figure 7 outline. They simply won't have the means to make and sustain a lengthy employment tribunal claim.

Figure 7. Financial circumstances of those facing redundancy



Legal advice and representation can lighten the workload - reducing the time and emotional pressure on a claimant pursuing their case alone. But 2013 cuts mean that legal aid is no longer available in the majority of employment cases. There is an

<sup>30</sup> Institute for Employment Studies, [Monthly vacancy analysis](#), September 2020

exception for discrimination claims. But this is subject to merits and means tests - and the financial threshold hasn't changed since 2010. Without adjusting for inflation, more and more people unable to afford legal support are excluded from legal aid each year. And even where these criteria are satisfied, representation at tribunal isn't covered without a successful application for 'Exceptional Case Funding'. Between 2013/14 and 2018/19, only 15 applications were made for this funding for discrimination cases and none were granted. So no such funding was provided for tribunal representation in a workplace discrimination case.

**Table 3. Costs of advice and representation for claimants<sup>31</sup>**

	Total paid for advice and representation in case	
	All claimants	Any discrimination claim
Median	£2,500	£3,000
Mean	£8,608	£8,867

As Table 3 shows, the absence of legal aid for employment cases means that legal advice and representation often comes at a significant cost. Retaining this support for protracted waiting times presents a further financial burden, which many impacted by the redundancy crisis won't be able to bear.

There are free alternatives to paid legal support including advice centres and pro bono legal services - but their capacity and resource is limited. Advice and support is available for employment issues, including information on how to start a tribunal claim. But, with increasing demand, more extensive support such as ongoing assistance with a claim or representation can't always be guaranteed.

Another option is trade unions - which offer members advice, support, and potentially representation for employment disputes. But in 2019, less than 1 in 4 (24%) employees were trade union members<sup>32</sup>. And the sectors with workers who were most likely to be furloughed are even less likely to be unionised. For example, companies in the 'accommodation and food services activities' sector had the lowest trade union density of all industries in 2019 - and the 'arts, entertainment and recreation' sector was below the all employees average. In 2019/20, only 6% of claimants at employment tribunals were represented by a trade union.

Without the financial means to pay for legal support, many impacted by the redundancy crisis will face pursuing their claim independently and representing themselves. In addition to the extra time needed to prepare, self-representation at tribunal can be a

<sup>31</sup> Department for Business, Energy & Industrial Strategy, [Survey of Employment Tribunal applications 2018](#)

<sup>32</sup> Department for Business, Energy & Industrial Strategy, [Trade Union Statistics](#)

daunting prospect and source of anxiety for potential claimants - and one more reason not to pursue the claim at all.

**Case Study: Lily was made redundant in May after 4 years in her job. She was the only one selected. Her employer told her that one of the criteria for selection was 'flexibility'. Lily is the only part-time worker in her office - she can only work certain hours because of childcare needs. She came to Citizens Advice to see whether her redundancy was fair. With support, Lily wrote to her employer requesting written reasons for the less favourable treatment and then pursued early conciliation - without success. Her next step is to take the claim to an employment tribunal. But Lily is still searching for work - and she can't afford legal representation. While Citizens Advice have offered support, the prospect of preparing the case and representing herself is daunting. Lily asked whether she could withdraw if she changed her mind and is now taking some time to consider her decision before proceeding.**

Research with Citizens Advice clients published in 2018 found that 3 in 5 (61%) participants chose not to pursue an employment tribunal after they learned what the process entailed<sup>33</sup>. In each of these cases, an adviser, employment specialist or legal professional had confirmed the client had a potential case. With increasing claims, backlogs, and waiting times - the process is likely to get a lot harder. And these heightened systemic barriers are likely to hit those affected by the redundancy crisis hardest.

**“[Client] doesn't have the mental strength to pursue a claim for constructive unfair dismissal... All she wants now is to have her wages settled correctly to the end of her employment and to get her benefit payments stabilised.”**

*Quote from an adviser's evidence form*

Urgent action is needed to ensure that the employment tribunal system is an effective source of redress in the pandemic and redundancy crisis. The government has recognised this and the measures taken so far are welcome. But more is needed to tackle the scale of the challenge faced. As the next section outlines, this means investing in employment tribunals and further supporting claimants to access and navigate the system. But it also means addressing the inadequate redress and enforcement landscape by creating viable alternative routes including a single enforcement body.

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<sup>33</sup> Eleanor Kirk, The 'Problem' with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens' Advice Bureaux, 2018

## 3. Ensuring access to redress in this crisis - and beyond

Employment tribunals offer the only route to redress for most people who have experienced unfair treatment at work. The previous chapter outlined how the resulting demand creates a queue to redress - which workers affected by the redundancy crisis will have to join. Even before the pandemic, this could make for a time consuming and stressful process for claimants - one which many people chose not to pursue even when they had legitimate cases against their employer.

Now the current crisis threatens to prevent more people from seeking redress. The combination of increasing claims to employment tribunals and restrictions on their capacity caused by coronavirus-secure measures will prolong waiting times for redress when it is needed most.

The government has recognised the challenges the employment tribunal system faces and has introduced a host of welcome measures aiming to increase tribunal capacity. But more action is needed to address the scale of the pressure on the tribunal system and the barriers to redress preventing people from pursuing valid claims. Ensuring that the current crisis does not reverse the recent progress we have seen towards equality in the labour market will require more concerted action to preserve the tribunal system, and strengthening other routes to redress including public enforcement.

### 1. Increase the capacity of the tribunal system by increasing funding

Meaningful access to redress for all workers requires an employment tribunal system with sufficient capacity and resources to hear cases within a reasonable time. Without appropriate funding the anticipated increase in the number of claims will lead to an unsustainable backlog, unacceptable waiting times, and denial of timely outcomes for those who need it.

To manage the oncoming redundancy crisis, coronavirus-related restrictions, and the backlog legacy of an under-resourced system, more resource for employment tribunals is vital. In real terms, 2020/21 annual funding for the employment tribunal system is still 10% less than it was in 2010/11, and, as shown in the previous chapter, the number of outstanding cases has been rising persistently since 2014/15. To get back to 2010/11 funding levels, the system would need an extra £7.8 million in the 2020/21 budget.

In response to the pandemic the government announced a one-off investment of £80 million across the whole of the HM Court & Tribunal Service to establish more Nightingale courts and hire additional staff. This investment is welcome, but spread across a service facing unprecedented challenges whose regular operating costs totalled £1.2 billion, the additional resources for Employment Tribunals is unlikely to be

sufficient<sup>34</sup>. As mentioned above only three of the 17 Nightingale courts currently operating are able to hear employment cases. This funding may go some way towards mitigating the immediate impact of Covid restrictions, but the employment tribunal system was already facing a growing backlog of cases before the crisis and is highly likely to experience a large increase in demand. A much more targeted investment in resources in employment tribunals will be required to help meet this new demand.

Investing additional resources can help to manage the increasing demand, regional disparities, and new challenges. For example, it could be put towards:

- More temporary tribunals for in-person hearings that meet health and safety standards - at the moment, only three of the Nightingale Courts are taking employment tribunal cases
- Extra investment for regions with increasing demand and lacking resource - included targeted increases in staff and temporary physical estate that complies with coronavirus health and safety guidelines
- Hardware and software necessary to conduct remote hearings effectively
- Data monitoring and user research to identify and resolve issues according to claimants' and employers' experiences of the system changes

Another way to ease the congestion in the system would be to invest, at least on a temporary basis, in making free legal advice more widely available. Access to legal advice can serve to reduce unnecessary pressure on the tribunal system overall. Early advice can encourage claimants to pursue other more informal routes to redress - and can reduce the risk of vexatious claims, or ones highly unlikely to be successful, from reaching tribunal. Professional guidance when drawing up claims and engaging with the tribunal system can also prevent simple administrative errors from causing overly long delays.

As highlighted in the previous chapter, it is encouraging that the government has already recognised that access to legal support and representation for employment issues is crucial in the pandemic context. Much needed funding for advice charities and law centres has been welcome for this purpose. However, they should consider going further and ensuring legal aid is available for all types of employment cases.

In the interim, amendments to existing legal aid provision for discrimination issues can be made to more immediately support claimants affected by unfair redundancies. This includes bringing the means test for legal aid into line with inflation and extending the existing support to cover tribunal representation as default. Ensuring that those facing discriminatory redundancies have meaningful access to redress is vital - in both the fallout of this unequal crisis and the construction of a post-coronavirus labour market that continues to make strides towards workplace equality.

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<sup>34</sup> HM Courts & Tribunals Service, [Annual Report and Accounts - 2019-20](#)



## 2. Fast-track the government's plans to create a single enforcement body for employment rights and ensure it has the remit and resources to improve redundancy processes

Access to employment tribunals is crucial to ensure that individuals have a way in which they can take action if they have been mistreated by an employer and to seek redress. However, they are not sufficient on their own to improve employers' compliance with the law in general.

This is partly because only a very small proportion of employment law breaches are ever brought to employment tribunal in the first place. For example, the Chartered Institute of Professional Development (CIPD) have recently estimated that up to half a million workers each year experience discrimination at work which would reach the burden of proof required to take a case to tribunal. But only 46,000 claims for discrimination were made in 2018/19<sup>35</sup>, meaning that the system sees fewer than 10% of cases.

The disparity between the number of incidents and the number of employment tribunal claims pursued is not surprising. The tribunal system places a burden on employees to identify breaches of the law, and take their case forward within tight time limits. As the previous chapter has demonstrated there are many barriers that prevent employees pursuing valid claims, including the time, financial and emotional cost. Action can and should be taken to reduce these barriers as far as possible, but there will always be a large proportion of people who are unable and unwilling to bring their cases forward.

For the claimants that do pursue tribunal claims through to decision, an outcome in their favour doesn't guarantee employers will comply with the tribunal's findings.

For example, a significant proportion of employers don't pay claimants the money that they are owed. Tribunal awards are 'judgment debts' which means it is the claimants who have to take further legal action if the employer does not automatically pay the money. In 2016 BEIS introduced a penalty scheme to help claimants pursue what they were owed, but despite this the claimant survey in 2018 found that 20% of successful claimants had still not received their money<sup>36</sup>.

Even when the claimants receive their award promptly, a successful case does not automatically lead to employers improving their practices in future. Although many employers will respond to having to pay an award by reviewing their general practices, in the majority of cases there is no obligation on them to do so. As said above, the

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<sup>35</sup> [Revamping labour market enforcement in the UK](#) (CIPD, 2020)

<sup>36</sup> Lack of payment can be because the company has been made insolvent since the judgment. Although in some cases the timing will be bad luck, it can also be an example of 'phoenixing' defined by the former Director of Labour Market Enforcement as where 'directors dissolve their company in order to avoid having to pay fines or arrears only to re-emerge soon afterwards under a different legal company but usually operating the same problematic business model.' see [UK Labour Market Enforcement Strategy 2018 to 2019](#)

majority of areas of employment law which can be brought to tribunal are not enforced by any other agency.

The government has recognised that public enforcement needs to be strengthened by promising to establish a single enforcement body for employment rights. Under the current plan the new organisations would take on the responsibilities of 3 of the current enforcement bodies, including enforcing the minimum/national living wage and regulating gangmasters and employment agencies. They have also promised to publicly enforce holiday pay for the first time<sup>37</sup>.

Establishing the body will be a genuine move forward for workers rights, but, given the scale of the crisis the new agency could and should have a more ambitious remit. Most clearly, as BEIS' consultation suggests, it should take on responsibility for ensuring that tribunal fees are paid in a timely manner.

The single enforcement body should also take on a more ambitious role in ensuring redundancy processes are conducted fairly. Redundancy and dismissal cases can involve establishing very specific individual circumstances and testing them against complex legal tests, and are therefore often more suited to be resolved by individual conciliation or legal action through the tribunal. However, there are still many aspects of redundancy law to which public enforcement could be applied.

For example, the body could take responsibility for overseeing that workers receive their full statutory redundancy pay and notice period. This responsibility would complement the duty the body is expected to have to ensure that minimum wage and holiday pay are paid out in full - as establishing the correct amount of holiday pay owed is a significant aspect of calculating redundancy payments. Proper enforcement of these rights would present an alternative for at least some of the 6,573 people who had to submit a tribunal claim for redundancy pay in 2019/20.

Employers are also already required to inform Insolvency Service Redundancy Payment Service when they plan to make more than 20 people redundant. These notifications could be shared with the new Single Enforcement Body, which would have responsibility for making sure that the duties to inform and consult employees were being fulfilled.

A well resourced enforcement body with remit to ensure that redundancy and dismissal processes are carried out fairly would help take pressure off the tribunal system, by creating an alternative route to redress. It would mean that the burden of challenging bad practice would not fall solely on individuals, and employers could still face consequences for violations of labour law even if the individual concerned wasn't able to take their case forward.

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<sup>37</sup> [Good Work Plan: establishing a new Single Enforcement Body for employment rights](#)

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