Employment tribunals

The intimidatory use of costs threats by employers' legal representatives

Summary

Citizens Advice Bureaux (CABx) help people with almost 600,000 employment problems a year. Some of these involve the redundancies, company mergers and other business changes that are inevitable in a dynamic economy. Others reflect the fact that disputes between workers employers will and do happen, just as they do in other areas of life. But in a great many cases the individual concerned has been denied one or more of his or her statutory workplace rights by an employer.

The principal legal remedy available to such workers is the making of a claim to an Employment Tribunal. CABx can provide advice on and assistance with the making of such a claim, and in some cases can provide representation at the tribunal hearing. However, the process is dauntingly legalistic and adversarial, the resources of CABx and other sources of free legal advice extremely limited, and the likely value of any resultant compensation relatively small.

This paper sets out our concerns in relation to the widespread use of unjustified threats by employers or their legal representatives to seek costs against employment tribunal applicants, with a view to intimidating them into withdrawing the claim.

The use of such intimidatory tactics, and their potential impact on applicants with valid and deserving cases, has increased significantly since July 2001, when the Government increased the maximum amount of a costs awarded from £500 to £10,000.

Inside

Introduction

In July 2001, the Government made a number of changes to the legal provisions and procedures by which Employment Tribunals can impose an order for costs against either the applicant or the respondent (that is, the person against whom the claim is brought, usually the applicant's employer or former employer).

In particular, revised employment tribunal procedural rules, which came into force on 16 July 2001, increased from £500 to £10,000 the maximum amount of costs that a tribunal can award, where it considers that a party (either the applicant or the respondent) has acted "vexatiously, abusively, disruptively or otherwise unreasonably".[1] And the new procedural rules extended this definition of the circumstances in which a tribunal can award costs, to include those where the tribunal considers that "the bringing or conducting of the proceedings by a party has been misconceived".

At the time, the Government sought to justify the changes – which were formulated with little if any prior consultation – by stating that they were intended to "strengthen and improve the employment tribunal system" by deterring "those people looking to bring an action which has little or no chance of success". Ministers stated that such deterrence was necessary because "there are too many weak cases in the [employment tribunal] system causing significant delays for those with genuine claims".[2] However, no specific evidence was presented in support of this statement.

In April 2001, Citizens Advice warned that, as well as possibly deterring some weak cases, the changes might well lead to applicants with perfectly valid and deserving cases withdrawing their claim for fear of a substantial costs award. In doing so, we noted that many employment tribunal applicants have a strong sense of having been wronged by their employer, but little if any idea of the actual legal strength of their case (and thus its likely chance of success or failure). And it has long been a commonplace tactic of employers' legal representatives to threaten a claim for costs in the event that the claim is dismissed by the tribunal, with the aim of frightening the applicant into withdrawing his or her claim (or into settling on the employer's terms).

In our experience, such intimidatory tactics are often successful, especially when used against unrepresented applicants – of whom there are far too many. This is despite the fact that the number of costs awards actually made against applicants has historically been very small. In the financial year 2000-01, for example, when the employment tribunal system disposed of some 93,000 cases, only 167 costs awards were made against applicants.

Indeed, in April 2001 we suggested that, if there really have been "too many weak cases in the system", then one might have expected employment tribunals to be using their established powers to award costs rather more extensively. But, of course, the vast majority of applicants are ignorant of this statistical reality and are thus vulnerable to the (often aggressively worded) costs threats of employers' legal representatives.

1 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001.
2 DTI news release P/2500/790, 27 November 2000.

The impact of the July 2001 changes

Since the new procedural rules came into force in July 2001 there has been a four-fold increase in the number of costs awards made against applicants (and, indeed, against respondents). Yet, as Table 1 below shows, the number of cases disposed of by tribunals has remained relatively constant. As a result, the proportion of cases disposed of by tribunals in which costs are awarded against the applicant has also increased four-fold, from 0.18 per cent in 2000-01, to 0.72 per cent in 2002-03.

Furthermore – and despite an assurance in April 2001 by the then Minister for Employment Relations that the "higher ceiling [of £10,000] should not lead to an increase in the average level of costs awards since awards are based on actual costs"[3] – the average amount of a costs award has risen from £295 in 2000-01, to £1,524 in 2002-03. In fact, this increase was somewhat inevitable, given the new upper limit and the distorting effect of a relatively small number of larger costs awards, and it is important to recognise that, in 2002-03, some two-thirds of costs awards made against the applicant were for less than £1,000, and almost one-third were for less than £400.[4] In 2002-03, the *median* costs award was £703, compared to £250 in 2000-01.

Despite this four-fold increase in the incidence of costs awards against applicants, the actual number of such costs awards remains very small – a fact which tends to undermine the Government's justification for the July 2001 changes. But the most notable consequence of the changes has been an explosive increase in the making of costs threats to applicants – and even to CABx representing applicants – by employers' lawyers. For, with the increase in the maximum amount of costs from £500 to £10,000, the potential impact of such a threat, especially when delivered in a strongly- and legalistically-worded letter shortly before the tribunal hearing, has increased enormously.

Ryedale CAB reports being approached by a woman claiming unfair dismissal by her former employer and, like many applicants, planning to represent herself before the tribunal. She had recently received a letter from her former employer's solicitor, repeatedly describing her claim as "vexatious" and threatening

Table 1: Costs awarded by employment tribunals[5]

Financial Year	2000-01	2001-02	2002-03
Costs awards against the applicant	167	467	691
Costs awards against the respondent	80	169	307
Cases disposed of by tribunals	92,938	97,386	95,554
Incidence of costs award against the applicant (%)	0.18	0.48	0.72
Average costs award (£)	295	983	1,524
Median costs award (£)	250	500	703

3 Letter, dated 24 April 2001, to Citizens Advice from the then Minister for Employment Relations at the DTI, Alan Johnson, MP.

4 It must also be noted that, in March 2002, following a decision of the Court of Appeal (in *Kovacs v Queen Mary & Westfield College and The Royal Hospitals NHS Trust*, [2002] ICR 919, CA), employment tribunals lost their discretion to take a party's ability to pay into account when making an award of costs. At the time of writing, draft new ET procedural rules, set to come into force in October 2004, restore this power by providing (in draft Rule 43(2)) that "the tribunal shall have regard to the party's ability to pay when considering whether it shall make a costs order or how much that order should be". Citizens Advice warmly welcomes this restoration of the legal position that existed prior to March 2002.

5 Source: Employment Tribunal Service annual reports.

an action for costs of "up to £10,000 in the event that your claim is dismissed by the tribunal". Having established the facts of the case, the bureau strongly advised that her claim was well-founded and that, even if the tribunal decided otherwise, an award of costs was extremely unlikely. However, the client was deeply anxious about the possibility of such costs and decided not to pursue her claim.

The vast majority of applicants to employment tribunals are on relatively low incomes – many are on welfare benefits having been unfairly dismissed or made redundant by the former employer against whom they are bringing the claim – and most are claiming relatively small sums in compensation. In 2002-03, some two-thirds of the awards for compensation in respect of unfair dismissal, for example, were for less than £5,000, and one-third were for less than £2,000. For such applicants, the prospect of losing and having to pay costs of up to £10,000 can be sufficiently intimidating to prompt a decision to withdraw the claim.

Gravesham CAB reports being approached by a man claiming unfair dismissal from his job as a parking attendant. He had recently received a letter from his former employer's solicitors, stating that they would be strongly contesting his claim and, if successful, would be seeking "substantial" costs. As a result, he was unwilling to proceed with his claim. In its report to Citizens Advice, the bureau concludes that "threats of costs should not be used as a scare tactic to prevent applicants from going ahead with their claim".

Uckfield CAB reports being approached by a man claiming constructive dismissal shortly before the hearing of his claim. Like many other applicants, he had not previously sought legal advice in relation to his claim. However, he had just received a letter from his former employer's solicitor, unfairly painting his claim in a very poor light and concluding:

> "I must inform you that I believe that your claim is misconceived. Should you continue with this claim then we will be seeking a costs order against you personally … which could be substantial (see Rule 14(1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2001)".

The client was extremely anxious, and unsure as to whether to proceed with his claim.

Northampton & District CAB reports acting for a woman claiming unfair dismissal from her job as a legal secretary; the client had been summarily dismissed two days after informing her employer that she was pregnant. Prior to the setting of a hearing date, and without consulting the bureau adviser, the client suddenly withdrew her claim after her former employer's solicitors warned that, if she did not do so, they would be seeking costs against her.

In reports to Citizens Advice, **Kingston-upon-Thames CAB** notes that its advisers are "finding more and more that solicitors for the respondent are threatening employment tribunal applicants with costs". **South Tyneside CAB** reports that such costs threats

are now "almost routine". **Abingdon & District CAB** suggests that such costs threats "can dissuade clients to abandon claims in fear of having costs levied against them, even where they have a good case". **Cirencester CAB** concludes that the £10,000 upper limit on costs awards introduced in July 2001 "discourages workers from pursuing cases because they cannot be sure that the tribunal will not order costs against them". And **Dawlish CAB** suggests that "there needs to be a restriction on the freedom to use the threat of costs to coerce claimants into withdrawing their claims, or the notion of costs in Employment Tribunals needs to be reconsidered".

In some cases, the intimidating threat of costs is accompanied by an offer to settle the claim for an unreasonably low but – in the circumstances – quite possibly tempting amount.

> **Abingdon & District CAB** reports acting for a man claiming a total of £9,000 for unfair dismissal by his former employer. Shortly before the tribunal hearing, the client received a letter from his former employer's solicitor, describing his claim as "vexatious and misconceived" and threatening an action for costs if he did not withdraw and the tribunal went on to dismiss his claim. Despite the bureau's attempts to re-assure the client of the validity and strength of his claim, the client agreed to settle his claim for £3,000.

> **Boston CAB** reports acting for a woman claiming unfair dismissal from her job as a receptionist. The bureau received a letter from the former employer's legal representatives (a firm of employment law consultants), stating that the client's dismissal "was both substantively and procedurally fair", offering the sum of £350 in settlement of the claim, and threatening to claim substantial costs if this offer were to be rejected and the case eventually dismissed. Whilst the client herself was extremely anxious about the threat of costs, a strongly-worded letter from the bureau's specialist employment adviser, who had obtained a barrister's opinion that the client's case was valid and highly likely to succeed, resulted in an immediate settlement of £1,650.

As in some of the above cases, CABx are often able to re-assure the applicant and convince him or her to pursue the case, either to a full tribunal hearing or to a negotiated or conciliated settlement without a hearing. But, as noted above, a large proportion of those making an employment tribunal claim are not legally represented, and no doubt many such applicants choose not to seek (or simply fail to obtain) appropriate legal advice after receipt of a costs threat from the respondent's legal representatives.[6] Accordingly, the cases noted by CABx (and other advice providers) represent only a small part of the problem.

6 The 1998 Survey of Employment Tribunal Applications found that, in cases that go all the way to full tribunal hearing, more than 40 per cent of applicants have no legal representation.

The Government's response

Whilst strongly defending the July 2001 revision of the employment tribunal procedural rules, the Government has acknowledged the potential for the intimidatory use of costs threats against applicants. Commenting on the July 2001 changes in December 2001, the then Minister for Employment Relations noted that "the potential costs should not deter people who believe that they have a justified case or grievance from going to employment tribunals … We are not in that ball game, as we have emphasised repeatedly".[7]

In July 2002, the same Minister emphasised that "it was never our intention to deter people who have a grievance or a claim against their employer from going to a tribunal, nor was it [our] intention to frighten people so that they could not pursue their case". But, openly acknowledging concerns that "the threat of costs is increasingly being used to intimidate applicants into withdrawing their [claims] regardless of whether the case is without merit", the Minister undertook to "begin a study of the employment tribunal cost regime" and "look very closely at the result".[8]

However, the promised study of the costs regime has not yet been undertaken and, somewhat surprisingly, the costs regime was not addressed in *Moving Forward*, the July 2002 report of the Employment Tribunal System Taskforce.[9] Yet a DTI consultation paper on a further revision of the employment tribunal (ET) procedural rules, published in December 2003, proposes a number of further significant changes to the costs regime.[10] And the DTI has stated that, following the consultation exercise, the new ET procedural rules will be laid before Parliament in "the Spring of 2004" to come into force on 1 October 2004.

The draft new ET procedural rules, published in December 2003, further extend the employment tribunal costs regime by introducing preparation time orders (essentially costs orders where the party to benefit from the order has not been legally represented, and thus cannot claim legal 'costs').[11] The draft new rules also restore the power of tribunals, removed by a ruling of the Court of Appeal in March 2002, to take account of a party's ability to pay when making a costs or preparation time order or how much that order should be (see Note 3, above).

Citizens Advice fully recognises the need for an effective costs regime in the employment tribunal system, and welcomes these provisions. The introduction of preparation time orders, for example, will provide a new means to penalise *employers* who act "vexatiously, abusively, disruptively or otherwise unreasonably" in cases where the applicant is represented by an adviser from the not-for-profit advice sector (who cannot claim legal 'costs' as such).

However, we remain concerned to see that the (necessary) existence of the costs regime is not exploited by employers' legal representatives to intimidate - with costs threats - applicants who have valid and deserving claims.

The restoration of tribunals' discretion to take a party's ability to pay into account when making an order for costs (or preparation time) will no doubt assist CABx and other advice providers in seeking to re-assure tribunal applicants about the real likelihood of a costs award being made

7 Hansard, House of Commons Standing Committee F, 11 December 2001, Alan Johnson, MP.
8 Hansard, House of Commons, 8 July 2002, col. 625-638, Alan Johnson, MP.
9 The Taskforce was established by the Secretary of State for Trade & Industry in October 2001, and was charged with considering how the employment tribunal system could be made "more efficient and cost effective for users against a background of rising caseloads".
10 *Employment Tribunals: Consultation on Draft Revised Regulations and Rules,* DTI, 5 December 2003. The consultation exercise ended on 5 March 2004.
11 Under the draft new rules, a tribunal may not make both a costs order and a preparation time order in favour of the same party.

against them. However, the provision will do nothing to prevent the making of unjustified costs threats by employers' legal representatives. Yet, in our view, the making of such intimidatory costs threats (and the potential impact on applicants with valid and deserving claims) needs to be addressed before the draft new ET procedural rules currently being consulted on are laid before Parliament in "the Spring" of 2004.

The DTI has indicated to Citizens Advice that the study of the costs regime, promised by the then Minister in July 2002, will now form part of the 2004 Survey of Employment Tribunal Applicants (SETA), which is currently "in preparation" and the final report of which "should be available [in] April [2004]". Accordingly, there may well not be an opportunity to respond to the findings of the Survey in relation to the costs regime before the new ET procedural rules are finalised and laid before Parliament. In our view, this would be unfortunate.

Recommendations

Citizens Advice calls on the Department of Trade & Industry and the Employment Tribunal Service to:

- Initiate and lead a multi-agency debate on the intimidatory impact on applicants with valid and deserving claims of unjustified costs threats by employers' legal representatives, and the potential remedies to this problem. For example, there may well be scope for Employment Tribunals to treat an *unjustified* costs threat as an abuse of process meriting the award of costs against the party making it, and (where appropriate) as a contravention of the rules governing solicitors' professional conduct. The Employment Tribunal System National User Group, which held its inaugural meeting in June 2003, may well be a suitable forum for this debate.

- Undertake an urgent review of the July 2001 changes to the Employment Tribunal costs regime, including robust research into the reasons for the withdrawal of claims by applicants.

- Take urgent steps to issue all Employment Tribunal applicants with clear guidance on the costs regime, including clear guidance on the circumstances in which costs may be awarded and the actual likelihood of this happening, and clear guidance on what to do in the event of the other party making an unjustified costs threat.

Published by

Social Policy Department
Citizens Advice
115-123 Pentonville Road, London N1 9LZ
T: 020 7833 2181 F: 020 7833 4371
www.citizensadvice.org.uk
Reg. Charity no. 279057