

CAS Briefing

Debate - 'Protecting Employee Rights and Access to Justice'

Scottish Parliament

11 June 2015



generations of good advice

Citizens Advice Scotland (CAS), our 61 member bureaux and the Citizen Advice Consumer Service helpline form Scotland's largest independent advice network. Advice provided by the Scottish CAB Service is free, independent, confidential, impartial and available to everyone. Our website, Adviceguide, also provides the public with up to date information on a range of topics. We are champions for both citizens and consumers and in 2013/14 we helped over 330,000 people deal with over a million issues. We want a fairer Scotland where people as citizens and consumers are empowered and their rights respected

Key issues

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Summary

Employment problems are one of the most common types of issues that people seek advice on at a citizens advice bureau. Citizens Advice Scotland (CAS) has published reports showing the impact of poor employment practices, Employment Tribunal fees, non-payment of Employment Tribunal awards, and the misuse of zero hours contracts, which are causes for concern based on the negative experience of CAB clients in Scotland.

Citizens Advice Scotland recommends:

- No fees should be charged to bring a claim before the Employment Tribunal.
- The system of enforcement of Tribunal awards in Scotland should be strengthened. The Scottish Government and Parliament should work with the UK Government to address this as it overlaps devolved and reserved issues.
- More action should be taken in Scotland to clamp down on the misuse of zero hours contracts including through the Scottish Business Pledge and public procurement systems. The UK Government should strengthen the law to give protection from unfair dismissal and full parental leave/pay rights to zero hours 'workers'; and giving them a statutory 'right to request' a contract that guarantees hours.

Poor employment practices

The Citizens Advice Service is a major source of external advice for people who experience employment problems. In 2013/14, citizens advice bureaux in Scotland advised clients on 46,540 new employment issues – an increase of 6% on the previous twelve months. Some of these issues are examples of extremely unfair employment practices which place clients in a difficult, complex and miserable situation.

As well as being in the interests of people who experience unfair treatment at work, it is in the interests of government and society as a whole that fair employment is promoted. Workers in low quality, stressful jobs have poorer general health outcomes, and poor daily quality of life than other groups – even those who are unemployed.¹ It is also important to ensure that unscrupulous employers who wilfully undermine their employees' basic employment rights do not gain an unfair advantage over fair employers.

Citizens Advice Scotland recently published ['Fair Enough: Protecting Scotland's Workers from Unfair Treatment'](#) which presented numerous examples of poor practices seen by Scotland's citizens advice bureaux:

- Clients being dismissed in unfair circumstances, including for being off sick, attempting to take holiday, or informed of their dismissal by text message.
- Employees who were not paid at all by their employers, in one case for six months' full-time work.
- Employers who failed to pay their employees' income tax and national insurance contributions leaving them to pick up the bill; and instances of clients paid considerably below the National Minimum Wage.
- Clients who were unfairly denied sick pay when seriously ill
- Employers refusing to allow employees to take paid holiday
- Women who were dismissed when they became pregnant
- Instances of racist and sexist bullying at work
- Migrant workers who were exploited and made to work excessive hours
- Clients who could not afford the fees to pursue an Employment Tribunal claim
- Cases where a client won their case at an Employment Tribunal, and were awarded several thousand pounds, but their ex-employers managed to avoid paying them any of the money they were due
- Many of the examples of poorest practice relate to clients on zero hours contracts

¹ Employment, poverty and social exclusion – Poverty and Social Exclusion in the UK project, June 2014
http://poverty.ac.uk/sites/default/files/attachments/Bailey%2C%20Employment%2C%20poverty%20and%20social%20exclusion_0.pdf

Cases studies – poor employment practices

- A West of Scotland CAB reports of a client who believed she was employed by someone as a groom, which included accommodation and livery. The client was told she would be paid for the work and it was arranged for the employer to be reimbursed through a 'DWP job incentive scheme'. However, this did not happen as the employer had no employer's liability insurance. The client advises she was given no wages at all for the six months she has worked there. The client has calculated that she is due about £6,000. She feels she was further exploited during this period of employment as she was sometimes locked in the stables and was made to work seven days a week for long periods of time.
- A West of Scotland CAB reports of a client who is employed at a beauty salon. As soon as the client found out she was pregnant she told her employer. The employer reacted by saying that this was 'not good' and was 'a kick in the face'. Subsequently, the employer told her that she was dismissed. They offered her the alternative of becoming self-employed and renting the room she used in the salon, but the client did not want to do this and would have rather stayed on as an employee.

Employment Tribunal fees

CAS has consistently opposed Employment Tribunal fees and believes them to be an unreasonable barrier to justice. The mounting evidence of their negative impact continues to grow – both from CAB evidence and from official figures which show the number of applications to the tribunal have fallen by 81%², and we believe they should be removed.

Fees payable by workers to take their case to the Employment Tribunal (ET) were introduced on 29 July 2013. These are charged at two levels depending on the nature of the claim and are payable at two stages—on lodging the claim and before the hearing itself. The total costs for going to full hearing are: Type A claims (including unpaid wages) £390 and Type B claims (including unfair dismissal and discrimination claims) £1,200.

Exemption (or 'Remission') from fees is available in limited circumstances. However, as well as the issues listed below, the design of the Remission system follows that of exemption from fees in the English court system making the process all the more confusing for Scottish consumers and advisers.

To understand the ways in which the ET fees, and its associated fee remission system, have impacted on CAB clients, CAS and the University of Strathclyde teamed up to publish ['The Price of Justice'](#) which surveyed CAB advisers on how the change affected their clients.

For CAB clients liable for paying full or partial fees, our report found:

- Fees act as a disincentive for CAB clients to make a claim in the ET
- The merit of a claim is not the key driver in deciding to take a claim to the ET: the decision has become a financial one
- ET fees negatively alter the power balance between workers and employers
- The fees have created additional difficulties for CAB advisers bringing an increased responsibility to the often voluntary role, and increased stress

² Ministry of Justice figures, number of cases lodged in the Employment Tribunal for the period January to March 2014 compared with the same quarter in 2013.

For CAB clients eligible for fee remission:

- The flux in a client's financial situation makes determining eligibility for remission complex
- Providing the evidence required for remission is often difficult as a result of a client's situation
- Determining eligibility for remission at two points in time can leave clients in an unpredictable situation and penalise clients who manage to find other employment before the case makes it to a hearing
- Group claims are sometimes compromised when some of the group qualify for remission and others do not

Case study – Employment Tribunal fees a barrier to justice

- A West of Scotland CAB reports of a client who was unfairly dismissed from his employment. He started the procedure to claim unfair dismissal at an Employment Tribunal. He was not granted fee remission as the client could not prove his income. The client has never had a bank account of his own and had his wages paid into this friend's account. For the initial fees charged by the Employment Tribunal he borrowed money, but was unable to borrow any more to pay the hearing fee, so his claim was dropped. The client's former employer offered £1,000 so the client wouldn't pursue the matter which he was forced to accept, despite it being estimated that he was likely to be awarded considerably more.

Administration of Employment Tribunals and the Scotland Bill

The Smith Commission recommended that “All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament”³.

However, the current Scotland Bill falls short of this wholesale devolution in proposing transfer but with the reservation of the power to make changes to any aspect of a newly devolved tribunal. The Bill proposes that provision can be made by Order in Council which:

- modifies the function of a tribunal,
- imposes conditions or restrictions (including conditions or restrictions relating to the composition or rules of procedure, or its staff or accommodation) and
- specifies the categories of case included in the transfer.⁴

The tribunals would not therefore become a fully 'Scottish Tribunal' in the same way as, for example, the Mental Health Tribunal but would continue to be subject to change by Westminster. As the Orders in Council to effect change would be made by the Privy Council, there is no requirement to consult.

In real terms, this means that the retention of fees in employment tribunals is quite possible, given the support for them from the UK Government. It also means that currently unforeseen changes could be made at any time without consultation.

³ Recommendation 63

⁴ Scotland Bill as introduced, section 33 2A(6)(a)

Non-payment of Employment Tribunal awards

If an employee's claim makes its way to an employment tribunal, is successful and an award is made, that is not the end of the story. In many cases, employees will not receive part of or all the money they are due, because an employer goes out of business or simply refuses to pay.

According to research published by the UK Government, only 41% of claimants are paid their award in full. The majority of respondents are either not paid their award at all (46%) or are only paid in part (13%).⁵

In Scotland, individuals attempting to enforce their tribunal award need to apply for an 'extract registered decree arbitral'. This acts like a court order which can be used to engage a sheriff officer to try and recover the debt from the employer.⁶ However, applying for and receiving the extract takes time. Individuals must wait six weeks until the time allowed for appeal to the Employment Appeal Tribunal has passed. A fee is payable to engage the sheriff officer and even then no money may be forthcoming.

If an employer goes out of business, the award can be very difficult to recover in full. Some CAB clients have experience of employers who close their business, only to emerge as a 'phoenix company', doing the same business from the same location, but with no liability to pay the client what they are owed.

Case study – Employment Tribunal award not paid to successful claimant

- A North of Scotland CAB reports of a client who did not receive wages or holiday pay from his former employer. The client was successful in his Employment Tribunal claim and received an award of £3,283.34. The client waited 42 days but received no payment from his former employer. He then had to write to the Tribunal for 'an extract of the judgement' which caused further delay. In the interim his ex-employer attempted to get the company 'struck off' meaning the client had to write then to Companies House to object. The objection was successful but this only delays the process for two months. The client now has his extract of award and it is uncertain what enforcement action he will be able to achieve in the time scale, given that the ex-employer reports that the company has no money. The client is in a catch 22 situation with a 'hollow victory' award - in that he is owed money but the respondent will not pay. The company will be struck off in two months' time meaning the client will have an award but no legal entity to pursue payment from thereafter. In order to see if Sheriff Officers can enforce payment, the client will need to pay further sums of around £100 but this may not be successful if his ex-employer has no money. The company is not formally insolvent and so the client is unable to get payment from the National Insurance Fund. The client could trigger the insolvency of the Respondent but the cost for this is over £1,500 (non-refundable) and there would still be no guarantee of getting any money thereafter as the Redundancy Payments Service will only pay holiday pay due if it is within 12 months. The time taken to get to Employment Tribunal, then get the award and then to trigger an insolvency makes this impossible.

⁵ Payment of Tribunal Awards 2013 Study – IFF Research, Department for Business Innovation and Skills, October 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf

⁶ Payment of Tribunal Awards 2013 Study – IFF Research, Department for Business Innovation and Skills, October 2013

Only 41% of successful claimants receiving their award in full is clearly unacceptable. Citizens advice bureaux in Scotland have seen employers fail to pay awards of several thousand pounds to clients who have been wronged. Action should be taken to significantly improve payment and collection of awards for claimants.

As an example of changes that have been made elsewhere, a 'fast track system' for enforcing Employment Tribunal awards has been introduced in England and Wales which allocates a High Court Enforcement Officer at the beginning of the enforcement process in an attempt to speed up the process. A fee is payable but remission is possible.⁷ CAB advisers who have advised clients who enforce their judgement against an employer based in England have spoken positively about their experience of using it anecdotally in addition to the case cited earlier. The Scottish Government should explore a range of options for improving the system of enforcement in Scotland, compatible with Scots law.

Misuse of zero hours contracts

No analysis of employment issues over the past couple of years would be complete without an acknowledgement of the rise of the zero hours contract. These 'flexible' employment arrangements have become increasingly prevalent during that time – the Office of National Statistics estimated that in the UK in December 2014 there were around 1.8 million employee contracts that do not guarantee a minimum number of hours.

Whilst zero hours contracts may be well-suited to particular types of work, such as casual or seasonal labour, the *misuse* of zero hours contracts is becoming a major problem, which should be addressed to prevent exploitation and hardship. Misuse can include situations where zero hours contracts are issued by employers inappropriately, such as where a full-time or part-time contract may be better suited. Based on the experiences of clients, Citizens Advice Scotland has actively campaigned for action to tackle misuse of zero hours contracts.^{8 9}

In addition to creating in-work poverty for CAB clients, misuse of zero hours contracts has also led to a number of serious concerns with regard to workers' basic employment rights. As casual workers on 'true' zero hours contracts (those that are a genuine flexible 'as and when required' working arrangement) are classed as 'workers' rather than 'employees', they are entitled to fewer basic statutory rights at work.¹⁰ Employment tribunals will look at what happens in practice when deciding what someone's employment status is (for instance, if a person was employed on a zero hours contract, but in practice worked 30 hours per week regularly they would generally accrue the rights of a full-time employee). However, this creates an unclear situation for the individual who is looking for basic advice.

⁷ I have an Employment or Employment Appeal Tribunal award but the respondent has not paid – HM Courts and Tribunals Service <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex727-eng.pdf>

⁸ Consultation – Zero hours employment contracts: Response from Citizens Advice Scotland, March 2014 <http://www.cas.org.uk/publications/consultation-zero-hours-employment-contracts>

⁹ Consultation response – Banning exclusivity clauses in zero hours contracts – Citizens Advice Scotland, November 2014 <http://www.cas.org.uk/publications/consultation-response-banning-exclusivity-clauses-zero-hours-contracts>

¹⁰ Compared with employees, workers usually are not entitled to minimum notice periods if they are dismissed; protection against unfair dismissal; the right to request flexible working; time off for emergencies or Statutory Redundancy Pay. In some circumstances they are not entitled to Statutory Maternity Pay; Ordinary Statutory Paternity Pay and Statutory Sick Pay.

Perhaps most importantly in this context however, is the difficulties workers on zero hours contracts can have enforcing their statutory rights, due to their employer's ability to simply not give any work to staff who have incurred their displeasure, rather than undertake any disciplinary or grievance process. This practice, which has become known as 'zeroing down' creates a real barrier to asserting what basic rights at work zero hours contract workers have.

Citizens Advice Scotland welcomes the focus given to ending the use of 'exploitative' zero hours contracts in the Scottish Business Pledge¹¹, and consultation on using new Public Procurement rules¹² to prevent misuse.

CAS would recommend the new statutory procurement guidance clearly defines what 'inappropriate' use of a zero hours contract would be considered to be. There is no commonly-used definition of this at present, though CAS would suggest the following uses of zero hours contracts should be considered inappropriate:

- Where a worker would prefer a more secure part-time or full-time contract
- If it causes hardship to individuals due to regularly changing patterns of work
- If it denies individuals basic employees' rights
- If it acts as a deterrent to workers asserting their basic employment rights
- If an exclusivity clause is used (although this is now banned by the Small Business, Enterprise and Employment Act 2015)

Case study – misuse of zero hours contracts

- Citizens Advice Direct reports of a client whose daughter had been working for the past four months on a zero hours contract. Usually she gets contacted by SMS texts or phonecalls to let her know when her shifts are. This morning she got a phone call that her daughter had not turned up at work and would be sacked. However, her daughter did not know that she was supposed to be at work, as no one had contacted her.

¹¹ CAS welcome Government commitment on Zero Hours Contracts - <http://www.cas.org.uk/news/cas-welcome-government-commitment-zero-hours-contracts>

¹² CAS response to the Scottish Government's consultation on changes to the public procurement rules in Scotland <http://www.cas.org.uk/publications/cas-response-scottish-government%E2%80%99s-consultation-changes-public-procurement-rules>