

Empty justice

the non-payment of employment tribunal awards

Summary

Citizens Advice Bureaux provide advice on and assistance with more than 500,000 employment problems a year. Some of these involve the redundancies, company mergers and other business changes that are inevitable in a dynamic economy. But in a great many cases the client is a worker who 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 (ET). However, the process is dauntingly legalistic and adversarial, and the cost of legal representation prohibitive – there is no ‘legal aid’, and the resources of bureaux and other sources of free legal representation (such as community law centres) are extremely limited. And, for many workers, the legal protection supposedly offered by this system is in any case rendered meaningless by their fear of being victimised or dismissed simply for making a Tribunal claim, or even just for raising the matter with their employer.

Furthermore, even where an Employment Tribunal claim is made and successfully pursued to its conclusion, a favourable ruling and the making of a monetary award by the Tribunal all too often proves to be a hollow victory. This paper sets out our concerns in relation to the seemingly widespread non-payment of Employment Tribunal awards by employers, and the immense legal and financial obstacles to the enforcement of such awards in the civil courts.

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Introduction

Since 1997, the Government has, in its own words, “worked hard to achieve a better deal for all working people” by establishing “a framework of decent workplace standards”.¹ This ‘framework’ has given “people at work essential rights – rights to a National Minimum Wage, rights to trade union recognition, rights for part-time workers, [and] rights to paid holiday”.

Millions of workers in the UK are now benefiting from these and other new workplace rights – such as the right to apply for more flexible, ‘family-friendly’ working and the right to paid paternity leave – and indeed from the Government’s enhancement of long established rights, such as those to maternity leave and pay.

However, hundreds of thousands – quite possibly millions – of the most vulnerable and low paid workers in the UK economy, many of them performing unglamorous but essential tasks, have yet to benefit from the Government’s strategy. For, as the General Secretary of the TUC, Brendan Barber, has noted “there are still too many bad employers who exploit their workers and offer the worst pay and conditions they can get away with”.²

At the same time, there are too many employers – and especially small employers in low-profitability sectors of the economy – with an inadequate understanding of their legal obligations to their workforce. Many small employers simply lack the means and resources – specialist human resources staff, for example – to keep abreast of changes in what is a complex field of law. In the face of the demands of running a small business in an increasingly competitive economic environment, inadvertent non-compliance with statutory employment rights remains all too common.

Every year, Citizens Advice Bureaux deal with more than 500,000 employment-related advice enquiries, from both workers and employers. Some of these relate to the redundancies, company mergers and other business changes that are inevitable in a dynamic economy operating under the influences of ‘globalisation’ and new technologies. Others reflect the fact that disagreements between workers and employers will and do happen, just as they do in other areas of life. But in most cases the enquirer is a worker who has been denied – or, at least, is not receiving – one or more of his or her statutory workplace rights by an employer.

Most of these individuals have a poor understanding of their statutory rights, and have little if any awareness of how to assert or enforce them. The majority are low skilled and low paid, and employed in small, non-unionised workplaces. As a result, they are extremely vulnerable to deliberate abuse by ‘rogue’ or criminally exploitative employers – or to inadvertent non-compliance by inadequately informed employers.

Citizens Advice Bureaux work hard to increase both workers’ awareness of their legal rights and employers’ understanding of their legal obligations – for example, by distributing copies of the DTI’s authoritative booklets and leaflets on employment rights.³ And they can assist workers who are not receiving one or more of their statutory workplace rights to negotiate with their employer, with a view to reaching an agreed improvement in the worker’s pay, terms or conditions.

However, where the employer proves to be uncaring or intransigent, the principal (and in most cases only) legal remedy available is the making of a claim to an Employment Tribunal.⁴ Again, bureaux can and do provide advice on and assistance with the making of

¹ *Know your rights: employment relations information for workers*, DTI, 2003.

² “Seeing the big picture”, Brendan Barber, *The House Magazine*, 9 June 2003.

³ Sadly, the DTI has recently ceased hard copy production of most of these booklets and leaflets, in favour of the texts being available via the Internet only. For further information, see: “The paperless waiting room” in *evidence*, Citizens Advice, April 2004. Citizens Advice is pressing the DTI to restore hard copy production of at least the most popular booklets and leaflets.

⁴ The principal exception to this is the right to the National Minimum Wage (NMW). The introduction of the NMW in 1999 was accompanied by the establishment of an enforcement agency within the Inland Revenue. The agency operates a national NMW Helpline; investigates complaints (including anonymous complaints) from both individual workers and third parties; and conducts on-site inspections of targeted employers. Other examples of such pro-active enforcement include the Employment Agency Standards Inspectorate of the Department of Trade & Industry, and the Health & Safety Executive (HSE).

such a claim, and in some cases can provide representation at the Tribunal hearing. But the process is unduly legalistic and adversarial, and thus extremely daunting – especially to pregnant women, new parents (and especially lone parents), people with mental health problems, and other vulnerable individuals.

And – as noted in a succession of reports by Citizens Advice and others in recent years – many aggrieved workers are loathe to make such a claim (or even to initiate grievance procedures) for fear of being victimised or even dismissed by their employer simply for doing so.⁵ In particular, working parents, homeworkers, carers and those who – on account of their age, skills or disability – face the greatest challenge in finding alternative employment are often unwilling to put their job at risk by ‘going to law’. We have repeatedly suggested that, for such workers, there needs to be available a more accessible and pro-active system of enforcement that does not rely on individuals entering into such stressful and damaging legal conflict with their employer.⁶

Not all workers are so fearful, of course, and in many cases the worker has in any case already been dismissed from the job – indeed, whether or not that dismissal was fair is frequently the very issue in dispute. Every year, some 100,000 claims are made to Employment Tribunals, which have jurisdiction to hear claims under more than 80 statutory provisions.⁷

Many of these claims are settled by negotiation before they proceed as far as a full hearing, sometimes privately (in which case the settlement is known as a Compromise Agreement), but more commonly through the conciliation services of the Advisory Conciliation & Arbitration Service (ACAS), in which case the settlement is known as a COT3 agreement (after the ACAS form on which it is set out).⁸ And some claims are withdrawn by the claimant without a hearing or a settlement, with ‘stress’ being the reason for withdrawal most commonly cited by such claimants.⁹

But, each year, about one in four of all claims proceed to a full hearing by a Tribunal of up to three members, who consider all the arguments, make a legal determination and – where appropriate – order a remedy or remedies.¹⁰ These can include re-instatement (where the claimant has already been dismissed), and/or a change to the claimant’s terms and conditions of employment, but by far the most common outcome of a successful claim is a financial award to be paid to the claimant by the employer (or former employer). And, each year, slightly more than half of those claims that proceed to a full tribunal hearing are successful, with the vast majority of these successful claims resulting in a financial award.

In 2003-04, some 13,000 Employment Tribunal claims were successful at a tribunal hearing. Of these 13,000 or so awards, some 4,000 (31 per cent) were for unfair dismissal, and some 5,100 (39 per cent) were in respect of unpaid wages or redundancy pay.¹¹

Unless the issue is then taken, on appeal on a point of law, to the Employment Appeals Tribunal (and, thereafter, the Court of Appeal), the matter should rest there. However, in England and Wales, Employment Tribunals have no power to enforce their awards, and Citizens Advice Bureaux report dealing with a steady stream of cases of non-payment of financial awards by employers.

Hollow victories: the non-payment of ET awards by employers

Evidence from the day-to-day advice work of Citizens Advice Bureaux indicates that making a claim to an Employment Tribunal and winning is frequently not the end of the story. All too often, and despite the sometimes immense time and effort put into the preparation of the claim and its presentation at the tribunal hearing, the employer against whom the claim has been brought simply fails to pay the award.

If not paid within 42 days of the tribunal ruling being sent out to both parties, most tribunal awards begin to accrue interest at a rate of eight per cent.¹² However, in practice this seems not to provide sufficient incentive for all employers to comply with the ruling. Citizens Advice Bureaux report dealing with many cases of non-payment of an tribunal award by employers – the vast majority being small employers (including a high proportion of sole traders and partnerships, but also many limited liability partnerships and some limited companies).

A man who sought advice from a CAB in London in November 2003 had been awarded over £1,200 by an Employment Tribunal in respect of unpaid wages some four months previously, but had not yet received any of the award from his former employer.

A CAB in Shropshire reports being approached in August 2003 by a man who, some eight months previously had been awarded almost £3,500 by an employment tribunal in respect of unpaid redundancy pay. Despite numerous letters and telephone calls to his former employer, he had not yet received any of the award.

A woman who sought advice from a CAB in Tyne & Wear in January 2004 had been awarded over £2,200 by an employment tribunal for unfair dismissal some six months previously, but had not yet received any of the award from her former employer.

A CAB in Dorset reports assisting a young man working as a gardener to make and pursue a tribunal claim in respect of unpaid wages. In October 2003 the tribunal ruled in the client’s favour, and made an award of just over £500. However, as of late April 2004 the client had still not received any of the award, and the bureau reports that “the company is now being wound up”.

A woman who sought advice from a CAB in Wales in October 2003 had been awarded just over £2,000 by an employment tribunal for unfair dismissal some three months previously, but had not yet received any of the award from her former employer.

In the majority of cases reported by Citizens Advice Bureaux, the Employment Tribunal award in question is relatively small. This reflects the fact that tribunal awards are calculated according to the claimant’s pay, and most of those seeking help with an employment problem from a Citizens Advice Bureau are low paid. However, in some cases the outstanding tribunal award is substantial. For example:

⁵ See, for example: *Wish you were here: a CAB evidence report on the paid holiday provisions of the Working Time Regulations 1998*, Citizens Advice, September 2000; *Easier said than done: enforcing rights at work*, Greater Manchester Low Pay Unit, October 2000; *Birth rights: a CAB evidence report on maternity and parental rights at work*, Citizens Advice, March 2001; *Clutching at straws: rights at work*, West Midlands Employment & Low Pay Unit, January 2002; and *Nowhere to turn: CAB evidence on the exploitation of migrant workers*, Citizens Advice, March 2004.

⁶ For further information, see: *Somewhere to turn: the case for a Fair Employment Commission*, Citizens Advice, October 2004.

⁷ Since 1997, the administration of Employment Tribunals (formerly called Industrial Tribunals) and their caseload has been done by the Employment Tribunals Service, an executive agency of the Department for Trade & Industry (DTI).

⁸ ACAS is an independent statutory body created by the Industrial Relations Act 1971. It has a statutory duty to conciliate in most Employment Tribunal jurisdictions once the claim is registered with the Employment Tribunals Service.

⁹ Source: *Findings from the 1998 Survey of Employment Tribunal Applicants*, DTI, 2002.

¹⁰ In 2003-04, some 24 per cent of the 93,973 claims disposed of (i.e. dealt with) by the Employment Tribunal system were disposed of at a hearing; some 37 per cent were disposed of by way of an ACAS-conciliated settlement (i.e. without proceeding to a hearing); and some 31 per cent were disposed of by way of a compromise agreement, or simply by being withdrawn by the claimant. Source: Employment Tribunal Service annual report, 2003-04.

¹¹ Source: Table 2, Appendix 1, Employment Tribunal Service annual report, 2003-04. In unfair dismissal cases, there may be two elements to the award: a basic award, which is calculated by multiplying the claimant’s weekly pay by the number of years he or she was employed, subject to a weekly limit of £270, and a compensatory award, which is what the tribunal considers “just and equitable” in all the circumstances (having regard to the employer’s fault and the loss suffered by the claimant).

¹² In discrimination cases, interest on unpaid awards runs from the day after the date of the award unless full payment is made within 14 days of the ruling.

A CAB in Cleveland reports assisting a man to make and pursue a tribunal claim for unfair dismissal and unpaid wages. The claim was successful, and in January 2003 the tribunal made an award of over £23,000. However, the client has never received any of the award from his former employer.

A man who sought advice from a CAB in Cheshire in March 2004 had recently won a tribunal award of some £40,000, but his former employer was refusing to pay.

And, sometimes, the evidence from bureaux reveals a pattern of non-payment of tribunal awards by a particular employer. For example:

A CAB in West Yorkshire reports assisting a Sierra Leonean man with refugee status in the UK to make and pursue a tribunal claim in respect of unpaid wages. The client first approached the bureau in December 2003, at which point he had been working for a local security firm for two months, but had not received any wages. The claim was successful, and in March 2004 the tribunal made an award of almost £2,400. To date, the employer – who did not attend the hearing – has made no payment to the client.

A neighbouring CAB – in Sheffield – reports assisting three former employees of the same security firm, all Somali men with refugee status in the UK, to make and pursue tribunal claims, again in respect of unpaid wages (and also, in one case, for unfair dismissal). In April 2004, all three claims were successful, with the tribunal making awards of £1,100, £1,500 and £15,000 respectively. To date, the employer – who again did not attend the hearings – has made no payment to the clients.

As noted in the introduction above, many tribunal claims are settled by negotiation or conciliation, often through the services of the Advisory Conciliation & Arbitration Service (ACAS), before they proceed as far as a full hearing. ACAS has a statutory duty to conciliate in most types of Employment Tribunal claim. This means that ACAS officials act as a mediator between the applicant and the employer, and work to promote a settlement of the claim (known as a 'COT3' agreement). Such a settlement brings the tribunal claim to an end, and has the legal status of a contract that can be enforced through the civil courts. In 2003-04, some 34,500 claims were resolved by means of an ACAS-conciliated settlement.¹³

One might expect such an ACAS-conciliated COT3 settlement, dependent as it is upon the willing engagement of the employer (or former employer) in the conciliation process, to lead to full compliance by the employer. However, bureaux report many cases of the non-payment by employers of such ACAS-conciliated settlements. And, unlike unpaid tribunal awards, unpaid COT3 settlements do not accrue interest.

A CAB in Dorset reports the case of a woman who had made a tribunal claim in respect of unpaid wages. ACAS had negotiated a COT3 settlement of £400 on her behalf, but her former employer had since refused to pay any money and had ignored numerous letters from both the client and ACAS. The bureau reports the client as being "angry and frustrated about the whole situation".

A woman who sought advice from a CAB in Cleveland in January 2003 had made a tribunal claim in respect of unpaid holiday pay, and ACAS had negotiated a COT3 settlement of £80 on her behalf. However, the woman's former employer had since not made any payment. Again, the bureau reports the client as being "very angry that her

former employer is simply ignoring the agreement reached via ACAS".

Another CAB in Dorset reports being approached in August 2003 by a man owed £1,625 by his former employer under the terms of a COT3 settlement negotiated some months previously by ACAS.

A man who sought advice from a CAB in Greater Manchester in December 2003 was owed £570 by his former employer under the terms of a compromise agreement negotiated by ACAS (in relation to unpaid wages). In its report to Citizens Advice, the bureau notes that "despite making numerous 'phone calls to his former employer the client has still not got his money, and now has the hassle of going through the courts to get the money he is owed".

The enforcement of ET awards in the courts

In England and Wales, Employment Tribunals have no power to enforce their awards. As a result, where an employer fails to pay a tribunal award, the claimant must seek enforcement through the civil courts. However, apart from being dauntingly legalistic, this process is both costly and time-consuming.

There are two key stages to the enforcement of Employment Tribunal monetary awards through the civil courts: getting the matter 'registered' in a County Court¹⁴; and asking the County Court to use one of its various methods of enforcement.

Registration in the County Court

There are some 230 County Courts in England and Wales, each with a specific geographic area of jurisdiction. To 'register' an unpaid

employment tribunal award, the claimant must obtain and complete a court form (Form N322A) and return this to the Court, together with a photocopy of the Tribunal ruling and the associated fee, currently £30. The form is processed by a Court Officer, who then automatically issues an Order to the employer to pay the amount of the tribunal award, plus interest and the cost of registration (£30), to the claimant within 14 days.

At this point, the employer's name is entered on the Register of County Court Judgments. Banks, building societies and credit companies may search the Register when considering applications for financial loans or credit by individuals and sole traders, and the threat of registration can be therefore be used as a tactic to persuade a small employer, such as a sole trader, to pay an outstanding Tribunal award.

However, this tactic is unlikely to be so effective against a limited company, or even a partnership, and even in the case of a sole trader there is no guarantee that registration will result in payment of an outstanding award. As a result, the time and effort required on the part of the claimant, and the associated fee of £30, can represent a significant deterrent.¹⁵

A CAB in Warwickshire reports assisting a woman to make a tribunal claim for unpaid wages after her employer, a firm of contract cleaners, suddenly ceased trading, owing her wages. In March 2003, the claim was successful, and the tribunal made an award of £142. The CAB immediately contacted the employer, who did not attend the tribunal hearing, and he undertook to pay the amount within two weeks. However, by June 2003 the employer had still not paid and – faced with having to pay a £30 fee to register the

¹⁴ In Scotland, this stage is obviated as tribunal decisions are enforced by Sheriff Officers, without application to the Sheriff Court.

¹⁵ There is provision in the County Court rules for individuals to apply for exemption from such fees where they can demonstrate that they are in receipt of certain welfare benefits (e.g. Income Support, or income-based Jobseeker's Allowance), or remission from all or part of the fee on grounds of hardship. However, most CAB clients attempting to enforce an unpaid ET award are in employment and therefore not in receipt of such welfare benefits, or are otherwise unable to demonstrate 'hardship' to the degree required.

award in the County Court – the client decided to take no further action.

A young woman who sought advice from a CAB in Cornwall in April 2003 had won a tribunal award of £25.30 in respect of unpaid wages two months previously. Advised that she would have to pay a fee of £30 to register the matter in the County Court, and that this amount would then be added to the sum to be paid by her former employer, the client decided that she could not take the risk that the employer might still not pay the amount owing to her.

A CAB in West Yorkshire reports being approached in October 2003 by a young man who had won a tribunal award of £105 in respect of unpaid wages some four months previously. Advised that he would have to pay a fee of £30 to register the award in the County Court, the client was reluctant to pursue the matter any further.

A young man with mental health problems who sought advice from a CAB in Tyne & Wear in April 2003 had won a tribunal award of £90 in respect of unpaid wages. Advised that he would have to pay a fee of £30 to register the award in the County Court, the client was reluctant to pursue the matter any further. In its report to Citizens Advice, the bureau notes that “to pursue the award, this client would be risking one third of what he is owed”.

Enforcement by the County Court

If, following registration of an unpaid tribunal award in the County Court, the employer still does not pay the award, then the claimant can ask the Court to use one or more of its various methods of enforcement. These include:

- Order to obtain information for judgment debtors – this is not so much a means of enforcement, as a means of finding out what income and/or assets an employer has, with a view to determining whether there is any point in proceeding with further enforcement attempts. The employer must attend, and can be found in contempt of court for not attending.
- Warrant of execution – this is an order to send the County Court Bailiff to take control of and sell (at public auction) the employer’s assets to the value owing to the claimant (including the costs incurred in enforcing the original tribunal award).¹⁶ After auction, the amount owed to the claimant is paid to him or her, and any surplus to the employer.
- Third party debt order – this is a method of obtaining payment of the tribunal award from a third party who owes the employer money, or who holds money for him or her (e.g. a bank or building society).
- Charging order – this is a method of securing payment of the amount owing to the claimant against land or property owned by the employer. It prevents the employer from selling the land or property without first paying the claimant what is owed to him or her. The claimant can enforce the sale of land or property owned by the employer by applying for an order of sale – but this requires the services of a solicitor.

However, proceeding with one or more of these enforcement actions involves the expenditure of both time and money. For example, an application for an order to obtain information for judgment debtors requires completion of a Court form (Form 316) and payment of the associated fee (£40). Similarly, an application for a third party order requires completion of a Court form (Form N349), and payment of the associated fee (£50). And

applying for a charging order is a complicated process that first requires the swearing of a statement of truth (formerly ‘an affidavit’), for which there is a Court fee of £50, and later requires payment of a further Court fee of £40. Accordingly, the making of such an application may well require the services of a solicitor, who will of course charge for his or her services. In some cases, such expenditure of time and money represents a significant deterrent to the taking of enforcement action.

A CAB in Cornwall reports being approached in April 2003 by a woman who had won a tribunal award of £1,340 in December 2002. In February 2003, when the employer had still not paid the award, the client had paid £30 to register the award in the County Court. However, the employer had still not paid the award and, when advised of the options for enforcement in the County Court, the client decided not to take any further action because “it will cost her money with no guarantee of getting any results”.

A man who sought advice from a CAB in West Yorkshire in November 2002 had won a tribunal award of £780 several months previously. When the employer had not paid the award, the client had paid £30 to register the award in the County Court, but the employer had still not paid the amount now owing. When advised of the options for enforcement in the County Court, the client “reluctantly decided it was not worth pursuing further”.

A CAB in Tyne & Wear reports being approached in April 2003 by a man who had won a tribunal award of some £900 in respect of unpaid wages several months previously. The client had subsequently paid £30 to register the outstanding award in the County Court, but the employer had still not paid the amount now owing. When advised of

the options for enforcement in the County Court, the client was of the view that “the entire procedure was too long-winded and would involve him in more expenditure”. As he had recently started a new job, the client was also worried that the need to attend Court hearings would “jeopardise” his new job. He therefore decided not to pursue the matter any further.

Furthermore, there is no guarantee that the use of one or more of these enforcement mechanisms will prove successful. There are a number of strategies by which employers can try to frustrate such enforcement action, and a range of circumstances in which, despite the taking of enforcement action, it may prove impossible to obtain the amount now owed (including interest and Court fees).

In the case of a warrant of execution, for example, assets that are deemed essential to the continuation of the employer’s business, or to satisfying the basic domestic needs of the employer and his or her family (if the employer is an individual/sole trader rather than a limited company), are exempt from seizure by the bailiffs.

Furthermore, only assets that actually belong to the employer can be seized, and it is common for employers to claim that what appear to be their assets actually belong to others. And, where there is a dispute as to ownership of assets, the employer may resort to a complex legal process, known as ‘interpleader proceedings’, requiring the claimant to engage the professional services of a solicitor (which, of course, must be paid for).

A woman who sought advice from a CAB in Berkshire in December 2003 had won a tribunal award of £3,000 in respect of unpaid wages. When the employer had failed to pay, the client had first paid £30 to register the outstanding award in the County Court,

¹⁶ County Court Bailiffs are civil servants, employed and managed by the Court Service. As such, they are distinguishable from the many firms of private bailiffs engaged by local authorities and magistrates courts to enforce the collection of domestic debts, and about whose practices Citizens Advice has repeatedly expressed serious concern (see, for example: *Undue distress: CAB clients’ experience of bailiffs*, Citizens Advice, May 2000).

and had subsequently paid £45 to obtain a warrant of execution. However, when the County Court Bailiffs had attempted to execute the warrant, by entering the employer's premises and attempting to seize some items of office equipment, the employer had claimed that the equipment was not actually owned by him, but was leased from another (connected) firm. When advised of the likely legal costs of engaging in 'interpleader proceedings', the client decided not to pursue the matter any further.

A CAB in Kent reports being approached in November 2003 by a man who had won a tribunal award of £13,000 in respect of unlawful deductions from wages and unpaid wages. When the employer had failed to pay, the client had first paid £30 to register the outstanding award in the County Court, and had subsequently paid £45 to obtain a warrant of execution. However, when the County Court Bailiffs had attempted to execute the warrant, they had been unable to identify any assets of the employer.

Similarly, a woman who sought advice from a CAB in Hampshire in June 2003 had won a tribunal award of some £500 in respect of unpaid wages (including unpaid holiday pay). When the employer had failed to pay, the client had first paid £30 to register the outstanding award in the County Court, and had subsequently paid £45 to obtain a warrant of execution. However, when the County Court Bailiffs had attempted to execute the warrant, they had been unable to identify any assets of the employer, despite making several visits to the employer's premises.

A CAB in Dorset reports assisting a young man to successfully pursue a tribunal claim in respect of unpaid wages

and unfair dismissal from his job as a car mechanic, with the tribunal making an award of some £3,100 in November 2002. When the employer – a sole trader – failed to pay, the client first paid £30 to register the outstanding award in the County Court, and then paid £45 to obtain a warrant of execution.

However, the County Court Bailiffs were unable to seize any assets as the employer, who was often out of the country for long periods, claimed that all the firm's assets were owned by his wife. Reporting this case to Citizens Advice in May 2004, the bureau notes that the client "has spent much time and energy, and also money in Court fees, trying to get the award he is owed – so far, in vain. We are very doubtful that this client will ever see his money. Is this justice?"

A CAB in Gloucestershire reports being approached in October 2003 by a young woman who had worked for two firms owned by the same man, firm A and firm B. After losing her job without notice, she had won a tribunal award of £590 in respect of unpaid wages against firm A. When the employer had failed to pay, the client had first paid £30 to register the outstanding award in the County Court, and had subsequently paid £45 to obtain a warrant of execution.

However, when the County Court Bailiffs had attempted to execute the warrant, the employer had claimed that firm A had now ceased trading, and that all his property and assets belonged to firm B. The client had therefore gone back to the Employment Tribunal to try to get the award made against firm B, but as more than three months had elapsed from the original ruling the tribunal would not do so, and the County Court had told the client that it could only try

to enforce a judgment against the firm named in the tribunal ruling. In its report to Citizens Advice, the bureau comments that "the client is extremely frustrated that, having won her case at tribunal, she is unable to enforce it."

As in this last case, above, it is not uncommon for those seeking to enforce an unpaid tribunal award against a former (rather than current) employer to find that the employer has now ceased trading. In such circumstances, it may be possible for the claimant to apply to the courts to have a receiver or liquidator appointed to wind up the employer's business and declare him or her insolvent (or, in the case of a sole trader, bankrupt).

If there are any assets in the business, these will then be sold to pay the employer's debts. And, if there are no assets remaining, the claimant can claim some of the money owed to him or her from the Department for Trade & Industry's National Insurance Fund.¹⁷

However, the amount owed to the claimant must be at least £750 (and is therefore of no use where the tribunal award is for less than this amount), the legal process is very lengthy and costly, and even if successful it is unlikely that the amount owed to the claimant will be paid in full (as the liquidator has to pay the employer's debts in a certain order).

The enforcement of ACAS-conciliated COT3 settlements

As with Employment Tribunal awards, where an employer fails to pay a worker in line with an ACAS-conciliated COT3 settlement it is necessary for the worker to apply to the civil courts for enforcement of the terms of the settlement. However, there is some confusion as to which civil court is the correct forum for

the attempted enforcement of such settlements.

According to the Department for Constitutional Affairs, "settled cases", including those conciliated by ACAS, "cannot be registered" in the County Court, and must be pursued in the High Court as an alleged breach of contract, which can be contested (i.e. the issue supposedly resolved by the Employment Tribunal can be re-opened in the High Court by the employer).¹⁸ However, one of the few legal texts on the matter states that "it is uncertain whether a COT3 agreement may be registered [in the County Court] ... that said, the authors have registered COT3 settlements in the past".¹⁹ And, certainly, bureaux report cases in which they have successfully sought to register an unpaid COT3 settlement in the County Court, as well as cases where they have sought enforcement in the High Court.

But, either way, such attempted enforcement involves expenditure of time and money by the claimant, with no guarantee of success.

A CAB in Hertfordshire reports being approached in October 2003 by a man owed £400 by his former employer under the terms of a COT3 settlement conciliated by ACAS. The client had paid to take out a summons in the High Court, but his former employer had refused to accept the summons and it had been returned to the Court. The client had approached ACAS for assistance, but it had told him that it could not offer any further assistance. In its report to Citizens Advice, the bureau reports that "the client is frustrated that his former employer cannot be forced to pay by ACAS".

A man who sought advice from a CAB in Cleveland in August 2003 was owed

¹⁶ This includes: up to eight weeks' unpaid wages, up to six weeks' holiday pay, and statutory notice pay – all subject to a weekly limit of £270; statutory redundancy pay; and a basic Employment Tribunal award (i.e. not a compensatory award, which must be claimed from the receiver or liquidator).

¹⁸ Paragraph 8.10 of *Transforming Public Services: Complaints, Redress and Tribunals*, a White Paper issued by the Department for Constitutional Affairs, July 2004, Cm 6243.

¹⁹ Carter, T. & Tsamados, P. (2001), *Enforcing ET awards & settlements*, Central London Law Centre, 2001.

£320 by his former employer under the terms of a COT3 settlement negotiated by ACAS. When advised of the options for enforcement in the civil courts, the client decided that it would be “uneconomic” to pursue the matter any further.

A CAB in Dorset reports assisting a woman who had been summarily dismissed on account of being pregnant, to make a tribunal claim for sex discrimination. In the event, the claim was arbitrated by ACAS, which conciliated a COT3 settlement of £3,000. However, the client subsequently received no payment from her former employer. The bureau reports ACAS being “extremely unhelpful” and doing “virtually nothing” to assist the client to enforce the settlement.

With the assistance of the bureau, the client paid to register the settlement in

the County Court and to obtain a warrant of execution, and subsequently obtained £1,000 from the County Court Bailiffs. However, the bureau notes that the client’s former employer “is now in liquidation and it is extremely unlikely that she will ever get the rest of the monies due. This case has taken up a huge amount of our time for very little reward for the client”.

A young woman who sought advice from another CAB in Dorset in February 2004 was owed £300 by her former employer under the terms of a COT3 settlement conciliated by ACAS in November 2003. When advised of the options for enforcement in the civil courts, the client decided that it would be “throwing good money after bad, and would be too much effort” to pursue the matter.

Conclusions and recommendations

On the basis of the information available to Citizens Advice, it is not possible to give a reliable estimate of the actual proportion of all Employment Tribunal awards that are not paid by employers, or are paid only after the taking of enforcement action in the civil courts by the claimant. However, the evidence from the advice work of Citizens Advice Bureaux, as reported in this report, suggests that such non-compliance by employers is both extensive, and quite possibly on the increase. Plymouth CAB reports seeing “a definite trend of employers not paying awards, and claimants therefore having to pursue them in the County Court”. Stratford-upon-Avon CAB reports that the non-payment of tribunal awards by employers is “a recurring scenario for us, and a very depressing one”. The specialist employment adviser at Purbeck CAB reports: “I have sweated a great deal of time and effort to win tribunal awards for too many clients who then end up with no money. To take a case to an Employment Tribunal hearing takes up huge amounts of time and energy, as well as forests of paper for the tribunal ‘bundles’. It is very frustrating for us, and devastating for the client”.

The reaction to such non-payment of the individual claimant is typified by Ammanford CAB, which – reporting a case involving non-payment of a tribunal award of £1,500 in May 2004 – notes that “the client is distressed and angry that, having been through the trauma of the tribunal, she still has to fight to get her money”. However, such non-compliance by employers also represents a significant threat to the overall effectiveness of the Employment Tribunal system. As Canterbury CAB notes in its report of a case of non-payment to Citizens Advice: “once a tribunal has made an award it should not have to be up to the individual to

enforce it. This would seem to reduce the authority of the Employment Tribunals”.

Indeed, enforceability underpins the effectiveness of any legal system. In 2003, the Lord Chancellor’s Department (now the Department for Constitutional Affairs) noted that “enforcement has a crucial role to play in the criminal and civil justice systems ... in a modern, democratic society there must be ways to enforce payments due ... unless there is prompt and effective enforcement the authority of the courts, the effectiveness of the penalties, and public confidence in the justice system are all undermined”.²⁰ And, more recently, the Secretary of State for Constitutional Affairs, Lord Falconer, has stressed that “a system where there is doubt about enforcement is one which will lose respect everywhere”.²¹

In September 2001, in our response to the Government’s consultation paper on the future of the Employment Tribunal system, *Routes to Resolution*, we reported bureaux dealing with “a constant stream” of cases of non-payment of a tribunal award by the employer. And, expressing our surprise at the silence of *Routes to Resolution* on the issue of such non-compliance by employers, and on the difficulty that many successful tribunal claimants face in enforcing their award (or settlement), we urged the Government to “consider the scope for more effective means of enforcing [employment] tribunal awards”.

In July 2002, in its report *Moving Forward*, the Employment Tribunal System Taskforce, established by the DTI in 2001 to examine how the system could be made “more efficient and cost effective”, concluded that “the lack of enforcement powers undermines confidence in the Employment Tribunal

²⁰ *Effective enforcement: improved methods of recovery for civil court debt and commercial rent, and a single regulatory regime for warrant enforcement agents*, a White Paper issued by the Lord Chancellor’s Department, March 2003, Cm 5744.

²¹ *DCA Manifesto – for a new Department*, Department for Constitutional Affairs, March 2004.

system". Describing this situation as "unsatisfactory", the Taskforce proposed that Employment Tribunal awards should not have to be registered in the County Court, as they must be in England and Wales, before the Court can be asked to take enforcement action, thus "aligning practice in England and Wales with that in Scotland".

To date, however, the Government has taken no action to improve the enforceability of Employment Tribunal awards. In July 2004, the Department for Constitutional Affairs published a White Paper on the creation of a unified tribunal system, incorporating Employment Tribunals as well as other central government tribunals.²² Noting that, "unlike most tribunals, there can sometimes be difficulty in enforcing Employment Tribunal decisions", asserting that COT3 settlements conciliated by ACAS "cannot be registered" in the County Court, and concluding that "this is unsatisfactory", the White Paper sets out the Government's intention to "reform these processes so that an award of compensation, whether ordered by [an Employment Tribunal] or agreed between the parties, can be enforced with the minimum of bureaucracy as if it were an order of the civil courts".

Citizens Advice warmly welcomes this proposed elevation of the legal status of Employment Tribunal awards in England and Wales, which will in future obviate the need for such awards to first be registered in the County Court before an application can be made to the Court to use one of its enforcement mechanisms.

However, the evidence from the advice work of Citizens Advice Bureaux, as set out in this report, indicates that this welcome move falls well short of the action required. For the CAB evidence demonstrates that, even where a tribunal award is registered in the County

Court, there are legal, financial and other obstacles to the successful enforcement of the award that, in far too many cases, deny the claimant the justice they have sought through the Employment Tribunal system – and which, immediately following the tribunal hearing, they understandably believed they had obtained.

In our view, it should not be necessary for successful Employment Tribunal claimants, faced with a non-compliant employer, to have to resort to legal action in the civil courts to enforce their financial awards – and thus obtain justice. Rather, unpaid awards should be enforced directly by the State – that is, by the proposed unified tribunal itself, which would need to be provided with the necessary powers and resources, or by another statutory body, such as the Fair Employment Commission championed by Citizens Advice and others (see Introduction, above). Such State-sponsored enforcement could be conducted, as now, through the civil courts, or through more direct action (such as the adding of the unpaid award to the employer's 'owed tax').

Furthermore, we can see no good reason why successful Employment Tribunal applicants, having demonstrated to the satisfaction of a tribunal that their workplace rights have been unlawfully violated by an employer, should have to wait whilst the State takes enforcement action on their behalf. In the words of the Department of Trade & Industry, Employment Tribunals are "a distinctive feature of the British system of administrative law that aim to provide speedy, accessible justice".²³ This suggests to us that, where an employer fails to pay a tribunal award within a reasonable period (42 days, perhaps), the State should pay the award to the claimant and then pursue the employer for that amount plus the costs of enforcement.

Undoubtedly, the vast majority of Employment Tribunal awards and ACAS-conciliated settlements are paid by the employers in question, and so the financial costs to the Government (and therefore the taxpayer) of such an approach to enforcement would not be substantial. Moreover, such costs could – and, in our view, should – be fully recovered, along with the original award or settlement, from those employers against whom such enforcement action has to be taken. And effective enforcement of Employment Tribunal awards would ensure that the costs to the taxpayer of dealing with a claim at a hearing or by means of an ACAS-conciliated settlement are not wasted.

Such an approach would also sit well with the Government's wider strategy, as set out in the Public Service Agreements of the Department for Constitutional Affairs, to "ensure effective and accessible justice" by "reduce[ing] the proportion of disputes which are resolved by resort to the courts" and by "ensuring that outcomes are enforced effectively".²⁴

We therefore recommend that:

- The Department for Constitutional Affairs (DCA) and the Department of Trade & Industry (DTI) should undertake an urgent joint review of the enforcement of Employment Tribunal awards and ACAS-conciliated settlements, with a view to identifying the most appropriate mechanism for the effective enforcement of such awards and settlements by the State, rather than by individual claimants.
- Once the DCA and DTI have identified an appropriate mechanism, provision for such a mechanism should be included in the forthcoming Courts and Tribunals Bill, which the Government currently intends to bring forward in June 2005 (to implement, as necessary, the proposals in the White Paper published in July 2004).

²² *Transforming Public Services: Complaints, Redress and Tribunals*, a White Paper issued by the Department for Constitutional Affairs, July 2004, Cm 6243. In March 2003, the Government announced its intention to accept the key proposal of the August 2001 report of the review of tribunals led by Sir Andrew Leggatt (the 'Leggatt Report'), and create a unified tribunal service within the Department for Constitutional Affairs by 2008. This service will be constituted from the 10 largest central government tribunals – including the Appeals Service (social security and child support appeals), Employment Tribunals (and the Employment Appeal Tribunal), the Special Educational Needs & Disability Tribunal, Mental Health Review Tribunal, the Immigration Appellate Authority, and the Criminal Injuries Compensation Appeals Panel – with other smaller tribunals joining as appropriate after 2008.

²³ From the Introduction to *Findings from the 1998 Survey of Employment Tribunal Applicants*, DTI, 2002.

²⁴ SR 2002 Public Service Agreements, as set out at: www.dca.gov.uk/dept/objectives.htm

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