

The influence of legal representation at employment tribunals on case outcome

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**DEPARTMENT FOR BUSINESS
ENTERPRISE & REGULATORY REFORM**

**EMPLOYMENT RELATIONS
RESEARCH SERIES NO. 84**

The influence of legal
representation at
Employment Tribunals on
case outcome

JULY 2007

EMPLOYMENT RELATIONS RESEARCH SERIES NO. 84

The influence of legal representation at Employment Tribunals on case outcome

BY

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COVENTRY BUSINESS SCHOOL, COVENTRY UNIVERSITY

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Employment Market Analysis and Research (EMAR) is a multi-disciplinary team of economists, social researchers and statisticians based in the Employment Relations Directorate of the Department for Business, Enterprise and Regulatory Reform.

Our role is to provide the evidence base for good policy making in employment relations, labour market and equality and discrimination at work. We do this through:

- Conducting periodic benchmark surveys
- Commissioning external research reports
- Conducting in-house research and analysis
- Assessing the regulatory impact of new employment laws
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About this publication

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Foreword

The Department for Business, Enterprise and Regulatory Reform (BERR) leads work to create the conditions for business success through competitive and flexible markets that create value for businesses, consumers and employees. It drives regulatory reform, and works across Government and with the regions to raise levels of UK productivity. It is also responsible for promoting choice and quality for consumers through competition policy and for ensuring an improved quality of life for employees.

As part of that work the Employment Market Analysis and Research branch (EMAR) of the Department manages a research programme to inform policy making and promote better regulation on employment relations, labour market and equality and discrimination at work issues.

This report is one of four commissioned by the Department to conduct secondary analysis of the Survey of Employment Tribunal Applications (SETA) 2003. Details of the SETA Small Grants Fund can be found here:

<http://www.berr.gov.uk/employment/research-evaluation/grants/seta>

This report, by Geraldine Hammersley, Jane Johnson and David Morris, explore the relationship between the choice and use of legal advice and representation by claimants in employment tribunals and their case outcomes and levels of satisfaction with outcomes. We hope you find it of interest.

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Grant Fitzner

Director, Employment Market Analysis and Research

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Executive summary

'No win no fee' arrangements are becoming increasingly common in employment tribunal cases. However little is known about the factors underlying the choice of such arrangements. In general three sets of potential influences are at work. These are the characteristics and circumstances of claimants, the willingness of legal advisers to enter into such arrangements and the type of case involved.

Secondary analysis of the Survey of Employment Tribunals (SETA) 2003 data found there was no statistical difference in the levels of satisfaction with case outcome expressed between those claimants represented on contingent fee arrangements and those who did not have such an arrangement. Claimants with contingent fee arrangements were involved in higher financial value cases and were more likely to be seeking compensation than claimants with other fee arrangements. They were also more likely to be advised that they were likely to win their claim than those with other fee arrangements. The most significant factors at play in the choice of fee arrangements are the jurisdiction and outcome of the case, the amount of money involved and the financial circumstances of the claimant.

Aims and objectives

This research aims to explore the relationship between the choice and use of legal advice and representation by claimants in employment tribunals and their case outcomes and levels of satisfaction with outcomes.

A predominantly exploratory methodology was employed rather than one concentrating on the testing of precisely formulated hypotheses. In particular the work does not attempt to identify causal relationships or build or test theories which attempt to explain choices of representation at employment tribunals. Instead factors which are common in contingent fee situations are identified and these would be the key variables to take into account in any explanation of the choice processes which lead to contingent fee arrangements with legal advisers.

Background

The stimulus for the research was the concern voiced by members of tribunals, the Law Society, the academic community and others at the spread and quality of 'no win no fee' advice and representation in employment tribunal cases. The

research aimed to explore factors that affect the adoption of contingent fee arrangements at employment tribunals.

Main findings

- There is no statistical difference in the levels of satisfaction with case outcome expressed between those claimants represented on contingent fee arrangements and those who did not have such an arrangement.
- Claimants who were covered by legal expenses insurance and/or members of a trade union were less likely to have contingent fee arrangements.
- Claimants with contingent fee arrangements were involved in higher financial value cases and were more likely to be seeking compensation than claimants with other fee arrangements.
- Claimants with contingent fee arrangements were more likely to be advised that they were likely to win their claim than those with other fee arrangements. Tribunal hearing outcomes suggest that this optimism might be misplaced. Claimants with contingent fee arrangements were successful in 48% of cases compared to 56% where normal fee arrangements applied and 56% of all cases (any representation). Note also here the tendency for contingent fee arrangements to be used in higher financial value cases.
- Cases where a contingent fee arrangement existed were more likely to be settled and less likely to be withdrawn. Those cases involving contingent fees were less likely to be ACAS conciliated but twice as likely to be privately settled.
- Large settlements (those over £5,000) were more a feature of contingent fee cases compared to other settled cases.
- Contingent fee payers also have higher salaries on average and more likely to be managers than non-contingent fee payers.
- Claimants entering into contingent fee arrangements do not seem to be responding to cold-calling by persons offering legal representation services when compared to those entering other arrangements with lawyers.
- Claimants who eventually enter into contingent fee arrangements are just as likely to have been contacted by Acas and equally aware of their right to some free preliminary advice as claimants in general.
- A multi-variable cluster analysis of the SETA 2003 data suggests that contingent fee claimants had higher than average salaries, had some higher education qualifications, and financial settlements were at the top end of the range reported in SETA 2003.
- There is evidence to suggest that claimants with contingent fee arrangements who settled their case or who rejected an offer of settlement, are more inclined to feel they would have done better at a Tribunal hearing.

About this project

This research was carried out as part of the Department for Business, Enterprise and Regulatory Reform's employment relations research programme. The research analyses data from the Survey of Employment Tribunal Applications 2003 (SETA 2003), and was funded by the Department's Small Grants Fund.

The paper uses data from the SETA 2003 dataset, which was collected by BMRB Social Research on behalf of the DTI (now BERR), Acas and the Scottish Executive. The data and supporting documentation has been deposited in the UK Data Archive: <http://www.data-archive.ac.uk>

About the authors

Geraldine Hammersley is a Principal Lecturer in HRM, Jane Johnson is a Senior Lecturer in Law and David Morris is Professor of Business Education. All three work at Coventry Business School, Coventry University. Both Geraldine and Jane have carried out previous research on employment tribunals and forms of legal representation in particular. David Morris has published widely in the business and management arena and some of his recent work focuses on organizational behaviour.

1

Sources of legal advice for claimants

Industrial Tribunals, re-named employment tribunals by the Employment Rights (Dispute Resolution) Act in 1998, were created in 1964 under the Industrial Training Act s.12, to provide a forum for resolving disputes between employers and employees, namely at that time, disputes concerning the payment of the Industrial Training Levy. Under the Industrial Relations Act 1971, their jurisdiction broadened to include unfair dismissal claims and since then they hear claims on all aspects of employment legislation which now includes eighty different areas of law. They are independent judicial bodies which aim to provide quick, cheap, speedy access to justice with little formality.

The continual introduction of new legislation regulating the employment relationship has given rise to an inevitable increase in the number of employment disputes and the number of claims being made to employment tribunals. Hawes (2000) indicates that the number of employment tribunal claims doubled in the 1990s. More recent data suggests that there were 197,365 claims in 2003/04, a 17 per cent increase on the previous year (ETS, 2004). This rise can be partially accounted for by the growth in the number of multiple claimant cases i.e. those involving more than one claimant, and the publicity and greater awareness generated by landmark cases such as *Thompson v Department of Work & Pensions*, a case which may, in part, account for the 76 per cent increase in the number of sex discrimination cases registered (IDS 2004).

This rise comes at a time when individuals are more aware of their rights and their employer's obligations. The recent incorporation of the European Convention on Human Rights into UK law (Human Rights Act 1998) and the publicity created by high profile equality and discrimination cases reaching the European Court of Justice have impacted on this awareness. Additionally, the rising number of legal representatives marketing their legal advice under 'no win no fee' arrangements may have resulted in a more attractive alternative than the traditionally hourly fee paying arrangements, under the 'nothing to lose' concept. Consequently, it is not difficult to recognise that the original Industrial Tribunal System has been stretched to the hilt in terms of volume of cases heard and levels of professional expertise required to achieve fair settlement. Moreover, as judicial bodies, employment tribunals have been expected to adhere to the principles of natural justice, which has inevitably introduced a degree of procedural formality normally associated with the ordinary civil courts. This coupled with the fact that employment legislation has increased in scope and complexity has meant that more individuals require legal advice and representation.

Further, there are a number of labour market issues, which have been identified as contributory factors in the increase in workload of employment tribunals (ETs). According to some authors the UK has the least protective employment legislation of all the EU countries (Slinger 2001). Historically in the UK a system of voluntarism combined with collective bargaining covered most aspects of employment. The introduction of increased legislation in the employment arena alongside the long-term decline in trade union membership (though stabilising in recent years) has enabled the development of an individualised approach to enforcement of employment rights, which results in individual workers pursuing claims against their employers (Knight and Latreille 2000; Burgess et al. 1999). The role trade union representatives play in assisting in negotiating a solution to an individual's employment disputes within the workplace should not be overlooked (Dickens 2002). She suggests that this view is supported by the Workplace Employment Relations Survey (WERS) 1998 data. For workplaces with more than twenty five employees the data indicated that there was a relationship between the increase in the rate of ET claims and an increase in the number of firms that had no union recognition (Cully et al. 1999). As the jurisdictions have grown, so more and more workers are covered by protective employment legislation. Alongside this are changes in the structure of the economy and composition of the labour force. Burgess et al. (1999) cite a correlation between claim growth and a rise in female participation in the labour market. They also suggest that the growth in the number of small enterprises, the majority of which are non-unionised, is significant, hence workplace characteristics play a part in contributing to the increase in claims.

The generally heightened awareness of employment rights has not resulted in all potential claimants resorting to law. Meager et al's. (2002) research into awareness, knowledge and exercise of individual rights indicated that the majority of respondents who had experienced problems with their rights at work took no action, only 5.8 per cent of their sample made a claim to the employment tribunal.

There is some evidence to suggest that the size and type of the employing organization is a factor in determining whether or not an aggrieved employee will resort to law. Dickens (2002) posits that 'small non unionised service sector employees are most likely to generate tribunal claims across a range of jurisdictions.' She also notes that more than fifty per cent of tribunal claims are brought against firms with less than twenty five workers.

The current funding arrangements for employment tribunal cases have resulted from legislative changes, in particular, the Access to Justice Act 1999, which replaced the Legal Aid system in England and Wales with two schemes, 'Legal Help' and 'Help at Court', both administered by the new Legal Services Commission. Legal Help provides initial advice and assistance with any legal problems, and Help at Court allows for representation at certain court hearings. Legal Aid as such has never been available for employment tribunal cases at first instance, but was available for appeals. Legal Help, which mirrors Legal Aid, is likewise only available in appeal cases. Some solicitors and other bodies may give limited free advice to those with low disposable incomes as pro-bono work, or in special cases, Legal Help (although not for actual representation) through the Community Legal Service, the generic title given to The Legal Services Commission.

The Community Legal Service (CLS) have developed a network of Legal Help through Citizen's Advice Bureaux (CABx) and Law Centres. Information on this network has been publicised through public library information centres and a website. In 2004 there are 496 CABx in England, Wales and Northern Ireland. In 2003 the CAB helped people with 510,000 employment related problems (CAB 2004). The Law Centres Federation has encouraged the development of publicly funded legal services for the most disadvantaged in society and promotes the Law Centre model as the best way of achieving this. Additionally, the CLS, having recognised the importance of quality legal assistance, lists selected lawyers and advice centres with a Quality Mark, as a guide to standards for the general public.

Employees who are members of a trade union also have access to legal help and advice through their union. Some unions offer a 24-hour helpline, and can advise on the merits of particular cases. In 2004 there are 67 unions with a collective total of some seven million members, representing one quarter of the working population. Additionally, the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE), and the Disability Rights Commission (DRC) may assist in the funding of a case where appropriate. Failing this the Free Representation Unit (FRU), which is a charity, provides free representation in the Greater London Area. It acts as a second-tier referral agency for clients from CABx, Law Centres or solicitors, as advice cannot be given to the public directly. FRU has grown steadily with workloads doubling over the past twenty years. In 2004 approximately 1,500 clients were referred to the Unit, and around 66 per cent of these are represented.

There are also a large number of employment law consultants who operate 'no win, no fee' arrangements alongside more traditional fee arrangements. Many of these consultants have targeted their marketing directly at employment tribunal claimants and respondents as soon as their cases are registered. (before the public register of claims was closed in October 2004). These consultants are not regulated and may not always be legally qualified. In addition media reports usually only cover a few very high profile ET cases, which has led to a widespread but erroneous perception that financial awards at employment tribunal are usually substantial. The Government acknowledged the problem of the volume of direct marketing targeting both claimants and respondents when it stopped publishing the Public Register of tribunal claims citing, amongst other reasons, the sheer volume of consultants approaching both parties (IDS 2004b).

The Bar Pro Bono Unit and the Solicitors Pro Bono Unit also offer free employment law advice in cases where Legal Help is not available, or the claimant is unable to afford legal assistance. Overall, however, there is little financial help available for those involved in employment disputes.

Legal practitioners have developed different forms of fee charging in order to allow litigants with little financial backing access to legal advice and justice. Clearly, charging an hourly fee for legal advice does provide the least risky alternative for practitioners; lawyers rarely lose out on such arrangements. However, as such rates can be very high, averaging £125 to £150 per hour, it would be very easy for claimants to quickly run up heavy costs. Consequently, conditional fees and contingent fees, generically called 'no win no fee', have developed, linking the fees charged to the forecasted outcome of the case. Historically, both schemes were deemed unlawful, under the old crime of champerty. Taking a share of the spoils of litigation was contrary to public

policy, as lawyers may be tempted for their own personal gain 'to inflame the damages, to suppress evidence, or even suborn witnesses' (Re Trepca Mines Limited 1963). It has been suggested that the rationale for such reasoning in medieval times was sound, as 'the mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power (Giles v Thompson, 1994). This view, however, is considered by some to be out of date and no longer stands up to scrutiny. Moreover the crime of champerty was abolished under the Criminal Law Act 1967, and the Thatcher government legitimised conditional fees under the Courts and Legal Services Act 1990. This was part of a commitment to reform of the legal profession and the shift to free competition and choice.

The aim and rationale behind such a scheme is to create broader access to justice, and potentially may provide an increase in the workloads of practitioners. Recent evidence in a Law Society (2003) survey suggests that fee income in the area of employment has increased by an average of 69 per cent for private practice firms.

Under conditional fee arrangements, a client who wins his or her case will have to pay their lawyer's professional fees and, in addition, a success fee which is calculated as a percentage of professional fees. This can be up to 100 per cent, although research from a survey of 121 firms has shown that the average level is around 43 per cent (Yarrow 1998). Conversely, if the client loses his or her case, he or she may have to pay the winning side's costs, including the uplift on the success fee charged by the successful party's lawyers' fees, and any insurance premiums paid out by the winner. However, there would be no professional fee charged by the lawyer. Conditional fee arrangements are hardly used in employment cases as costs are rarely awarded although they can be used as a penal sanction for vexatious litigants (McPherson v BNP Paribas 2004). Instead, contingent (or contingency) fee arrangements have developed. These can also be described as 'no win no fee', and as stated by Underwood 'for all practical purposes there is no difference between conditional fee arrangements and contingent fees except for the way they are spelt' (Underwood, 1999). Both schemes result in the client only paying a fee if he or she wins. The fee is either contingent or conditional upon the result.

Under a new Rule 8(1) of The Solicitor's Practice Rules 1990, adopted in 1999, 'A solicitor who is retained or employed to prosecute or defend any action, suit or other contentious proceeding shall not enter into any arrangement to receive a contingent fee in respect of that proceeding, save one permitted under statute or by the common law' (Law Society Gazette 1996). As employment disputes are deemed non-contentious, employment lawyers have been able to interpret this rule literally, and thus legitimately operate on a contingent fee basis. Moreover, those offering legal advice who are not qualified solicitors are free to make their own arrangements for fee charging.

In contingent fee arrangements, the client is charged a percentage of the damages awarded. This is agreed between the legal representative and the client before representation and may vary. The concept of lawyers having to share the financial consequences of their judgements, rather than simply charging hourly rates, which offers greater rewards to the least efficient providers, has been recognised as being advantageous to the client. However, previous research has shown that claimants will only be represented if two conditions are met. Firstly, the legal representative needs to believe that the

chance of success is good. Secondly, the likely award will need to be in the region of £12,000 - £15,000 (Johnson and Hammersley, 2005). Smaller claims, although often of merit, fall by the wayside and thus access to justice may be limited.

Contingent fees are simple to explain to a client, as they are based on a proportion of the award granted, and there is less likelihood of lawyers padding out their costs to earn a higher success fee as in conditional fee arrangements (Zander 2003). Additionally, the client enjoys several advantages. For example, there will be no anxieties about having to pay large legal fees, and no requirement to pay before a case is heard. Also, the lawyer is deemed to be taking the risk and in most cases should have carefully assessed the chances of winning. As costs are not usually awarded in employment tribunals, there are no fears of the client having to meet such payments and thus the notion of 'no win no fee' is clear.

One evident concern to policy makers is the influence of contingent fee arrangements on the experience and outcome of employment tribunal claims, as well as their influence on the actual number of claims being made. The Survey of Employment Tribunal Applications (SETA) 2003 did ask claimants about their use of contingent fee arrangements and so can be analysed to shed light on the outcomes of claimants using contingent fee arrangements. Unfortunately survey data cannot help us to explore the counterfactual position, how many people would have made a claim to an employment tribunal even if contingent fee arrangements did not exist.

2

Methodology

The method of investigation adopted for this report was a form of simple investigator triangulation. In the first stage two of the researchers (Hammersley and Johnson) undertook literature reviews of the prevalence of 'no win no fee' arrangements in employment tribunal cases. These reviews were undertaken from the perspectives of a human resource management specialist (Hammersley) and an employment lawyer (Johnson). This review forms the basis of Chapter 1 of this report. Independently the third researcher (Morris) undertook an exploratory analysis of the SETA 2003 data to identify statistical relationships from the data which could be worthy of further discussion. Regular discussions took place once the initial work was complete to identify areas of commonality and difference in so as to agree where additional research effort should be directed.

This approach has a number of advantages as a working methodology including the potential to reduce the bias inherent in adopting a particular discipline-based approach and greater face validity. However it is not a particularly helpful structure for reporting our findings and we do not follow it here.

Chapter 3 sets out the results from an exploration of the SETA 2003 survey data.

3

Choice of representation

The SETA 2003 dataset includes a large number of variables about claimant choices of advice, guidance and representation throughout the duration of an employment tribunal claim. However the narrative format chosen for the survey (that is questions were asked in the order in which 'critical incidents' occurred in the process) only permits limited analysis of the continuity of advice. It is not possible from the survey to identify the particular routes by which claimants arrived at different types of representation. In particular we cannot identify from SETA 2003 how or why particular claimants chose contingent fee arrangements as opposed to other types of representation. SETA concentrated on the 'facts' of representation rather than exploring the reasons why particular forms were chosen over other possible alternatives.

Figure 1 shows the pattern of choices for claimants once a claim has been submitted. Prior to completing the ET1 claim form SETA asks for information about all sources of help and information used without any prioritisation. At the stage where the claim form (ET1) is being completed, that is when a decision has been made to proceed with an employment tribunal claim, claimants are asked to identify single guiding representatives dealing with the day-to-day activities relating to the claim, or to identify a 'main advisor' where no representative is identified. Claimants are later asked to identify other sources of advice and guidance other than their representative or main advisor (which can be multiple). The reason for this approach in SETA 2003 was to identify the most important source of advice and representation at key stages in the claimant's case. However this approach may lose information on the full range and hierarchy of advice to claimants during the case.

Why opt for contingent fees?

In overall terms there are three sets of influences on the type of representation chosen. Firstly there are claimants' choices. Secondly there are the options which legal advisers are willing to offer. Thirdly there is the type of case involved. We also need to remember that self-representation is an option for claimants. Indeed this route is frequently chosen. In the SETA sample 35% of claimants chose this route (see Figure 1 below).

Claimants' choices

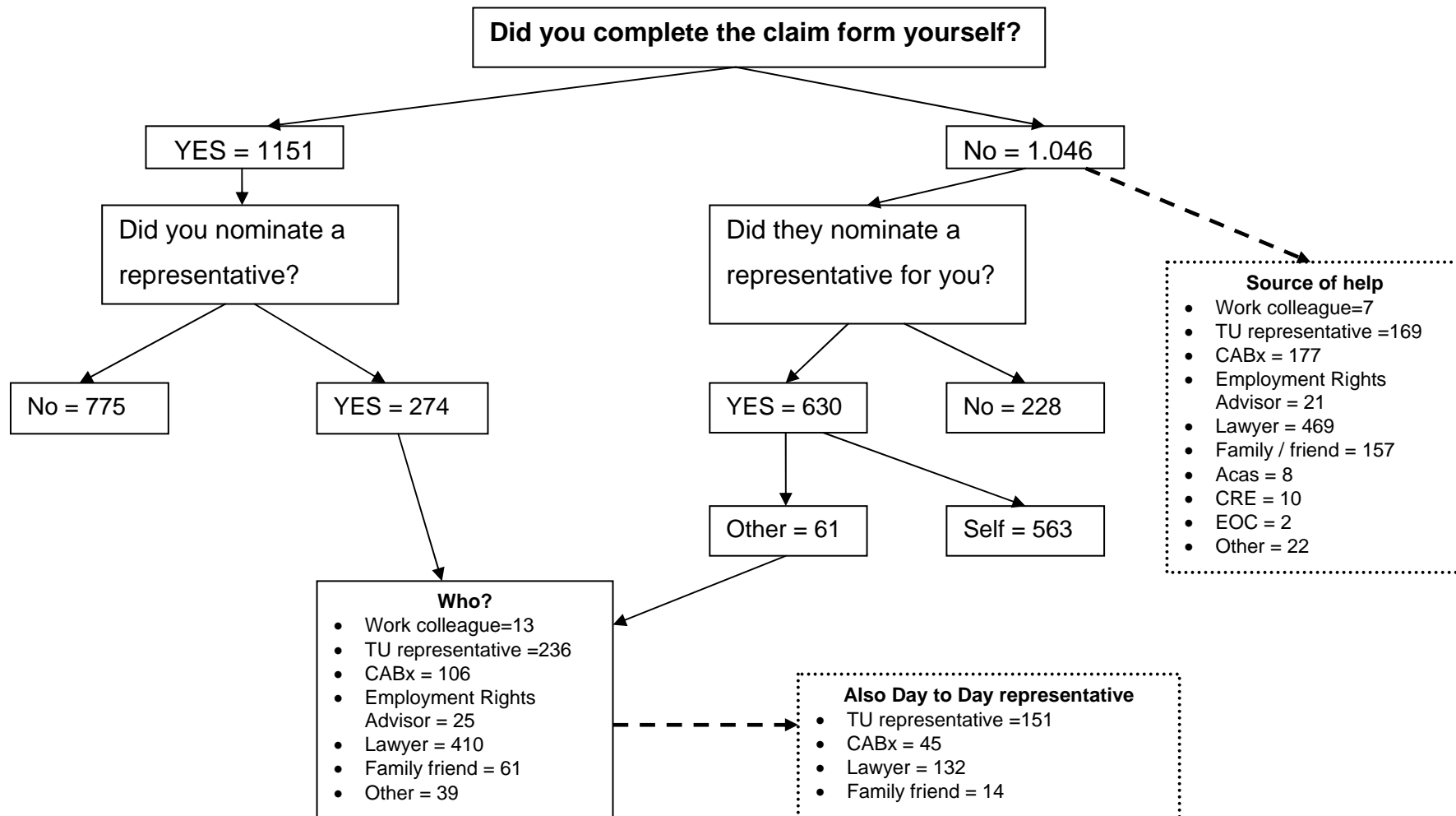
Claimants' choices of whether or not to adopt a contingent fees approach will be a combination of push and pull factors. However overall there are three broad possibilities. Firstly claimants may be pushed into contingent fee arrangements by lack of cheaper or free (in the sense of zero priced at the point of use) alternatives, for example, availability of legal expenses insurance or trade union support.

Secondly contingent fees may be chosen for economic reasons. This motivation only comes into play if the claimant does not have legal expenses insurance or membership of some organization which will provide free legal (or other acceptable) support, for example a trade union or professional association. However in the absence of such insurance the relative price of alternative sources of advice and representation is likely to be a factor in claimants' choice. The perceived quality of the service is also relevant. Under the 'hedonic' principle claimants may assume a positive association between quality and price. However it is clearly difficult for claimants to observe or assess 'quality' directly and proxy measures might be used such as reputation or the adviser's estimation of the chance of winning. The assumption that claimants are motivated in economic ways, that is, they act as economically rational individuals, is obviously a very strong one. However there is reason to suspect that an assumption of economic rationality may be unlikely given some of the motivations reported by respondents for undertaking employment tribunal cases – such as seeking justice or simply having their day in court to 'name and shame' their former employer. There is also the assumption that claimants have full knowledge of all the alternative means of funding their actions. Assuming we do operate under rational economic assumptions then the key variables which will be involved in the decision over choice of representation are as follows:

- relative price, that is the level of fees plus any other costs involved in the action
- probability of winning
- estimated probable award in the event of winning
- claimant's ability to pay which will, in part, depend on income
- claimant's attitudes towards risk.

Contingent fee arrangements shift financial risk from claimants to advisers. Clearly advisers will want to charge for taking on this risk. However this shift in risk, even at a positive price, may be in the interests of both parties. The legal advisers may be willing to take on the additional risk in individual cases because they can add them to the portfolio of other cases and the associated risks which they are already carrying. It is a fundamental feature of risk management that a portfolio of risks will have less overall risk than the simple sum of the risks associated with the individual elements of a portfolio. For the claimant this will probably be their only case and therefore they have to shoulder all the risk. In short claimants might find it in their economic interests to shift the risk associated with losing the case to someone else who is better equipped to manage the risk. This is exactly the same principle as is involved in taking out legal expenses insurance. Claimants opting for contingent fee arrangements paid £3,020 on average for advice and representation. Claimants who used legal advisers but did not opt for contingent fees paid an average of £2,243. However we must be wary of attributing the difference in payments (£777) simply to the risk premium charged by advisers. It may be that the characteristics of the cases dealt with under different fee arrangements may not be the same. For example claimants might wish to opt for contingent fees in more risky, complex or 'high stakes' cases.

Figure 1: Representation routes, submission of claim form



Source: SETA 2003. N = 2,236 claimant interviews

Notes: "Don't know" not included in counts.

Thirdly claimants may end up in contingent fee arrangements purely on the basis of opportunism. This can arise because claimants may be 'cold-called' by lawyers, employment rights advisers or others with offers based on some form of contingent fees.

Advisers' choices

Claimants may not always be able to access their preferred choice of advice and representation. Of the 581 claimants (out of the 2,236 claimants interviewed) who said that they desired additional sources of advice in handling their cases 11% (64) said that they had been refused help from their preferred additional source. Obviously free services will be the favoured in many cases. However in some cases the price of 'financial freedom' may be lack of individual choice. For example the legal insurer or trade union may appoint the representative rather than the claimant and reserve the right to withdraw the service if, in their view, a settlement is a sensible 'commercial' decision. The claimant may be willing to trade off this lack of choice for the lower price of advice and representation. However, many claimants receive some free services (often free advice during the early stages of the ET process) but pay for others (typically representation). Of the 1,389 claimants in the survey who had a day-to-representative (out of 2,236 in total), 9% (125) paid for part of the advice and representation received. Thus there may be both claimants who would have preferred a contingent fee arrangement but were not offered one and, on the other hand, claimants who opted for contingent fees out of necessity. SETA does not provide any data from which inferences on these two competing tendencies may be drawn.

The likely variables influencing legal advisers in offering contingent fee arrangements to clients are:

- the potential earnings from the case
- the chances of settling or winning the case
- the risks associated with the case
- the complexity of the case
- non-financial costs and benefits such as influences on reputation
- altruism (or desire to be seen to be altruistic via pro bono work)

Given that there are significant fixed costs associated with any ET case contingent fees may not be offered in low financial value cases since the percentage of the potential settlement asked for may be very high. Law Society guidance to its members suggests that a contingent fee of one third of the settlement is often appropriate. Similarly if the adviser estimates the chances of winning or reaching a satisfactory settlement to be low then a higher risk premium will be sought.

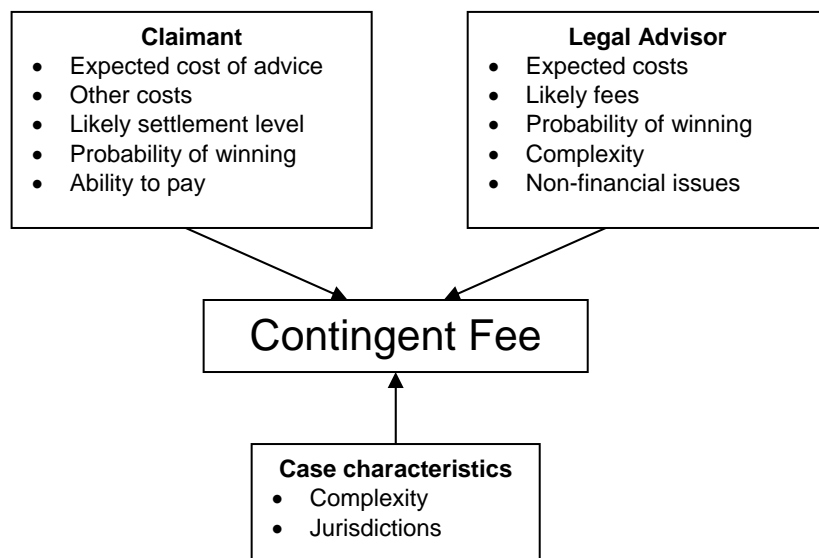
We also note that there is a significant (mainly US literature) which suggests that lawyer moral hazard is a feature of simple (non-contingent) fee structures. Moral hazard is the risk that the presence of a contract will affect the behaviour of one or more parties. The classic example is in the insurance industry, where coverage against a loss might increase the risk-taking behaviour of the insured. In the non-contingent fee structure the lawyer has

an incentive to maximize his fees by doing more work, whether or not this will increase the client's net wealth (in the sense of any financial settlement reached less the lawyer's fees). Contingent fees align the economic interests of the client and lawyer in that both are interested in maximizing any financial award made. Whilst this literature refers mainly to personal injury and medical negligence cases it may generalize to other contingent fee situations. If so we might expect more satisfactory outcomes for claimants than might otherwise be the case.

Case characteristics

Attitudes towards and perceptions of risk may influence the types of cases which are acceptable to claimants (clients) and advisers (lawyers) in cases where contingent fees are adopted. Case complexity and jurisdiction might be influences here. We have discussed attitudes towards risk above. However there may be differences in perceptions of risk between claimants and solicitors which relate to the nature of the case. It is not obvious what these variables are but jurisdiction and complexity (in a legal sense) are two potential factors. The circumstances in which claimants left their employment might also be relevant. For example: Did they walk out? Did they discuss the matter with employer before they left? Did the employer have procedures for dealing with grievance issues? Figure 2 summarises the overall influences on the choice of contingent fees.

Figure 2: Influences on choice of contingent fee arrangements



Identifying contingent fee payers

There are a number of difficulties in identifying claimants who use contingent fee arrangements from the survey. The findings from the survey (Hayward et al: 40) identify contingent fee arrangements as ones in which if a case is won, including by a settlement of being reached before going to tribunal, the

solicitor receives a pre-agreed proportion of the settlement or award. This can come in two parts, firstly a fee and secondly repayment of disbursements, although arrangements do vary. Even if the successful claimant pays no fees they may still be liable to pay the legal representative's disbursements. This can give rise to confusion in answering questions about contingent fee arrangements since the respondent may not make any distinction between fees per se and disbursements. This means that respondents can answer that they do have to pay something to legal advisers even if the case is won even though the case is being funded on a contingent fee basis.

Difficulties arise however in interpreting answers to questions where contingent fee arrangements are concerned. Firstly the questions make no mention of disbursements as opposed to fees and simply use the term 'fee' to imply any payments made by claimants to solicitors. Secondly question E13 and the follow-up questions are confusing. Question E13 asks 'Did you have an arrangement with any legal adviser(s) by which you would have to pay their bill if you won the case?' There is confusion because the words 'fee' and 'bill' are being used interchangeably; however the bill presumably includes both fees and disbursements. Claimants may well not be able to distinguish meaningfully between a fee and a disbursement and in the context of a long telephone interview it would have been very difficult to explore the exact nature of payments made for legal advice or representation – especially given the recall issues involved with the SETA interview being conducted up to 18 months or so after the claim was promulgated.

If the respondents answered 'yes' to E13 then a further question was asked to identify one of three possibilities. The first possibility is 'Yes - paid only if won' implying that any fee or bill would only be paid if the case was won and nothing would be paid if the case was lost. In fact even under contingent or conditional fee arrangements successful claimants could end up paying something, win or lose, because they would still be required to pay the disbursements. Indeed answers to another question (N4) asking for the total amount paid personally by claimants for advice and representation in the case showed that 89 respondents paid something for advice and representation but also said that they had a contingent fee arrangement with a legal adviser such that they paid (the bill) only if they won. It is possible, of course, that claimants paid for some advice before reaching a contingent fee arrangement with a legal adviser. These payments could have been made to the ultimate adviser or someone else. However it is not possible to identify whether or not this is the case from the survey evidence. Again collecting detailed information on the nature of all payments to all advisors involved in a case was beyond the ability of the SETA telephone interview.

The second alternative offered in question E13 could cause even greater confusion. This alternative was 'Yes – paid if won or lost'. Claimants were not asked to identify whether if what they paid if they lost the case was only a proportion of the solicitor's fees, none of the solicitor's fees or simply any disbursements. The questionnaire however interprets both answers (Yes - paid only if won and Yes - paid if won or lost) as being evidence of contingent fee arrangements.

Table 1. Crosstabulation of contingent fee payers and paying for help and advice.

		Whether had contingent fee arrangement with any legal adviser(s)				Total (n)
		Don't know	Yes - paid only if won	Yes - paid if won or lost	No arrangement	
		N	N	N	N	N
Whether had to pay for all help or advice	Don't know	1	2	0	7	10
	Paid for all	11	64	120	151	346
	Paid for some	2	25	23	81	131
	All free	15	51	16	820	902
Total		29	142	159	1059	1389

Source: SETA 2003, N= 2,239 claimants

Table 1 shows answers to question E13 ('Whether had contingent fee arrangement with any legal adviser') in the columns and answers to question E12 (whether had to pay for all or part of the help and advice received) in the rows.

Table 2 shows claimants' responses to a question asking if they received any free advice from lawyers cross-tabulated with answers to question E13 ('Whether had contingent fee arrangement with any legal adviser'). The data in this table is difficult to interpret but does suggest that there could be some confusion in possibility is to restrict analysis to the 'Yes-paid only if won' category since this could be supposed to correspond to 'no win, no fee' arrangements. However it is also quite clear that the claimant may have received free legal advice before submitting a claim or a free consultation session with a lawyer before committing to a contingent fee arrangement with the same or different legal advisor. The possibility of claimants having more than one legal advisor and having different payment arrangements with different advisors at different times was left open in the SETA interview. The researchers focused upon whether claimants had received free advice at any time and whether or not they had entered some kind of contingent fee arrangement at any time.

Table 2. Crosstabulation of contingent fee payers and provision of free advice by lawyers.

		Whether had contingent fee arrangement with any legal adviser(s)				Total
		Don't know	Yes - paid only if won	Yes - paid if won or lost	No arrangement	
Did a solicitor, barrister or some other kind of lawyer provide free help or advice?	No	9	20	22	623	674
	Yes	8	56	17	278	359
Total		17	76	39	901	1033

Source: SETA 2003

The analysis reported here assumes that respondents who answered 'Yes – paid only if won' or 'Yes – paid if won or lost' in response to the question

about contingent fee arrangements did have a contingent fee arrangement with their legal advisers at some point during the claim. However we will pay especial attention to the first category of respondents. The questions eliciting information on fee arrangements with legal advisers should be reviewed to establish whether or not they are effective in obtaining the information required.

Results

Tables 3, 6 and 7 below summarise the results of cross-tabulations linking the issues in column 1 to whether or not claimants represented by a legal adviser had a contingent fee arrangement or not. Comparisons between claimants with contingent fee arrangements and those represented/advised by non-legal advisers (for example trade union representatives) are not reported. Column 2 reports whether or not the comparisons yielded significant statistical differences at the 5% significance level (that is there is a less than 5% chance that the observed pattern of responses could have occurred by chance). Note that the terms 'yes' and 'no' do not indicate levels of responses but only relative levels. For example in row 1 the analysis suggests that there is no statistical difference in the patterns of responses to the question asking claimants if they were motivated to make a claim by monetary concerns between those with contingent fee arrangements and those without. However overall most claimants did say that money was important to them. Similarly, overall, claimants were satisfied with the advice and representation they received from legal advisers (as indicated by the questions relating to the last two rows of Table 4a), the 'no' in column 2 indicates that there is no statistical difference in the levels of satisfaction expressed between those on contingent fee arrangements and those who did not have such an arrangement. (The criterion for recording a 'yes' in column 2 is that both the Pearson chi-squared test statistic and the Likelihood Ratio should be less than .05.)

Column 3 indicates the direction of the statistical relationship. As always we must be wary of imputing causality here. For example the statistical observation that managers are more likely to have contingent fee arrangement with legal advisers may have nothing to do with being a management role per se but may be related to the higher incomes that managers enjoy and/or the greater amounts of money involved in cases where a manager is a claimant. Thus being a manager may be a proxy for other economic variables. Similarly column 3 tells us nothing about the interaction between variables; we cannot simply take all the 'yes' directional characteristics and interpret them as a typical profile of a contingent fee claimant.

Table 3 shows results for claimants. These indicate that there may be some push factors here in that claimants who were covered by legal expenses insurance and/or members of a trade union were less likely have contingent fee arrangements. Given that in these cases the provider of the 'free' advice and representation will be the ultimate bill payer it is likely that fee arrangements will be made by them.

Economic factors also play a part. Although contingent fee paying claimants, when asked if their decision to enter into the Tribunal process, were no more

likely than others to say that they were motivated by money they were involved in higher financial value cases and were more likely to be seeking compensation. This finding ties in with contingent fee payers having higher salaries on average and more likely to be managers. Unfair dismissal cases also tend to involve higher settlements than cases under other jurisdictions. For example 33% of all unfair dismissal cases in the SETA sample resulted in settlements over £5,000 compared to 20% of other cases. However this pattern was not repeated for cases decided at Tribunal; here the corresponding figures are 33% for unfair dismissal cases and 42% for all others. Note however that over three times as many cases are settled than go to a Tribunal hearing but there is no tendency for unfair dismissal cases to be settled (rather than decided at a Tribunal hearing) compared to others.

Where outcomes are concerned contingent fee cases are more likely to be settled than those where a legal adviser was employed as the claimant's representative under a normal fee paying arrangement. Table 4 summarises outcomes from settled cases.

Compared to all cases in the SETA sample those involving contingent fees were less likely to be ACAS conciliated but twice as likely to be privately settled. Large settlements (those over £5,000) were also a feature of contingent fee cases.

Claimants entering into contingent fee arrangements do not seem to be responding to cold-calling by persons offering legal representation services when compared to those entering other arrangements with lawyers. Similarly claimants who are advised, guided and/or represented by lawyers are no more likely to have been cold-called than those using other forms of help. Table 5 gives some more data on sources of advice used.

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Table 3: Results of Crosstabulations for Claimant Characteristics

Issue	Significant: Yes or No?	Direction
1. Was the claimant motivated by money?	No	
2. Was the claimant hoping to get money owed and/or compensation?	Yes	Claimants with contingent fee arrangements were more likely to want compensation.
3. Amount of money involved in case	Yes	Contingent fee arrangements more likely in higher value cases (above £5000)
4. Was the claimant dismissed?	Yes	Claimants opting for contingent fees were more likely to have been dismissed.
5. How well informed was claimant prior to case?	No	
6. How well informed did the claimant feel about what the Tribunal might award if they won their case?	No	
7. Whether claimants thought it was right to involve their main advisers in the case	No	
8. How satisfied was the claimant with the outcome of the case?	No	
9. Advice on chances of winning at a hearing	Yes	Claimants with contingent fee arrangements were more likely to be advised that they were likely to win.
10. Was claimant a member of a trade union or staff association?	Yes	Claimants who were members of a trade union unlikely to have contingent fee arrangements
11. Did claimant have legal expenses insurance?	Yes	Claimants covered by legal expenses insurance or similar arrangement unlikely to have contingent fee arrangements
12. Was the claimant 'cold-called' with offers of unsolicited legal advice?	No	
13. Gender of claimant	No	
14. Was claimant employed in the public or private sector?	No	
15. Claimant's age	No	
16. Did claimant have managerial/supervisory duties?	Yes	Managers much more likely to opt for contingent fees
17. Claimant's level of education	No	
18. Claimant's income	Yes	Claimants with higher salaries are more likely to opt for contingent fee arrangements
19. Outcome of case	Yes	Cases where a contingent fee arrangement existed were more likely to be settled and less likely to be withdrawn.
20. Would claimant advise a friend in same position to put in an application?	No	
21. Did claimant feel it was worthwhile bringing Tribunal?	No	

Table 4: Settlement in contingent fee cases

	ACAS Settled	Privately Settled	All other outcomes
Contingent Fee Payers	23%	27%	50%
All cases	48%	14%	38%
Settlements over £5k, contingent fee payers	38%	46%	
Settlements over £5k, all cases	15%	30%	

Source: SETA, 2003.

Table 5: Sources of Advice Used

Sources of free advice	Contingent fee/Free advice not given	Contingent fee/Free advice given	No contingent fee/Free advice not given	No contingent fee/Free advice given
TU Representative	107	8	672	229
CABx	106	9	685	216
ACAS Helpline	111	4	891	10
ACAS Officer	114	1	868	33
Employment Rights Adviser	111	4	872	29
Lawyer	42	73	623	278
Other	116	6	812	89

Source: SETA, 2003. Note: The survey also included 'Person nominated on claim form' as a category for free advice. This has been excluded from the table since there would be overlap between the categories shown here.

Lawyers are much more likely to have given claimants some free advice before in cases which are eventually funded through contingent fee arrangements than otherwise. Secondly it is clear that many claimants who eventually enter into contingent fee arrangements with lawyers have not had free advice from other sources. Claimants who eventually enter into contingent fee arrangements are just as likely to have been contacted by Acas and equally aware of their right to some free preliminary advice as claimants in general.

Claimants who entered into contingent fee arrangements do not seem to be more or less satisfied than others. There is no statistical difference between stated levels of satisfaction at the early advice stages (Items 5, 6 and 9 in Table 4) or in post-case satisfaction (Issues 7,8, 21 and 22).

As already noted above, it is likely that several of the variables identified in Table 4 may be measuring essentially the same things, for example claimants' incomes or the size of the case in financial settlement terms. It would obviously be helpful to eliminate some of the overlap and identify the key variables involved. There are several widely used methods of identifying groups characterised by different or similar characteristics. Cluster Analysis

is a form of multi-variable analysis which (statistically) defines clusters composed of relatively homogeneous groupings. Such similarity or closeness within clusters is judged on the basis of the values of cases (here claimants employing legal advisers) for a set of variables. In this case the variables initially chosen are those with 'Yes' entries in the middle column of Table 4. (See Everitt, 1997 for further explanation of cluster analysis techniques; the technique used here is k-means analysis). Cluster Analysis is capable of splitting data into any number of clusters, provided there is sufficient data available. Normally a minimum of 200 cases is advised, a criterion which is met by the 301 cases in which contingent fees were used. One advantage of cluster analysis is that it does not require any assumptions about the distribution of the data and it can be used in a purely exploratory way. The most interesting cluster identified was one of 174 cases which shared the following distinguishing characteristics:

- claimants used contingent fee arrangements
- claimants had higher than average salaries
- financial settlements were at the top end of the range reported in SETA
- claimants had some higher education

Table 6: Results of crosstabulations for Legal Advisor characteristics

Issue	Significant: Yes or No?	Direction
9. Advice on chances of winning at a hearing	Yes	Claimants with contingent fee arrangements were more likely to be advised that they were likely to win.
22. Were claimants advised to withdraw their case?	No	
23. Were claimants advised to settle?	No	
3. Amount of money involved in case	Yes	Contingent fee arrangements more likely in higher value cases (above £5000)

There is no evidence that legal advisers are more prone to 'push' for a settlement when they have a contingent fee arrangement with their client than when they have a conventional fee arrangement (Table 6). However the analysis of results in Table 4 does show that settlement is a more likely outcome when contingent fees are involved. Although claimants were more likely to be advised that they would probably be successful if they went to full Tribunal hearing outcomes suggest that this optimism might be misplaced. Claimants with contingent fee arrangements were successful in 48% of cases compared to 56% where normal fee arrangements applied and 56% of all cases (any representation). Note also here the tendency for contingent fee arrangements to be used in higher financial value cases.

When cluster analysis was employed the only distinguishing feature of contingent fee cases from the point of view of legal advisers was the amount of money in the final settlement.

Table 7: Results of crosstabulations for characteristics of cases

Issue	Significant: Yes or No?	Direction
24. Whether claimant would have done better at Tribunal compared to accepting settlement	Yes	Claimants under contingent fee arrangements believe they would have done better going to Tribunal.
25. Did employer have written grievance procedure?	No	
26. Were written procedures followed before ET application?	No	
27. Did employer have written disciplinary procedure?	No	
28. Did the claimant resign from or walk out on their job?	No	
29. Was the workplace small in employment terms (less than 50 employees)?	No	
30. Jurisdiction	Yes	Contingent fee arrangements more likely in unfair dismissal cases; less likely in 'fast track' cases, more likely in standard period conciliation cases.

Interestingly, claimants in contingent fee arrangements who settled their cases or who where an offer of settlement was made and rejected were more likely to believe they would have received a more favourable outcome to their case by going to a Tribunal hearing rather than settling their claim with the employer.

There is no statistical evidence to support the idea that contingent fee arrangements are more likely to occur in cases where employers have less formalized and/or legally compliant personnel procedures (Issues 25, 26, 27 and 29). Nor do the circumstances under which claimants left their jobs statistically relevant unless they were dismissed.

4

Conclusions

This research has explored the growing phenomenon of ‘no win no fee’ arrangements in employment tribunal cases. This growth has been accompanied by concerns. On the one hand there have been worries about whether or not legal advisers will behave in the same way as they would under normal fee arrangements. For example will there be a tendency for them to advise clients to settle rather than opt for a full Tribunal hearing. There is also concern about whether or not claimants will pursue claims in situations where they would not normally do so. On the other hand ‘no win no fee’ arrangements extend access to justice. There is therefore a balance to be struck between potential detrimental effects of ‘no win no fee’ arrangements and the benefits for those who use them in situations where they might not otherwise be able to pursue legitimate claims.

A priori there are three sets of factors which would influence the choice of ‘no win no fee’ arrangements. Firstly there are factors which are relevant to claimants. Whilst SETA data clearly confirms that the reasons why claimants bring employment tribunal cases are not simply economic ones, that is there are motivations other than money involved, it may well be that once a decision has been made to pursue a claim then the way in which it is pursued will be mainly an economic decision. If this is the case then the factors which affect claimants will be their income, their attitude towards risk and the expected value of any settlement or award they might get. It is quite likely that claimants may choose to opt for contingent fee arrangements in situations where there is both high risk and potentially higher rewards but also the possibility of higher losses.

Where legal advisers are concerned it is likely that ‘no win no fee’ arrangements would be offered in situations where there is a potential for substantial awards to be made. This both reduces the risk that any proportion of fees retained by a legal adviser would not cover their costs and also, again, is part of the high risk high reward trade-off. Other factors which may influence their choices in this situation are the potential for winning the case and the possible complexity of pursuing the case. Given that any employment tribunal case has substantial fixed costs associated with its pursuit, it is quite likely that legal advisers will only offer ‘no win no fee’ arrangements when there is a potential for high value awards being made. Finally there are factors which are linked to the type of case itself. Again complexity, riskiness and potential economic value of any award will be factors.

Our results confirm that ‘no win no fee’ arrangements extend access to justice for those who do not have other opportunities to fund their cases without risk

of loss to themselves. For example contingent fee cases are much more common where claimants have no access to trade union representation or do not possess any legal insurance. On the other hand contingent fee cases are most commonly used by better off claimants in high value cases. Contingent fee users also tend to be better educated than other claimants in addition to any effects that education they have on income.

There is also a tendency for contingent fee cases to be settled rather than pursued to Tribunal hearing. The level of settlements tends to be higher but this is because high value cases are being pursued. Paradoxically claimants whose cases do go to hearing do less well than claimants who do not have contingent fee arrangements. This is contrary to the opinions of claimants who settled their claims or where an offer of settlement was made by an employer – where those involved in contingent fee cases were more inclined to believe they would do better through a Tribunal hearing.

However claimants are generally satisfied with the outcomes of cases with 'no win no fee' arrangements. They are satisfied with the process, advice given and outcomes. There is no statistical difference between the levels of satisfaction at any stage of pursuit of employment tribunal claims between claimants with contingent fee arrangements and those with any other form of representation. It may well be, then, that concern with 'no win no fee' arrangements are misplaced.

Further research on this topic is clearly merited. This paper has been exploratory and has done little more than identify some of the key variables in the choice of contingent fee arrangements. Whilst the analysis points to some confirmation of an economic explanation for the particular choice of method of pursuing employment tribunal claims rather than the motivation for instigating the claim in the first place, more research will be required to explain choices and build reliable models of claimants' choice of representation. SETA data is valuable for giving an overall picture of choice of representation but it needs to be extended by other means. In particular in-depth interviews with claimants using contingent fee arrangements would be valuable. The SETA data can be improved in at least two ways, at least for the purposes of understanding contingent fee arrangements. Firstly the questions which relate to fee arrangements with legal advisers are too general to support detailed analysis of outcomes by fee arrangements. It may well be that the answers to such questions do not give a reliable indication that contingent fee arrangements are in fact being employed by claimants. Secondly the narrative style of the survey interviews does not allow for tracking in detail the patterns of advice through the employment tribunal process. Some indication of overlap between advisers at different stages is given but more detail would be desirable. It would be helpful to know, for example, who suggested contingent fee arrangements, when they were suggested and whether advisers were changed during the process.

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