Advising in Austerity

Kirwan, Samuel

Published by Bristol University Press

Kirwan, Samuel.
Advising in Austerity: Reflections on Challenging Times for Advice Agencies.
Project MUSE. muse.jhu.edu/book/80071.

For additional information about this book
https://muse.jhu.edu/book/80071
JUSTICE AND LEGAL REMEDIES IN EMPLOYMENT DISPUTES: ADVISER AND ADVISEE PERSPECTIVES

Eleanor Kirk

Introduction

Following the examination of the legal context of employment disputes in Nicole Busby’s chapter, I explore in this chapter two key questions: how do people think about the law in relation to problems at work, or disputes with their employers, and how do advisers transform or augment these notions into action or inaction in relation to employment disputes?

In the context of the proliferation of individual employment rights and changes to the nature of workplace organisation and occupational structure, Citizens Advice Bureaux are increasingly becoming providers

* Eleanor Kirk is a researcher at the University of Bristol Law School. Whilst working on the ‘Employment Disputes’ project she was also completing her PhD on how conflict is expressed in the contemporary workplace, how workers’ grievances come to be focused on particular issues, and the role therein of collective organisation. Eleanor lives in Glasgow.
of employment advice – to the extent that they have been described as a new actor in employment relations, partly filling the void left by the decline of trade unions (Abbott, 1998). Bureaux offer information and advice regarding employment law, and assistance in enforcing the law via the employment tribunal system.

As described in Adam Sales’s chapter, clients bring with them varying degrees of prior understanding and expectations which advisers seek to either validate and elaborate upon, modify or transform. Clients’ notions of their employment rights are not always accurate, and as well as assisting in furthering disputes, advisers may sometimes also close them down. In the context of recent changes to employment law, such as the weakening of unfair dismissal protection and the imposition of fees for tribunals, advisers are increasingly the bearers of bad news to their clients regarding available legal options. I consider in this chapter the sometimes divergent perspectives of clients and advisers regarding justice and legal remedies, and how advisers seek to manage expectations.

Laypeople and legal consciousness in employment disputes

Generally clients arrive at CABx possessing a rudimentary understanding of: their rights, how these rights apply to their situation, the legal remedies available and how these remedies might be accessed. However, some clients in our study were, prior to their disputes, unaware of the existence of the Citizens Advice service or of the possibility of challenging their employer at all. Muriel was informed of these facts through a chance meeting on an aeroplane with an Acas employee. Others came to CABx with debt or benefits problems, unaware that they might dispute employers’ behaviour in relation to their troubles. Jimmy came to a CAB for advice about benefits when his employer, who owed him several months’ wages, laid him off. An adviser noted that he could pursue the wages legally and made him an appointment with an employment specialist. Kim came for help with housing when her home was damaged in a fire. The housing problem
and health complications had caused her problems at work which she had not sought advice about until an adviser unearthed the issues.

As Emily Rose describes in her chapter, when arriving for their first interview at the bureau, lacking knowledge of appropriate timelines, legally relevant starting points or facts, clients often relate their problems to advisers in a rather jumbled fashion. After eliciting the narrative in an orderly way, advisers translate the situation for the client, laying out relevant options. From this point, advice involves helping clients weigh up the pros and cons of particular courses of action. In rationalising their decisions, clients related their notions of justice and legality, which sometimes conflicted with advisers’ recommendations about the nature of employment law, and how the Employment Tribunal System operates.

‘It must be illegal’

Most clients can be observed to operate on the basis of ‘natural justice’ principles; they adopt a position in which egregious experiences ‘must be illegal’ and seek advice regarding the validity of this supposition. Clients had often discussed the issues with other laypeople for confirmation of their sense of injustice, however vague, or the idea that ‘something’ could be done, and that by extension that there ‘must be something that can be done legally’ about the problem.

Before Peter came to CAB, he and his wife knew little about tribunals and what they entailed but were convinced his employer’s treatment of him was illegal. Peter’s wife commented:

‘I’ve heard of unfair dismissal and knew it could be taken to some kind of court, but we only really got to know about them from [solicitor] … I think that common sense would say that disabled people are protected, that they have to be. I didn’t know that much about it, I just knew that there was things in place to protect you.’
Understanding of terms for types of claims such as ‘unfair dismissal’ or ‘discrimination’, or how they apply to their particular situation, was limited; many clients struggled to understand these terms, even after having them explained across several advice appointments.

In deliberating upon the pursuit of legal action, participants expressed multifaceted notions of justice: they wished to clear their name, to stop the employer from mistreating others or generally for them to ‘mend their ways’. These were often contrasted with the loyalty they felt that they have shown to the employer. Once in the Employment Tribunal System, disputes tend to become focused upon financial compensation. However, the sentiment that ‘it’s not about the money’ was ubiquitous, with clients regarding their disputes as concerning matters of principle, and looking to ETs as external authorities that might recognise the wrongs they have suffered, that their employer broke the law, and subsidiary branches of these themes: “I don’t care about the money, we just want to see justice getting done” (Muriel).

Mike felt that his former employer had treated him badly and although he was struggling to find another job, “it wasn’t about the money it was about proving, that they [the employer] were wrong”. Many felt they were dismissed far too easily, especially where they had provided dutiful service to the employer over many years. For those who felt they could not go back to their jobs, they tended to want to have the unfairness of their situation recognised by an independent authority. Amanda felt she was dismissed unfairly after 27 years: “I said it all along. I wouldn’t have cared how much of an award I got, just as long as I got the decision. That’s what was most important to me.”

Many wanted to ‘clear their names’, and being called a liar by their employer in the course of the dispute had been a sticking-point for them, a personal attack or character assassination that they could not accept. Sally “wasn’t getting made out to be a liar”. She:

‘was wantin’ to do unfair dismissal … wasn’t really interested in the money, ah just wanted tae clear ma name, and [the solicitor] had sat and he spoke tae me and he said that there would need tae
be some sort of figure, so we had kind of worked out between us how much ah had lost in wages.

Disputes involving unpaid wages were clearly ‘about the money’, but even here, there was a symbolic quality to making employers ‘pay for their crimes’. Cheryl was owed around £400:

‘It was more just wanting the money back in principle … [I’d] earned it, so I should have it. Even if it was hundred pound or a thousand pound … I worked hard in there – it was long hours, short breaks, really stressful work – I thought I’m not going to let this lie, cause it’s money I deserve to get.’

Whilst there was an obvious financial component to Mary’s grievance she was ‘no’ carin’ too much about the money, Ah would just like tae see them gettin’ paid back for what they’ve done … A bit of justice”. Most participants were uncomfortable putting a price on their suffering. Mulling over the issue of a financial settlement in relation to her dismissal, Sarah’s husband said, “it’s completely out of principle so it’s silly to come out with a figure … it’s the winning that matters, if [Sarah] win[s] and get[s] £50, that’s fine”.

To many clients, ‘justice’ only appeared to be possible through formal legal action, even a full tribunal hearing in some cases, whereas accepting a settlement might let employers pay their way out of disputes, enabling them to continue to treat people poorly. Desiring formal justice in this way, as it takes up the time and resources of tribunals and courts, tends to be viewed pejoratively within the dominant policy rhetoric. However, from the perspective of many CABx clients, this is their only realistic opportunity for a ‘fair’ hearing. In contrast to what they had experienced in the workplace, here it is imagined that the employer’s decision making will be fully placed under scrutiny.
The fallibility of folk knowledge

Of course, lay understandings of employment law are not always correct. Some clients arrived at the Citizens Advice Bureau only after being alerted to the possibility of enforcing their rights by friends, family or chance meetings with informed individuals. While in many cases clients underestimated the scope of employment law, in others clients had higher expectations of legal protections than are warranted in reality. Correspondingly, clients are sometimes pleasantly surprised that they have legal options for redress, but advisers are often (and increasingly) the bearers of bad news to clients in terms of available legal remedies and the difficulties enforcing them. Advisers manage the expectations (and emotions) of clients who may have legitimate grievances against their employers which are likely to be only partially redressed in the uncertain event of a successful claim to tribunal. The recent weakening of employment rights (such as unfair dismissal protection) and imposition of fees for ETs as well as cuts to legal aid, and local council funding which affects CABx resources, means that there may be little positive advice to offer:

‘With the cuts, you know, we get the brunt of it … we’re the messenger [that] gets shot.’ (CAB manager)

One adviser, discussing fees in particular felt constrained in how she could help clients:

‘You’re meeting people and you can’t help … “I’ve been dismissed when I’m pregnant”, “I’ve been dismissed because of my disability”, and basically there’s very little that you can do … you almost feel a bit de-skilled … you’re not doing what you want to do, or what you feel you should be doing.’ (CAB solicitor)
These and other quotes highlight the significant tensions in practising advice during a period in which the options for legal redress are increasingly distant:

‘The tears in people’s eyes when you tell them that the law is no good to them … “But that’s not fair”. You’re darn right it’s not! … a lot of my conversations to do with employment law are negative … it’s not my job to mislead people, so you have to tell them what the hurdles are going to be. But then how do you do that without talking people out of taking the case that they might win?’ (Generalist adviser)

A CAB manager explained that because for many clients fees had put ETs “outwith their reach”, advisers were faced with constantly disappointing clients (whose lives were often in turmoil) with the news that there is little they can do, and this impacts on CABx’s ability to retain volunteers in particular:

‘The challenge is keeping people happy to continue volunteering. When you’re spending your day delivering bad news … You can’t help them, there isn’t a happy outcome … I’ve got to manage that with people who are coming in here you know to try and make sure they come back and they don’t feel completely disheartened by it all.’ (CAB manager)

Even where cases are deemed to be strong, advisers may also have to frustrate clients’ expectations about the availability of free legal representation or legal aid. However much clients think they need or should have representation at an Employment Tribunal, CABx rarely have the resources to provide this assistance themselves or are able to locate reliable providers to whom they can refer clients.
Unfair but not illegal

Many clients (and some advisers) referred to the limited protection of the framework of employment rights as unjust. Cases that did not progress to the Employment Tribunal often involved circumstances that, while being highly unfair, were either not strictly illegal or difficult to provide evidence for.

Some clients, like Jack, felt they had been treated poorly, but were not qualified for legal protection. Jack had been working as a scaffolder with an employer for ten months when he had an argument with a colleague at work and lost his temper. He was trying to preserve health and safety standards, but he was nevertheless dismissed. Jack came to the Citizens Advice Bureau after discussing his situation with a friend who told him that his employer could not just sack him on a whim without any warning or investigation of the alleged misdemeanour. The friend told him, “they’ve got to give you a warning or it’s unfair dismissal”. He initially told the friend that he was just going to leave it but the friend had told him, “you should do them for that”. Jack was unaware that there was a two year qualifying period of service for unfair dismissal but suspected that his employer could not just dismiss him so easily. He learned about the Employment Tribunal system at the Citizens Advice Bureau. However, as he was not qualified for unfair dismissal protection, an adviser told Jack that the best outcome he will likely achieve is to obtain a weeks’ notice pay. He was surprised and disappointed, asking, “is that all?!" After learning this, Jack was not sure that pursuing the dispute was worth the hassle, even though he was having financial difficulties, being out of work, on benefits and in debt. He did not return to the bureau.

Bullying by management is a common grievance brought to CAB, but not one that is well protected by law. Advisers often sympathised but had to inform clients that bringing a successful claim of this type to tribunal is very difficult:

‘There’s nothing you can do about that, it seems, it wouldn’t stand up … bullying and harassment, from what I heard, it seems
really hard ... I’ve seen a lot of general “picking on me” stuff that really upsets people. “He shouldn’t be allowed to do that”. … and it sounds awful, and then I’ve got to turn it to people and say, “look, employment law is … [limited]”. (Volunteer generalist adviser)

In such circumstances, advisers can only legitimately encourage clients to raise those aspects of their complaints which are demonstrable and clearly covered by legal jurisdictions:

“Have you had any unpaid wages? Or are you being paid the minimum wage? … These are the things you can claim for here. Have you got anything that fits into these categories?” … there’s nothing you can really do for being just picked on.’ (Volunteer generalist adviser)

Advisers were circumspect in suggesting clients might bring claims of certain types such as constructive dismissal, which involve leaving a job to pursue a very uncertain outcome at tribunal; this option was considered as particularly risky given current labour market conditions. A CAB solicitor told Lesley, a teacher who wanted to leave her job because of bullying, that “as difficult as it is I wouldn’t advise you to quit. You’re employed and being paid and it might be difficult to find another job just now”.

Advisers may also have to close down disputes if the time limits set by the Employment Tribunal process have been passed. Gordon wished to dispute the terms of his redeployment following a redundancy situation and was awaiting an appointment with a CAB solicitor. However, there was a mix-up regarding Gordon’s appointment date and when he turned up at the CAB, he was informed that he had missed his slot with their solicitor. By the time the client saw the solicitor, he had missed the deadline to dispute his redeployment. The solicitor told Gordon that were it not for the time bar, he would have had a strong case. Gordon was bewildered and responded that his original position was not genuinely redundant as someone else is doing it. The
solicitor cut him off saying, “I understand what is being done, but after four weeks, the door closes”, after which point Gordon could not claim unfair dismissal and does not get a redundancy payment. Gordon was livid that the opportunity to dispute his treatment was snatched away from him.

Even where clients are deemed to have strong legal cases, advisers often suggest that they may have to lower their expectations of the ‘justice’ they will obtain via the ETS. If successful, an ET might result in some compensation, but rarely would anyone ‘get the truth’ or ‘clear their name’ in the way clients commonly desired. Amanda and Sarah were jointly bringing unfair dismissal claims against their former employer. An adviser checked at one point whether they might consider re-engagement. Amanda replied “No … I’m 99% sure that they’d just make up some new reason to make me redundant or get me out.” Nevertheless, “I said it all along. I wouldn’t have cared how much of an award I got, just as long as I got the decision. That’s what was most important to me.” Sarah’s response to the same question was that she could not go back but “just want[s] them to deal with people properly”, and change the way “[the boss] speaks to people!” The adviser’s response to Sarah was similar to the one she gave to Amanda, “the tribunal will not be concerned with getting an apology or changing practices. They might not give you the remedy you want in that respect”.

Following advice at CAB that the type of justice ETs provide may not match their expectations, generally clients were pragmatic about modifying, or monetarising their sense of recompense. Many were nevertheless reluctant to agree to financial settlements that would allow employers to avoid hearings, or impose confidentiality agreements, meaning outcomes such as exposing their employers, clearing their name and having their ‘day in court’ would be forfeited. However, often clients are worn down and heed the advice that proceeding to a full hearing is guaranteed to be a continuing struggle for uncertain gain. Peter’s former employer offered what he considered to be a derisory payment as part of a settlement agreement in an unfair dismissal claim, on the proviso that he signed a confidentiality clause. The couple were
uncertain about paying the full hearing fee and decided to settle at this point. Peter’s wife reflected:

’It was signing documents never to discuss it. I would rather that they just kept their money and walked away from it. It was never about the money. It was about the way that they made Peter feel … We just wanted them tae be made aware that they had done wrong.’

The parameters of settlement also conflicted with Muriel’s desire for justice, exposing the employer for what they had done:

’People were saying to me, “don’t take the money … just go to court … you won’t be able to say what the truth is so basically they’re just going to buy your silence”.’

The CAB solicitor representing her attempted to manage Muriel’s expectations about potential remedies, saying during an advice appointment:

’A lot of people say to me, “I want to clear my name”. However, an employment tribunal is not looking at whether you did something wrong or not but really whether the employer did something wrong in relation to your employment. But the employee’s record does not change.’ (CAB solicitor)

Muriel continued to view her dispute in broader terms of right and wrong, despite the solicitor’s advice:

’He said to me, “oh you might never find out the truth and you might”, but at the same time I’ve got to try … I could have just walked away and just left it … I’ve moved on with my life now but at the same time you can’t really get closure until you really find out.’
However, following the breakdown of her relationship with her partner, Muriel decided to accept a settlement facilitated through Acas and her solicitor, having lost the will to fight.

Ray was adamant that he wanted reinstatement after being dismissed, and would not accept a financial settlement, against the advice of his CAB representative:

‘They offered me £2000 to drop [the claim] … I says, “I don’t want money I’m not after money. I really want ma job back and I want them tae find oot why they actually sacked me”.’

Ray was unsuccessful at hearing and walked away with nothing. However, when asked whether he ever regretted not settling, he said: “No, no, because I thought the way they went about it was totally wrong and I thought 20 years working in the same place and just to be dismissed like that.”

Sometimes what an adviser may view as the ‘best’ outcome may not fit with a client’s notion of justice. However, advisers are only offering guidance on the likely remedies available in the ETS which may not offer the kind of ‘justice’ many clients seek.

**Conclusion**

The employment tribunal system in the UK involves a passive–reactive system which relies upon a high level of capability and knowledge among individuals in order that they can understand and enforce their rights (Dickens, 2012), rather than proactivity on the part of employers to meet agreed standards. Yet our research shows that employees presenting to Citizens Advice Bureaux hold only vague notions of employment law, often drawing upon a natural sense of (in)justice in which what appears to them as immoral must be illegal.

Not all bureaux are able to either train or recruit the level of expertise required to provide employment advice or representation. A recent survey of CABx in Scotland found that 50% described themselves as providing specialist employment advice (Wood and Rose,
5. JUSTICE AND LEGAL REMEDIES IN EMPLOYMENT DISPUTES

2014). Where specialist employment advice is available, advisers are increasingly the bearers of bad news to clients regarding the extent of their rights, regarding the cost and difficulty of bringing a claim (particularly post-fees), regarding the availability of representation on a day-to-day basis and in front of employment tribunals, and regarding the remedies available and likelihood of receiving any eventual award. Many conversations are ‘negative’, as one adviser put it, adding to the difficulty and emotional management required in advice giving. For bureaux managers, the challenge is to recruit and retain volunteers who may find that a good proportion of their work involves delivering bad news to many clients regarding their prospects for resolving a work-related grievance via the Employment Tribunal system. It is perhaps unsurprising given this experience that as organisations, Citizens Advice and Citizens Advice Scotland has been campaigning for an alternative to the employment tribunal system as a means of enforcing employment rights, looking to state enforcement through some form of ‘employment commission’ (see CAS, 2014).