

Contingency Fees in England and Wales

Access to Justice in Employment Tribunals

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I. Introduction

This paper considers the use of 'US-style' contingency fees in England and Wales in one of the areas traditionally pointed to as lacking legal aid, employment tribunal cases. It is based on three studies, one a review of US evidence and two empirical.¹ The studies come at a time when a review of English² costs rules is being conducted by a Court of Appeal judge for the senior civil judge, the Master of the Rolls.³ One of the options under consideration is to permit US-style contingency fees in civil litigation, where they are currently prohibited.

Employment problems affect about 5 or 6% of the population in the CSJS surveys over the usual LSRC reference period, and appear to have significant impacts on physical health (according to the latest LSRC figures comparable to relationship breakdown and only 'beaten' by problems

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¹Moorhead and Cumming (2009) *Something for Nothing – Claimants views on their Funding Arrangements* (London: BERR, forthcoming); Moorhead and Cumming (2008) *Damage-Based Contingency Fees in Employment Cases - A Survey of Practitioners* (Cardiff: Cardiff Law School Working Paper Series; Moorhead Richard and Peter Hurst (2008) "Improving Access to Justice" Contingency Fees: A Study of their Operation in the United States (London: Civil Justice Council)

² The jurisdiction is of course England and Wales, but the customary subsuming of Welsh identity is adopted

³ Sir Rupert Jackson's review is due to report by the end of 2009

directly associated with health/safety issues)⁴ as well as stress-related illness.⁵ Advice and representation services are provided by a range of funding, although the absence of legal aid funding for tribunal representation has been a frequent target for criticism. Most cases are funded privately or supported by trade unions or legal expenses insurance. Large numbers of claimants either give up or represent themselves; although there is some local authority and pro bono representation.

In England and Wales, contingency fees are an increasingly important, and persistently controversial, element of the funding landscape for legal services. Colloquially known as 'no win, no fee' agreements,⁶ contingency fee agreements fall into two types:

- Conditional Fee Agreements (CFAs) are permitted in most areas of litigation other than family and criminal law. The distinguishing characteristic of this species of contingency fee is that costs are calculated on the basis of the work done by lawyers (in terms of hours spent on a case).
- Damage-based contingency fees (DBCFs) are equivalent to American-style contingency fees. Here the distinguishing characteristic is that the fee is calculated on the basis of a percentage of compensation awarded or paid.

Interestingly, when CFAs were being introduced, DBCFs were ruled out as a form of funding for litigation conducted through the courts. Nonetheless, their use has occurred outside of litigation. Importantly, this has arisen without significant or specific regulatory oversight. In policy terms, this is peculiar: litigation through the courts cannot be funded by paying lawyers damage-based contingency fees, but proceedings through the tribunal system can be funded by paying lawyers damage-based contingency fees.

This 'back-door' entry of DBCFs into the English system is doubly interesting because, in spite of the proclaimed controversies of American-style DBCFs, there has been remarkably little research on their use. Capable of being used in a wide-range of contexts, including benefits and

⁴ Such as personal injury, domestic violence and mental health cases.

⁵ Pleasence, P., Balmer, N.J., Tam, T., Buck, A., Smith, M. and Patel, A. (2008) *Civil Justice in England and Wales: Report of the 2007 English and Welsh Civil and Social Justice Survey*, London, Legal Services Commission, LSRC Research Paper No. 22 (London: LSRC), p. 38.

⁶ Whilst 'no win, no fee' implies a services that is without charge, it is important to emphasise that 'no fee' has a specific meaning which depends on the approach of the advisers involved. The phrase does not specify the charges that may be levied if one *does* win. Further, even if one loses, certain charges may be levied which are not defined as a 'fee'.

child support cases, they appear (on anecdotal evidence) to be most common in the context of employment cases. Latterly, their use in equal pay cases has become particularly controversial.

Damage-based contingency fees are not permitted in civil litigation⁷ principally because of a concern that damage-based contingency fees provide lawyers with too strong an interest in the result. This may have particular impacts on the cases they take on (the suggested likelihood that they may bring too many weak cases, for instance) and how they process those cases (with damage-based contingency fees being more likely, at least in theory, to lead to lower settling of claims). There are also European professional code obligations, which bind (for example) the Law Society and forbid a *pactum de quota litis* (cases where the lawyer takes a share of the result).⁸

Whilst, in principle, the same concerns apply equally to employment tribunal cases, some practitioners have developed a damage-based contingency fee-based element to their practice. Initially questioned on professional ethics grounds, the Law Society permits such arrangements on the basis that tribunals are 'non-contentious' business and so the use of DBCFs is not prohibited either by Statute or by professional rules. Barristers appear to be prohibited from accepting work on the basis that tribunal work is litigation.⁹

The provenance of damage-based contingency fees in employment cases is an interesting contrast to the origin of CFAs. DBCFs developed through a somewhat contentious definition of non-contentious and without any significant regulatory attention. In contrast, the 'legalisation' of conditional fees was accompanied by much debate. Significant and onerous rules were put in place to regulate these agreements and, in particular, the information provided to clients. The rules, themselves designed to protect claimants from inadequate costs advice from their lawyers, were utilised by defendants in challenges to the enforceability of the agreements, anxious to avoid responsibility for fees in cases they had lost. These rules have subsequently been relaxed and largely shifted into

⁷ They are permitted for third party funding arrangements. See, Mulheron, Rachael and Peter Cashman (2008) *Third party funding: a changing landscape* 27 (3) Civil Justice Quarterly 312-341. The impact on the client may be similar but incentives on the funded lawyers may be quite different.

⁸ CCBE (2006) *Code of Conduct for European Lawyers* (Brussels: Conseil des barreaux européens - Council of Bars and Law Societies of Europe), para. 3.3.1.

⁹ <http://www.barcouncil.org.uk/about/instructingabarrister/fees/> and private communication with Bar Standards Board on file with author.

the sphere of professional regulation. Nevertheless, it is fair to say CFAs have been highly visible and regulated and the opposite is true of DBCFs. That is not to say that DBCFs have been without controversy. Commentators have accused them of, amongst other things: causing nuisance claims;¹⁰ restricting access to justice only to the quick and easy cases;¹¹ creating a conflict of interest between lawyer and client (particularly in relation to settlement);¹² encouraging non-solicitors to become involved in employment claims;¹³ and, promoting the use of aggressive advertising.¹⁴

On the other hand, the arrangements have been credited with increasing access to justice.¹⁵ On the face of it, DBCFs are also considerably simpler than CFAs. There are not the complications engendered by ATE premiums and the associated costs recovery and success fees are calculated by reference to a clear outcome (a percentage of compensation) not some unpredictable 'base cost' based on hours worked. Nevertheless, the idea that a client pays nothing if they lose and only pays costs out of compensation of a fixed proportion (say 30%) if they win, can also be wide of the mark. There remain issues around the funding of

¹⁰ Avery Katz, *The effect of frivolous lawsuits on the settlement of litigation* (1990) 10(1) *International Review of Law and Economics* 3; B. Clement, *Tribunals to crack down on 'compensation culture'* *The Independent* (London 8th May 2000); B. Clement, *'Compensation culture' sweeping Britain* *The Independent* (London 13th September 2004).

¹¹ Jane Johnson and Geraldine Hammersley, *Access to justice: employment tribunal contingency fees, what chance of justice?* (2005) 14 *Nottingham L.J.* 19, pp.25, 28; H.M. Kritzer, *Contingency fee lawyers as gatekeepers in the civil justice system* (1997) 81(1) *Judicature* 22.

¹² Geraldine Hammersley & Jane Johnson (2004) *The Experiences & Perceptions of Applicants Who Pursue Claims at Employment Tribunals*, paper presented at Work, Employment & Society Conference, UMIST. 1-3 September 2004, http://www.britisoc.co.uk/user_doc/Hammersley.pdf last downloaded 11 July 2008 pp.12-13; Geraldine Hammersley, Jane Johnson and David Morris (2007) *The influence of legal representation at Employment Tribunals on case outcome* (London: BERR) p.15 (though see also observations at p.18); Johnson and Hammersley (2005) cited note 11, pp.26-7; G.P. Miller, *Some agency problems in settlement* (1987) 16 *Journal of Legal Studies* 189; P.L. Latreille, J.A. Latreille and K.G. Knight, *Making a difference? Legal representation in employment tribunal cases: evidence from a survey of representatives* (2005) 34(4) *I.L.J.* 308, at 310, quoting B. Hay and K.E. Spier, *Settlement of Litigation* in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (Macmillan, Basingstoke 2002) p.442 (see also pp.444-6).

¹³ See, for example, R. Jones, *Cowboy advisers targeted: Inquiry into claims malpractice* *The Guardian* (London 13th August 1999); S. Webster, *Age of the no win, no fee outfits*, *The Times* (London 4th October 1994) (these articles are predominantly concerned with personal injury cases but there is some reference to employment cases).

¹⁴ See, for example, Hammersley and Johnson (2004) cited n12, p.14; J. Sherman, *Men are to pay a high price for sexual equality* *The Times* (London 12th March 2007).

¹⁵ Hammersley *et al* (2007) cited n12, p.20-21; Johnson and Hammersley (2005) cited note 11, p.28.

disbursements and deductions from compensation payments. VAT may also complicate the picture.

Cost rules

There is a further important characteristic of cases brought in employment tribunals that distinguishes them from cases brought in the courts of England and Wales. In court cases, costs usually follow the event and many of the costs associated with CFAs are recoverable from unsuccessful opponents. In tribunal cases, the situation is that ordinarily each party bears their own costs. This means that any compensation recovered by a claimant will be reduced by any payments made to their lawyer and also, importantly, that a claimant can bring a case without significant risk of having to pay their opponents costs if they lose.¹⁶ In respect of costs, the situation is more analogous to tort cases in the United States than it is to civil cases in our courts.

II. Methods

As noted above, the empirical elements of this paper are based on two studies. The methods are outlined here, but further detail is contained within the relevant reports.

The Practitioner Survey

We interviewed 191 employment advisers: those working in solicitors firms and in non-solicitor settings (where they do claimant work we refer to these generically, for convenience, as claims management consultants (CMCs)). The study aimed to look at a number of issues:

- To provide data from practitioners on the extent to which they use damage-based contingency fees in employment cases;
- To provide data from practitioners on the nature of the agreements they use;
- To understand the types of cases in which damage-based contingency fees are (or are not) used;
- To consider the pros- and cons- of using damage-based contingency fees from the perspective of practitioners; and,
- To consider any broader issues practitioners believe damage-based contingency fees raise in practice.

The response rate for solicitors was 57%, a very respectable figure, but we are likely to have a bias towards those who *do* have some experience of damage-based contingency fees in our sample. We do not claim, therefore, that this sample is necessarily representative of all employment

¹⁶ Tribunals have powers to award costs in certain limited circumstances and do so infrequently.

firms, but it does represent a wide and significant range of practice within the employment advice sector. Response rates were much lower for Claims Management Consultants (the response rate was as poor as 16%). It is important to acknowledge that survey data has limitations. Whilst we had high response rates and our reading of the data suggests practitioners generally discussed their approaches with candour, there are limits. Practitioners may not always be able to describe accurately what they do and may also not wish to reveal particularly aberrant behaviour. We have been mindful of this in conducting our analysis and further address this through triangulating our findings with SETA data (see below) and the broader literature on contingency fees where possible.

SETA data

In addition to the interviews we conducted some original analysis of survey data collected for the (then) Department for Trade and Industry (DTI). This Survey of Employment Tribunal Applications (SETA) data dates from 2003 and covers a large random sample of completed employment tribunal applications. SETA data on employment tribunal applications contains data on case types, advice/representation and outcomes. It identifies claimants who appear to have brought cases using DBCFs and other sources of funding, albeit with some error. That said, it may provide important insights into the impact of DBCFs on actual outcomes. It is important to emphasise that, unlike our interviews, the data is confined to cases where an employment tribunal application is issued: the results may not be typical of all employment claims.

Claimants interviews

The claimants interview project was based on conducting short, qualitative telephone interviews with individuals who had issued claims in the Employment Tribunal using one of the four funding arrangements (i.e. private payment, DBCFs, legal expenses insurance (LEI) and trade unions funding).

The sample was taken from a list of individuals who participated in the recent SETA survey and agreed to be recontacted.¹⁷ Under the SETA survey, BMRB contacted a random sample of employment tribunal applicants¹⁸ whose cases had completed by between January 2007 and January 2008. It follows that the sample would not include those who had not issued an application in an employment tribunal. It did include a range of outcomes for tribunal applicants however (those who withdrew their claim, those who settled their claim and those who proceeded to a

¹⁷ Results are to be published by BERR (forthcoming, Spring 2009).

¹⁸ They also interviewed defendants but defendants did not fall within the remit of our study.

final tribunal hearing). Claimant response rates to requests for interviews was 66%.

Having conducted their interviews, BMRB kindly provided access to lists from which we were able to identify claimants who were likely to have been funded under one of the four funding types we were interested in. On the basis of SETA data, it was possible to compile separate and largely accurate lists of those who were likely to have funded their case privately on a 'normal' hourly or fixed fee basis and those who funded their case using a no win no fee agreement. The SETA survey data did not distinguish between LEI and TU clients, so we compiled one combined list of claimants apparently funded under either of these arrangements and sought to interview roughly equal numbers within each group.

We contacted 128 individuals by letter; aiming to interview about 15 individuals from each funding group.¹⁹ Once this target was reached we sought no further interviews,²⁰ meaning that only 107 of those we wrote to were telephoned. The response rate (excluding failed contacts) was 78%.²¹ All interviews were conducted on the telephone according to an interview schedule. The key questions were generally open, to encourage free-flowing discussion on the issues. Interviews were recorded digitally and subsequently transcribed in full. The transcripts have been analysed using NUD*IST N6, a qualitative data analysis package, to ensure the themes emerging during these conversations were properly reflected in analysis. Interviews also resulted in a small amount of quantitative data, which was analysed using SPSS where appropriate.

As a qualitative study, it is important its limitations. Whilst there were high response rates and claimants discussed the issues candidly, their

¹⁹ All potential interviewees were sent a letter and information sheet setting out the research aims and inviting them to participate, making clear their participation was voluntary and that they could withdraw from an interview at any time. Contact was made at various times of the day to ensure maximum and unbiased coverage of the sample provided by BMRB. Consent to participation was confirmed on the telephone before any interview commenced. All data was anonymised and securely stored.

²⁰ Once we had interviewed 17 private payment and DBCF clients we simply stopped contacting individuals on each of those lists. The position was slightly different for the LEI/TU list. We could not tell without ringing which of the two funding arrangements the individual had used. In seeking (unsuccessfully) to reach our target for LEI interviews we contacted some trade union clients and were forced to decline interview once funding arrangement was established.

²¹ 18 individuals declined to be interviewed, primarily because, despite agreeing to be recontacted at the time of the SETA survey, they did not want to take part in another survey. 25 individuals were 'failed contacts'. This generally meant that the individual was contacted at least six times but we failed to get an answer, though in some cases this meant that the contactee had not used a relevant funding arrangement.

views are confined by their own experiences, expectations and understandings. As will be seen, legal funding arrangements are complex, and claimant understandings of them limited. They may also seek to conceal aspects of their behaviour or understanding which they feel, rightly or wrongly, would show them in a bad light. Care was taken to reflect on this in the analysis. Further, the sample size, respectably large as it was for such qualitative work, means it would be premature to generalise to all employment tribunal claimants on the basis of any findings. Other than the absence of claimants who did not get to the stage of issuing an application, there are no obvious biases in our sample. Nevertheless, the numbers are still too small to say with confidence that our results are typical of all employment claimants. Qualitative analysis provides an indication of the kinds of issues raised by these claimants' experiences and the prevalence of views amongst *this* sample but only further study in this area could test for generalisability.

III. Findings

Access to justice imbalances

The latest LSRC figures for employment claims present the following picture for people with employment (and other) problems. Table 1 shows those with employment problems to be broadly in the mid-range in terms of the proportions getting advice, those not doing anything are relatively few and far between (6%). Between a quarter and a fifth handled their employment problem alone and about a further one in ten tried to get advice, failed and then handled it alone. Thus over 30% were in fact handling their problem alone, without any apparent advice.

It is worth emphasizing that the only problem types where proportionately more respondents took the trouble to seek advice but could not find it were: unfair police treatment; mental health; immigration; housing (rented); neighbours; and welfare benefits. Furthermore, previous research has identified employment problems as a key 'trigger' problem likely to lead to a cascade of other problems²² and as already noted employment problems appear to have significant impacts on physical health (according to the latest LSRC figures comparable to relationship breakdown and only 'beaten' by problems directly associated with health/safety issues)²³ as well as stress-related illness.²⁴

²² Moorhead R, Robinson M and Matrix Research and Consultancy, (2006) *A trouble shared – legal problems clusters in solicitors' and advice agencies*, (London: Department for Constitutional Affairs).

²³ Such as personal injury, domestic violence and mental health cases.

²⁴ Pleasence et al 2008, op.cit. 38

Given the apparent importance of employment problems both as triggers for other problems and, it seems safe to assume, a significant precursor to social exclusion, the limited legal aid help for members of the public is of concern, particularly given a CLS priorities targeted at reducing social exclusion. Legal aid is not generally available for representation in employment tribunals, although legal help is available for prior advice and assistance and there may be other sources of free assistance from (say) local authority funded agencies. Members of the public may also have legal expenses insurance or trade union membership which covers representation (see further below). The reasons for this are largely historical. Employment tribunals (and their predecessors, industrial tribunals, were designed to be sufficiently informal to enable lay litigants to represent themselves satisfactorily. This somewhat dubious claim has largely been debunked by a series of research studies (see, for example, Genn and Genn 1989; Genn et al 2006), yet successive governments have clung tenaciously to the view that employment problems should not be further funded by the legal aid scheme.

Table 1: Response to Civil Justice Problems by Problem Type²⁵

	Did nothing	Handled Alone	Obtained advice	Tried and Failed to get Advice	Tried and Failed to get Advice and Handled Alone	N
Discrimination	35.8%	17.3%	39.5%	4.9%	2.5%	81
Consumer	3.9%	61.1%	28.2%	0.2%	6.6%	543
Employment	6.4%	22.3%	61.7%	0.5%	9.0%	188
Neighbours	12.8%	18.0%	58.4%	4.9%	5.9%	305
Housing (owned)	4.3%	18.6%	75.7%	0.0%	1.4%	70
Housing (rented)	4.4%	45.1%	39.6%	0.0%	11.0%	91
Homelessness	20.4%	9.3%	64.8%	3.7%	1.9%	54
Money/debt	2.4%	47.8%	43.1%	0.0%	6.7%	253
Welfare benefits	5.2%	38.5%	45.9%	0.0%	10.4%	135
Divorce	4.3%	15.9%	78.3%	0.0%	1.4%	69
Post-relationship	4.8%	16.9%	73.5%	0.0%	4.8%	83
Domestic violence	10.8%	21.6%	64.9%	2.7%	0.0%	37
Children	2.2%	32.6%	63.0%	0.0%	2.2%	46
Personal injury	20.6%	9.9%	63.1%	5.0%	1.4%	141
Medical negligence	17.9%	25.0%	50.0%	5.4%	1.8%	56
Mental health	0.0%	25.0%	62.5%	12.5%	0.0%	8
Immigration	0.0%	11.1%	77.8%	0.0%	11.1%	9
Unfair police treatment	31.3%	21.9%	31.3%	9.4%	6.3%	32
N	193	761	1081	38	128	2201

²⁵ This table is derived from Pleasence et al (2008) Table 28. I have removed individual cell Ns to allow a clearer focus on the percentages.

The LSRC figures on access to justice only take us so far. They provide no indication of the extent to which those with problems bring claims, or how those claimants are advised or assisted. Information on advice received by those with problems is also rather general in nature.

It is, however, reasonably well-known that claimants are less likely to have representation than defendants. Hayward et al indicate:²⁶

Two fifths of applicants nominated a representative on the [then] IT1 form, compared with 55 per cent of employers on the [then] IT3. The most common source of help for both parties when completing the claim and response forms was a solicitor (44 per cent of applicants compared to 71 per cent of employers).

Fifty-five per cent of applicants and 59 per cent of employers used a representative to help with their case on a day-to-day basis. Employers were, however, more likely than applicants to be represented at a full tribunal hearing (72 versus 42 per cent).

Information on the depth of advice and assistance provided to the two groups is less readily available. In the practitioner survey, we were able to estimate the resources devoted within these firms to respondents and claimants respectively by multiplying the estimated proportion of work that is done for claimants by the number of team members. A similar calculation is then done for respondent work. From this it can be estimated that, within our sample firms, the equivalent of 117 fee earners were engaged in claimant work and 334 fee earners were engaged in respondent work.

If we assume that these personnel were specialists and representative of employment specialists generally, this is a very significant differential in the extent to which specialist personnel are devoted to the work of respondents over claimants.

The analysis can be taken one step further by looking at the chargeable costs incurred on the two types of work by multiplying the fee earner equivalents above by 1100 hours (as an assumed number of chargeable hours per annum) and the hourly rate given by firms in estimating costs (see below). If claimant hourly rates are lower generally than respondent hourly rates this is likely to overestimate the fees generated by claimant work. Within this sample this suggests more than three times as much is spent on respondent work.

- £21.5m would be estimated as devoted to claimant work
- £70.7m would be estimated as devoted to respondent work

²⁶ Hayward et al op.cit., page xix

It should be emphasised that these are estimates only. A number of assumptions would have to hold true for them to be fully accurate. Nevertheless they provide an interesting indication of the legal resources being made available currently to claimants and respondents. Respondents outspend claimants by a factor of three: partly because they are more often advised and represented and partly, it would seem, because they spend more per hour on their cases.

A final part of the access to justice picture is claimant perceptions about sources of advice. There is very little data on this. Genn et al's report on tribunal users touched on claimant perceptions of legal costs, suggesting that the most significant barrier to seeking advice from a solicitor was the anticipated expense.²⁷ Such comments came from those who had used a solicitor and those who had not but perceived them as expensive. More specifically, respondents who thought that they would have to meet the costs of a claim themselves (either because they were unaware of no win no fee agreements, or because they did not think they would be eligible for them) often felt cost was a significant concern.²⁸ One might expect these concerns to overstate the problem. In particular, the reported prevalence of advertising of no win no fee agreements for employment cases is casually linked to claims of a compensation culture. Our interviews with claimants, however, revealed little if any influence of advertising on decisions to claim or decisions about which adviser to take suggesting advertising has had very little impact on a key group (those with actual claims). Similarly, they had little or no understanding of the funding options available to them. A deduction that might be made from this evidence is that consumer understanding of funding options is worryingly low and for those that assume they cannot afford it such knowledge is a major impediment to the bringing of claims.

Prevalence and use of DBCFs

It is against this background that an assessment of DBCFs and their impact on access to justice takes place. Amongst employment specialists interviewed, most did not use contingency fees:

- 127 respondents (66%) said they did not use damage-based contingency fees; the remainder did use damage-based contingency fees.
- Only 11% of those we interviewed used them in more than 50% of their cases. Firms that are smaller and concentrate on claimant work appear more likely to do damage-based contingency fee work. The remainder used them in up to 25% of their cases.

²⁷ Genn, Hazel, Ben Lever, Lauren Gray and Nigel Balmer, (2006) Tribunals for diverse users DCA Research Series 1/06, p.79.

²⁸ Ibid, p.57.

Our data also suggests that damage-based contingency fees are not generally a new phenomenon. One respondent indicated that his firm had been using them for 20 years and over half of those who used them had been doing so for over five years. Although firms in the sample who used damage-based contingency fees in more than 50% of cases had been using damage-based contingency fees for longer on average (7 years) than firms using them up to 25% (5.5 years), the differences did not appear to be significant.²⁹ The vast majority appear to have begun using them after the introduction of CFAs in 1995: 91% had begun using them within the last 10 years. In that sense, it might be surmised that the introduction of CFAs signalled the legitimacy of contingency fees more generally, even though the legislative debates singled out DBCFs as an anathema, at least in the context of civil litigation.

DBCFS access to justice and the 'explosion' in claims

For those without legal expenses insurance, and who are not members of a Trade Union,³⁰ DBCFs provide an alternative method of funding employment litigation. For those unable to afford to pay privately for legal representation and unable to gain access to free assistance and/or representation, DBCFs present the only practicable alternative to self-representation.³¹ Prima facie, then, proponents suggest DBCFs offer an important means of increasing access to justice.

There is, however, a popular critique of this argument which must be dealt with. Under the critique, DBCFs do not promote justice - they simply lead to an 'explosion' of dubious claims. Both interpretations assume the same underlying phenomenon: that DBCFs have increased the number of employment tribunal claims brought, but take very different views on the merits of the cases brought. If DBCFs increase the number of claims brought, and the proportion of claims with good merits that are brought, then any increase would signal an improvement in access to justice. If DBCFs increased the number cases but also the proportion of dubious or meritless cases that were brought, then a negative interpretation would be more appropriate. Let us first consider whether there is any plausible relationships between DBCFs and claim numbers.

²⁹ Two-tailed t-test, $p = .230$

³⁰ A current source of controversy for Trade Unions is that some of their members are taking cases on DBCFs even though, for cases with merits, they would be entitled to free assistance from their Union.

³¹ The Legal Services Commission funds limited advice and assistance but not generally representation in employment cases. Local authorities may also fund some assistance and/or representation but levels of funding around the country are generally assumed to be patchy.

DBCFs and Trends in Employment Tribunal Cases

If the explosion criticism is well-founded, one would expect to see rising numbers of employment claims corresponding with increasing use of DBCFs. Commentators have pointed to a surge of claims in the 1990s.³² One report suggests that in the late 1980s there were only around 40,000 claims per year;³³ in 2006/2007 there were over 200,000.³⁴

If such a rise were to be blamed on DBCFs, we would expect them to be highly prevalent. However, the best available evidence of their prevalence is that an estimated 11% of Employment Tribunal claims were being handled under DBCFs in 2003.³⁵ This figure is consistent with our data from specialist practitioners. Such a low figure suggests that they cannot be held responsible for such sharp increases in claims, at least up to 2003. Further, it is likely that DBCFs have only become established in the market in any numbers relatively recently. Our survey data suggests that about half of the employment specialists began to use them in the last five years and most within the last ten years. Beyond this, there is no hard data on the extent to which use of DBCFs may have increased in recent years,³⁶ but let us assume for the moment that use of DBCFs in employment cases in the period over firms have indicated they began to adopt them. We can examine existing data on advice seeking and claiming in order to evaluate the extent to which trends in advice seeking or claiming have also increased. In this regard, it is interesting to note that recent tribunal statistics (between the periods of 1998/1999 and 2006/2007) (

³² Hammersley *et al* (2007) cited note 12 page 1; Johnson and Hammersley (2005) cited 11, pp.25, 28

³³ Latreille *et al* (2005) cited note 12, p.308

³⁴

http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAS_06-07.pdf

³⁵ Hayward *et al* (2004) *op.cit*, p.41.

³⁶ Forthcoming SETA data from BERR/BMRB should begin to address this issue.

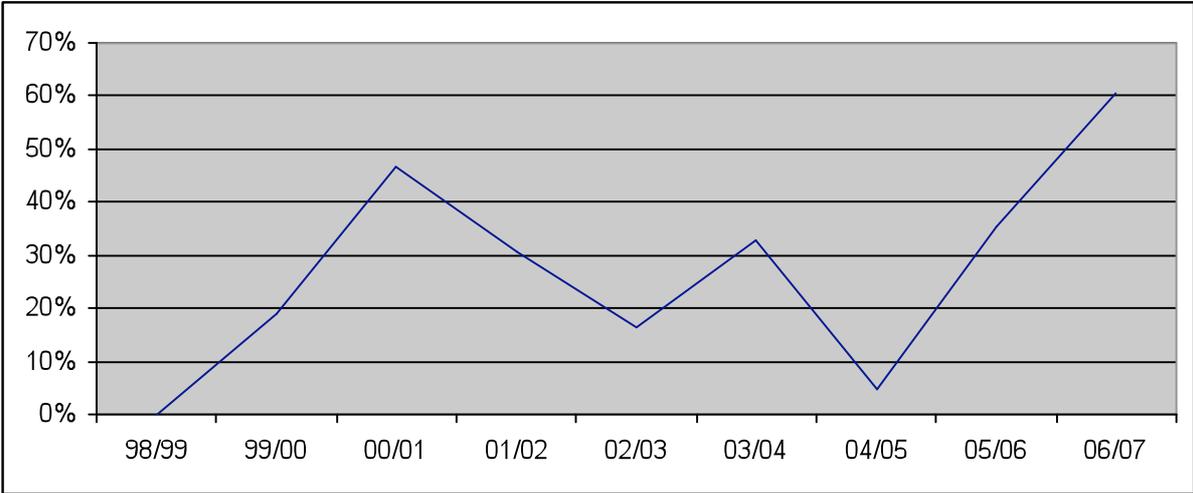
Table 2)

Table 2: Tribunal Claims 1998-2007³⁷

	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07
Individuals Claiming	-	-	-	-	98,617	115,042	86,181	115,039	132,577
Number of Claims	148,771	176,749	218,101	194,120	173,322	197,365	156,081	201,514	238,546

The results for total claim numbers are represented graphically in Figure 1.

Figure 1: Cumulative increase in claim numbers



Broadly the trend is up, although there is clearly considerable volatility in the figures. Indeed, between 2000/01 and 04/05, the trend was broadly downwards, when a substantial proportion of our interviewees appear to have taken up contingency fees for the first time, and a substantial increase since 2004/05. This rise is chiefly attributable to increased equal pay and sex discrimination cases (

³⁷ <http://www.employmenttribunals.gov.uk/publications/publications.htm>

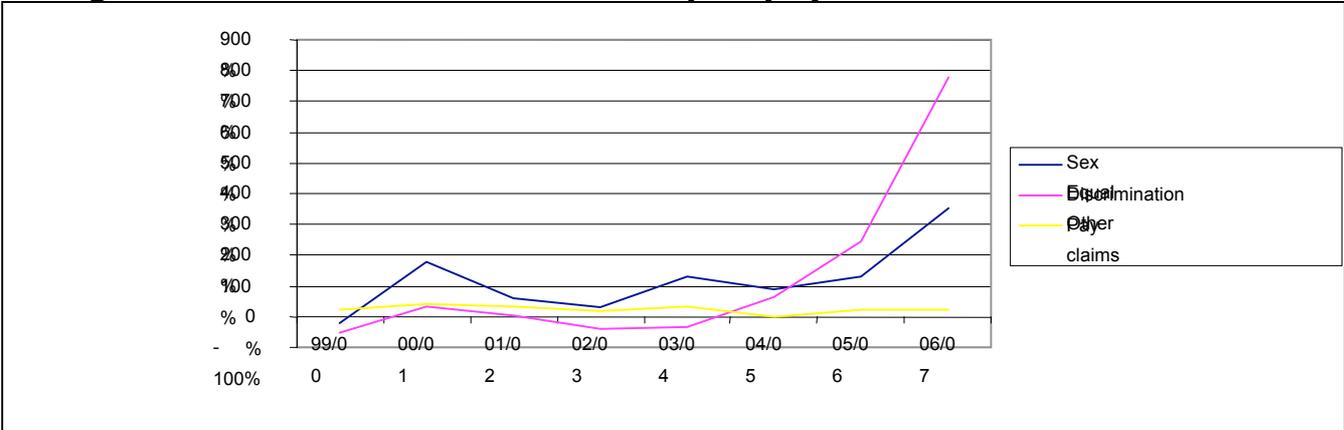
Table 3):

Table 3: Sex discrimination and equal pay claims 1998-2007³⁸

	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07
Sex Discrimination	6,203	4,926	17,200	10,092	8,128	14,284	11,726	14,250	28,153
Equal Pay	5,018	2,391	6,586	5,314	3,077	3,217	8,229	17,268	44,103
Other claims	137,550	169,432	194,315	178,714	162,117	179,864	136,126	169,996	166,290

The results can be best seen in graphical form.

Figure 2: Sex discrimination and equal pay claims 1998-2007



Thus if DBCFs had had a *general* impact on claim numbers we would expect to see a significant increase in non-discrimination/equal pay claims over this period and in latter years in particular. Any increases amongst these cases have been relatively modest over the 7 year period (between 0 and 20%) and importantly there is no upward trend. This is not consistent with DBCFs fuelling an upward trend in underlying claims.

There is, however, potential for DBCFs to have fuelled the dramatic increase in claims in sex discrimination and equal pay cases. That argument would depend on DBCFs being particularly attractive in those cases, relative to employment tribunals generally. There are two reasons for thinking they might be. Firstly, discrimination cases are not subject to

³⁸ Ibid

the normal limits on compensation and so may give rise to more profitable DBCFs (although the cases may also be more complex which would inhibit profitability). Secondly, the multi-party nature of some of these claims may make them more profitable for firms geared up to take them.³⁹ There are, however, a couple of reasons for being somewhat cautious about that claim. One is that large numbers of these cases (anecdotally the majority by some margin) are brought by Trade Unions not by firms operating under NWNF agreements, although it is alleged this has been prompted by the activities of DBCF firms (see further below). Secondly, practitioners are generally wary of bringing equal pay claims because of their complexity, although discrimination claims were generally seen as more suitable (See

Table 7 below at page 37). There are, however, some firms who specialise in equal pay claims and plainly bring such claims in large numbers.⁴⁰

Alternative explanations for growth in claims numbers

Whilst it is likely, therefore, that DBCFs have contributed to a significant growth in the number of equal pay and discrimination claims, and plausible that they may have contributed to modest growth in other claims, it is important to emphasise that there is, as yet, no hard evidence of the underlying trends in the use of DBCF funding. It is also important to emphasise that we should not deduce from growth in claims alone that this is due to DBCFs. There are other plausible explanations for the growth in such claims. The large scale problems in relation to public sector pay are a structural problem emphasised but not caused by DBCFs. Further, commentators have suggested a number of alternative reasons to explain rises in tribunal claims over time. Firstly, there is the obvious point that as new employment legislation is introduced new rights emerge and as a result employees have greater scope to bring tribunal applications. As Hammersley and Johnson have pointed out,⁴¹ the 1990s

³⁹ Because of economies of scale from having multiple, similar claims against a common employer.

⁴⁰ In particular, Stefan Cross Solicitors handle large numbers. One report suggests upward of 7,000 equal pay cases on no win no fee, though this figure is likely to be out of date: see, for example, *Lawyer of the week: Stefan Cross* Times, April 3, 2007

⁴¹ Hammersley and Johnson (2004) cited note 12, p.2

and early 2000s saw much new employment legislation, including the Employment Rights Act 1996, the Employment Relations Act 1999 and the Employment Act 2002. Further, the introduction of the Human Rights Act 1998 may have led to increased awareness of rights.⁴² Equal pay disputes have grown against major public sector job evaluation initiatives. Importantly, Burgess et al demonstrated the importance of underlying socio-economic drivers of employment tribunal cases with factors such as the rise in numbers of women in the workforce; increases in the numbers of people employed in small enterprises; and, a decline in manufacturing and trade union membership accounting for significant levels of growth in employment tribunal applications.⁴³

It must also be borne in mind that tribunal statistics only account for claims involving an application to tribunal and do not account for claims which settle before proceedings are issued. However, data from Genn's 1999 'Paths to Justice' survey, combined with LSRC surveys in 2001, 2004 and 2006, all of which reviewed justiciable problems in England and Wales, shows no significant change in reported incidence of employment problems.⁴⁴ If DBCFs had substantially increased the public's propensity to claim, we might expect to see an underlying increase in their identification of employment problems and we do not.

As already noted, the increase in tribunal applications may be interpreted as giving rise to more, and more dubious claims, or positively as increasing access to justice. Let us turn now to the issue of quality, which may help us resolve the dilemma of whether any increase is positive or negative.

Access to Justice or Explosion of Spuriousness? Quality - the Arguments and Evidence

Unlike in ordinary civil litigation, in employment cases the winning party does not usually recover its costs from the losing one, and under a DBCF a claimant does not have to pay his own lawyer's fees if the case is lost.⁴⁵

⁴² Hammersley *et al* (2007) cited note 12, p.1

⁴³ Burgess, Simon, Carol Propper and Deborah Wilson (2001) *Explaining the Growth in the Number of Applications to Industrial Tribunals 1972-1997* (DTI: London)

⁴⁴ H. Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart Publishing, Oxford 1999) p.24; P. Pleasance, *Causes of Action: Civil Law and Social Justice* (2nd Edn, The Stationary Office, Norwich 2006) p.27; P. Pleasance, N. Balmer and T. Tam, *Civil Justice in England and England and Wales: Report of the 2006 English and Welsh Civil and Social Justice Survey* (LSRC London 2007)

<<http://www.lsrc.org.uk/publications/csjs2006.pdf>> accessed 29th August 2008, p.11.

⁴⁵ See, for example, J. Robins, 'Fighting for equality' (2007) L.F. 50(Aug) 8, in which some solicitors are quoted as supporting a change in the costs regime in employment

Consequently, a contingency claimant has minimal financial risk from losing a case; a situation which is often criticised as encouraging nuisance claims. The idea is that feckless individuals can 'have a go' without the fear of incurring a debt. Employers faced with such a claimant may simply settle for financial reasons rather than defend meritorious cases, which means that potentially unscrupulous representatives could bring unmeritorious claims in the hope of obtaining a 'nuisance settlement'.

Whilst the academic evidence supports the proposition that costs shifting acts as a partial brake on unmeritorious claim, it has other drawbacks: in particular leading higher costs and the major disincentives to risk averse defendants.⁴⁶ Theoretical economics and empirical evidence also tend to support the view that, because a NWNF practitioner has to invest their own time, and possibly other costs, in a case, they are going to be careful about the cases they take on. Thus DBCFs may improve the quality of cases (quality in the sense of the underlying merits of the case) that are brought, because practitioners carefully select cases with good prospects of success.⁴⁷ Alternatively, it is possible that these incentives operate to restrict access to justice: practitioners are overly cautious, cherry-picking only the very best cases, or are confined by the economics of the situation to reject meritorious but low value cases which would not be profitable. The latter has already been identified as a potential problem in relation to employment cases.⁴⁸

tribunals. Anecdotally we heard evidence of a stiffening of the approach to costs in some tribunals.

⁴⁶ Rickman, Neil (1994) The economics of contingency fees in personal injury litigation. 10 Oxford Review of Economic Policy. 34 – 50; Hause. John C. (1989) Indemnity, settlement and litigation or I'll be suing you. 18 Journal of Legal Studies. 157 – 180; Katz, Avery (1987) Measuring the demand for litigation: Is the English rule really cheaper? 3 Journal of Law, Economics and Organisation. 143 – 176; Snyder, Edward A. and James W. Hughes (1990) *The English Rule for Allocating Legal Costs: Evidence Confronts Theory* 6 Journal of Law, Economics and Organization 345-380 and Snyder Edward A. and James W. Hughes. (1995) *Litigation and settlement under the English and American rules: Theory and Evidence*. 38 Journal of Law and Economics 225.

⁴⁷ Helland, Eric and Alexander Tabarrok (2003), *Contingency Fees, Settlement Delay and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 Journal of Law, Economics, and Organization 517 -521.; Clermont Kevin M. & John D. Currihan (1978), *Improving on the Contingency Fee*, 63 Cornell Law Review 529; Dana, J. & K. Spier (1993), *Expertise and Contingent Fees: the role of asymmetric information in attorney compensation*, 9 J Law Econ Org 349; Kritzer (2004) op.cit.

⁴⁸ Hammersley *et al* (2007) cited note 12, p.21 ; Johnson and Hammersley (2005) cited note 11, p.28

Quality and success rates

There is data available on the outcome of DBCF and non-DBCF cases from which it is possible to construct a picture of success rates.⁴⁹ SETA data on employment tribunal applications contains data on fee types, advice/representation and outcomes. We conducted some analysis of the available dataset and these results are set out in Table 4. It should be emphasised that these results are confined to cases where an employment tribunal application was issued. Because it is possible for an applicant in the SETA survey to have had some (albeit insubstantial help) from a range of advisers, results are also confined to those cases where an employment tribunal applicant gained most help from either a solicitor or a claims consultant. The SETA dataset identifies DBCFs but with some error⁵⁰ as a result two definitions of DBCF used.⁵¹ Cases where a person has their main support from a lawyer or an employment consultant which may have been conducted under legal expenses; trade union or other funding are labelled 'Not DBCF' below. The outcome data is that collected from the SETA survey which has the advantage of distinguishing more accurately between cases withdrawn and cases settled privately than Employment Tribunal statistics.⁵² Success for the claimant is defined in the final row of the table as being success at hearing or a settlement.⁵³

Table 4: Success Rates in Employment Tribunals using DBCF

⁴⁹ We had some data from our survey too but this was not very reliable.

⁵⁰ See, Hammersley et al (2007) cited note 12, page 11 onwards.

⁵¹ The broader definition treats all claimants who said they had to pay their adviser "if they won the case" as being under contingency fees. The narrower definition treats only those who said they had to pay "if they won the case" and that they paid only if they won. Because it is possible for someone to pay some costs win or lose under DBCFs, it is possible that either definition is more accurate; hence the need to look at both. See Hammersley et al (2007) page 11 onwards cited at note 12, who discuss this in more detail and tend to concentrate on the broad definition in their analysis.

⁵² Hayward et al cited note 26.

⁵³ It should be recognised that a claimant may not regard the terms of a settlement as a success, but taking this into account would overcomplicate the analysis.

	Narrowly	Defined	Broadly	Defined	Total
	DBCFC	Not DBCFC	DBCFC	Not DBCFC	
Applicant unsuccessful at hearing	11%	8%	9%	9%	52
Applicant successful at hearing	7%	11%	9%	11%	59
ACAS settled	57%	54%	55%	54%	320
Privately settled	12%	14%	16%	12%	81
Withdrawn	12%	12%	9%	13%	68
Dismissed	2%	1%	2%	1%	9
Total	112	477	243	346	589
Success Rate	76%	79%	80%	77%	78%

Source: Author's analysis of SETA 2003

The differences in distribution for DBCF and non-DBCFC cases are neither marked nor statistically significant:⁵⁴ for both kinds of case a success rate was between 76% and 80%. More sophisticated analysis which takes into account the underlying characteristics of these cases may reveal deeper patterns,⁵⁵ but Table 4 suggests that in terms of overall outcomes impact by fee type may be negligible. If outcome is taken as an indicator of quality, contingency fees appear to neither improve nor weaken the quality of cases brought. It may also suggest that practitioners are not unnecessarily risk averse in bringing contingency fee cases (i.e. they do not appear to be generally only cherry-picking 'easier' cases to run under DBCFCs).

Interview evidence

We collected interview evidence on quality issues in a number of ways. Firstly, we asked practitioners: what proportion of cases do you consider for damage-based contingency fees but decline? (Table 5)

Table 5: What proportion of cases do you consider for damage-based contingency fees but decline?

	Frequency	%
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⁵⁴ Basic inferential testing suggest they were not significantly different. Chi-square, $p = .293$ on the narrow definition and $p = .498$ on the broad definition

⁵⁵ Hammersley et al began this task with cluster analysis although more sophisticated multivariate analysis would be appropriate. They have suggested that levels of dismissal are higher for contingency fee cases, but withdrawals are lower and settlements more frequent. Hammersley et al cited note 12

0-10%	13	25
11-40%	11	21
50-65%	13	25
66-80%	8	15
81-99%	8	15
Valid responses	53	

It is evident from these results that practitioners screen out large proportions of cases in determining the availability of DBCF funding. The mean figure for the proportion of cases considered for DBCFs but then declined was 44% and half of respondents reported turning away 50% or more of potential DBCF cases. The solicitors we surveyed rejected a higher level of cases on average (48%) than claims consultants (37%), but the difference were not significant.⁵⁶ Similarly those who used damage-based contingency fees between 50 and 100% of their work were less likely to decline cases (39%) than those who used it for up to 25% of their work (48%), but again the differences did not reach significance thresholds.⁵⁷ The distributions did not differ significantly by firm size, team size, emphasis of the practice or between those who did more than 50% of their cases on damage-based contingency fee and those who did less than 25% or their cases on a damage-based contingency fee.⁵⁸

Even for those practitioners heavily dependent on DBCFs, these results are not consistent with the view that DBCFs generally give rise to a willingness on the part of employment advisers to 'have a go' come what may.

It was also very clear, when talking to practitioners, that the types of case they were interested in taking on had to have good prospects of success and sufficient high levels of compensation.

Practitioner opinions on spurious claims

The above data is consistent with practitioners assessing cases on their merits and economic return before taking a claim on a DBCF basis. Our survey also provided opportunities for the issue of spurious claims to be discussed. In particular, this was raised when interviewees were asked about issues relating to opponents using damage-based contingency fees. Around one in ten suggested spurious claims as an issue.

The main abuse in contingency fees is where representatives take on cases on the basis that the company will pay just to

⁵⁶ Two tailed T-test, p = .27
⁵⁷ Two tailed T-test, p = .28
⁵⁸ Anova and t-tests used, p > .05 on all occasions.

avoid the hassle of the case. They take on low merit cases just to get a settlement. This is essentially blackmail of employers; they payout to avoid the costs of defending the claim. (IV152) Contingency fees are propping up a system of claimants being able to have a go without fearing any consequences of paying. (IV117)

Some interviewees accused the DBCF practitioners of creating the problem. IV66 considered that they tend to conduct litigation "en masse" without assessing claim merits. Several respondents suggested that such practitioners will take on claims with little merit with the sole aim of obtaining a settlement:

The opposition takes on cases where there is a reasonable prospect of settlement and not where there is a reasonable prospect of success. (IV141)

A few accused contingency practitioners of advising claimants to bring unmeritorious claims. IV159 suggested that spurious claims are leading to respondent clients becoming "disenchanted" with the system.

The level of complaints was modest and generally made by those who did not have experience of bringing contingency fee cases themselves. Sometimes, their reasoning showed a lack of understanding of how DBCFs fees work. For instance, IV57 suggested that only claimants with weak cases would agree to lose a proportion of compensation. The likelihood of course is that claimants will lose some of their money win or lose when paying hourly. Occasionally concerns were raised by those with some experience: CM09 commented that, as a contingency practitioner, he tends to attract "perhaps less worthy cases" whilst also noting that many cases have "perfectly reasonable prospects of success".

Quality of claims and equal pay

The studies I have engaged in do not purport to speak definitively about equal pay cases, particularly given the fluidity of the situation and the fact that many cases are unresolved. Nevertheless, given the furore over equal pay cases, and the clear and significant increase in case numbers of this kind, it is important to discuss equal pay cases, partly to recognise that this is an area which gives rise to unusual and difficult problems, but also to suggest that in terms of DBCFs impact on *individual* claims, available evidence remains consistent with the view that DBCFs promote access to justice rather than an explosion of dubious claims.

It is important to preface these remarks by emphasising that for all the organisations involved in equal pay cases, the stakes are high. The issues are complex and continue to unfold.

The points above about the economics of contingency fees apply also to equal pay cases. There are some differences, notably the mass nature of these claims, but is clear by the way that equal pay cases are being

litigated that the costs of bringing even mass claims is likely to be high (although that is not say that proportionately the profits from such cases may not be higher than other employment claims) and one would expect that the practitioners bringing the cases would need to be confident, in general, of the merits of the cases that they brought.

Criticism of no win no fee lawyers in this arena have principally come from two constituencies: local government and the trade unions. In the simplest of terms, they indicate that presence of DBCF lawyers in equal pay cases has had a detrimental impact on the collective resolution of equal pay cases. DBCF lawyers counter with an allegation that trade union members have had their individual interests compromised in ways which are discriminatory, of significant detriment to them and without their free an informed consent. The nature of the dispute is set out in the opening three paragraphs of the Court of Appeal judgment in a leading case on the problem *Allen v GMB*:⁵⁹

1. Prior to 1997, the terms and conditions of employment applicable to local authority employees were set out in different documents which were referable to different categories of employees. Manual workers were governed by the White Book whilst administrative, professional, technical and clerical (APT&C) workers were governed by the Purple Book. A third category of craft workers came under the Red Book but this case does not concern that category. As regards the White Book and Purple Book employees, it was recognised that some gender-based pay inequalities had been allowed to develop. In 1997 a national collective agreement – the Green Book – was negotiated between the relevant trade unions and the local authority employers. The intention was to bring the White Book and the Purple Book employees under a new system with a common pay and grading structure. It was to be known as "single status". Although the overarching structure of single status was the result of a national agreement, it was envisaged that actual pay scales and pay rates would be devolved to local level and that, in order to eradicate historical inequalities, local agreements would be preceded by local job evaluation studies. Each job would be assessed and placed on the appropriate Green Book scale. This proved to be a complex exercise. In Middlesborough, a job evaluation study was carried out and, in due course, new terms and conditions reflecting it came into effect on 1 April 2005. GMB (the Union) was one of the unions which

⁵⁹ *Allen and others v GMB* [2008] EWCA Civ 810; [2008] WLR (D) 243

negotiated the new terms and conditions with Middlesbrough Borough Council (the Council).

2. The complexity of these circumstances is plain to see. From the Council's point of view, the funding of any pay deal is heavily dependant upon the flow of money from central government and takes place against the backdrop of "capping". On the other side, the Union has to represent members in different categories whose interests can and do conflict. Put very simply, the Council sought an outcome that was affordable. The Union wanted one that somehow compensated the victims of past inequality but at the same time provided a measure of pay protection for those who were disadvantaged by the job evaluation study and maximised the amount available for future pay across the board. In addition, the Union was constrained by the natural perception that, if it pushed too hard, the consequences might include job losses and contracting out, neither of which would be in the interests of its members.

3. It is beyond dispute that, faced with these conflicting pressures, the Union decided to give priority to those who needed pay protection and to achieving equality and better pay for the future rather than to maximising claims for past unequal pay. The deal done between the Union and the Council provided the White Book women with some compensation for the historical inequalities (in the region of 25% of the full value of successful equal pay claims) but did not provide the Purple Book women with any such compensation, the Council having apparently taken the view that their equal pay claims were without merit.⁶⁰

Allegations that the Union had indirectly discriminated against some of its members were advanced on the following basis:

First, the Union had failed to protect the interests of the claimants by not pursuing proceedings at an early stage so as to establish an early date for the calculation of back pay. Even if the Union had preferred not to litigate, it should have protected the claimants in this way. Secondly, the Union had deliberately omitted to give advice about back pay and had refused to support litigation in order not to antagonise the

⁶⁰ Cited note 59 Para. 10

Council or to delay or impede the progression to single status. Thirdly, the Union had "rushed headlong" into an ill-considered back pay deal. It had accepted too readily the Council's plea of poverty. Finally, and, it seems, crucially, the Union had failed to give the claimants a fully informed choice about the options available to them. They had not been informed that what they were being offered was substantially less than they might receive following successful litigation and there was no assessment of the litigation risk which the ET considered to be relatively small, at least for some of the claimants. The ET considered that, if the Union was going to require the claimants to make some sacrifice in the interests of other members, then that should have been made plain to them. There had been not only a failure to provide full information but also positive manipulation of "relatively unsophisticated claimants" by suggesting that the offer from the Council was acceptable and placing them in a position where they were in fear that, if they pressed for more, it might lead to job losses and to their being seen as traitors by their colleagues. The ET considered this to be "the worst aspect of the case".

The Court of Appeal supported the Employment Tribunal's finding of indirect discrimination placing considerable emphasis on the Unions's dealing with "some of its members with marked economy of truth in what it says and writes to them."⁶¹

It is not possible to offer opinion on whether these problems are manifest more generally in the equal pay arena. What *Allen* illustrates is the tension between collective bargaining and individual employee rights and the potential for significant injustice to arise. Beyond the facts of *Allen*, it is worth drawing attention to a point about the quality of equal pay cases. The Local Government Employers organisation's main criticism is not the merits of the individual claims, but the impact of such claims on local government finance, collective negotiation and interests beyond those of the individual. For them, equal pay cases involve a bargain being struck which protects the interest of local authority residents, employees who benefit from (and are threatened by) the processes of job evaluation associated with equal pay, and the impact of settlements on job security. NWNF lawyers' significance, beyond any increase in the number of cases they are directly responsible for, LGE states, has been to stiffen the approach of trade unions to these cases, particularly in light of the *Allen v*

⁶¹ Cited note 59 Para. 24.

GMB decision: forcing them to bargain harder for the rights of their members *full* entitlement to backpay.⁶²

Trade union criticisms of DBCF lawyers do concentrate in part on the quality of the cases brought, but not to suggest that they generally bring cases with poorer merits.⁶³ In fact they claim the opposite: that DBCF lawyers cherry-pick the better cases, leaving trade unions deal with a wider range of cases including those that are not so straight-forward. This emphasises the potential narrowness of any access to justice contribution made by DBCFs but it is not consistent with a view that DBCFs have led to an increase in unmeritorious cases. They also make significant complaints about the costs advice given to clients under DBCFs; the ways in which clients are bound into ('handcuffed') to lawyer settlement decisions; the fact that trade union members who bring cases under DBCFs would have deductions made from damages under DBCFs which would not be made by union funded solicitors; and the advertising material used to persuade union members to take cases under DBCFs rather than through trade unions.⁶⁴

There continues to be significant criticism in the press in relation to equal pay claims against public sector employers being brought under DBCF agreements.⁶⁵ Employers and Trade Unions continue to argue that these claims undermine collective negotiations to secure sustainable equal pay packages for all workers and that budgets are being stretched by compensation awards, which could lead to job losses and/or reductions in male workers' salaries.⁶⁶ Councils have suffered severe financial difficulties as a result of the level of claims and have had to borrow from

⁶² Local Government Employers (2006) *Unblocking the route to equal pay in local government* (London: LGE)

⁶³ They also allege that claims are not well-handled, partly because of the high volumes involved.

⁶⁴ This research was not designed to concentrate on equal pay cases although most of these complaints are addressed more generally in our analysis of the consumer interest issues posed by employment DBCF cases.

⁶⁵ See, for example, D. Prentis & P. Kenny 'The way to achieve equal pay is through unions, not these lawyers' *The Guardian* (London 8th January 2008); D. Brindle & P. Curtis 'Fight for equality that could put jobs at risk' *Guardian* (London 2nd January 2008); J. Robins, 'Who's best at getting equal pay for women?' *The Observer* (London 12th August 2007); J. Sherman, 'Council tax to rise as 'parasitic lawyers' chase equal pay claims' *The Times* (London 6th March 2007).

⁶⁶ J. Sherman, 'Men are to pay a high price for sexual equality' *The Times* (London 12th March 2007); D. Rowbottom, 'Re-inventing the collective approach to equal pay' (2005) 155 N.L.J. 1701; D. Brindle and P. Curtis, 'Fight for equality that could put jobs at risk' *The Guardian* (London 2nd January 2008).

the government to meet compensation awards.⁶⁷ BERR has also expressed concern over the operations of damage-based contingency fee lawyers in equal pay claims, suggesting that they make negotiation agreements “difficult” and “further complicate the situation and are sometimes contrary to the best interests of the claimant”.⁶⁸ Conversely, *Allen* shows how it can be successfully argued in some cases that the Trade Unions have at least in some cases failed to properly represent their members at an individual or collective level.⁶⁹

Importantly, at root, equal pay claims, whether funded by the unions or DBCF lawyers, arise from major structural problems in public sector pay and a fundamental problem in balancing individual and collective rights, not from any problem with the legal merits of DBCF cases. It is not alleged that they are ‘bad’ cases, rather that individual cases should not take precedence over collective agreements; and that the local authorities can better compromise those agreements collectively with unions. Put another way, any growth in DBCFs in equal pay cases appears to be consistent with increases in individuals access to justice (on current evidence and subject to some of the broader concerns discussed below). The problem is that local authorities are unable or unwilling to afford the liabilities associated with individual rights to equal pay. The Unions have recognised the dilemma and put the economic and employment interests of the collective above its members individual legal rights, striking a bargain that is better for some (more often, but not always, men) and worse for others (more often women). Some of the losers, assisted or led by DBCF practitioners, have exposed the problems. Law and public finance have collided.

Why do DBCFs only provide limited access to justice?

This paper has so far suggested that DBCFs make a modest contribution to improving access to justice, but it is important to consider the ways in which they are limited. There were a variety of reasons why DBCFs were not used by firms or were only used for certain cases. Many firms did mainly/solely respondent work and considering DBCFs inappropriate for such a client base (mentioned by almost half of those not offering

⁶⁷ H. Siddique, ‘Council boost for equal pay claims’ *The Guardian* (London 28th September 2007); P. Curtis, ‘Council’s face £2.8bn bill for equal pay’ *The Guardian* (London 2nd January 2008).

⁶⁸ Business and Enterprise Committee, ‘Jobs for the Girls: Two Years On: Government Response to the Committee’s Second Report of Session 2007-08’ HC (2007-08) 634 [51] & [53]; ‘All-party MPs’ call for equal pay reform’ (2008) 46 IDS D.W. 2, p.3

⁶⁹ See, for example, J. Robins, ‘Cash: Home Loans: Unions under renewed attack for failing low-paid women members: Female workers angry at the GMB for selling them short in a compensation deal have triumphed at court’ *The Observer* (London 24th August 2008); J. Robins, ‘Who’s best at getting equal pay for women?’ *The Observer* (London 12th August 2007).

DBCFs);⁷⁰ or only acted for high net worth individuals who pay by the hour (mentioned by about a quarter). Our data suggested that the predominant reason for not conducting damage-based contingency fee business was the lack of any need to do so on a commercial basis. Another way of putting this is to say that most (but not all) firms have sufficient work from other sources to make taking DBCFs unattractive. This was particularly so given concerns about profitability and riskiness of damage-based contingency fee cases.

The lack of profitability argument is intriguing. Kritzer's work in the States suggests that personal injury practitioners were able to develop portfolios of cases which lead to substantial average profits over and above those of hourly fee cases. Kritzer viewed the extra profit as compensating them for the risk.⁷¹ We employed a similar method to Kritzer in our practitioner interviews. Although this is not the ideal means of exploring profitability it was the best available to us. Interviewees are unlikely to reveal grossly-exploitative charging but data on specific cases may reveal some broad patterns in levels of charging which provide useful evidence on this issue. We asked practitioners for information on the last contingency fee case they completed: what level of compensation was paid; what the fee paid out of that compensation was; how many chargeable hours they spent on the case; and, what the normal hourly charge out rate would have been for similar cases. Respondents were also asked to indicate their normal hourly rates for similar cases. Because we knew both the compensation, number of chargeable hours worked and the percentage fee charged we could calculate a notional hourly rate for those cases.

Figure 3 compares the notional hourly rate with the hourly rate that the practitioner indicated they would charge for an equivalent case by use of a scatterplot graph. The scatterplot reveals considerable variation. All those circles to the right and below the diagonal line indicate cases where the notional hourly rate on the DBCF was higher than the practitioner's equivalent hourly rate. This happened on 17 occasions. Notional (DBCF) hourly rates were lower than equivalent hourly rates on 21 occasions.

⁷⁰ 93 of the 110 firms that did mainly or solely respondent work made no use of DBCFs.

⁷¹ Kritzer 2004

Figure 3: Notional and Equivalent Hourly Rates Compared

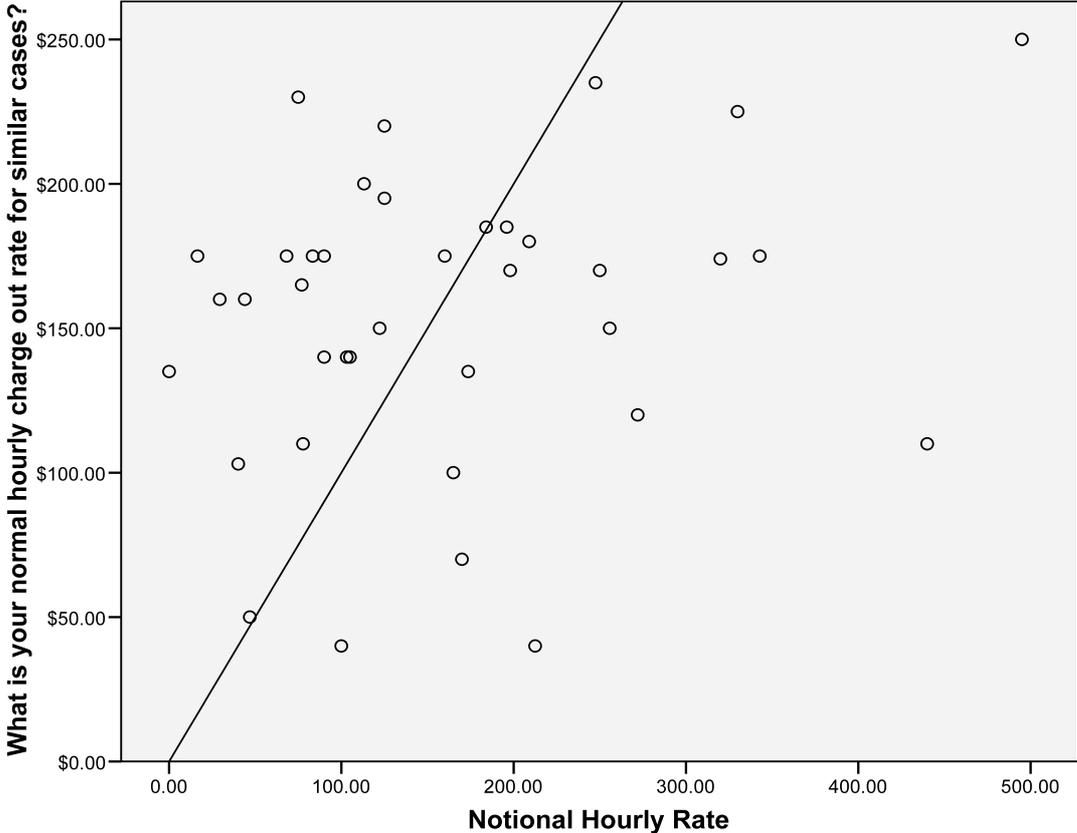


Table 6 provides summary statistics for the two hourly rates.

Table 6: Hourly Rates and Contingency Fees Compared (Notional Hourly Rates)

	Contingency Fee (Notional Hourly Rates)	Hourly rates on Equivalent Cases
Minimum	£0	£40
Maximum	£495	£250
Mean	£162	£155
Median	£125	£168
N	38	38

The difference in the means of the notional and equivalent hourly rates is very modest and not statistically significant.⁷²

⁷² A paired sample t-test was conducted (p= .708). Because a Q-Q plot suggested the distributions of these variables may not be normal a Sign test was also conducted which also did not reveal significant differences (p = .626)

Of course these figures need to be treated with caution. DBCF Practitioners may have been tempted to underplay the level of fee in contingency cases or, in spite of the exhortation to focus on the most recent case settled, pick a case that was unprofitable. Data was available from 38 practitioners only, further emphasising the need to treat the results with some caution. Nevertheless it is notable that there is considerable variation in hourly rates for DBCF cases (which one would predict whether or not DBCFs were more profitable or not) showing, at the very least, that respondents were not always picking cases that would show DBCFs were less profitable. There are some reasons for placing more confidence in the results. Kritzer's study showed up significant increases in notional hourly rates on contingency fees suggesting that some practitioners will reveal higher charging where it occurs. Furthermore, published data on costs in Employment Tribunal cases suggests that no win no fee agreement cases cost applicants similar or less than those paying win or lose.⁷³

It also needs to be emphasised that the hourly rates do not take into account the level of cases being lost under DBCFs. SETA data suggests practitioners on DBCFs would be likely to lose between one in four or one in five cases.⁷⁴ This would be likely to mean that DBCFs were significantly less profitable than hourly fees.

From this data it can be deduced that risk is a major impediment to firms taking on cases, and risk takes two forms: the risk of losing and getting nothing and the risk of having to do much more work on the case than the percentage fee would justify. Such risks can be smoothed by high volumes of cases and the ability to manage cashflow with other sources of funding, but even then the evidence is consistent with DBCFs being less profitable than normal private client funding.

Why not charge more and increase access to justice?

Practitioner respondents were asked what percentage of compensation normally constituted their fee. 42 (74% of those providing a valid response) indicated they did not have a set rate but charged within a band. Many however had a normal rate, which they only varied in more or less exceptional circumstances. The average (mean) fee was 31% with 33% being the most common (modal) fee. 69% of respondents indicated fees in the 30-40% bracket.⁷⁵ Variable rates could drop as low as 5-10% but

⁷³ Hayward et al Table 4.23 cited note 26. Further analysis would need to be conducted to establish the robustness of these findings.

⁷⁴ see above Moorhead and Cumming 2008, op.cit. para. 228

⁷⁵ Another way of indicating the types of fee charged is by looking at the level of fee actually charged on the last case settled data. The percentages charged on these cases ranged between 10 and 50%. 17 (36%) were 30% or less; 19 (40%) were between 33

most respondents indicated a lower limit of around 25 or 30%.⁷⁶ 34% (16) had an upper band of 30% or less; 21% (10) had an upper limit of 33-35%; and 41% (21) had an upper limit of between of 40 and 50%.

Practitioners varied their fees to take account of assessments of likely case duration; anticipated level of compensation; prospects of success; case complexity (over a third); and, client characteristics. Some also charged VAT, disbursements and other fees *on top* of any percentage fee. These extra charges were sometimes charged only if the client wins. Some firms charged these costs *win or lose*. For the latter firms, no win no fee, had a fairly arcane meaning not usually understood by clients as our client interview work showed.

Subject to the variations taking place, this data suggests that there was some room to increase fees and so increase access to justice. Our client survey data suggested clients would probably be accepting of this. Without DBCFs they had no access to justice: for them 50% of something would be better than 50% of nothing. Conversely, there is some evidence of 'natural' regulation of the level of fees: with clear fractions, such as a quarter or a third, being viewed as more naturally fair 'focal points' for agreements.⁷⁷ To be sure, it would be possible to overcome these 'natural norms' but lawyers might sensibly be sceptical of the long term reputational impact of taking as much of a client's compensation as they themselves take. In those circumstances, there may not be much room for further increases in percentage fees.

Risk and profitability: access to justice and economics

Because the profitability of DBCFs depends significantly on the risk associated with the case, the investment of time and money necessary to bring the case to a conclusion and the level of compensation achieved access to justice via this mechanism is variable. Such variability may accord with theories of economic efficiency, but there is a larger question about the tension between efficiency and justice. Good cases, cases where a significant wrong has occurred and where the merits of the case are good, may not be profitable cases. If they are not profitable, they may not be taken on.

and 35%; and 12 (25%) were between 40 and 50%. The mean figure was 32%. In subsequent analysis we rely on the average figure indicated by respondents rather than the figure given for the example case.

⁷⁶ 23 out of 38 responses fell into this band.

⁷⁷ See, Zamir and Ritov for a discussion. Zamir, Eyal and Ilana Ritov, *Neither saints nor devils: a behavioural analysis of attorneys contingent fees* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=eyal_zamir last downloaded 24th November 2008

As one way of investigating this, respondents offering DBCFs were asked how suitable they felt damage-based contingency fees to be for particular case types. Suitability in this context generally meant (as the interview evidence confirmed) the economic viability of advancing claims by this method. The results are represented graphically in

Figure 4 and the data is in

Table 7. It should be emphasised that we only generally have responses from just over 50 respondents to each of these questions; they do however indicate some relatively clear patterns of difference between case types. Those cases regarded as most suitable for DBCFs gravitate towards the bottom of the chart.

Figure 4: How suitable are damage-based contingency fees for particular case types?

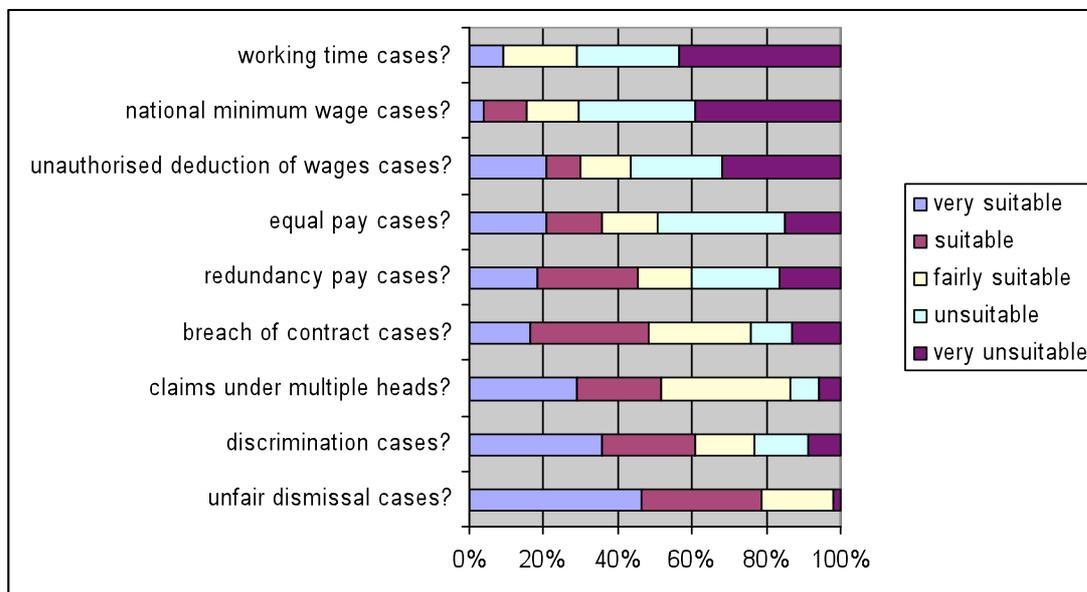


Table 7: How suitable are damage-based contingency fees for particular case types?

How suitable are damage-based contingency fees for	Very suitable	Suitable	Fairly suitable	Unsuitable	Very unsuitable	N
Unfair dismissal cases?	46	32	20	0	2	56
Discrimination cases?	36	25	16	14	9	56
Claims under multiple heads?	29	23	35	8	6	52
Breach of contract cases?	17	31	28	11	13	54
Redundancy pay cases?	18	27	15	24	16	55
Equal pay cases?	21	15	15	34	15	53
Unauthorised deduction of wages cases?	21	9	13	25	32	53
National minimum wage cases?	4	12	14	31	39	51
Working time cases?	9	0	20	27	44	55

The position of equal pay cases is an interesting contrast with the data on the numbers of such claims, only a minority thought they were suitable or fairly suitable. It could be that that in such cases it is the existence of multiple claims, as opposed to case type, which makes the case suitable for contingency funding and very few firms are geared up to take them on that basis. It may also emphasise the level of work necessary to take on equal pay cases (in particular given the associated level of appellate work on such cases currently). Several respondents suggested that group actions are more suitable because of increased profitability. IV228

discussed damage-based contingency fee use in the recent equal pay claims:

[such claims]...typically have a well-understood background and so all you need to know is whether your client falls within the scope of the background facts. Also, you can have a very large group of claimants with features common to the class, meaning that the risk can be spread.

Discrimination claims were frequently mentioned as suitable for damage-based contingency fees given the possibility of unlimited damages.

Compensation thresholds

We also asked practitioners whether they had minimum values in mind when they took on cases. 23 respondents (38% of those using damage-based contingency fees) reported having a minimum case value that had to be reached before a case would be taken on (although many indicated that they would look at cases on their merits and that minima were more of an informal guide than a hard and fast rule). Responses ranged between £500 and £30,000. Half the respondents had a minimum level of £5,000 or less.

Table 8: Minimum Claim Value

	Frequency	%
£1,000 or less	3	13
£2-3,000	5	22
£3,500-£5,000	7	30
£8-10,000	4	17
£15-30,000	4	17
Total	23	

These limits are lower than that found in a previous study – £12,000-£15,000 before a case would be accepted⁷⁸ – but nevertheless suggest that large numbers of employment cases would not be perceived as viable propositions to practitioners operating DBCFs. A threshold of £3,000 would exclude an estimated 43% of cases based on the figures for tribunal awards. This underestimates the cases going to tribunal are of their nature more likely to be of a higher value than cases settling. The

⁷⁸ Hammersley and Johnson (2004) cited note 12, p.13; Johnson and Hammersley (2005) cited note 11, pp.23, 25, 28.

Employment Tribunal Service figures for 2006/07 awards shows that the median amount awarded in Employment Tribunals was £3,800 and the mean amount £7,974 (the latter being much higher because of a limited number of high value awards).⁷⁹ The figures above are for tribunal awards, the figures for settlement are even lower. Figures for settlements of cases issued in Employment Tribunals suggest a mean level of settlement of £4,000 and a median settlement of £1,000.⁸⁰

To try and get some data on the size of claims which were brought under damage-based contingency fees, we asked those who had experience of taking contingency claims to indicate the amount the last case they handled on a damage-based contingency fee settled for. Payments ranged between £500 and £95,000. Half the claims were settled for £10,000 or less but the average (mean) settlement was £17,500. The mean figure is somewhat skewed by large claims at the upper end of the distribution; only about 30% of claims were of this order or larger. Nevertheless it is reasonably clear from this evidence that, in so far as these example cases were representative generally of claims brought by DBCF practitioners,⁸¹ DBCF cases were likely to be used in claims of higher value than the population of employment claims generally.

We can compare the distribution of tribunal awards with the distribution of values for the last case settled as given by our respondents (

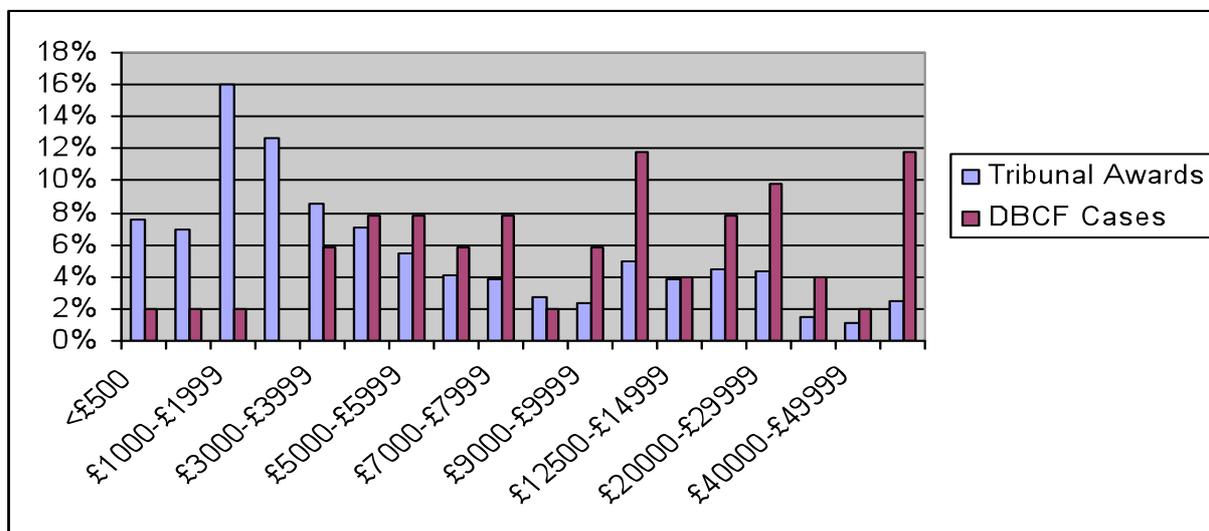
⁷⁹ Employment Tribunal and EAT Statistics (GB) 1 April 2006 to 31 March 2007. There are separate figures for, inter alia, discrimination claims which cover far fewer cases.

⁸⁰ Hayward et al (2004) cited note 26, Table 8.12

⁸¹ There is a risk that practitioners would be more likely to recall bigger cases so we may expect the figures to be inflated somewhat.

Figure 5).

Figure 5: Distribution of DBCF settlements compared with the distribution of Employment Tribunal Awards



Whilst we should bear in mind that the figures for the DBCF cases may be inflated somewhat by practitioner recall biasing towards higher value cases, the profile of DBCF cases is clearly at the higher end of the compensation spectrum.

Kritzer, in his work on personal injury contingency fees, suggests one reason why looking at the viability of cases on a case-by-case basis may be misleading. Utilising what he calls ‘portfolio theory’ he shows that personal injury practitioners in the States are willing to take on smaller cases, even though they are unprofitable. There are probably two main reasons for this. One is that practitioners need to have a steady stream of cases coming in if they are to recruit the ‘big cases’ likely to lead to high profits. It partly a matter of marketing and partly a matter of cross-subsidy. Secondly, there may be opportunity cost explanations. If personal injury practitioners in the US are not taking the smaller cases, what are they able to profitably do with their spare time? Working more on their bigger cases may not yield extra gains. They could diversify, but the absence of alternative sources of funding for personal injury cases may make this difficult and they of course lose the marketing benefits of working on a large volume of personal injury cases.

Whilst some practitioners we interviewed appeared willing to take on unprofitable cases, I doubt the extent to which portfolio theory provides much comfort in the context of employment cases. The compensation thresholds set by firms were, as already noted, high. There are two further reasons. The levels of compensation are not generally very high in employment cases. Thus the possibility of the few subsidising the many is somewhat limited. Secondly, the opportunity cost arguments are different.

For many firms, there is sufficient alternative work available to mean that forgoing DBCF work is not problematic. Many have mixed respondent/claimant practices and rely on high-value clients to pay privately for claimant work. Insurance and trade union funding is also more prevalent than in many areas, although it is generally confined to fewer firms.

Consumer interest problems

The studies have identified a number of consumer interest problems associated with DBCFs. Whilst there was not evidence to support the view that the overall level of percentage fee charged by DBCF practitioners was exploitative, in fact rather the reverse, there was evidence of other consumer detriments. To keep this paper brief, the evidence in relation to these is not rehearsed in detail, but is consistent with:

- Lawyers misselling DBCFs as no win no fee when in fact the client is charged costs over an above the percentage fee (such as disbursements, administration fees, VAT). Sometimes these costs are charged win or lose, or regardless of compensation recovered (as opposed to awarded).
- There being potential conflicts of interest on settlement. This allegation, frequently made with DBCFs, is inherent in most fee arrangements, DBCF and otherwise. The evidence from these studies is pulls in a number of direction. Our client interviews suggested settlement advice was being given in a way which prevented clients from choosing to reject settlement advice, when they should be offered a choice, and that this occurred for all types of funding where the practitioner or a third party funder was at risk (trade union, legal expenses insurance and DBCF funding). Settlement clauses in many DBCF agreements are draconian and place the lawyer's interests above their clients in conflict, arguably, with the Solicitors' Code of Conduct. Conversely, DBCF, trade union and LEI clients may not settle as early as private paying clients because they are less risk averse. There is some evidence that DBCF lawyers are less inclined to take cases to a tribunal.
- In employment cases, clients may well have a choice of funding options, particularly if they can afford to pay themselves or have LEI or are a trade union member. Solicitors routinely fail to counsel clients on their options. This too is a breach of their Code of Conduct. The likely explanation is they want the client on their terms and do not want to raise the possibility of alternative funding which might mean they would have to go elsewhere.
- Some evidence from practitioner interviews and client interviews suggested that DBCF practitioners may provide lower levels of service for the client. This may be a sign of their efficiency (concentrating on outcome rather than process) but it appears to diminish the quality of the process for the claimant.

- Almost no research has been conducted on legal expenses insurance or trade union funding. There is some work suggesting legal expenses insurers cherry-pick the easier cases.⁸²
- There is no research on the economic incentives at work on trade union or LEI funded lawyers. What is known about the reward mechanisms suggests the potential for significant problems. Some trade unions, in particular, require panel firms to do their employment cases on a pro bono basis, on the basis that they will then be referred profitable personal injury cases. They claim that quality monitoring inhibits the diminutions in quality which would otherwise be likely under such systems of remuneration.
- Whilst claimants who used trade union advisers were happy with the service received, union members who had gone elsewhere expressed doubts about their independence and/or the quality of the solicitors instructed.
- LEI/TU funding typically restricts consumer choice of lawyers. Whilst this may, in fact, be problematic, if panel firms are operating under constraints which diminish quality, claimants generally did not react against the absence of choice, partly because they were well managed at inception and partly because the concept of choosing a legal adviser was bewildering to many. This is an interesting contrast to the findings in the Scottish Public Defender Survey.⁸³
- We found no evidence that claimants faced inappropriately aggressive marketing, or that advertising of claims was driving large increases in claiming, or more spurious claiming.

⁸² Fenn et al, 2002

⁸³ Goriely et al (2001) *The Public Defence Solicitors' Office in Edinburgh* (Edinburgh, The Scottish Executive).

IV. Conclusions

Damage-based contingency fees (DBCFs) are an important and significantly under-researched aspect of the justice system in England and Wales. They were allowed to develop in employment cases through a gap in the regulatory framework whilst regulators and government concentrated on promoting (and regulating) conditional fees in civil cases. The result is that a significant vehicle for access to justice has developed largely unscrutinised by serious research or policy attention. This failure is all the more surprising given the constant, and somewhat ill-informed, criticism of damage-based contingency fees as an unwelcome Americanisation of our justice system. Similarly, the furore over equal pay cases (with no win no fee lawyers being blamed for a significant impact on local authority budgets) has inflamed the current debates about compensation culture. The evidence suggests that critiquing DBCFs as the cause of large increase in spurious claims is wide of the mark. DBCFs may have increased the number of claims, but they do not appear to have diminished the merits of cases brought.

Conversely, DBCFs are not a panacea to access to justice problems. Clearly, lower value claims are less likely to be brought under DBCFs and it is claimants in this group in particular who are likely to struggle to afford representation (and may also be most likely to struggle with self-representation). There is also considerable variability in the risk assessment practices of advisers: this depends not only on the characteristics of the case but also the context within which practitioners work. This may mean that access to justice through this mechanism is something of a lottery. For practitioners desperate for the work, incentives to take on weaker cases (even spurious cases) may remain, although our evidence does not suggest that this is a prevalent problem.

One way by which the situation could be improved would be to develop a conditional legal aid fund (CLAF) or supplementary legal aid scheme (SLAS) whereby contingency fees are backed by a fund which receives a proportion of the damages a client receives. Such a fund could be sued to smooth some of the risks faced in the market, and ameliorate some of the harsher aspects of DBCF economics. Non-profit agencies could function on a DBCF basis, using possibly lower levels of contingency fee to fund supplementary activities.

The government has traditionally been sceptical of CLAFs and SLASs because of the risks of adverse selection inherent in a government backed scheme, where cases are likely to come to them as a last resort, and the need to pump-prime such a fund. Adverse selection would be a difficult problem to tackle, particularly in the light of the solicitors' profession continuing inability, it seems, to advise clients disinterestedly of their funding options. Such problems might, with significant effort and ingenuity, be overcome, but it would be a brave administration that

invested in an employment SLAS or CLAFs when the budget is under such pressure, even if it did offer a significant extension of access to justice to a critical group, and might ultimately be cost neutral or revenue raising. There may also be the potential for third party funders to come in and perform a similar function, although currently such funders are only showing interest in very high value litigation.⁸⁴

It is important to keep in mind the centrality of employment problems to much of what legal aid services concern themselves with. From LSRC data it is possible to see the importance of employment problems: they are serious, they impact markedly on clients lives, and are likely to be one of the key triggers for social exclusion and the associated clustering of legal problems.⁸⁵ Many people with employment problems appear to proceed unadvised. Claimants are less likely than respondents to have nominated a representative; and are considerably less likely to get the help of a solicitor or to be represented at a full tribunal hearing.⁸⁶ Tellingly, employers are clearly willing to invest in these problems when they are respondents. In our sample, the amount of specialist resources we can estimate as being spent on representing defendants outweighs that spent on claimants by roughly three times. Admittedly, it's a crude estimate but it suggests a larger differential in support for claimants and defendants than bare indicators of whether or not someone has assistance or is represented. In the vernacular of the human rights jurisprudence, there is a significant and serious inequality of arms.

⁸⁴ Mulheron et al, 2008 op.cit.

⁸⁵ Moorhead et al 2006, op.c.it

⁸⁶ Hayward et al cited note 26.

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