

**The location and type of employment tribunal claim can determine the chances of success: A unique investigation into the history and current workings of the Employment Tribunal System**

**ABSTRACT**

The UK Employment Tribunal System (ETS) is '*broken*' and in need of reform according to the British Chamber of Commerce (BCC) (2011) and the Confederation of British Industry (CBI) (2011). This resulted in a number of governmental reviews and significant changes to how employment tribunals operated, in particular the increasing use of Judges working alone and the implementation of tribunal fees.

Through analysing these historical changes Lord and Redfern (2013) identified elements of the Employment Tribunal System (ETS) that could be improved to increase its overall effectiveness, ability to minimise justice and various factors that affected their claim. From these variable factors this paper focuses upon the three dimensions of a claim; (1) the year, (2) the jurisdiction and (3) the geographical location of where the claim was heard between 2013-2017.

The analysis of the data reveals that London has the least chance of success for a claimant, with the North-East being the region with the greatest chance of success. 2016-17 offered the least chance of success whilst 2014-15 offered the greatest chance of success for a claim. Redundancy had the greatest chance of success whereas Discrimination suffered from the least chance of success.

From these findings, this paper goes onto conclude that where the tribunal claim is held could have a potential impact upon the success of case. The paper also suggests that this could be related to the social and political nature of the area, or the demographics of the tribunal panel from these locations.

Finally the paper concludes that judicial decisions can be affected by personal, social and political influences depending on where, when and nature of the case.

**Key Words / Key Phrases:** Employment Tribunal, Employment Law, Industrial Tribunal, Tribunal claims

Word count: 6,234

- Introduction and context of the research

This paper adopts the framework of an ‘odds’ statistical analysis to highlight the outcome of ET Claims in Great Britain from 2013-2017 and argues that although ET’s are distinct bodies operating independently, the outcome of the claim can be influenced by where the case was heard, the year it was disposed of and jurisdiction.

Determining whether ET’s operate a fair and just system is difficult (Lord and Redfern, 2013), therefore the intention of this paper is to highlight the differences between the outcomes of the claim and what the potential reasons are for differences.

The structure of this paper commences with an outline of how ET’s were established, how they morphed into their current structure and what their impact upon the employment relationship has been.

The paper then goes on to analyse ET claims based on the annual HMCTS statistical data, providing an overview of the types of claims since 1971. Then the data procured from a Freedom Of Information (FOI) request is scrutinised indicating the likely chances of success of a claim based on region, year and jurisdiction.

The paper concludes by making some observations as to why tribunal claims may be influenced by these three variables based around the theory of judicial decision making.

- The introduction of ‘law courts’

Modern day Employment Tribunals are an integral aspect to the application of employment law in the UK and have presided over a fluctuating number of claims, since their original inception in 1964. The last few years have seen a substantial decrease in accepted claims with 61,308 cases accepted by tribunals in 2014/15 in comparison to 105,803 in 2013/14. However, the number of claims has slightly risen and plateaued over the last couple of years. The table below outlines the figures from the creation of Employment Tribunals in 1997:

***Table 1 - Employment Tribunal Claims***

<b>Year</b>	<b>No. of Applications</b>	<b>No. of Single Claims (One claim can have multiple jurisdictions)</b>
April 1997- March 1998	80,435	80,435
April 1998 - March 1999	91,913	148,771
April 1999 - March 2000	103,935	176,749
April 2000 - March 2001	130,408	218,101
April 2001- March 2002	112,227	194,120
April 2002- March 2003	98,617	172,322

April 2003- March 2004	115,042	197,365
April 2004- March 2005	86,189	156,081
April 2005- March 2006	115,039	201,514
April 2006 - March 2007	132,577	238,546
April 2007 - March 2008	189,303	296,963
April 2008 - March 2009	151,028	266,542
April 2009 - March 2010	236,100	392,700
April 2010 – March 2011	218,100	382,400
April 2011 – March 2012	186,300	321,800
April 2012 – March 2013	191,541	332,800
April 2013- March 2014	105,803	193,968
April 2014- March 2015	61,308	129,966
April 2015- March 2016	83,032	177,892
April 2016 – March 2017	88,476	143,648

(Source: Employment Tribunal annual reports and statistics; HMCTS Quarterly statistics, 1997-2017)

However, Industrial Tribunals (as they were originally known) were initially established under s.12 of the *Industrial Training Act* (1964) for the purpose of only considering appeals by employers against training levies imposed under that Act. The tribunal system has evolved over the last five decades into a complex and formal process that has detracted from its origins as an informal mediation service. The introduction of tribunals in the mid twentieth century laid the foundations for an influx of various individual employment law.

However, the law relating to industry and the individual at work can be traced back to the late nineteenth and early twentieth centuries, where labour legislation had been introduced to protect and support the individual worker:

*“There is perhaps, no major country in the world, in which the law has played a less significant role in the shaping of industrial relations than in Great Britain, and in which the law and legal profession have less to do with labour relations.”*

(Kahn-Freund, 1954:44).

Key legislative codes such as the *Factory and Workshop Act* (1901) and *Coal Mines Act* (1911), protected individuals from industrial accidents, the *Employment of*

*Children Act* (1903), as well as the aforementioned *Factory and Workshop Act* (1901), regulated the hours of work of women and young persons. The *Truck Act* (1896), the *Trade Union Act* (1871), amended in (1876), offered protection and governed the major rules regarding the status of trade unions and the *Coal Mines Regulation Act* (1887) determined the method of wage payments.

The period between the Boer Wars (1880-1881 and 1899-1902) and the First World War (1914-1918), is described as '*the formative period of British labour law*' (Kahn-Freund 1954:215). During this period the Liberal governments (1892 – 1895 and 1905 – 1915) introduced minimum wage legislation, through the *Trade Board Act* (1909), and most importantly the foundations of '*social security*', were also put in place, specifically the *Workman's Compensation Act* (1906), the *Old Age Pensions Act* (1908) and the *National Insurance Acts* of (1911) and (1913). During this radical period, legislation was introduced, that safeguarded the individual's right to strike and freedom of association, culminating in the *Trade Disputes Act* (1906). Although this period saw a series of legislative measures being introduced, it is recognised that these were more of a widening of the scope of existing principles rather than the formulation of new ones (Kahn-Freund, 1959).

Until the 1960's, law relating to employment in the UK was extremely limited and only related in essence to restrictions on employers regarding the maximum number of working hours for women and children, minimum health and safety standards and protection of the individual concerning trade union membership and activity. Trade boards, which were the forerunners to wage councils, were established to:

*"...regulate the pay and conditions of workers in industry where collective bargaining machinery had not developed and where earnings would otherwise have been lower than the community considered proper for the maintenance of health and human dignity."*

*Trade Boards Act* (1909:13).

Latterly the boards were enabled, through the passing of further legislation, to determine overtime rates, holiday entitlement and other terms and conditions of employment (e.g. *Trade Boards Act*, 1918; *Wages Councils Act*, 1945). Despite these legislative measures, there were no government interventions, which protected individual employees in relation to statutory minimum notice periods, discrimination on the grounds of sex or race, dismissal of employees without following proper procedures or offering severance pay. Rules and regulations such as these, which are now integrated into the fabric of employment law, were far from being discussed or implemented. In other countries around the world, the state actively intervened in the employment relationship, seeing their role as being passive and what Kahn-Freund (1900 – 1979) labelled a '*collective laissez-faire system*'. This '*voluntarism*' system of state philosophy was built on the premise that individuals should be empowered into entering a contractual agreement, which they felt fit. The government had created the court system to enforce individual contracts of employment, if they were ever broken by the employee or employer, and further protection was afforded to employees through the presence of a resilient trade union movement and effective mechanisms of collective bargaining. The freedom of the individual and the protection offered by trade unions and collective bargaining provided what the state believed was a system, which worked and promoted the free market. Since 1960, arguably due to the increasing power of the

trade unions and their impact upon the UK economy, employment law has played an even more dominant role within the employment relationship, in particular with individual employment rights.

The first important piece of legislation came in the form of *The Redundancy Payments Act* (1965), which has been viewed as a way of encouraging the mobility of labour but most importantly designed to ensure that reasonable severance payments were made to employees laid off for economic reasons. The Act also laid the foundations for the establishment of the redundancy fund, which had an original function of providing for the payment of rebates to employers who had made redundancy payments and latterly provided for the making of redundancy payments direct to employees out of the fund in the event of the employer's insolvency.

However, the most significant development in employment law came a year earlier in 1964 when Industrial Tribunals were created by the *Industrial Training Act* (1964). These were initially created to hear appeals in relation to the assessment of training levies under the 1964 Act. Over the following three years the remit of tribunals was extended to include such areas as the determination of the right to a redundancy payment and issues surrounding the level of, or inaccuracy of, a written statement of terms and conditions of employment. As a result of issues such as wage inflation, unofficial strikes and the general existence of restrictive practices in industry, the government initiated a review, and commissioned Lord Donovan to carry out an investigation into and make recommendations on how these problems could be resolved. The main recommendation from the *Donovan Commission* (1968) stipulated that the remit of Industrial Tribunals should be broadened to deal with other areas of the employment relationship. This encompassed the area of unfair dismissal, and later, with the introduction of further legislation, ensured the system dealt with issues around sex discrimination, equal pay, race discrimination and maternity rights etc.

With the advent of the Conservative Government (1979-1997), came a raft of collective employment legislation, which largely curtailed the activities of trade unions and also the relative freedom with which they could take industrial action was condensed (Davies, 2009). Although the Conservative government concentrated on collective employment law (Rose, 2008), the acceptance of the UK into the European Economic Community in 1973 brought many directives, which introduced individual employment rights (Davies, 2009). This involved the introduction of the TUPE regulations in 1981, the remit of equal pay legislation being widened in 1984 and 2010, and new health and safety legislation introduced in 1988.

With the continuation of the Conservative Government into the 1990's, further legislation was introduced to restrict the practices of trade unions as well as the broadening of health and safety law as a result of European intervention. The 1990's also saw the implementation of one of the most important individual employment laws passed in the UK. The introduction of the *Disability Discrimination Act* (1995) ensured that organisations with employees who were disabled or suffered from a long-term illness were treated in a reasonable manner. The 1995 Act instigated an avalanche of further individual employment legislation over the next couple of decades, which included:

- *Working Time Regulations* (1998)

- *Employment Relations Act* (1999)
- *Part-Time Workers Regulations* (2000)
- *Age Discrimination Act* (2004)
- *Equality Act* (2010)

This body of employment legislation resulted in the UK being:

*“...moved a very great distance from a voluntarist regime towards one that has a great deal more in common with the ‘codified’ approaches of our continental neighbours.”*

(Taylor and Emir, 2008:88)

There is no single clear reason why a vast amount of employment regulation has been introduced; however, Taylor and Emir (2009) have attributed the following reasons:

- UK membership of the European Economic Community (EEC) and more recently the EU
- The decline in trade union membership and activism over the past twenty-five years
- Government economic policy
- The growth of regulation in many areas of national life
- Plain political expediency

The Donovan Commission had severe reservations regarding the efficiency, effectiveness and also appropriateness of Industrial Tribunals, stating that, *“The Multiplicity of jurisdictions is apt to lead to waste, to frustration and to delay”*

(The Royal Commission on Trade Unions and Employers’ Associations 1965 – 1968: para. 570).

This example supported the commission’s recommendations:

*“...that industrial tribunals should be enlarged so as to comprise all disputes between the industrial worker and his employer... not only overcome the present multiplicity of jurisdictions ...also...produce a procedure which is easily accessible, informal, speedy and inexpensive, and which gives them the best possible opportunities of arriving at an amicable settlement of their differences”*

(The Royal Commission on Trade Unions and Employers’ Associations 1965 – 1968: para. 572).

The Donovan Commission seemed to have a utopian vision of employment law courts including how they should be designed, developed and delivered. To understand Donovan’s recommendations, it is appropriate to identify and evaluate the key elements of their report, which can be segmented into the following recommendations:

- Easily Accessible
- Informal
- Speedy
- Inexpensive

### *Easily Accessible*

A key aspect of the Donovan Commission's recommendations and problems with the system it was reviewing was the accessibility of hearings. The Commission envisaged "*that they will be operating in all major industrial centres and thus easily accessible*" (The Royal Commission on Trade Unions and Employers' Associations 1965 – 1968: para. 548). This not only had the premise that both the employer and the employee could access a tribunal in their area rather than some considerable distance away, but would also speed up the process of resolving the dispute.

### *Informal*

The Donovan Commission's ideal for having an 'informal' tribunal structure was divided into two segments. Firstly, they wanted the whole tribunal system to have a more informal approach, from the application process to the hearings and judgements. Secondly, the Commission wanted an informal approach to the resolution of disputes, through having a pre-hearing. This sought to have the obvious benefit of resolving the dispute in a setting away from the more formal full hearings.

### *Speedy*

The idealology of a speedy tribunal service is linked to the premise of developing an informal approach, as a rapid resolution of the dispute would be addressed through an informal pre-hearing. It can also be linked to the process of a tribunal hearing being informal, as tribunal 'court rooms' are far less formal than other court systems. For example, there are no wigs or gowns and the hearing rooms were considerably less imposing. Through an 'informal' process, the Commission expected employees with a dispute to apply to a tribunal and have this resolved (either to the benefit of the employee or employer) in a reasonably speedy timeframe, in comparison to other courts.

### *Inexpensive*

As well as the ideal of disputes being disposed of in a speedy fashion, the Donovan Commission envisaged them to be also inexpensive. The term 'inexpensive' is subjective, but can be interpreted to mean inexpensive for the parties involved, specifically the employee and employer. Therefore, it is possible to interpret the recommendation being focused on employees and employers rather than the government, as the Donovan Commission had made a number of proposals which would have severely increased the cost of running tribunals, such as the recommendation to create more tribunal hearing 'courts', across an increased number of towns and cities.

- Impact of tribunals on the way employers manage relationships

The extension of employment legislation and the further availability of tribunals was viewed disparagingly by some employers at the time, with Evans *et al.*, (1985) stating that although a fairly muted response was received in 1971, when unfair

dismissal was first introduced, employers were more vociferous when legislation and the remit of tribunals were extended in 1975. Objections raised at the time included they would be a deterrent to job creation, tactics would be used to avoid legislation (for example temporary contracts) and an increase in bureaucracy. A study at the time by Clifton and Tatton-Brown (1979) countered this notion and in fact demonstrated that they had little or no impact on firms. In the study, 4 percent of companies suggested that this had an impact upon their business, and rated lowly in a list of main difficulties in running a business. However, a significant factor of this study involved the reinforcement of small businesses being largely ignorant of the law. Although, over the last four decades, this has changed, with data from the *Workplace Industrial Relations Survey* (2004) finding that 76 percent of companies had a disciplinary and grievance procedure in place. This can be associated to the introduction of a raft of employment legislation, a rigid process for following disciplinary and grievances, and the threat of a costly visit to a tribunal.

Gennard and Judge (2010:273) link the protection of employees back to the Industrial Relations Act (1971) stating that:

*“...the Act gave individual employees the right, for the first time, to complain to an industrial tribunal that they had been unfairly dismissed. The 1971 Act was a turning-point in the relationship between employer and employee. The relative informality of the then industrial tribunals and the fact that access to them did not depend on lawyers or money meant that for many employee the threat of dismissal without good reason disappeared or diminished.”*

Gennard and Judge (2010:273) go on to counter this by warning:

*“...this does not mean that employees cannot be unfairly dismissed. They can. The law has never removed from management the ability to dismiss who it likes, when it likes, and for whatever reason it likes. All that has happened since 1971 is that where employers are deemed to have acted unreasonably and unfairly in dismissing employees, they can be forced to compensate an individual for the consequences of those actions.”*

This contrasting analysis by Gennard and Judge (2010) highlights the impact and influence of tribunals on how employers manage staff members. Despite the protection afforded by employment legislation, employers still deal with employees in a manner that was prevalent prior to the creation of tribunals. Many employers continue to argue that the relationship with their employees should remain private and that disputes should not be dealt with in a public arena (Rollinson, 1993).

Because of this, tribunals have become a measurement as to whether ‘natural justice’ has taken place. Employment law has formalised the ideologies of natural justice, into a rigid framework that employers have to adhere to which has resulted in natural justice being supplanted into employment legislation, whereby the action of the employer in dealing with the employee is measured just as highly, if not more so, than the actual actions or non-actions of the employee. The threat of a tribunal has resulted in employers not being able to act ‘instinctively’, but forcing them to follow set procedures to the detriment of both parties.



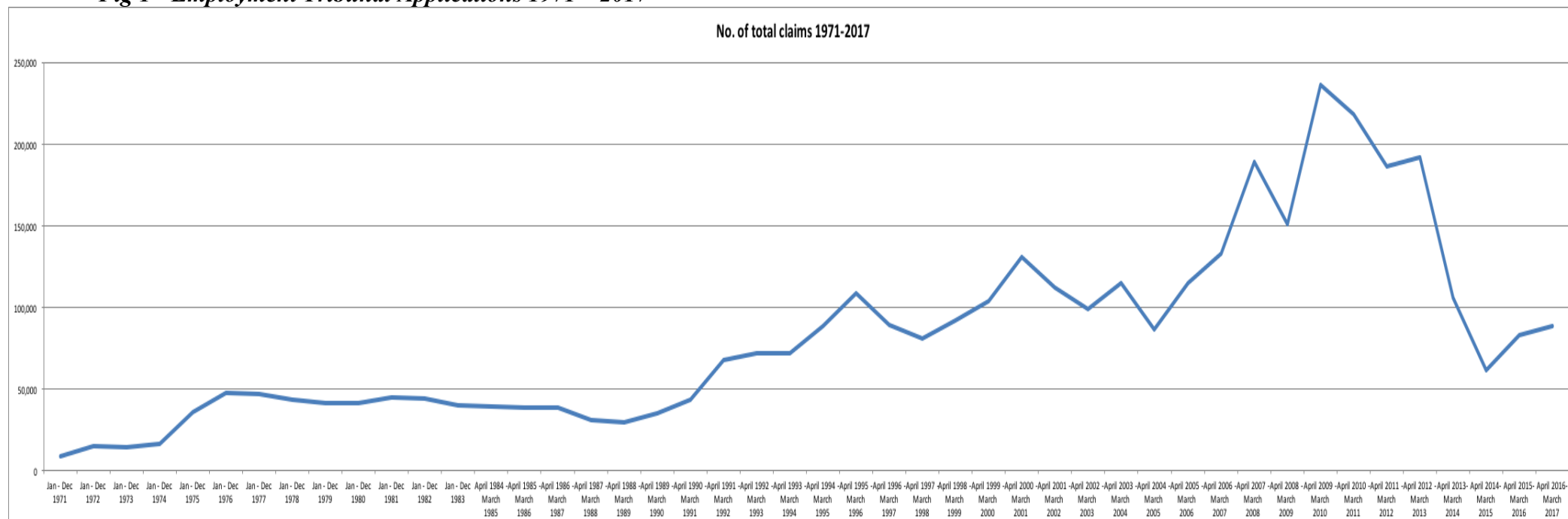
- Tribunals: Applications, jurisdictions and outcomes

There have been a number of studies scrutinising ET statistics (Burgess, Propper and Wilson, 2001; Genn and Genn, 1989; Keter, 2003; Latreille, Latreille and Knight, 2007; Saridakis, Sen-Gupta, Edwards and Storey, 2008, Corby and Latreille, 2012 and Corby 2015) as well as regular publications such as the *Workplace Employment Relations Surveys*, the *Survey of Employment Tribunal Applications* and government department reports which probe into the vast quantity of data that the government produce regarding ET's. To ensure that a complete picture could be produced regarding the emergence and development of tribunals the authors collected, entered and analysed the data using Microsoft Excel, IBM SPSS and Minitab. During initial analysis of ET statistics, the authors found that numerous studies had used various statistics collected from various sources, which in some cases differed. Another issue, which has affected previous research, is the re-alignment of annual statistics whereby the ETS produce figures for not only the previous year but also the previous two years prior. The figures were adjusted after more robust data is collected. The authors therefore had to check all annual data twice to ensure that realignments had been recognised. The final issue with ET statistics involved the change in jurisdiction titles throughout the forty plus year analysis. As the ETS broadened its jurisdiction remit tribunal claims were separated into these distinctions; however this was not an issue. Complications arose when the ETS amalgamated the jurisdictions, which results in a distorted year-by-year analysis of specific jurisdictions. For example, the jurisdiction '*Suffer a detriment / unfair dismissal – pregnancy*' incorporated three jurisdictions relating to pregnancy that were previously recorded under 'Other'. Therefore analysing jurisdictions year-by-year can produce misleading conclusions, which need to be appreciated and understood.

The following data tables and graphs provide a comprehensive representation of the number and types of tribunal claims as well as other details such as regional and outcome figures. Although there is a wealth of information, all aspects of the statistics provide an interesting portrait of various components of the ETS. During the life of the tribunal system, there have been various reporting standards, therefore more comprehensive figures have been included within this section due to the ETS providing more data.

The number of ET claims has risen from 8,592 in 1971 to 88,476 in 2017, although it must be noted that the jurisdiction of tribunals has expanded considerably, enabling different types of claims to be submitted. In 2016/17 ET's had the authority to adjudicate over sixty-five different jurisdictions, which may have contributed to the significant rise in claims, as detailed below in Fig.1:

**Fig 1 - Employment Tribunal Applications 1971 – 2017**



**N.B.** The counting year for ET claims changed from calendar to financial year in April 1984. Figures for this and subsequent years run from April to March of the following year (e.g. 1st April 1984 to 31st March 1985)

(Sources: 1971 -1984 – Employment Gazette; 1985-1998 – Hawes (2000); (1998-2013 –Employment Tribunal Service Annual Reports; 2013-17 HMCTS statistics)

Although claims have increased significantly since ET's were created in the form we now know them, over the last couple of years there has been a significant drop, which coincides with the introduction of fees and the mandatory use of Acas's conciliation service prior to submitting a claim. The TUC have labelled this a "tax on justice" stating that the reduction in 'equality' claims have impacted upon the vulnerable the most.

Table 2 below emphasises this, as it clearly demonstrates a dramatic reduction in equal pay, sex discrimination and working time directive claims.

**Table 2 - Employment Tribunal Receipts by Jurisdiction**

	1998/99	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009 / 10	2010 / 11	2011 / 12	2012 / 13	2013/14	2014/15	2015/16	2016/17
<b>Total Claims Accepted</b>	<b>91,913</b>	<b>103,935</b>	<b>130,408</b>	<b>112,227</b>	<b>98,617</b>	<b>115,042</b>	<b>86,181</b>	<b>115,039</b>	<b>132,577</b>	<b>189,303</b>	<b>151,028</b>	<b>236,100</b>	<b>218,100</b>	<b>186,300</b>	<b>191,541</b>	<b>105,803</b>	<b>61,308</b>	<b>83,031</b>	<b>88,476</b>
<b>Singles</b>		70,600	78,000	71,000	68,000	65,700	55,600	56,660	53,377	50,094	62,400	71,300	60,600	59,200	54,704	34,219	16,420	16,986	17,044
<b>Multiples</b>		33,300	52,400	41,200	30,700	49,400	30,600	36,300	35,357	34,414	88,700	164,800	157,500	127,100	136,837	71,584	44,888	66,096	71,432
<b>JURISDICTION MIX OF CLAIMS ACCEPTED</b>	<b>1998/99</b>	<b>1999/00</b>	<b>2000/01</b>	<b>2001/02</b>	<b>2002/03</b>	<b>2003/04</b>	<b>2004/05</b>	<b>2005/06</b>	<b>2006/07</b>	<b>2007/08</b>	<b>2008/09</b>	<b>2009 / 10</b>	<b>2010 / 11</b>	<b>2011 / 12</b>	<b>2012 / 13</b>	<b>2013/14</b>	<b>2014/15</b>	<b>2015/16</b>	<b>2016/17</b>
<b>NATURE OF CLAIM</b>																			
Unfair dismissal(1)	43,482	53,070	49,401	51,512	45,373	46,370	39,727	41,832	44,491	40,941	52,711	57,350	47,884	46,326	49,036	28,528	12,652	13,294	11,988
Unauthorised deductions (Formerly Wages Act)	29,660	39,894	41,711	42,205	39,451	42,524	37,470	32,330	34,857	34,583	33,839	75,536	71,275	51,185	53,581	27,385	28,701	36,178	9,074
Breach of contract	27,188	30,958	31,333	30,791	29,635	29,661	22,788	26,230	27,298	25,054	32,829	42,441	34,609	32,075	29,820	16,762	8,250	9,253	7,838
Sex discrimination	10,157	7,801	25,940	15,703	11,001	17,722	11,726	14,250	28,153	26,907	18,637	18,204	18,258	10,783	18,814	13,722	4,471	5,359	8,836
Working Time Directive	1,326	5,595	6,389	4,980	6,436	16,869	3,223	35,474	21,127	55,712	23,976	95,198	114,104	94,697	99,627	49,087	31,451	36,648	30,281
Redundancy pay	8,642	10,846	9,440	8,919	8,558	9,087	6,877	7,214	7,692	7,313	10,839	19,025	16,012	14,661	12,748	6,663	2,939	3,830	2,322
Disability discrimination	3,151	3,765	4,630	5,273	5,310	5,655	4,942	4,585	5,533	5,833	6,578	7,547	7,241	7,676	7,492	5,196	3,106	3,449	3,781
Redundancy failure to inform and consult			1,542	3,862	3,112	5,630	3,664	4,056	4,802	4,480	11,371	7,487	7,436	7,984	11,075	3,604	2,307	4,073	2,409
Equal pay	7,222	4,712	17,153	8,762	5,053	4,412	8,229	17,268	44,013	62,706	45,748	37,385	34,584	28,801	23,638	17,202	9,621	17,035	10,467
Race discrimination	3,318	4,015	4,238	3,889	3,638	3,492	3,317	4,103	3,780	4,130	4,983	5,712	4,992	4,843	4,818	3,064	1,858	1,997	2,239
Written statement of terms and conditions	3,098	2,762	2,420	3,208	2,753	3,288	1,992	3,078	3,429	4,955	3,919	4,743	4,016	3,630	4,199	2,226	925	1,020	978
Written statement of reasons for dismissal			1,425	1,526	1,658	1,829	1,401	955	1,064	1,098	1,105	1,097	929	962	808	433	209	210	157
Unfair dismissal - transfer of an undertaking	562	1,287	1,087	1,806	1,161	n/a	n/a	n/a	n/a	n/a	n/a								
Written pay statement			884	1,082	1,117	1,387	1,076	794	990	1,086	1,144	1,355	1,333	1,287	1,363	940	282	376	262
Transfer of an undertaking - failure to inform and consult	2,060	1,336	1,323	2,027	1,054	1,321	1,031	899	1,108	1,380	1,262	1,768	1,883	2,594	1,591	1,219	568	635	809
Suffer a detriment / unfair dismissal - pregnancy(2)	1,341	1,216	963	981	878	1,170	1,345	1,504	1,465	1,646	1,835	1,949	1,866	1,861	1,589	1,248	790	865	870
Part Time Workers Regulations			12,280	831	500	833	561	402	776	595	664	530	1,575	774	823	1,163	304	216	371
National minimum wage		1,306	852	556	829	613	597	440	806	431	595	501	524	511	500	259	161	238	223
Discrimination on grounds of Religion or Belief	n/a	n/a	n/a	n/a	n/a	70	307	486	648	709	832	1,000	878	939	979	584	339	336	381
Discrimination on grounds of Sexual Orientation	n/a	n/a	n/a	n/a	n/a	61	349	395	470	582	600	706	638	613	639	361	189	187	198
Age Discrimination						n/a	n/a	972	2,949	3,801	5,184	6,821	3,715	2,818	1,994	1,087	12,629	7,622	
Others	7,564	8,186	5,090	6,207	4,805	5,371	5,459	5,219	5,072	13,873	9,274	8,059	5,528	5,919	6,901	12,328	18,361	28,241	41,052
Public Interest Disclosure																2,226	1,395	1,392	1,490
<b>Total</b>	<b>148,771</b>	<b>176,749</b>	<b>218,101</b>	<b>194,120</b>	<b>172,322</b>	<b>197,365</b>	<b>156,081</b>	<b>201,514</b>	<b>238,546</b>	<b>296,963</b>	<b>266,542</b>	<b>392,777</b>	<b>382,386</b>	<b>321,836</b>	<b>332,859</b>	<b>196,194</b>	<b>129,966</b>	<b>177,461</b>	<b>143,648</b>

(1998-2013 –Employment Tribunal Service Annual Reports; 2013-17 HMCTS statistics)

The number of claims have risen slightly since the initial severe decline and seemed to have plateaued, however the abolition of tribunal fees in July 2017 may see a recovery of the number of claims to 2013 levels.

One of the most interesting findings from the statistics is that unfair dismissal claims have remained constant over the last fifteen years, and have either increased or decreased in line with the total number of claims. The Working Time Directive (WTD) has seen one of the most significant increases with claims in 1998/1999 at 1,326 whilst in 2016/17 30,281 claims were accepted, although this fallen from a high in 2010/11 of 114,104. The WTD regulations have obviously developed over the relatively short period of time they have been in operation, and possibly is an area, where there is regular conflict in the workplace. The survey by Rutherford & Achur (2010) does disclose details regarding the types of disputes related to the WTD, with National Minimum Wage, non-receipt of pay, holiday pay and working hours issues as the dominant factors in their grievances. The decrease over the last number of years

could be associated with the introduction of fees, would be as the risk of funding a claim, with a lower potential compensatory return.

The five most common jurisdictions are unfair dismissal, unauthorised deductions (wages act), breach of contract, equal pay and working time directive. As Renton (2012) highlights, the first four of these categories would have been familiar to an employment lawyer when tribunals were formerly created in the 1970's, and therefore counteracts in some essence what has been previously discussed regarding tribunals having grown into a completely new entity. It can be argued that the statistics continue to concur with what Renton (2012) believes, in that tribunals have not morphed into a new, monolithic institution, but merely expanded upon the lines that they had already been set. Analysing the different types of claims being accepted, it is clear that over the last forty years, the majority of workplace disputes that tribunals have adjudicated over, have remained the same. Corby and Latreille (2012) and Corby (2013) believe that tribunals have gone through an isomorphism and now reflect the civil courts in the UK due to pressure from the government and judges who stem from the same legal background. With the rescinding of tribunal fees, it would appear that Renton (2012) would be more accurate in defining the composition of the tribunal system but the system is so politically driven that continual changes will be inevitable.

- The rise and fall of tribunal fees

Until July 2013 claimants were not required to pay a fee when submitting a claim, only potential legal representation costs and the emotional experience of pursuing a claim. The contentious introduction of fees (Corby, 2013; James 2011; TUC, 2013) raised issues around access to justice. Under the *Employment Tribunals and the Employment Appeal Tribunal Fees Order* (2013) claimants (except for specific exemptions) had to pay the following fees:

Table 3 - **Employment Tribunal fees**

Fee Type	Type A claims	Type B claims
Issue fee	£160	£250
Hearing fee	£230	£950

(MoJ Fees Factsheet, 2013)

According to the MoJ Fees Factsheet (2013:3) the:

*“Wages Act / refusals to allow time off / appeals etc. will be defined in the Order as Type A claims, and attract the level 1 fee, as stated in the consultation response. Discrimination / detriment / dismissal claims will be defined in the Fees Order as Type B claims and consequently allocated to the higher level 2 fees.”*

For respondents, it had been estimated that the cost of defending a claim was £8,500 and the average settlement costs being £5,400 (BCC, 2011). Therefore, respondents were

sometimes more inclined to settle a claim rather than proceed to a full hearing due to the high costs involved in defending the claim.

Employer organisations and ‘independent’ governmental reports, such as the ‘*Beechcroft report on Employment Law*’ (2012), campaigned successfully for fees to be introduced when submitting a claim which came into effect in July 2013 and impacted upon the number and types of claims (Renton, 2012). Although the ET figures outlined a sharp reduction in claims during the ‘fee period, it is difficult to authoritatively state that the introduction of fees impacted upon the willingness of employees in submitting a claim.

In July 2017, the supreme court decided that employment tribunal fees were unlawful as they prevented access to justice. For four years, claimants were responsible for paying to have their disputes heard through the tribunal service which correlated with the severe drop in the number of claims over that period. The trade union UNISON brought the case about as they believed it was virtually impossible or excessively difficult for some individuals to exercise their employment rights and that the process also indirectly discriminated against certain groups such as female workers. The government had tried to pre-empt some of these issues by conducting their own review into the tribunal system, headed by Sir Oliver Heald from the Minister of State for Justice. The outcome of this review determined that fees were not unfair and that a fair contribution was made to the operational costs of tribunals and therefore should remain in place. There was some acknowledgement of the significant drop in the number of claims being related to the introduction of fees and a recommendation that more support should be provided through the widening of the ‘Help with Fees’ scheme.

However, the judgment by the supreme court has now effectively removed the issues around fees with the present government who have now not only removed the fees requirement but also established a scheme for reimbursing those fees paid by claimants which is estimated to cost the government £33 million (People Management, 2018)

- Statistical design

As mentioned earlier in this paper, the purpose of this paper has been developed from previous statistical research by Lord and Redfern (2013) and has the aim of assessing the development of the employment tribunal system and identifying potential variances of employment tribunal claims based on year, region and jurisdiction.

To contextualise the following statistical data, the paper has explored the background to tribunals, why they were created, analysed their original mission, the dynamics of the present model, and will now focus upon the outcomes of tribunal claims and how this may be affected by region and jurisdiction. Specifically, the next section will extend beyond the standard analysis of the ETS and provide a unique insight into the effects and ramifications of tribunals based around three different potential outcomes.

The original data set, requested via a FOI request, was extensive and contains the results of around 860,000 claims in 8 regions of Great Britain over the 4 years from April 2013 to March 2017. Many entries are blank (0 claims) or  $\sim$  (1, 2, 3, 4 or 5 claims). The authors replaced blanks with 0 and imputed values for  $\sim$  by proportionately distributing differences in block totals, and by assigning 1 to each individual  $\sim$  when the block total is  $\sim$ .

Overall there are 22 types of claim, which were pooled into ‘groups’ of ***Claims*** for robustness and clarity:

- contract
- discrimination
- pay
- redundancy
- dismissal
- other

There are also 10 types of outcome, which were pooled into ranked ***Outcomes*** for robustness and clarity:

- successful
- settled
- unsuccessful

Some unusually large frequencies of dismissed cases are evident, which correspond to unions’ mass claims. This has resulted in the exclusion of dismissed cases from all other analyses, as they provide no information about the success rates of valid cases and to avoid the unusual observations arising from mass claims.

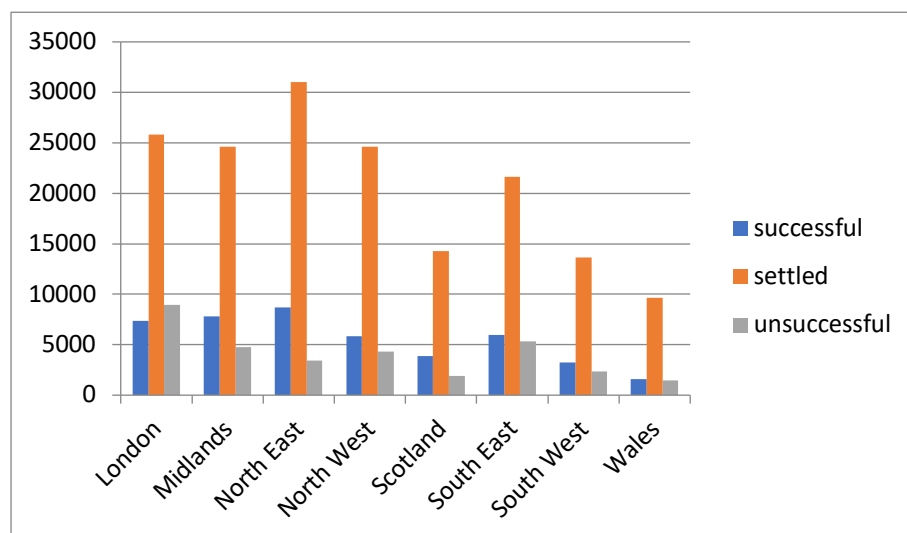
The following tables and figures outline the results of the analysis from the ET statistical data.

*Total number of claims per region*

Table 4 - **Region by Outcome**

<b>Sum of Frequency</b>			
	<b>successful</b>	<b>settled</b>	<b>Unsuccessful</b>
London	7,348	25,810	8,959
Midlands	7,837	24,615	4,735
North East	8,698	31,019	3,451
North West	5,813	24,609	4,347
Scotland	3,885	14,246	1,916
South East	5,989	21,613	5,307
South West	3,218	13,612	2,376
Wales	1,594	9,615	1,459
<b>Grand Total</b>	<b>44,382</b>	<b>165,139</b>	<b>32,550</b>

*Fig 2- Region by Outcome*

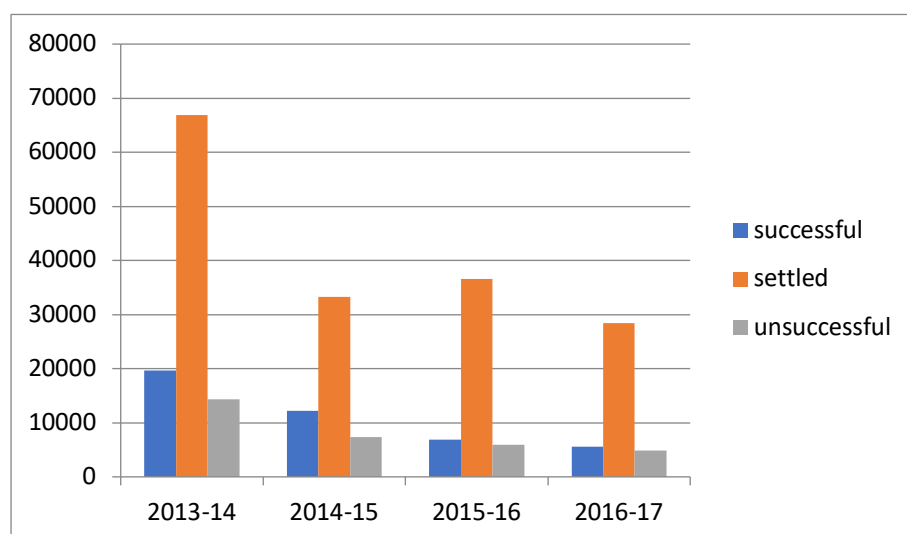


Outcomes per year

**Table 5 - Year by Outcome**

Sum of Frequency			
	successful	settled	unsuccessful
2013-14	19,665	66,819	14,349
2014-15	12,180	33,326	7,335
2015-16	6,901	36,632	5,972
2016-17	5,636	28,362	4,894
<b>Grand Total</b>	<b>44,382</b>	<b>165,139</b>	<b>32,550</b>

*Fig 3 - Year by Outcome*

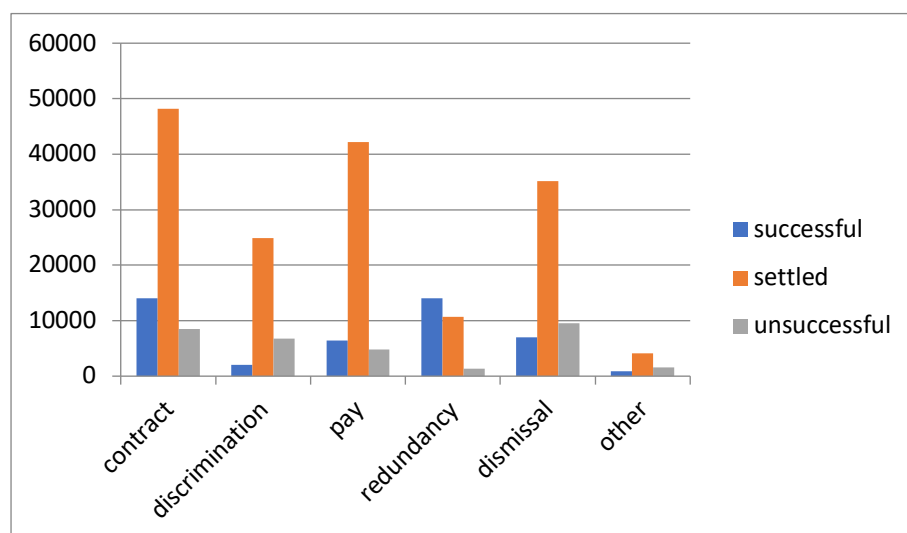


### Outcome per claim

Table 6 - Claim by Outcome

Sum of Frequency			
	successful	settled	unsuccessful
contract	14,042	48,135	8,488
discrimination	2,058	24,861	6,736
pay	6,455	42,188	4,776
redundancy	13,978	10,642	1,329
dismissal	6,969	35,159	9,589
other	880	4,154	1,632
<b>Grand Total</b>	<b>44,382</b>	<b>165,139</b>	<b>32,550</b>

Fig 4 - Claim by Outcome



- Odds Ratios analysis of tribunal claims

Having established that the outcomes of tribunal claims are significantly associated with region, year and claim, we conducted further analysis of the data in order to combine these three factors in a single model that provides estimates of their effects, so enabling better interpretations and predictions. A suitable model is to compare ‘outcome’ against ‘region’, ‘year’ and ‘claim’.

Table 7 represents the estimated odds arising from the comparison of the three variables. For each variable (Region, Year and Claim), there has to be a ratio of (1) known as the reference category which always has the lowest chance of success.

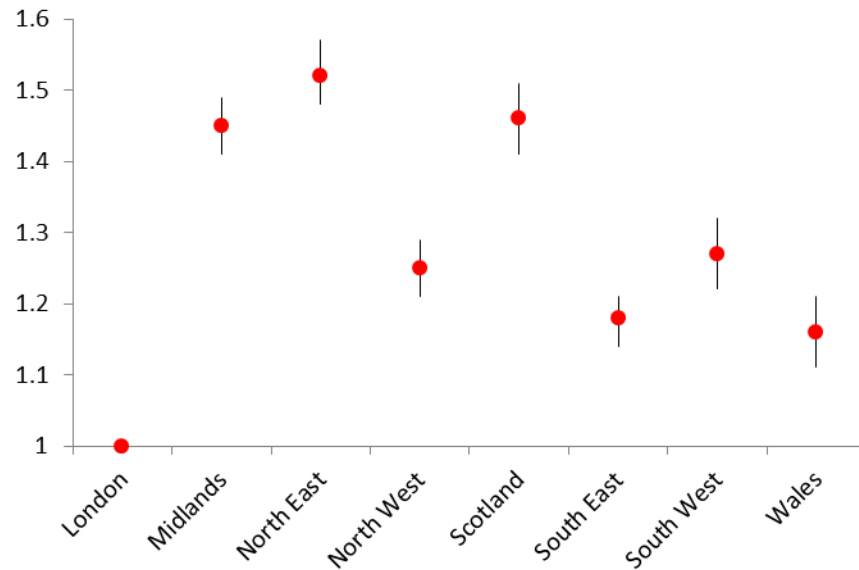


Table 7 - **Ordinal logistic regression analysis with response variable *OUTCOME***

Predictor Variable	Odds Ratio
<b><i>REGION</i></b>	
London	1
Midlands	1.45
North East	1.52
North West	1.25
Scotland	1.46
South East	1.18
South West	1.27
Wales	1.16
<b><i>YEAR</i></b>	
2013-14	1.17
2014-15	1.32
2015-16	1.05
2016-17	1
<b><i>CLAIM</i></b>	
contract	2.38
discrimination	1
pay	1.90
redundancy	10.99
dismissal	1.40
other	1.06

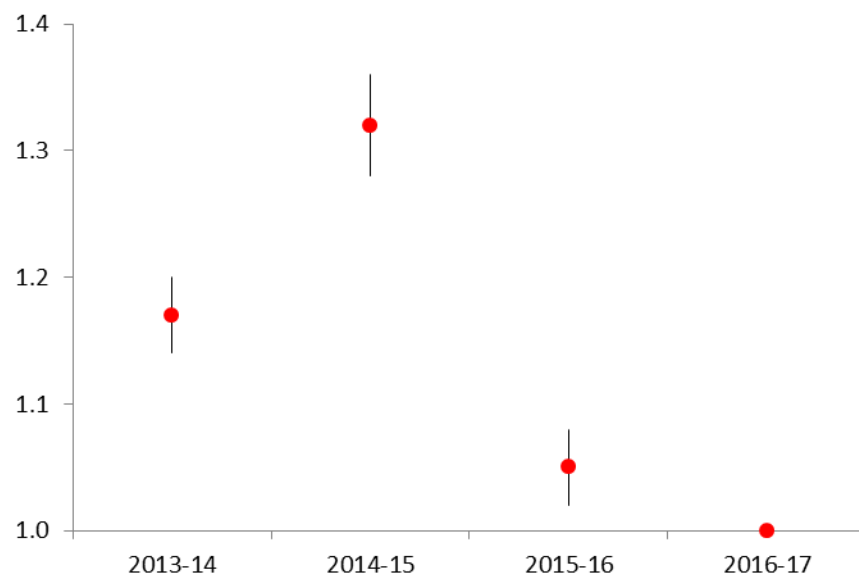
For **REGION**, London is the reference category with an odds ratio of 1. All other regions have odds ratios that are significantly greater than one, particularly North East, Scotland and Midlands. This means that London offered the least chance of success and these three regions offered the greatest chances of success, confirming the results noted previously. The odds ratio for the North East was 1.52, which means that the odds of a successful claim for this region were 52% greater than the corresponding odds for London.

*Figure 5 - Odds ratios for successful outcomes according to regions*



For **YEAR**, 2016-17 is the reference category with an odds ratio of 1. All other years have odds ratios that are significantly greater than one, particularly 2014-15. This means that 2016-17 offered the least chance of success and 2014-15 offered the greatest chance of success with an odds ratio of 1.32, so the odds of a successful claim in 2014-15 were 32% greater than the corresponding odds for 2016-17.

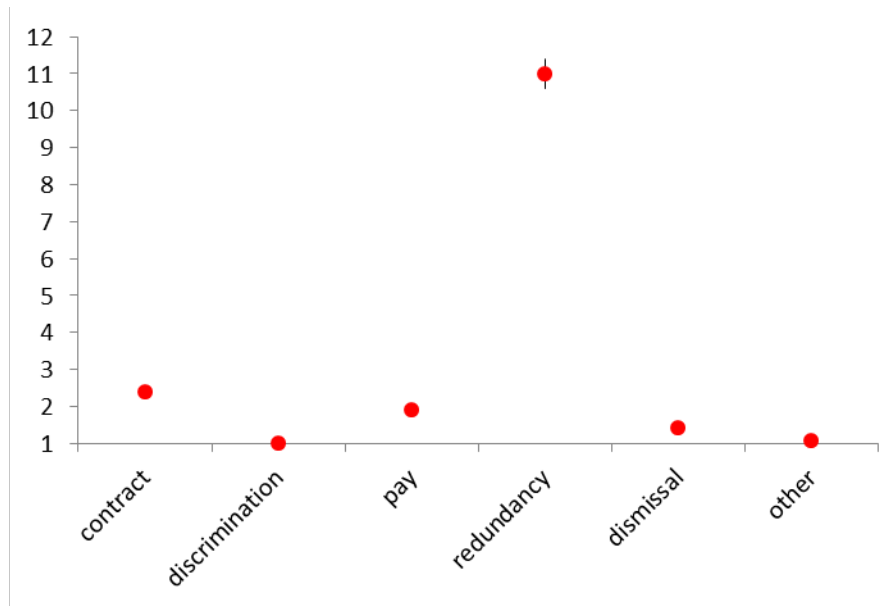
*Figure 6 - Odds ratios for successful outcomes according to years*



For **CLAIM**, discrimination is the reference category with an odds ratio of 1. All other types of claim have odds ratios that are significantly greater than one, particularly redundancy, contract and pay. This means that discrimination offered the least chance of success and these three types offered the greatest chances of success, confirming the results noted previously. The odds ratio for redundancy was 10.99, which is considerably greater than the odds ratios

for all other types of claim and means that the odds of a successful claim for redundancy were almost 11 times greater than the corresponding odds for discrimination.

**Figure 7 - Odds ratios for successful outcomes according to types of claim**



- Conclusions and discussion

The overall conclusion is that there are significant variations in the rates of successful outcomes of valid tribunal claims within this extensive data set. The type of claim is particularly influenced, with redundancy disputes achieving substantially better success rates than all other types of claims. Regional variations are also noticeable, with London offering the least chance of success.

The reasons behind why outcomes differ depending upon various factors is difficult to precisely define. The general rule of law holds that legal cases depend solely on laws and facts, with Judges applying legal reasons to the facts of the case in a coherent, logical and deliberate manner (Leiter, 2005). However, Justice Holmes (1881) noted that the law is rooted more in experience rather than logic, and that political as well as social factors influence judgements. Kozinski (1993:993) derisively commented that justice is, “what the judge ate for breakfast.” There are however, a multitude of different factors that can influence a judicial decision, except for the facts of the case. These include self experiences of political preferences, esteem and concern for reputation, beliefs about the role that may constrain their attitude, emotional and psychological factors, and the general rule of exercising discretion (Baum, 1997).

Schroeder (1918:89-93) theorised in his article on the Psychological Study of Judicial Opinion that,

*“every judicial opinion necessarily is the justification of every personal impulse of the judge in relation to the situation before him and the character of these impulses is determined by the judge’s life-long series of previous experiences, with their resultant integration in emotional tone.”*

Therefore it could be argued that judicial decisions can be located back to earlier experiences and a manifestation of lifelong chain of influences. Schroeder (1918).

The formalist theory counteracts these beliefs by stating that judicial opinion is based upon the rules of law and the facts of the case which then informs the decision of the judge (Frank, 1995). But this relies upon a straightforward and flawless piece of deductive reasoning (Capurso, 1998)

So how does the theory of justice and judicial decision making align with the findings of this paper?

A clear alignment could be between the reasons why redundancy claims had a higher chance of success may be associated with the serious nature of someone losing their job as well as the stringent process employers have to follow when making staff redundant. Previous experiences of the tribunal panel may influence how they apply the law because of the impact of redundancy on employees. Following a consultation and selection process that is not clearly defined can be difficult, as well as instigate a process which sometimes has not been defined properly, and has only been determined by the decision of the tribunal panel. For example, in *Sefton BC v Wainwright* (2014), the ET stated employees who are pregnant or on maternity leave must receive preferential treatment when being made redundant. Employers were not aware of this until the ruling was made and therefore is an element of redundancy which is difficult to legislate for and therefore could have resulted in more successful claims than other more straightforward areas of employment law.

The other two jurisdictions that had high success rates, pay and contract claims, are usually claims which are of low value in compensatory terms which employers are more willing to fight against, therefore taking more of a risk with the claim going to a full hearing.

The regional variations in success rates are interesting with London and the rest of the South-East area having small chances of success. The South East does have a different economic make up in comparison to the rest of the UK and therefore could have a different approach to tribunals and the specifics of a case.

Reviewing the history and development of employment tribunals highlighted the core principles of the tribunal system:

- Easily Accessible
- Informal
- Speedy
- Inexpensive

Although the Donovan commission had good intentions in identifying these elements as key priorities, it has led to divisions in outcomes of claims which could be affected by how accessible the tribunal system is in certain regions as well as how quickly and efficiently each individual tribunal hearing centre disposes of a case.

The reasons behind the results in this study are difficult to categorically explain and rationalise, though what can be concluded is that tribunals vary considerably when dealing with cases under their remit. They can use these data to monitor and evaluate the effectiveness of tribunals ensuring, as discussed at the commencement of this paper, that injustice is minimised.

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