

# Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals

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## **Abstract**

As migrant workers, EU-8 nationals enjoy a right to equal treatment with nationals in respect of their terms and conditions of employment. While some employers have tried to meet their legal obligations towards EU-8 nationals, others have taken advantage of these workers and have denied them their employment rights under UK law. In this paper we explore how EU-8 migrants make use of Employment Tribunals to enforce their employment rights. How many cases do they bring before Employment Tribunals, and what are they about? Are claims brought alone or with support, and if so, from whom? How are EU-8 workers treated once they are before a Tribunal and how successful are their claims? If there is evidence that EU-8 migrants are successfully bringing claims to enforce their employment rights, then fears about undercutting and exploitation of vulnerable workers are perhaps less serious than they would first appear. If they are not, then concerns about (mis)treatment are justified and prompt the further question as to how their rights could be better protected in practice, particularly given the introduction of fees for accessing Employment Tribunals.

## **A. Introduction**

Migration is a highly politicised issue in the UK, and the role of migrant workers is particularly sensitive. Unlike a number of European Union (EU) Member States, the UK, then under a Labour Government, did not impose restrictions on the admission of workers coming from the EU-8 states (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia), apart from the requirement to register under the Worker Registration Scheme (WRS). Over a million EU-8 workers, taking advantage of their free movement rights under Article 45 of the Treaty on the Functioning of the European Union (TFEU), arrived in the UK after 2004.

As migrant workers, EU-8 nationals enjoy a right to equal treatment with nationals in respect of their terms and conditions of employment. While some employers have tried to meet their legal obligations towards EU-8 nationals and have treated these workers with respect, other employers,

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especially agencies in the food processing sector, have taken advantage of these migrant workers and denied them their employment rights under UK law.<sup>1</sup> Not only does this raise questions about social justice towards migrant workers but it also means that responsible employers find it difficult to compete with rogue employers in their sector.<sup>2</sup> More generally, it has led to the perception that migrant workers are undercutting national workers and are thus, effectively, denying national workers jobs.

The aim of this article is not to examine whether EU-8 migrants are in fact ‘taking British jobs’. Our aim, instead, is to understand what happens if migrant workers are denied their employment rights. Our particular focus is whether EU-8 migrant workers enforce those rights by bringing claims before Employment Tribunals (ETs). We wanted to examine the number of cases brought and what they were about; how EU-8 migrants brought their cases to Tribunal (alone or with support); how EU-8 migrants were treated once in a Tribunal; and how successful were their claims. If there is evidence that EU-8 migrants are successfully bringing claims to enforce their employment rights, then fears about undercutting and exploitation of vulnerable workers are perhaps less serious than they would first appear. If they are not, then concerns about (mis)treatment are justified and prompt the further question as to how their rights could be better protected in practice, particularly given the introduction of fees for accessing ETs.

We recognise that enforcement of employment rights through ETs is only the tip of what Braithwaite has described as an ‘enforcement pyramid’.<sup>3</sup> At the base of the pyramid is ‘restorative dialogue’ - information, persuasion and voluntary agreement. When persuasion and dialogue fail, progressively more deterrent sanctions are required until there is compliance, ‘peaking’ with individual complaint to courts and tribunals. In focusing upon ET enforcement, we do not underestimate the importance of enforcement mechanisms that are lower in the regulatory pyramid.<sup>4</sup> Indeed, individual enforcement before courts and tribunals often goes hand in hand with other lower level methods of compliance. Yet court or tribunal enforcement is an important object of inquiry as the ‘peak’ enforcement mechanism. Individual litigation before courts and tribunals may also have powerful ‘trickle down’ compliance effects within a workplace or sector. In the broader EU context in which these EU-8 equal treatment cases inevitably arise, we note that an enforcement strategy based upon individual claims lies at the core of the Free Movement of Workers Enforcement Directive 2014/54. Article 3(1) provides:

Member States shall ensure that after possible recourse to other competent authorities including, where they deem it to be appropriate, conciliation procedures, judicial procedures, for the enforcement of obligations under Article 45 TFEU and under Articles 1 to 10 of Regulation (EU) No 492/2011, are available to all Union workers and members of their

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<sup>1</sup> <http://www.jrf.org.uk/publications/forced-labour-uk-food-industry>; <http://www.equalityhumanrights.com/media-centre/2010/march/inquiry-uncovers-mistreatment-and-exploitation-of-migrant-and-agency-workers/>.

<sup>2</sup> A point made by Labour Leader Ed Miliband in a speech in the 2015 election campaign: <http://press.labour.org.uk/post/116671926509/labour-has-a-better-and-fairer-plan-to-control>.

<sup>3</sup> J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: OUP, 2002) at 30. For application in the equality context, see B. Hepple, ‘Enforcing equality law: two steps forward and two steps backwards for reflexive regulation’ (2011) 40 *ILJ* 315-335 at 321.

<sup>4</sup> The data presented in this paper in fact underline their importance. We intend to reflect on this in a separate paper that is currently in progress with our colleague, Sarah Fraser Butlin.

family who consider that they have suffered or are suffering from unjustified restrictions and obstacles to their right to free movement or who consider themselves wronged by a failure to apply the principle of equal treatment to them, even after the relationship in which the restriction and obstacle or discrimination is alleged to have occurred has ended.

We would like to know whether this law ‘in books’ on equal treatment and judicial enforcement is a true reflection of law ‘in action’:<sup>5</sup> are ET processes *in fact* available to EU-8 migrant workers to vindicate their employment rights?

Yet we faced a problem in trying to answer our questions: there are no official data on how many ET claims have been brought by EU-8 nationals, let alone data on the subject matter of those claims or their outcome.<sup>6</sup> Furthermore, most ET decisions make no reference to the nationality of claimants. Even in respect of race discrimination claims, there may be no mention of nationality of the claimant in the decision. Moreover, most ET decisions are not reported and there is no easily accessible, searchable database.

In the face of this data vacuum, we undertook a manual search of the Employment Tribunal Judgment Register for England and Wales (located in Bury St Edmunds). We examined all ET decisions from across England and Wales held in the archive at Bury St Edmunds between 1 January 2010 and 31 December 2012 (three years of cases) and developed a coding system to record key details about the claimant and their claim wherever there was evidence to suggest that the claimant was an EU-8 migrant worker. We sought to triangulate our ET decision analysis by reference to data from interviews with employment law professionals, trade unions and judges (see further section B). We are acutely aware of the limitations of this approach but consider that despite its shortcomings it is better to attempt to analyse the problem empirically rather than simply rely upon assertion and anecdote.

We expected to find relatively little enforcement of employment rights by EU-8 migrants. In earlier work by Barnard looking at Employment Appeal Tribunal (EAT) decisions, she identified only 13 appeals brought by EU-8 migrant workers in the period 2005-2012.<sup>7</sup> This equates to approximately two appeals per year, as compared to the 2000 or so appeals the EAT receives annually.<sup>8</sup> Of these 13 appeals brought by EU-8 nationals, Barnard found that most appellants were of Polish nationality. Consistent with Barnard’s EAT study, we found that levels of enforcement before ETs were also very low, and EU-8 claimants were predominantly Polish nationals. But the empirical research carried out for the ET study has enabled us to present a ‘deeper’ account of enforcement in ETs by EU-8 migrants. Not only do we look at the number of cases brought but we can also elaborate upon the nature, presentation and outcomes of claims brought to ETs by EU-8 migrants, as well as what a subset of the decisions in this sample can tell us about the enforcement experience.

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<sup>5</sup> R. Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12.

<sup>6</sup> We made Freedom of Information requests to many government agencies to confirm this. See for example: [https://www.whatdotheyknow.com/request/et\\_claims\\_brought\\_by\\_eu\\_8\\_nation#incoming-522469](https://www.whatdotheyknow.com/request/et_claims_brought_by_eu_8_nation#incoming-522469).

<sup>7</sup> C. Barnard, ‘Enforcement of employment rights by migrant workers in the UK: the case of EU-8 nationals’, in C. Costello and M. Freedland (eds), *Migrants at Work* (Oxford: OUP, 2014).

<sup>8</sup> Between 1 April 2011 and 31 March 2012 the EAT received 2172 appeals and disposed of 2217. See Ministry of Justice, ‘Employment Tribunals and EAT Statistics, 2011-12’ (London: Ministry of Justice, 20 September 2012), table 13.

The article is structured as follows. We begin, in section B, by outlining our methodology. We then present our data on the number and types of claim brought by EU-8 migrants before ETs, how EU-8 migrants are represented before ETs and by whom, and the outcomes of their claim (section C). In section D we examine a small subset of cases brought by EU-8 migrant claimants with the aim of highlighting common features and bringing our data to life. We conclude in section E by returning to our research questions and considering what our data might suggest about possible reform.

## B. Method

### 1. Approach

Since this research considers the practical operation of a set of legal rules, and their interaction with people and institutions, its guiding philosophy is socio-legal. Following Lacey's analysis, we take socio-legal scholarship to have two defining characteristics: (1) locating 'legal practices within the context of the other social practices which constitute their immediate environment', and (2) subjecting 'legal practices to a (broadly speaking) empirical inquiry which scrutinizes not merely the legal articulation of the relevant rules and processes but the meaning and effects of those rules and processes as interpreted and enforced, and as experienced by their subjects'.<sup>9</sup> A socio-legal approach in our view necessitates the use of empirical methods. This has its challenges: in common with other legal fields, empirical methods are still not widely used to investigate labour law questions. There is therefore limited (though growing<sup>10</sup>) empirical expertise and research upon which to draw.

With this socio-legal starting point in mind, we used an exploratory research design comprised of documentary analysis and coding, interviews and focus groups. An exploratory approach to the research questions enabled us to collect a large amount of relatively unstructured information. This seemed appropriate given the paucity of pre-existing empirical knowledge in the field.<sup>11</sup> Combining documentary analysis with interviews and focus groups has helped to triangulate the documentary data and thereby strengthen our findings. Qualitative data has added depth and nuance to our documentary analysis, while quantitative data from the documentary analysis has added some breadth and generalisability. We draw mostly upon our quantitative (documentary analysis) data in this article.

Data was collected in three consecutive phases: (1) documentary analysis and coding of ET decisions 2010-2012 filed at the Register, (2) interviews and focus groups with employment law professionals and relevant organisations or groups, including trade unions, Citizens Advice Bureaux, the Migrants' Rights Network, the Pay and Work Rights helpline, AdviceUK, the Equality Advisory Support Service, Federation of Poles in Great Britain, East European Advice Centre, the Gangmasters' Licencing Authority, the AIRE Centre, New Europeans and Employment Tribunal judges, and (3)

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<sup>9</sup> N. Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 *Social Legal Studies* 131-157 at 132.

<sup>10</sup> Both investigators hosted (with other Cambridge colleagues) a two day symposium in April 2014 that explored the use of empirical methods in labour law. See further [http://www.cels.law.cam.ac.uk/new\\_frontiers\\_in\\_empirical\\_labour\\_law\\_research/](http://www.cels.law.cam.ac.uk/new_frontiers_in_empirical_labour_law_research/) and A. Ludlow and A. Blackham (eds) *New Frontiers in Empirical Labour Law Research* (Oxford: Hart, 2015, forthcoming).

<sup>11</sup> J. Webb, *Understanding and Designing Marketing Research* (London: Dryden Press, 1992).

further detailed documentary analysis of a subset of 2010-2012 ET decisions to identify common features.

## 2. Documentary analysis and coding of ET decisions

We examined every case held on paper record by the Employment Tribunal Judgment Register in Bury St. Edmunds for the three year period 1 January 2010 to 31 December 2012 (ie we looked at all cases for the years 2010, 2011 and 2012). This period was selected for three reasons: first, we felt that a 2010 start date was long enough since the 2004 accession of EU-8 Member States for us to see evidence of migration and enforcement; second, we wanted to capture information for more than one complete year, to increase generalisability, and full records were available for 2010-2012 in the Register; and third, this was a realistic number of cases to search through given the level of research assistance available to us.

Our principal objective in searching the Register was to identify how many claims had been brought by EU-8 migrants. Having found during a pilot visit, that it was not possible to ascertain the claimant's nationality with certainty from the face of the Register (less still his / her migrant worker status), we used a number of assumptions to capture relevant data by inference. These data capture terms ('triggers') included the claimant having both a first name and surname that appeared to originate from an EU-8 state, a reference to the claimant's EU-8 nationality in the body of the ET decision, and the nature of the factual dispute that led to the claim. We developed the following trigger codes in light of our knowledge of the literature on migrant workers:<sup>12</sup>

- CN: claimant's name (we were guided by online lists of common first names and surnames for each EU-8 country<sup>13</sup>)
- CR: respondent type (where the respondent represented a business of a type known to employ high numbers of migrant workers, such as agencies and food processing and packing businesses<sup>14</sup>)
- CT: claim type (where the claimant's claim was of a type that the literature suggests is more common among migrant workers: eg discrimination on grounds of nationality, race or pregnancy or claims for unpaid wages<sup>15</sup>)
- ERN: express reference to EU-8 nationality in the ET decision
- CI: claimant used an interpreter
- CIP: claimant appeared in person (ie without any formal representation or support)

For each case that was identified as having at least a 'claimant's name' trigger (CN), we recorded:

- case number, date judgment was handed down and Tribunal name
- names of parties
- nature of claim (eg unfair dismissal, discrimination)

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<sup>12</sup> See Barnard, above n.7.

<sup>13</sup> Our research assistant developed and used the following rough guide: Polish: -wicz; -czyk; -iska; -oska; -ynski; -inski; -cik; -icki; Lithuanian: -ciute; -ciene; -skas; -naite; -saite; Slovakia/Slovenia/Czech Republic: -nik; -vic; -ova; Latvian/Estonian: -zate; -dova; -jeva; Non-EU8: -skaite (Bulgarian); -vitch; -vich; vlad-; -nov (Russia).

<sup>14</sup> See Barnard, above n.7, 203-206. Other trigger respondent types included cleaning services, businesses using waiters and waitresses, labourers and drivers, the care sector and agencies or temporary worker providers.

<sup>15</sup> See Barnard, above n.7, 203-206.

- whether there was legal representation and if so, of what sort
- the outcome of the case
- any other relevant facts (eg the extent to which the ET assisted the claimant by, for example, providing translators)

Having recorded this information for all relevant cases in the 2010-12 period, we checked and developed our coding, adding the following three ‘triggers’ to capture more refined information about representation:

- CFRU: claimant was represented by the Free Representation Unit
- CCAB: claimant was represented by the Citizens’ Advice Bureau
- CLC: claimant was represented by a legal consultant or advisor

We recognise that our methodology is somewhat rudimentary, but we would argue that this was necessarily so, given the lack of official information and paucity of previous research with which we had to work. We would argue that, in the absence of any other publicly available data on EU-8 migrants using the Tribunal Service, this was the best approach to start mapping and understanding the field.

Having searched for, and coded, all cases between 1 January 2010 to 31 December 2012, 46 cases emerged where we could say with confidence that the claimant was an EU-8 migrant worker (see further below). We returned to Bury St Edmunds (to the County Court where the Register is now stored) to extract those cases in order to take a closer look at the judgments. This exercise has enabled us to gain a deeper ‘case study’ understanding of EU-8 migrants’ lived experience of enforcing their employment rights before ETs. It gave a human face to the numbers and stories to tell.<sup>16</sup>

## C. Findings

### 1. How many EU-8 migrant workers use ETs?

Our documentary analysis of ET decisions produced a total dataset of 1548 cases. So between 1 January 2010 and 31 December 2012 we found evidence of 1548 cases being brought before ETs (and disposed of) by claimants who appeared to be EU-8 migrant workers at least on the basis of name (CN). This represents approximately 0.005% of all cases disposed of by ETs during this period.<sup>17</sup> Data on the size of the UK’s migrant worker population is contested and partial. However, between 2010 and 2012, there were 428,892 new national insurance number registrations to adult nationals from EU-8 countries, Cyprus, Malta, Romania and Bulgaria.<sup>18</sup> 861,000 people from EU-8 countries

<sup>16</sup> See further on this type of methodology, P. Ewick and S. Silbey, *The Common Place of Law* (Chicago, University of Chicago Press, 1998), 28.

<sup>17</sup> ETs disposed of 28091 cases between 1 January 2010 and 31 March 2010 (assuming an even distribution of cases across the calendar year – a quarter of the total caseload for the year of 112364), 122,792 cases between 1 April 2010 and 31 March 2011, 110,769 cases between 1 April 2011 and 31 March 2012 and 79642 cases between 1 April 2012 and 21 December 2012 (26271 + 27773 + 25598). This gives a total number of 341294 cases disposed between 1 January 2010 and 31 December 2012. See Ministry of Justice, ‘Tribunal statistics quarterly tables - April to June 2013’ (London: Ministry of Justice, 20 September 2012), table 2.1.

<sup>18</sup> Information Directorate, Department for Work and Pensions ‘Statistical Bulletin: National Insurance number allocations to adult overseas nationals entering the UK – registrations to March 2012’ (London: Department for

were reportedly working in the UK in June 2014<sup>19</sup> and, during 2013, 1,148,000 people resident in the UK were EU-8 nationals (1.8% of the UK's total population).<sup>20</sup> If we say, then, that there are approximately 1 million EU-8 migrant workers in the UK out of a total working population of approximately 29 million people in 2012,<sup>21</sup> we would expect claims by EU-8 migrant workers to represent 1/29th of the ETs' disposed caseload, which equates to 3.45%, or 11769 cases between 2010 and 2012. Even assuming that all 1548 CN cases involve EU-8 migrants, our data suggest that EU-8 migrant workers are using ETs over 85% less than we would expect, relative to their approximate population size.

We recognise, of course, that name is not always an accurate indicator of a person's nationality, less still their migrant worker status because of the various phases of EU-8 migration to the UK. Many Polish nationals, for example, settled in the UK after the First World War. They form part of the resident workforce, and so do not count as EU-8 migrant workers. For this reason we are wary of treating the claimant's name trigger alone (CN) as synonymous with EU-8 migrant worker status. In recognition of these limitations, we have disaggregated the data to examine caseload by trigger number (Table 1) and type (Table 2).

Number of triggers	Number of cases
6	10
5	48
4	166
3	391
2	484
1	449
Total	1548

Table 1: Caseload by number of triggers

Table 1 shows that the number of triggers for cases in our set of 1548 ranged from 1 to 6, where 1 trigger meant that only claimant name (CN) indicated that the individual was an EU-8 migrant while 6 triggers indicated six factors, including claim type (CT), respondent type (CR), or use of interpreter (CI), pointed to the individual being an EU-8 migrant. The higher the number of triggers, the more likely we think the case concerned an EU-8 migrant. So where a particular case had six triggers (n=10) this was as close as we could come to certainty that the claimant was an EU-8 migrant.

Trigger type	Number of cases	As % of 2010-13 total (n=1548)
CN only	449	29
Includes ERN	148	9.6

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Work and Pensions, 30 August 2012), figure 2.1: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/222803/nino\\_allocations\\_aug12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/222803/nino_allocations_aug12.pdf).

<sup>19</sup> Chartered Institute of Personnel and Development, 'EU briefing, September 2014' (London: CIPD, September 2014), 1: [http://www.cipd.co.uk/binaries/the-impact-of-eu-migrant-labour-in-the-uk\\_2014.pdf](http://www.cipd.co.uk/binaries/the-impact-of-eu-migrant-labour-in-the-uk_2014.pdf).

<sup>20</sup> Office for National Statistics, 'Population by country of birth and nationality report, August 2014' (London, Office for National Statistics, 28 August 2014), table 2: [http://www.ons.gov.uk/ons/dcp171776\\_375449.pdf](http://www.ons.gov.uk/ons/dcp171776_375449.pdf).

<sup>21</sup> Office for National Statistics, 'Labour market summary, June 2012', 20 June 2012, 1: [http://www.ons.gov.uk/ons/dcp171780\\_265825.pdf](http://www.ons.gov.uk/ons/dcp171780_265825.pdf).



Includes CI	90	5.8
Includes ERN and CI	46	3
Includes CIP	504	32.6

*Table 2: Caseload by trigger type*

Table 2 shows that there were 449 cases in our dataset of 1548 that were identified as being brought by a potential EU-8 migrant worker on grounds of their name (CN) alone. In 148 cases the list of triggers included (but was not limited to) an express reference to EU-8 nationality (ERN). 90 cases included (but were not limited to) a CI trigger (claimant used an interpreter), 46 cases had at least both ERN and CI triggers, and there were 504 cases in which the claimant was in person (CIP: ie without any formal representation or support).

Putting Tables 1 and 2 together provides us with a more accurate picture about levels of ET enforcement among EU-8 migrant workers than the raw dataset figure (n=1548). Given the limitations of using the CN (claimant's name) trigger alone as an indicator of EU-8 migrant status, we think the CN cases (which amount to approximately one third of our dataset [n=449]) are best excluded. Thereafter, as explained above, the more triggers a case has, the more confident we can be about EU-8 status.<sup>22</sup> As Table 1 shows, we found 1099 cases with 2-6 triggers, 615 cases with 3-6 triggers, 224 cases with 4-6 triggers and 58 cases with 5-6 triggers.

The strongest evidence of EU-8 nationality in our dataset is where there was an express reference to EU-8 nationality in the ET decision (cases coded ERN). As Table 2 shows, only approximately 10% of our dataset (n=148) included an ERN trigger. We were surprised by this, given the prevalence of discrimination claims within our dataset and the relevance of nationality to those claims. As is clear from Table 3, the vast majority (85.8%) of these ERN cases were brought by Polish nationals. This is unsurprising given that data shows that Polish nationals are by far the largest group of migrants in the UK<sup>23</sup> and this is consistent with Barnard's earlier finding in her EAT study (described above). The use of an interpreter (CI) was further good evidence of migrant worker status, of which there were 90 cases.

Nationality	Case frequency	As % of ERN total (n=148)
Slovakian	7	4.7
Czech	1	0.7
Polish	127	85.8
Hungarian	1	0.7
Latvian	2	1.4
Lithuanian	9	6.1
Polish and Latvian	1	0.7

*Table 3: ERN cases by nationality*

<sup>22</sup> Though we note that there were 9 cases in the ERN and CI category that had fewer than 5 triggers and there were 20 cases that had 5-6 triggers that did not arise in the ERN and CI category.

<sup>23</sup> An estimated 726,000 residents in the UK have Polish nationality (14.8% of the total number of non-British nationals resident in the UK). See Office for National Statistics, 'Population by country of birth and nationality report, August 2014' (London, Office for National Statistics, 28 August 2014), figure 3: [http://www.ons.gov.uk/ons/dcp171776\\_375449.pdf](http://www.ons.gov.uk/ons/dcp171776_375449.pdf).



We can have greatest confidence, then, in claiming that 46 cases (that all had both ERN and CI triggers) concerned EU-8 migrant workers. In other words, 46 out of the total 1548 cases in our data set (see Table 2) are highly likely to have been brought by EU-8 migrants (i.e. about 15 cases per year).

This may be to interpret the data too narrowly. An alternative approach would be to focus on the cases where there were most triggers (and thus, as we saw above, the greatest likelihood of the claimant being an EU-8 migrant). If we focus on cases in which there were 4-6 triggers, this gives us a total of 224 cases (four triggers [166] + five triggers [48] + six triggers [10] – see Table 1). A similar case volume is yielded if we focus on ERN (express reference to nationality) and CI (claimant uses an interpreter) cases of which there were 238 in total (ERN cases [148] + CI cases [90] – see Table 2). In other words, whether we examine the data for evidence of EU-8 migrant status ‘quantitatively’ (in Table 1) or ‘qualitatively’ (in Table 2), our data suggest that ETs disposed of approximately 66 cases per year between 2010 and the end of 2012 that were brought by EU-8 migrant workers, out of annual case disposal totals of over 100,000.<sup>24</sup> 200 cases equates to only 0.06% of all cases disposed of by ETs between 2010 and 2012, which is 3.39% less (or 11569 fewer cases over three years) than we would expect to find if employment rights were being enforced by EU-8 migrant workers at levels proportionate to (official) population size. In short then, our data suggest that very few EU-8 migrant workers use ETs to enforce their employment rights. This low level of enforcement is broadly consistent with Barnard’s findings about enforcement at EAT level (in fact it is slightly lower at ET level).<sup>25</sup>

## 2. What types of claim do EU-8 migrant workers bring to ETs?

We also analysed our dataset of 1548 cases in terms of the types of claim that were being brought. We have chosen to focus on the cases in which we have strongest evidence to suggest EU-8 migrant worker status (where triggers include both ERN and CI: n=46, see Table 2). Table 4 presents data about the types of claim(s) brought by claimants in these 46 cases, ranked from most to least common. There were a total of 121 claims brought across the 46 cases, which produces a mean of 2.6 claims per case.

Claim type (jurisdiction)	Frequency	As % total claims (n=121) <sup>26</sup>
Pay (unpaid wages or holiday pay)	35	29
Unfair dismissal	28	23.1
Race discrimination	13	10.7
Notice pay	12	9.9
Sex discrimination <sup>27</sup>	9	7.4
Disability discrimination <sup>28</sup>	5	4.1
Breach of contract	4	3.3

<sup>24</sup> See fn.17.

<sup>25</sup> Barnard found 13 appeals brought by EU-8 migrants during 7 years (2005-2012). The EAT disposes of approximately 2000 appeals per year. On this basis, the EU-8 appeals in Barnard’s sample represented 0.09% of all appeals. See Barnard, above n.7. We have identified 200 cases brought by EU-8 migrants during 3 years (2010-2013). ETs disposed of 341294 cases during this period. On this basis, EU-8 cases represented 0.06% of all cases.

<sup>26</sup> Percentages may not add to 100 due to rounding.

<sup>27</sup> Includes harassment and victimisation and discrimination on grounds of pregnancy and maternity.

<sup>28</sup> Includes harassment, victimisation and failure to make reasonable adjustments.

Redundancy pay	3	2.5
Written statement	2	1.7
Minimum wage	2	1.7
Public interest disclosure detriment / dismissal	2	1.7
Age discrimination	2	1.7
Agency Regulations	1	0.8
s.152 TULR(C)A	1	0.8
Personal injury	1	0.8
Sick pay	1	0.8
Total claims	121	

*Table 4: ERN+CI cases by jurisdiction*

As can be seen from Table 4, the most common claim was for pay (for either unpaid wages or holiday pay). Pay claims accounted for 29% of total claims across the 46 cases in the dataset. It is difficult to compare our data with national Ministry of Justice (MoJ) data on the jurisdictional mix of Employment Tribunal cases disposed of between 2010 and 2012.<sup>29</sup> However, our ‘pay’ claim type seems to relate best to ‘Wages Act’ and (some of the) ‘working time’ cases in the national data. Wages Act claims accounted for approximately 16% of cases disposed across 2010-12 and working time cases accounted for approximately 10% of cases across the same period. Even if we assume that all national working time cases concerned holiday pay (which we strongly suspect they do not), the MoJ data suggest that pay claims accounted for a maximum of 26% of claims disposed by ETs between 2010 and 2013. Pay claims therefore appear to be overrepresented within our data by comparison with national data by at least 3%.

The second most common claim type within the ERN+CI dataset was for unfair dismissal (accounting for 23% of total claims across the 46 cases). This is consistent with MoJ data that shows that approximately 20% of claims between 2010 and 2012 were for unfair dismissal.

The most striking disparities between the remainder of our claim type data and national data are in respect of race and, to a lesser extent sex, discrimination, and minimum wage claims. There were 13 claims of race discrimination brought across the 46 ERN + CI cases. This equates to 10.7% of claims as compared to approximately 2% in national MoJ data. There were 9 claims of sex discrimination (7.4% of total claims as compared to 6.4% in the MoJ data). In respect of the minimum wage, there were two claims (1.7% of total claims as compared to 0.2% in the MoJ data, though we acknowledge how small our sample size is, and therefore the limited weight that we can place upon this national comparison finding). The high number of race and sex discrimination in our dataset is consistent with the literature.<sup>30</sup>

### **3. How do EU-8 migrant workers present before ETs?**

We were interested to know how EU-8 migrant claimants presented before Tribunals, and if they were represented, by what sort of individuals and organisations. This is an important issue given concerns about access to justice, particularly in light of recent reforms to Employment Tribunal fees.

<sup>29</sup> Ministry of Justice, ‘Employment Tribunals and EAT Statistics, 2010-11’ (London: Ministry of Justice, 1 September 2011), table 2; Ministry of Justice, ‘Employment Tribunals and EAT Statistics, 2011-12’ (London: Ministry of Justice, 20 September 2012), table 2; and Ministry of Justice, ‘Tribunal statistics quarter 4 – Jan-Mar 2013 tables’, table 2.2 (<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-and-annual-jan-mar-2013-2012-13>).

<sup>30</sup> See Barnard, above n.7, 203-206.

It is also of particular importance to those who do not have English as a mother tongue and who are unfamiliar with the British system. We started by analysing our maximum dataset of 1548 cases from 1 January 2010 to 31 December 2012 (that is all cases at the Register where there was reason to suspect on at least the basis of the claimant's name [CN], that they may be an EU-8 migrant worker). The results of this analysis are outlined in Table 5.

Claimant representation type	Frequency	As % of total cases (n=1548)
Claimant appeared in person (CIP) <sup>31</sup>	391	25.3
Claimant represented by the Free Representation Unit (CFRU)	16	1
Claimant represented by Citizens' Advice Bureau (CCAB)	13	0.8
Trade union	7	0.5
Claimant represented by a legal consultant or advisor (CLC)	34	2.2
Solicitor	56	3.6
Counsel	68	4.4
Paralegal / legal assistant / student	6	0.4
Lay representative	82	5.3
Unknown	875	56.5

*Table 5: Claimant representation across 1 January 2010 – 31 December 2012 dataset*

As Table 5 shows, even before Tribunal fees were introduced, a quarter of the claimants in our sample appeared before the ET in person, without the benefit of any formal representation. Thereafter, claimants in our sample were most commonly represented by lay representatives (5.3%), counsel (4.4%), or a solicitor (3.6%). Very few claimants benefitted from CAB (Citizens' Advice Bureaux) representation, a view confirmed by information provided by our interviews with CAB staff (though more benefitted from CAB advice – see section D, below). This may be explained by linguistic barriers and too little community resource for language support, a lack of knowledge among EU-8 migrants about CAB services and relatively few CABs having the training or resource to be able to offer representation. A member of staff at SOS Polonia, an advice organisation for migrant workers based in Southampton, suggested that low levels of engagement with CABs may also be explained by a reticence among EU-8 migrant workers to trust individuals and organisations outside of their own communities, and fear of engaging with formal state institutions or authorities.

Once again, it is difficult to compare our data with equivalent national data. National data on representation is of limited usefulness because it is dependent upon whether claimants provide such information. Furthermore, national data for 2011-12 only includes claims that were entered on the IT system.<sup>32</sup> Representation information was provided by claimants and included on the IT system in respect of 600,745 claims between 1 January 2010 and 31 December 2012;<sup>33</sup> significantly less than the total jurisdictions disposed of in the same period of 697,651.<sup>34</sup>

<sup>31</sup> This includes where the claimant was accompanied by a family member or friend.

<sup>32</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3 and fns.1 and 4.

<sup>33</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3 (59000 + 218100 + 159100 + 164545).

<sup>34</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table 2.2 (56742 + 243952 + 229968 + 166989).

Another challenge is in determining how national categories of representation type relate to the categories in our dataset. The most straightforward comparison is of representation by trade unions. Between 1 January 2010 and 31 December 2012, national data indicates that trade unions represented claimants in making 23,478 claims before Employment Tribunals.<sup>35</sup> This represents approximately 3.9% of all cases in which there is national data on representation for this period. As Table 6 shows, what is most striking by comparison to our data is that there were no cases in the ERN and CI dataset (about which we have greatest confidence that the claimants are EU-8 migrants) where claimants were represented by trade unions. Even if we broaden the analysis to encompass the maximum number of cases in the dataset (n=1548), claimants were represented by trade unions in only 0.5% of cases (see Table 5). This is significantly less than the national trade union representation rate of 3.9%. This finding is perhaps unsurprising, given that many EU-8 migrant workers work in industries where there is little trade union presence. We would argue that it should prompt reflection on the part of trade unions about the effectiveness of their engagement strategies, although we are aware of the steps taken by some unions to engage with EU-8 migrants.<sup>36</sup>

Claimant representation type	Frequency	As % of total cases (n=46)
Claimant appeared in person (CIP) <sup>37</sup>	36	78.3
Claimant represented by the Free Representation Unit (CFRU)	0	0
Claimant represented by Citizens' Advice Bureau (CCAB)	0	0
Trade union	0	0
Claimant represented by a legal consultant or advisor (CLC)	2	4.3
Solicitor	2	4.3
Counsel	1	2.2
Lay representative <sup>38</sup>	5	10.9

*Table 6: Claimant representation across the ERN+CI dataset*

A further comparison can be drawn with national representation data in respect of the prevalence of lawyer-led litigation. It is more difficult to draw a direct comparison here because of uncertainty about what the comparable national 'lawyer' category comprises. The notes that accompany national data state that 'lawyer' comprises solicitors, Law Centres and Trade Associations.<sup>39</sup> This best corresponds with a combination of 'solicitor', 'counsel' and 'CLC' (claimant was represented by a legal consultant or advisor) categories in our data. Combining the data for these three categories, results in 'lawyers' representing claimants in a total of 10.8% cases in our

<sup>35</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3 (3125 + 10000 + 5500 + 4853).

<sup>36</sup> See eg Union Modernisation Fund Round 3 projects. For evaluation, see Department for Business Innovation and Skills, 'Union Modernisation Fund: Round Three evaluation – broadening the role and value of unions for an increasingly vulnerable workforce' (London: Department for Business and Skills, February 2014).

<sup>37</sup> This includes where the claimant was accompanied by a family member or friend.

<sup>38</sup> These are cases in which the Tribunal describes the representative as 'lay representative' or an individual name is given without any further information or suggestion that they are a family member or friend of the claimant or professionally qualified as an adviser.

<sup>39</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3, fn.2.

ERN and CI dataset<sup>40</sup> (n=46) and 10.6% in our CN dataset<sup>41</sup> (n=1548). Thus, on either view of the data in this study (ERN+CI or just CN), lawyers represented far fewer individuals (approximately 10%) than they did nationally during the same period (approximately 60%).<sup>42</sup> Respondent employers in our ERN+CI and CN datasets were more likely to be represented by a lawyer (within its broad national data meaning) than claimants. In our CN dataset, 164 claimants (10.6%) were represented by a lawyer (within its broad national data meaning), compared to 406 respondents (26.2%). We note, though, that the rate of representation of respondents by lawyers was still considerably less than the national average, a reflection in part we think of the high number of disputes within our sample between claimants and respondents who are both EU-8 nationals (see further section D).

A final, and perhaps most important, comparison can be drawn with national representation data in respect of the claimant in person (CIP) rate. As Table 5 shows, the CIP rate for our CN dataset was 25.3%. This is a similar rate of in person representation as was reported in the 2013 Survey of Employment Tribunal Applications (SETA), where one in four claimants (24%) reported having no advice or representation.<sup>43</sup> Employment Tribunal statistics for 2010-12 offer a more directly comparable perspective as they cover the same time period as our dataset. They report that between 2010 and 2012, claimants provided no information about representation on ET1 forms in respect of 116,629 claims.<sup>44</sup> This suggests that these claimants represented themselves because there is no requirement to provide information where the claimant is in person.<sup>45</sup> This equates to a CIP rate of approximately 19.4%, which is lower than the rate in our CN dataset of 25.3% (see Table 5). More remarkably, as Table 6 shows, if we focus only on ERN and CI cases in our dataset (which, for the reasons described above, we think are most likely to be EU-8 migrant workers: n=46), the claimant in person (CIP) rate increases dramatically to almost 80%. This is a striking finding as it suggests that even before the introduction of ET fees, EU-8 migrant workers were four times more likely to represent themselves before a Tribunal than other claimants.

#### **4. What were the outcomes of EU-8 migrants' cases before ETs?**

One of our early interests in this study was to examine how successful EU-8 migrants were as claimants before ETs. Did they win all, or some, parts of their claims, and how did their rate of success compare with the national average? Answering these questions about success has proved difficult; national comparison even more so. One of the difficulties relates to the number of cases that were settled or withdrawn. Settlement can be considered a 'success' if it is on advantageous terms but the ET decisions in our dataset often did not reveal the terms on which the parties settled. Some claims were simply recorded as 'withdrawn', without stating any reason for their withdrawal.

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<sup>40</sup> 4.3 + 4.3 + 2.2.

<sup>41</sup> 2.2 + 3.6 + 4.4 + 0.4. It is unclear whether a law student would be included within the national 'lawyer' representation category. However, there were only 2 cases in our ERN+CI dataset in which claimants were represented by law students. Thus, even if these two cases were removed, the proportion of cases in which lawyers represented claimants would not alter significantly.

<sup>42</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3 (40475 + 142700 + 72600 + 120087).

<sup>43</sup> Department for Business Innovation and Skills, 'Findings from the Survey of Employment Tribunal Applications 2013' Research Series No. 177 (London: BIS, June 2014), 6.

<sup>44</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3 (11225 + 40400 + 34900 + 30104).

<sup>45</sup> Ministry of Justice, 'Tribunal statistics quarterly tables - April to June 2013' (London: Ministry of Justice, 20 September 2012), table E.3, fn.3.

In these cases, it was impossible to know whether the claims were in fact settled to the claimant's advantage or whether claimant was simply withdrawing an unmeritorious or weak claim. Comparison with national 'success' rates was also fraught with difficulty, particularly as to whether we were comparing claims that were sufficiently similar to the cases in our EU-8 dataset.

Given these difficulties, we decided to analyse success only in the 46 ERN+CI cases for which we had judgments. Although we recognise that this is a small sample, it enables our analysis to be more accurate and nuanced. Reading these cases gave us a deeper appreciation of the lived experience and 'stories' of enforcement by EU-8 claimants before ETs.<sup>46</sup> We return to this in section D, below but conclude this section first, by looking at case outcomes and levels of success enjoyed by EU-8 migrant claimants before ETs in those 46 cases.

The greatest and most certain indication of success was where the claimant won all claims in their case. As Table 7 below shows, this occurred in 9 out of the 46 cases in our ERN+CI dataset, which was the second most common outcome overall (second to 'lost all claims'). Thereafter, EU-8 claimants were successful in at least part of their case in a further 9 cases (6 + 2 + 1). In total then, 18 EU-8 claimants (or 39.1% out of a total of 46 cases) enjoyed some success before the ET. As Table 8 shows, the vast majority of these 18 successful claimants brought claims for unpaid wages or for holiday pay (62.5%). Successful claimants were awarded compensation that ranged from £49 at its lowest for unpaid wages to a peak of £22,315.16 for unfair dismissal and pregnancy discrimination. We recognise that even in cases where Tribunals awarded compensation, it does not follow that claimants actually received the payment they had been awarded. We also note that since the introduction of ET fees, it would not make financial sense for many of the successful claimants in this sample, to present a claim before an ET. We modelled for the impact of fees upon our 18 successful claimants. This revealed that 6 claimants recovered less than they would have paid in hearing and issue fees had their claims been presented after the introduction of fees in July 2013.

Case outcome	Frequency	As % of ERN+CI dataset (n=46) <sup>47</sup>
Won all claims	9	19.6
Won part, lost part	6	13
Won part, withdrew part	2	4.3
Won part, lost part, settled part	1	2.2
Lost all claims	13	28.3
Lost everything partly or wholly due to time bar	5	10.9
Lost part, settled part	3	6.5
Lost part, withdrew part	3	6.5
Lost part, settled part, withdrew part	1	2.2
Settled everything	2	4.3
Withdrew all claims	1	2.2
Total	46	

Table 7: Case outcome in ERN+CI dataset

Claim jurisdiction type	Frequency of	As % of successful
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<sup>46</sup> L. Barmes, 'Individual rights at work, methodological experimentation and the nature of law' in A. Ludlow and A. Blackham (eds) *New Frontiers in Empirical Labour Law Research* (Oxford: Hart, 2015) 19-30 at 22.

<sup>47</sup> May not total 100 due to rounding.

	successful claims	claims (n=24) <sup>48</sup>
Pay (unpaid wages or holiday pay)	15	62.5
Unfair dismissal	3	12.5
Race discrimination	1	4.2
Pregnancy discrimination	1	4.2
Disability discrimination	1	4.2
Failure to provide written statement	1	4.2
TULRCA protective award – redundancy	1	4.2
Breach of contract	1	4.2
Total	24	

*Table 8: Successful ERN+CI claimants by claim jurisdiction type*

At the other end of the spectrum, Table 7 shows that 13 EU-8 claimants in the ERN+CI dataset lost all of their claims. This was the most common single outcome across the dataset. A further 5 claimants lost all claims partly or wholly due to them being presented out of time. Overall then, a total of 18 EU-8 claimants (or 39.1%) were entirely unsuccessful before the ET. From this perspective, EU-8 migrant claimants appear just as likely to succeed at least in part as they are to fail altogether.

For the reasons given above, it becomes more complex to evaluate success in respect of cases that resulted in (part or whole) settlement or withdrawal. As Table 7 shows, this outcome accounts for 10 out of the 46 cases in the ERN+CI dataset (i.e. the last five types of case outcome listed in Table 7 from ‘lost part, settled part’ to ‘withdrew all claims’).

#### **D. The Lived Experience of EU-8 Migrants before ETs**

As we said above, there are limits to what a purely ‘quantitative’ case analysis can reveal about the context in which claims arose or the experience of claimants before ETs. Given the difficulties in contacting individual claimants (since most were in person rather than represented, and many may have returned to their home states), ET decisions provide the richest sources of contextual data. We therefore examined the 46 ERN+CI decisions in detail. This revealed a number of common features.<sup>49</sup>

First, the EU-8 migrant claimants in our ERN+CI dataset tended to work in jobs requiring relatively low levels of skill. They worked as, for example, cleaners, shop/café assistants, logistics drivers and warehouse operatives. Most had little or no English; interpreters were functional necessities rather than helpful added extras.<sup>50</sup>

Second, although 80% of the claimants in our sample appeared in person (CIP), on closer examination of the cases, many had received advice at some stage in the process, occasionally

<sup>48</sup> May not total 100 due to rounding.

<sup>49</sup> We recognise the somewhat circular nature of our methodology and argument here: we have used the fact that the claimant works in eg a food processing business as evidence to suggest that they are an EU-8 migrant; it therefore is not surprising that working in such industries is a common feature of these cases. This might have been better controlled for by examining a wider pool of our cases (eg all 200 or so cases where there were 4-6 triggers or all ERN or CI cases). However, this was not feasible within our resources. Furthermore, the picture that emerges from analysis of the dataset has been triangulated with interview data and is broadly consistent with the relevant literature.

<sup>50</sup> See eg *Piasecki v Accor UK Business & Leisure Hotels Ltd* 2345470/2012, judgment of 20 Nov. 2012, [4].



(though rarely) from solicitors<sup>51</sup> or a trade union,<sup>52</sup> sometimes from CABs, sometimes from family members (including the use of children to act as translators in some cases<sup>53</sup>). Examples of cases in which claimants benefited from advice before proceedings include *Tomaszewska-Arditti*,<sup>54</sup> where the claimant sought ‘prompt assistance via the job centre, ACAS and a solicitor’; and *Jarosz v Malgorzata Kawalska Pulman*<sup>55</sup> where the claimant received advice from the CAB, whose advisors also wrote a letter to her employer on her behalf,<sup>56</sup> and where the HMRC also took up the respondents’ failure to pay maternity pay on her behalf. In *Belaniová v Executive Care Group*<sup>57</sup> the claimant’s GP advised her about the short time limits for bringing a claim before the ET.<sup>58</sup> In that case, the claimant also approached Unison for help but the trade union declined to assist her because she was not a member.

In some cases, the quality of advice that claimants received was not the best: in *Zegiestowski* the claimant got ‘conflicting advice [from the CAB] and he decided to issue proceedings himself’.<sup>59</sup> Trade unions do not have an unblemished record across our sample of cases either: in *Makareviciene*<sup>60</sup> the Tribunal noted that the reason why the claimant’s claims were not presented in time was ‘due to the negligent acts or advice given to the Claimant by her union’.<sup>61</sup>

Third, a number of cases in our dataset involved claims brought by one EU-8 migrant against another, of which *Jarosz v Malgorzata Kawalska Pulman*<sup>62</sup> is an example. The claimant worked in a Polish shop. When she announced that she was pregnant, the Polish owner started treating her badly and subsequently told her that she was not to come back the store. Before returning to Poland to give birth, she visited the shop to buy some provisions. That night the shop was burgled and the owners blamed the claimant. She and her boyfriend were arrested and were held in police custody for five hours before being released without charge. Miss Jarosz won her unfair dismissal and discrimination on maternity ground claims and was awarded £22,315.

In other cases in the dataset the employer was British but the line manager was Eastern European. This produced further tensions between different groups of EU-8 nationals. In *Lietuvninkiene v Tulip Ltd*, for example, the claimant, a Lithuanian, alleged that her Polish line manager ‘does not like Lithuanians’. She quoted him as ‘calling her a “fucking old woman”’.<sup>63</sup> Our CAB interviewees reported similar cases of unfair treatment arising from intra EU-8 group conflict.

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<sup>51</sup> See eg *Piasecki v Accor UK Business & Leisure Hotels Ltd* 2345470/2012, judgment of 20 Nov. 2012, [16].

<sup>52</sup> See eg *Lietuvninkiene v Tulip Ltd* 1500670/2011 & 1500827/2011, judgment of 21 February 2012. The claimant approached her union, the T & G but ‘she was told they could not help her’ [6]. Cf *Hajduga v Robert Wiseman* 1303359/2012 where the claimant’s union, USDAW, assisted him during his employment.

<sup>53</sup> See eg *Nefjodova v Dorsky* 2405223/2010, judgment of 13 September 2011, [1].

<sup>54</sup> 3203005/2011, judgment of 29 November 2012, [10].

<sup>55</sup> 2513840/2009, judgment of 23 February 2012.

<sup>56</sup> See also *Piasecki v Accor UK Business & Leisure Hotels Ltd* 2345470/2012, judgment of 20 November 2012, [2].

<sup>57</sup> 2501981/11, judgment of 1 August 2011.

<sup>58</sup> [7].

<sup>59</sup> *Zegiestowski v Staffline Group Plc* 2403587/2012, judgment of 28 November 2012, [18].

<sup>60</sup> 1201109/2011, judgment of 8 December 2011.

<sup>61</sup> [3.1].

<sup>62</sup> 2513840/2009, judgment of 23 Feb 2012.

<sup>63</sup> 1500670/2011 & 1500827/2011, judgment of 21 February 2012, [3].

In cases where the employer was British, we found evidence that some were operating in a less than professional manner. In such cases, Tribunals exercised their discretion in favour of the claimant. *Trzaska* is a case in point.<sup>64</sup> In other cases, however, we found evidence of British employers recognising the needs of their migrant staff, including, in *Szczepanska v Dalepak*, providing Polish staff with handbooks and contracts translated into Polish.<sup>65</sup> Responding to a complaint of automatic unfair dismissal on grounds of pregnancy, *Dalepak* described how ‘the company is used to female workers taking maternity leave and that up to 10% at any one time may be on maternity leave’.<sup>66</sup> The facts of some cases suggested that some employers had demonstrated considerable patience in the face of challenging staff behaviour. In *Dworznik* for example,<sup>67</sup> the claimant was described as a ‘difficult and in many cases unreliable employee, who was often late for work and who deliberately refused to carry out the lawful instructions given to him by his employer when it suited him not to do so’.<sup>68</sup> The claimant had been instructed not to smoke in the cab of the respondent’s lorries and was given multiple verbal and written warnings in response to repeated breaches of the rule. The claimant also caused significant damage, refused to assist a colleague ‘Mate’ because he was Romanian, and accused his employer of racism. The employer tried to manage the claimant’s behaviour for over five months before they dismissed him.

Fourth, many claimants struggled to cope with Tribunal procedure. Some found it difficult to comply with basic directions given by Employment Judges, such as providing witness statements.<sup>69</sup> Limitation periods were particularly problematic<sup>70</sup> as was claimants understanding court documents.<sup>71</sup>

Fifth, once claimants made it to the Tribunal, ETs did much to accommodate them. There was heavy reliance on translators, many of whom were expressly praised and thanked by Employment Judges. The following statement from *Lietuvninkiene* is typical:<sup>72</sup>

‘I record here that I took time to explain, through the good offices of the interpreter Ms Zardasht, that now we have established the Claimant’s complaints, these must now inform the process of disclosure of documents.’

In *Nefjodova v Margarita Dorsky* the claimant sought review of the decision on the basis that the ‘translator has provided poor service and incorrect translation’. However, the Tribunal rejected

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<sup>64</sup> *Trzaska v Country Bideford (Management) Ltd* 1700697/2011, judgment of 10 October 2011.

<sup>65</sup> See eg *Szczepanska v Dalepak Limited* 1201926/2010, judgment of 26 February 2010, [4] and *Antczak v Staffline Recruitment Ltd* 1804434/2011, judgment of 11 April 2012, [5.2].

<sup>66</sup> *Szczepanska v Dalepak Limited* 1201926/2010, judgment of 26 February 2010, [9].

<sup>67</sup> *Dworznik v Bulk Logistics (UK) Ltd and Lidl Limited* 3302485/2011, judgment of 8 August 2012. See also *Ulikowska v Alibone Recycling* 1202377/2008, judgment of 15 December 2011 (facts described below).

<sup>68</sup> [6.2].

<sup>69</sup> *Wankowicz v Belmont Laundry* 3202885/2009, judgment of 10 November 2012, [2].

<sup>70</sup> *Belaniovva v Executive Care Group* 2501981/11, judgment of 1 August 2011. See also *Tomaszewska-Arditti*, 3203005/2011, judgment of 29 November 2012; *Pankowski v WMS Recruitment* 1500035/2012, judgment 16 October 2012.

<sup>71</sup> See eg *Nefjodova v Margarita Dorsky* 2405223/2010, judgment of 21 July 2011; *Balcikoniene v PBP Services Ltd*, 3300468/2009, judgment of 30 June 2011, [4].

<sup>72</sup> *Lietuvninkiene v Tulip Ltd* 1500670/2011 & 1500827/2011, judgment of 21 February 2012, [5].

this, noting that the earlier hearing had been conducted with the use of an interpreter, Mrs Burch, 'to whom the tribunal are indebted for her discrete and diligent assistance'.<sup>73</sup>

As *Lietuvninkiene* clearly shows, the ETs often set out clearly all they had done to ensure a fair trial. Returning to *Nefjodova v Margarita Dorsky*, the Tribunal said:<sup>74</sup>

'In the light of the claimant's lack of English, lack of representation, apparent confusion about the written correspondence from the tribunal and initially occasional tangential answers to questions, the tribunal at first had some concerns about the claimant's understanding of the proceedings and what was required. The tribunal was therefore at pains to ensure that clear explanations were provided to the claimant (including of the ratio of the main authority relied on by the respondent), that she understood the proceedings and was on an equal footing with the respondent.'

In *Kowejsza v Kuantto Ltd (Krystov Golon and Szymon Sroka)*, a non-payment of wages case, the ET also played a very active role, which extended to constructing proper bundles, sometimes for both (unrepresented) sides:<sup>75</sup>

'This was a difficult hearing for a number of reasons.

First, the claimants are all of Polish nationality and do not speak English. One very competent interpreter had her work cut out interpreting for all four of them.

Second, the respondent [had prepared an assortment of documents] ... but it was a bundle which was not paginated or fastened together in any way. When we had provided means of securing the bundle and had sat together numbering the pages, it transpired that not all the bundles have the same documents.'

The claimants were eventually awarded between £800 and £1800.

The fact that claimants often spoke little or no English also led some Tribunals to exercise their discretion in favour of such claimants. In *Zegiestowski*, for example, the ET recorded that:<sup>76</sup>

'We gave the claimant the benefit of the doubt on [the issues of bringing a claim one day out of time] because his grasp of English was not good and he may not initially have thought that his demise at [the employer] was connected to his race.'

We came across no evidence that ETs were discriminating against EU-8 migrants. On the contrary, a number of Tribunals expressed sympathy towards the migrants' position.<sup>77</sup> In one case, *Witkowski*,<sup>78</sup> the facts were so extreme and the abuse by the employer so great (setting itself up as a quasi-employment agency and 'using it as a means to lure unsuspecting Polish immigrants to the United Kingdom in order (a) to fill houses owned [by] the associate business and (b) to assure an

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<sup>73</sup> 2405223/2010, judgment of 13 September 2011, [11].

<sup>74</sup> 2405223/2010, judgment of 21 July 2011, [11].

<sup>75</sup> 3301755/2011, judgment of 17 November 2011, [4].

<sup>76</sup> *Zegiestowski v Staffline group plc* 2403587/2012, judgment of 28 November 2012, [26].

<sup>77</sup> See eg *Belaniová v Executive Care Group* 2501981/2011, judgment of 1 August 2011, [14]. 1500670/2011 & 1500827/2011, judgment of 21 February 2012, [12].

<sup>78</sup> 1950959/2010, judgment of 22 February 2011.

income stream from the book keeping contracts that this claimant and other fellow countrymen entered into')<sup>79</sup> that the case was referred to the Department for Business Innovation and Skills to consider if it is appropriate for the Secretary of State to take any action against the respondent under the Employment Agencies Act 1973.

Notwithstanding the above, we found good evidence of Tribunals consciously reflecting upon any unfairness that might be caused to respondents by virtue of their understanding approach to some claimants. Tribunals generally gave detailed consideration to claims, even if the issues were not always immediately apparent or appropriately presented. ETs often gave full reasons, even in relatively low value claims, such that some of the judgments are quite long. In *Staskova*,<sup>80</sup> for example, the judgment ran to 9 closely typed pages for a final award of £46.65; *Almasi Rohanszki*<sup>81</sup> ran to 19 closely typed pages for £594.30.

Tribunals did not mince their words when they thought they were being misled by a claimant or where they saw evidence that the claimant should have known better. In *Kuklinksi*,<sup>82</sup> for example, the Tribunal concluded that 'The claimant makes the claim of race discrimination to divert attention from the main allegations of financial mismanagement, which he admitted, in the hope that there would be a finding of unfair dismissal.' In *Piasecki*,<sup>83</sup> the Tribunal concluded that the claimant knew how to instruct a lawyer (because he had briefly instructed a solicitor to pursue a personal injury claim). Tribunals were also alive to the possibility that claimants might misrepresent their linguistic proficiency. In *Balcikoniene*,<sup>84</sup> the Tribunal noted that the claimant was described previously in the course of a separate claim as speaking English 'forcefully and fluently'. They noted the sharp contrast with these proceedings where the claimant had given evidence solely through an interpreter and described her English speaking ability as 'small'.

Tribunals were prepared to countenance costs awards against unsuccessful claimants. While in *Nefjodova v Margarita Dorsky*,<sup>85</sup> the ET rejected a £30,000 application for costs, in *Ulikowska v Alibone Recycling* the claimant was ordered to pay £3,800 in costs.<sup>86</sup> The facts of *Ulikowska* are striking. After making numerous complaints against her employer for health and safety breaches, all of which were unsubstantiated, the claimant called in the police with whom she then refused to cooperate; the employers willingly cooperated. The claimant eventually wrote to the MoJ and the *Independent*:<sup>87</sup>

'From the beginning we have experienced horror, we are mentally and physically destroyed.. When police does not help victims and only help criminals there is only one answer, police is involving into backing up for family reasons and acquaintances... Do Alibones Recycling Ltd's bosses who treat themselves as gods and criminal group go unpunished?'

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<sup>79</sup> *Witkowski v Drivers4you* 1950959/2010, judgment of 22 February 2011, [9].

<sup>80</sup> *Staskova v Rolfe Resources Limited* 1303065/2011, judgment of 24 November 2011.

<sup>81</sup> *Rohanszki v Stone, sued as the personal representative of Mrs Minnie Stone deceased* 2201303/2012, judgment of 11 October 2012.

<sup>82</sup> *Kuklinksi v MHC Social Enterprise Ltd* 2503164/2011, judgment of 1 November 2011, [35].

<sup>83</sup> *Piasecki v Accor UK Business & Leisure Hotels Limited* 2345470/2012, judgment of 20 November 2012.

<sup>84</sup> *Balcikoniene v Governing Body of St Eugene de Mazonod Catholic Primary School and others* 3304522/2010, judgment of 28 March 2011, [4-5].

<sup>85</sup> 2405223/2010, judgment of 17 July 2012.

<sup>86</sup> 1202377/2008, judgment of 15 December 2011.

<sup>87</sup> [4.6].

This was the last straw for the employers who dismissed her for gross misconduct. She lost her claim for unfair dismissal and a costs order of £3,800 was made against her.

In conclusion, we would argue from a survey of these cases that EU-8 migrants appearing before an Employment Tribunal seem to benefit from a fair process and good consideration of their claims, notwithstanding the chaotic manner in which many claims are presented. The core problem is that so few cases ever get to this stage at all. Many drop by the wayside; some claims are probably never brought at all. In concluding this article then, we draw together our findings and reflect upon possibilities for reform.

## E. Conclusions and Reform

We are acutely conscious of the shortcomings of our methodology. We therefore take reassurance from Baldwin and Davis<sup>88</sup> who argue that the skill of the empirical legal researcher lies in marrying some aspects of the insider's legal knowledge with the sociologist's ability to discern the 'public issue in the private trouble'.<sup>89</sup> They note that the methods by which this is achieved – observing, interviewing, perusing documents – can have a somewhat 'homespun or improvised feel to them' but they continue 'this is not necessarily a matter for regret, provided that the methods employed are appropriate as a means of exploring the issues which the researchers say they are trying to explore'. We think our methods are the best in the circumstances to answer to our original research questions.

In summary, our answers suggest a very low rate of enforcement of employment rights by EU-8 migrants bringing claims before ETs; lower in fact than the rate of enforcement found by Barnard in respect of EAT cases. Most ambitiously, we could say that there were 1548 cases brought to ETs by EU-8 migrants between 2010 and the end of 2012. Most conservatively, we would say that there were 46 cases; most realistically we would say that there were between 200 and 250. On any account of this data, we have found significantly fewer claims being brought by EU-8 migrants than we would expect if this group was enforcing employment rights at a rate that is proportionate to population size. Of those cases that were presented to ETs, the most common claim brought by EU-8 claimants in our sample was for pay (unpaid wages or holiday pay). There was an overrepresentation of sex and race discrimination claims relative to national data on the jurisdictional mix of ET cases disposed of during the same period. Levels of lawyer-led litigation were very low; levels of claimant in person litigation was very high (80% in the ERN+CI dataset). We found good evidence to show that ETs took considerable care to do all they could to assist migrants who had not been able to help themselves, in the face of claims that were frequently chaotically presented, and claimants who could speak little English. We found no evidence of discrimination by Tribunals. EU-8 migrant claimants were just as likely to succeed in their claim at least in part as they were to fail altogether. They enjoyed greatest success in respect of money claims. Tribunals gave full consideration to these claims, even if they were of low value (for as little as £49). The introduction of ET fees seems likely to have an especially deleterious effect on this group of claimants, particularly as regards these low value money claims, in respect of which ET enforcement is no longer financially viable.

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<sup>88</sup> J. Baldwin and G. Davis, 'Empirical Research in Law' in P. Cane and M. Tushnet, *The Oxford Handbook of Legal Studies* (Oxford, OUP, 2003), 890.

<sup>89</sup> Citing C. Wright Mills, *The Sociological Imagination* (New York, OUP, 1959).

Given the very limited use of ETs by EU-8 migrants, this does raise serious concerns about the exploitation of migrant workers and social justice. Our findings cast doubt on there being a true level playing field between domestic and migrant workers, and suggest that migrants' rights to equal treatment in the host Member State may be rights that exist more 'on paper' than in practice. This prompts further questions about how the employment rights of EU-8 migrant workers (and similarly situated domestic workers) could be better protected in practice, particularly given the introduction of fees for accessing ETs. Ideas that might be explored include, at its most basic, a simplified ET1 form, the abolition of ET fees, especially for low value cases, a simplified mechanism for claiming unpaid wages, and early neutral evaluation mechanism. More broadly, other enforcement bodies in this field, such as the Gangmasters Licensing Authority (GLA), Her Majesty's Revenue and Customs (HMRC), and the Employment Agency Standards Inspectorate (EASI) could be given greater powers to intervene on behalf of these vulnerable groups. This needs further exploration. As the Labour party's manifesto put it in 2015:<sup>90</sup>

We need fair rules at work to prevent the exploitation of migrant workers, which undercuts local wages and increases demand for further low-skilled migration. Labour will introduce a new law to stop employers undercutting wages by exploiting workers. We will ban recruitment agencies from hiring only from overseas<sup>91</sup> and crack down on rogue agencies by extending the remit of the Gangmasters Licensing Authority where there is evidence of abuse.

This was ultimately unsuccessful. The challenge will be for the Conservative government to make good on their promise to 'take further steps to eradicate abuses of workers, such as non-payment of the Minimum Wage, exclusivity in zerohours contracts and exploitation of migrant workers'.<sup>92</sup>

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<sup>90</sup> <http://www.labour.org.uk/page/-/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf>, 50.

<sup>91</sup> Conduct of Employment Agencies and Employment Businesses Regs 2003 as amended by SI 2014/3351.

<sup>92</sup> <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>, 21.