Something for nothing? Employment Tribunal claimants’ perspectives on legal funding

RICHARD MOORHEAD, CARDIFF LAW SCHOOL, CARDIFF UNIVERSITY
REBECCA CUMMING, CARDIFF LAW SCHOOL, CARDIFF UNIVERSITY

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BY
RICHARD MOORHEAD, CARDIFF UNIVERSITY LAW SCHOOL,
REBECCA CUMMING, CARDIFF UNIVERSITY LAW SCHOOL,
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Enquiries should be addressed to emar@berr.gsi.gov.uk or to:

Employment Market Analysis and Research
Department for Business Innovation & Skills
Bay 4107
1 Victoria Street
London SW1H 0ET
UNITED KINGDOM

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Foreword

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This research project was funded in large part by the Nuffield Foundation. BIS provided permission for the authors of the report to contact Employment Tribunal claimants who were interviewed by BMRB as part of EMAR’s ongoing work on the Survey of Employment Tribunal Applications (SETA). The main aim of the research was to examine in detail the claimants’ perspectives on the funding arrangements employed to enable them to bring their cases.

This project is a qualitative study based on 63 semi-structured interviews with claimants who have completed employment claims, whether they were successful or not. It is the first study that the authors are aware of to compare client perspectives on four methods of funding: trade union funding; legal expenses insurance; ‘American style’ damage-based contingency fees; and ‘normal’ private payment, generally the payment of lawyers on an hourly rate basis.

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Bill Wells
Director, Employment Market Analysis and Research
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This project would also not have been possible without the co-operation of the Department for Business Innovation & Skills, who gave permission for us to contact claimants who were interviewed by BMRB, as part of their ongoing work on the Survey of Employment Tribunal Applications (SETA). We would also like to thank BMRB for very professional and timely assistance with this process.

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Finally we must thank all the claimants who we spoke to. Their cooperation and willingness to spend the time discussing their experiences are what make the project, but they remain anonymous and unrewarded.

As ever, all analysis, views and errors are our own.
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Executive summary

This research aims to examine in detail Employment Tribunal claimant perspectives on the funding arrangements employed to enable them to bring their cases.

It is a qualitative study based on 63 semi-structured interviews with claimants who have completed employment claims (whether they were successful or not). It builds on the authors’ existing work conducted with suppliers of employment law services.1

It is the first study that we are aware of to compare client perspectives on four methods of funding: trade union funding; legal expenses insurance (LEI); ‘American-style’ damage-based contingency fees (DBCFs); and ‘normal’ private payment (generally the payment of lawyers on an hourly rate basis). As a qualitative study, the report is exploratory in nature. We recommend that its findings are tested on larger samples.

This report’s main findings are:

- Advertising was associated with some contingency fee claims, but appeared to have minimal impact on the propensity of claimants to claim.

- Advertising only had a modest impact on choice of adviser. Advertising did raise awareness that those who could not afford to pay privately could use no win no fee agreements but again only for a small number of respondents.

- Claimants appeared to be primarily motivated to claim because their own notions of justice were violated by their employer and/or because of encouragement by their family, peer groups and trade-unions.

- Very few claimants chose their adviser in any informed or meaningful way or made a conscious choice between funding types.

- The evidence suggests that many solicitors failed in their professional obligation to inform and advise claimants of alternative methods of funding.

- A choice of adviser is often denied to claimants by unions and legal expenses insurers but this only rarely gave rise to concerns for the claimants.

- Most clients demonstrated only very basic understandings of their fee arrangements but were generally satisfied with their fairness.

• Contingency fee claimants had a slightly more positive attitude towards the level of their fees than private payers, who expressed some reservations about expense. Contingency fee clients appeared to regard their cases as analogous to being ‘free’ even though they often paid sizeable percentage deductions from compensation if successful.

• Lack of understanding about fee arrangements gave rise to some areas of concern. Particular problems related to legal expenses insurance clients who were not covered for all their legal costs, and some contingency fee clients who were charged more than their understandings of ‘no win no fee’ suggested they ought to be. These charges were often substantial. Nevertheless, claimants often accepted additional charges as justified or simply as the way things were done in the legal system.

• Participants were generally happy with any settlement advice they received. Satisfaction was most consistent amongst those with a case that had gone to a final tribunal hearing (including even those who then lost). Where claimants were dissatisfied it was generally because they felt that their claim should have gone to a final hearing (this was so whether it was settled or withdrawn). Occasionally claimants felt that their settlement was inadequate.

• The number of settlement offers made per case appeared to differ under each funding regime, suggesting possible differences in negotiating behaviour. This suggests that approaches to negotiating settlements may vary depending on how a lawyer is paid and the risk the client bears.

• The evidence suggested greater risk aversion amongst privately paying clients. Settlement activity was more frequent amongst legal expenses insurance and trade union funded lawyers.

• There were also some subtle differences in the way clients were advised on settlement, which may indicate the differing financial incentives at work. Privately paid practitioners were more likely to present advice in a neutral manner. Advisers using other arrangements were more likely to speak in terms apparently designed to ensure the client accepted their advice without argument. This appeared to diminish any genuine client choice on settlement decisions.

• Overwhelmingly, and unsurprisingly in the light of this approach, clients accepted settlement advice, deferring to their adviser’s expertise. Therefore, the situation did not appear to be one where lawyers generally pressurised clients into settlement. However, robust pressure to settle was not always absent. This occurred for legal expenses insurance, trade union and contingency fee claimants, with legal expenses insured and trade union funded claimants (in this sample) most often threatened with withdrawal of funding.

• Our evidence suggests that, for the contingency fee clients we interviewed, ‘handcuff clauses’ (clauses effectively ensuring they accept the lawyer’s advice) were rarely if ever applied. Claimants did not appreciate the likely existence of such clauses. Most assumed that their claim would have continued had they wanted it to.
• Consistent with other lawyer-client research, clients were usually satisfied with their representatives’ service often rating it as ‘good’ or ‘very good’.

• On the whole, however, contingency fee claimants appeared less satisfied; with more rating their service as merely ‘fair’. The results would need testing across a larger sample but are consistent with a view that contingency fee lawyers concentrate more on getting a result, and invest less time in communicating and reassuring the client about their case. It may also be that such results reflect client expectations that service from contingency fee lawyers would be lower.

• Contingency fee claimants were the most likely to suggest that their funding regime had a negative impact on service quality, either because they viewed the arrangements as a form of charity; because they felt their case should have reached a tribunal hearing when it did not; or because they felt the lack of a guaranteed fee resulted in less effort from the representative. Conversely, a few contingency fee clients felt that their adviser having an interest in the compensation improved the service they received.

• Trade union funded and private payment claimants were the most likely of the interviewees to suggest that their funding impacted positively on their legal service. Private payment clients often equated higher fees with a better service, whilst trade union clients tended to suggest that their union’s experience was valuable, or that union support caused opponents to take the claim more seriously. Legal expenses insurance clients were more divided in their opinions.

• The efficient operation of the complex models of funding for employment tribunal claimants depends on clients being able to make informed choices about the model most appropriate to them. They clearly do not even attempt such choices. Furthermore, the evidence suggests that employment solicitors are not counseling their client on the options in breach of their regulatory regimes. Some may be exploiting client ignorance for their own gain.

• Regulatory agencies do not appear to have fully considered the implications of damage-based contingency fees for professional obligations. The Solicitors’ Regulation Authority, the Ministry of Justice - as regulator of Claims Management Companies - and, if needs be, the Legal Services Board, need to actively consider the permissible approaches to charging agreements in such areas.

About this project

This research is funded by the Nuffield Foundation. BIS provided permission for the authors of the report to contact Employment Tribunal claimants who were interviewed by BMRB as part of their ongoing work on the Survey of Employment Tribunal Applications (SETA). The main aim of the research is to examine in detail the claimants’ perspectives on the funding arrangements employed to enable them to bring their cases.

The research method used is that of qualitative interviews. The project is based on 63 semi-structured interviews with claimants who have completed employment claims, whether they were successful or not. It is the first study that the authors are aware of to compare client perspectives on four methods of funding: trade union funding; legal expenses insurance; ‘American style’ damage-based contingency fees; and ‘normal’ private payment, generally the payment of lawyers on an hourly rate basis.
About the authors

Professor Richard Moorhead is a Deputy Head of School in the Cardiff Law School at Cardiff University. Rebecca Cumming was a research assistant in the Cardiff Law School at the time of the project. She is now a business researcher for Central Biotechnology Services at Cardiff University.
Introduction

There is unparalleled interest in the funding arrangements used to bring legal claims but almost no research on claimant perspectives of those funding arrangements. Dissatisfaction with costs and costs information remains a recurrent claimant complaint, and Legal Services Ombudsman reports have shown clear breaches of the obligations contained in the Solicitors Code of Conduct. Yarrow and Abrams’ work on Conditional Fee Agreements (CFAs) in the late 90s suggested a number of concerns with costs advice, but it has not been followed up by further research (in spite of the profound changes in the operation of CFAs). A singular, recent exception was a Citizens Advice study, valuable but solely concerned with complaints about no win no fee agreements. Hammersley, Johnson and Morris have conducted some research into client perspectives on contingency fees, though having to wrestle with problematic samples of respondents. Even in the United States, where damage-based contingency fees (DBCFs) are a constant source of controversy, there is no significant work on consumer perspectives.

This lack of consumer-focused work is particularly surprising given the broader interest that fee arrangements have generated in public policy terms. No win no fee agreements are subjected to substantial criticism by defendant sectors in civil litigation as well as in employment tribunal cases. Trade unions and no win no fee lawyers attack each other with regard to equal pay cases. Similarly, before the event insurance (BTE) is criticised for restricting the choice of who claimants instruct; with some evidence

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that BTE insurers tend to fund ‘softer’ cases (i.e. only those cases that are most easy to win).  

Policy interest in the problems of current systems and their alternatives has heightened significantly recently. The Civil Justice Council has begun to consider whether the system which operates in some employment cases (contingency fees without costs recovery) might operate in civil litigation should the CFA system collapse. The Secretary of State at the Ministry of Justice, Jack Straw, has signalled an intention to review no win no fee agreements, as well as commissioning exploratory research in the field. Most recently, the Master of the Rolls has announced a fundamental review of costs in civil litigation being conducted by Lord Justice Rupert Jackson.

Against this background, the study seeks to investigate the four funding arrangements used in employment tribunal claims:

**Private payment** is the traditional method of legal funding. A lawyer charges claimants an hourly rate (or less commonly a fixed fee) for services rendered. Because there is generally no costs recovery in employment cases, the claimant will be liable to pay for any work done irrespective of the case result.

**Damage-based contingency fees** (DBCFs) are a species of ‘no win no fee’ agreement. Generally, lawyers are not paid fees if they lose and a fee based on the percentage of damages recovered for the claimant if they win. This is the common model of funding in the USA (and some other jurisdictions), where the DBCF is usually paid from the claimant’s damages. It is not permitted in civil litigation in England and Wales but it is permitted in relation to ‘non-contentious business’ including some tribunal claims.

**Legal expenses insurance** (LEI) provides insurance cover for legal fees. Users normally have an ‘add-on’ policy attached to their car, home or other insurance policy. The lawyer’s fees are covered by the insurance company in return for payment of the premium by the insured.

**Trade unions** may assist their members in bringing employment claims, normally through instructing an external firm of solicitors. The arrangements for paying such lawyers are not transparent. It is understood that such lawyers may be paid for their time and/or promised other directly remunerative work (e.g. personal injury cases) in return for doing such cases. Under the latter arrangement, employment cases would be done without payment or at lower rates.

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10 Moorhead, Richard, Paul Fenn and Neil Rickman (2008) No Win No Fee - A Scoping Study (Ministry of Justice, unpublished)
As funding has become increasingly controversial so claimants have faced an increasingly complex set of choices. The primary goal of this study was to investigate those choices. Thus this report covers:

- What factors influence individuals to bring claims in the first place. The aim here was to investigate the role of advertising and other forms of aggressive marketing.
- How claimants choose their advisers.
- How well claimants understand the fee arrangements they enter into.
- How claimants perceived the settlement of claims.
- Whether and why claimants are satisfied with the representation they receive.

In looking at these issues the study has borne in mind the key criticisms made of each form of funding (see Chapter 2) and the broader concerns that claiming is out of control. The latter idea, that claims are often unmerited and that grievances are stirred up by claims managers and solicitors actively recruiting clients who do not have genuine grievances, also forms part of the background to this study.

A central idea in the critique of claiming is that employment claimants get something for nothing because claiming is 'easy' and funding is 'riskless'. They can simply 'have a go'. The criticism relates partly to the absence of, or rather limited form of, cost shifting that takes place in employment tribunals but also to the ways in which cases are increasingly brought. No win no fee, trade union and BTE funding of cases all apparently relieve claimants of the need to pay for their claims (at least until compensation is paid). This has led, particularly as regards DBCFs, to a redoubling of the critique.

This work is based on a limited number of interviews with a stratified, random sample of claimants. There are limits to what such studies can show. A larger study would be necessary to generalise our findings to the entire population of employment tribunal claimants. Nevertheless, the claimant voice is so far little heard in the debate on funding and this study contributes important data to debates around the regulation of funding; professional relationships and the underlying process of employment claiming.
2

Background and the existing research base on claimants, costs and satisfaction

Very little research has been conducted on client perceptions of lawyer costs. Where it does exist, the tendency is to emphasise costs as a major impediment to access to justice.\textsuperscript{11} There is also evidence that the general population think that the legal system works better for the rich than for the poor\textsuperscript{12} and that they disagree with the proposition that lawyer's charges are reasonable given the work they do.\textsuperscript{13} Genn et al's report on tribunal users touched on claimant perceptions of legal costs, suggesting that the most significant barrier to seeking advice from a solicitor was the anticipated expense.\textsuperscript{14} Such comments came from those who had used a solicitor and those who had not but nonetheless perceived them as expensive. More specifically, respondents who thought that they would have to meet the costs of a claim themselves (either because they were unaware of no win no fee agreements, or because they did not think they would be eligible for them) often felt cost was a significant concern.\textsuperscript{15} Thus some individuals may worry about costs unnecessarily because they lack knowledge of viable alternatives to privately funded litigation. Indeed, only a small number of respondents mentioned knowing of solicitors who would take a case on a NWNF

\textsuperscript{11} Although see, Kritzer, Herbert M. (2009) To Lawyer or Not to Lawyer: Is that the Question? 5 Journal of Empirical Legal Studies 875-906. Also, Eekelaar et al have suggested that divorce lawyers are cost-effective when compared to the services of other professionals (namely estate agents). Eekelaar, John, Mavis Maclean and Sarah Beinart, Family Matters: The Divorce Work of Solicitors (Hart Publishing, Oxford 2000), pp.129-147.


\textsuperscript{13} Genn (1999) op cit, p.236. Such concerns appeared to stem from both personal experience and from media reports about high legal costs, ibid. p. 238. Ipsos Mori data on public opinion of the professions tells us that in annual surveys from 1999-2003 there were never more than 1% of respondents who considered lawyers underpaid for the job that they do (http://www.ipsos-mori.com/content/opinion-of-professions-2.ashx).

\textsuperscript{14} Genn, Hazel, Ben Lever, Lauren Gray and Nigel Balmer, (2006) Tribunals for diverse users DCA Research Series 1/06, p.79.

\textsuperscript{15} Ibid, p.57.
Further, Hammersley and Johnson found that worries about costs contributed to the stress of bringing an employment claim.\textsuperscript{17}

Yarrow and Abrams conducted an extensive review of personal injury claimant experiences with pre-Access to Justice Act CFAs\textsuperscript{18}. This research has been superseded by developments in the architecture of CFAs but remains of interest as the main work to engage with client views of lawyer charges.\textsuperscript{19} Solicitors were criticised for providing inadequate information on costs and/or alternative funding arrangements. Specifically, CFA solicitors were less likely to discuss the possibility of trade union and LEI funding, resulting in some claimants commencing cases using CFAs where TU/LEI funding could have been used. Some claimants were also not fully aware of their potential financial liabilities, particularly in relation to disbursements, which caused some significant financial problems, and ATE premiums.

In terms of case outcome, the Yarrow and Abrams study found that most claimants were satisfied. There was little evidence that solicitors were putting pressure on claimants to accept settlement offers; although claimants were generally unaware of the potential for conflict of interests and the authors found that pressure was largely unnecessary given solicitors’ strong influence over claimant decisions. Indeed, (then) Department for Trade and Industry Survey of Employment Tribunal Applications (SETA) data suggests that the majority of clients who are advised to settle do so.\textsuperscript{20} If clients do not generally question advice, then issues of conflicts of interest within different funding arrangements become more invisible; representatives who do not champion their clients’ best interests are unlikely to be challenged.

There has been some more recent research based on data from claimants who used DBCFs.\textsuperscript{21} One study focused specifically on claimant perceptions of the employment claim process, using a postal questionnaire followed up by telephone and face-to-face interviews to question individuals about their experiences with claiming. The study was limited by a small sample with an apparently significant response bias. The other study was based on a large sample but had only limited questioning specific to funding arrangements. The studies have suggested that DBCF claimants are not generally more dissatisfied with their case outcomes than other claimants; may have overly-optimistic views about the prospects of success of their cases; and may be less satisfied with settlement (and that their cases may be more likely to settle than under other funding mechanisms).

\textsuperscript{16} Ibid, p.79.
\textsuperscript{17} Hammersley and Johnson (2004) op cit, pp.14-15; Johnson and Hammersley (2005) op cit, p.27.
\textsuperscript{18} Yarrow and Abrams (1999), op cit; Yarrow and Abrams (2000), op cit.
\textsuperscript{19} After the Access to Justice Act, the nature of CFAs changed dramatically with the potential for clients not to bear any costs under such agreements believed to be much more common.
\textsuperscript{21} Hammersley and Johnson (2004), op cit and Hammersley et al (2007), op cit.
Our study is distinctive for a number of reasons: it is timely (given the policy interest in funding currently) and it focuses on funding arrangements to a depth only the Yarrow and Abrams studies have been able to. Moreover, it is able to go further, comparing all four of the main funding arrangements available to employment claimants; and it does so on the basis of a robustly drawn sample of clients.\textsuperscript{22} The ability to look at four funding arrangements is a particular innovation.

\textbf{2.1 Issues posed by different fee arrangements}

There is a wide literature on lawyer fees which does not draw on client perspectives.\textsuperscript{23} It tends to focus on contingency fees or legal aid, generally comparing these regimes with privately paid hourly fees. The research makes clear that all fee arrangements have different pros and cons for claimants and other stakeholders (notably their opponents and the public purse).

Similarly, conflicts of interest can arise in any funding arrangement. With hourly rates, there are incentives for claimant lawyers to ‘over-service’ their claimants, i.e. to do more work than is necessary to achieve a result. The precise arrangements between insurer/trade union and claimant solicitor have not been subject to independent research and so the incentives operating there are less clear. Some firms agree to take cases from trade unions without payment or for significantly reduced payment to ensure a supply of personal injury claims is referred to them. Under these arrangements there is a risk that the financial incentives may inhibit the ability of trade union lawyers to act in their employment claimant’s best interests. Conversely, trade union and legal expenses insurance providers may use their position as bulk purchasers to monitor and maintain quality to counteract such problems.

DBCFs are also regularly criticised on ‘conflict of interest’ grounds.\textsuperscript{24} In particular, there is a danger that contingency fee representatives will give settlement advice with their own financial interests in mind, settling cases where the risks and rewards to themselves outweigh the effort (and so cost) required to advance the clients interests. Such incentives may be somewhat counteracted by the need for advisers to maintain a reputation for being tough with their claimants\textsuperscript{25} as well as opponents.\textsuperscript{26} Nonetheless, DBCF practitioners and third party funders such as legal expenses insurers and trade unions often maintain formal control over settlement decisions via clauses allowing them to impose

\textsuperscript{22} Yarrow and Abrams and the small-scale Hammersely et al study had to contend with unsatisfactory means of sampling clients.


\textsuperscript{24} Ibid, Chapter 11.

\textsuperscript{25} Kritzer, Herbert M., Risks, Reputations and Rewards: Contingency Fee Legal practice in the United States (Stanford University Press, California 2004), pp.221-22 (and more generally Chapter 7).

negative consequences on clients who reject advice. Conflict of interest concerns consequently take on added significance.

This research cannot resolve the questions of conflict of interest, but it can provide useful data on client perspectives on settlement and, in particular, their view of who was in charge in settlement negotiations. The study is also able to explore the ways in which settlement are dealt with under the different funding regimes.

2.2 Complexities and adviser client relations

The complexities of some funding arrangements are open to question on consumer interest grounds. Lawyers not atypically claim that whichever system they use is ‘clear’ and in the claimant’s interest. Hourly rate lawyers say that claimants understand clearly what work they are paying for and how much it will cost. Critics point to the inability of claimants to predict total charges under such agreements; their inability to assess whether all hours put into a case were necessary or beneficial; and the capacity for cases on hourly fees to ‘run out of control’, racking up costs way above anticipated or economic levels. The DBCF percentage charge arrangement is apparently simple, but our previous work has shown that DBCF lawyers charge in ways which may not be as transparent or predictable as a simple model suggests.

LEI and trade union funding appear unproblematic at first glance. They have the apparent advantage of doing away with complexity by apparently covering ‘everything’ (a reality this study tests) but they also tend to limit the choice of representative to panel firms. Choice is an important but an almost completely unresearched area in this context. Critics suggest panel practitioners are ‘tame’; acting in the interests of the insurers or union and not the claimants. In the personal injury field, Fenn et al have demonstrated that LEI is associated with softer cases (i.e. only taking cases where defendants liability is clearer) and has shorter settlement durations. There may also be issues in relation to the extent of cover: limits may be placed on the amount claimable in legal costs, and as shall be seen below it may be unclear at which point the insurance will begin to fund the claim.

As a member organisation, trade unions have been assumed to act in the interests of their members. That understanding has been called into question by the entry of no win no fee lawyers into the equal pay arena. They have alleged discriminatory practices on the part of unions which call into question the ability or willingness of unions to represent some categories of members; a position

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28 See Moorhead and Cumming (2008), op cit, Chapter 6.
29 It has been shown to be important in the context of public defenders. T. Goriely, Evaluating the Scottish Public Defence Solicitors’ Office (2003) 30(1) J. Law & Soc 84, pp.86-88.
given some credence by decisions in the Court of Appeal.\(^{32}\) The unions counter with allegations that no win no fee lawyers’ turn their members against them through misleading advertising; contract unfairly and cherry-pick only the cases that are easier to win.

### 2.3 Awareness and informed consent

An issue particularly associated with more complex funding arrangements is how well claimants understand their fee arrangements. It is important for two reasons: one is the obvious point that the reasonableness of a solicitors’ charges depends on the claimant having contracted with them in a transparent manner. Secondly, informed consent is particularly important in considering whether to regulate diverse models of practice. A justification for permitting diverse models of charging is that different lawyers and clients have different attitudes to risk, and permitting them to contract in different ways would be more sensitive to risk; and might also ensure more cases got access to justice.\(^{33}\) A debate on the justifications for such models depends on claimants being able to understand the models if they are able to choose between them. So, if some solicitors charge for disbursements on top of a contingency fee and some do not, claimants’ understandings of their fee arrangements ought to be sufficiently complex to understand the difference. This study looks in detail at such understandings.

### 2.4 Not just choice of lawyer, choice of funding?

Similarly, a regulatory debate would also be informed by whether or not claimants in fact scrutinise different charging models and ‘shop around’ generally for the best deals. Put simply, we need to know not only whether claimants can exercise choice, but whether they even try. In particular, this study considers the extent to which claimants were offered or considered alternative ways of funding their litigation.

This is partly an issue of whether solicitors appear to be putting their own interests over those of the client. Solicitors are obliged to establish with the claimant ‘whether the claimant’s own costs are covered by insurance or may be paid by someone else such as an employer or trade union’.\(^{34}\) Solicitors able to take a client who pays privately may have to refer the same client elsewhere if they have LEI or trade union membership. The extent to which this rule is apparently complied with is considered here. Furthermore, DBCFs have critical advantages for clients, shielding them from certain risks and costs, but there is no explicit requirement that solicitors’ clients be advised of the possibility of using

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\(^{32}\) The most well-publicised case is Allen v GMB [2008] EWCA Civ 810, which has attracted much academic discussion and media coverage, for example J. Robins, Cash: Home Loans: Unions under renewed attack for failing low-paid women members: Female workers angry at the GMB for selling them short in a compensation deal have triumphed at court The Observer (London 24\(^{th}\) August 2008). Also see Moorhead and Cumming (2008), op cit, para.276-279.

\(^{33}\) A regulated model of contingency fees almost inevitably makes contingency fees (at least marginally) more risky and expensive for practitioners and so is likely to inhibit the cases they take on (again possibly just at the margins).

such an arrangement.\textsuperscript{35} If contingency fees are recognised as a legitimate form of funding, this omission is difficult to justify.

\subsection*{2.5 The broader context}

There is of course a broader debate about compensation systems emphasising the amorality of some claiming. This debate is a direct challenge to ‘access to justice’ agendas and a more indirect challenge to the legitimacy of lawyers and the legal system, at least in so far as the system permits particular forms of funding and claiming behaviour. Damage-based contingency fees are at the heart of this debate; prompting concerns of an ‘American-style’ litigation explosion.\textsuperscript{36}

This research has some relevance to these concerns. With a ‘claiming culture’ being associated with increases in advertising and other forms of more direct marketing, this study is able to investigate how the claimants we interviewed selected their advisers and what they said actually makes them claim in the first place. These issues are particularly important as they provide some data on the motivations of claimants in bringing claims and whether they are acting on their own initiative or in response to some external stimulus or recruitment (e.g. through aggressive advertising).

\textsuperscript{35} Unless one reads the requirement ‘whether the claimant's own costs … may be paid by someone else’ as including a DBCF lawyer. It is clearly plausible to do so.

\textsuperscript{36} See, Moorhead, Richard and Peter Hurst (2008) op.cit. for a discussion of the US system and Moorhead and Cumming (2008) op. cit. for a discussion of whether there has been an explosion in employment tribunal claims attributable to DBCFs.
3

Methods

The project was based on conducting short, mainly qualitative, telephone interviews with individuals who had issued claims in the Employment Tribunal using one of the four funding arrangements this study sought to investigate: i.e. private payment, DBCFs, LEI and trade unions funding.

The sample was taken from a list of individuals who participated in the recent SETA survey and agreed to be recontacted. Under the SETA survey, BIS’s fieldwork contractor BMRB contacted a random sample of employment tribunal applicants whose cases had completed by between January 2007 and January 2008. It follows that the sample would not include those who had not issued an application in an employment tribunal. It did include a range of outcomes for tribunal applicants however (those who withdrew their claim, those who settled their claim and those who proceeded to a final tribunal hearing). Claimant response rates to their requests for interviews was 66%.

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

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

We contacted 128 individuals by letter; aiming to interview about 15 individuals from each funding group. Once this target was reached we sought no further interviews, meaning that only 107 of those we wrote to were telephoned. Willingness to be interviewed was high.

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37 They also interviewed defendants but defendants did not fall within the remit of our study.
38 On file with the lead author.
39 Once we had interviewed 17 private payment and DBCF clients we simply stopped contacting individuals on each of those lists. The position was slightly different for the LEI/TU list. We could not tell without ringing which of the two funding arrangements the individual had used. In seeking
All interviews were conducted on the telephone according to the interview schedule (Appendix A: Interview Schedule). The key questions were generally open, to encourage free-flowing discussion on the issues. Interviews were recorded digitally and subsequently transcribed in full. The transcripts have been analysed using NUD*IST N6, a qualitative data analysis package, to ensure the themes emerging during these conversations were properly reflected in analysis.

All research methods have their limitations. As a qualitative study, it is important to emphasise some. Whilst there were high response rates and claimants discussed the issues candidly, their views are confined by their own experiences, expectations and understandings. As will be seen, legal funding arrangements are complex, and claimant understandings of them limited. They may also seek to conceal aspects of their behaviour or understanding which they feel, rightly or wrongly, would show them in a bad light. For example, clients may not want to reveal any cynical motives by behind decisions relating to their claims, or they may avoid discussing issues which reveal their ignorance. We have been careful to reflect on such limitations in conducting the analysis.

Further, the sample size, respectably large as it was for such qualitative work, means it would be inappropriate to generalise to all employment tribunal claimants on the basis of any findings. Other than the absence of claimants who did not get to the stage of issuing an application, there are no obvious biases in our sample. Nevertheless, the numbers are still too small to say that our results are typical of all employment claimants. Qualitative analysis provides an indication of the kinds of issues raised by these claimants’ experiences and the prevalence of views amongst this sample but only further study in this area could test for generalisability.

(unsuccesfully) to reach our target for LEI interviews we contacted some trade union clients and were forced to decline interview once funding arrangement was established.

40 18 individuals declined to be interviewed, primarily because, despite agreeing to be recontacted at the time of the SETA survey, they did not want to take part in another survey. 25 individuals were ‘failed contacts’. This generally meant that the individual was contacted at least six times but we failed to get an answer, though in some cases this meant that the contactee had not used a relevant funding arrangement. Over three-quarters of those we were able to contact were interviewed.
4

Data on participants

Where appropriate, data on research questions within the study were also analysed according to three variables likely to impact on respondent answers: funding arrangement, main adviser (whether they were a solicitor or a claims manager) and case outcome. Doing this enabled assessment of the impact of these variables on client perception of the employment claim process.

4.1 Funding arrangement

There were 63 respondents to the survey. The aim was to speak to equal numbers from each of the four funding arrangement groups. There were 17 privately paying clients, 17 DBCF clients and 17 trade union clients. We were able to speak to 12 LEI clients.

4.2 The types of advisers used

Interviewees were asked to give details of all legal advisers used during their claims. Most had received advice from multiple sources; where this was the case their ‘main adviser’ was established, i.e. the practitioner responsible for the bulk of legal advice given.

The vast majority of respondents used a solicitor as their main adviser and for that reason in discussing the findings, this report tends to concentrate on solicitors unless specifically stating otherwise. Other main advisers included claims management consultants (five respondents); trade union representatives (two respondents) and one used a newly qualified barrister apparently instructed directly on an informal basis.

Solicitors were funded through all four methods. All those who paid privately used a solicitor.

Claims management consultants (CMCs) are the target of frequent criticism in relation to their business practices, and often in relation to their use of no win no fee agreements.41 They are now regulated.42 On four of the five occasions where a CMC was the main adviser, a DBCF arrangement was used. The other occasion was an LEI arrangement.

41 See, for example, Robins, Jon, Cash: Warning: may contain nutty claims; could be the end for the compensation culture that has gripped Britain – there’s a new lawman in town, writes Jon Robins The Observer (London, 24th December 2006); Webster, Sean, Age of the no-win, no-fee outfits The Times (London, 4th October 1994). Our previous report found that some practitioners had reservations about the operations of CMCs in employment litigation: Moorhead and Cumming (2008), op cit, paras.398-404, 477.

42 CMCs that represent claimants have been subject to Part 2 of the Compensation Act 2006 and are therefore required to be authorised and regulated by the Ministry of Justice since April 2007.
4.3 Other advisers

Often the claimants we interviewed had seen more than one adviser. Roughly two in five participants received some advice from a trade union representative. This was partly due to our approach to sampling interviewees (with roughly a quarter being selected because they were trade union funded). Some individuals received advice from union representatives even where their case was not funded by a union (either because the case was considered and rejected on its merits and the claimant went elsewhere; because the claimant’s union membership post-dated the employment problem; or because the claimant was a non-union member in a part-unionised workplace and the union representative gave some early advice for goodwill).

Claimants had also often approached CABx, generally as a first port of call and several had been encouraged to claim on the basis of CABx advice that their claim had strong merits. Trade union funded claimants were (somewhat unsurprisingly) the least likely to use CABx, re-emphasising the importance of frontline union advice in stimulating and/or gatekeeping claims.

On two occasions a respondent had used a CMC but not as his main adviser. One interviewee contacted a claims company he found online, which then referred him to a solicitor. The claimant did not pay anything to the claims company and had no further contact with it after being referred. He assumed that the company sold prospective claims on to the solicitors firm. The other respondent had had a ‘couple of sessions’ (PP2) with an employment consultant before electing to go with a solicitor as his final adviser. There did not appear to be any referral relationship between the CMC and solicitor.

4.4 Claim outcome

Claim outcome is often said to impact on client satisfaction.\textsuperscript{43} For this reason, we looked at whether or not individuals obtained compensation in analysing data on satisfaction. In the sample, the vast majority of interviewees had obtained compensation; less than a fifth did not.

\textsuperscript{43} See, for example, Moorhead, Richard, Avrom Sherr and Alan Paterson, What Claimants Know: Claimant perspectives and legal competence (2003) 10(1) IJLP 5, pp.24-25; Hammersley and Johnson (2004), op cit, pp.11-12; Genn (1999), op cit, p.220.
5 Why do claimants claim?

5.1 The decision to claim and choosing an adviser

Debates about the compensation culture frequently suggest that claimants are amoral actors, motivated by financial gain or simply out to ‘have a go’. This is a view particularly ascribed to no win no fee claimants (because such individuals operate under conditions of no, or minimal, risk), although similar arguments could be applied to trade union and LEI funded claimants. A more sympathetic perspective would see such claimants bringing claims because they perceive genuine grievances that need rectification. Such views suggest competing motivations for claiming: instrumental motivations (claimants are ‘in it for the money’) or justice-based motivations (claimants wish to rectify a wrong).

This study collected evidence on claimant’s views on why they brought claims, their descriptions of their attitude to the process and outcomes, and how they chose their representatives. These all shed important light on their motivations for bringing the claim. Of course, such evidence must be treated with a degree of circumspection. Claimants are unlikely to reveal themselves as unmeritorious and motivated purely by financial gain. Nevertheless analysis of the evidence suggests a degree of consistency of approach in their descriptions of the claiming process. In particular, as shall be seen, the answers to perhaps morally loaded questions (what prompted them to claim); factual questions (around the role of third parties and advertising); and questions where the issue of motivation reappeared unbidden (in discussing settlement) were consistent. This gives us some confidence in expressing the view that the claimants we interviewed were largely motivated by a sense of injustice, rather than more instrumental desires for compensation.

5.2 The decision to claim

In order to address these issues, participants were firstly asked to explain what it was that made them decide to bring their employment claim. As a follow up, and to ensure all factors bearing on participants’ decisions were covered, respondents were asked whether any particular people, sources of information, advice or advertising made them think of bringing a claim. In exploring the latter, one might expect to see the potential influence of instrumental motivations revealed.

As already noted, our evidence strongly suggests that the claimant’s own sense of grievance appeared to be much more significant than any external influence in a respondent’s decision to claim.44 A large majority of participants were

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44 Hammersley and Johnson also found evidence suggesting that individuals bring claims to ‘pursue a principle and have their day in court’ and/or to call employers to account: see Hammersley and Johnson (2004), op cit, pp.10—11.
motivated by knowledge (or a feeling) that their rights had been breached, a sense of principle, or both. Furthermore, the most significant external forces encouraging or supporting claims was the response of friends, relatives and colleagues to the individual’s situation. Those we spoke to relied heavily on advice from their social circles. Other external influences (such as advertising) appeared to have a very modest or non-existent impact.\(^45\) Where claimants were influenced by advertising (only around a quarter of the claimants we interviewed) this was generally influential only on their selection of lawyers/advisers, not in deciding to claim in the first place.

5.3 The senses of grievance

Respondents’ stated that decisions to claim were primarily motivated by a perception that their employer had fallen foul of the law and (more often) a desire to take their employer to task about perceived unfair treatment (sometimes – particularly where bullying was alleged - out of a stated desire to prevent them doing the same to others). The only motivation volunteered by interviewees indicating anything close to an instrumental viewpoint was recounted very occasionally: the need to do something to mitigate the financial crisis caused by a lost job. When asked what factors made them think about bringing a claim, it was the sense of grievance which was volunteered first and with the most conviction. Similarly, interviewees often talked in depth about why they felt aggrieved; what they thought of their (ex)-employer’s behaviour; and/or their legal knowledge.

Roughly half of respondents indicated they were motivated to claim for reasons of ‘principle’, making this the greatest influence on a decision to claim. Many acted because of anger at treatment they perceived as unfair or unreasonable; some wanted to see their name cleared; others wanted to establish ‘the truth’ behind their dismissal; some wanted an apology; and several expressed a desire to protect other employees from similar future actions. Many of these interviewees emphasised their sense of grievance as more important than the receipt of compensation, e.g.:

Yes, although it was a lot of money the main thing was to have my day in court and sort of clear my name and to highlight just what the company I worked for were doing to people. (DBCF5)

This approach was also apparent in claimants’ discussions of case outcome. For example, PP15 described his six-figure compensation as ‘a bonus’ when compared with vindication of his claim for unfair treatment.

Interestingly, roughly a quarter of interviewees indicated that their decision to claim was at least partly due to an awareness of a legal entitlement. Some of

\(^45\) It is possible that interviewees were reluctant to admit to external influences, though there are a number of reasons for thinking this is unlikely. Firstly, questions were posed in terms of things that may have made them think of bringing a claim (we did not put the issue to them in terms of influence). Furthermore, claimants were not reluctant to discuss the issues raised by these questions. Similarly, if the suggestion is that claimants would want to be seen as maintaining autonomy over their decisions, then the fact that many readily admitted to being influenced by friends, relatives or colleagues appears anomalous.
these had knowledge of the relevant law because of their employment history and one respondent had done a law degree. The remaining interviewees indicated more folksy understandings of employment rights:

[H]e was a naughty boy and in this day and age you know as well as I probably you can’t do that, you can’t just walk in on a Monday morning when nothing is wrong, no problems have arisen, no warnings, no nothing and say here you are, by the way I’m off to Spain and you’ve got a week’s notice. (LEI8)

Only four interviewees commented that they claimed because of a need for redress. Two were worried about unemployment and thus wanted their jobs back; the others said that they claimed because they needed the compensation:

What was it that made you actually decide to claim?

[A]nd some kind of compensation because I had got bills to pay. (DBCF15)

5.4 External influences

External influences could be relevant not only to a decision to claim, but to the selection of an adviser once a decision to claim has been made. Whilst a ‘compensation culture’ critique would focus on the influence of advertising and self-interested agents (advisers) ‘chasing’ claims, most respondents’ external influences were social. Around a third of respondents indicated that they had been encouraged to (or supported in their) claim by friends, relatives or colleagues. Most of these interviewees had received encouragement from multiple individuals. In six cases participants had been encouraged by a social contact with legal knowledge; examples included an employment law lecturer, a solicitor, trade union representatives and managers. In one case the advising party had previously brought an employment claim and two interviewees had spoken to people who had also been made redundant and who may therefore have been in the process of claiming.

Only two claimants discussed advertising as impacting on their decision to claim and advertising only appeared to have a modest impact in selection of an adviser (see below).

5.5 External influence – Choice of adviser

A less direct way of inferring external influence is by looking at how claimants chose their advisers and in particular the role of advertising in this process. Claimants were asked how they chose their adviser. Where an interviewee indicated that advertising was involved, we probed for more details.

Where claimants had a choice of adviser,46 this was usually informed by a recommendation from friends, family or colleagues: a finding consistent with a

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46 Some TU/LEI participants were not entitled to choose their own adviser (discussed in more depth below).
number of other studies. Recommendations also occasionally came from other sources such as solicitors, the CAB and ACAS.

5.6 The influence of advertising

Advertising on TV, radio and in newspaper adverts has the clear potential to evoke a desire to claim where none may have existed before. Only five participants reported responding to such unsolicited advertising. All were influenced by such advertising in selecting who their adviser should be. Two also indicated that advertising had encouraged them to claim although other factors seemed more important: one indicated being primarily influenced by their sense of grievance and the other of the necessity of doing something about their predicament. The adverts did, however, cement these feelings and prompted the respondents to do something about them.

Within the sample, therefore, unsolicited advertising did not appear to play a significant role in the commencement of claims. The possibility that unsolicited advertising for claims might have a non-specific or subconscious effect on claimants (making them generally more aware that they might claim for an employment grievance) cannot be discounted, but we have little evidence that advertising had either a specific or general effect beyond aiding potential claimants in their search for advisers and so helping advertised firms gain market share.

Interestingly, those respondents who were either encouraged to claim by adverts or used them to choose an adviser all entered into DBCF arrangements. This is suggestive of a link between DBCFs and advertising, but the small numbers involved mean it would be premature to generalise.48

The evidence was not consistent with the view that DBCF advertising encouraged claims that were weak. Only one of the five DBCF claimants who responded to advertising was unsuccessful in his claim. Nor was the size of the awards indicative of small ‘nuisance settlements’: awards of £3,200, £7,000, £8,000 and £38,000 were made. As noted in our previous report, a much larger sample of Employment Tribunal claims showed that the success rates generally for DBCF cases taken to tribunals was very similar to those funded in other ways.49

Interestingly, three participants noted that they had responded to an advertisement specifically because of the promise of no win no fee. E.g.:

[I]t was an 0800 number which was free and secondly there was no win no fee and I thought great, you know I won't need to dish anything out which I

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47 Kritzer (2004) op cit, pp.47-51. Moorhead et al have suggested that clients are generally more satisfied when an adviser has been recommended to them: Moorhead et al (2003) op cit, pp.25-26.

48 This is plausible in the light of those using DBCFs apparently doing so because of a lack of alternative claimants paying on a ‘normal’ basis. Conversely, our prior report suggested that DBCF lawyers were less likely to use forms of marketing associated with ‘aggressive’ advertising: see Moorhead and Cumming (2008), op cit, paras.391-394, 396.

49 See Moorhead and Cumming, op cit, paras.228-229; Hayward et al (SETA 2003), op cit.
didn't have, any money … [T]hat's what influenced [me] really to be quite honest, influenced me to pursue it. (DBCF15)

Given Genn's findings about tribunal users’ lack of awareness about funding arrangements, such advertising (if it is properly put together) may have important public legal education benefits. Further, two participants who did not explicitly mention the promise of no win no fee suggested that they would not have had the money to pay privately for legal advice.

Three of these DBCF participants used a claims management consultant (CMC) as their main representative, which means that in three of the five cases where a CMC was the main adviser, ‘no win no fee’ advertising was a factor in the individual’s choice of representative. However, again the small numbers involved preclude generalisation.

5.7 Cold calling

No interviewees mentioned cold calling or leaflets, suggesting that the Government’s decision to stop publishing the public register of tribunal claims has had an impact in this regard.50

5.8 Trade unions

Over half of the trade union claimants indicated that contact with their union had encouraged them to claim. This group was much less likely to indicate that discussions with friends, relatives or colleagues had influenced their decision, suggesting that trade union representatives may act as an obvious first port of call and something of a replacement for social advice networks. A couple of the DBCF and private paying claimants indicated that contact with their union had encouraged them to claim, despite the fact that their unions did not ultimately fund their cases.

5.9 The issue of choice

Not all claimants using LEI or trade union funding were entitled to choose their advisers: half of the LEI claimants reported that they were obliged to use panel solicitors and fifteen of the seventeen TU claimants said they had to use union retained lawyers. About half of the remaining LEI claimants reported a belief that they had a choice of which solicitor to choose but had gone along with the insurer’s suggestion anyway. Whilst this may suggest that LEI claimants are more likely to have a choice than those using union funding, it may indicate a misunderstanding by claimants of the level of choice available to them.

The Law Society, amongst others, has vigorously defended the right of claimants to choose their own representation and has been critical in the past of insurers’

50 IDS, ‘Say goodbye to the Register of tribunal applications’ IDS Brief 763. In a study conducted whilst the Register was public, Hammersley & Johnson found that all the tribunal applicants they surveyed had received mail shots from prospective representatives once their cases were listed: Hammersley, Geraldine and Jane Johnson (2004) The Experiences & Perceptions of Applicants Who Pursue Claims at Employment Tribunals, paper presented at Work, Employment & Society Conference, UMIST. 1-3 September 2004, http://www.britsoc.co.uk/user_doc/Hammersley.pdf last downloaded 11 July 2008, p.14.
policies of requiring claimants to have their cases handled by panel solicitors. There are anecdotal criticisms of the quality of work provided by panel firms under such schemes based, in part, on the suspicion that insurers may pay them low rates and keep them on a tight leash as far as incurring costs is concerned. In the legal aid context, an attempt to inhibit defendant choice of lawyers as part of the Scottish public defenders service pilot backfired badly, prompting an apparently significant client backlash (perhaps encouraged by private practice lawyers). An issue of some interest, therefore, is claimant’s reaction to the restriction of choice by legal expenses insurers and trade unions.

All LEI and trade union clients were asked whether or not they had a choice of lawyer. Where they did have a choice, they were asked whether they felt the choice was suitable; where they did not, they were asked whether they were happy for their insurer/union to make the decision. Generally, claimants did not mind that they lacked the right to choose an adviser. Roughly three-quarters of those without a choice were happy and a quarter was not, with some expressing relief at having the decision made for them. However, it seemed that generally respondents had not really given any thought to the issue before; they simply accepted it as the normal position. Furthermore, claimants are patently aware of their lack of knowledge in being able to make an informed choice:

[D]id you feel that you had a suitable choice of lawyer?

Yes, I mean to be honest at the time you don’t know, you have no idea who is good and who is bad. (LEI3)

Some assumed the funder would only use experts:

Well at the time you don’t know what’s going on so you just follow the advice you are given and if they have got a panel of solicitors you think that they are probably the best. (LEI10)

I mean they are not going to pay somebody who doesn’t work effectively for them, are they? They use people who … work with their cases all the time. (TU6)

They may also feel somewhat beholden to their funder and unwilling to challenge around issues of choice. TU17 ‘was sort of grateful for what I could get at the time’, for instance. Some displayed a degree of economic realism in electing to use third party funding. TU5 acknowledged that ‘they [the trade union] probably wouldn’t have wanted to pay the cost of a really top solicitor’.

Some of those who were happy for the insurer/union to choose were clearly happy because they considered that they had received a good service; they trusted their union; or were aware of the panel firm’s good reputation. One participant thought it fair that the union should choose as ‘they were paying the bill’ (TU6).

Interestingly, however one claimant who had paid privately for his advice did not use his LEI cover because he could not select his own solicitor:

The only thing I did consider originally was that I’ve got legal insurance on the house insurance but the only problem with that I had to go with the solicitor they would nominate and obviously I didn’t want that, I wanted someone I knew who was going to be, would put the case properly. (PP1)

He said this even though his legal costs were very substantial (five figures) and exceeded the compensation he obtained.

5.10 In choosing advisers are claimants acting like informed consumers?

Consumer choice depends on informed consent, an issue further discussed below. What is very clear from discussions with claimants is that very few made an informed choice of representative themselves. As has been seen, LEI and TU funded claimants were largely directed to a solicitor, with clients assuming that this was in their interest or simply the way things were done. Others were dependent either on recommendations or on usually cursory scanning of lists of solicitors (such as those in the yellow pages). Where the latter approach was taken, there was, at best, only a rudimentary attempt to identify solicitors who specialised in employment tribunal work. Mostly clients picked the first firm they came to in a list. For example:

[O]nce the results came up how did you pick the one that you eventually went with?

I think he was top of the list. (DBCF16)

However, some respondents did consider certain factors in selecting their representatives: a few sought a local solicitor; three looked for specialisation in employment law; and three specifically looked for those willing to work on a DBCF agreement. Although these interviewees did not shop around, they did have some idea of the qualities they were seeking in an adviser.

Only three respondents made a selection after consideration of a number of different potential advisers, i.e. there was evidence that they had, at least to some degree, shopped around. Two used the Yellow Pages to ring different potential representatives but did not indicate how they then made their choice. One had sought to compare costs but had found that all the solicitors he rang charged similar rates. This respondent had also done some research on the internet before using the directory and appeared to have been the most proactive in comparing the market. The remaining respondent had shopped around on the internet. She used an internet search; then narrowed the results down to those offering DBCF agreements; and then made her selection after investigating the companies’ websites and ‘reading the blurb’ (DBCF14). She did not, however, indicate factors influencing her judgement of each website.
A choice of funding options

The limited exercise of choice over representative is compounded by the absence of choice over how that representative is paid. As shall be seen, claimants understandably took little or no interest in alternatives when LEI or TU funding was on offer. Nor, again perhaps understandably, were alternative funding arrangements discussed with these claimants.

In particular, clients paying privately or on a DBCF might be expected to benefit from a wider discussion of the options. Under Rule 2.03 of their Code of Conduct, solicitors are obliged to establish ‘whether the claimant’s own costs are covered by insurance or may be paid by someone else such as an employer or trade union’. Whilst ‘someone else’ could be read to include a DBCF lawyer, there is no explicit obligation to advise clients of the potential for a DBCF.

In a study preceding the introduction of this rule, Yarrow and Abrams found that CFA solicitors often did not advise claimants of the possibilities of trade union and LEI funding, sometimes resulting in claimants commencing cases under CFAs where union/LEI funding could have been used. This suggests that solicitors may not advise clients of these options because doing so is not in their interests (because they are not panel firms for insurers or TUs). Similarly, and more recently, trade unions have expressed considerable (but as yet unsubstantiated) concern at DBCF lawyers recruiting trade union members and not advising them of free trade union advice as an alternative.

With these concerns in mind, claimants were asked whether they had been advised of ways of funding their cases other than the one they chose. Additionally, all claimants who were not union funded were asked whether they were a union member when the claim was commenced. If they were, they were asked whether they had considered getting legal assistance from the union. If they had, they were asked why they decided against union help. If they had not, they were asked why not, and also whether their representative had discussed this option.

Only around a quarter of the claimants we interviewed indicated that their adviser had discussed alternative options with them. This included all trade union claimants, and five of the LEI claimants, who had gone straight to their union/insurer and consequently had not received advice on alternative funding options. These interviewees often considered this question inapplicable; in their

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54 See Moorhead and Cumming (2008), op cit, para.280.
minds the advice was free and consequently there was no need for discussion of alternatives.

Significantly, roughly two-thirds of claimants paying privately said they were not advised of other funding options. Two participants appeared to have knowledge of other arrangements but had not raised this with their solicitors. One appeared confused by the possibilities:

\[
\text{I do wonder if I had been able to get help from the union how much, I don't know if you get a no win no fee thing, how much different the case might have been but…}
\]

Were those options ever discussed with you by your solicitor?

No. (PP9)

The other commented that her adviser had not discussed legal aid, though (probably correctly) doubted the adequacy of this for her case. Interestingly, the comments of these interviewees perhaps suggest that even if individuals are aware of alternatives they may be reluctant to raise them. Further, PP9 appeared to assume that because he had selected his solicitor he should simply accept the payment options provided: an interesting view in the light of the haphazard way clients generally choose their solicitors. This client had sought a local solicitor in the Yellow Pages and had gone with the first contacted firm. Seeking an alternative was simply not considered.

Many interviewees were surprised by the question, suggesting that they were unaware there was any choice:

\[
\text{I didn’t know there was anything else or other ways of trying to fund it actually. (PP15)}
\]

Of the six private payment claimants who did receive advice on other options, four were told about DBCFs and two about LEI. One interviewee advised about LEI did not have it, but the other chose not to look into it. This response may also indicate one of the problems associated with LEI restriction of client choice:

\[
\text{I suppose I put my belief in the fact that I had bought a solicitor in that the council would actually make a settlement on that initial move and I think it's always difficult, once you are underway with a solicitor with the home insurance side of it, it seemed to me that you needed to let them know what was happening and that they may have then come on board and put their own solicitors in place and because it was such a massive unknown to me I suppose I delayed over it and in the end it was easier staying with the solicitor. (PP5)}
\]

Of the four private claimants advised about DBCFs, three elected not to go down that route for price reasons. One thought that the percentage was too large, but the other two were advised by their solicitors that private payment would work out cheaper.\(^{55}\) The other claimant advised of the existence of DBCFs was told that

\(^{55}\) For one client this was patently correct: after £500 worth of work a settlement of £18,000 was offered.
her solicitor did not work on that basis. She did not go elsewhere in search of such an arrangement.

6.1 DBCF claimants

Roughly three-quarters of the DBCF claimants indicated that they had not received advice on alternative funding options. Three of these indicated that they had actively sought a DBCF agreement and assumed that this meant no other funding options should have been discussed:

*I personally chose this particular no win no fee so there was never any necessity really for him to be discussing it any other way.* (DBCF15)

Some clients stressed that they had chosen a DBCF for financial reasons:

*My main concern was that I didn't have to pay if I didn't get anything because obviously I didn't want to have a debt ... being out of work.* (DBCF17)

Whilst many DBCF clients may be unable to afford to pay privately, there is no obvious reason why trade union funding or LEI should not be discussed (although this may mean the lawyer has to refer the case elsewhere).

6.2 A failure to advise on trade union funding?

Of the 46 respondents who did not fund their claims through unions, seven said they were union members at the time of the incident giving rise to the claim. These seven interviewees were asked whether or not they had considered getting union help.

Five had considered getting help and two had not. Three of the former would have been happy to use their unions but were told that their cases did not fulfill funding conditions: one because his claim was assessed as having less than a 50% chance of success; another was told (somewhat surprisingly) that help was only available for compromise agreements and so chose not to use her union; and the third was told that the union would not assist in proceeding to tribunal (perhaps because of merits concerns).

The other two claimants were dissatisfied with their unions. PP9 had asked her union for help but noted that they were very slow in responding and ‘didn’t seem to want to know’. The delay caused her to seek alternative assistance. She attributed the poor service to her having asked previously for help with an unrelated matter. PP14 appeared to have received conflicting advice from his union, advising him to withdraw the case before tribunal despite advising him to claim in the first place. In the end, PP14 chose to pay privately for the case because he did not consider that he was getting a good service:

*I don't feel that the union in the end had my best interests at heart. I feel that they wanted just to protect themselves.*

The two respondents who had not considered union funding did not want to use their union because of a belief that they were not completely independent from their ex-employers:

Did you consider getting legal help from your union?
No because they are in the management's pocket. (DBCF5)

PP5 indicated:

To be quite honest the union by my experience have been unbelievably weak in dealing with any of this so I didn't have much faith in them. (PP5)

6.3 Conclusions: choice of funding arrangements

Overall then, it appears that although some practitioners advised claimants of alternative funding options, many did not and even those who were may have provided incomplete advice (for example they advise on DBCF/private payment but fail to mention LEI or union funding). The introduction of Rule 2.03 does not appear to have had the desired impact. Although it is possible that the claimants we interviewed simply failed to recall the advice, the genuine surprise they expressed that there might have been alternatives is supportive of our conclusions.

In terms of services provided to union members, the evidence suggested that amongst those we interviewed, where union members did not use union funding this was either because the union declined to fund their claim or because the client had a poor regard for the services provided by the union not because they were not counseled on that option.
Views on the outcome of employment claims

Remedies in employment claims can be divided into three types: lump sum compensation, other financial benefits, and non-financial benefits. Financial benefits are those attracting a definite monetary value, including reinstatement or a pay rise. Non-financial benefits are incapable of precise valuation, for example a reference or an apology. Because of the suggestion that DBCFs lead to lawyers prioritising financial remedies, particularly lump sum compensation (which their fees attach to), over non-financial remedies, we were keen to explore the outcomes of interviewees’ cases. We were particularly interested given the suggestion that DBCF clients may have their desire for non-economic outcomes frustrated by the need for the solicitor to concentrate on remedies that will yield a fee.56

Only eleven interviewees (roughly one in six) had obtained a remedy other than lump sum compensation. Six obtained benefits with a strong financial element: two were re-deployed to alternative roles or locations; one was re-instated into her original job; another received benefits in relation to pension; one obtained injury allowance; and another back pay and salary adjustments. Essentially economic in nature, these remedies might in any event be sufficiently clear to be paid for under DBCF agreements.57

Non-financial remedies included four claimants who obtained references; the most commonly mentioned non-financial benefit. A fifth received copies of her appraisals which she intended to use as evidence of her competence in lieu of references.

It is worth emphasising that these remedies, including which had a readily calculable economic value, were, in any event, additional to compensation. DBCFs might work reasonably well with such cases because of the compensation. Conversely, benefits other than compensation (both financial and non-financial) were only received by trade union, LEI and privately playing clients in the sample. This may indicate that the DBCF practitioners were focused on obtaining lump sum compensation to the detriment of their clients’ broader interests.

56 See Moorhead and Cumming (2008), op cit, paras.377-380; Underwood, Kerry The real no win, no fee case (2001) 12(Mar) Litigation Funding 6, p.6. DBCF agreements can specify a financial amount to be paid on reinstatement (as a percentage of salary received for a month (or several months) reinstatement).

57 At least some DBCF practitioners have clauses calculating a percentage fee against a multiple of salary payments for reinstatement, for instance.
Respondents receiving benefits other than lump sum compensation were also asked whether the additional benefit was important and how important it was relative to any compensation paid. Eight of the eleven respondents said that the additional benefit was important to them. Six described their benefit as ‘important’ or ‘very important’, though the remaining two did not think that it was as important as their compensation.

Three respondents did not think their benefit important at all (two had obtained references, though one of these had become self-employed and so had no need for a reference). The other had been advised to accept re-instatement but harboured doubts about the desirability of such a choice. For five of the eight interviewees who did value their other remedy, the value came from security for future employment (references and/or the ability to say they had been made redundant rather than sacked).

7.1 Motivations resurfacing in outcomes

It was noted above that it appeared to be a sense of grievance that motivated most claimants to bring their claim. In a similar manner, roughly a fifth of interviewees cited ‘proving a point’ as a valued outcome:

Did you get any other benefits as a result of bringing the case?

[J]ust personal benefits really, knowing that I had done the right thing and knowing that their refusal to admit liability was them saying yes we got it wrong, let’s settle the case. So it was a personal victory as well. (LEI5)

Other respondents valued, inter alia, ‘peace of mind’ flowing from having their ‘name cleared’ (NWNF5); ‘an acknowledgement that they had damaged me’ (PP9); knowledge of being ‘right’ (TU4); and making the employer take their claim seriously (TU8). Those motivated by a sense of grievance tended to suggest they valued vindication of principle above lump sum compensation.

In a similar vein, it is worth emphasising that some claimants, despite being apparently successful in financial terms, did not always feel that they had achieved a complete victory. Whilst this could have been because their financial expectations were not met, this was not generally how the disappointment was expressed; these interviewees did not feel that they had successfully proved their point. Some ascribed their disappointment to the irrelevance of ‘truth’ in employment litigation. Dismissal actions centre on whether the employer followed correct procedures and do not always seek to establish who is ‘right’ or ‘wrong’ where substantive allegations are made about the employees conduct. LEI3 was dismissed from a high-profile job where allegations of unlawful behaviour were made. She maintained her innocence and was extremely unhappy that the tribunal was not entitled to decide on whether she was innocent or guilty:

It would appear that if you take something to tribunal all you get is that if they didn’t follow correct procedure in handling the case you win. The fact of whether you are innocent is never brought into it. … OK I got the money I lost in earnings but that was all I got but justice has never, ever been
done and the fact that I can never work [in the same role] again has never been compensated.

Other respondents were disappointed that their claims had not reached tribunal. Six explicitly viewed reaching a full hearing as the best way of achieving vindication:

I was keen to go [to tribunal] … [W]hen I started off I wasn’t doing it for money I was doing it to clear my name and I wanted somebody independent to say yes, you were unfairly dismissed. … So the settlement was a bit disappointing for me. (PP2)
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The cost of legal representation: a claimant perspective

8.1 Do claimants understand their fee agreements?

One of the main aims of this research was to explore how well respondents understood the fee agreements they entered into. In order to do this, participants were asked to describe what their representatives had told them about their fee agreements; to describe how well their representatives explained the calculation of the fees; to rate the usefulness of the fee explanation; and to indicate whether there were any aspects of their fee agreements that they were not sure they understood.

Expecting a degree of uncertainty in clients’ general perspectives, questions about key areas of cost (such as disbursements, barrister’s fees and VAT) were also asked, to tease out the claimants’ understandings.

8.2 The need for appropriate costs information

The Solicitors Code of Conduct Rule 2.03(1) states that:

You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses.

The Rule obliges solicitors to provide clients with information on, *inter alia*, their charges; any payments which are likely to be made to others; and potential liability for the other party’s costs. Information must be clear and in writing. Solicitors must also discuss with their clients whether ‘the potential outcomes … justify the expense or risk involved’. Guidance on the rule states that its purpose is:

[T]o ensure that the client is given relevant costs information and that this is clearly expressed.

Costs information must be worded ‘in a way that is appropriate for the client’. The guidance stresses that information must be given in writing and also requires it to be regularly updated.

Thus solicitors are bound by fairly specific rules in explaining fee arrangements to clients.
8.3 What were claimants told about fees by their advisers?

DBCF and private payment claimants were initially asked to explain what their advisers had told them at the outset about how their legal fees and other costs would be calculated and paid.\(^{58}\) We wanted to see what it was about explanations which stuck in claimants’ minds and how they, unprompted at that stage by more detailed questions, articulated their fee agreements. It should be remembered that the amount of time between claim and interview may have had an impact on claimants’ ability to recall the details. Several interviewees indicated how long it had been since their claim had completed, with answers ranging between less than a year to over a year.

Claimant accounts of their representative’s fee explanation varied widely. Three DBCF and three private payment clients appeared to have a particularly good understanding of their arrangements (they gave clear explanations and did not show confusion when questioned further), whilst two DBCF and three private payment clients did not seem to know even the basics. A few respondents from each group talked in great detail about their arrangements, whilst several more were particularly brief (especially it seemed DBCF clients).

Five respondents had paperwork to hand; the remainder were presumably recalling their agreements from memory. Having paperwork to hand did not necessarily result in better understanding.

8.4 Core understandings of their fee agreements

Generally, DBCF claimants appeared to have a basic understanding of their fee arrangements; the vast majority understood that they would be parting with a proportion of compensation should their claim be successful. All the DBCF participants bar two volunteered that a percentage fee was agreed on, and in most cases an exact figure was provided by them.

Particularly interesting was DBCF clients’ initial discussion of financial liability on losing. Six explained that their adviser had indicated that they would pay nothing where the case was unsuccessful:

> What did your legal adviser tell you at the outset about how your legal fees and other costs would be calculated and paid?

> *Basically just that if I didn’t win the case I wouldn’t have to pay.* (DBCF14)

> *He just roughly went over saying... he went through it saying obviously if you don't win you don't have to pay us anything.* (DBCF13)

It is common for disbursements to remain payable irrespective of outcome and thus explanations such as these may confuse clients. Indeed, DBCF14 actually did pay barrister’s fees and her claim was unsuccessful.

Conversely, five DBCF clients did volunteer that costs could be payable on losing. Three discussed non-refundable up-front fees; DBCF15 referred to

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\(^{58}\) We did not ask the LEI or Trade Union claimants the same question because of their usual lack of liability for legal fees.
disbursements generally; and DBCF11 recognised her liability for counsel’s fees whatever her claim’s outcome.

The majority of private payment claimants indicated that their adviser had discussed an hourly rate in explaining how the fees would be calculated.\(^{59}\) All understood that their adviser’s time would be charged for by the hour. The majority had to be prompted to recall an hourly rate, a contrast with the relatively ready recollection of percentages by DBCF clients. Only seven thought that they could recall their adviser’s hourly fee.

Interestingly, amongst the private payment clients there was greater focus on initial estimates of overall costs. They were clearly more concerned with the total expense than the hourly charge:

> I think he gave me an approximate idea you know of how much it would cost at each stage, it went through a few stages I think like writing to the employer first before we went to the employment tribunal and he gave me a price for sort of, a rough price for everything really.

What did he say right at the start with relation to the fees?

> I can’t remember, I don’t know what you mean, do you want to know exactly how much he charged do you mean or?

> [W]hat hourly rate did you agree that the solicitor would be paid?

> [To husband] Can you remember how much an hour– was it £200 or something? (PP9)

The approach of these private payment claimants is interesting. A positive interpretation would be that solicitors are increasingly providing estimates of total cost for their clients.\(^{60}\) Certainly, this would accord with what claimants appear to want and expect. In fact, twelve interviewees received an overall costs estimate and one was quoted a fixed fee.

Conversely, it suggests a dissonance between how solicitors think of their charges and how claimants think of them. A number of practitioners in our previous report emphasised that the benefit of hourly rates was the clarity provided to a claimant: they knew what effort had been put in and what cost attached to that effort.\(^{61}\) This is not borne out by claimant understandings; they appeared to think much more globally about their solicitor costs.

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\(^{59}\) Of the remaining two private payment respondents, one had been charged a fixed fee of £1,500 and the other could only recall his adviser giving him estimates.

\(^{60}\) In line with Rule 2.03(1) of the Solicitors Code of Conduct, which requires solicitors to give clients ‘the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses’.

\(^{61}\) Some practitioners commented that using hourly rates led to improved client relations because clients preferred the certainty, transparency and/or simplicity of hourly rate fee structures: see Moorhead and Cumming (2008), op cit, para.80. Conversely, other practitioners thought that DBCFs out-performed private fees in this regard: Moorhead and Cumming (2008), op cit, para.199.
8.5 Trade union and LEI claimants

The majority of trade union funded participants, and around half of those using LEI, considered questions on fee explanation as not generally relevant to them. They tended to report that there had been no significant discussion of fees, as the union/insurer was covering their expenses:

Well as it was being handled by the union there was no sort of real mention of fees. (TU3)

They didn't really explain about the fees because they just told me that the fees would all be covered by the insurance company. (LEI11)

These claimants appeared unconcerned with the method by which their adviser was receiving payment; they were simply satisfied that their fees were covered. Some interviewees evidently considered themselves as external to the fee agreement:

I wasn't actually employing the solicitor, my legal insurance was. (LEI9)

Half (six) of the LEI users recalled a discussion or receiving information on funding. Four were not covered for their entire claim and recounted discussions relating to their consequent financial liabilities. Three of these had paid legal fees prior to involvement of the insurer and had thus had discussions with an adviser relating to fees before the insurer came on board. Conversely, two interviewees described more general correspondence relating to how the solicitor would normally be paid:

I got obviously like a welcome pack from them and yes although again I knew that I wouldn't have to pay anything for it they did do a breakdown of roughly how much it would cost if you know for anyone paying themselves, so yes it was quite simple and straightforward. I knew sort of what they charged per hour and so on… (LEI5)

Only one LEI claimant noted that she was informed of financial limits applicable to her cover for legal fees.

8.6 Did claimants actually understand their fee agreements?

When asked, most claimants suggested that they understood their arrangements completely, with only about a fifth admitting that they did not fully understand one (or more) aspect(s). However, it became clear in discussions that confusion surrounding the calculation and payment of fees was much more widespread. Worryingly, although the majority of participants had at least a rudimentary understanding of their arrangements, twelve respondents demonstrated an inability to describe even very basic aspects of their fee agreements. Beyond that, this section seeks to summarise the two main areas in which claimants appeared to not fully understand their fee agreements. Other areas of confusion are dealt with at appropriate points later.
8.7 ‘Hidden’ Extras

Lawyers typically think of their payment arrangements in terms of their own fees (sometimes called profit costs); other expenses (called disbursements) and VAT. The extent to which fee arrangements distinguish between such costs and the extent to which such distinctions are made to claimants and are understood by claimants is the subject of this section. In particular, our previous work on DBCFs has highlighted the potential for apparently simple fee arrangements to mislead claimants and lead them to the view that they have been charged for ‘hidden extras’. For example, claimants on a DBCF may have to pay separately for a barrister win or lose (particularly significant for no win no fee claimants); their LEI agreement may require payment of some fees; an hourly or percentage fee may not include VAT; or they may be charged for disbursements, such as medical reports or travel expenses in addition to the main agreed fee. These issues are explored here.62

A number of questions were employed to check carefully whether or not participants had paid any extra expenses over and above the profit costs of the adviser (we deal separately with VAT below). Roughly three-quarters of respondents did not recall having to pay any extra expenses. It is likely that this is an underestimate,63 but the majority of participants felt that the fee agreement they entered into covered the costs that they were asked to meet.

Conversely, six DBCF participants, mentioned costs over and above a percentage in their initial description of their adviser’s explanation of fees (though three of these referred to paperwork in giving their explanations). Three mentioned an up-front fee; three discussed VAT; three disbursements; and three suggested that barristers’ fees would be an additional cost, though only one of these was actually sure of the position. Further, two private payment interviewees mentioned that their advisers had discussed the issue of barristers’ charges with them at the outset of their claims and one mentioned the addition of VAT. Therefore, some clients are aware of the potential for extra costs at the outset of their claims.

8.8 Extra costs paid by DBCF clients

Four of the DBCF claimants had paid extra for a barrister. Three had won their cases and had paid the fees in addition to the percentage fee; the other lost her case but still had to pay the barrister. Three indicated how much they paid:

62 In our previous report, some practitioners discussed the issue of recoupment, where certain welfare benefits paid to claimants during their unemployment are claimed back by the state when a tribunal award is made: Moorhead and Cumming, op cit, paras.154-58. This raised the issue as to whether DBCF practitioners took their percentage fee from the compensation awarded by the tribunal or from the compensation actually received by the claimant. However, none of our DBCF respondents had been subject to recoupment and so we were unable to explore this issue from a claimant’s perspective.

63 Claimants sometimes contradicted themselves in discussing additional costs, initially not recognising extra expenses and then doing so later in the interview. Discussions with such interviewees revealed the difficulty in asking claimants about charging, particularly without the ability to probe and test all answers. We cannot be sure as a result that we have picked up all claimant knowledge about extra charging.
£150, £700 and £3,000. The highest fee was paid by the claimant who did not gain any compensation. Three of the four DBCF claimants who paid counsels’ fees as an extra considered that this was not properly explained to them at the start of their cases:

Did what you were actually charged differ in any way from what you thought you would be charged?

_It did slightly in as much as they put the barrister’s costs on top as well. I would have thought that would have all come out of the 33%. ... In all honesty I can't remember them actually saying that to me at the time._ (DBCF8)

Another respondent had been provided with a DBCF contract which clearly stated that the percentage fee was exclusive of ‘submissions by a barrister’. The following quote indicates her confusion:

_I didn't understand the ‘what is not covered by this agreement submissions by a barrister’ because I didn't understand at the beginning that if there was a barrister at the hearing I would have to pay for it. ... But it does say what is not covered by this agreement and that was submissions by a barrister._

OK but at the start you didn't feel that was made clear?

_Well it is clear but you don't understand that this person that you are trusting is not a barrister and I didn't know what the person was at all. I mean I thought he was a solicitor to start with and he wasn't, he was a student solicitor so that was not clear what he actually was and all he was really was a legal adviser, wasn't he?_ (DBCF10)

A related issue is costs payable where the case is lost. Three of the four interviewees who paid separately for counsel thought they would not have had to pay anything if they had lost the case. However, the excerpts that two of these claimants read out from their agreements suggested otherwise. DBCF14 explicitly suggested that she ‘wouldn’t be charged anything’ on losing but later commented that she had paid counsel after the tribunal dismissed her case.

_What is covered by this agreement? Your employment tribunal claim relating to your employment with so and so. What is not covered by this agreement? Any submissions by a barrister. ... If you lose the case you do not pay us anything. ... I did pay for the barrister at the hearing._ (DBCF14)

Thus whilst advised that barristers’ ‘submissions’ are not covered by the agreement, she is then told that if she loses her claim she does not pay anything. ‘Us’ is the crucial word and requires the claimant to distinguish between costs paid to the solicitor for their work and costs paid to the solicitor for someone else’s work. Whilst arguably intelligible, the capacity of the agreement to mislead the claimant, as in fact occurred here, is obvious.

Three DBCF claimants paid a fee up-front. One paid a £25 ‘administration fee’ (DBCF10). The others paid non-refundable deposits which were off-set against
the percentage fee if the case was won: for these two claimants there was a ‘fee’ regardless of whether there was a win. In one case the non-refundable deposit was £200; in the other it was £1,400.

One DBCF client had an appeal which was not covered by the DBCF agreement and had also paid extra travel expenses.

8.9 LEI and extra costs

Interestingly, four of the twelve LEI users paid out profit costs to their advisers because they were not covered for the full cost of their claim by their insurers. Three indicated that they had to pay legal fees incurred prior to acceptance of the case by their insurance company. LEI7 asked her husband to explain this situation during the interview, showing that these costs could be substantial:

[The solicitor has to submit to the insurance company what the background is and the adequacy of the case such that the insurers can say yes, this is a valid case for them to pay up the fees under the terms of the insurance. … Now once he submits it, they think about it and submit it to their own people for them to vet it and see if they like it. While that is going on my solicitor is commencing proceedings and incurring costs. … Until the point when the insurers say they will accept the costs, anything incurred before that date they won’t pay. … So that meant our total fees in this particular case were around £2,500, up to the point where they agreed it we’d incurred £1,000 and the insurers considered themselves not liable for that because it was before the date when they approved the payment.

LEI4 similarly had to pay fees in this situation. LEI3 was liable to pay legal fees up to the point at which tribunal proceedings were issued:

[I] paid him an initial fee because you have to, with an insurance company, you have to get to a point that it is to go to tribunal before the insurance kicks in.

A LEI claimant had also paid £50 for an expert’s report.

8.10 How was VAT dealt with?

VAT increases a legal bill significantly. On current rates, adding VAT to a 33% DBCF increases the fee to 38%. In our previous report we found that around half of the DBCF practitioners we spoke to included VAT in their percentage fees. Only a tiny proportion of practitioners did the same with their hourly rates. In order to investigate further, the DBCF and private payment claimants were asked whether VAT was included or excluded from the percentage/hourly fee charged. Of the seventeen DBCF claimants, six said that their percentage fee included VAT; seven said that VAT was added; and four did not know or were unclear. For the seventeen private payment claimants, eleven said that the hourly rate excluded VAT; three said it was included and three were unsure. This is broadly consistent with the picture gleaned from our previous work.

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64 Moorhead and Cumming, op cit, para.160-62.
8.11 Those who had paid extra costs

All participants who had paid for extra expenses and/or VAT were asked whether they felt that their advisers had adequately informed them of these (potential) financial liabilities at the start of the case. The majority did feel adequately informed, but eight respondents (roughly a third of those who had paid some kind of additional charge) felt that they had not been properly informed of the need to pay one or more of their charges. It was the DBCF claimants who most commonly fell into the latter group. No private payment claimant felt the same.

Even within the group who felt adequately informed, four respondents suggested that they were slightly surprised by extra charges but acknowledged that they had been informed of the potential need to pay at the start of the case, usually through written documents rather than orally:

*The only thing that I had forgotten was that they were going to charge VAT, although when I went back through the notes it was clear that they were going to but it wasn't highlighted.*

So do you feel … that you were properly advised?

*Yes I think I was. It was up to me to scrutinise their offer.* (DBCF11)

This claimant attributed her surprise at the extra charge to her failure to read the material provided carefully enough.

Two participants, both LEI claimants, felt inadequately advised of the fact that their LEI policy did not cover all of their legal fees. One felt that her solicitor had unjustifiably deducted more than he was entitled to:

*I understood that I paid him an initial fee because you have to, with an insurance company, you have to get to a point that it is to go to tribunal before the insurance kicks in. … [which] I paid for and then when I had settled and [ex-employer] had paid me the money and [solicitor] sent me the bill, he made a further deduction which I had never agreed to for about another £1,000 he deducted from my money because obviously they sent the money to him.*

*Do you feel that you were properly advised at the start of your case that these costs were not included in the agreement?*

*I]t was a complete shock to me when I got the bill that this was deducted so … I would have to say yes, I didn’t realise they were but you know I didn’t, I didn’t get involved in arguing about it because quite honestly … to go through this terrible trauma you’re not in a state to argue anymore.* (LEI3)

Other interviewees who did not feel adequately informed of their additional financial liabilities were the LEI claimant who paid for a chiropractor report and the DBCF claimant who was required to meet his adviser’s travel expenses:

*So did you expect to pay [his travel expenses]?
I don’t know. I suppose what I said at the time it sounds a bit cheeky with what they are getting out of it but at the time you know you just wanted somebody there you knew so I mean it was sort of about £90, something like that, so it wasn't neither here nor there. He worked hard to get to what it was for the final settlement so I was quite happy because I was only expecting half of what I got really. … [I]t was a surprise but I didn’t mind, put it that way. It was just a train fare basically. (DBCF12)

He appeared to assume that admitting prior ignorance of the charge would reflect badly on his adviser, something which he was obviously keen to avoid, and so he took care to emphasise satisfaction with the service he received.

Two claimants did not feel properly advised that VAT would be added to their fees; both were DBCF users.

8.12 Those who had not paid extra costs

For those who had not been asked to pay extra costs, confusion was even greater. Over half of the DBCF users (nine out of seventeen) were somewhat uncertain as to the costs they might have had to pay.

DBCF15 appeared particularly confused about disbursements. She is worth discussing in some detail as an indication of the way legal cost agreements can confuse clients. She worked in sales and actually had a good understanding of her staged-percentage agreement, cases which proceeded to a hearing were charged a higher percentage, but appeared confused on the issue of extra costs. She stated that if she lost she would become liable for disbursements, but was not sure if they were payable where the case was won. Further, she was not clear on what the term ‘disbursement’ actually covered:

[It] was clear that [disbursements] were not included. It said plus disbursements but what they didn’t qualify is what did they mean? What exactly are they going to include and what they will not include and that should have been clarified because it is a technical term. (DBCF15)

Additionally, she was unclear as to whether the highest percentage fee in a staged fee system was inclusive of any barrister charges:

If a barrister was involved additional cost and so on. … If it was to be after the tribunal, so let’s say the tribunal took place and then let’s say that the barrister was involved … then they would charge let’s say 44%.

With the 44% that would have included the barrister?

Well this is what I would assume. I don’t actually know whether that would be the case or not.

Interestingly, she refused to accept a barrister:

The date was set but they actually called me and asked me if I would give them permission to get a barrister … and I said absolutely not. And the reason actually, the reason I refused the barrister was because I actually believe that the case was not going to go to court and it was that
They would basically get paid, you know the solicitor would then be able to take more away from the actual claim.

She appeared to think that the solicitor would bring in the barrister in order to take the top fee (i.e. 44%) without actually having to go to tribunal. However, previously she indicated that the 44% fee applied only if the case actually went to tribunal, and further she was unaware if the 44% included the barrister’s fee. Clearly, this participant was unsure about her potential financial liabilities and took important tactical decisions perhaps in ignorance of the true position.

8.13 Total cost

Six private payment clients were particularly worried or confused about their final bills, adding weight to the assertion that such claimants often concentrate on total cost and do not understand the mechanics of their fee arrangements. Most of these interviewees became confused after the presentation of a costs bill. Two had final bills which vastly exceeded costs estimates initially received. However, none blamed their advisers for this uncertainty:

"Initially I thought it would only be £4,000-£5,000 and I’m sure if I was told it was £20,000 … I might have tried to do it a cheaper way … But he did explain exactly how his costs would be charged and I would give him the full mark … [The case] just seemed to involve more work than he had anticipated." (PP1)

Conversely, PP2 expressed prospective concern with total costs. She had been given estimates during the claim for the cost of proceeding to the next stage, but she would have preferred to know the exact price. Nonetheless, she accepted that it was difficult for her representative to give precise figures.

The benefits of having a clearer idea in advance of global costs are shown by PP12, who withdrew his claim when the costs looked set to exceed £1,000 because he didn’t have enough money to continue and was also worried about losing. His adviser informed him of the hourly rate (£200/hour), but he had not received a total costs estimate. Had he been given such information he may have been better informed in deciding to claim in the first place. £1,000 would not cover the cost of most employment claims and had the claimant appreciated this then he could have saved himself a bill of over £700.

In addition to those confused about their final bills, two private payment claimants, and one LEI claimant who had paid privately for some initial advice, were unsure as to exactly how their advisers incurred their hourly charges:

"I was clear how their fees would be calculated on the hour but I wasn’t sure when they were actually doing work for me. So when they were making telephone calls, when they were typing letters." (PP11)

8.14 Were claimants satisfied with their advisers’ fee explanations?

In order to explore how well claimants felt that their advisers explained the fee agreement, and the factors which influenced their satisfaction in this regard,
claimants were asked how well their representative had explained how their fees would be calculated. As an additional follow up respondents were asked to rate the usefulness of the explanation on a scale of 1-5 (1 being very good and 5 being very poor).

8.15 Rating adviser fee explanations

Most claimants who rated their adviser’s fee explanation thought that it was ‘good’ or ‘very good’. Only three claimants rated this aspect of their advice as poor or very poor (two LEI and one DBCF client).

Interestingly, it was clear that confusion did not always equate to a negative opinion of the explanation. In particular, some claimants said that they were satisfied but went on to express misunderstandings about their agreement. Often claimants would give a high rating but then point out aspects of the fee explanation which they were not happy with. Additionally, respondents who rated explanations as ‘fair’ were divided, some criticising their adviser’s fee explanations and others praising them. It follows that claimants appeared to contradict themselves. For example:

[C]ould you rate the usefulness of the explanation on a scale of 1-5 with 1 being very good and 5 being very poor?

Well yes it was very good. It explained exactly what I had to pay....

Did what you were actually charged differ in any way from what you thought you would be charged?

It did slightly in as much as they put the barrister’s costs on top as well. I would have thought that would have all come out of the 33%. .... In all honesty I can't remember them actually saying that to me at the time. (DBCF8)

What explanations can be offered for claimants explicitly acknowledging that some aspects of the explanation could have been improved, whilst also giving their advisers top marks? One is that, the more they thought about the process, the more uncertain they became about its quality. It was also apparent from the tenor of their comments that claimants often formed the view that, whatever happened, this was the way things were done. They were already part of an unpredictable and complex process and unclear costs advice was simply part of that unpredictability or complexity. They seemed resigned to, or accepting of, a situation where they placed themselves in their advisers’ hands and accepted whatever costs they were asked to pay, whether they understood why or not. The culture is one of trust, or subservience, as opposed to an expectation of informed consent.

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65 Those who did not give a rating were generally trade union and LEI claimants who felt that the question was inapplicable because there had been no real explanation relating to fees (discussed in more detail below).
8.16 What makes fee explanations satisfactory?

Given the generally positive view presented by clients, it is important to spend some time discussing what clients liked about the fee explanations they received. As noted above, Rule 2.03 of the Solicitors Code of Conduct provides detailed guidance on necessary aspects of solicitor fee explanations. Solicitors must give advice on, *inter alia*, the likely overall cost; other charges; and the potential for paying the opponent's costs. Further, the information must be clear; in writing; and given in a format appropriate to the client. Interestingly, in describing what it was about fee explanations that made them satisfactory or otherwise, respondents tended to concentrate on the clarity or simplicity of explanations and/or the existence of written information. This perhaps suggests that Rule 2.03 is reflective of what clients themselves seek in a fee explanation.

Claimants may require different levels and methods of explanation in order to feel that fees have been adequately explained. Several participants suggested that they had benefited from clear, simple or repeated explanations:

"[H]e went through everything meticulously. He was very good. … He literally laid it out it was like one of those Dummies Guides, Dummies 101 Guide to Law." (PP6)

For two claimants (one DBCF and one who paid privately), satisfaction with fee explanation appeared to stem from an opinion that the arrangement was particularly simple. They consequently appeared to assume that provision of basic details was sufficient:

"[A]t the start of your case how well did your representative explain how the fees would be calculated?"

"Well he was just crystal clear. It was ... exactly how I explained it to you he explained to me - it was 50% of the first £5,000 and 35% of anything over and above that." (DBCF5)

PP9 was happy that her adviser had indicated at the outset how much each stage of her claim was likely to cost, and similarly PP2 valued staged costs reviews where she was invited to consider whether or not to continue. PP5 praised his representative’s advice in relation to cutting costs:

"She was also very good in saying that if you can prepare this sort of information it is going to save you money..."

Other factors which appeared to influence claimant satisfaction with their adviser’s fee explanation included: the fact that the adviser discussed fees before anything else (DBCF15); the provision of a free initial consultation lasting two hours (PP6); and a prediction that the case would be won (PP8).

*Written costs information*

Twelve participants appeared to relate their satisfaction with their adviser’s fee explanation to the existence of a written document regarding the arrangements. Written explanations can be re-referred to, and thus may enable claimants to build an understanding of the fee agreement in their own time. However, the
majority of the participants who discussed written correspondence in fact showed uncertainty or confusion about one or more aspect(s) of their fees. They seemed to assume that the existence of written correspondence automatically meant that the fee explanation was satisfactory. A different approach was taken by LEI1, who had received written documentation describing her arrangement but still considered that the solicitor had not explained it. She was presumably referring to the absence of a verbal explanation. She said she had not read the documentation that she received.

8.17 Reasons for dissatisfaction with fee explanation

As already noted, there were fewer comments expressing direct dissatisfaction with adviser explanation of fees. Of the four interviewees who considered their representative’s explanation unclear, all were DBCF claimants. DBCF13 did not think that the explanation was forthcoming at the outset of the claim, meaning that he was not clear on the arrangements initially:

[A]t the start of the case how well did your representative explain how their fees would be calculated?

_Not very at the start of the case. He went into more detail in the middle of the case._

So … what was his explanation like at the start?

_He just roughly went over saying… he went through it saying obviously if you don't win you don't have to pay us anything. … And so we basically went on and built the case and then he went into the discussion about financial fees and things like that._

Two interviewees on hourly rate agreements thought that their advisers could have explained the breakdown of hours actually worked more clearly. These claimants were concerned to understand where their money was going, as opposed to simply understanding the payment arrangements.

8.18 Understanding the percentage

Four DBCF claimants showed signs of confusion in recalling the fee, but did manage to recall it eventually. Interestingly, these interviewees tended initially to give an estimate which underestimated their percentage fee, but then produced figures which suggested that the fee in fact was greater.

8.19 Hourly rates: estimates and instalments

In terms of the cost of legal services, there is a plausible case for saying that privately paying claimants may be in a somewhat disadvantaged position when compared with other claimants. They pay their legal fees win or lose, and there is greater potential for costs to exceed compensation. Only if the hourly fee results in a lower final bill than a contingency fee would have done are they likely to be better off. Further, they may be expected to pay costs up front and as the case progresses. This potentially creates some uncertainty for these claimants and may put them at greater risk of falling into debt. For these reasons,
estimates and payment in instalments become of significance for privately paying claimants.

The vast majority of the private payment respondents suggested that they had received some kind of estimate as to the likely total costs; only three said that they had not. One participant had been quoted a £1,500 flat fee. Four participants had received two estimates: one for a case settled pre-tribunal and one for a case taken to tribunal. One also indicated that his adviser had given additional estimates for changes in cost depending on the length of the tribunal hearing. Conversely, two participants had simply been given an estimate for costs based on the claim reaching tribunal, suggesting that their representatives advised on a ‘worst case scenario’ basis:

So there’s different depending on how many of hours of work but if the matter goes to a fully contested hearing costs are going to be in the region of £3,000…. (PP8)

What is unclear is whether practitioners gave costs estimates based on averages for similar cases, or whether they took into account factors peculiar to the case in hand. This was not usually made explicit. However, two respondents indicated that their advisers had taken the former approach, perhaps doing it this way to emphasise the uncertainty of an estimate:

[I]t wasn’t a quote; it was only what a normal case like this takes to take it to the tribunal. (PP1)

Conversely, PP2 was regularly advised on how much it would cost ‘to go to the next stage’ perhaps suggesting that his representative was giving estimates individualised to his case.

Three claimants did not recall being given any indication of the likely total costs. Two appeared to find this unsurprising and accept the prospect of indefinite costs. For example:

So they didn't give you any kind of indication of what it would cost overall?

Not at all but only that basically it was like a piece of string really, the longer we went on the more it was going to cost. It was fairly obvious really. (PP14)

These three respondents did not seek estimates and did not question their representatives’ lack of advice in this regard. Failure to advise clients on the likely overall cost of a claim may breach the Solicitors Code of Conduct.66

Of the seventeen private payment claimants, the majority (ten) had paid for their legal costs in instalments; five had not; for two it was not discussed in the interview. Four respondents paid one instalment prior to paying the final bill. Three recalled paying similar amounts at monthly intervals. Two respondents had paid varying amounts at irregular intervals, again at the discretion of the solicitor:

66 Rule 2.03(1) requires solicitors to give their clients ‘the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses’.
It was all different really. The first [instalment] was about £500 I think and then it went up... we had to pay off... it went up to thousands in the end.

And so how often did you pay the instalments roughly?

*Well just when they sort of asked really ... when they thought they needed paying.* (PP15)

The uncertainty of this kind of arrangement may reduce a claimant’s ability to budget for legal costs. Indeed, PP15 indicated that he had to get a loan ‘a few times’ to cover the payments (his costs were almost £50,000). Conversely, PP5 suggested that although payments were irregular and varied (varying between £94 and £2,500), his solicitor ensured that he was never completely unprepared for the cost.

### 8.20 Were claimants happy with their legal fees?

This study also examined participant satisfaction with legal fees. Existing research tends to suggest that generally people view legal fees as too expensive, but much of this work is not claimant-focused (that is it included perceptions of lawyers charges from individuals who had not used lawyers, either because they had not needed to or could not afford to). Furthermore, the existing research discusses legal fees generally and does not distinguish between different types of funding arrangements.

It was possible to ask DBCF and privately paying claimants whether or not they were happy with the legal fees they agreed with their representatives. Where they were not happy, they were asked why this was the case; what they thought a fair percentage/approach would have been; and whether or not they tried to negotiate a different percentage/approach with their legal advisers.

Of the seventeen DBCF respondents, the vast majority (14) indicated that they were happy with their percentage fee; two were unhappy; and one was unsure. The results for the seventeen privately paying claimants were almost identical, with fourteen saying they were happy with the costs agreed on and three saying they were not happy. Overall, private payment claimants tempered their satisfaction with an underlying acknowledgement that they had paid for something universally accepted as expensive:

*Were you happy with the costs agreed on?*

*Well as happy as you can be yes.* (PP17)

Whereas DBCF clients did not generally offer this qualification:

*What percentage of your compensation did you agree?*

*20%. I didn't think that was bad.*

*OK, so you were happy with the percentage?*

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67 See Chapter 2.

68 We did not ask the same of trade union or LEI claimants because they were not generally responsible for paying the fees and thus the question was not relevant.
8.21 Fairness and outcome

Four participants (three using DBCFs and one paying privately) appeared to base their assessment of ‘fair’ fee level on whether they had achieved a desired outcome. Interestingly, and surprisingly, the claimant responses emphasised (again) the importance of justice-based motivations over instrumental concerns:

[W]ere you happy with the arrangement agreed on?

Yes, although it was a lot of money the main thing was to have my day in Court and sort of clear my name and to highlight just what the company I worked for were doing to people. (DBCF5)

I was happy with the arrangement initially. … But because of the bad advice I didn't take it all the way to court and therefore didn't get what I should have got really. … It was a matter of winning the case. … I didn't go into the case for the money. … I went into [it] to be vindicated of being bad at my job and I wanted an apology from the practice. He didn't achieve that for me. (DBCF6)

Two respondents were satisfied despite paying large legal bills. PP5 obtained £5,000 in compensation but paid over £7,000 in legal costs. He was nonetheless happy with the arrangement because it provided vindication and he had covered some of his costs: ‘it was actually really good that in the end I didn't lose the whole amount’.

DBCF12 is worth focusing on in some depth as he incurred large costs for rather limited work from his representative. He conducted most of his case himself with the help of his wife, after a solicitor had told him that because his case only had a 50/50 chance of success fees would be in the region of £5-10,000. Ultimately, however, he brought in a CMC for the second day of the tribunal hearing because his wife (who was acting as his advocate) felt out of depth against the other side’s barrister. The CMC charged a contingency fee of 27% and compensation paid was substantial meaning that resulting costs were over £10,000. The interviewee was happy to pay this amount for one day of representation despite rejecting the costs by the solicitor for the entire claim. This case suggests the value to this client of a representative bearing risk and influencing the outcome at a critical point.

8.22 Total cost

Three private payment interviewees noted that although happy with the hourly rate and/or initial estimate, they were unhappy with the total bill. For two of these, the costs had escalated massively. PP1 received a costs estimate of £4-5,000 only to end up paying almost £20,000. PP15 paid £48,000 in legal fees (though he did obtain six-figure compensation). Neither interviewee, however, blamed their solicitor for the escalation in costs. PP1 suggested that the case had simply involved more work than anticipated and PP15 attributed the escalation to the other side’s conduct. However, PP1 commented that he may have sought a cheaper alternative had he been aware of the total cost at the
outset and was also ‘very annoyed’ at not being able to reclaim his costs from his employer.

One DBCF respondent thought her fee too high: 33% (plus VAT and barristers’ fees), which does not appear excessive by market standards. She thought that a fair fee level would have been a maximum of 20%. However, she gained a sizeable five-figure sum in compensation (the highest award amongst the DBCF users), meaning that she would have also paid sizeable costs. She later commented that ‘it seemed expensive at the end’ (DBCF8), suggesting that it was the amount paid in fees and not the actual percentage agreed on which caused her dissatisfaction.

8.23 Ability to claim

Four DBCF users were satisfied with their arrangements because they enabled them to fund a case they could not otherwise have afforded:

Were you happy with that percentage?

Yes I was because I wasn't in a position to fund it myself at the time being out of work. (DBCF11)

Whilst some may argue that claimants who have ‘no choice’ but to use a DBCF may as a result be vulnerable to excessive percentage fees, respondents did not appear to feel exploited and in fact recognised that they were better off with a deduction from compensation, as the alternative was no representation and (presumably) no claim:

So you were happy with the percentage?

Oh very happy. I mean 20% of something is something; 20% of nothing is nothing. (DBCF3)

This contrasts with some private payment interviewees who appeared to have resigned themselves to costs which they were actually dissatisfied with, despite indicating that they thought the fee fair when asked:

Were you happy with the costs agreed on?

Well as happy as you can be yes. (PP17)

8.24 Work done by the solicitor

During the interview, six participants (three private payment, two DBCF and one LEI) questioned the hours put into their cases by their representatives. Three of these (two DBCF users and one privately paying claimant) related satisfaction with fee level to the perceived amount of work done by their solicitors. Such an approach was particularly interesting when used by DBCF claimants, because it perhaps suggests wariness of a system in which fee does not necessarily mirror effort. Wariness does not, however, always translate into dissatisfaction:

69 In our previous report we found that 33% was the most common (modal) fee charged, with 31% being the mean fee: Moorhead and Cumming (2008) op cit, para.101.
DBCF17 was satisfied because, on his assessment, his solicitor had done a reasonable amount of work for the fee paid:

[W]ere you happy with that percentage?

Yes because it had gone on for quite a while and he had like been in touch with company solicitors and he had done a load of negotiating really. (DBCF17)

DBCF15 also appeared to have considered how much work her solicitor had done in some depth but came to a different conclusion:

I would look at the amount of time that they have spent and then break that down into hourly rate and see whether that is whatever percentage that would then give me. Let's say I mean I guess that about 10% maybe is absolutely ample to what because these people are experts, they know exactly what they are doing and the majority of the stuff is done by their secretaries.

One private payment claimant felt that some of the work done by her solicitor was unnecessary and perhaps driven by the costs regime:

I think there were a lot of costs for letters backwards and forwards to the other party’s solicitors that perhaps could have been dealt with in a telephone call. (PP13)

All of these interviewees explicitly or implicitly kept tabs on the work done by their solicitors. However, it is unclear how they assessed this; whether they were aware of the total hours worked; and what information was provided to them about work done by their advisers. Nonetheless, their approaches suggest an awareness of the potential for the solicitor’s financial interests to conflict with their own. Further, whilst the DBCF claimants were concerned with whether or not their advisers had done enough work, PP13 was concerned that her adviser had done too much work, neatly illustrating some client awareness of the different conflicts of interest inherent in each arrangement.

8.25 Value of service

Three privately paying interviewees indicated that although they thought the fees expensive, they were happy to pay because they considered that they had received a good service:

[The fee] was very high but for the level of advice I was getting I thought it was worthwhile. (PP14)

Conversely, PP11 (who was dissatisfied with aspects of his solicitors’ services) thought that:

[I]t is a mystery as to how [solicitors] earn £200 an hour or however much they earn.

Interestingly, when PP11 was asked what he thought a fair approach to fees would have been, he said ‘possibly a no win no fee’. However, he did not explain why he thought this preferable.
For these claimants, opinion on service quality affected satisfaction with fees. They did not, however, indicate how they came to the conclusion that their advice was expensive.
Conflicts of interest inherent in funding arrangements may manifest themselves in relation to settlement advice given by legal representatives. Potentially, practitioners could give advice to further their own financial interests, as opposed to seeking to champion those of the claimant.\textsuperscript{70} For solicitors, however, failing to act in the claimants best interests is a breach of professional obligations.\textsuperscript{71} Conflict in relation to settlement advice has become a particularly vexed topic in relation to DBCF agreements, with critics suggesting that practitioners will take into account hours worked in relation to likely reward and advise accordingly, irrespective of the outcome for the claimant.\textsuperscript{72} Often research predicts that DBCF lawyers will settle cases for less than hourly fee lawyers.\textsuperscript{73} There is also research to suggest that some DBCF claimants feel pressured into settlement.\textsuperscript{74} Contingency fees have also been accused of both slowing down and speeding up the time to settlement.\textsuperscript{75}

Our previous report found:

[R]easonably consistent evidence that DBCF cases are more likely to settle without a tribunal hearing. … There is also some evidence that

\textsuperscript{70} See Moorhead and Cumming (2008) op cit, paras.296-365.


\textsuperscript{72} The most commonly cited objection is that a DBCF lawyer may advise settlement even where continuing with the claim would be likely to yield higher compensation for the claimant, on the basis that the increase would not compensate for the extra work put in.


\textsuperscript{74} Hammersley and Johnson (2004), op cit, p.16; Johnson and Hammersley (2005), op cit, pp.26-27.

cases may settle for less and sooner than non-DBCF cases but this is more equivocal.76

Whilst the literature concentrates on DBCFs, other funding arrangements may also impact negatively on settlement advice. Hourly fees may provide an incentive to over-service claimants by stringing cases out when they could be settled cheaply and quickly. Trade union and LEI funded solicitors may favour settlement, as unions and insurance companies may be concerned to minimise risk and costs and may manage their solicitors accordingly. If, as noted above, some solicitors are taking cases as loss leaders for more valuable personal injury work, the incentives would be further strengthened.

This study sought to explore claimant perspectives on the settlement advice they received.

9.1 Did cases settle or go to tribunal final hearing?

Of the 63 respondents, roughly two-thirds (42) settled their claims; just over a fifth (14) went to tribunal final hearing; four withdrew and three had no successful outcome (one did not get past the initial consultation stage and two claims were thrown out by the tribunal).

In this sample, DBCF cases were the most likely to have reached final hearing and the least likely to have settled. It was the LEI and trade union cases which were more likely to settle and least likely to reach tribunal. Only two LEI and one trade union cases went to final hearing. However, on such small numbers it would not be sensible to generalise from this.

Claimants were also asked how many settlement offers had been exchanged. Understandably, answers were often estimates and may not have been based on full information about the number of offers actually exchanged. Clients of trade union and legal expenses insurance lawyers tended to recall the highest number of offers, with those paying their lawyer privately recalling the fewest. Contingency fee clients were somewhere in the middle. The results are not consistent with LEI or trade union lawyers taking the first offer (although it is conceivable that they were more inclined to make offers as part of a desire to settle the case quickly). If anything, the results point in the direction of hourly rate lawyers settling after limited settlement discussions (evidence against suggestions that they may string cases out and in favour of risk aversion weighing more heavily on clients who pay win or lose).

9.2 Did respondents feel adequately advised on settlement/tribunal?

All participants were asked whether they were happy with any settlement advice given by their representative. Where claims had gone to tribunal, participants were asked whether they were happy with the decision to go. If a respondent was unhappy, we probed on why this was the case.

The vast majority of participants had received some advice relating to settlement and were happy with the advice and around a fifth were unhappy. All fourteen respondents who went to tribunal were happy with the decision, even those who lost their claims, with one partial exception.\footnote{PP17 (who lost his case) indicated that though he was happy at the time he later began to doubt the adequacy of his representative’s advice. He recalled that when he met his barrister at the hearing, ‘it was very apparent that I had been badly advised by my solicitor at the outset’. This was the only instance in which an interviewee indicated any dissatisfaction with the decision to go to tribunal.}

9.3 Why were some claimants unhappy? Settling too early and/or for too little

Five respondents were unhappy that their claims had not gone to tribunal and/or that they had settled too early. Three thought that they had settled for an inadequate amount (with two suggesting that their representatives were proposing inadequate offers). These respondents consisted of three DBCF, two private payment; one LEI and one union client (TU5 thought he had settled both too early and too low). In addition, several respondents who were satisfied with their settlement advice indicated that they would have preferred their claims to have reached tribunal. Once again justice-based motivations for claiming were apparent: these respondents felt that going to final hearing would have been more effective in allowing them to prove their point to their (ex)-employers.

9.4 Pressure to settle

In total, there were fourteen cases in which some pressure to settle could be seen. Interestingly, pressure was exerted in a variety of different ways. Sometimes it was subtle, sometimes it was more obvious, and sometimes it was inherently related to the funding arrangement used. This section examines the variety of ways in which claimants in this sample were pressured into accepting a settlement offer.

Interviewees who had been subjected to pressure to settle, were generally (though not always) unhappy with their settlement advice. Those that were not only evidenced explicit exposure to pressure. Privately paying clients were the least likely to have experienced pressure to settle, which is perhaps unsurprising given that such representatives generally have less incentive to do so.

9.4.1 Active pressure from representatives

Two of the DBCF clients had been subjected to overt pressure to accept offers. DBCF6 suggested that initially her adviser indicated that she had a strong claim, but that after she had signed the fee agreement he began to pressure her into settlement, suggesting that she had little chance of success at tribunal:

\begin{quote}
At the outset he was confident that I had a good claim and as the case went on he said you know I don’t know why you don’t settle out of court. If you fight [type of employer] the court is going to go in their favour. They never go against [type of employer]. You would be best off just settling out of court. … When I had the initial meeting with him we went through all
\end{quote}
the paperwork … he said I had a very good case. When I signed the contract to say that yes I would accept these fees his attitude changed and it was oh you are not going to win.

When the opposition proposed a settlement offer her adviser stressed the probability of losing. DBCF6 formed the view that her representative’s actions were ‘purely just to get the fees’. DBCF16 recalled that her solicitor sought to avoid tribunal and that he employed what she regarded as underhand tactics to try and secure a settlement:

[H]e spent 5 months trying to coerce the former employer into making a settlement … I feel that he was trying to achieve a result without going to the tribunal, so he was fabricating things. … It was threatening. … If I had been receiving it it would have sounded like threatening – you know if you don't pay this we are going to go and do this. … There was very hostile letters which I didn't want … all I wanted was someone to adjudicate who was right or wrong.

Further, when it became clear that the case was going to tribunal, the solicitor refused to represent her unless she agreed to pay his fees win or lose, despite originally quoting a fee of 33% where the case was won and no payment if the case was lost. This appeared to include all costs to date: she had to ‘guarantee what [the solicitor] had spent’ if she wanted the representation to continue, suggesting that she would have had to pay his hourly fees even if the case was lost. Whether the adviser breached the original agreement or the agreement was such that his actions were legitimate but the client failed to comprehend that; both scenarios are worrying. DBCF16 was forced to represent herself and felt that she lost her case as a result. She did not pay her adviser anything, though it was not clear whether he would have demanded payment had she won the claim (as some DBCF agreements allow).

However, it was not only DBCF users who had been actively pressured into settlement. TU5 felt that his union had pressured settlement in order to minimise costs:

I feel that towards the end they were very keen to settle it so as to avoid further cost for themselves presumably. … [T]hey say things like … if it wasn’t settled they would obviously have to refer it back to the trade union as to whether they would continue funding it. (TU5)

He felt that his representative’s enthusiasm for settlement resulted in lower compensation because in his view a tribunal would have made a bigger award. This respondent was actually a solicitor and was thus able to judge his representative’s approach from a somewhat informed perspective.

PP11 thought that his solicitor had actively pushed for a quick settlement. His quote reminds us that a lawyer’s desire for cash flow may provide pressure to settle under any funding model:
quick settlement, get their fee and move on to the next claimant. That's the impression I got.

Importantly, however, his solicitor acceded to his decision to continue. He commented ‘I told the solicitor what to do’. The difference in outcome between this and the DBCF cases (and to a lesser extent the union case) is significant. The privately paying claimant maintained control over settlement, whereas the DBCF claimants felt forced into outcomes they were unhappy with. Unsurprisingly, advisers may be more inclined to follow their claimants’ settlement wishes where fees are guaranteed irrespective of outcome. Nonetheless, these findings suggest that it is not solely DBCF practitioners who actively exert pressure to settle. Further, two DBCF participants stressed that their advisers had actually encouraged them to reject settlement offers considered as too low:

[T]hey offered £6,000 the first time and he told me not to take it and he would get back onto them and he phoned me half an hour later to say they had offered £8,000 and he was advising me to take it. (DBCF2)

9.4.2 Claimants threatened with a withdrawal of funding

Overt pressure is also exerted through the threatened withdrawal of funding. This was a factor in the settlement decisions of three LEI and one trade union claimants; the continuation of their funding was dependent on acceptance of settlement advice. Rather than employing tactics, as the DBCF practitioners mentioned above appeared to do, these representatives told their clients frankly that their funding simply would not continue should they refuse to take an offer. Given the existence of settlement clauses in many DBCF agreements (see below), it is perhaps surprising that DBCF practitioners did not employ a similarly blunt approach. No DBCF interviewee reported that their adviser threatened withdrawal of funding should a settlement offer not be accepted, although DBCF16, who had not actually received a settlement offer, was told that she would have to guarantee her solicitors fees win or lose when it became clear that the claim was headed for Tribunal. This is not, however, our understanding of how settlement clauses generally operate. The general absence of such threats may simply reflect the fact that claimants usually appear to accept settlement advice.

LEI and trade union arrangements, therefore, may effectively require claimants to accept settlement advice. For example:

[T]hey offered £7,000 and he said I have got to say to the insurers that it’s not an unfair offer … it is a fair offer. I can’t say it’s an unfair offer so he said I suggest we take it. (LEI7)

78 Briefly, DBCF agreements often contain clauses allowing representatives to withdraw (and sometimes charge the client) where the client refuses to accept advice to settle. Clients did not recall that such clauses were used to persuade them to accept advice.
TU5 was told by his solicitor that if he did not settle the case he would be referred back to the union for a decision on continuation of funding. LEI9 and LEI12 were required to accept offers or pay any consequent fees:

\[
\text{[W]e came to a point where they basically said I would have to go, accept the offer essentially otherwise I would have to pay any resulting fees myself. (LEI9)}
\]

9.4.3 The threat of adverse costs orders

Whilst employment tribunals do not generally order an unsuccessful party to pay their opponents costs, they can and do make such orders, albeit rarely. Solicitors are obliged to advise claimants of the possibility of costs liability. The threat of adverse costs awards was also raised in settlement discussions. Within this sample, two trade union and one LEI clients actually withdrew their claims because of the threat of costs (though LEI6 had his funding withdrawn anyway because of low success prospects; he was then put off continuing privately by the potential for a costs award). Additionally, LEI9 and PP9 were influenced to settle because of the threat of costs. If this data is reflective of a broader picture, it would suggest that the threat of costs has a much broader impact than the low incidence of cost orders would suggest on its own.

Subtler ways to encouraging settlement were apparent. Interestingly, advisers differed in how they portrayed the likelihood of getting more than the offer of settlement under consideration. Some interviewees had advisers suggest that they would definitely not receive any greater amount by continuing; other respondents suggested that their advisers had explained that there was a risk that a greater amount would not be awarded and decided to settle accordingly. The numbers involved are too small to generalise but the only respondents who remembered advice to the effect that continuing definitely would not yield a higher reward used fee agreements where the practitioner might be said to have an incentive to minimise costs/risks: DBCFs, LEI and trade unions (though these interviewees were also influenced to settle by other factors). Such advice effectively removes a decision from the client presenting an absence of choice. Advice to private payment clients was more nuanced; practitioners pointed out

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79 For LEI12 the situation was slightly complicated. He had LEI through an organisation representing his profession. His employer had implemented the insurance scheme, but his claim occurred before its commencement within the workplace. His employer allowed him to use the insurance to claim on the basis of goodwill, but after a trial date was set LEI12 was told that if he went to full hearing he would be liable for the fees from the point at which he was informed of this potential liability.

80 Employment tribunal statistics show that, since 2002 at least, costs awards against applicants have been made in less than 1% of cases (statistics before 2002 do not show the number of individuals claiming, instead giving only the total number of claims, meaning that the chance of costs against an applicant cannot be accurately computed) http://employmenttribunals.gov.uk/Publications/publications.htm.


82 Advice that continuing would definitely not gain a higher return was classed as pressure to settle; advice on risk was not.
the risk of paying more costs alongside the benefits of proceeding to try and get more. This dilemma was explained to the clients and they could then determine for themselves whether continuing was worthwhile. This slight difference in approach to advice perhaps suggests a hidden pressure to settle employed within arrangements where the practitioner has an incentive to do so.

9.5 Other reasons for dissatisfaction with settlement advice

Two DBCF interviewees were unhappy because they achieved compensation when they would have preferred non-financial remedies (re-instatement/apology):

Were you happy with your representative’s advice in relation to settlement?

*It wasn’t the absolute result that I really wanted. … I wanted my job back and I just ended up with a shed load of dosh instead.* (DBCF8)

Some critics argue that DBCFs inhibit remedies other than lump sum compensation, as it is more difficult to determine a proportion of such awards. These cases may have been instances where DBCF agreements influenced advisers to seek compensation (though this cannot be assumed).83

Three trade union claimants felt that they had received bad advice from their union solicitors. TU8’s solicitor told her that there was probably no point in pursuing her claim but her union representative insisted that the claim be continued, to the claimant’s eventual benefit (she obtained a redundancy package and a small compensation payment). TU1 commented that she received conflicting advice as to whether the claim was to go to full hearing:

*They said at one time that we had to go to the tribunal, then they said then we would settle out of court and then after that again they said no we are going again, so it was very confusing for me what was going on.*

TU14 was told by the Tribunal at a preliminary hearing that his case did not have much chance of success (and that there was thus a relatively high chance that costs would be awarded against him). As a result, his union withdrew funding. He recalled that prior to this his union had advised him that he had a good claim and consequently suggested rejection of two (apparently very low) offers from his ex-employer. TU14 further suggested that his solicitor failed to inform him of correspondence from the opponent stating that the initial offer would not be increased and would possibly be decreased (as it then was). He felt misled by his union and denied the opportunity to make an informed decision on settlement.

9.6 Reasons for accepting settlement advice

Nineteen respondents indicated reason(s) for accepting their representative’s settlement advice. Mostly claimants based their decisions on cost-benefit analyses provided by advisers. Because of a presumed expertise on the part of

83 Hammersley et al found that employment claimants using DBCFs were more likely to be seeking compensation than claimants using other fee arrangements: Hammersley et al (2007), op cit, pp.14-15.
the adviser, most trusted their representatives completely, although others were dissatisfied with their advice but relented because they assumed that their adviser knew best:

"To be quite honest I think that I went along with a lot of what he advised and you know I relied a lot on his expertise." (DBCF15)

The representative is generally in a position of some power, and unscrupulous representatives could potentially take advantage of this. DBCF6, who alleged that her adviser had been supportive of the case until the fee agreement was signed but then persistently advised settlement, was persuaded to agree when her adviser stressed his experience. If the following 90% figure is meant to refer generally to outcomes in tribunals it significantly exaggerates the risk of losing:

"He told me that he usually takes cases on for the other side. … [A]nd he said in my experience at least 90% of them go for the company rather than the claimant and I would advise you to take a settlement." (DBCF6)

Six interviewees cited financial worries as a reason for settling. Four of these paid privately; none used a DBCF. Two private payment interviewees noted their cost-benefit dilemmas: for them, continuing for more money may be disadvantageous where the cost (in legal fees) of doing so outweighs any likely increase:

"[If I had gone to tribunal] I would have had to pay more costs and they told me that it was likely to be £3,000 payment for the solicitor if it went to a tribunal so that would eat into the money that I was awarded anyway." (PP8)

PP8’s funds were diminishing and continuing would have left him unable to meet living expenses. This highlights another problem for claimants paying privately: if payment in instalments is expected then money may run out where the claim is particularly lengthy or complex. Clients may consequently be forced into settlement or withdrawal (or they may seek, as PP15 did, to take out loans to cover the payments). This may explain the low average number of settlement offers in private payment cases (see below).

9.7 Did clients understand what would happen on rejection of settlement advice?

Because of concerns about the capacity of DBCF, trade union and LEI lawyers to tie clients to their settlement advice, respondents were asked what would have happened if they had told their representative that they did not want to accept a settlement offer. This was of course a hypothetical question for many clients but it provides some insight into their understandings of underlying fee agreements. For DBCF clients at least (and probably LEI and TU funded clients) such agreements were likely to ensure that they accepted advice where they and their lawyer came into conflict.

Fifty-three interviewees answered. The majority (39) of these indicated that they were aware what would happen if they rejected a settlement offer; the remainder either did not know or provided an unclear answer. Trade union claimants were
the least likely to provide a clear and certain answer. Of those who were aware of the procedure, only three indicated an outcome other than continuation of the claim.

9.8 Continuation of the claim

Thirty-six of the 39 interviewees who considered themselves aware of the consequences of refusing to accept a settlement offer thought that if they had so refused their claim would simply have continued. Some explained that this had actually happened (two LEI, two DBCF, two trade union and one private payment clients). Indeed, a couple of the respondents who had rejected settlement offers indicated that their adviser had been instrumental in their decision:

[T]hey did make an offer and I didn't feel it was enough and the solicitor said no, he thought it wasn't enough and so he replied. (DBCF4)

Further, a couple of LEI claimants suggested that their representative had disagreed with their decision but had nonetheless continued with the case:

[The solicitor] was sort of 50-50 … he thought that was about what we would get … and I said I felt I should have had a lot more. … So we went on to tribunal. (LEI10)

Thus in some cases the claimants continued despite disagreeing with their representative over settlement.

Where interviewees had not actually rejected settlement offers, they nevertheless seemed to assume that the case would have continued. As one DBCF claimant put it:

[W]hat would have happened if you had told your representative that you didn't want to accept a settlement offer?

He would have carried on because he was taking my orders. (DBCF3)

For DBCF, LEI and trade union claimants, it is unlikely that these interviewees were able to reject an offer against their representative’s advice without some consequence suggesting that most claimants do not appreciate the existence of settlement clauses.

9.9 Restrictions on ability to reject settlement advice

Only three interviewees indicated that they did not have the final say on any settlement decisions. Two were DBCF claimants and one used LEI. DBCF17 indicated that if she told her representative that she didn’t want to accept a settlement offer, then had she gone on to lose the claim she would have become liable for his fees:

I think … if I went against him and I lost and I didn’t get nothing I would have to pay fees. … [I]t was a no win no fee but … any recommendation he gave me, if I had said no, took it to a tribunal and walked away with nothing I would have had to have paid him.
She didn’t know exactly what she would have become liable to pay: ‘it was never ever actually discussed’ (DBCF17). This was the closest a DBCF interviewee came to identification of a settlement term which tied the client’s hands. DBCF16 thought that her adviser ‘would have made [her] pay’ had she wanted to reject a settlement offer, but she was not completely sure of her position. As no settlement offers were made by her opponent, the issue of rejecting settlement advice never arose. Her opinion appeared to be influenced by her representative’s ultimatum when it became clear that the case was headed for tribunal: either guarantee his fees (win or lose) or lose his representation.

LEI7 indicated he was only entitled to reject ‘unfair’ offers in order to continue to benefit from his insurance cover.

9.10 Claimants who were unsure or unclear

Seven claimants admitted that they did not know what would have happened if they had told their advisers that they did not want to accept a settlement offer. They appeared not to have considered the possibility. Again, this suggests some ignorance amongst claimants of potential consequences in rejecting settlement advice. A further seven claimants did not give a clear answer to the question.
Satisfaction with legal service

Whilst costs practice and advice has not provided a common focus for research, many studies have looked at levels of consumer satisfaction with lawyers. Although it is commonly assumed that lawyers are poorly regarded by their clients; the research tends to paint a rather different picture. Clients generally appear very satisfied with their lawyers, but the general public less convinced that lawyers do their jobs satisfactorily.

Of course claimant satisfaction with their lawyers is not necessarily synonymous with good quality legal services. Clients have been demonstrably happy with service even where professional judgments on quality suggest the lawyer has been incompetent. Claimants may be able to evaluate, for example, customer service and may respond warmly to sympathy and being taken seriously by a professional adviser, but they are less able to assess the accuracy of legal advice.

The fact that claimants may value aspects of legal service which seem tenuously related to competence from a lawyer or researcher’s point of view is not the same as saying that claimant satisfaction is redundant in assessing legal competence. It is important to consider overall levels of satisfaction as a necessary but not sufficient part of professional competence. This study goes further than existing client satisfaction research by enabling exploration of the impact of funding regime on the satisfaction of respondents in this sample.

10.1 How satisfied were our respondents?

Participants were asked to rate their representative’s service on a scale of 1-5, with one being very good and five being very poor. ‘Very good’ was the most common answer, with roughly two in five participants giving this rating. Roughly a quarter of respondents thought that their adviser’s service was ‘good’ and a similar number thought that it was ‘fair’. Only two thought their service was ‘poor’ and five thought it was ‘very poor’. This means that around two-thirds of

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85 Ipsos Mori data shows that in annual surveys from 1999-2004, roughly half of the surveyed population were satisfied with the way that lawyers do their jobs, with around one in seven being dissatisfied. http://www.ipsos-mori.com/content/opinion-of-professions3.ashx

respondents thought that their adviser’s service was ‘very good’ or ‘good’ compared to only around one in ten who thought it was ‘poor’ or ‘very poor’. Therefore, as was expected, a large majority of the interviewees were satisfied with their legal service.

Overall, the DBCF claimants we interviewed appeared to be less satisfied with the service they had received. Whilst around three-quarters of participants using other types of funding arrangement rated their adviser’s service as ‘very good’ or ‘good’, less than half of the DBCF claimants did the same. The difference was mainly due to a comparatively large number of DBCF claimants giving a ‘fair’ rating, though more DBCF claimants also rated their adviser as ‘poor’ or ‘very poor’. The differences between funding regimes may be caused by chance as a relatively small number of claimants can impact dramatically on results.

The gaining of compensation appeared to have an impact on adviser ratings. Whilst over two-thirds of those who obtained compensation rated their adviser as ‘good’ or ‘very good’, only around two in five of those who did not gain compensation felt the same. Similarly, less than one in ten of those who gained compensation gave a rating of ‘poor’ or ‘very poor’, compared to around a third of those who did not gain compensation. Respondents who did not gain compensation may have attributed this at least in part to their adviser’s service.

Interestingly, only solicitors attracted ratings of ‘poor’ or ‘very poor’, and further that these were not exclusively solicitors who failed to gain compensation for their clients (three of the seven solicitors attracting poor ratings did not obtain compensation but four did).

10.2 What did respondents value in terms of legal service?

We also sought to determine why participants gave the ratings that they did. From the answers we were able to formulate a list of factors which claimants valued in the legal services they received.

10.2.1 Communication/availability

Roughly half of respondents indicated that the level of communication between themselves and their advisers influenced their rating, making this the most commonly cited factor influencing a (usually positive) assessment of legal service. Good communication meant being kept well-informed and up-to-date with the case, or where advisers were generally available.

They were always in contact and we got regular e-mails from them, any updates and if you have got a query you just sent an e-mail and it came straight back. (DBCF12)

They were always there if I needed them, phone calls or whatever just any time. (TU12)

Private payment claimants were much less likely than other groups to discuss communication.

87 Although DBCF10, who had used a CMC clearly had concerns about the quality of a claims manager (see below).
Participants who were unhappy often felt that there was insufficient communication or criticised their representative’s slow responses. Those in the former camp appeared to assume that their advisers should take the initiative in communication, whilst those in the latter camp had attempted to prompt correspondence but had still not received it:

[M]y solicitor wasn’t really… he didn’t contact me as well as I thought that he would. … He seemed to keep me in the dark on a lot of aspects of the case. (DBCF13)

I had to really chase them up … [N]obody was keeping me in the picture what was going on a lot of it. … The correspondence wasn’t very… it was all coming from my side more than from them. (TU1)

One participant commented that she was kept abreast of case developments (including settlement offers and going to tribunal) by her former colleagues rather than her adviser. It was more common for DBCF users to suggest that communication was not forthcoming; perhaps suggesting their lawyers were trying to keep their costs down by not spending time communicating with clients unless absolutely necessary.

Three interviewees (two using LEI and one a DBCF agreement) rated their adviser negatively because they had been no face-to-face contact:

I never ever saw the solicitor and he never ever turned up at the hearings or anything. … He just sent the barrister without being there himself. … I never ever got to meet him. [H]e changed offices as well halfway through … the hearing went from Bristol to London and of course me down here in Dorset … miles away from anybody, not getting to see anybody … just a disinterested voice on the end of the phone. (LEI10)

In fact, at least six claimants (three DBCF, two LEI and one trade union) had not met their advisers and the remaining three respondents were happy to communicate solely by email, telephone and/or letter and rated the service they received as ‘good’ or ‘very good’, suggesting that for some lack of contact is unproblematic. Also, it appears that a lack of face-to-face contact is not exclusively a feature of panel solicitors employed by LEI and trade union clients.

10.2.2 Expertise

Around two in five of respondents indicated that their satisfaction was influenced by their view of the adviser’s ‘expertise’. Several participants were impressed by experience in employment law:

They knew what they were doing and they had done lots of cases before, specialists in the field. (LEI12)

Similarly, one participant attributed the poor service she had received to her adviser’s lack of experience (a property lawyer had taken the case on because he knew the claimant’s mother). Claimants may form views on experience from the way in which advisers discuss their own expertise or from discussions with third parties:
I had complete confidence in them because I knew from what has been said that they had done these things before, both from a third-party and from what they said. (PP14)

DBCF10 did not feel able to give a rating because although she thought her adviser ‘tried his best’, he had failed to inform her of the applicable time limits for lodging the claim with the tribunal and as a result the claim was thrown out for being submitted late. This is almost certainly negligent. She blamed the poor advice on the fact that she had not used a solicitor.

LEI8 appeared satisfied simply because her adviser believed her story; DBCF7 thought that the advice he received was ‘good’ because his representative ‘told [him] from the start that [they] would win it and did’; and TU4 was grateful to her trade union solicitors for advising her to drop an unmeritorious claim because she later accepted that it had saved her time and money.

Private payment claimants were more likely than the other groups to discuss expertise; perhaps suggesting (as some did more directly) an assumption that increased expertise is a corollary of paying by the hour.

10.2.3 Explanation

Roughly a third of participants thought that the quality of their adviser’s explanations had a bearing on overall service quality. Six were impressed that their adviser had sought to ensure that they understood any explanation that was given:

[T]hey were extremely careful to make sure that I understood both sides of whatever decision or more than both if there was more than one possible outcome. They were very patient about it. (TU6)

DBCF5 felt that her adviser helped to prepare her for taking the stand at tribunal.

[H]e explained it all to me from a legal aspect and a tribunal aspect … [W]hat bits and pieces you needed to fight the case … what reasons you needed to fight the case for and … I was well-prepared when I had to take the stand.

Three participants suggested that their advisers had explained what was happening at various stages, and two valued explanations concerning the options available to them as the case progressed.

Four participants thought that their representative’s explanations had been inadequate. DBCF14 commented that she had not been properly informed of the need to pay counsel’s fees in addition to the percentage fee. DBCF2 noted that ‘half the time [she] wasn’t quite sure what [the adviser] meant’. LEI10 thought that his adviser’s attitude towards his case changed repeatedly between positive and negative. TU3 felt unprepared for tribunal and felt that she would have benefited from some explanation of what to expect.
10.2.4 Support
Six participants gave a good rating because they felt that their adviser had offered personal support during their claims:

[H]e was very supportive … it was a really difficult time for me and I did have doubts about myself and whether they had been right in sacking me and it was good to say that he agreed that I had been treated very badly and … support in that respect made me believe that I did have a good case. (PP2)

Another interviewee praised the way in which her representative ‘dealt’ with her emotional state during the claim.

Four interviewees thought that their adviser had failed to support them and gave a low service rating accordingly:

[I]n the beginning they weren't really in my corner, they just wanted a quick settlement, get their fee and move on to the next claimant. That's the impression I got. (PP11)

TU17 was unhappy because she felt that her solicitor was unprepared to support her claim if it involved any risk.

10.2.5 Timeliness and hard work
Three DBCF claimants were concerned that their adviser had not put sufficient work/effort into the case, perhaps supporting the argument that some such practitioners may seek to minimise workload in order to cover costs. DBCF16 suggested that her adviser wanted to put in as little work as possible:

I think from the outset he wanted to get the maximum money for the minimum work. … A couple of times … I gave him details that he put in letters wrong which I had to correct him for. He just didn't give it any time.

Interestingly, she thought that his behaviour ‘was probably because he wasn’t getting paid’. In a similar vein, DBCF2 commented that two of her friends did the majority of the work.

DBCF8 suggested that her adviser was reluctant to help when her ex-employer raised an ancillary issue around over-payment. Her suggestion was that he was reluctant to take responsibility for any extra work.

One LEI claimant felt that his barrister was completely unprepared for the case.

10.2.6 Transparency and motivation
LEI3 was unhappy with her adviser because he had deducted £1,000 from her compensation and she had no idea what this payment was for.

DBCF15 thought that her adviser was ‘possibly more interested to get his money than he was to get the right to compensation for me’. Further, she suggested that there was unnecessary delay (two months) in receiving her share of the compensation from the solicitor.
DBCF6 was aggrieved that her representative had seemingly changed his attitude towards her claim after she had signed the contract. The quote suggests a classic case of crude image management on the part of an adviser; building up the case to get the claimant on board and then softening the claimant up for settlement by emphasising the case’s weaknesses:

Initially when he took the case on he was quite confident and giving me positive feedback but as the case went on he started giving me negative feedback and I felt that he wasn't really doing the case justice. … I felt that he shouldn’t have taken the case on. … [W]hen I had the initial meeting with him we went through all the paperwork … he said I had a very good case. … When I signed the contract … his attitude changed and it was oh you are not going to win and I kept saying to him why have you taken the case on if you thought I was not going to win?

This claimant gained £1,500 in compensation. However, she was not actually unhappy with the amount that she’d settled for, rather the fact that the claim had failed to reach tribunal.

10.2.7 Other

Two interviewees appeared unhappy that their adviser had changed during the claim:\(^{88}\)

Well initially when I went them I saw a lady and I was quite happy with her and then it went so far and then I was told she had left the firm and a gentleman had taken over so I had to go in and sort of repeat everything to him… (DBCF4)

Other reasons for satisfaction with legal service included: the lawyer being ‘tough’, where the interviewee found him slightly intimidating but thought that this was beneficial in that he may appear the same to her opponent (LEI3); a personal liking (DBCF1); patience (DBCF17); and feeling comfortable with the solicitor (TU7).

10.3 Legal service and the impact of funding arrangement

Overall, within the confines of the small sample size, there is evidence to suggest that DBCF respondents appeared less satisfied with the legal service they received and some evidence pointing towards concerns that those lawyers are less communicative than clients like; less inclined to ‘put the effort in’; and/or that their clients may sometimes be suspicious that the lawyers are only interested in getting compensation, and their share of it. However, we also wanted to explore whether claimants themselves felt that their funding arrangements had impacted on service and so participants were questioned accordingly. The results must be treated with some caution, because client assessment of funding impact is unlikely to be informed. They generally had no experience of another funding regime to compare it against. Indeed, three respondents felt unable to answer the question because they had never used any other type of legal funding and thus had nothing to use as a comparator. Further, clients may be influenced by

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\(^{88}\) See, Moorhead et al (2003) op cit, pp.19-26, on this point.
expectations. For example, it will be seen that no win no fee agreements are perceived by some as a form of charity and this may have fuelled a feeling that they would have received better service if they had been able to pay for it in the normal way.

DBCF and trade union claimants were more likely to suggest that their funding arrangement impacted on the service they received: almost three-quarters did so compared to less than half of the respondents using LEI or paying privately. DBCF claimants were the most likely to consider the impact negative. Trade union and private payment claimants were more likely to suggest that it was positive. LEI users were equally split between those alleging a positive impact and those alleging a negative one.

10.4 Private payment impact on service

The most common reason for private payment claimants to suggest the desirability of paying privately was a feeling that paying higher fees equated to better service:

> Well I suppose at the end of the day you get back what you pay for. If you only pay someone a small amount of money and go to a very small solicitor you probably don’t get the same benefit as you get going to a well known solicitor, so really apart from obviously the cost I was more than pleased with everything. (PP1)

Conversely, two privately paying clients thought that their advisers had possibly run up some unnecessary costs:

> I thought there were some phone calls that were perhaps unnecessary, going through things I had already gone through you know. (PP12)

10.5 DBCF impact on service

Twelve of the seventeen DBCF claimants thought that using a DBCF had impacted on the legal service they received; and most thought that the impact was negative. However, four participants thought that they had received a better service due to the financial incentive for the practitioner in winning the claim:

> [I]t's this man's livelihood the same as it was mine so he had a bit of mutual interest. (DBCF5)

DBCF12 related his practitioner’s hard work to the high compensation (and therefore fee) involved in his claim:

> [O]bvously if they were going to get £9,000 or £10,000 out of it they were going to push hard … it's motivation really, isn't it?

Conversely, three respondents thought that the lack of a guaranteed fee led to reduced quality of service:

> Obviously he would be more keen on working the case if he knows he is definitely going to get the money, but maybe not so much involved in the case if he knows that there is a possibility that he won't get any money out of it. (DBCF13)
The difference in opinion between this and the latter group of DBCF participants was striking. Both identified the risk to the practitioner in working on a no win no fee basis but each came to opposite conclusions as to the effect that this would have on the quality of service given.

The riskless nature of the fee may introduce a presumption of charity amongst claimants and, interestingly, lower client expectations about quality. DBCF15 commented that she would have expected a better service had she been paying for it, even though she did pay for it out of her £7,000 compensation. Similarly, DBCF10 commented that:

“If you’re not paying anything you tend to be with whoever will support your case.”

Four respondents thought that had they not used a DBCF their case would have reached tribunal. All associated reaching tribunal with a better level of service. DBCF16 thought that her adviser had wanted ‘to get the maximum money for the minimum work’ and never had any intention of going to tribunal because of the distance to travel. Two participants appeared to relate the failure to go to tribunal to their ‘level’ of adviser which was automatically associated (in their eyes) with DBCFs. Their comments again evidence the presumption of charity:

“I think if I could have afforded someone higher I think it might have gone further but for the way I decided to go which was the no win no fee because I couldn’t afford … a solicitor basically and I felt … the service was good considering I wasn’t going to pay anything else.” (DBCF17)

10.6 LEI impact on service

Five of the twelve LEI claimants thought that their insurance funding impacted on the legal service that they received; six did not and one was unsure. There was roughly equal division between negative and positive comments about the impact of LEI on the service.

Two participants thought that their LEI funding had impacted on their opponent’s approach. LEI5 thought that having a solicitor onside probably discouraged unscrupulous behaviour. LEI4 thought that the other side was more prepared to settle:

“If it probably did impact on the fact that [the other side] settled because they knew that they weren’t going to run me out of money by delaying.

LEI10 thought that his adviser was less committed to the case because he was funded by the insurance:

“[T]he panel solicitor is miles away … You never ever met him and you got the impression that he couldn’t care less, he was getting paid no matter what happened – win, lose or draw … progress was slower than if … I had a local solicitor that I could have gone and seen, talked to face-to-face and was actually pushing for me rather than just getting paid no matter what.”
LEI11 thought that her adviser may have been concerned to minimise costs in order to keep within costs limits set by the insurance company. This was based on an intuition rather than knowledge:

*I just feel that the insurance company at the end of the day was the claimant, not me. ... And therefore the solicitor was conscious or maybe her firm made her conscious of the fact that there was only a certain amount of costs that she could rack up I think there were kind of hidden activity levels, chargeable levels that they could go to.*

10.7 Trade union funding impact on service

Twelve of the seventeen trade union claimants thought that their union funding impacted on the legal service they received; two did not think it had an impact; and three were unsure. Where claimants did think that the union funding had an impact, most thought that the effect was positive.

Four interviewees thought that the support from their union ensured that their opponent took the case seriously:

*I don't think that the company would have taken any notice of what I'd said unless I had that backing. ... It gave me a little bit of legal clout.* (TU4)

Four respondents thought that their service was improved because union representatives had experience in the field.

TU6 thought that her union had been able to provide her with an impartial service because they had no ‘stake’ in her claim:

*It doesn't matter whether they win for me or not therefore I'm actually getting a very fair hearing. They don't have a stake in it. ... They are not going to earn anything out of me. ... They are very impartial because they had nothing to gain.*

Conversely, three respondents considered that they received a lower quality service because of their representative’s desire to avoid incurring costs. TU14 acknowledged that the opposition used tactics to deter the claim (bringing in expensive representation) and that his union caved because of a threat of paying the other side’s costs. His claim was withdrawn.

TU17 felt that had she paid privately she would have received more ‘support’, though she could not give a reason for her feeling.

10.8 Would claimants use the same funding arrangement again?

Participants were also asked whether they would use the same type of legal funding again. The vast majority said that they would; only eight respondents answered no. Two interviewees said that it would depend entirely on the circumstances and one didn’t know. These findings confirm that participants were generally satisfied with how their funding arrangements had worked in practice.
Some claimants qualified their ‘yes’ answers. DBCF10 said that she would use a ‘proper solicitor’ as opposed to a CMC; DBCF15 would make more extensive enquiries before choosing a representative; and LEI10 would select his own representative. LEI11 considered that he would have no other option but to use LEI.

DBCF claimants were slightly more likely to indicate that they would not use a DBCF again, though once again the numbers were too small to draw firm conclusions. This is somewhat unsurprising given that they were the group most likely to indicate dissatisfaction with the legal service they received and also the most likely to suggest that the DBCF had a negative impact on the legal service. No LEI claimant said that they would not use their insurance again.
Conclusions

This research examines the experience of employment tribunal claimants in detail with particular regard to the funding arrangements enabling them to bring their cases. It is the first study that we are aware of to compare four methods of funding: trade union funding; legal expenses insurance; damage-based contingency fees; and ‘normal’ private payment (i.e. the payment of lawyers by private clients out of their own pocket, usually, on an hourly rate basis). The claimant’s is a voice little heard in the debate on funding and this study contributes important data to debates around funding; the regulation of professional relationships; and the process of employment claiming.

It is a qualitative study based on 63 semi-structured interviews with a sample of people who have completed employment claims (whether they were successful or not). Although themselves drawn from a sample expected to be representative of the overall population of claimants, the numbers within each of the four groups are not sufficiently large to enable generalisation about client views across the four fee types. Rather, the data provides an initial indication of the range and kinds of concerns and views relating to the different funding regimes.

The data suggests key differences in client approach to understanding of and attitude to different funding types, but we recommend that these differences are tested on larger samples.

The study broadly covers the following topics:

- what factors influence individuals to bring claims in the first place;
- how claimants choose their advisers;
- how well claimants understand the fee arrangements they enter into;
- how claimants perceive the settlement of claims; and,
- whether claimants are satisfied with the advice and representation they receive.

In looking at these issues this study has borne in mind the key criticisms made of each form of funding arrangement and the broader concerns around claiming in employment tribunals, such as concerns about a compensation culture.

11.1 Why and how are claims brought?

Claimant data on this question is primarily interesting for two reasons. Firstly, understanding how and why claimants bring claims sheds some light on the idea that claiming is an amoral activity, motivated by the opportunism and greed of
claimants and their advisers. The latter, in particular, are alleged to stoke the fires of the claims industry through advertising and more disreputable marketing techniques. Secondly, issue of client choice: whether and how clients choose their advisers, and whether they regard such choice as important, is significant for a number of regulatory debates centring on this area.

Research based on claimant perspectives cannot totally refute the amorality critique. Claimants have obvious reasons in an interview for not portraying themselves in a negative light and those with something to hide would be disinclined to speak to researchers. However, within those limitations, the evidence from this study on motivation was consistent. Claimants explained their decision to claim as primarily prompted by a genuine sense of grievance: the knowledge or feeling that rights had been breached; a desire to vindicate principle; and/or, to prevent errant employers from mistreating more employees. External influences on decisions to claim were almost entirely derived from friends, relatives, trade union representatives and/or colleagues who reinforced the claimants' sense of right and wrong and their sense that something could be done about their problems.

Furthermore, there was almost no evidence of adverts, cold-calling or other marketing techniques impacting on the decision to claim. Only two out of the sixty three interviewees indicated that advertising had encouraged them to claim in any way but even here there were other factors which appeared as strong or stronger in terms of influence, such as their sense of grievance and the encouragement of family or friends. Similarly, only five respondents selected an adviser in response to advertising (TV or newspaper adverts). Interestingly, however, all of these entered into DBCF agreements. The possibility that advertising has a more general background influence on people’s propensity to claim cannot be excluded, but this study provides some evidence of the absence of any direct effect.

No interviewees mentioned having been subject to cold calling or similar techniques, suggesting a shift away from previous practice where tribunal applicants had frequently been subject to direct approaches from advisers. Changes in access to the employment tribunal registers appear, as a result, to have had the desired effect.

11.2 Choice

Choice is important for two reasons. Firstly, a common criticism of legal expenses insurance is that it inhibits client choice. Insured claimants may have to receive their legal services from a panel firm tightly controlled by an insurer. Such panels are criticised as inhibiting client choice and quality of service. The same criticism might apply to trade union funding, although interestingly it is a criticism less commonly made.

Secondly, solicitors’ charging a variety of rates and in a variety of ways, may permit clients to choose the approach which most suits them. This is particularly important in the context of DBCFs because there is a range of approaches to charging, some of which allocate more risk and/or cost to the client but may mean their cases have a greater likelihood of getting taken on. An interesting
and important question is whether clients perceive this range of choices and makes any kind of informed choice between them.

Overall, it seemed clear that very few claimants chose their adviser in any meaningful way. The majority of individuals used a representative either chosen by their union/insurer or recommended to them by social contacts or intermediaries (like CABx). Where this was not the case, individuals tended to approach the first adviser they came to or that looked potentially appropriate in a telephone directory or an internet search. The absence of choosing reflected uncertainty amongst claimants about how to distinguish between advisers and, in particular, their ability to ascertain who was likely to be the best for them.

However, with limited but notable exceptions, particularly one client who paid substantial costs rather than have an LEI lawyer, clients were generally content to have such choices made for them, particularly where they could be provided with a local solicitor. Indeed, they appeared to regard such choices being made for them as more likely to guarantee a competent provider. That does not mean that they were more likely to get a competent provider.

11.3 No choice of adviser but a choice of funding arrangements?

Different funding arrangements have different pros- and cons-. Private clients pay win or lose, and often before they have any compensation from which to deduct such payments. Conventional economic theories suggest they may also get better service quality (because they pay for more time to be spent) and better outcomes (because practitioners can go the extra mile for a higher settlement). Privately paying claimants are not, however, shielded from the risk of losing, which may undo the benefits on outcome because cost bearing clients may be more risk averse and so settle sooner than they would do otherwise.

TU and LEI clients are largely or wholly shielded from risk and may receive their compensation without deduction. These look like the best deal for claimants, although payment arrangements between TU/LEI funder and solicitor may not be transparent and may contain incentives which mean only ‘softer’ (i.e. easier, less risky) cases are taken, which are settled more quickly, and for less, than claimants might be entitled to. Critically of course, LEI and TU funding is only available to policy holders or union members.

DBCFs are theoretically available to anyone. In their purest form they should shield clients from the risk of losing, making them more affordable than private payment. Their main disadvantage, when compared to LEI/TU funding, is that claimants will have a substantial percentage deducted from their compensation. Conventional economic theory suggests that compared to private payment they may lead to poorer service quality and lower outcomes (undersettlement).

There are two points to make about these differences. Firstly, many of the incentives and disadvantages are highly contested. Neither theory nor evidence points clearly in favour of one model. Secondly, almost all claimants do in fact have a choice of funding. The only exception is the claimant who does not have sufficient funds to pay privately and is neither a member of a union nor a holder
of a relevant legal expenses insurance policy. They have to opt for a DBCF unless they can find an organisation able to take the case on without charging.

The fact that most claimants do in fact have a choice is underlined by professional obligations requiring solicitors to advise on those choices. The obligation was introduced in the light of previous research suggesting that solicitors only advised on the funding arrangements that they preferred. It is thus important to understand whether the claimants we interviewed were in fact offered any choice.

The majority of respondents appeared neither to have been offered, nor to have considered the possibility of, alternative methods of funding their cases. It is possible that sometimes the claimants we interviewed simply forgot; but this is not likely to have occurred on the scale seen here. The evidence suggests that many solicitors, though not all, are failing in their professional obligation to inform claimants of the possibility of these alternatives.

It is of course debatable whether all clients should have the choice emphasised to them. The Solicitors Regulation Authority (SRA) rules clearly oblige solicitors to advise of the possibility of union and/or insurance funding, but should union members or the insured be advised of alternatives? Claimants occasionally had a sense of disquiet about the use of such funding; but our sense is that this concern was not strong enough to require that choices be canvassed with LEI/union claimants which would require them to pay something either up front or out of their compensation. There is, however, significant room for debate.

The position with privately paying claimants is different. The need to canvass the possibility of trade union or LEI funding is obvious, yet it appears it was usually not done. Similarly, there are obvious and clear benefits to claimants in using DBCFs over private payment, even though there may also be drawbacks for them and some professional distaste for no win no fee in some quarters. Unless one takes the view that solicitors should not be under a duty to advise their clients on the merits of available alternative funding arrangements, the arguments that such clients should be counselled on the availability of DBCFs, even if the particular firm declines to offer them themselves, are strong. SRA rules/guidance needs to be reconsidered in this light.

The issue of choice has also surfaced in a similar but more specific context. A criticism made of DBCF lawyers is that they recruit union members when it is not in the clients' interests and do not advise them of the alternative. This was not supported by any evidence from the claimants we spoke to. Union members who had not used union funding had generally either been told by their union they were ineligible for funding or had declined to use union solicitors because of perceptions of poor service or a lack of independence. We cannot yet be sure that the criticisms of DBCF lawyers in this regard are unfounded, nor can we be sure how widespread perceptions of poor quality and lack of independence are amongst union members who instruct non-union lawyers, a larger sample would

need to be drawn, but there was no suggestion in any of the interviews that the negative views of unions (which were not generally shared by those who had relied on their unions to fund employment claims) were cultivated by other advisers.

11.4 Do claimants understand their fee arrangements?

Clients generally demonstrated only a basic understanding of their fee explanations. DBCF clients tended to concentrate on the percentage fee and the lack of financial liability on losing. Interestingly, private payment clients focused on overall costs estimates rather than the hourly rates which formed the bedrock of those estimates. Our data suggested that they tended to think globally about the cost of their legal assistance. In fact, they often struggled to remember what the hourly fee was and were sometimes unsure as to how global estimates and final bills were arrived at.

LEI and trade union clients generally considered questions on fee explanations irrelevant. It was (generally) free, so there view was, what did it matter to them? Almost all reported that there had been no significant discussion of fees as the union/insurer was covering them. This was less true for some LEI clients, some of whom had to pay substantial costs as part of the process of persuading the insurer to take on the claim. Thus whilst LEI may appear to be free at the point of claiming, for some policy holders the reality may be very different. This is a significant matter meriting further attention by the LEI industry and industry and professional regulators.

The majority of participants said that they understood their fee agreements completely. However, it was apparent from the interviews that in fact confusion surrounding the calculation and payment of fees was widespread. DBCF claimants in particular appeared more likely to be confused and this confusion focused on costs charged over and above the percentage rate. It was clear they might be charged initial deposits or administration fees; disbursements (particularly counsel’s fees) and VAT on top of the quoted percentage. For many this did not accord with what they thought they had agreed. Often, these charged were substantial. Even so, most accepted them either because they could see, on a close reading of their client care letters, that they were in fact liable for such charges or because they assumed that this way of charging is simply the way things are done in legal services. The culture of clients in these situations appeared to be typically one of submission.

In spite of, often unrecognised, confusion on the part of claimants and the not uncommon incidence of surprising extra charges, the majority of claimants rated their adviser’s fee explanation positively. Paradoxically, claimant satisfaction with fee explanation was primarily dependent on perceived clarity of explanation and adequacy of information provided. Many claimants valued written correspondence even if they simply used that to evaluate in retrospect whether the imposition of a particular charge was legitimate.
Similarly, the majority of DBCF and private payment claimants were happy with the fairness of their fee arrangements.\textsuperscript{91} DBCF claimants had a slightly more positive attitude towards the level of their fees than private payers, for whom there appeared to be an underlying feeling that they had paid for something universally accepted as expensive. Their fees were generally sizeable four or even five figure sums but the difference in view may also be because DBCF clients appeared to regard their cases as analogous to being ‘free’ even though they paid often sizeable deductions. The elision of the (relative) risklessness of DBCFs with a view that a contingency fee is ‘free’ is an interesting element of the clients’ psychological approach to funding. They may feel like they are getting something for nothing, when in fact they are not.

11.5 Settlement issues

Settlement decisions crystallise the economic interests of client and adviser. There is potential for those interests to be in conflict across all four types of fee agreement. DBCF agreements in particular have been linked with such conflicts of interest and also the use of ‘golden handcuff’ clauses which effectively ensure clients are likely to follow advice on settlement.\textsuperscript{92} In the light of such concerns, this report investigates how clients perceived settlement, whether they understood such clauses to exist and who they thought was in charge of settlement decisions.

The majority of participants were happy with any settlement advice they received. Interestingly though, satisfaction appeared to be most consistent amongst those who had been advised to go to a tribunal (even amongst the four participants who then lost). Where claimants were dissatisfied it was generally because they felt that their claim should have gone to Tribunal (when it was settled or withdrawn). Occasionally, claimants felt that their settlement was inadequate.

Overwhelmingly, clients accepted settlement advice, understandably deferring to their adviser’s expertise. Sometimes settlement was driven by the financial worries of being out of work and/or, for private paying clients, having to find money to pay legal bills. The situation did not generally appear, therefore, to be one where lawyers routinely pressurised clients into settlement.

There were, however, apparent differences in the number of settlement offers made under different funding regimes. Although it is evidence which would need to be more robustly tested on larger samples, this suggests that there may be different approaches to negotiating settlements depending on how a lawyer is paid and the risk the client bears. The evidence was most consistent with greater risk aversion amongst privately paying clients and greater settlement activity by LEI and TU funded lawyers.

There were also some subtle differences in the way client were advised on settlement which may indicate the differing financial incentives at work. Privately paid practitioners were more likely to present advice in a neutral manner. Clients were advised what the prospects of increased offers were and then advised of

\textsuperscript{91} Trade Union and LEI clients were not asked because they were generally not responsible for their fees.

\textsuperscript{92} See, Moorhead and Cumming op.cit. especially para 364 and onwards.
the downsides of proceeding (the extra costs they would have to find). Those using other arrangements were more likely to speak in black and white terms; in particular the level of settlement on offer was often portrayed by their lawyer as the best achievable. Claimants were told they would not get anymore. If this is an accurate description of the process, settlement discussions are a further example of how informed client choice is nullified in the employment claiming process.

However, robust pressure to settle was not always absent and occurred across the funding regimes. No major distinctions could be drawn between LEI, TU and DBCF claimants, though LEI and TU claimants were more often threatened with withdrawal of funding. In one instance the termination of a DBCF was threatened, though this did not actually relate to the acceptance of a settlement offer; rather the need to go to a tribunal in the absence of one. Threats of adverse costs orders were also utilised more often than one would have expected given their rarity in practice. Notably, where active settlement pressure was applied to a privately paying claimant, he was able to maintain control of the decision.

Our evidence suggests that for the DBCF clients we interviewed ‘handcuff clauses’ requiring clients to accept their lawyer’s advice on settlement were rarely if ever applied. Practitioners would have been likely to retain the contractual power to deal robustly with clients who rejected advice but did not need to: clients either accepted advice or could be dealt with in more subtle ways. Similarly, clients did not appreciate the likely existence of such clauses. Most respondents assumed that their claim would have continued had they wanted it to.

11.6 Satisfaction with service

Claimant satisfaction provides a limited, but important, assessment of the service provided to them. It does not establish substantive accuracy, or otherwise, of legal advice or assess other technical aspects of professional competence, but it does provide some indication of client perceptions of service. In assessing legal service quality claimants primarily valued good communication/availability, expertise, clear explanations, personal support, timeliness and hard work. Their judgments also appeared to be influenced by the eventual outcomes of their cases.

Consistent with other lawyer-client research, clients were usually satisfied with their representatives’ service: a sizeable majority rated it as ‘good’ or ‘very good’. On the whole, however, DBCF claimants appeared less satisfied; many only rated their service as fair. Given the size of this sample, the apparent difference should be treated with some caution. It is, however, consistent with a view that DBCF lawyers concentrate more on getting the client a result, and invest less time in communicating and reassuring the client about their case. This may be less satisfying for the client, but more efficient for the lawyer. The interesting issue this would pose is whether procedural justice should be traded off against efficiency in this way.

It is also possible that client expectations of service may differ depending on funding arrangements. Partly for this reason, we were interested in whether
clients perceived any link between the type of funding they were using and the quality of service. Clients of course had limited ability to answer this in an informed way. In particular, few had experience of employing lawyers in any other context.

DBCF claimants were the most likely to suggest that the funding had a negative impact on quality, either because they viewed the arrangements as a form of charity (meaning that the service was consequently poorer than would be expected through private payment); because they felt their case should have reached a tribunal hearing; or because they felt the lack of a guaranteed fee resulted in less effort from the representative. It is worth emphasizing again that DBCF clients nevertheless regarded their agreements as ‘fair’. A potential explanation is that, regarding DBCF lawyers as free, or themselves as recipients of charity, meant they might regard the fees as fair but the service as poorer. Conversely, a few DBCF clients felt that an interest in the compensation improved the service they received.

Trade union and private payment claimants were more likely to suggest that their funding impacted positively on their legal service. Private payment clients often equated higher fees with a better service, whilst trade union clients tended to suggest that their union’s experience was valuable, or that union support caused opponents to take the claim more seriously. LEI clients were more divided in their opinions.

Consistent with broad indications of satisfaction, the vast majority of participants would use the same funding arrangement again, though DBCF clients were slightly less likely to take this view.

11.7 Implications of the study

The purpose of this study was to investigate client perspectives on the process of bringing an employment claim and the funding arrangements used to bring such claims. Concentrating on the employment arena allowed us to look at how clients perceive the controversial and comparatively unregulated damages-based contingency fees but also to cover issues with three other funding arrangements often used in employment tribunals: private payment, trade unions and LEI.

Lack of choice is a theme running through many sections of this report. In particular, claimants did not have any choice of lawyer (because LEI or TU funders preclude it), or were not able to make an informed choice between different lawyers or funding models. Knowledge about alternatives appeared worryingly low.

Tackling this lack of knowledge is difficult. The solicitors’ profession imposes obligations on its members to advise on alternative funding arrangements but we found little evidence that these were honoured. This breach is particularly important where solicitors are effectively tied to one form of funding. These solicitors have a potential conflict of interest. There is a real risk that clients are not being properly counseled on the funding options available to them and that this absence is being driven, in part, by solicitors’ self-interest in charging for clients on their preferred basis. Each funding arrangement has pros and cons which are complex and contested. Unsurprisingly, clients have limited
understandings of their fee arrangements. These concerns are worrying generally, but are of particular concern when the client, rather than a trade union or a legal expenses insurer, is footing the bill.

In our previous report we commented on the diverse approaches to charging for VAT and extra costs, particularly disbursements under DBCF agreements. This is a particular issue in the context of DBCFs, where clients seemed to expect to be charged a percentage if they win and nothing if they lose, and yet found themselves either paying a percentage plus disbursements (and not uncommonly VAT on top of that) or find out that the ‘no fee’ if they do not win may in fact require payment of other expenses. We found evidence of consumer disquiet about this, but not evidence of outrage. There is a submissive culture amongst clients which seems to mean that they accept such surprises as part of the legal system, or something to be borne as a recipient of legal help ‘for nothing’.

There are arguments to be made in terms of allowing firms the flexibility to impose such charges. It enables the lawyers to offset some of their risk and may mean that they are more willing to take certain cases, thus potentially widening access to justice. The justifications for permitting a variety of models depend, in our view, on transparency and client choice. If clients can make an informed choice between different models, then the apparently negative impacts of certain charging models are easier to justify. The almost total absence of any active or informed choice by the claimants raises significant doubts about the desirability of allowing such charging practices. The Solicitors Regulation Authority, the Ministry of Justice as regulators of Claims Management Companies, and if needs be the Legal Services Board need to actively consider the permissible approaches to charging in such areas. The case is particularly strong in relation to VAT but applies equally to other charges such as disbursements. Firms could, should, and many do, bear these as part of their assessment of risk in taking on cases where they are rewarded by a simple percentage fee. This must be particularly the case where firms use in their advertising, literature or discussions the term no win no fee. To do otherwise is to mislead the client.

We would make similar observations about ‘golden handcuff’ settlement clauses: they are potentially draconian and our research would suggest usually unnecessary. There are other approaches to managing conflicts with clients which are less draconian and fairer to all concerned. Solicitors in particular need to be much more protective of their duty to their client in such circumstances. Regulators should review the permissibility of such clauses. They could be forbidden or standardised in ways that properly balance the interests of clients and lawyers.

We end by emphasising the title of this report. Employment tribunal claimants are not uncommonly portrayed as amoral actors, able to get something for nothing. There are two main senses in which this study suggests that view is wrong. Claimants clearly perceived themselves as being motivated by injustice not by opportunism. Whilst we were impressed with the consistency and

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sincerity of these views, we would also expect claimants to voice them; it is more important to emphasise the general absence of evidence that advertising influences claiming behaviour and the apparently total absence of ‘ambulance chasing’ by employment advisers. A stronger role for advertising, in particular, would have hinted at more claimants simply claiming because they could ‘have a go’ but we saw no signs of such an impact, quite the reverse. That is not to say that claimants are all, or even generally, in the right; but their motivations were, in our view predominantly based on a sincere sense of injustice rather than a cynical exploitation of opportunities to get money. For them, their grievance is not a ‘nothing’; it is a heart-felt wrong.

Secondly, it is a specific criticism of certain fee arrangements, damage-based contingency fees in particular but applicable to trade union funding and legal expenses also, that clients can bring cases without cost or risk. This research suggests that often such agreements are riskless and costless, but often they are not. Interestingly, clients perceive such funding arrangements as not having costs attached to them even when they win, and this may in part explain comments which suggested they were simply grateful for any help they could get. Poor service or charging practices were discounted by claimants on this basis. Paradoxically they excuse their lawyers because they think they are getting something for nothing. In fact, they are not.
Annex: Interview schedule

Date and time:

Interview is taken from the following list:

LEI / TU [ ]
NWNF [ ]
Paid Privately [ ]

Interview should be from the following list:

LEI / TU [ ]
NWNF [ ]
Paid Privately [ ]

Interview consent procedure

[ ] Check caller is person identified
[ ] Introduce yourself by name
[ ] Check they received our letter and have had time to read it
[ ] Check it is a convenient time to speak

We are looking at the ways people bringing employment claims fund that advice. The sorts of question we will be asking include how the fee arrangements worked from your perspective; how clear the advice on fees was; and how you chose your adviser.

You do not have to help. Indeed, you can withdraw from the interview at any time without giving an explanation and can refuse to answer any of the questions.

What you say will be treated in strictest confidence. With your permission, we will record the interview to ensure we have an accurate picture of what you say. It also ensures your views are properly reflected in our report. We will ensure that your anonymity is protected. Data will be securely and confidentially stored. It will not be possible for other people to identify you from anything we write.

[ ] Check they are happy to participate in the interview
[ ] Check we may record the interview
Screening Questions

Can I check you had an employment claim and that you received some legal advice and assistance with the claim from a solicitor or an employment claims handler?

[ ] yes  [ ] if no

Check what advice they received and if not a solicitor, trades union, insurance company or claims company end interview with thanks

And which of these statements best describes how this advice was paid for?

[ ] I paid for it myself

[ ] I took the case using legal expenses insurance

[ ] I took the case on a ‘no win no fee’ basis

[ ] My trades union paid my legal expenses

[ ] Other

If other, ask them to explain the arrangement briefly and if it is clearly not a private fee, no win no fee, LEI or TU case, end interview with thanks.

Introductory Questions

[For LEI / TU] – Can I check whether or not you were expected to pay for any legal fees or other expenses?

[For CyF / hourly paid] – What did your legal advisor tell you at the outset about how your legal fees and other costs would be calculated and paid?

Were you offered a choice of payment methods?

Thank you. We're going to go back through some of that in a moment but first can I ask some basic questions about your case.
What kind of adviser or organisation you got this advice and help from?

Options to include:

[ ] Solicitors
[ ] Employment Consultant/Claims Company
[ ] CAB
[ ] Law centre
[ ] Trade Union
[ ] Other

How did you choose them? If there was advertising/a leaflet involved, get them to explain how they saw/got that.

[For anyone who did NOT get their advice from a Trade Union] – Were you a member of a Trade Union at the time?

[ ] Yes  [ ] No

7.1. [If yes] Did you consider getting legal help with your claim from your union?

[ ] Yes  [ ] No

7.2.1. [If no] Why not?

7.2.2. [If no] Did your lawyer discuss this possibility with you?

[ ] Yes  [ ] No

7.2.3. [If yes] What made you decide not to use your union?

Can you describe for me in a sentence or two, the nature of your claim?

**Let them talk, try and clarify if unclear… don’t just list these types of case.

May want to clarify whether claim includes:

Unfair dismissal
Unauthorised deduction of wages
Breach of contract
Redundancy pay
Discrimination
Working time
Equal Pay
National Minimum Wage
More than one of the above

Why did you decide to bring that claim in the first place?
Did any [other] people, sources of information or advice or advertising make you think of bringing a claim?

Advertising
Did someone write to you or approach you to make the claim?
Relative/friend suggested it
Contact with trade union
CAB
Media
Other

**Compensation**
Did you get compensation?

[ ] Yes [ ] No

How much compensation did you get?

Did you get any other benefits as a result of bringing the case?

[ ] Yes [ ] No

**Don’t prompt but these are the types of things ‘other benefits’ could be:**
Re-engagement / re-deployment
Apology
Improved terms

12.1. [If yes] Probe for how important these were to the interviewee and how important they were relative to any compensation paid.

Funding advice given by the legal representative

At the start of your case, how well did your representative explain how their fees would be calculated?

13.1. Get them to explain and then ask them to rate the usefulness of this explanation on a scale of 1-5:

1 = very good
2 = good
3 = fair
4 = poor
5 = very poor

Were there aspects of the fee agreement that you were not sure you understood? [Probe for details]

Contingency fee cases

Answer this section for any cases involving a contingency fee element, for other cases go to page 84

What percentage of your compensation did you agree that the solicitor would take?

**If their representative did not take a percentage, try and establish what the arrangement was.

Were you happy with the percentage agreed on?

[ ] Yes       [ ] No
If no:

17.1. Why not?

17.2. What do you think a fair percentage would have been?

17.3. Did you try and negotiate a different figure?

   [ ] Yes       [ ] No

VAT

18.1. [If they won compensation] was [X%] the figure deducted or was VAT added to the figure so that more than [X%] was deducted?

   [ ] X% figure ACTUALLY deducted
   [ ] VAT added so more than X% deducted

   [You may have to go through the figures with them.]

18.2. [If they did not win compensation] if you had won compensation, would [X%] have been the figure deducted or would VAT have been added to the figure so that more than [X%] was deducted.

   [ ] X% figure ACTUALLY deducted
   [ ] VAT added so more than X% deducted

Disbursements

[Where the claimant won and was charged accordingly]:

19.1. Did what you were actually charged differ in any way from what you thought you would be charged?

   [ ] Yes       [ ] No

   [If yes]:
   
   Explore the nature of any differences and any financial value attached to those differences.

   Prompt check position re: disbursements (expenses such as photocopying, the adviser’s travel costs, expert fees or barrister fees)

   [If no, or if answer does not adequately address disbursements issue]
19.2. Aside from the percentage fee, did you have to pay for any other costs?

[ ] Yes   [ ] No

19.2.1. [If yes] Explore the extra costs

19.2.2. [If yes] Did you expect to pay these costs?

[Where the claimant lost and did not get compensation]:

19.3. Did you have to pay anything to your solicitor?

[ ] Yes   [ ] No

[If yes]:

19.3.1. What did you have to pay for?

19.3.2. How much did you have to pay (ask what this consisted of)?

Recoupment / other deductions

Other than your legal costs and disbursements, were there any other deductions from any compensation paid?

[ ] Yes   [ ] No

[If yes]:

20.1. What were they for?

20.2. How did this affect what fee you paid your lawyer?

Did your representative make the deductions and then take a percentage of the rest or did he take a percentage from the full amount before deductions were made?

[ ] Made deductions first, took percentage of remainder

[ ] Took percentage of full amount

[ ] Don’t know

[Where any costs were charged in addition to the percentage fee]

So in addition to your percentage, you’re adviser charged you for [as appropriate] VAT, disbursements and there was a deduction from compensation [which was not reflected in a lower fee]. Do you feel you were properly advised of these details at the start of the case?
Hourly Fees

Answer this section for clients who paid all or some of their costs on an hourly rate basis. Otherwise go to page 86.

What hourly rate or rates did you agree that the solicitor would be paid?

Did you receive any other indication of the likely total costs?

[ ] Yes [ ] No

[If yes] Follow-up: were they quotes or estimates?

Did you pay any instalments for costs as the case progressed?

[ ] Yes [ ] No

[If yes] How much and how often?

Were you happy with the costs agreed on?

[ ] Yes [ ] No

[If no]:

25.1. Why not?

25.2. What do you think a fair approach would have been?

25.3. Did you try and negotiate a different approach?

Did what you were actually charged differ in any way from what you thought you would be charged?

[ ] Yes [ ] No

[If yes]

Explore the nature of any differences and any financial value attached to those differences.

Probe for disbursements such as photocopying, the adviser’s travel costs, expert fees or barrister fees? [Deal with VAT separately below]
If no, or if answer does not adequately address disbursements issue]

26.1. Aside from your representative’s fees, did you have to pay for any other costs?

[ ] Yes  [ ] No

26.1.1. [If yes] Explore the extra costs

26.1.2. [If yes] Did you expect to pay these costs?

Did the hourly rates include VAT or was VAT added on top?

[ ] Included VAT  [ ] VAT added

So in addition to the hourly fees that you paid, your adviser charged you for [as appropriate] VAT, disbursements. Do you feel you were properly advised of these details at the start of the case?

[ ] Yes  [ ] No

Expand…

What did the final bill for legal fees come to?

Try and break down into lawyers’ fees and disbursements. Also get a figure for any disbursements.
**Insurance/TU**

**[LEI only]** Did your legal expenses insurance cover all your costs?

[ ] Yes       [ ] No

[If no]:

What was not covered? Get an explanation of what was not covered by the agreement, for example. Prompts:

- Lawyers fees (if so find out how they are calculated – hourly rates/contingency fee etc.)
- Disbursements
- VAT

**[If the claimant won compensation]** did you have to make any payment out of your compensation?

[ ] Yes       [ ] No

Find out what it was for, how much…

Who to…

**[Where there were additional charges or deductions]**, do you feel you were properly advised at the start of the case that these costs were not included in the agreement and/or that you would have to make a payment from your compensation?

[ ] Yes       [ ] No

Did you have a choice of lawyer under the TU/Insurance?

[ ] Yes       [ ] No

33.1. **[If yes]** Did you feel you had a suitable choice of lawyer?

33.2. **[If no]** Were you happy for the insurer/trade union to choose for you?
Settlement/Tribunal

Did your case settle or did you go to a tribunal final hearing?

[ ] Settled       [ ] Tribunal

**If your case settled**, roughly how many offers of settlement were there prior to the final offer?

Were you happy with the representative’s advice in relation to settlement?

[ ] Yes       [ ] No

36.1. **If not**, probe on why they were unhappy, what they did about it and what happened.

36.2. Probe on whether they knew what would have happened if they had told their representative that they did not want to accept a settlement offer.

If case went to tribunal, were you happy with the decision to go to tribunal?

[ ] Yes       [ ] No

37.1. **If not**, why not? [Probe for whether the advice was pressuring them towards it]
Interviewee satisfaction

Could you rate the service you received from your legal representative on a scale of 1-5:

1 = very good
2 = good
3 = fair
4 = poor
5 = very poor

Could you explain why [they were very good, etc.]?

Do you think the service you received had anything to do with the way it was funded?

Would you use this type of legal funding again?

[   ] Yes       [   ] No

Is there anything else you would like to add about your experience?

Would you like to receive a summary of research findings when we have finished this work? If so, how should we send them to you? (try and get email rather than postal address)

[   ] Yes       [   ] No

Details:

End interview with thanks.
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