

#Legalsupportmatters

Whistleblowing with Discrimination at Employment Tribunal



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Foreword

Colin Law (Lord Low of Dalston CBE)



This report looks at claims of whistleblowing detriment with claims of discrimination at Employment Tribunal. It finds that whistleblowers who also suffer discrimination in the workplace fare worse than whistleblowers who do not suffer discrimination. Bringing a claim for whistleblowing at the same time as a discrimination claim reduces the success rate of both claims. No doubt this has much to do with the further finding that claimants bringing a whistleblowing claim at the same time as one of discrimination are more likely to represent themselves and, therefore, less likely to have legal representation.

The report makes a number of recommendations for improving the situation of appellants before tribunals and is thus to be warmly welcomed.

Executive Summary

Are whistleblowers who suffer discrimination empowered to receive justice? This report considers the situation of employees claiming whistleblowing detriment with discrimination at Employment Tribunal in England and Wales in 2015-2018. The report addresses debates around the urgent need for legal aid to remove imbalances in power, especially pertinent in areas of complex law, such as whistleblowing and discrimination.

The University of Greenwich, in collaboration with Equality and Employment Law Centre undertook research into Employment Tribunal judgments where whistleblowing detriment (referred to throughout as 'whistleblowing' for ease) was claimed alongside discrimination. The data includes judgments from 2015-2018 inclusive in England and Wales that went to preliminary hearing or beyond at Employment Tribunal.

The research was funded by the British Academy, Leverhulme Trust and University of Greenwich.

This report finds whistleblowers who also suffer discrimination in the workplace fare worse at Employment Tribunal than whistleblowers who do not suffer workplace discrimination. The report has the following key findings:

- 1. Race, Disability and Sex discrimination are the most commonly claimed types of discrimination in conjunction with a whistleblowing claim.**
- 2. Success rates are low.** Bringing a claim for whistleblowing at the same time as a discrimination claim reduces the success rate of both claims at Employment Tribunal.
- 3. Claimants have poor representational power.** Claimants bringing a whistleblowing claim at the same time as a discrimination claim are more likely to self-represent and therefore less likely to have legal representation. Accordingly, they have lower levels of equality of arms compared to claimants who bring a whistleblowing claim without a discrimination claim.
- 4. Legal tests hinder access to justice.** Whistleblowing claims with discrimination are more likely to be out of time than whistleblowing claims without a discrimination claim. In only a small proportion of cases is the time limit extended.
- 5. Claiming whistleblowing with disability discrimination is associated with significantly distinct outcomes.** Disability discrimination is the most likely to be successful or settled and have equality of arms compared with race and sex discrimination.

Introduction

In 2017, Doug Pyper wrote a briefing paper for the House of Commons library entitled “Legal Advice and Help in Employment Law Matters”. The report identified that *“the reality is that procedural and substantive legal points may elude or confuse an unrepresented litigant”*.

Our report based on research carried out by the Centre for Research in Employment and Work at the University of Greenwich in collaboration with the Equality and Employment Law Centre focuses on the difficulties faced by litigants in person in Employment Tribunals particularly in cases involving discrimination combined with whistleblowing. It demonstrates that litigants in person continue to struggle to understand the complex nature of the law and to effectively put forward their cases.

Equality and Employment Law is a new member of the Law Centre Federation but has been providing a free specialist discrimination law advice service not only in our home city of Liverpool but also nationally through the auspices of the Legal Aid Agency Civil Legal Advice Service (CLA) for well over 8 years.

This experience has given us a unique perspective on the difficulties that claimants encounter when attempting to access free or affordable legal advice services when dealing with the most complex employment law claims. The fact that a shortage of free legal advice services results in poor outcomes for claimants at Employment Tribunal cannot be a surprise particularly as free advice generally does not include representation when, in contrast, most respondent employers are represented.

This inequitable situation is caused both by the lack of provision driven by the Legal Aid, Sentencing & Punishment of Offenders Act 2012 (LASPO), which removed the majority of employment law from the scope of legal aid, and a lack of awareness of the limited provision that remains. Even the authors of the recent Parliamentary Report on Legal Aid referred to above seemed to be unaware of CLA. Furthermore, the income and capital eligibility limits for legal aid have not changed since 2010 which means that fewer and fewer individuals can successfully access advice through legal aid.

Lord Bach in his report of 2017 (The Right to Justice) recommended that the Government restore legal aid for early ‘legal help’ (support prior to representation in courts and tribunals) to pre-LASPO levels for all social welfare law including employment law, which we would lend particular support to given its complexity.

Furthermore, an earlier report by Lord Low in 2012 (Tackling the Advice Deficit – A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales), recognised that general advice (as provided by the Equality Advisory Service) may not be the most effective way forward but did emphasise the benefits of early intervention and action rather than allowing problems to escalate. This report recommended, amongst other things: public legal education, a national advice strategy and urged courts and

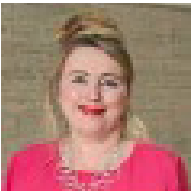
tribunals to review how they can operate more efficiently for example through adopting their model of dispute resolution at every stage to meet the needs of litigants who have little or no support.

Despite these knowledgeable and well-informed interventions there have been no changes. We are therefore very pleased to have collaborated with the Centre for Research in Employment and Work at the University of Greenwich on this important study to again shine a light on the inequality of arms between claimant employees and respondent employers, and to call for the long-awaited implementation of solutions so that this inequality is finally addressed.

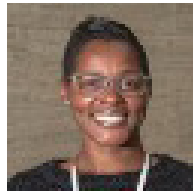
We also hope that this will report will stimulate discussion amongst employers, as well as lawyers, academics and politicians. Employers should ensure that managers are well versed in their responsibilities under the Equality Act and are clear as to when a potential protected disclosure has been made. Whistleblowing cases can provide an organisation with the opportunity to improve the culture and mechanisms of employee engagement and create impactful change in their procedures and norms. Furthermore, the lessons learnt will avoid protracted workplace grievances and or disciplinary hearings.



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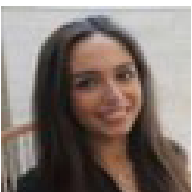
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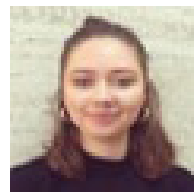
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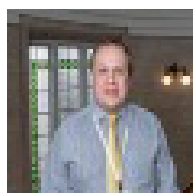
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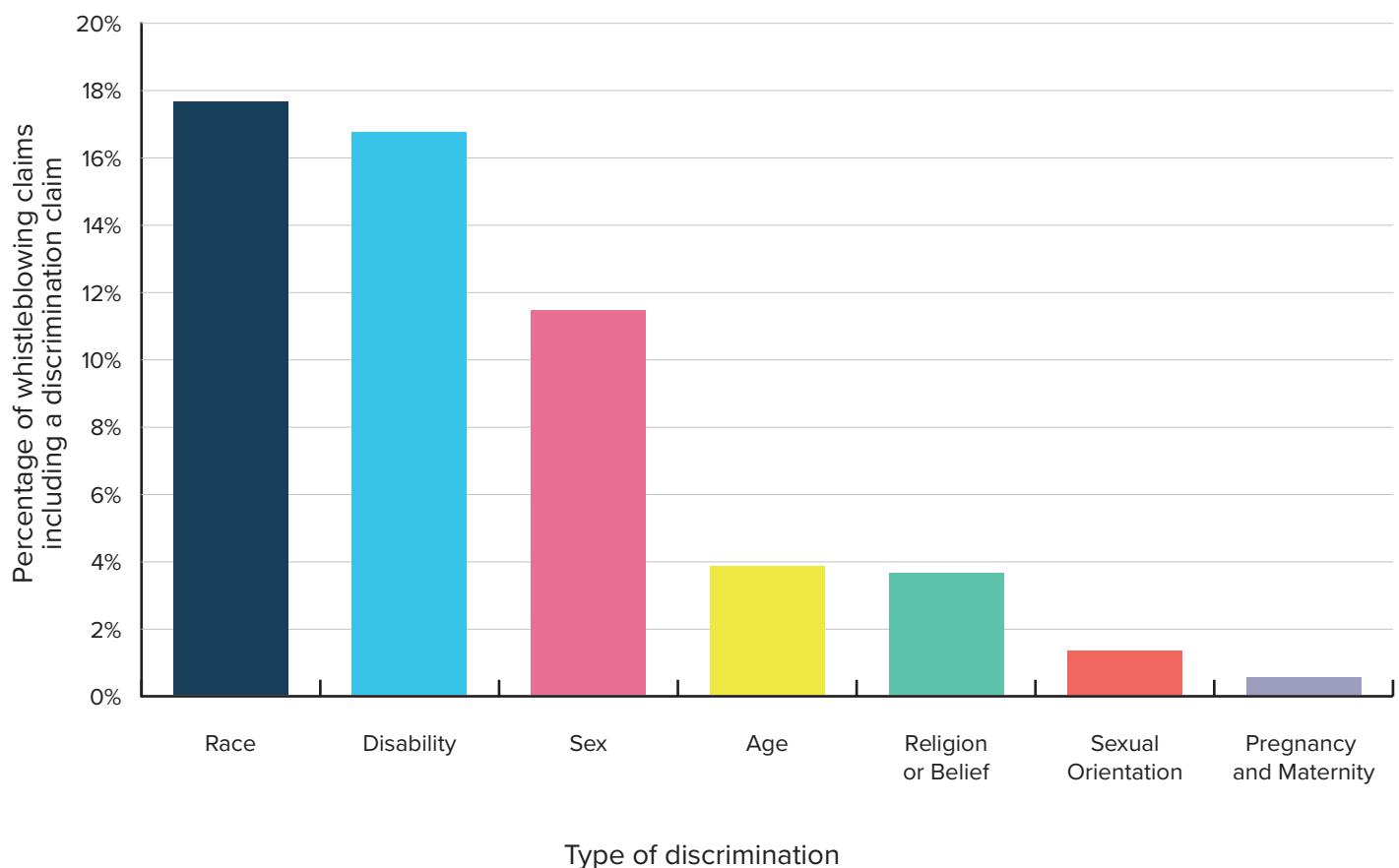
Whistleblowing claims with Discrimination Claims at Employment Tribunal

When an employee or worker has blown the whistle and they have been treated badly or otherwise dismissed as a result, they can bring a claim for whistleblowing detriment or automatic unfair dismissal to an Employment Tribunal. Our research focuses on whistleblowing detriment specifically and shows claimants rarely *only* bring a claim for whistleblowing. In 41% of claims (247 claims in 2015-2018), claimants bring a claim for whistleblowing *and* discrimination. That means that whistleblowing claims are most commonly made at the same time as a discrimination claim.

This report analyses claims where a claim for discrimination was brought at the same time as a claim for whistleblowing. We analysed all the claims that went to preliminary hearing or beyond in 2015, 2016, 2017 and 2018 (methodology and tables are in the appendix). A total of 603 claims were analysed; 247 where whistleblowing was claimed in combination with discrimination

We can see that the top three claimed types of discrimination in combination with whistleblowing are race discrimination (17.6%), disability discrimination (16.7%), and sex discrimination (11.4%). The report focuses on these top three types of discrimination.

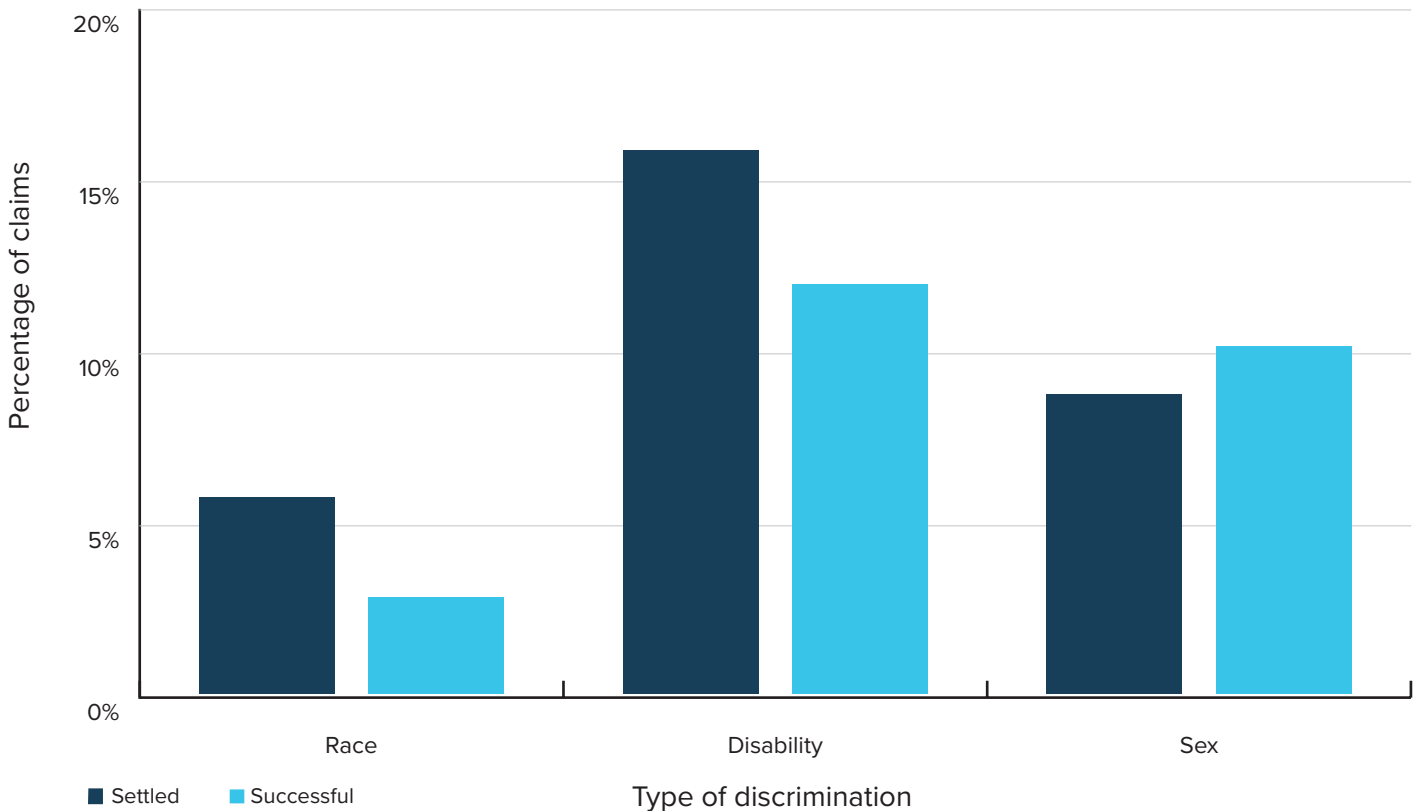
Fig1. Types of discrimination claimed in combination with whistleblowing



Whistleblowers are more likely to win their case if there is no discrimination claim involved. Overall, 12% of whistleblowing claims are successful. Where whistleblowing is claimed alongside discrimination, however, the success rate for whistleblowing is 4.5%. We do see that in 10.5% of claims the discrimination claim is upheld, regardless of the outcome of the whistleblowing claim.

Overall, we can see settlements are more common than successful claims for race and disability, however, the opposite is true for sex discrimination where successful claims are more common than settlements, see figure 2.

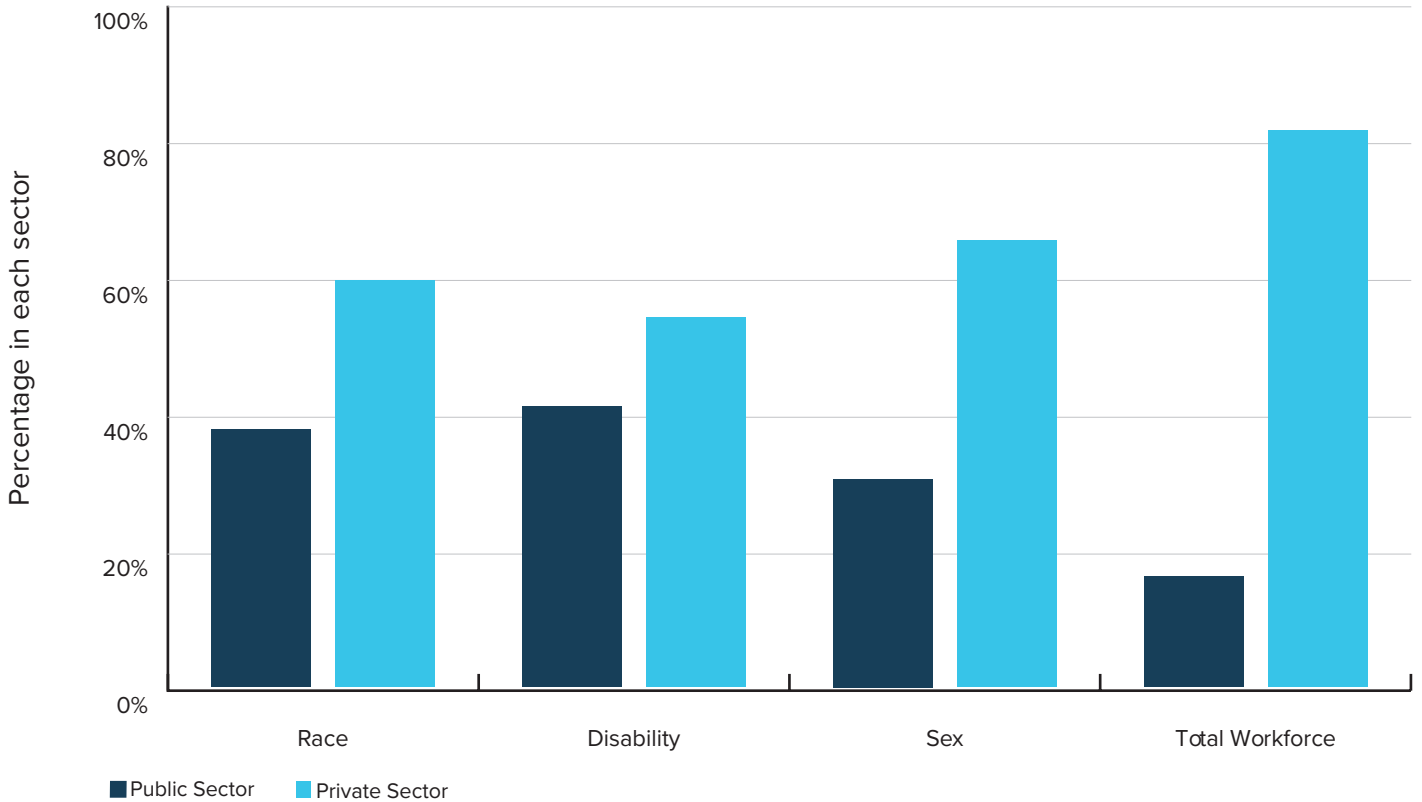
Fig 2. Outcome of discrimination claim



The data shows that claiming disability discrimination in combination with whistleblowing, results in more successful whistleblowing outcomes than in combination with race discrimination, which has fewer successful outcomes for the whistleblowing claim.

Whistleblowing claims with a discrimination claim at Employment Tribunal are comprised of 61.2% in the private sector and 34.4% in the public sector. Given the spread of the workforce between each sector - 81.3% work in the private sector, 16.1% work in the public sector, it seems the public sector is overrepresented, suggesting that whistleblowing in the public sector is more likely to escalate to Employment Tribunal than in the private sector. When looking at our top three types of discrimination we see differing patterns (see figure 3). Whistleblowing with a disability discrimination claim is most common in the public sector but least common in the private sector. In contrast, whistleblowing with a sex discrimination claim is most common in the private sector but least common in the public sector.

Fig 3. Sector

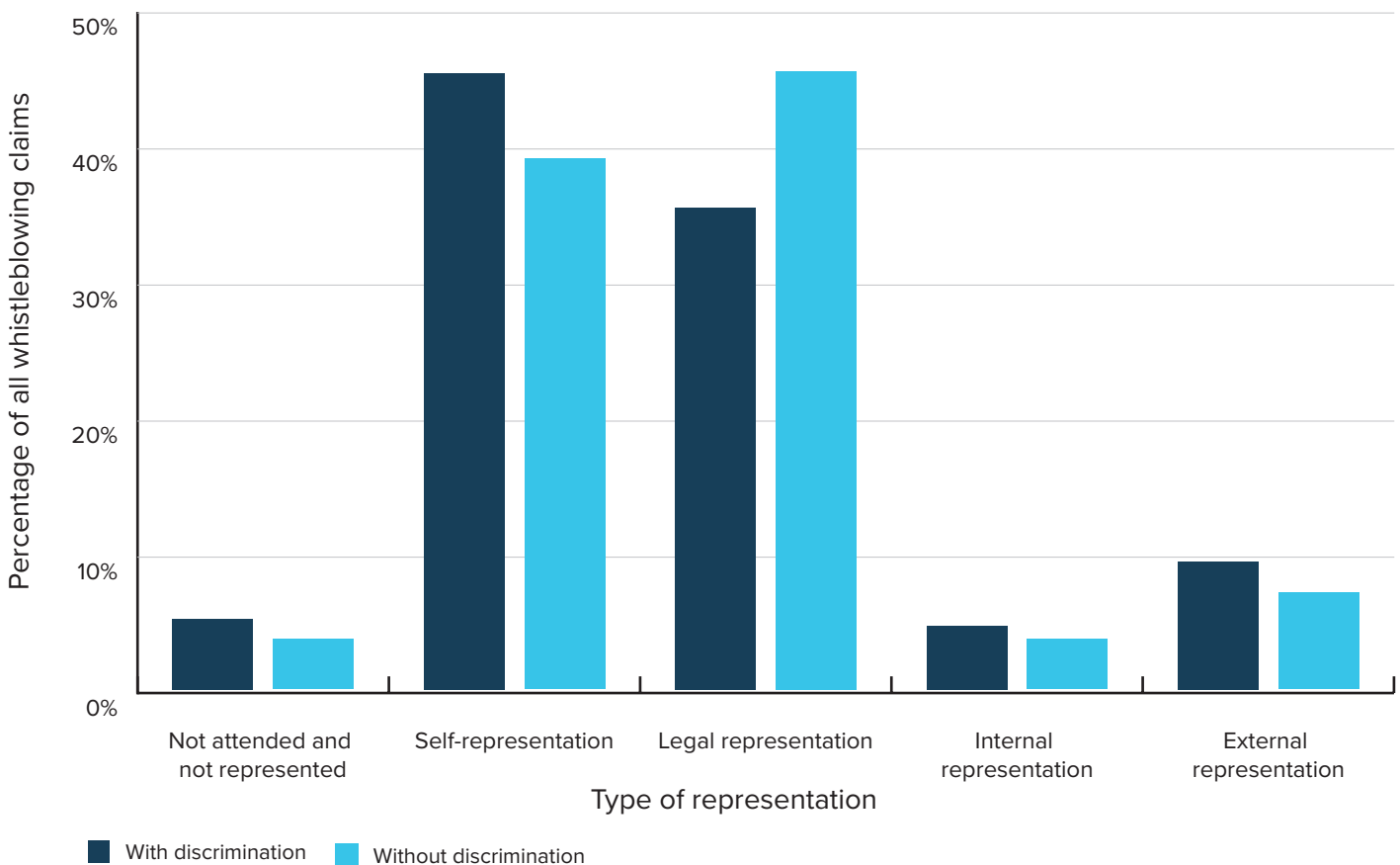


Time limits of 3 months minus 1 day are in place for both whistleblowing and discrimination claims. This means claimants must lodge their claim with the Employment Tribunal within 3 months minus 1 day of the event happening. We found that in 23% of the whistleblowing claims where discrimination was also claimed, the claim was presented outside of this time limit, compared to just 16.9% of the whistleblowing claims that did not include a discrimination claim. Only 15% of the out of time claims were allowed to proceed with the judge extending the time limit.

Representation and Inequality of Arms at Employment Tribunal

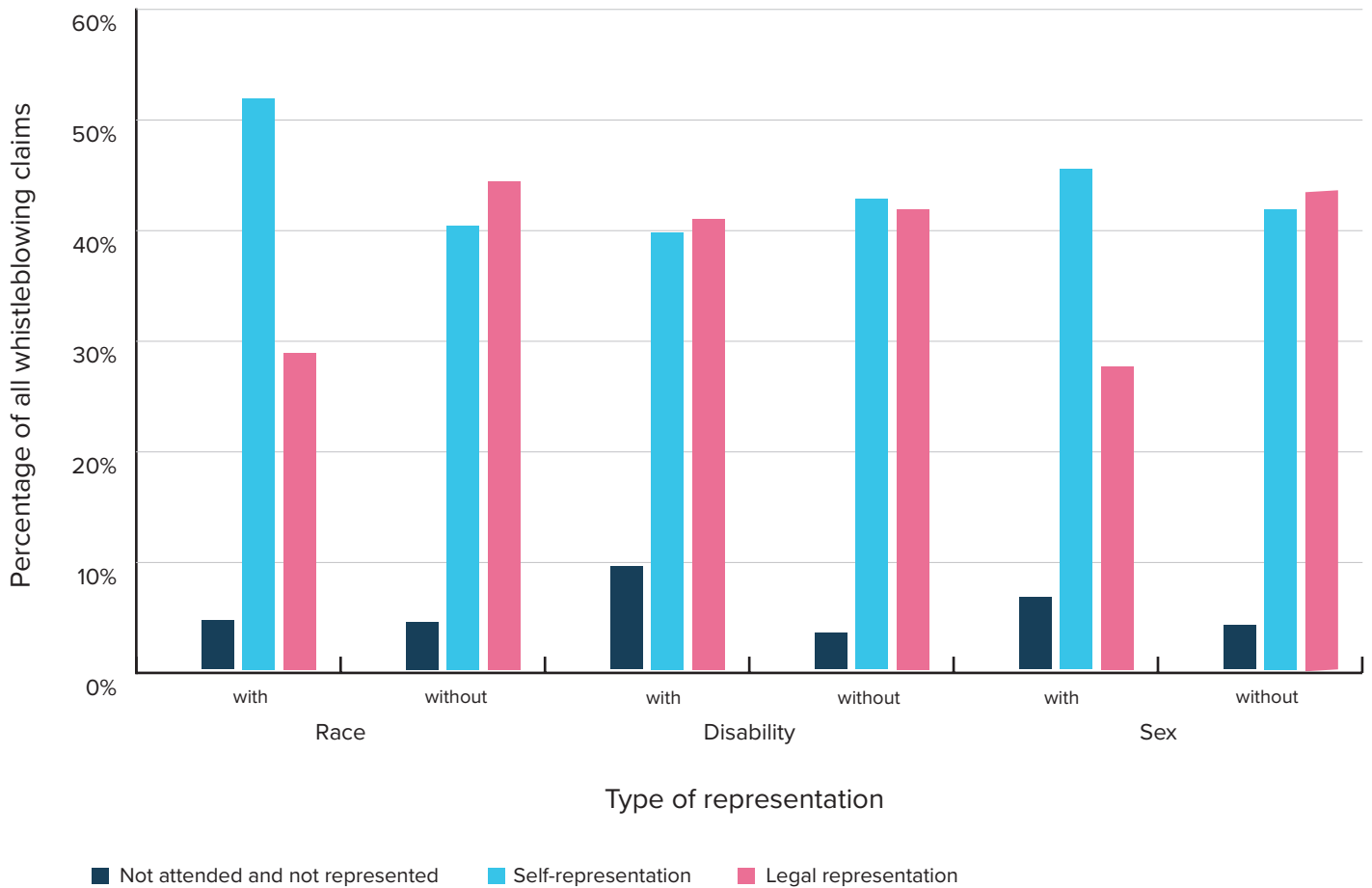
We have seen whistleblowing is rarely claimed alone and most commonly claimed in combination with discrimination, mainly race, disability and sex discrimination. Whistleblowing and discrimination legislation are inherently complex. Therefore, claimant representation is even more important than in other areas of employment law. Yet we find that claimants bringing discrimination claims are less likely to have legal representation (figure 4). Claimants with a discrimination claim are more likely to be self-represented (litigant-in-person), more likely to not attend or not be represented and less likely to have legal representation than those bringing a whistleblowing claim without a discrimination claim. Other forms of representation include external representatives (lay representatives, Citizens Advice and Trade Unions), and internal representation (family and friends), see table 4 in the appendix.

Fig 4. Claimant representation by type of claim



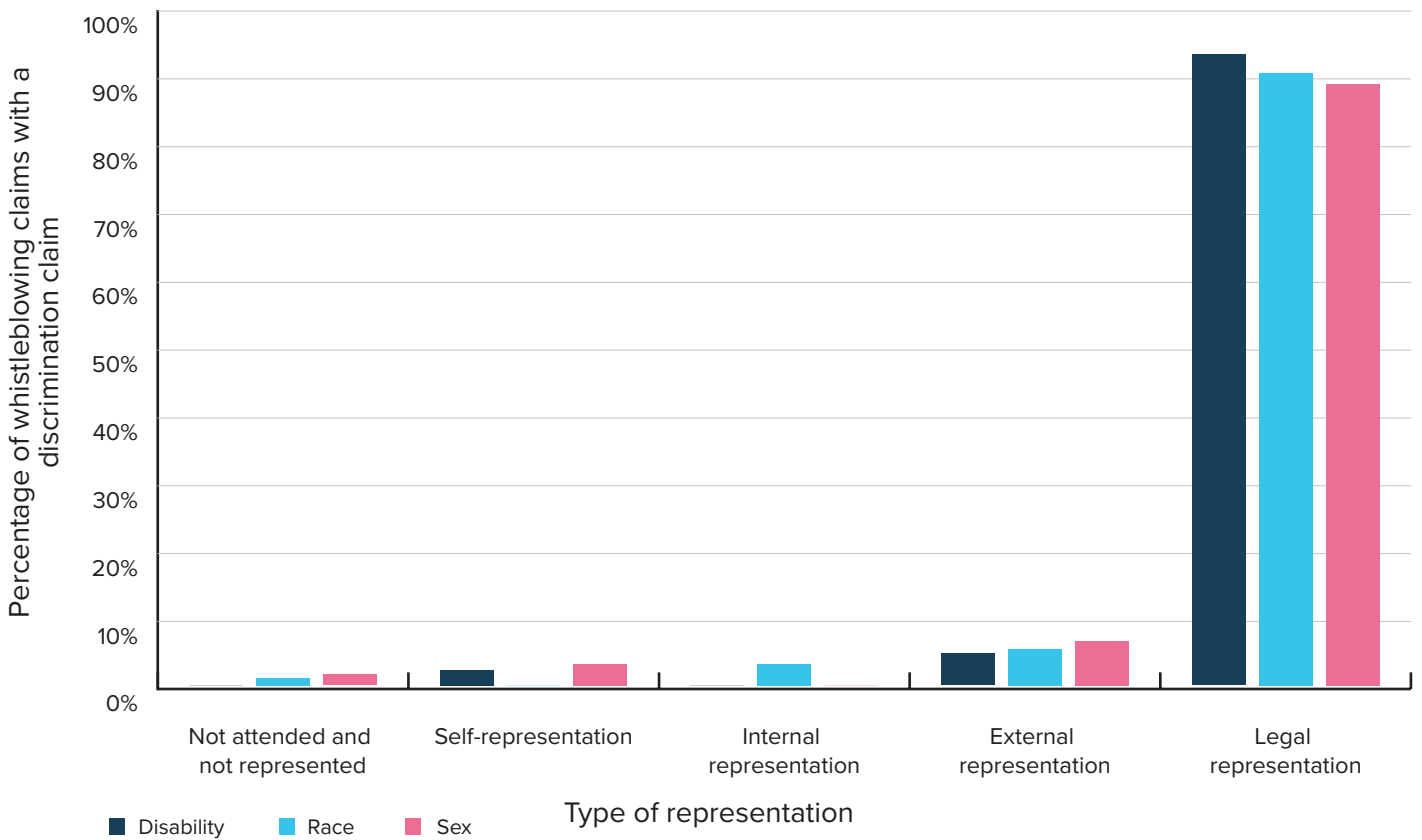
The situation becomes more worrying when we consider different types of discrimination included with the whistleblowing claim. Figure 5 shows that claimants of race or sex discrimination are most likely to self-represent (litigant-in-person). Disability discrimination claimants on the other hand are notable in that they are far more likely not to turn up at the Tribunal hearing than other discrimination claimants.

Fig 5. Types of discrimination and claimant representation



While we find a predominance of self-representation amongst claimants, the opposite is true for employers, see figure 6. Legal representation is the most common for all types of claims, with employers facing a disability discrimination claim having the highest level of legal representation.

Fig 6. Employer representation



Why is representation so important? Figures 7 and 8 shows that compared to self-representation, claims with legal representation are more likely to result in a successful whistleblowing claim, both for claims with or without a discrimination claim. However, the effect is larger for claims with discrimination claims, highlighting the greater need for legal representation in complex claims.

Fig 7. Impact of representation on all claims

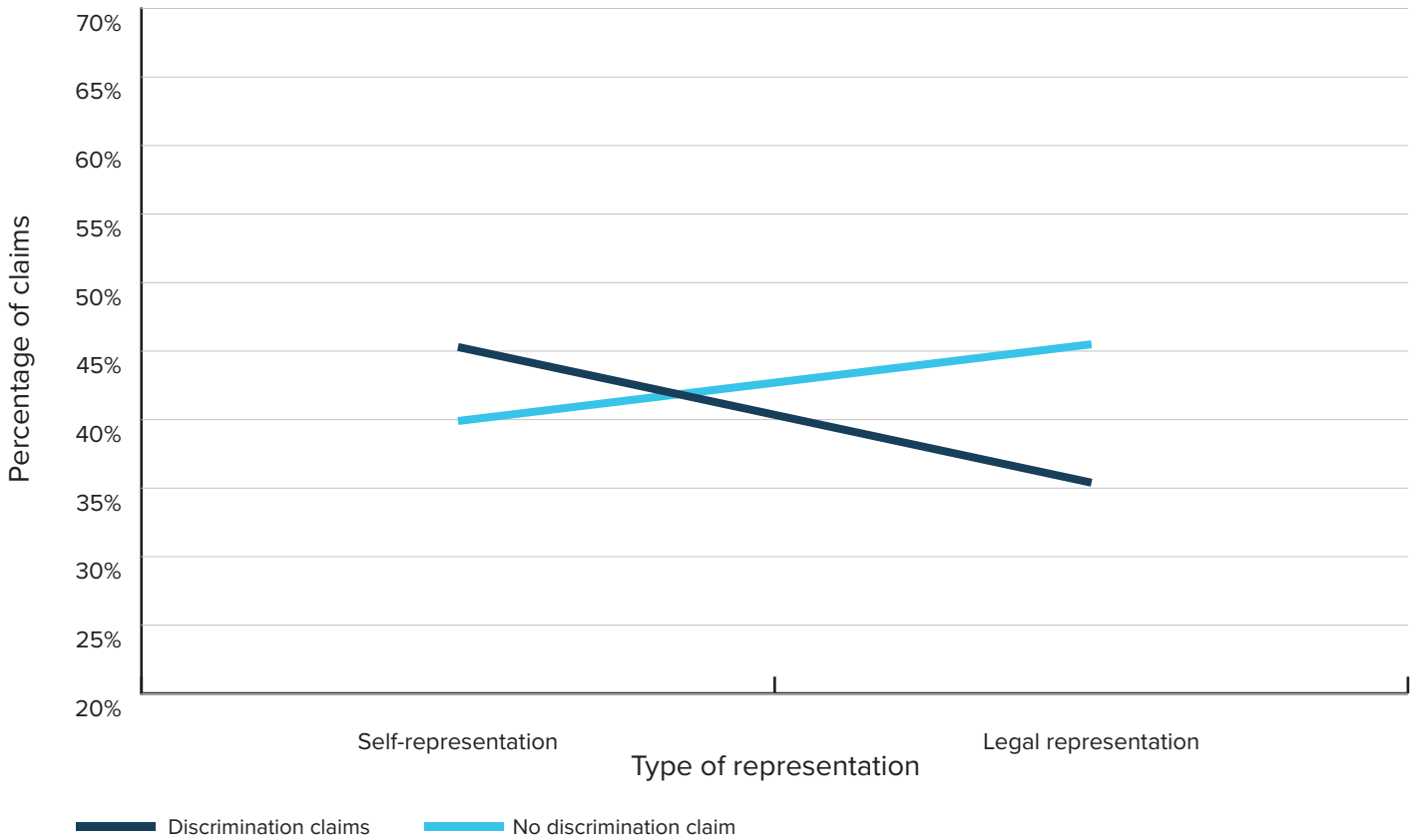
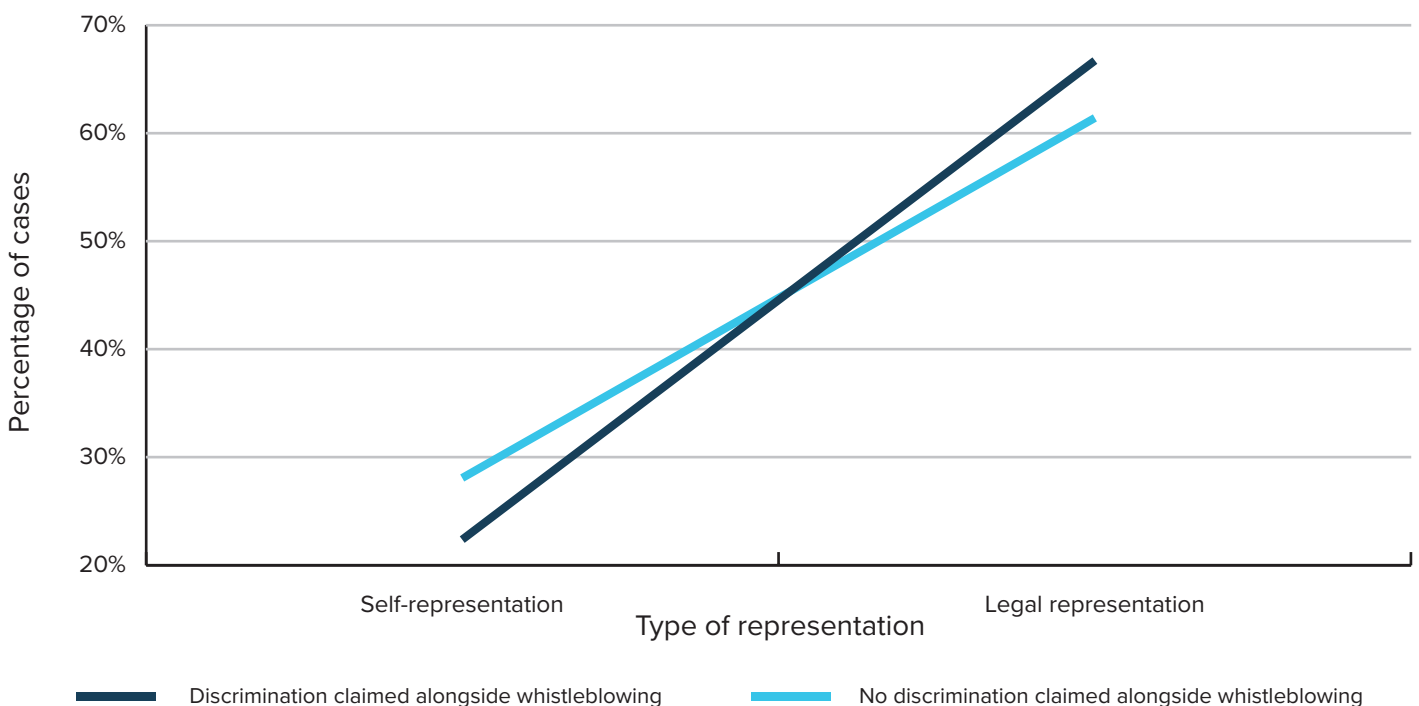
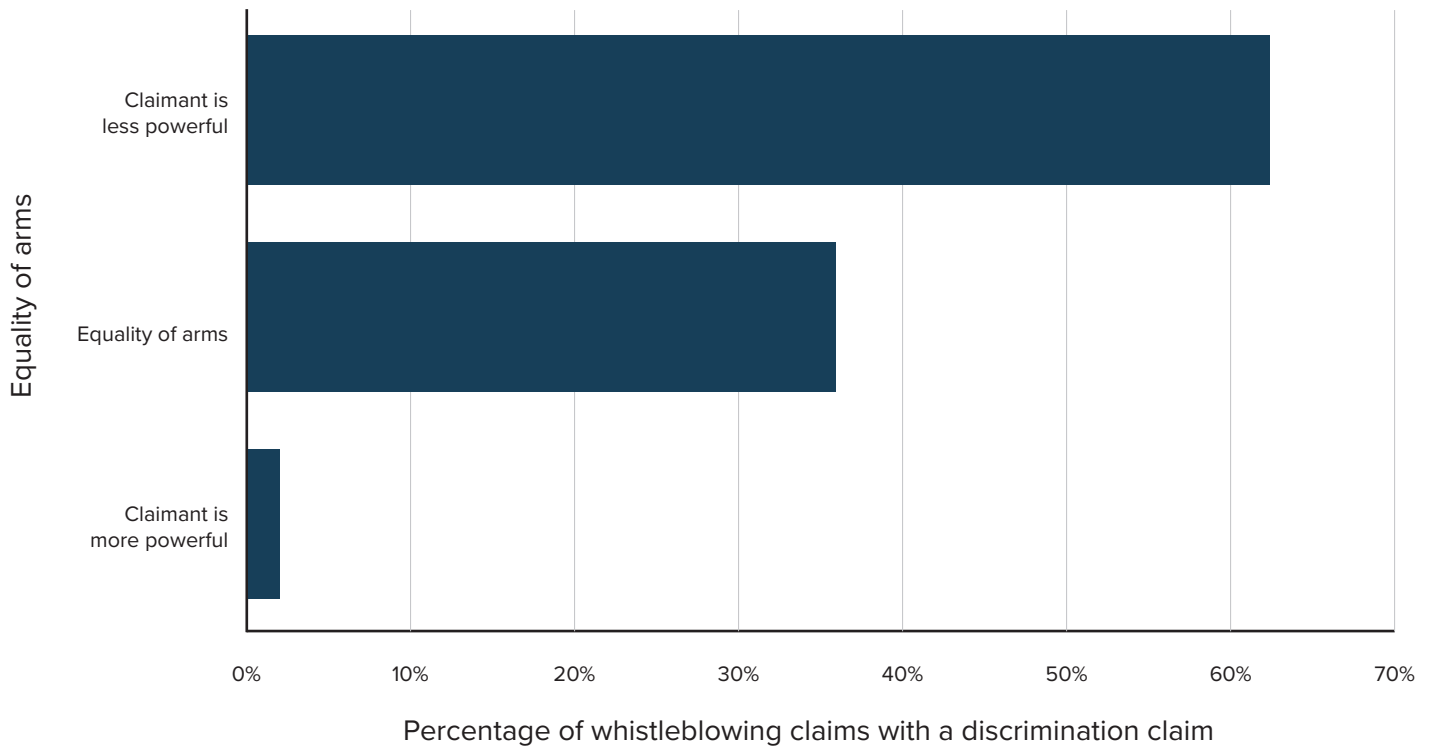


Fig 8. Impact of representation on outcome of whistleblowing claim



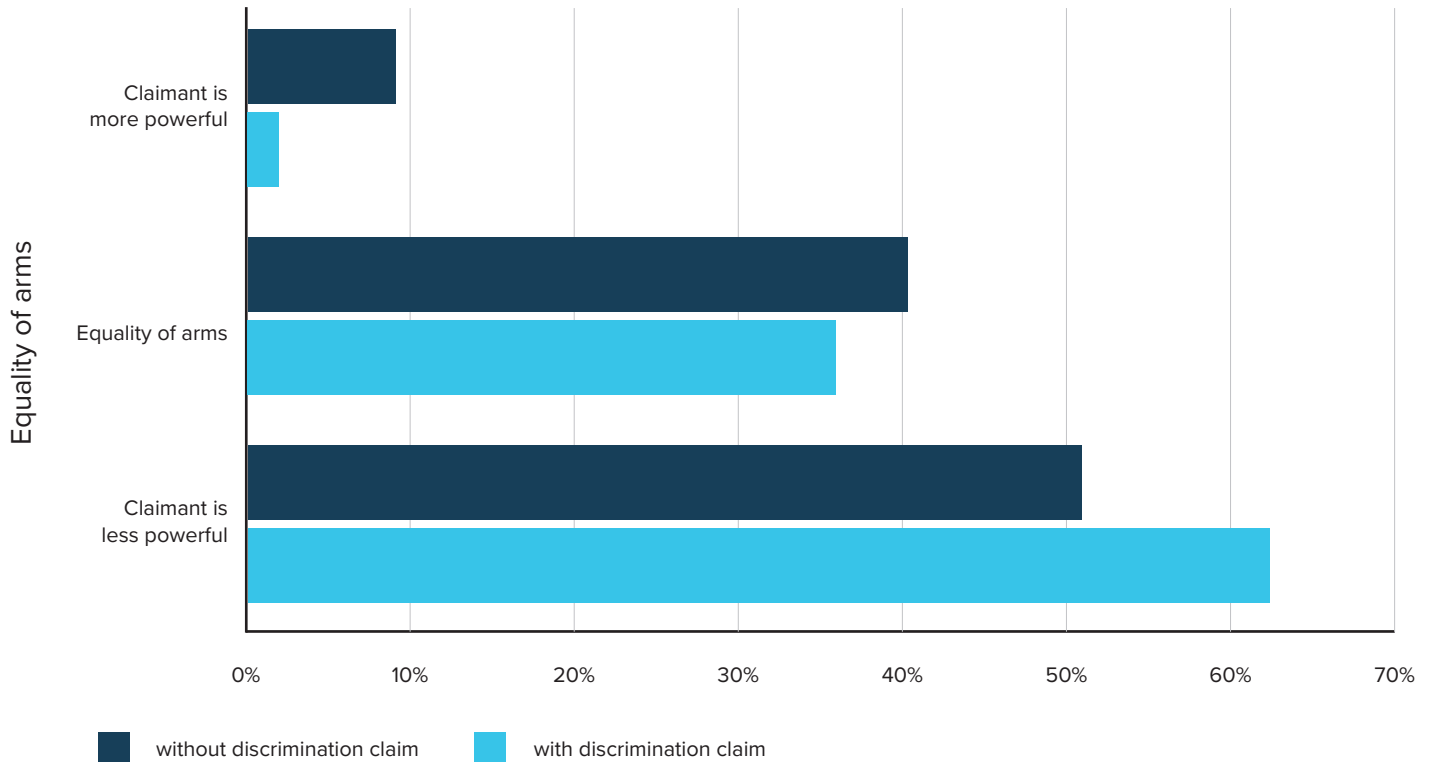
Another way of showing the striking imbalance of power between claimants and employers, is through an 'equality of arms' count, which is shown in figure 9. Only in 1.9% of the claims does a worker claiming discrimination have stronger representation than the employer, whereas in 62.3% of claims it is the employer who has more professional and hence powerful representation.

Fig 9. Equality of arms



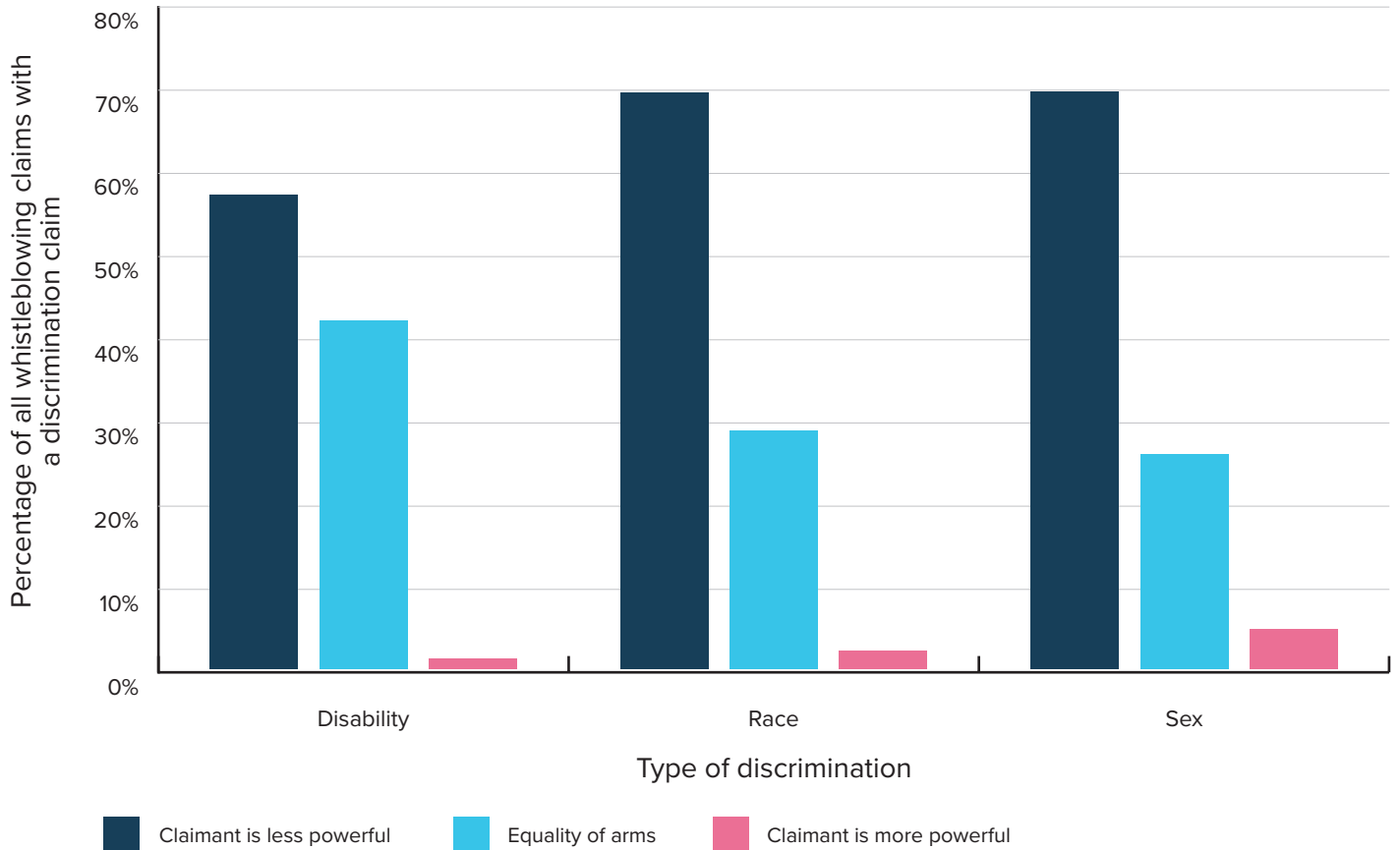
Equality of arms is more likely to be reached when the claimant does not claim discrimination at the same time as whistleblowing and the claimant is more powerful when a discrimination claim is not included, see figure 10.

Fig 10. Equality of arms by type of claim made



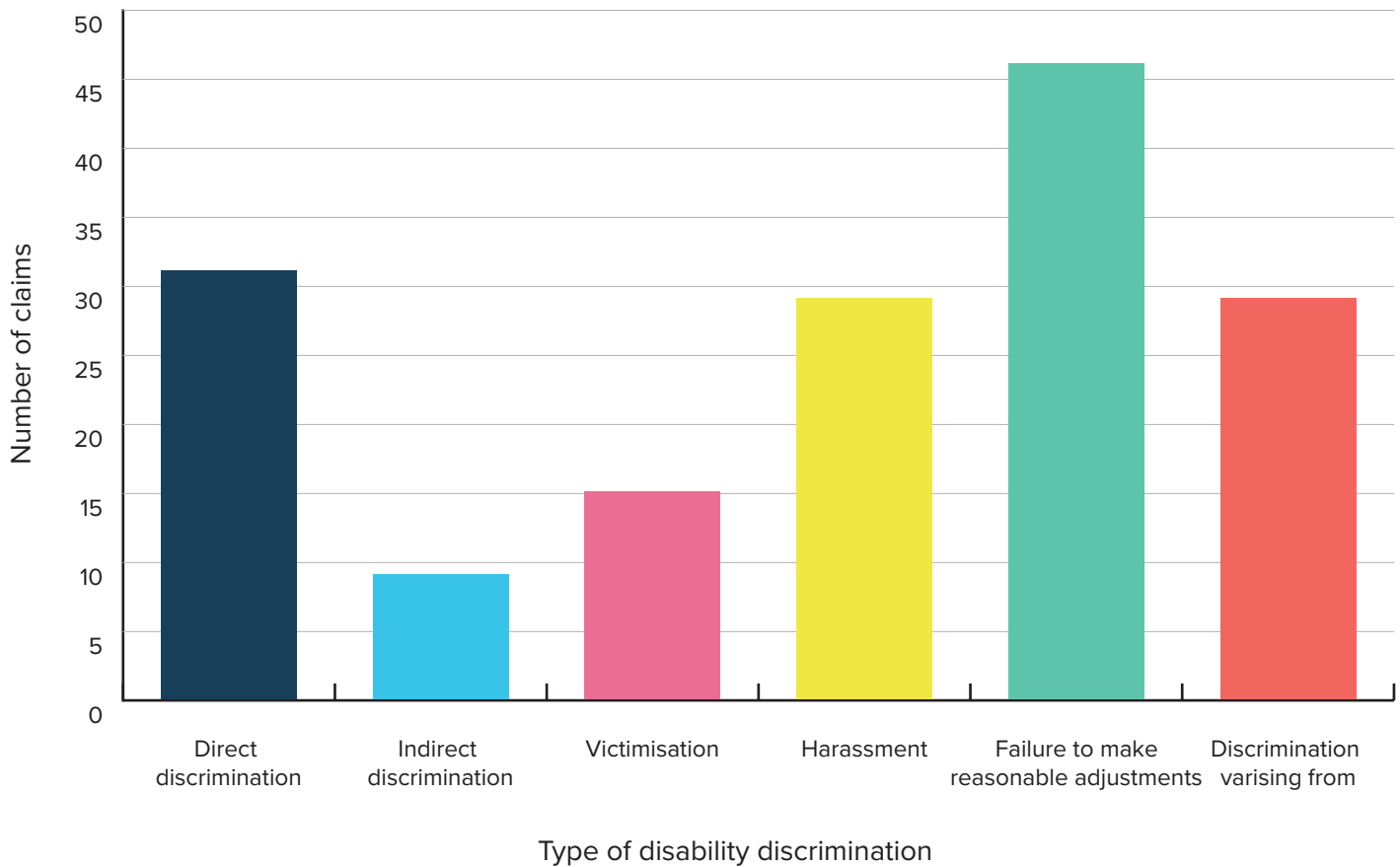
The claimant remains on the losing end, but there are also differences between types of discrimination claims. Figure 11 shows that disability discrimination claims tend to have more chance of equal representation power than race and sex discrimination claims.

Fig 11. Equality of arms by type of discrimination claimed alongside the whistleblowing claim



Earlier we discussed the complexity of discrimination and whistleblowing legislation. Research shows disability discrimination legislation is particularly complex. We investigated, therefore, whistleblowing claims where a claim for disability discrimination was made, see figure 12. Claims for failure to make reasonable adjustments are the most common disability discrimination claim we propose failure to make reasonable adjustments could form part of an employer detriment towards and employee after they have blown the whistle.

Fig 12. Types of disability discrimination claimed alongside a whistleblowing claim



Case Studies

Drawing on experience from Equality and Employment Law, two case studies clearly show how the lack of early advice and this imbalance of power has real time consequences on individuals.

Claimant A

Claimant A was employed as a nurse practitioner. She was initially advised by a private firm of solicitors but was unable to continue to afford their services. In late 2019 she instructed EaEL when she became eligible for legal aid.

Proceedings were issued early in 2019. At the time EaEL were instructed, the claim was well under way and the parties were engaged in disclosure which ran to over 1500 documents. The claimant alleged that she had suffered detrimental treatment as a result of raising patient safety concerns in 2017 and that she was discriminated against because of her sickness absence, which she alleged arose as a result of her disability. She went off sick in 2017 and had not returned to work. She had issued various grievances which rumbled on for months.

Despite extensive investigation of internal emails, it was not possible to identify evidence to support the claimant's whistleblowing allegations which were, in any event, out of time. Furthermore, it was not possible to identify any claim for disability discrimination. Notwithstanding a costs threat, EaEL were able to negotiate a settlement for the Claimant which avoided a 10 day tribunal hearing.

This is a typical example of claims that arrive at the doors of EaEL. The Claimant had issued claims which were out of time and lacking in supporting evidence. She was unable to manage the disclosure of vast quantities of documents and did not appreciate the legal difficulties that she faced. Without specialist advice it is highly likely that she would have been subject to a very significant costs order.

Claimant B

Claimant B was employed as a support worker in a school. She was initially advised by her trade union but once her employment was terminated they ceased to assist her. In July 2020 she instructed EaEL when she became eligible for legal aid.

Proceedings were issued early in 2020. At the time EaEL were instructed, the claim was well under way and the claimant was required to file further and better particulars of her claim as her claim was poorly pleaded. The claimant alleged that she had suffered detrimental treatment as a result of raising concerns about data breaches in 2018 and that she was discriminated against because of her race when she was chosen for redundancy in late 2019.

Unfortunately, the claimant had issued her claim out of time in connection with both claims. On consideration of the documents there was no evidence that her redundancy had been racially motivated and the claimant was advised to withdraw both claims without costs penalty with the assistance of ACAS.

This is a further example of how a claimant struggled to issue proceedings herself and was unable to get to grips with the complexity of the legislation. Furthermore, she could also have been subject to a costs order. With early specialist intervention however, unnecessary court proceedings could have been avoided.

Conclusion

This report has shown that claimants bringing whistleblowing claims that include claims for discrimination fare worse at Employment Tribunal than claimants bringing whistleblowing claims without discrimination claims.

In particular, we found that the most commonly claimed types of discrimination in a whistleblowing claim were race discrimination, disability discrimination and sex discrimination. Claimants bringing whistleblowing claims with a discrimination claim more commonly worked in the private sector than the public sector, were more likely to bring a claim that is out of time and unlikely to have this time limit extended.

Claimants face inequality of arms, where the employer is better represented than the claimant. When claimants bring a claim for whistleblowing that includes a discrimination claim they are more likely to be self-represented and, therefore, less likely to have legal representation. This inequality of power is especially pertinent given the complexity of whistleblowing and discrimination legislation.

Claimants bringing disability discrimination claims in combination with whistleblowing claims have distinct outcomes. Disability discrimination claims in combination with whistleblowing claims are the most likely to be settled and succeed. The claimant is more likely when bringing a whistleblowing and disability claim not to attend and not represent, which never happens for an employer in disability claims, however, disability claims are the most likely to have equality of arms.

Recommendations

As a result of this research we call for radical change to the Employment Tribunal system and make several key recommendations to achieve this change.

1. A predominance of litigants in person can clog up the system, we want **early advice** available to all claimants to reduce claims in the system.
2. To redress the representational imbalance, we call for **legal aid for all claimants** in the Employment Tribunal system.^a
3. The alarming number of claims that are out of time and the low number of claims that have time limits extended make us call for an **increase in the time limit** of claims to 6 months in line with equal pay claims and discrimination claims brought in the civil courts.
4. In order to reduce the need for claims to be made, we call for **organisational training and development** to educate employers about their legal obligations.
5. We call for reinstating the change made by the Equality Act 2010, which permitted **recommendations to benefit other employees** rather than just the individual claimant who has often left employment at the time of the hearing.
6. We call for setting out **statutory guidance for Judges in respect of appropriate recommendations** and encouraging their use; particularly around organisational training and development.

Appendix One – Method

This project analysed all Employment Tribunal claims that went to preliminary hearing or beyond where whistleblowing was claimed in combination with discrimination in 2015-2018. A central archive holds records of all Employment Tribunals in Bury St Edmunds. This electronic database was searched for judgments from 2015-2016 and then judgments were located and scanned. The Ministry of Justice, in 2017, placed all Employment Tribunal judgments online. Therefore, to locate the 2017 and 2018 records we searched their online database and downloaded all whistleblowing claims where discrimination was also claimed.

We created a codebook, initially based on the coding used in the Survey of Employment Tribunal Applications (Buscha et al., 2012) and expanded these codes to reflect variables we were interested in such as “was the claimant subject to a detriment?” We then used this codebook to systematically code all the judgments that went to preliminary hearing or beyond. We did not include claims that did not go to preliminary hearing due to a lack of information on the judgment.

After coding was completed the data was cleaned and analysed using SPSS. We used descriptive statistics and cross-tabulation to analyse the data. In some cases, we converted variables into dummy-variables and in other instances we collapsed variables. We used a consistent collapsing-level when a variable was used to test more than one hypotheses.

The research project was led and authored by Dr Laura William and Dr Wim Vandekerckhove, Centre for Research in Employment and Work, University of Greenwich.

Appendix Two – Tables

Table 1: Types of discrimination claimed in combination with whistleblowing

Type of discrimination	Percentage
Race	17.60%
Disability	16.70%
Sex	11.40%
Age	3.80%
Religion or Belief	3.60%
Sexual Orientation	1.30%
Pregnancy and maternity	0.50%

Table 2: Outcome of discrimination claim

Type of discrimination	Settled	Successful
Race	5.7%	2.8%
Disability	15.8%	11.9%
Sex	8.7%	10.1%

Table 3: Sector distribution of claims

Type of discrimination	Public sector	Private sector
Race	37.7%	59.4%
Disability	41.0%	54.0%
Sex	30.4%	65.2%
Total Workforce	16.1	81.3

Table 4: Claimant representation by type of claim

	Not attended and not represented	Self-representation	Legal representation	Internal representation	External representation
With discrimination	5.2%	45.3%	35.4%	4.7%	9.4%
Without discrimination	3.7%	39%	45.4%	3.7%	7.1%

Appendix Two – Tables

Table 5: Types of discrimination and representation

Type of representation (claimant)	Race		Disability		Sex	
	with	without	with	without	with	without
Not attended and not represented	4.4%	4.3%	9.3%	3.3%	6.5%	4.0%
Self-representation	51.6%	40.1%	39.5%	42.5%	45.2%	41.6%
Legal representation	28.6%	44.1%	40.7%	41.6%	27.4%	43.3%

Table 6: Employer Representation

Type of representation (employer)	Disability	Race	Sex
Not attended and not represented	0.0%	1.1%	1.6%
Self-representation	2.3%	0.0%	3.2%
Internal representation	0.0%	3.2%	0.0%
External representation	4.7%	5.4%	6.5%
Legal representation	93.0%	90.3%	88.7%

Table 7: Impact of representation on all claims

Type of representation	Discrimination claims	No discrimination claim
Self-representation	45.3%	39.9%
Legal representation	35.4%	45.5%

Table 8: Representation and impact on successful whistleblowing claims

Type of Representation	Discrimination claimed alongside whistleblowing	No discrimination claimed alongside whistleblowing
Self-representation	22.4%	28.1%
Legal representation	66.7%	61.4%

Appendix Two – Tables

Table 9: Equality of arms

Equality of arms	Percentage of all claims
Claimant is less powerful	62.3%
Equality of Arms	35.8%
Claimant is more powerful	1.9%

Table 10: Equality of arms by type of claim made

Equality of arms	With discrimination claim	without discrimination claim
Claimant is less powerful	62.26%	50.80%
Equality of Arms	35.85%	40.20%
Claimant is more powerful	1.89%	9.00%

Table 11: Equality of arms by type of discrimination claimed alongside a whistleblowing claim

Equality of arms	Disability	Race	Sex
Claimant is less powerful	57.0%	69.2%	69.4%
Equality of arms	41.9%	28.6%	25.8%
Claimant is more powerful	1.2%	2.2%	4.8%

Table 12: Types of disability discrimination claimed alongside a whistleblowing claim

Type of disability discrimination	2015	2016	2017	2018
Direct discrimination	10	1	11	9
Indirect discrimination	1	0	6	2
Victimisation	4	0	6	5
Harassment	6	1	13	9
Failure to make reasonable adjustments	12	0	19	15
Discrimination arising from	5	1	9	14

