



Making employment rights effective

Linda Dickens

There has been considerable expansion in statutory individual employment rights in Britain over the past forty or so years. But the development of a more comprehensive role for legislation in regulating the employment relationship has not been accompanied by any strategic consideration of the mechanisms for enforcement of rights. The Employment Tribunals (ETs) constitute the predominant institution for employment rights enforcement, resting on a complaints-driven approach; there is limited enforcement by state agencies, with a variety of bodies providing an uneven patchwork of incomplete coverage.

The enforcement landscape in Britain is the result of historical accident, incrementalism, political convenience and ad hoc responses to particular needs. It is not informed by a logic of enforcement designed to make employment rights effective – by which is meant ensuring compliance with statutory standards, giving substantive effect to formal rights, reducing the likelihood of adverse treatment and promoting fairer workplaces.

A flawed approach, not just a flawed system

Public policy currently views the centrepiece of the enforcement system (the ETs) as flawed – mainly in terms

of its cost and operation. An alternative perspective, taken in a forthcoming book (see box on page 3), is that the enforcement approach is flawed – in terms of reducing the likelihood of adverse treatment at work. An enforcement approach centred on penalising individual breaches of employment rights when successfully challenged, and offering individualized remedies and outcomes, has only limited ability to effect social and workplace change. An enforcement approach that requires only passive or reactive employer compliance is less effective in delivering fairer workplaces than approaches aimed at developing the

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The changing governance of hospitals and collective bargaining

In the face of growing budgetary pressures and changes in demand for both the volume and quality of health care, public authorities across Europe have moved to reform the organisation and governance of publicly-provided care through hospitals. In all countries these reforms have been strongly influenced by the doctrine of ‘new public management’. Four key processes are shaping the direction of these reforms. One is *managerialisation*, or the adoption of private sector management techniques in place of professional control. A second is *marketisation*, involving the introduction of mechanisms of market competition in the provision of health. The third process is the *corporatisation* of hospital organisations, giving them a more autonomous status intended to resemble that of a private company. The fourth is *privatisation*, as private providers undertake more public healthcare provision and public organisations are transformed into private ones.

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Making Employment Rights Effective

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kind of workplaces where such breaches are less likely to occur in the first place, by encouraging pro-active employer compliance and addressing structural and organisational issues. The contention is that in Britain too much weight is placed on individuals having to assert and pursue their rights (a passive/reactive, individualized approach), with too little weight placed on agency monitoring, inspection and enforcement. Furthermore, the value of employee-based representative mechanisms as 'bridging institutions' between the legal system and the organisational field is not recognised in policy, and opportunities to complement and strengthen the regulatory capacity of the state through encouraging representative voice and through forging partnerships with non-state actors in enforcement and co-regulation are not being taken.

In any consideration of how to make employment rights effective there is a need to be sensitive to the varied contexts within which they fall to be implemented and the differing orientations of key actors. Small firms are often depicted as particularly problematic in terms of employment rights but research demonstrates a more complex and varied picture, with response and impact varying according to the nature of law and the kind of firm concerned. Similarly there is variation among medium and large organisations in interest in, attitudes towards and compliance with employment rights. Factors such as business strategy, the presence of unions and different preferred approaches to managing employees, together with the role of line management and the human resource management function in the implementation of employment rights, influence the extent and way in which rights on the statute book are translated into practice and given substance at the workplace.

Cost cutting and concern over burdening employers drive current reforms

The current reform agenda is being driven not by the evidence of the limited impact of individual rights in tackling the continuing 'unfairness' and problems experienced at work, but rather by concerns to reduce public expenditure and to lessen the

'burdens' on employers which employment rights for workers are argued to constitute. In practice, however, 'solutions' involving reducing employment rights or making their enforcement more difficult, while to the disadvantage of employees also may fail to match the nature of concerns being expressed by some employers. Certain concerns, for example, arise not from the substance and impact of employment rights per se, but relate to their complexity; the frequency and piecemeal nature of change; and the administrative consequences of having to deal with this. Such problems have been exacerbated rather than addressed by aspects of successive governments' reform attempts. There are problems also for employers, as well as for workers, arising from the nature and fragmentation of the current enforcement landscape and inappropriateness of current enforcement mechanisms for certain rights.

Aspects of the current ET reform agenda relate to the use of alternative dispute resolution (ADR) as a means of preventing cases needing to be heard by a tribunal, notably the proposal that all tribunal applications should go first to Acas for 'early conciliation'. Currently conciliation by Acas provides a very cost effective filter within the ET system, saving potential hearing days at tribunals and thus saving public expenditure and reducing financial and non-financial costs to the parties. Although conciliation produces some wider impacts, such as reform of employers' policies and procedures, this occurs only in a minority of cases; such outcomes are not set objectives for conciliation where success is measured in terms of tribunal hearing days saved. Although ADR has the potential to assist in producing the kind of workplaces where breaches are less likely to occur, this is less likely to be realised where the focus is primarily on its utility as a way of saving costs in the context of constrained resources.

Facilitating pro-active enforcement

Administrative/agency inspection and enforcement, unlike the ET system, facilitates structural, pro-active outcomes and has a number of positive features. It allows unfairness to be tackled where no individual may be in a position to bring a complaint and overcomes problems arising from individuals' lack of knowledge, capacity or willingness to pursue and

maintain rights. Agencies can perform an educative role and assist pro-active improvement through monitoring and inspection; they can build upon employers' acceptance of the basic principle of fairness involved in providing workers with protection, helping remedy and prevent non-compliance occasioned by lack of detailed awareness of the legal obligations. Unlike the ET system, agency monitoring and enforcement of positive requirements imposed on employers does not rest on adversarialism, thus facilitating fairer workplaces being seen as a mutual goal. Further, government enforcement of rights serves to highlight the importance accorded by the state to the fair treatment of workers, emphasising this is in the wider public interest rather than punishment of, or redress for, individuals. Certain conditions need to be in place however. These include the need for the body to have adequate resources, high visibility and credibility, a willingness and ability to operate pro-actively, sufficient appropriate powers and effective sanctions likely to deter non-compliance and stimulate self-regulation, and a will to resort to them if other forms of intervention (advice, education, persuasion) fail. Exploration of the experience of agency enforcement in the fields of health and safety and equality indicate that these conditions have often been lacking in the case of agencies operating in Britain and show current developments risk undermining them further.

The pro-active/structural approach to enforcement of employment rights provides scope to engage other stakeholders in ensuring organisations fulfil their statutory duties, and in achieving desired organisational outcomes. Indeed engagement with stakeholders (including unions and other workplace representatives) is one of the three interlocking mechanisms (alongside strong incentives for organisations to engage in self-scrutiny and an effective independent enforcement agency) identified by Hepple, in his chapter, as necessary (although missing) for reflexive, or responsive regulation (whereby formal legal devices are integrated with self-regulation). He sees this as holding the key to more effective enforcement of workplace equality.

The scrutiny and regulatory capacity of non-state actors can enhance the regulatory

capacity of the state. Non-state actors include trade unions. Social regulation through collective bargaining can make legal regulation based on statutory individual rights less necessary, and / or can assist in making it more effective. Issues of capacity, access to information and necessary authority would need to be addressed, but the state could harness the ability, knowledge and expertise of unions to supplement its own regulatory capacity to make employment rights more effective. This approach is absent currently. Nor is the potential to use the regulatory capacity of employers in conjunction with legal regulation, through procurement and use of power within supply chains for example, being fully exploited.

Use of procurement power and supply chain pressure may appear as alternatives to legal regulation but the evidence discussed in the book suggests that 'hard law' is required to drive such employer action and to ensure substantive outcomes. Concerns about reputational risk, damage to brand, consumer pressure for ethical products, and other 'business case' rationales may lead to some employer voluntary action and self-regulation but business case arguments are highly contingent, variable, selective and partial. The research by Deakin, McLaughlin and Chai, reported in their chapter, indicates that when left to take voluntary action in relation to pay audits, employers generally do not act. Also, that where business case or CSR-driven initiatives are taken, their impact may not run very deep, for example leading to 'window dressing' policy statements rather than substantive implementation.

No 'magic bullets'

Exploring alternative, additional approaches to that of individual rights enforcement through the ETs makes clear that there are no 'magic bullets'. Indeed existing alternative approaches as currently found are often inadequate to the task and themselves need improvement in ways indicated. There are no easy, universal answers but the chapters in the collection help identify what does and does not 'work' and in which contexts, and so illuminate steps which might be taken – were there sufficient political will to do so – to help make employment rights effective in promoting fairer workplaces.

Making Employment Rights Effective: Issues of Compliance and Enforcement

Linda Dickens (ed), Hart Publishing, forthcoming September 2012

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The changing governance of hospitals and collective bargaining

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In the face of growing budgetary pressures and changes in demand for both the volume and quality of health care, public authorities across Europe have moved to reform the organisation and governance of publicly-provided care through hospitals. In all countries these reforms have been strongly influenced by the doctrine of 'new public management'. Four key processes are shaping the direction of these reforms. One is *managerialisation*, or the adoption of private sector management techniques in place of professional control. A second is *marketisation*, involving the introduction of mechanisms of market competition in the provision of health. The third process is the *corporatisation* of hospital organisations, giving them a more autonomous status intended to resemble that of a private company. The fourth is *privatisation*, as private providers undertake more public healthcare provision and public organisations are transformed into private ones.

A European Commission-funded research project asked to what extent, and how, have these trajectories of reform affected well-established arrangements for the governance of the health sector workforce? And, have the resulting changes been towards arrangements that more closely resemble private sector practice, as anticipated by proponents of 'new public management'? These questions were addressed by studying developments over the past two decades in three countries, France, Italy and the UK. The project involved interviews with leading employers' organisation and trade union officials, and with experts, and extensive documentary research in the three countries.

The extent and nature of reforms

Reforms to the governance of hospital health care have travelled furthest in the UK, where each of the four main processes is apparent. It has travelled least in France, where managerialisation has been the predominant trend. Italy lies in between, with clear evidence of both managerialisation and corporatisation, whilst marketisation and privatisation vary according to region. Managerialisation features strongly in all three countries,

with senior management at hospital level being accorded greater authority and discretionary power and formal systems of performance measurement and control put in place at the expense of professional norms and autonomy. In Italy, however, greater managerial autonomy risks being politically compromised given the politicised nature of the appoint process of local health directors.

Marketisation has been and continues to be prominent in the UK. There is now an extensive quasi-market in hospital services, in which private providers are increasingly becoming players. Although encouraged by central government, moves towards marketisation vary between Italy's regions, reflecting their role in co-financing and organising health care including hospital provision. In France, the adoption of an activity-based pricing model for allocating budgets lays the basis for marketisation, but so far there has been no initiative to introduce competition through a quasi-market.

Corporatisation is prominent in both the UK and Italy, but has not featured in France. In the UK, the introduction

of Foundation Trust status in the mid-2000s substantially augments the greater governance and operational autonomy that hospitals had initially obtained in the early 1990s. In Italy, the introduction of *azienda* status in the early 1990s, gave larger hospitals independent status in respect of local health authorities. Concerning privatisation, the private sector has a long-established role in the provision of hospital health care for the public system in both Italy and France. With the exception of Italy's Lombardy region, there has been no substantial recent change in the balance between public and private hospital providers. In the UK, there was traditionally no such role for private providers within the NHS. This has changed, and from the early 2000s onwards the possibility of private provision has been introduced and subsequently grown. In sum, pressure for changes in the institutions and structures for workforce governance should be greatest in the UK and least in France.

Collective bargaining: three varieties of change

Changes in collective bargaining and other, administrative mechanisms of workforce governance are evident in each of the three countries. Although these changes are

connected to the extent and nature of the reforms introduced, these have not played a determining role. Other factors, including containing and channelling workforce unrest, political choice and the capacity of employers and unions to frustrate initiatives are also important.

In France, the 2000s saw the opening up of greater space, and an enhanced role, for collective bargaining in the public hospital sub-sector, as compared to administrative regulation which was the established mode of governance given the public servant status of the majority of the workforce concerned. This is consistent with growing managerial authority at hospital level, which brings variation in actual working conditions across hospitals. A centralised administrative model has problems in coping with such variation, whereas collective bargaining and forms of social dialogue – which entail multi-level arrangements – bring the capacity to address issues at hospital level. However, greater prominence for collective bargaining is not only a consequence of managerialisation. It is also an accommodation to widespread, organised workforce discontent evident in increasing resort to industrial action at the beginning of the decade. Moreover, although the role of collective bargaining for public hospitals has grown it nonetheless remains secondary to legal and administrative rules emanating from the state. The centralised nature of these rules continues to mark out mechanisms of workforce governance in public hospitals, and the wider public services, as different from those found in the private sector.

In Italy, the formal two-tier bargaining arrangements which cover hospitals parallel those which prevail in the private sector. But the detailed provisions specified in the sector-level agreement, which echo the administrative regulations which applied up until 1993, set it apart from its private sector counterparts, whose provisions have become more framework in character over recent years. Managerialisation and corporatisation might be expected to be reflected in a growing role for lower-tier bargaining at local area and hospital levels under the two-tier bargaining arrangements which characterise the public service in general, and hospitals in particular.

Whilst there is indeed significant lower-tier negotiation on working conditions and the effects of restructurings, lower tier negotiations over pay for performance – where they have taken place – have not generated the outcomes intended. Budgetary responsibility has not been devolved to hospital level, meaning that incentives to improve performance for either of the negotiating parties is weak. The emergence of a regional level of collective negotiation – uneven between regions and generally not formalised – is distinctive when compared to the private sector, and reflects the enhanced role of the regions in the financing and organisation of hospital health care.

“ Other factors, including containing and channelling workforce unrest, political choice and the capacity of employers and unions to frustrate initiatives are also important. ”

In the UK, reform measures promoting managerialisation, marketisation and corporatisation have been accompanied by initiatives to decentralise arrangements for collective bargaining. But the character of the initiative undertaken by a Conservative government in the 1990s, differed from that pursued by a Labour government a decade later. This underlines the scope that exists for the exercise of political choice, and also the need to take account of the capacity of organised actors – employers and trade unions – to frustrate change initiatives which are perceived to run counter to their interests.

The 1990s initiative was intended to promote an ‘uncontrolled’ decentralisation of collective bargaining to local, hospital level, akin to developments in the private sector, and thereby undermine the national framework. Amongst the reasons for its relative failure was employer caution over the potential negative consequences of

a full-scale embrace of local bargaining, relating to the capacity of a well-organised workforce to engage in comparison-based bargaining, as well as union resistance. In contrast, the thrust of the subsequent initiative in the 2000s has been to effect a ‘controlled’ or ‘organised’ decentralisation through recasting national agreements as more flexible frameworks, in which there is a greater role for negotiated local implementation and variation. The success of this renewal is attributable to the commitment of both employers and unions, since both had interests in the retention of a modified national framework. But it also rested on the commitment of resources by government. Renewal of the national framework sets hospitals, and the wider NHS, apart from the dominant private sector trajectory, which in the 1980s and 1990s saw the dismantling of national-level, sector-wide bargaining arrangements in favour of company- and site-based ones.

Changes in collective bargaining and other mechanisms of workforce governance have occurred in each of the three countries. However the logics shaping these changes are multiple, and the direction of change is not generally towards arrangements which more closely resemble those found in the private sector.

Read more: Manuel Galetto, Paul Marginson and Catherine Spieser ‘Collective bargaining and the changing governance of hospitals’ Available under ‘Academic Papers’ at www.gusto-project.eu/index.php

Research update

Recently published

Details of books, reports, articles and chapters for edited collections by IRRU staff are available from our website. Recent papers presented by staff at conferences can also be accessed at the website. Here we highlight two recently published books, each of which draws on original research.

In *Social failures of EU enlargement*, Guglielmo Meardi examines the consequences for social order, employee voice and social welfare of the accession to the European Union of ten post-communist countries, widely seen as a case of economic success. Inspired by Albert Hirschmann's 'exit', 'voice' and 'loyalty' framework for analysing economic behaviour, Meardi's book is organised around these three concepts. It starts with the absence of loyalty, or 'betrayal', through considering the unfulfilled expectations entailed by failure to transfer the so-called 'European social model' to the new central east European member states. Implementation of 'hard law' in the form of EU directives, 'soft law' stemming from European-level social dialogue between employers and trade unions together with the role of multinational companies in diffusing employment practices are reviewed. The second part, addresses 'exit', which is expressed in high levels of labour turnover and associated absence of organisational commitment, widespread abstentions in elections and the political sphere, and most visibly unprecedented, large-scale migration to western EU member states. The third part of the book asks whether the massive scale of exit and the depth of betrayal might trigger the emergence of 'voice'. It investigates the possibilities and potential for a trade union renewal that could democratise the workplace, social movements that could democratise civil society in central eastern Europe and transnational responses that could transform the EU. Published by Routledge, 2011. ISBN: 978-0-415-80679-4

Short-term investors and the evolution of corporate governance in France and Germany by Michel Goyer investigates the impact of increased capital mobility in the form of portfolio investment in France and Germany with a focus on

the investment allocation of two types of short-term oriented investor, hedge funds and active mutual funds, from the United Kingdom and the United States. The evidence on the funds allocated of these short-term investors highlights the greater attractiveness of French blue chip companies over their German counterparts. The book goes on to address the consequences of this disparity in investment allocation for the French and German varieties of capitalist economy. Its central argument is that important political, economic, and social outcomes are rarely generated by one cause alone; they occur as the result of specific intersections of conditions. Nonetheless, some variables are more influential than others. Specifically, variation in work organisation and the scope for unilateral restructuring is found to be a more significant discriminator between the two countries than differences in corporate governance arrangements. Published by Oxford University Press, 2011. ISBN: 978-0-19-957808-5

New research grants

Performing ourselves: What working as an actor tells us about society: Deborah Dean has been awarded a 1 year Mid-career fellowship by the British Academy to write a book on her research on performers as workers. The study explores actors' working realities to understand advantage and disadvantage in wider society. Despite all performers doing the same work using the same skills, in what is a nominally unsegregated occupation, their access to jobs, pay and career longevity is highly segmented on the basis of societal conceptions of age, gender, ethnicity etc. The study draws on unique empirical research in Britain, the US and continental Europe.

Employee information and consultation practice across the EU: Eurofound has commissioned an IRRU research team involving Mark Hall, Jimmy Donaghey and John Purcell to undertake a project mapping and analysing employee consultation practice across the EU in the light of the 2002 Directive on Information and Consultation in national undertakings. Part of the project involves undertaking company case studies of

practice in each of six EU countries, chosen to reflect the range of national industrial relations systems within the EU. The findings will feed into the European Commission's 'fitness check' of EU employee consultation directives.

Young workers and precarious employment: funding for a seminar series was awarded by ESRC to Melanie Simms, together with Lefterios Kretsos (Coventry University) and Miguel Martinez Lucio (University of Manchester). Two seminars were convened during 2011, focusing on international patterns of precarious work amongst young people and the causes of such precarious employment. Two further seminars take place during 2012, addressing trade union responses to young workers and state and policy responses to young people's precarious employment. Details are available at: www2.warwick.ac.uk/fac/soc/wbs/research/irru/ywescr/

IRRU staff

Linda Dickens retires at the end of April 2012, having joined IRRU as a researcher in 1971. She became Professor of Industrial Relations at Warwick Business School in 1991. Linda will continue in her public roles as a Council Member of Acas and as a Deputy Chair of the CAC.

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About IRRU

IRRU embraces the research activities of the industrial relations community in Warwick University's Business School (WBS). There are currently 15 academic and research staff in membership, plus a number of associate fellows.

Our work combines long-term fundamental research and short-term commissioned projects. In both instances, we maintain the independence and integrity which have been the hallmark of IRRU since its establishment in 1970. We aim thereby to improve the quality of data and analysis available to industrial relations policy-making by government, employers and trade unions.

IRRU's advisory committee includes senior representatives of the Advisory, Conciliation and Arbitration Service, the Chartered Institute of Personnel and Development, the Confederation of British Industry, the Department for Business, Innovation and Skills, and the Trades Union Congress.

IRRU's research projects are clustered around four main themes:

- Europeanisation and internationalisation of employment relations, including employment practice in multinational companies;
- equality, inequality and diversity in employment;
- evolving forms of employee representation and voice;
- legal regulation of the employment relationship.

Textbooks by IRRU staff on industrial relations and human resource management include:

Trevor Colling and Michael Terry (eds), *Industrial Relations: Theory and Practice* (3rd edn), Wiley, 2010

[Peter Boxall and] John Purcell, *Strategy and Human Resource Management* (3rd edn), Palgrave Macmillan, 2011

[Gill Kirton and] Anne-marie Greene (eds), *The Dynamics of Managing Diversity: A Critical Approach* (3rd edn) Elsevier, 2010

Keith Sisson, *Employment Relations Matters*, 2010, published online at: www2.warwick.ac.uk/fac/soc/wbs/research/irru/erm/

IRRU is the UK national centre for the network of EU-wide 'Observatories' operated by the European Foundation for the Improvement of Living and Working Conditions. The network embraces the European Industrial Relations Observatory (EIRO), the European Working Conditions Observatory (EWCO) and the European Restructuring Monitor (ERM). A consortium consisting of IRRU and the Institute for Employment Studies is also among a small group of European research institutes responsible for coordinating EU-wide comparative analytical reports for the three Observatories.

The three Observatories' databases are publicly accessible on-line at:

www.eurofound.europa.eu/eiro

www.eurofound.europa.eu/ewco

www.eurofound.europa.eu/emcc/erm

Further information

Information on our current research programme and projects, and on recent papers and publications, is available from IRRU's website: www2.warwick.ac.uk/go/irru/

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