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Delivering fairer workplaces through statutory rights? Enforcing employment rights in Britain

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INTRODUCTION: THE GROWTH OF EMPLOYMENT RIGHTS

Over the past forty years Britain has experienced dramatic change in the role of legal regulation of the employment relationship. The voluntarist system, which characterized British industrial relations for most of the 20th century, has gone. At its heart was a policy of relative legal abstention, with primacy to, and support for regulation through collective bargaining. Regulation of the employment relationship by means of collective bargaining between employers and unions was far more important than legal regulation through Acts of Parliament.

Public policy in Britain no longer gives primacy to collective bargaining. Its coverage has shrunk so only around one third of employees are covered now, compared to over 80% in 1980. Union membership and density have fallen, particularly in the private sector. Protection at work now rests less on collective organisation than on individual legal rights, the number of which has expanded considerably since the 1970s. There is not simply 'more law'; the nature and scope of legal regulation in Britain has shifted decisively.

The move away from supporting collective bargaining as the prime method of regulating the employment relation came under Conservative governments between 1979 and 1997. Although some new statutory rights were introduced, the government's aim in that period was not to replace workers' protection through social regulation with protection through legal regulation, but, rather, to increase managerial control and freedom to take unilateral action. The post-1997 Labour governments took a different approach and attempted to provide for the first time 'a comprehensive framework of minimum employment standards' (DTI 2004) in order to promote fairness at work. Legal regulatory norms and statutory structures were extended into key areas of the employment relationship, such as pay and working time, which until 1997 had remained largely a matter for voluntary determination.¹

The considerable expansion in statutory rights emerged partly through domestic policy, like the introduction of a National Minimum Wage (NMW) in 1999, and partly as a result of a changed attitude towards the European Union (EU). Significant aspects of the legislative framework derive from the decision of the Labour government, soon after attaining office in 1997, to end the Conservative government's so-called 'opt-out' from the Social Chapter in the EU Maastricht Treaty, and its acceptance of the social chapter of the EU's Treaty of Amsterdam. These include rights relating to working time and to information and consultation of employees. EU legislation also extended the grounds of

¹ The labour law policies of different governments since 1979 are discussed more fully in Dickens and Hall 2009.

UK anti-discrimination legislation, first introduced in the 1970s, and improved rights for 'atypical' workers.

This development of a more comprehensive role for legislation in setting minimum standards was not accompanied, however, by any strategic overview and consideration of the mechanisms, institutions and processes for rights enforcement. Government discussion papers and official reviews conducted at different times have focused mainly on efficiency and cost-cutting rather than the appropriateness of different forms of rights enforcement and their effectiveness in delivering fairer workplaces.²

Law is only one (incomplete) mechanism for delivering fairer workplaces, and is affected by its interaction with other structural and contextual factors. But legal rights can play an important role and the effectiveness of enforcement matters. This paper considers employment rights enforcement in Britain. It argues that too much weight is placed on individuals having to assert and pursue their rights (particularly in the light of changed labour market and employment contexts) and too little weight is placed on agency enforcement and on encouraging pro-active employer action. Opportunities to enhance the regulatory capacity of the state are not being taken and problems arise from the absence of a collective dimension to rights enforcement. In conclusion the paper suggests that de-regulation legacies from previous periods and the contingent nature of the declared pursuit of fairness at work help explain the UK government's apparent reluctance to take action

INDIVIDUAL RIGHTS ENFORCEMENT

The main thrust of enforcement in Britain rests on the individual asserting their statutory rights, if necessary by making a claim at an Employment Tribunal (ET, a form of administrative tribunal with a legally qualified 'employment judge' and two lay members). ETs were first given jurisdictions involving employer/employee disputes in the mid 1960s and early 1970s when statutory rights were enacted relating to redundancy and unfair dismissal. There was little parliamentary debate and limited, if any, strategic consideration of the kind of institution required. As statutory protections increased (for example in relation to sex, race and other forms of discrimination; gender pay equality and 'work-life balance' rights among others), ETs became the expedient enforcement option emerging as the nearest thing Britain has to a labour court for employer/employee disputes.³ The ET system now deals with over 60 different jurisdictions, handling increasingly large caseloads (189,303 claims were accepted in 2007-8).⁴

At the time when individual statutory employment rights emerged they were minor players in a voluntarist system resting on social regulation through collective bargaining. Statute law was seen largely as 'gap filling' – extending protection to those falling outside the protections offered by collective bargaining and organized workplaces. Had the current importance of statutory protection been foreseen more attention might have been paid to the nature and appropriateness of the enforcement system and its interaction with employment relations at the workplace.

ETs were expected to provide a cheap, accessible, non-legalistic, expert, speedy route to justice in employment disputes. It is commonplace that they have not done this -

² E.g. *Resolving Employment Rights Disputes – Options for Reform* 1994; *Routes to Resolution* 2001; *Moving Forward, Report of the Employment Tribunal System Taskforce* 2002; *Better Dispute Resolution* 2007.

³ Appeal on a point of law only is to a higher specialist tri-partite body, the Employment Appeal Tribunal, and thence into the ordinary court system.

⁴ ET statistics in this paper derived from Employment Tribunal Service annual publications.

although they score above the ordinary courts on these measures. By the mid 1990s the tribunals were struggling to cope with the growing number of jurisdictions and considerable caseload, and the system was imposing ever higher costs to the public purse. The political context was one of de-regulation; the then Conservative government viewed employees' statutory protections as 'burdens on business' to be minimized. This shaped the range of solutions which were considered in addressing the 'tribunal problem'. The emphasis was on achieving cost savings through increased efficiency, not reviewing the effectiveness of the ETs as a means of delivering fairer workplaces through enforcing statutory rights. The perceived crisis was addressed by restricting access (removing protections from some workers; imposing hurdles to bringing claims) and reducing the incentives to seek legal redress (making it harder to succeed; allowing remedies to deteriorate, and increasing threat of costs awards).

There was some consideration of alternative dispute resolution (ADR) mechanisms in the mid 1990s but this took place also through the lens of cost saving. Although ADR, including arbitration, may offer various advantages over judicial determination in employment rights disputes, the state's interest in arbitration at the time of the 1994 review was mainly because it seemed to provide a cheaper option - a single arbitrator rather than a three-person panel. This eventually resulted in provision for tribunal applications for unfair dismissal and (later) flexible working requests to go to arbitration rather than to judicial determination at ET at the request of the parties. This arbitration option was constructed in such a way that it is not surprising that it is little used. Only 60 cases have been accepted for this alternative route between the start of the scheme in 2001 and 2008.

When an application is made to the ET conciliation is offered by the state funded Advisory Conciliation and Arbitration Service (Acas). Over two-thirds of applications do not reach a hearing by the ET: one third being abandoned or withdrawn, just under a third settled through Acas and a further 11% struck out without a hearing. Settlements are matters for the parties themselves; conciliation officers do not take a view as to the sufficiency or fairness of any settlement judged by any external standard or social policy, something which may be thought to be especially problematic in the equality jurisdictions. The pre-tribunal conciliation stage is valued as providing a cost-effective filter, saving the expense of tribunal hearings, but any potentially broader role for Acas individual conciliation officers to contribute to delivering fairer workplaces is constrained. Even a basic role ensuring that the employer has policies, procedures, and practices in place which could prevent similar disputes arising in the future has been inhibited by assessing conciliation using performance measures which emphasise clearance rates, and by years of under-funding of the function (Dickens 2000).

A recent government instigated review proposed greater use of workplace mediation to settle disputes and so reduce the need to bring cases to ETs (Gibbons 2007). Some additional state funding has been provided for this purpose but the opportunity for real policy engagement with what different ADR processes and mechanisms, such as conciliation, mediation, arbitration and adjudication, as well as judicial determination, might offer in this area has not been taken.

As this discussion indicates, despite the changed approach to statutory rights since 1997, the Labour government has shared the Conservative governments' diagnosis of the ET 'problem' and continued to focus on the cost effectiveness, efficiency and operation of the tribunal system with a concern to reduce the number of cases coming to ETs (Gaymer 2006; Sanders 2009), often by mounting barriers to access. Official reviews since 1997 have not been tasked, for example, with examining the efficacy of relying on a 'victim complains' approach as a mechanism for delivering fairer workplaces and social justice. This is despite well documented weaknesses in the nature,

application and enforcement of the increasing number of individual employment rights – weaknesses which are exacerbated by the changing nature of employment, labour market and employment relations.

Surveys of many different kinds indicate that only a very small proportion of workers who experience problems at work, including those involving a potential breach of legal rights, actually go to ETs. There are growing numbers of vulnerable, unorganized workers, without effective knowledge of their rights and how to enforce them. (Pollert 2005, TUC 2008). Awareness of rights is not evenly distributed. It has been found to vary by personal and job characteristics. The better informed are those relatively advantaged in the labour market: white, male, better qualified, white-collar employees, those in permanent full-time jobs with written employment particulars. (Meager et al. 2002; Casebourne et al. 2006). Such workers however are least likely to report experiencing violations of their rights. Even where knowledge of rights does exist, people may work in contexts where they are reluctant or fearful to exercise them or articulate grievances. Where people do seek to bring claims to tribunals they face problems of lack of affordable advice and representation. Legal representation is not required but is advantageous in dealing with legal issues within an adversarial system. No legal aid is available. In a number of jurisdictions (including the major discrimination and unfair dismissal jurisdictions) the majority of claims which go forward for a tribunal hearing do not succeed.

The individualised, private law model of rights enforcement which characterises the British system has limited ability to effect social change. Although employment rights enforced through ETs can provide legal redress for those individuals who are unfairly treated, they often fail to have a broader impact on employer behaviour and workplace relations - even among employers who are taken to tribunals (Blackburn and Hart 2002; Kersley et al. 2006). This is not to deny that employment rights can have indirect effects helping to ensure adherence to minimum standards. This may occur through a 'shadow of law' impact of an individual right - for example the development of dismissal rules and disciplinary procedures to avoid claims of unfair dismissal. The extent of this indirect impact however will be affected, among other factors, by the perceived risk of individual claims being made and the consequences of non-compliance. Currently the risk is low and consequences are not likely to produce a strong deterrent effect. WERS 2004 found on average 2.2 claims per 1,000 employees across all workplaces, affecting 8% of employers. In 2007/8 the median award of compensation in the discrimination jurisdictions was around £8,000 for race and disability; £5,000 for sex discrimination, and much lower in age and sexual orientation cases. In unfair dismissal cases the median compensation award was around £4,000. Reinstatement is awarded very rarely. Redress is primarily monetary compensation, even in the discrimination jurisdictions where a provision for an action recommendation to be made has been narrowly conceived and rarely used.

Potentially, the enactment of individual legal rights, embodying public policy, can help effect attitudinal change, shape the climate of employment relations and provide levers, legitimacy and impetus for those within organizations wishing to act. However, research into the impact of the legislation indicates that it is easier to establish a more direct link between legal regulation and changes in procedures and espoused policies to comply with legislative requirements, than it is to demonstrate a consequential change in employment practice (Dickens and Hall 2009). This indicates relatively shallow impact in terms of delivering fairer workplaces.

ADMINISTRATIVE AGENCY ENFORCEMENT AND INSPECTORATES

Some of the problems with a reliance on the 'victim complains' approach identified above could be avoided through administrative/agency inspection and enforcement. This approach allows unfairness to be tackled where no individual may be in a position to bring a complaint. It allows targeting; it can perform an educative role and 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.

There is no general labour standards inspectorate in the UK. However agency enforcement in areas such as Health and Safety has a long history. The Equality and Human Rights Commission (EHRC) has statutory powers to launch official inquiries and investigations and to enforce public authority equality duties (as previously did the separate equality commissions which it subsumed). There has been some more recent development where the state has taken a direct role in enforcing rights. However this has been ad hoc arising from one off solutions to immediate problems rather than any broader strategic assessment. An example of this is the Gangmasters' Licensing Authority (GLA) which was set up following the death in 2004 of thirty Chinese migrant workers, supplied by a labour contractor to collect shellfish. The GLA is restricted to workers in agriculture, horticulture, shellfish gathering and processing and packing; there is no system for licensing labour suppliers in other sectors.

The GLA forms part of an uneven and incomplete patchwork of agency enforcement and inspectorates falling under the responsibility of various different government departments. As well as the GLA, there is the NMW enforcement division of HM Revenue and Customs (the UK tax authority); the Agricultural Minimum Wages Inspectorate; the Employment Agency Standards Inspectorate, and the Health and Safety Executive. Even in combination, the remit of these five enforcement bodies is far from comprehensive in terms of rights and the areas of activity, and there is little co-ordination or even information sharing between them, even though firms found to be non-compliant in one area, such as the NWM, are likely to be non-compliant in others (Dickens 2008). The agencies vary too in matters such as resource allocation, inspection rates and philosophy of enforcement.

Enforcement agencies and inspectorates offer advantages in rights enforcement with a view to delivering fairer workplaces but certain conditions need to be in place. These include the need for the body to have adequate resources, sufficient appropriate powers, effective sanctions likely to deter non-compliance, high visibility and credibility, and a willingness to operate pro-actively. These conditions have not always been present in the UK.

A TUC-led investigation and a recent government-initiated forum considered this enforcement framework, specifically as it affected vulnerable workers, and documented continuing weaknesses (TUC 2008, BERR 2008). Subsequently the government promised measures to address some issues (for example providing a single shared helpline and facilitating information sharing between different inspectorates and agencies) and additional resources and powers have been given to some of the bodies. It is clear, however, that the UK government has little appetite for wider or more comprehensive agency enforcement of the kind advocated by various commentators (e.g. Brown 2006). It has stated that it is unwilling to 'risk unbalancing the UK model for dispute resolution where the emphasis is on individuals taking action to assert their rights and tilt the system towards more intrusive labour-inspectorate models common in other EU states' (BERR 2008:41).

A COLLECTIVE DIMENSION TO RIGHTS ENFORCEMENT

The context within which the number of ET cases have risen is a decline in trade union membership and collective bargaining and thus of social regulation as a form of protection. The fact that only 14% of workplaces in Britain now have a lay union representative (Kersley et al 2006) limits the extent to which unions can help embed, monitor and enforce legal standards in workplace practice. This underpins some commentators' calls for a general labour inspectorate. Any move in that direction, however, need not be seen as an alternative to seeking to re-establish a collective dimension to fairness at work and rights enforcement.

Trade unions potentially are effective positive mediators of legal rights, helping translate formal rights into substantive change at the workplace and helping ensure and establish good practice through self regulation. As such they can play a role (alongside HR managers, another potential positive mediator) in reducing recourse to legal action (Dickens and Hall 2006). Research shows that workplace employee representation arrangements encourage internal solutions to individual employment disputes and that 'collective procedures are the custodians of individual rights' (Brown et al 2000: 627). This indicates a potential alternative approach to addressing the 'problem' of the high ET caseload; one which does not risk jeopardising the social justice dimension in pursuit of cheaper, quicker resolution.

The Government has supported a role for unions as rights-awareness raisers and advice providers (for example by providing funding under its 'union modernisation' scheme for such activity) but, although it acknowledged that unionised workplaces are 'better at managing individual employment disputes' (DTI, 2001: para. 3.4), there has been a reluctance to privilege collective bargaining, or even collective voice, over more individualised methods of conducting employment relations.

Although post-1997 Labour governments no longer displayed the hostility to collective bargaining which characterised the Conservative administrations, there was no return to public policy encouraging and supporting collective bargaining as the best method of conducting industrial relations and many of the legal restrictions imposed on trade union action were retained. Statutory support for establishing trade union presence and for collective, representative structures at the workplace is limited. The implications of the connection between the collective and individual areas of labour law have not been followed through. Rather, the post-1997 legislation aligns with individualization of the employment relationship.

The UK government has had to address the 'representation gap' in non-union workplaces in order to implement European legal requirements for employer consultation with worker representatives over a growing range of issues, such as redundancy and health and safety. In so doing, however, it has shown a preference for ad hoc, one-off solutions rather than institution building. The reluctance to privilege collective voice also carried through to the implementation of the EC Information and Consultation Directive, which it originally opposed and can be seen in the detail of the UK's provisions.

There is no legal right for unions to organize. A statutory procedure was introduced in 2000, whereby a union which has already secured a minimum level of membership and can demonstrate likely majority employee support within a defined bargaining unit, may seek an award of recognition for collective bargaining over pay, hours and holidays. The enactment of this procedure (and anticipation of it) had a positive effect on union recognition agreements but bargaining units have been relatively small and, in terms of workers covered, in-filling (building on areas of traditional union presence) and close expansion has been more prevalent than union expansion into new areas.

The state has not sought to forge a link between legal rights for trade unions and individual worker protection. It has not harnessed regulatory tools of non-state actors, such as unions, to enhance the regulatory capacity of the state.

The individualisation of protection at work means that the collective dimension of many individual disputes is not acknowledged within the enforcement approaches. There is no provision for class action at the ETs (not even in the discrimination jurisdictions, although discriminatory practices affect people by virtue of their membership of a group. Trade unions have no standing to bring cases on behalf of a group of members.

In practice essentially collective concerns are being brought to tribunals in the guise of individual cases. One indication of this is the extent to which claims to ETs are being brought by numerous individuals against the same employers: over 50% of cases are multi-claimant claims. Many of these currently concern gender pay equality. At one time there was statutory provision for collective agreements and employer' rules to be scrutinized for discriminatory terms by an expert body (the Central Arbitration Committee) on reference from unions, employers or the Secretary of State. This collective route was repealed in the 1980s. Since then Britain has lacked a legal route for tackling the collective, systemic nature of pay inequality, although instances of unequal pay rarely exist in isolation from the pay system as a whole (Dickens 2007).

Positive synergy and mutual reinforcement between legal regulation and social regulation is called for yet the pay equality area provides evidence that the individualization of rights can lead to dissonance and conflict between these two routes to delivering fairness at the workplace. Framing the social problem of (un)equal pay as 'how to secure legal redress for a disadvantaged individual', rather than as 'how to use the law to promote reform of discriminatory pay structures/systems' has led to legislative approaches which risk jeopardizing equality bargaining in this area.

OTHER ROUTES TO FAIRER WORKPLACES

The administrative enforcement/inspectorate approach represents an alternative to the individualised, private law model characteristic of the British system which leaves individuals to enforce their rights. As with social regulation through unions and collective bargaining, the emphasis of effective agency enforcement is not simply on providing *individual* redress for breaches of rights once they occur, but on producing the kind of workplaces where breaches are less likely to occur in the first place. In this sense agency enforcement and social regulation can be presented as pro-active or preventative – encouraging those with power – the employing organisations – to take action to deliver fairer workplaces.

There are other potential levers, currently underused in the UK, which could also foster this kind of pro-active approach. These include attention to employment conditions in procurement policy and using the law to impose positive duties on employers (not just to give rights to workers).

Public procurement in the UK has increased considerably with contracting out of public services and public-private partnerships and it is worth around £125 billion a year. But national and local state power as purchaser of goods and services remains an underused tool for persuading and assisting organisations to comply with statutory standards and deliver fairer workplaces. Procurement is a potential lever not only for the public sector. In some areas, such as ethical trading, the private sector uses the power of the organisation at the head of a supply chain to seek ensure certain standards. Potentially the supply chain could be leveraged in terms of fairer workplaces, with the main contractor playing a role in standard setting and monitoring in respect to employment standards.

In the equality area there has been legislative development in the form of positive duties imposed on public authorities. As I've argued elsewhere (Dickens 2007) this represents an important shift from an emphasis on not discriminating unfairly to one requiring the promotion of equality. The current separate duties relating to various areas of discrimination are to be subsumed into a single equality duty with enforcement by the EHRC. This approach requires action to be taken without individual complaints having to be made. It focuses attention on desired outcomes, allowing organisations scope for different routes to achieve them. Some characterise this as a move towards 'reflexive regulation' or 'responsive regulation' (McCrudden 2007). With this approach, the emphasis is on encouraging change (with assistance and monitoring) rather than on penalising non-compliance, although penalties ultimately must be available.

Although the Equality Duty appears to constitute acknowledgement of the inevitable limits on the ability and effectiveness of individual discrimination litigation (or employer enlightened self-interest) to bring about social justice, the government has refused to extend such requirements to private sector employers, and it is not being seen as a model to be applied more generally.

INACTION – FAIRNESS AS CONTINGENT

It is clear that there are steps which could be taken in Britain to help translate the formal rights on the statute book into real rights, and to promote adherence to minimum employment standards. As indicated in the discussion above, piecemeal measures have been taken, but there is a reluctance to address the issue strategically, and to embrace reform suggestions likely to enhance delivery of fairer workplaces.

An explanation for this can be found the legacy of the Conservative governments' de-regulation ideology (a view that workers' rights equate to burdens on employers), and the contingent nature of New Labour's pursuit of fairness at work. As argued elsewhere (Dickens and Hall (2006)), the declared attempt is a synthesis and mutual reinforcement of social (fairness) and economic (market) goals but in practice there is a hierarchy. Fairness is not pursued as an end in itself. The UK government's willingness to promote social justice and ensure fairer workplaces is contingent on the extent that it can be argued to promote and support business interests and to underpin (employers' views of) economic efficiency. This has affected both the government's willingness to legislate (with, for example, minimal implementation of EC Directives) and the nature of legislation, with a preference for 'soft' law and 'light touch' regulation. What is suggested here is that it carries through also to employment rights enforcement.

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