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Introduction—Making Employment Rights Effective: Issues of Enforcement and Compliance

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BACKGROUND AND RATIONALE

DESPITE THE PROLIFERATION of statutory employment rights there is continued widespread experience of unfairness in British workplaces. The reasons for this are many and complex, but part of the explanation is that the development of a more comprehensive role for legislation has not been accompanied by any strategic consideration of the mechanisms, institutions and processes for rights enforcement. In focusing on issues of enforcement and compliance, this volume illuminates how they might contribute to making employment rights effective—by which is meant giving substantive effect to formal rights, reducing the likelihood of adverse treatment and promoting fairer workplaces.

Over the past 40 or so years Britain has experienced dramatic change in the role of legal regulation of the employment relationship. The so-called voluntarist system, which characterised British industrial relations for most of the twentieth century, has gone. At its heart was a policy of relative legal abstention, with primacy of, and support for, regulation through collective bargaining. Today, in contrast, protection at work rests less on collective organisation than on individual legal rights, the number of which has expanded considerably since the 1970s, partly through domestic policy and partly through the influence of the European Union. The main thrust of enforcement in Britain rests on individuals asserting their statutory rights, if necessary by making a claim at an employment tribunal (ET). ETs were first given jurisdiction over employer/employee disputes in the mid-1960s and early 1970s when statutory rights were enacted relating to redundancy and unfair dismissal. There is some agency enforcement in Britain but, as statutory protections developed (for example in relation to sex, race and other forms of discrimination; gender pay equality;

time-off and leave; 'work-life balance'; and protections for part-time workers, among others), ETs became the expedient—if not necessarily the most appropriate—enforcement option for handling the ever increasing numbers of rights.

There is a growing consensus that, although these specialised bodies compare favourably with the ordinary courts on many measures, there are problems for all parties with the existing system of rights enforcement centring on the ETs—although the definition of the precise problems, and thus the proposed solutions, varies. Government consultations and official reviews conducted at different times (including one being undertaken at the time of writing) have focused mainly on the efficient operation of the system and reform measures aimed at cutting costs, and attempting to reduce the number of cases coming to ETs, rather than exploring the appropriateness and effectiveness of potential different forms of rights enforcement in terms of achieving social objectives (eg BIS 2011; Gaymer 2009; Employment Department 1994). Some concerns about the ET system are widely shared, but often the reform 'solutions' run counter to making employment rights effective by narrowing their scope, making it harder for workers to exercise rights and more difficult and costly to access justice and to secure appropriate remedies, while at the same time providing limited encouragement to employers to address workplace issues which give rise to legal claims. There has been little official questioning of the efficacy of relying on the 'victim complains', self-service approach, which the ETs embody, despite weaknesses in the nature, application, enforcement and limited impact of the increasing number of individual employment rights which research has revealed—weaknesses which are exacerbated by the changing nature of employment, the labour market and employment relations.

Survey and other evidence suggests continuing 'unfairness' with widespread experience of problems at work (eg Casebourne et al 2006; Pollert and Charlwood 2009; Fevre et al 2009). The Fair Treatment at Work survey in 2008 found just under a third (29 per cent) of respondents to the survey reported that they had experienced a problem at work in the two years prior to the survey interview (Fevre et al 2009) and it has been argued that such surveys (drawing on perceptions) often fail to capture the extent of certain types of unlawful treatment (Fevre et al 2011). Over 28,000 claims of breach of employment rights were upheld by ETs between 1 April 2010 and 31 March 2011. Ministry of Justice statistics show that a further 25,500 were settled through Acas conciliation, others being settled privately or withdrawn. As discussed below, surveys of 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, so the tribunal figures for cases where an employment rights breach is found are likely to understate considerably the extent of unfairness or adverse treatment being experienced.

Although current policy debate presents the 'problem' as too many cases being brought to ETs, it could be argued that in terms of addressing adverse treatment at work, there are too few cases. The proportion of justiciable disputes going to ETs was estimated in 2001 at between 15–25 per cent (DTI 2001). The Gibbons review noted that rates of employment litigation in Britain are relatively low, with only 0.4 per cent of the working population submitting a claim in 2002, compared to 1.5 per cent in Germany for example (Gibbons 2007: 15). The 2008 Fair Treatment at Work survey showed that only three per cent of employees who report experiencing a problem at work actually go on to register an ET claim, and the profile of ET claimants differs from the profile of those who report experiencing workplace problems (Fevre et al 2009). While some problems may be resolved without need of an ET claim, the relatively low proportion of problems being brought to tribunals also undoubtedly reflects the nature of the enforcement system which calls for a knowledge of rights and how to assert them, and the capacity and willingness to do so. 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 and 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 (Pollert 2005: 222–26). Even where knowledge of rights does exist, people may work in contexts where they are reluctant or fearful to exercise them, fearing reprisal (see for example Mitchell 2009). Further, those experiencing adverse treatment may lack the capacity or support necessary to bring a legal claim (Pollert and Charlwood 2009).

Problems at work, and perceptions of adverse treatment, extend beyond areas covered by employment rights (Bewley and Forth 2010) and statutory employment rights constitute only one, incomplete, mechanism for delivering fairer workplaces. Nonetheless legal rights can play an important role in this, and so the nature and effectiveness of enforcement matters—not only in terms of outcomes for those individuals whose rights are infringed but in terms of bringing about change. The enforcement landscape in Britain is the result of historical accident, political convenience and ad hoc responses to particular needs, rather than one informed by a logic of enforcement designed to make employment rights effective—by which I mean ensuring compliance with statutory standards, giving substantive effect to formal rights, reducing the likelihood of adverse treatment and promoting fairer workplaces.

This book developed from a workshop held at the University of Warwick early in 2011, aided by a small grant from Warwick Business School. It was attended by a group of scholars from different disciplines whose current and recent research I thought could inform debate by critically exploring potential alternative, additional approaches to enforcement through ETs

and other drivers for securing compliance, and by illuminating the way in which employment rights interact with organisational and workplace contexts. In combining contributions from labour lawyers, sociologists, and employment relations scholars the aim was to provide an overall richer consideration than might be provided within the separate disciplines. Contributors were encouraged to consider audiences beyond their own discipline in writing and revising their chapters, both in terms of style (eg minimising the detailed case citation and statute referencing common in legal texts) and in the need to explain various concepts which might be familiar in some fields but not others.

The book deals generally with 'Britain' unless otherwise stated and where legal differences or separate systems exist within Britain, it deals with England and Wales. The law is as at 30 November 2011.

STRUCTURE AND CONTENT

In chapter two, Gillian Morris provides a broad overview of the development, range and nature of statutory employment rights and the current mechanisms for enforcement, particularly the nature and operation of ETs, to provide a context for the subsequent chapters. Chapter three looks briefly at the tribunal reform agenda before considering in detail an aspect of it, namely a greater emphasis on alternative dispute resolution (ADR). Current provision for, and conceptualisation of, arbitration, conciliation and mediation in the context of the ETs are critically examined. In the chapter I argue that there is potential for ADR to make a wider contribution in terms of improving workplaces rather than simply reducing tribunal case loads.

The following two chapters turn to a consideration of rights enforcement through agencies and inspectorates. This approach is relatively underused in Britain but there is long-standing agency enforcement in the area of equality, and of health and safety—the areas which provide the basis for consideration in two chapters in this book. In chapter four Bob Hepple describes and reflects on the different approaches to rights enforcement taken by different agencies and at different times in the area of workplace equality, and highlights the unrealised potential of recent legislative and institutional developments. Health and safety at work is an area which is not usually discussed as part of labour law, and also tends to fall outside mainstream industrial relations considerations. However, the critical review of how agency enforcement of health and safety legislation has fared under the 'better regulation' agenda provided in chapter five by Steve Tombs and David Whyte, helps in understanding factors which may influence the effectiveness or otherwise of agency enforcement, and is of relevance to a consideration of 'reflexive regulation', something also addressed in chapters four and seven.

Chapters six and seven contribute to a consideration of alternative, non-judicial approaches to achieving the desired policy outcomes behind individual employment rights such as the use of procurement/supply chains, and levers such as corporate social responsibility (CSR). In chapter six Christopher McCrudden looks at the use and potential of public procurement as a strategy which can deliver fairness in the workplace, drawing particularly on the experience of public procurement in Northern Ireland to assess achievements and identify the factors which help to determine its effectiveness. In chapter seven Simon Deakin, Colm McLaughlin and Dominic Chai draw on their original research to explore various 'reflexive' legal mechanisms to encourage employers to address the gender pay gap and gender inequalities. Although focussed on a particular area of employment rights, their contribution, like others, has a broader relevance: comparing the modes of working of different regulatory techniques, assessing the effectiveness of different mechanisms in the public and private sectors, and considering the potential, and limitations, of CSR and shareholder pressure based on the logic of the business case for fairer workplaces.

The organisational context within which rights fall to be implemented is an important consideration in terms of compliance and rights' likely impact on practice (Dickens and Hall 2006: 349–51). Small firms are often depicted as particularly problematic in terms of employment rights. In chapter eight Paul Edwards looks at employment rights and practice in small firms, drawing on research in this sector to demonstrate a more complex and varied picture, with response and impact varying according to the nature of the law and the kind of firm concerned. In chapter nine, the nature of and explanations for variation among medium and large organisations in attitudes towards, and compliance with, employment rights is explored by John Purcell. He considers the management of employment rights, locating it within the context of business strategy and different preferred approaches to managing employees, and discusses the role of line management and the human resource management function in the implementation of employment rights. Such factors influence the extent and way in which rights in the statute book are translated into practice and given substance in the workplace. In chapter ten Trevor Colling discusses the role of trade unions in making employment rights effective. He explores issues arising from the shift from social regulation, that is regulation through collective bargaining, as the main source of protection at work, to legal regulation through individual employment rights, and provides detailed consideration of the changing relationship of, and interaction between, these two systems of regulation.

In the final chapter, I discuss the reluctance of successive governments to address strategically the issues of effective enforcement in terms of securing compliance and delivering fairness. I draw on the other contributions to this volume to consider the potential for reducing the likelihood of adverse treatment offered by placing greater emphasis on agency enforcement and

inspection and encouraging the use of other regulatory and non-regulatory measures, and by utilising the regulatory capacity of non-state actors. There are no straightforward universal solutions and currently the alternative approaches display their own weaknesses. In chapter eleven, however, I argue that, were the necessary political will to emerge, such approaches could be used to encourage proactive, structural employer action to deliver fairer workplaces. In combination they have the potential to help translate formal rights in the statute book into real, substantive rights in the workplace; to reduce the likelihood of adverse treatment and so make employment rights effective.

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