Chapter 2: Sources and institutions of employment law

Page 58

1. What are the pros and cons of resolving disputes between employers and employees in specialist tribunals, rather than the courts?

Author's answer: When the industrial tribunal (now 'employment tribunal') system was set up, the intention was that it would operate as a more speedy form of securing access to justice for employees and workers than the courts. It was designed to be an informal procedure to enable employees and workers to represent themselves. As such, the intention was to encourage and enable lay representation rather than legal representation by solicitors, barristers or advocates which was, and is, the preserve of the courts. The employment tribunals were also supposed to be inexpensive. Finally, by staffing the employment tribunals with judges who were specialist in industrial and workplace disputes, including lay judges with experience in dealing with disputes from both the employer and employee side, it was understood that expertise in labour disputes and employment law would be built up, leading to more consistent decision-making that was reflective of good workplace practices and harmonious industrial relations. However, a process of 'legal isomorphism' has emerged whereby the employment tribunal system has increasingly mimicked the procedures and practices of the courts. For example, it is unusual for there to be lay representation and the vast majority of claimants are legally represented. This has had the effect of introducing formality into the process, with a loss of flexibility and the emergence of more rigid legal procedures. Moreover, sometimes, cases can take a long time to be heard, leading to a loss of speedy access to justice. Although the employment tribunals are undoubtedly a specialist forum for the resolution of disputes, legally qualified judges are increasingly sitting alone without the benefit of wing members from the employer and employee side of the equation. Finally, the introduction of employment tribunal fees in 2013 resulted in a large drop in the number of employment claims filed in the tribunals until the decision of the UK Supreme Court in *R (on the application of UNISON) v Lord Chancellor* [2017] 3 WLR 409) in 2017 abolishing those fees. The charges levied during the 2013-2017 period were simply too expensive for many claimants of modest means.

2. Are you convinced that the UK Government is correct in thinking that ACAS should play a more prominent role in the resolution of disputes between employers and employees? Give reasons for your answer.

Author's answer: As an organisation, ACAS's fundamental purpose is to act as a middle-man between employers (or groups of employers) and employees (or trade unions) to assist in the resolution of individual or collective workplace disputes. It has considerable experience in dispute resolution and has a swathe of dispute resolution procedures and mechanisms at its disposal that it can apply (and which it has considerable expertise and experience in applying) towards the achievement of that goal. A hotly debated issue is whether parties engaged in individual or collective employment disputes should be mandated to adhere to dispute resolution processes administered and channelled through ACAS, or whether this should be a purely voluntary process. Some commentators suggest that legal rules prescribing the compulsory reference of disputes to ACAS are ill-conceived on the basis that non-voluntary referral systems are unlikely to be

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successful: if parties are not invested in seeing out the process, the measures are likely to fail. An aligned point is that parties should have the liberty to litigate their individual or collective workplace disputes in court or employment/labour tribunals. On the other hand, it may be argued that the individual liberty or prerogative to decide to litigate disputes is not unqualified. Instead, one might argue that this liberty is restricted where greater harm is caused by the over-burdening, and clogging up, of the court and employment/labour tribunal systems by litigated disputes. Here, the line of argument is that it is not in the public interest for parties to have unrestricted access to the courts or tribunals to litigate their disputes (the costs of which are funded through the public purse) where more readily available processes exist for the settlement of disputes through organisations such as ACAS.

3. To what extent do you think human rights and international labour standards should have a role to play in interpreting, applying, and developing common law and statutory employment protection rights? Give reasons for your answer.

Author's answer: Turning first to the common law, there is undoubtedly scope for human rights norms and international labour standards to be incorporated into the obligations that they impose on employers and employees. As noted by Hugh Collins and Virginia Mantouvalou in chapters 9 and 22 of M. Freedland et al, *The Contract of Employment* (Oxford, OUP, 2016), this may entail a degree of adaptation and adjustment of the common law (e.g. implied terms in law of the contract of employment), but it is clearly a potential development in the future. The same can also be said for statutory employment rights to the extent that human rights norms and international labour standards could – if there was a will on the part of politicians and the judiciary – be deployed to inform the content of what is meant by concepts such as 'fair' or 'unfair' dismissals, or 'proportionate' treatment or application of criteria in the context of discrimination statutes.

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