THE INSTITUTE OF EMPLOYMENT RIGHTS

Access to Justice: Exposing the Myths

by Andrew Moretta

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introduction

In the United Kingdom for most of the twentieth century employment protection was a matter left largely to the unions, an approach to industrial relations which became known as 'voluntarism.'[1] The weakness of the worker relative to the might of the employer was balanced by the power of collective representation. Individual employment relations were governed by contract and collective agreement. Grievances were resolved by negotiation. A dismissal perceived of as unfair could be remedied – sometimes within hours – by a reinstatement. The last resort in these circumstances was, of course, a strike, and negotiation would, on occasions, escalate into a confrontation.

The first legislative interventions into the individual employment relationship were essentially aimed at reducing these confrontations. In 1963 the Contract of Employment Act provided for minimum notice periods, and made it a requirement for the employer to provide a written statement of the particulars of the employment contract. The Redundancy Payments Act 1965 gave redundant employees the right to statutory payments; and industrial tribunals, established in 1964 to adjudicate in disputes between employers and the Ministry of Labour,[2] became the forum for complaints brought under the new Act. The jurisdiction of these relatively informal, 'costs neutral' tribunals was further extended to hear complaints of breaches of the new right not to be unfairly dismissed, conferred by the Industrial Relations Act 1971.[3]

The Employment Protection Act 1975 established the Employment Appeals Tribunal and provided a substantial number of new individual employment rights, from maternity pay to the right to be provided with a written statement of the reasons for a dismissal – all enforceable by means of a complaint to tribunal. The statutory redundancy regime was extended, and an additional 'compensatory award' for those unfairly dismissed was introduced. The Sex Discrimination Act 1975 and the Race Relations Act 1976 provided for complaints of less favourable treatment on the grounds of sex and race by employers to be presented to an industrial tribunal.[4] Individual rights provided a 'floor of rights', a minimum standard for voluntary agreements between workers and employers to build upon, and were intended

to take some of the heat out of industrial relations. They were not intended to replace collective negotiation and agreement.

UK membership of what became the European Union led to further employment protection legislation being enacted and, as envisaged, industrial tribunals increasingly became the forum for the adjudication of individual employment grievances.[5]

The legislative attacks on the trade unions of the 1980s and 1990s, which restricted the freedom of organised labour to take industrial action and to manage their own affairs, led to an increased reliance by workers on these individual employment rights. As collective rights were withdrawn, the threat of strike action was largely replaced with the considerably less persuasive threat of a tribunal claim.

During this period, unemployment became a problem on a scale not seen since the late 1920s and early 1930s. Many of the large unionised heavy industrial and manufacturing concerns were closed down, and those workers able to find alternative employment tended to be recruited into relatively recently established firms in the expanding service sector, where, thanks to the prevailing business *zeitgeist*, and the absence of statutory recognition procedures, unions were seldom accepted as representatives of the work force. Union membership fell significantly. Some companies derecognised the unions and others narrowed the range of matters subject to collective agreement.[6] The concept of the 'individual contract of employment' gained popularity. For most workers, this meant that the terms and conditions of employment were no longer the subject of any negotiation at all, and were now presented by the employer to the individual worker on a 'take it or leave it' basis.

As the perceived threat to business posed by organised labour started to fade, many of those wedded to the idea of the small state and *laissez faire* economics became sufficiently emboldened to suggest that some of the legal rights that had been conceded when the individual employment contract supplanted voluntarism could be withdrawn.

Unfair dismissal – the cornerstone of individual employment protection law, perhaps less politically sensitive than other measures, and more obviously open to legislative attack due to its origins being in domestic rather than European law, became a particular target of criticism. The banking crisis of 2008 and the subsequent recession provided the opportunity for the representatives of business, both inside and outside Parliament, to press their case. Stripping away the

rights of workers would, they argued, help build business confidence: they purported to believe that the ability to hire and fire at will was crucial to rebuilding the economy.

from red tape to Beecroft

This campaign for employment deregulation took on greater momentum with the emergence of a Conservative Prime Minister following the May 2010 election. As the Government's Employment Law Review, which sought 'to provide clarity, certainty and give business the confidence to manage their workforce effectively' and the employment law 'Red Tape Challenge' got underway, apocryphal stories abounded. Half-truths and misrepresentations cropped up in a series of articles featuring employers supposedly driven to the brink of ruin by litigious workers.

Meanwhile, in the pages of the press, the weight of disinformation from the Confederation of British Industry (CBI) and the Institute of Directors (IoD), was such that the Coalition Government felt obliged to respond with a 'Bosses Charter' – a reminder to industry of where the real power lay in the employment relationship. The employers' campaign appeared to reach a peak following the October 2011 'unauthorised' release of the Beecroft report, presenting the radical proposals favoured by many Tories.

Since then, many of the deregulatory aims have been realised. Although perhaps better described as 'reregulation' rather than deregulation, the damage inflicted has been substantial. The introduction of employment tribunal issuing and hearing fees in particular, has seen a massive reduction in the number of workers able to bring a claim against an employer. Now, collective rights are targeted, and the Government's Trade Union Bill[7] is a step beyond the 'step by step' legislative attrition of the Thatcher and Major years. It is, without a doubt, an ideologically inspired bid to deliver the *coup de grace* to the unions, and the Bill has been condemned by, among many others, the ILO Committee of Experts, the Equality and Human Rights Commission, the Committee on Standards in Public Life, and even the Government's own Regulatory Policy Committee (RPC), which it appointed to monitor the cutting of £10bn of "red tape". The unions now face a decisive battle, one which will be fought in workplaces, on the streets, in Parliament and in the Courts.

In the meantime, the campaign for deregulation continues, and the myths propagated during the last few years persist. This booklet attempts to dispel a few of those myths.

About the Institute

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

We provide the research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of our unique network of academics, lawyers and trade unionists.

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

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In the second of IER's series of Mythbusters, Andrew Moretta considers the many myths surrounding access to justice. Andrew starts by highlighting how, during the Thatcher years, enforcement of rights shifted away from collective bargaining towards individual rights enforced through the courts. He then charts the narrative surrounding the "red tape" and "burdens on business" ideology which he believes paved the way for systematic attacks on the tribunal system – most particularly the introduction of fees, cuts to legal aid and the closure of many law centres – all designed to blunt the effectiveness of employment protection. More recently the ability of trade unions to protect the interests of workers is being threatened by new anti-trade union legislation. The author concludes "the action necessary to remove the legislation and restore trade union freedoms lost since 1979 will now involve breaking the law."

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