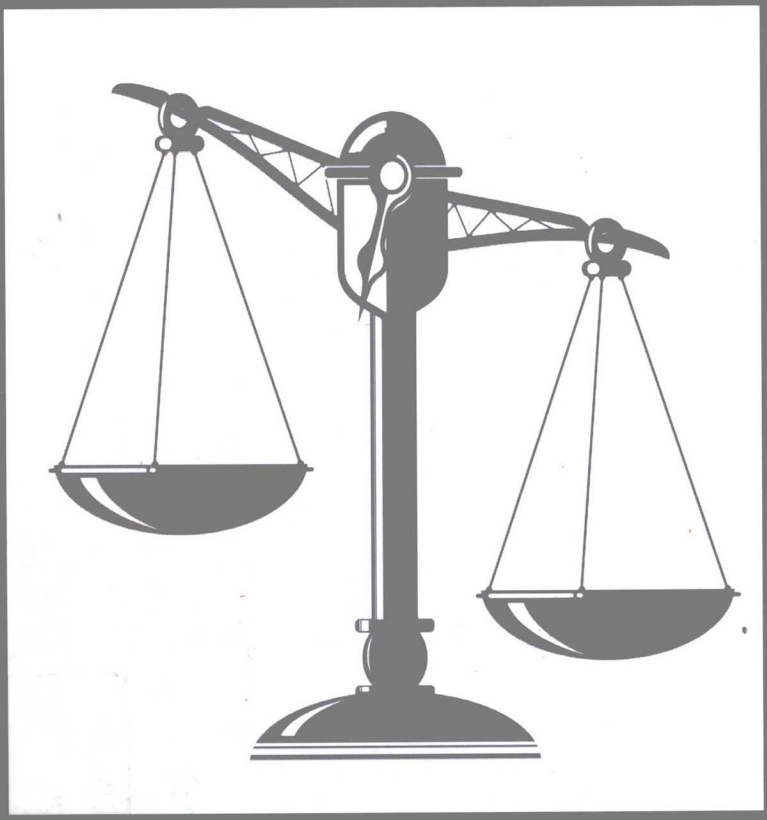
ADJUDICATING EMPLOYMENT RIGHTS

A Cross-National Approach



SUSAN CORBY
AND PETE BURGESS

Adjudicating Employment Rights

A Cross-National Approach

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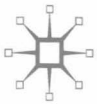

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1
Introduction: Issues and Overview

Our remit

In all developed countries, workers are protected by statutory and/or contractual employment rights, and there are institutions for adjudicating between workers and employers should disputes arise. This book focuses solely on the organisation and operation of these institutions. We do not examine workers' employment rights as such or how those rights are publicised, although such provisions contribute to the ability of the law to resolve disputes. Nor do we look at workplace institutions that provide scope for such disputes to be resolved before they enter the judicial domain, except where there is a direct and prescribed link between the workplace and external adjudication. We leave that to other books. We define 'adjudicating' broadly to include decisions by a court, by an arbitral body, by an administrative body or by an enforcement body and we restrict our attention to individual disputes of rights, not of interests, although in some countries there is an overlap in terms of the institutions used.

We begin by explaining our rationale, including our rationale for making comparisons. We then discuss our methodology before providing an overview of the many institutions covered in this book. The chapter ends by outlining the book's structure.

Our rationale

Why are adjudicatory institutions important today in the employment sphere? Traditionally, one of the key roles of trade unions has been to protect individual workers and resolve workplace disputes. During the last half century, however, there has been a decline in trade union density across all developed economies, although within this trend there are substantial national variations with Sweden experiencing only a slight decline compared with a fall of more than a half in the United States and New Zealand (see Table 1.1 on p. 2). This has been paralleled, although not directly, by a

Table 1.1 Trade union density

Country	Average density 1971–1980	Density 2011
France	21	8
Germany	34	18
Ireland	57	36
Italy	47	35
Netherlands	37	19
New Zealand	43	21
Sweden	74	68
United Kingdom	47	27
United States of America	23	11

Note: South Africa is not included as black trade unions were not lawful in the 1970s.
Source: Visser (2013) ICTWSS Database, Amsterdam, University of Amsterdam. Figures calculated by the authors and rounded.

fall in the coverage of the workforce by collective agreements, and in particular those concluded at industry level. There are a number of mechanisms, however, that mean that trade union density and collective bargaining coverage may not move identically. Although in the United Kingdom, for instance, there is broad alignment with union density at 25 per cent and collective bargaining coverage at 31 per cent (Brownlie, 2012), in France, despite low union density (8 per cent), collective bargaining coverage is over 90 per cent. This is due to the continued application of industry bargaining and the extension of industry-level agreements to non-signatory employers through administrative processes. Of course, high levels of collective bargaining coverage do not in themselves mean that the 'quality' of bargaining is high, or that there is a vigorous trade union presence at workplace level able to support individuals with grievances.

Alongside this decline in trade union density, there has been an increase in individual statutory employment rights across all the countries covered in this book. From the 1970s in particular, and in some countries earlier, there was a substantial expansion in employment protection legislation that, in many instances, generated an upsurge in individual cases brought to courts and tribunals. The United Kingdom, Ireland, Germany, Sweden, the Netherlands, France and Italy are also all members of the European Union and so are covered by the expansion of European Union employment law, which over the past 40 years has provided new individual rights, or extended existing national rights. South Africa, post-apartheid, has introduced many individual rights, akin to those in the European Union, as has New Zealand, especially as a result of its Employment Relations Act 2000. Even the United States, often seen as notorious for its lack of individual statutory employment rights, was a pioneer in introducing anti-discrimination legislation during the 1960s covering, for instance, gender and ethnicity.

As a result of these two trends in the last half century – the decline of collective regulation and the mushrooming of statutory rights in the developed world – workplace disputes are less likely now to be resolved by employers and unions acting jointly and voluntarily, but by the civil courts, by labour courts, by administrative bodies or by arbitration. The nature and operation of these institutions for resolving individual workers' disputes, however, have been largely ignored in the employment literature, although they have become increasingly salient. This book attempts to fill this gap by focusing on the institutional architecture itself.

Comparisons

We appreciate that these institutions will be shaped within an individual country by an interplay between its industrial relations context and the legal system. Accordingly, each of the ten countries covered in this study has its own chapter, in which we outline the institutions for adjudicating employment rights in their national context. Our aim, however, is also to venture a number of cross-national comparisons and contrasts in three respects. First, we consider it worthwhile to compare the basic institutional parameters of these institutions across a number of essentially descriptive dimensions: these include the overall system of labour jurisdiction, the scope and requirement for mediation and conciliation; the role of lay members in adjudication and how they are appointed and exercise their roles; and the role of the judiciary.

Secondly, in more theoretical terms, we want to explore the scope for linking the structure and operation of these institutions with theories and models that might help explain their origins, persistence or change. And thirdly, we want to offer an empirically grounded evaluation of these institutions, drawing on and measuring against certain criteria, such as accessibility, speediness and informality.

It can be argued that comparisons are well-nigh impossible, often drawing on the alleged impossibility of comparing apples and pears. We would argue that despite the difficulties inherent in such comparisons, they are useful and informative. To continue with the apples and pears analogy, both are types of fruit; and fruitarians, as well as cider and perry drinkers, could find comparisons between such allegedly incommensurable entities illuminating. The same goes for cross-national comparison, which can be instructive for academics and practitioners exposed to a variety of systems professionally and also as a means of arriving at a deeper understanding of an individual national system; it enables us to appreciate the different approaches that can be adopted and to discuss the effectiveness of different approaches, as well as to suggest theoretical explanations (Blanpain, 2007).

Moreover, despite their differences, all the countries in this book share the same broad ideological context as they operate in a neo-liberal environment

(although governmental responses to neo-liberalism vary country by country). Neo-liberalism has many definitions but is used here in the sense of both a political theory and an approach to economic management based on free markets and free trade, privatisation and the breaking up of state monopolies, and deregulation (see Turner, 2008 for a full discussion). In the employment sphere neo-liberalism is linked with an emphasis on individualism and on flexibility that is reflected in the nature and extent of employment legislation.

Furthermore, all the countries in this book are confronted with virtually the same choices and challenges; for instance, how to balance access to justice with preventing unmeritorious claims; how to apportion the costs of the adjudication system between the worker, the employer and the state; whether to distinguish institutions for adjudicating employment disputes from other adjudicatory institutions; and how to square the legal presumption of equality between the claimant and the respondent with the industrial relations reality that the worker individually rarely has equality of power vis-à-vis the employer.

Other choices and challenges centre on how to resolve the conflict between a party's right to be represented by a lawyer and the aim of making first-instance adjudicatory systems non-legalistic; how to strike a balance between resolving disputes speedily and informally through alternative dispute resolution procedures and resolving disputes through litigation to ensure that the law is applied and legal norms are propagated; how to strike a balance between labour inspectors' role to provide advice with their role in prosecution and the role of non-state actors in employment adjudication systems, such as unions, employers, lawyers and civil society organisations.

Each country responds differently to these issues dependent on the way in which these problems are posed and perceived, and in relation to interests – both wider social interests and also the interests and cultural norms of the immediate actors. For instance in South Africa, when apartheid was dismantled and new employment institutions were established, access to justice was a prime consideration (see Chapter 10 in this book). In the United States (Chapter 12) arbitration has grown in the private sector, because a prime consideration for employers has been to create a dispute resolution system that is speedier and cheaper than the civil court system, but this has been at the expense of the development of the law. In Germany (Chapter 4), a prime consideration was to recognise the special characteristics of the workplace by having a wholly autonomous labour court system in which lay members sat at every level. In Great Britain, a prime consideration recently has been to place some of the cost of the adjudication system (employment tribunals) on the worker, so reducing the cost to the state (see Chapter 5). In New Zealand (Chapter 9), a prime consideration is to prevent legalism at the first-instance adjudicatory body (the Employment Relations Authority), so the adjudicator is not required to be a lawyer.

As to the role of non-state actors, in Sweden unions and employers' associations have an institutionalised role: they can bring a case to the Labour Court on behalf of a worker or an employer covered by a collective agreement; (see Chapter 11). In France too, there is some scope for unions to intervene on behalf of, or in some cases instead of, the individual at a labour court.

Methodology

This book owes its origins to an Economic and Social Research Council[1] award that included a study of lay judges in Great Britain and abroad. The study of labour courts abroad was primarily based on desk research, supplemented in some countries by interviews with organisational representatives and jurists. This research led to a broader consideration of the institutions for adjudicating employment rights and a desire to look at countries that did not have labour courts and/or used alternative adjudicatory bodies such as the civil courts and arbitration. It also led to amplifying our desk research with visits to all the countries concerned to interview key stakeholders, such as judges, advocates, trade unions and commentators in order to understand how the institutions worked in practice. Additionally, experts in the relevant countries commented on draft chapters.[2]

In making a judgement about how many countries to include, we had to make a trade-off between depth and breadth and decided to examine the institutions in ten countries: France, Germany, Great Britain (not the UK, as the institutions in Northern Ireland differ from those on the mainland), the Netherlands, New Zealand, Ireland, Italy, South Africa, Sweden and the United States. The countries chosen provide differing answers to the question of how individual employment rights are adjudicated and offer a good spread across some of the accepted – if critically – national typologies. They represent different legal origin models: common law/Anglophone countries are represented by Great Britain, New Zealand, Ireland, United States and South Africa. The other five countries (Sweden, Netherlands, Germany, France and Italy) are civil law countries, albeit exhibiting different features within this overall characterisation.

They also represent both different varieties of capitalism (Hall and Soskice, 2009) and industrial relations models (Ebbinghaus and Visser, 1997). In terms of capitalist varieties, the sample embraces liberal market economies such as Great Britain and the United States and co-ordinated market economies, but with variants: the Nordic model (Sweden), the continental model (Germany and the Netherlands) and the Latin model (France and Italy). In terms of industrial relations models, the book covers the 'Nordic corporatist' model (Sweden), 'Continental European Social Partnership' (Germany, Netherlands), 'Anglo-Saxon pluralism' (perhaps better 'Anglophone') (Great Britain, Ireland, United States, New Zealand) and

'Latin polarised' (Italy, France). As the country chapters and more detailed consideration of comparative issues show, these broad typologies embrace significant and interesting national differences; (see Chapter 2 for a full discussion).

For the convenience of the reader we mainly use generic terms, for instance civil court, labour court, professional judge, lay judge, but sometimes we use the local name, which can have symbolic implications. For instance the Swedish Labour Court is called *Arbetsdomstolen;* in France lay judges are called *prud'hommes* (literally 'good men') or *conseillers*; in Italy professional judges are called *pretori*.

Workplace dispute institutions

Adjudication

Before focusing on workplace dispute adjudication, we first consider adjudication more generally. The value of adjudication, says Lucy (2005), lies in its rationality, its impartiality and its legitimacy, but these are not simple terms. First, rationality: adjudication is not based on the tossing of a coin, or whether a witch on a bobbing stool sinks in the water, but on arguments and evidence. Nevertheless, decision-makers may differ in the weight they give to certain arguments and/or evidence and, as a consequence, rationality can be contested. As Bourdieu (1987) argued, there may also be different types of rationality drawing on different sources of reason, and the decision-makers might be systematically steered towards one approach or another depending on their intellectual formation, origins and socialisation (see Chapter 3, France).

Second, impartiality: on the one hand, a decision-maker may find it relatively easy to be impartial in the face of wealth, status or need. On the other hand, a decision-maker may find impartiality harder to achieve when faced with parties who are not equally able to put forward their case, for instance because one is legally represented and the other is not. Furthermore, decision-makers have to be partial to the rules, standards and values that constitute the legal system (see Lucy, 2005 for a full discussion of judicial impartiality). In the employment sphere, however, these values have often been anti-worker and/or anti-union (see, for instance, Wedderburn, 1986).

The third value of adjudication is said to lie in its legitimacy and this can be enhanced by having juries representative of the population so a judge alone does not decide, or by having representatives of workers and employers, that is lay judges, to adjudicate alongside the professional judge. Yet legitimacy and impartiality may not sit easily together. For instance, lay judges may provide legitimacy in that they are representative of workplace actors, but are they then *parti pris* and thus partial?

The parameters

We have already maintained that the resolution of individual employment disputes is decreasingly being carried out by employers and unions acting jointly and increasingly being conducted by adjudicatory institutions. These are largely based on what Dickens (2012) has termed a self-service model: that is, individuals make claims to an adjudicatory body to obtain compensation for a wrong. This is a reactive model, normally with damages given after the wrong has been done as redress rarely restores the status quo ante. In some countries, as we will see below, these adjudicatory bodies are labour courts, while in other countries they are civil courts or arbitral bodies.

Another model is provided by the state using public law, rather than individual private enforcement: labour inspectors, for instance, enter workplaces to ascertain whether the employer is observing certain statutory standards and, if not, they can serve administrative notices and/or take the employer to court. Labour inspectorates, or their functional equivalents, can be found in all the countries depicted in the book and their remit ranges from the particular, for instance labour inspectors for Great Britain's national minimum wage (Chapter 5), to a wide remit as in France (Chapter 3). Although possibly prompted by an employee or trade union complaint, the interaction is between the labour inspector and the employer, not the worker versus the employer, and labour inspectors can in theory be proactive, advising employers to change systemic practices to prevent a possible future failure to meet employment standards.

Labour inspectorates are supply-led; the number of workplace inspections that labour inspectors can carry out essentially depends on the number of inspectors whom the government decides to fund. In this age of austerity, many governments are increasingly limiting the resources being spent on inspectorates, with evidence for a decline in numbers. Also, particularly in South Africa, labour inspection is limited by the number of trained inspectors available.

Whereas labour inspectorates are supply-led, the courts, which governments also fund, are demand-led. Having introduced statutory employment rights and provided a means, however inadequate, for compensation for a breach of those rights, governments cannot determine the number of claims individuals may make. Governments can seek to limit demand in various ways, for instance by not publicising employment rights, by not providing legal aid, by delay (and Italy is notorious for its delays) to discourage claimants.

Importantly also, governments can limit demand for court adjudication by erecting a barrier to access by charging fees. In fact, there are fees for lodging a claim and/or for having a full hearing, whether in labour courts or civil courts in many of the countries covered in this book. The exceptions are

the labour courts in Ireland, South Africa, Sweden and until recently (2013) Great Britain. France will abolish its modest filing fee in 2014.

Another way that governments can limit demand is by the institutionalisation of workplace employee representation – especially if, as in Germany (Chapter 4), there is an express injunction on workplace bodies to ensure that laws are complied with and to filter disputes before they reach the courts. At the end of the day, however, governments cannot determine demand; they can only reduce it.

Conciliation and mediation

Another way in which governments can reduce demand for litigation in the courts is by erecting conciliation and mediation gateways, through which parties have to pass, before access to a court. If a settlement is achieved through conciliation or mediation, a dispute does not have to be heard by a court. Such alternative dispute resolution is cheaper for the public purse, not least because conciliators/mediators are mostly paid less than professional judges and normally less administration is needed in terms of case management (fewer documents, for example). It can also be cheaper for the parties as the dispute is settled earlier and more informally.

Conciliation and mediation are, in practice, interchangeable terms as both are voluntary in the sense that the two sides have to agree to a settlement. Unlike a court or arbitration, a decision is not imposed on the parties by a third party. As will be seen later, in some countries engagement with the conciliation or mediation process is mandatory, that is the parties must (not may) attempt to reach a settlement through conciliation or mediation, before adjudicatory action is taken, even though any settlement remains voluntary; (see Chapter 10, South Africa; Great Britain from 2014, Chapter 5; and Germany, Chapter 4).

In both conciliation and mediation there are national variations in the mechanics. The styles of the conciliator and mediator vary between a facilitative and directive style, depending largely on the character of the conciliator/mediator and national traditions. In Great Britain conciliation is normally conducted by email or telephone and mediation by face-to-face meetings, but that distinction is not made elsewhere. For instance, normally in South Africa conciliation is conducted face-to-face, as is mediation in New Zealand.

In some countries in this book, there are separate institutions for conciliation/mediation, which are government funded. For instance in New Zealand, mediation is carried out by The Mediation Service of the Ministry of Business, Innovation and Employment. In Great Britain the Advisory, Conciliation and Arbitration Service (Acas) offers conciliation for all claims lodged at the labour court. In other countries, the court provides conciliation/mediation which is carried out by a professional judge. In Germany, there has long been a requirement to attempt to reach an amicable