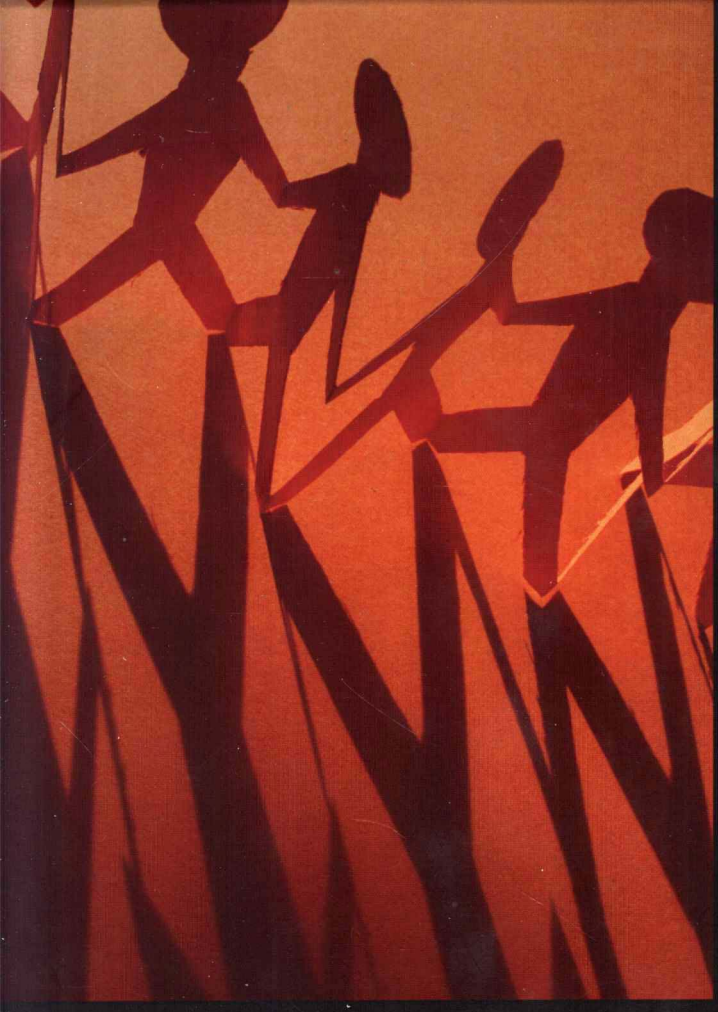

MAKING EMPLOYMENT RIGHTS EFFECTIVE

ISSUES OF ENFORCEMENT AND COMPLIANCE

Edited by Linda Dickens

Making Employment Rights Effective

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Preface

The completion of this book owes much to the support given to me by colleagues in the Industrial Relations Research Unit and the Industrial Relations and Organisational Behaviour Group of Warwick Business School, University of Warwick. I am grateful for their unselfish collegiality during 2011—a difficult time both institutionally and for me personally. Throughout the project valuable administrative and secretarial assistance was provided with cheerful enthusiasm by Natalie Johnson. Above all I wish to record my thanks to Michael Terry who performed many and diverse roles essential to my work on this publication and more generally.

Linda Dickens

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Contents

1

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

LINDA DICKENS

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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2

The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms

GILLIAN S MORRIS

THIS CHAPTER CONTAINS a broad overview of the development, range and nature of statutory employment rights and the current mechanisms for their enforcement. As such, it does not discuss in detail the content of these rights (see generally Deakin and Morris 2012) or the reasons for their introduction (see Davies and Freedland 1993, 2007). Rather the aim is to provide a context for the chapters which follow. The enforcement mechanisms themselves divide into those which are based on individual complaints that a right has been breached and more proactive mechanisms of protection through a licensing or inspectorate model or other forms of administrative enforcement.

THE DEVELOPMENT, NATURE AND RANGE OF STATUTORY EMPLOYMENT RIGHTS

Statutory employment rights covering the workforce as a whole were introduced only recently in Britain. The legal relationship between employer and worker in British law is based on an individual contract, enforceable through the same courts which enforce other types of contract. Historically, the brake on the exploitation of workers which a 'freedom of contract' model could produce came not from legislation but from collective bargaining. In major industries key terms of the employment relationship, such as pay, hours and holidays, were derived from collective agreements between employers or employers' associations and trade unions, whose provisions were then incorporated into individual contracts. From the end of the nineteenth century, and more actively from the end of the First World War, it became government policy to support collective bargaining as the preferred method of determining terms and conditions of employment, including in

its own role as employer (Fredman and Morris 1989). The trade union movement supported this preference for 'voluntarily-determined' rather than statutory standards, which was combined with a reliance on voluntary procedures for dispute settlement negotiated by the collective parties rather than resorting to litigation. Substantive statutory regulation of the employment relationship was essentially confined to matters which collective bargaining did not in practice cover, such as health and safety, or sectors or groups of workers which were difficult to organise or otherwise outside the reach of collective bargaining. Thus, special provision was made for the working hours of women and children and from 1909 there was a statutory scheme for minimum rates of pay (and subsequently other terms of employment) to be set by trade boards (later called wages councils) in sectors where the absence of collective bargaining left workers vulnerable to exploitation.

The residual role of statute as a source of regulation has been transformed over the past 50 years. The process began modestly, with the introduction of the right to a written statement of employment terms and minimum notice periods in 1963. 1965 saw the introduction of statutory redundancy payments for no-fault economic job loss, followed by a broader range of individual rights in 1971, most notably the right not to be unfairly dismissed. The 1970s also brought the right to equal pay for men and women and individual rights in the areas of sex and race discrimination; maternity; and membership and non-membership of, and participation in, trade unions. The 1979–97 Conservative governments sought to deregulate the labour market both by weakening trade unions and relaxing or removing statutory standards; the powers of the long-standing wages councils, for example, were curtailed and eventually abolished. However, there were limits to the deregulatory strategy: obligations resulting from membership of the European Community (now the European Union) required new or extended statutory rights, such as rights on transfer of a business and a broader scope for equal pay. Protection against disability discrimination was introduced following domestic pressure. The advent of a Labour government in 1997 brought more fundamental reforms, the most notable being the introduction of a national minimum wage to which the trade union movement had dropped its historical opposition. Further EU obligations also produced important changes, particularly general restrictions on working time; rights for part-time workers and those working under fixed-term contracts; rights to non-discrimination on a much wider range of grounds, including age; and 'family-friendly' rights. New rights for agency workers, again required by EU law, were introduced by the Conservative–Liberal Coalition Government which took office in 2010.

The major areas covered by the multiplicity of statutory rights which now govern the employment relationship include those listed in the table below (Dickens and Hall 2010: 304).

Table 1. Individual statutory employment rights

(1) Statutory employment rights in place in 1997 include:
- a minimum period of notice of termination;
- a statement of the principal terms and conditions of the contract of employment and of discipline and dismissal procedures;
- an itemised pay statement;
- a statement of the reason for dismissal;
- protection against unfair dismissal;
- protection against discrimination on grounds of race, sex and disability;
- time off work for ante-natal care;
- maternity leave and pay;
- return to work after leave for childbirth;
- time off work for various public and trade union duties;
- equal pay and other contractual terms as between men and women;
- redundancy payments;
- protection against dismissal or action short of dismissal on grounds of trade union membership, non-membership or union activity;
- preservation of acquired rights on the transfer of undertakings;

(2) Statutory employment rights introduced since 1997 include:
- the national minimum wage;
- protection against dismissal or detriment for 'whistleblowing';
- the right to be accompanied in grievance and disciplinary hearings;
- statutory limits on working time;
- paid annual leave;
- parental leave;
- time off for family emergencies;
- the right to request flexible working;
- paternity leave and pay;
- adoption leave and pay;
- equal treatment for part-time workers;
- protection for fixed-term employees;
- protection against discrimination on grounds of age, religion or belief and sexual orientation.

(3) Statutory employment rights introduced since 2010 include:
- protection for agency workers

Source: Dickens and Hall 2010: 304.

The significance of statutory rights as a source of employment protection in Britain was enhanced by the radical decline in the coverage of collective bargaining since the early 1980s (Brown 2010). The proportion of employees covered by collective agreements fell from 64 per cent in 1984 to 41 per cent by 1998 in workplaces with 25 or more employees (Cully et al 1999: 242; Kersley et al 2006: 185). Collective bargaining is now largely confined to the public sector; the 2004 Workplace Employment Relations Survey found that it was used in only 14 per cent of private sector workplaces (Kersley et al 2006: 179–81). Moreover the range of issues over which bargaining took place has also shrunk (Brown and Oxenbridge 2004: 70). Thus, far from being an adjunct to collective bargaining, statutory minimum standards are now for many workers the main source of protection in relation to fundamental terms, such as pay, hours and holidays. They are also particularly important in relation to discipline, termination of employment and equality.

This book is concerned primarily with the mechanisms of enforcing employment rights rather than their substantive content. However there are certain important features of statutory employment rights which are integral to enforcement and compliance. The first is the technical complexity of many of these rights, which can make it difficult for workers who have no access to specialist advice to claim them and potentially poses problems for employers seeking clarity about their obligations. Moreover, the incremental approach to legislation has meant that rights are located in a wide variety of statutes and secondary legislation rather than being collected in a single document; indeed, the relevant provisions governing a specific right may themselves be scattered among different legislative instruments. The second important feature is the partial nature of their coverage and consequential difficulties in determining whether or not an individual is covered by them. Many significant rights, notably those available on termination of employment, are confined to 'employees', although others, including the National Minimum Wage, limits on working time, and protection against discrimination, apply to the wider category of 'workers'. An 'employee' is an 'individual who has entered into or works under ... a contract of employment'; 'contract of employment' is, in turn, defined, as 'a contract of service or apprenticeship'. The term 'worker' is not identically defined in every statute, but usually refers to an individual

> who has entered into or works under (or, where the employment has ceased, worked under) (a) a contract of employment, or (b) any other contract ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or undertaking carried on by the individual.

In very broad terms, the category of 'employees' was traditionally intended to distinguish dependent or subordinate labour, subject to the employer's direction and control, from more independent or autonomous workers.

However, this form of demarcation has proved increasingly difficult to apply (Deakin and Morris 2012: paras 3.18 *et seq*). Historically, the case law adapted to allow highly skilled workers employed by a single employer to be classed as 'employees', despite their ability to exercise professional discretion, but it has proved much less able to accommodate individuals who are in a high degree of economic dependence but may lack other formal attributes of a contract of employment. There is a particular problem in relation to 'casual' workers who are offered work only when it becomes available because of the (contentious) insistence by the courts that there should be subsisting mutual obligations between the parties in the form of a requirement to work and to offer work in order for a contract of employment to exist. This has the effect of excluding those in precarious work relationships who may be most in need of protection. In the National Minimum Wage Act 1998, specific provision was made for homeworkers, whose status may otherwise have been uncertain, as well as for 'workers' generally. However this approach has not been adopted widely, nor was the opportunity taken by the government to change the scope of application of pre-existing rights, which remains ill-matched to patterns of employment in the contemporary labour market (Dickens 2004; Leighton and Wynn 2011). Indeed, even where legislation does extend to 'workers' the courts have recently emphasised the need for there to be an element of direction from the recipient of work or services to distinguish 'workers' from independent businesses, an approach which risks unduly narrowing the scope of protection. In summary, therefore, although on one view the rights listed in Table 1 could be said to be sufficiently comprehensive to constitute, in essence, a labour code, they are much less universal and coherent in their application than such a description would suggest. A further limitation on the coverage of many rights is the requirement for an employee to have worked for the employer for a minimum period of time; to claim unfair dismissal, for example, at the time of writing the employee requires one, and from April 2012 will require two, years' 'continuous employment' (with specified exceptions, such as dismissal on grounds of union membership and whistleblowing). This excludes those on short-term contracts and may encourage employers to shed staff before they qualify to claim.

Practical guidance on conduct in many areas covered by statutory rights is contained in codes of practice. These are issued, variously, by the Secretary of State, the Advisory Conciliation and Arbitration Service (Acas), the Equality and Human Rights Commission (EHRC) and the Health and Safety Commission (now merged with the Health and Safety Executive: HSE). Those currently in force which are particularly relevant to individual rights are those issued by Acas in the areas of Disciplinary and Grievance Procedures (revised in 2009) and Time Off for Trade Union Duties and Activities (revised in 2010) and those issued by the EHRC and its predecessor bodies in relation to discrimination and equal pay.