BOOK REVIEW

Making Employment Rights Effective: Issues of Enforcement and Compliance

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Issues of enforcement and compliance have generally been the poor relations in any discussion of legal and regulatory regimes concerning the workplace. Though considerable attention has been paid to the conceptual and substantive aspects of collective bargaining and employment standards legislation, there has been relatively little examination of whether the models adopted have made a noticeable difference in the lives of workers.

Making Employment Rights Effective: Issues of Enforcement and Compliance provides such an examination in an interesting collection of essays focusing on enforcement and compliance in the context of statutory regulation of employment relationships in the United Kingdom. As one of the authors, Gillian Morris, points out in her chapter on the evolution of statutory employment rights, this focus is significant in two ways. First, statutory protections of employment rights are of relatively recent vintage in the U.K.,1 and the period of roughly 50 years over which the current range of standards has developed provides an interesting basis for study; the period is long enough that many statutory schemes have gone through a number of variations, and some conclusions can be drawn. As Morris further points out,2 many of the matters now addressed through statutory regulation were once addressed at the bargaining table, and the expansion in the reach of statutory employment standards has coincided with the

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2 Ibid at 10.
shrinking sphere of influence of collective bargaining. It might also be noted — though the papers in this volume do not single this out for particular attention — that the developments described have taken place against the backdrop of an evolving system of European law.

The papers in the book cover a range of contexts, from occupational health and safety to equality rights, procurement practices and the small enterprise environment. Though some of the chapters deal with specific regulatory regimes, such as occupational health and safety or employment tribunals, other chapters look at cross-cutting themes such as the roles of management and unions. The premise is that, despite the burgeoning number of statutory regimes that establish standards, there is still a significant amount of unfairness in the workplace, and that this can in part be attributed to difficulties in enforcing existing rights and inculcating in employers a willingness to comply with the standards that have been set. The authors identify numerous sources for these difficulties, including inherent flaws in legislation, but a number of them link the ineffectiveness of regulation with the “smaller government” political agenda that has been in the ascendancy, with its emphasis on self-regulation and voluntary models of monitoring.

It is not possible here to provide a précis of each of the essays in this volume, but it may be helpful to outline several of them to convey the flavour of the discussion. In the first of these examples, Christopher McCrudden has contributed an analysis of the use of procurement practices as a lever for bringing about broader recognition of employment rights. Although McCrudden focuses on the use of public procurement, he suggests that procurement in the private sector might also be used to leverage compliance, although the dynamics would be considerably different. Procurement policies have been used as a means of promoting employment opportunities, encouraging “decent work” in terms of benefits, compensation or other conditions, and advancing the value of social inclusion. McCrudden cites the example of the Northern Ireland Fair Employment and Treatment Order of 1998, which required contractors to provide employment opportunities across lines of religious and political affiliation. In another example, the Transport for London project to extend the

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3 *Ibid* at 87.
East London Line in the runup to the 2012 Olympics included four commitments which contractors were required to make: “to have an equality policy, to have a training plan, to demonstrate how they were going to engage with the communities they were going to be serving, and to have a plan around how they were going to diversify their supply base.”4 Although procurement policies have been used in connection with a wide range of employment rights, McCrudden indicates that the most common theme is the advancement of equality rights. He concludes that while the examples he describes show how procurement can be used effectively as a tool for advancing workplace rights, questions remain about whether showpiece procurement contracts will always be operationalized to produce all of the benefits they were ostensibly designed for.

In an excellent chapter on equal pay, Simon Deakin, Colm McLaughlin and Dominic Chai examine the benefits and disadvantages of a number of regulatory mechanisms, including collective bargaining, direct regulation, and a more “reflexive” approach grounded in ideas of self-regulation and corporate social responsibility. The authors comment that the period after 2000 constituted a “natural experiment” in methods for narrowing the pay gap.5 The enormous increase in equal pay litigation undertaken by “no-win, no-fee” law firms both demonstrated the potential power of “hard law” in this area, and — in the view of some unions — threatened to undermine collective bargaining as a primary means of securing fairness for workers.6 The chapter presents the results of a study of pay audits conducted by a number of private and public employers; the study revealed considerable variation in the degree of transparency in the process followed and in the breadth of the information considered.7 The authors go on to describe what a reflexive approach to the equal pay issue would entail: the use of an overarching legislative framework which would establish the parameters of a process, and place general obligations on workplace actors; and the development by the actors themselves of practices suitable for a particular context.

4 Ibid at 97.
5 Ibid at 115.
6 Ibid at 135.
7 Ibid at 122-125.
Though the authors see promise in such an approach, they emphasize two things. The first is that the legislative framework needs to be sufficiently robust to ensure that any process will meet basic standards in certain respects. In this connection, they interpret the 2010 decision of the Coalition Government to freeze the provision of the new Equality Act 2010 requiring disclosure of gender pay inequalities by employers as an ominous sign. The second is that they do not see a reflexive approach as eliminating the need for “hard law.” In their view, the best long-term hope for addressing pay inequities lies in solutions negotiated by employers and the representatives of their employees. It is necessary, however, to retain a strong statutory framework — and the possibility of litigation — to encourage this to happen.

In an interesting chapter on the role of trade unions, Trevor Colling traces the shift from the vaunted British system of “collective laissez-faire” under which trade unions played a preeminent role in setting the terms and conditions of employment for British workers, to a regulatory regime with a more individualized emphasis. As Colling points out, the state played a role in supporting collective bargaining, but this role changed and became more explicit beginning in the 1970s with the passage of regulatory statutes aimed at least in part at curbing the influence of trade unions. Though not all of the subsequent wave of regulatory legislation was based on anti-union premises, it did have the effect of swinging the pendulum in an individualistic direction. Colling suggests that despite this focus on the terms and conditions of individual workers, the “current crisis in dispute resolution stems from an individualized system straining to deal with collective problems.”

In this environment, trade unions are struggling to find ways of utilizing the new statute-based articulations of workplace rights as a basis for collective representation. To some extent, the adaptability of unions and the flexibility of the traditions of collective bargaining have allowed unions to continue to play a role in mobilizing workers

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8 Ibid at 115.
9 Ibid at 135.
10 Ibid at 188.
11 Ibid at 184.
on a collective basis, by insisting on rights which are now defined in individual terms. Changes in the legal framework brought about by the ideological reorientation and financial strategies of successive governments have meant, however, that unions must play their revised role in the face of significant constraints, and Colling concludes that it remains to be seen whether unions can rally from their current weakened state to recapture the more influential position they once enjoyed.

As these examples show, the papers in the book cover a wide range of subjects. Collections of this kind sometimes have a rather miscellaneous air, and the efforts of editors to identify what they have in common can seem laboured. In this case, however, the volume succeeds in achieving a sense of overall coherence, and the papers are tied together by an identifiable set of common themes.

The most obvious commonality is the focus on issues of enforcement and compliance. In each of the essays, the authors are careful to direct attention to mechanisms for enforcement, to the role played by various actors in upholding workplace rights (or not), and to the prospects for making various kinds of statutory regimes more effective.

Other common threads emerge as well. One of them is that the succession of statutory initiatives to regulate workplace rights since the 1970s has produced a strikingly heterogeneous array of entitlements and mechanisms for their realization. From the role of the taxation authorities in pursuing minimum wage arrears to the role of the Advisory, Conciliation and Arbitration Service (ACAS) in providing a range of dispute resolution options; from the flexibility available to those negotiating procurement contracts to the more direct regulation of health and safety standards; from the role of judges to that of employers, to that of government officials — the current range of mechanisms, actors and legal texts does have the overall character of a “natural experiment” to determine what might work. While some efforts have been made to consolidate or streamline the regulatory regime, notably the drawing together of a number of human rights statutes into the Equality Act 2010, there remains a patchwork of regulation comprised of different statutes based on divergent conceptual starting-points. As a number of the authors observe, the

12 Ibid at 186.
complexity of this system often leaves the individual worker who is
the notional beneficiary of the legislation in a state of total bewilder-
ment and unable to make effectual use of the mechanisms supposedly
at his or her disposal.

Another theme identifiable across the volume has to do with
the stamp left on labour and employment law by the ascendancy dur-
ing the last several decades of neoliberal political ideas and finan-
cial exigency. Much of the legislation discussed in the book, such
as anti-discrimination legislation, was not directed at the objective
of weakening collective bargaining or restricting the capacities of
trade unions. Nonetheless, the combination of legislation that was
part of an assault on trade union influence with other legislation not
conceived in these terms led to a shift from a collective conception
of employment rights to an individualistic one. The neoliberal pol-
itical turn that has influenced Labour, Conservative and Coalition
governments since the 1970s has featured, among other things, a
determination to reduce the role of government and to display greater
confidence in the ability of social actors to make fair and ethical deci-
sions on their own. Though the authors in this book who comment on
specific instances where self-regulation is relied on do not rule out the
potential of voluntary compliance regimes to secure workplace rights,
they do caution that such systems need to operate within a framework
where “hard law” solutions can be accessed if necessary.

Even where statutory regimes are designed to regulate in the
more traditional sense, by complaint, investigation and quasi-criminal
enforcement, cycles of financial desperation have led governments
to withdraw the resources that are necessary to make these systems
effective. A number of the authors in the book comment on the emp-
tiness of statements that a workplace right exists if there is no way
for an employee to pursue a complaint that the right has not been
recognized by the employer.

Finally, though each of the chapters in the book is devoted to a
particular issue, the volume as a whole permits interesting compari-
sions of different kinds of remedial strategies. The book examines the
regulatory regime that has emerged in the last 40 years. Over that
period, dramatic developments have taken place in the organization
of work, the political alignment of nations, the world economy, the
status of equality as a value in the workplace, and public attitudes
toward the legitimacy of collective action. A study of enforcement
and compliance in relation to particular employment-related statutes cannot hope to address all of these far-reaching changes. To look at it the other way around, however, their impact on the regulation of employment has been significant, as the authors of the papers here are clearly aware. One of the reasons for the neglect of remedial issues in the study of labour and employment law may have been the assumption that the major actors in the system shared an understanding of how disputes over workplace rights could best be resolved. In a changing political and economic climate, the question of how to implement a public consensus about the need for a workplace right or standard has become a matter of considerable debate. The authors represented in this volume have succeeded in outlining the dimensions of this question and identifying the aspects of it that require further attention.

The pre-1970s system of industrial relations in Britain, with its voluntarist ethic and its resistance to legislative support, seemed somewhat mysterious to North Americans weaned on Wagner Act pluralism and a collection of employment standards legislation. The current spectrum of more individualized legislative arrangements described in this book will no doubt also seem somewhat puzzling to a North American audience, interesting though it is. The overall message of the book, however, is a useful one for Canadian observers of labour and employment law. To the extent that our own mechanisms of enforcement and compliance are understudied and inadequately conceptualized, we would do well to consider whether the existing range of legislative regulation and voluntarist efforts provides sufficient support to the system of workplace fairness we would like to see.