Employment Law Review

Hugh Collins
London School of Economics

The Regulatory Impact of Employment Law

- Original purpose of employment law review was to reduce the impact of employment laws and regulation on business.
- Assumption that light employment regulation affords British business a competitive advantage in comparison with other countries, which should lead to higher levels of employment and greater profits.
- Controversial: compare with Germany eg unemployment rate of slightly above 5% compared to UK at nearly 8%.

Deregulation

- Econometric studies have concluded that laws such as the law of unfair dismissal are neutral with respect to levels of employment.
- Eg. increase in the qualifying period for unfair dismissal from 1 to 2 years seems very unlikely to have any positive net effect on employment levels. Perhaps a few more employees will be hired, but equally a similar number will be fired.
- It follows that deregulation is unlikely to impact on levels of employment.

More ambitious aims of ELR

- Taking people on- making it as easy as possible for businesses to recruit their first, and subsequent, members of staff
- Managing staff- getting the Government out of the relationship between employer and staff by removing inflexible processes and requirements and allowing grown-up conversation between employers and staff
- Making change easier – allowing change to happen in a way that is flexible and economically efficient, whilst remaining fair to individuals.

New Coalition Agenda?

- Continuity of deregulation from Thatcher eg qualifying period of 2 years for unfair dismissal; cap on compensatory award
- Early dispute resolution (and reduction of tribunal cases and costs) agenda derived from New Labour: eg compulsory ACAS conciliation;settlements; ‘grown up conversation’.
- Anti-EU gold-plating – Thatcherite spirit

Tensions in goals

- Facilitating the use of settlements and early conciliation by ACAS before a tribunal claim commences will encourage ‘grown up’ (brutal?) conversations and make dismissal more efficient (probably), but
- This involves more government intervention in the workplace
- This requires two new sets of regulations
- Will this initiative work? Depends on ACAS funding and the problem of perception.

Reality and Perceptions

- Distinguish between actual costs to business of laws and regulation and the perception of regulatory burden held by business.
- Even though the UK is a relatively light touch country with respect to employment laws, employers often perceive a high level of regulatory burden.
- Gap between perception and reality has many aspects: eg dismissal, tribunal claims, levels of compensation.

Dismissal

- Many employers are reluctant to recruit new employees in the belief that it will be difficult to dismiss these employees either if they turn out not to be satisfactory or if there is an economic downturn for the business.
- Many employers believe that there is a statutory dismissals process which they are required to follow (untrue) and there seems to be a related belief that if this process is followed the dismissal with be legally fair (also untrue).

Tribunal Claims

- In practice, few employers will end up in tribunals.
- According to the latest available statistics, there were 230,000 separate claims launched in tribunals, of which 73% were settled, withdrawn or struck out.
- Of the remaining 27%, only 12% of claims successful.
- So employers have about a 90% chance of winning or settling the claim for a small sum.
- Presumably the plan to introduce tribunal fees (and other ways of imposing costs on claimants) and the 2 year qualifying period for unfair dismissal will significantly reduce the number of claims (I estimate 20%).

Levels of compensation

- Employers believe that dismissal exposes them to high levels of compensation and litigation costs.
- Regarding compensation levels the most recent statistics indicate that the median award for unfair dismissal is £4560, and for sex discrimination (only 166 cases) is £6746.
- Litigation costs are substantial, of course, if legal advice is taken, but can be avoided usually easily by settling cases.
- The ERR Bill adds the financial penalty for aggravating behaviour by employer

Conclusion on Reality and Perception

- The government acknowledges the gap between perception and reality
- Responds through the employer's Charter and its excellent website
- Oddly, though, the evidence is that merely by talking about employment regulation and red tape, including discussions of proposals to deregulate, the government adds to the anxiety of employers about the dangers of failing to comply with the law. Modern politics sets agendas by creating anxieties about issues – be it terrorism, immigrants, or bankers bonuses – and employment law is no exception.
- It seems to follow that if the government remained completely silent about employment law, that would reduce perceptions of the regulatory burden, which in turn might achieve the positive benefits that are sought.

Gold-plating of EU Law

- A subsidiary target of the employment law review is to remove gold-plating of the EU Directives in national legislation that gives employees greater rights than those provided for in the EU measure.
- Our laws rarely comply with the letter and the spirit of EU Directives. E.g. holiday pay.
- Targets of alleged gold plating include: agency workers directive, collective redundancies, and TUPE.

Agency Workers Directive

- Institute of Directors and the British Chamber of Commerce, attacks alleged gold-plating (by the civil service) in respect of the temporary agency workers directive.
- Allegation: the Directive only applies to ‘statutory pay and holiday’ not terms of employment in general.
- Article 5 of the Directive states:

  “The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.”
- There is nothing there about a limit to statutory pay and holiday, though presumably, whatever they are, they are included.
- In the March 2013 employment law progress review, the government accepts no gold-plating exists.

Collective redundancies

- EU law does not set a fixed minimum period for consultation with representatives of the workforce. The requirement is simply:

  'Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement' (Art 2).
- There is a requirement to notify public authorities of collective redundancies of more than 20 employees 30 days before they take effect (article 3).
- UK management often do not notify workers until the final decision has been made to make dismissals, which is contrary to the spirit of the EU law (but tolerated by UK courts), which hopes to facilitate agreements about alternatives to dismissal and measures to help find alternative employment. Few notifications are made 'in good time' in that sense.
- A long consultation period may be rather pointless in the UK if the decision has already been made.
- But the current law may have a beneficial effect because it has probably helped employers to adjust to adverse market conditions by measures other than dismissals such as agreements with the workforce regarding shorter-working weeks and pay cuts.
- The important thing to do is to have 'grown-up' conversations early and quickly to permit concession bargaining.

Transfer of Undertakings

- Owing to considerable ambiguities in the original law, courts had to make up the rules on the hoof, with sometimes unexpected and paradoxical results eg ‘transfers’ where no staff and no equipment were transferred at all.
- EU and UK government tried to clear up the mess by a revised law, most of which was extremely beneficial to certainty and reduced litigation.
- It is possible that some of the UK rules regarding sub-contracting go further than is required by EU law,
- But to abolish those rules will plunge us back into the uncertainty that applied before.
- Here removal of (alleged) gold-plating will simply cause confusion and additional legal costs.

Workers' Rights

- Inalienable rights of Employment Rights Act 1996 (forces indirect attacks eg qualifying period, tribunal charges)
- Human rights (and anti-discrimination) should be protected again even indirect attacks

Questioning rights

- Employee shareholder can alienate labour rights: symbolic difference between property ownership and cash; unitary frame of reference; implications for micro-businesses/start-ups?
- Fines imposed on employers for abusive management practices: payment to the state for gross violation of labour rights rather than increased compensation to: employee (always denied by the courts).