Review of Seminar 5 – 'The Changing Shape of Regulation at the Workplace'

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This paper provides a summary and analysis of the key themes that emerged from the fifth seminar of the series held at the University of Warwick on the 5th June 2013. It is intended to inform, and provide a link to, the rest of the series. It is important to note that the contents reflect the views of the author and not necessarily the views of those presenters and contributors referred to below.

There has been a shift in the main source of regulation at the workplace. As collective bargaining has receded, the legal framework has come to provide the main focus of policy attention, with implications for conflict articulation and resolution. The current policy emphasis is on reducing the scale and scope of regulation in order to reduce perceived 'burdens' on employers and spur economic growth. This seminar sought to explore the implications of changing forms of regulation and examine key tensions between notions of fairness, equity and efficiency which underpin the current policy debate. In particular in a series of presentations and wide ranging discussion it addressed main questions:

i) *What is the purpose and effect of employment regulation?*
ii) *How has employment regulation changed and with what consequences?*
iii) *What is the rationale behind current government policy in this area?*
iv) *What impact will these changes have on dispute resolution in the UK?*

1. The purpose and effect of employment regulation

As Melanie Simms from the University of Warwick explained in the first presentation, the UK's system of employment regulation was historically based on a system of voluntarism under which conflict was mediated and resolved through collective bargaining. Employment regulation was limited to providing a minimum level of legal protection against the worst excesses of exploitation and the 'establishment, enforcement and extension of worker rights rested on strong (workplace) unions'. Therefore, the resolution of employee grievances, disciplinary issues and other disputes rested on social processes of negotiation and in turn on the balance of workplace power.

For Hannah Reed, from the TUC, the imbalance of power within the employment relationship provided the underpinning rationale for a framework of legislative protection, however the lack of broad principles securing the relationship between social partners in the UK had tended to result in an over emphasis on the detail of regulatory measures. Matthew Percival from the CBI did not disagree that some regulation was necessary to ensure a consistency of treatment in the workplace - but generally reflected the view that regulation should provide a set of minima or a floor of standards. He argued that while regulation provided a buffer against the pressures of globalisation and international competition, it also needed to reflect the reality facing organisations operating in

challenging markets. In some respects therefore, these contrasting views encapsulate the tension between efficiency and equity within debates over employment regulation and the UKs system of dispute resolution.

Others on the panel debating this issue pointed to the role of regulation in providing signposts and guidance for managers as to how to handle difficult situations. For example, Fiona Hobbs from EEF argued that regulation had a value in pointing managers as to 'what to do' when things went wrong. This was particularly the case given the relative lack of confidence of many managers, an issue identified in previous seminars. Certainly the codes of practice and other forms of voluntary regulation are critical in this respect. In his presentation Steve Williams, from Acas, explained their general approach in developing codes of practice that establish clear principles which provide a foundation for good practice at the same time as providing flexibility of application. Importantly, despite perceptions of employers' dislike of regulation, Acas generally found that employers wanted clear guidance and examples as to how to handle certain issues.

In terms of the effect of regulation – there was broad agreement that by international standards, the UK was lightly regulated. David Coats (WorkMatters Consulting) pointed out that, according to the OECD, the UK was only third from bottom of their employment protection 'league table'. However, opinions among delegates and panellists differed as to the implications of this. From an employer and government perspective, this was generally seen as providing a clear competitive advantage. Other delegates questioned whether there was any evidence that 'light-touch' regulation had a positive impact on aggregate employment. Moreover, it could be argued that the effect of employment regulation is shaped by the perception of the legislative burden as opposed to its reality thus tempering any impact of reform.

2. The changing shape of employment regulation

While employment may remain comparatively lightly regulated, the voluntaristic model outlined by Melanie Simms has undoubtedly been eroded by the growing juridification of employment relations more generally and dispute resolution in particular. Sue Corby (University of Greenwich) and Paul Latreille (University of Sheffield) discussed the changing nature of employment tribunals in the UK – another issue which had been raised repeatedly during earlier seminars. Their presentation charted the growing formality of the ET system away from the original intention of the Donovan Commission to create industrial juries providing a quick and accessible source of justice. For example in 2008, two-thirds of claimants and respondents were legally represented compared to less than half in 1978 while tribunal procedure has come to more closely resemble civil courts. Corby explained that this is perhaps epitomised in the change in the treatment of witness statements – whereas witnesses simply 'told their story' during the 1970's, they are now required to submit formal statements that are taken as read in England and Wales. Corby and Latreille also pointed to the narrowing of accessibility with fewer hearing centres, the growing

complexity of application procedures, more extensive screening mechanisms and most recently, the introduction of employment tribunal fess. Furthermore, the tri-partism that was one of the essences of the industrial tribunal system has been progressively eroded. In particular the situations in which judges can sit alone have been extended from technical cases to unfair dismissal claims.

In her presentation, Melanie Simms examined the relationship between declining unionisation and growth of legal regulation. It has been argued by some that this expansion has reduced the demand for unionisation as workers are able to enforce their employment rights without the need for representation – however, in reality, unions have not only seen an extension of employment rights as a vital source of protection for their members but have increasingly relied on the enforcement of such rights to maintain and extend workplace influence.

However, as Simms pointed out, the ability of individuals to mount litigation without the support of trade unions is highly questionable (see Dickens, 2012). Not only is the UK system inherently reactive but the complexity of the legal framework makes it very difficult for unrepresented and vulnerable workers to successfully navigate. In this way the ability of individuals to challenge managerial prerogative and enforce legal rights has become increasingly dependent on their ability to finance legal advice and litigation. Moreover, this is unlikely to get any easier as a result of the introduction of employment tribunal fees.

In some respects this underlined a continuing theme form the series to date – the importance of channels of effective employee representation – not simply in terms of extending employment and enforcing employment rights but in providing channels through which informal processes of resolution can be maintained. David Coats argued that the decline of trade union representation and consequently the low levels of employee participation in decision making had a number of negative outcomes. For example, he suggested that this lay at the root of the growth in the volume of employment tribunal applications, high levels of unfair treatment and low levels of employee engagement.

Union decline and the development of the 'representation gap' places increased emphasis on other forms of voluntary regulation. Ed Heery (Cardiff) discussed the potential role of civil regulation of employment relations. In particular, the voluntary codes and guidance developed by civil society organisations and employer forums, which provide incentives to encourage good employment practice in areas perhaps not covered by statute. These generally take the form of charters, codes and statements of best practice and tend to apply to specific groups such as LGBT workers, women, disabled workers and carers, or to specific issues such as whistleblowing or bullying and harassment.

Compliance with these standards are based on incentives as opposed to the sanctions of legal regulation and this in turn tends to rest on the business case for ethical management. For example, Heery pointed out that organisations might expect that being seen to adopt

certain standards could aid recruitment and retention as well as enhancing corporate brands by providing an indicator of corporate social responsibility and citizenship. Perhaps more negatively he pointed out that organisations could also see this as a way of avoiding formal sanctions through litigation and avoiding being targeted by hostile campaigns – indeed this could mean that those organisations involved in activities which may be vulnerable to such issues may have the greater incentive to adopt.

As this perhaps suggests civil regulation is critically related to both legal and union based regulation. Indeed, it can be argued that some forms of civil regulation – or self-regulation – represent a strategy to pre-empt and undercut demands for statutory restrictions or measures. However, it can also complement and/or supplement existing legislation through codes of practice and guidance. While civil regulation tends to operate independently of collective regulation and outside union structures – unions can develop joint campaigns with some civil society organisations – for example working with Citizens UK over the campaign for the Living Wage.

In fact, the Living Wage represents one of the clear successes of voluntary regulation and its potential in stimulating a demand for perhaps more substantive government action. However, while civil regulation can boast impressive breadth of coverage often involving large and high profile employers, evidence of its impact is much more difficult to assess. In particular, there are concerns that compliance may lack any real substance and be limited to areas in which organisations can see a return to their 'bottom-line'. Nonetheless, while there is very limited research in this area, given the reluctance of government to reduce the breadth and complexity of employment legislation, it would seem that this form of regulation may become more influential.

3. Coalition policy – reform, de-regulation and early resolution

Against this backdrop, the reform of employment law and the UKs system of dispute resolution has become a major pre-occupation of government. The focus of policy debate over dispute resolution has revolved around employment legislation and particularly the extent to which existing legislation imposes unreasonable burdens on employers – reducing efficiency and stunting employment growth. Hugh Collins explained that the government's employment law review was based on the assumption that light-touch regulation provides the UK with a competitive advantage when compared with other nations. Collins however questioned this pointing to the example of the Germany which appears to combine a relatively 'tough' regulatory regime with high levels of economic performance.

The government also aimed to remove itself from dispute resolution – encouraging less formal and more flexible processes of resolution or 'grown-up' conversations between employers and their staff. In doing this, employers could manage change more efficiently. In policy terms this involves the increased use of 'settlement agreements' and an enhanced role in early resolution for Acas. As Collins pointed out, these changes actually threaten to

increase the scale and complexity of regulatory change – introducing new sets of regulations which could simply add to the confusion that the government is apparently targeting.

There has also been a shift in the nature of codes of practice and guidance. Steve Williams looked at the role of codes and guidance within the context of the overall government philosophy in this area as played out in the 'Red Tape Challenge' but also the potential of such regulation to provide employers with clarity and business certainty. In doing this he examined the careful trade-off or balance between regulation that enables business and that which constricts activity. Importantly Williams argued that the reception to codes of practice and guidance depended on the extent to which key stakeholders were consulted and involved and the perception of Acas as an independent and impartial body. Moreover, social partnership is a central part of the Acas approach, something that is clearly under pressure in other areas of policy formation.

Both Hugh Collins and David Coats, in their presentations, drew the important distinction between the actual costs and burdens to business and the perception of the regulatory burden held by business. Critically, while the UK has a comparatively light-touch employment regime, employers still see the system as complex and costly. Work conducted for BIS by researchers from Kingston University and TNS-BMRB (Jordan et al., 2013) found that employer perceptions of employment regulation did not reflect the reality and consequently did not appear to significantly shape behaviour – particularly with regard to smaller firms. They found evidence that 'the perception of legislative burden may be more indicative of employers' anxiety than the actual impact of regulation on running a business' (Jordan et al., 2013:44) mirroring another BIS study into the wider regulatory 'burden' (Peck et al., 2012). Moreover they suggest that this perception is driven by the volume of the 'anti-legislation discourse' as opposed to substantive effects.

Hugh Collins developed this point further arguing that employers often misunderstand the law related to dismissal. For example, there is a strong belief that there is a statutory dismissals procedure which they must follow – however, this was abolished in 2008. Similarly, he argued that the threat of employment tribunals is often overstated – few employers experience tribunals and just over 1 in 10 claims to employment tribunals are successful – or put another way in 9 out of 10 cases employers either settle or successfully defend the claims made against them. Furthermore, the employer perceptions of potential compensation is also often inflated – while maximum levels of compensation may be high the median award for unfair dismissal is just under £5,000 and for sex discrimination under £7,000.

4. The impact of reform – access, efficiency and innovation

Views as to the potential impact of employment reforms were, perhaps not unexpectedly mixed. There was a general welcome for specific measures such as the new Acas role in providing early conciliation. However, there was also some concern that the introduction of

fees could introduce a significant disincentive for employers to settle until they were sure that employees were going to pay fees. Hannah Reed argued that the government's review of dispute resolution was in fact a missed opportunity – and that some form of early assessment or sifting process with a senior judge would be an effective way of dealing with weak or speculative claims.

The introduction of employment tribunal fees split opinion. Matthew Percival of the CBI believed that fees would weed out weak and speculative claims. While a number of delegates argued that there was very little evidence to support this, Percival suggested that the experience of many of their members was that they were forced to settle claims to avoid the high costs of legal representation and management time involved in taking a case to hearing. Fiona Hobbs form the EEF was sceptical of the impact of fees arguing that legal advisors and trade unions may well fund claims. Delegates also raised the broader problem that by reducing the risks associated with dismissal the incentives for employers to resolve issues at an early stage could be reduced.

There was also some discussion of the 'protected conversation' aspect of settlement agreements – while some felt that they could provide a 'nudge' towards sensible and 'grown-up' conversations – a number of contributors voiced concerns that they simply added an additional layer of uncertainty and complexity into dispute resolution.

Paul Latreille looked specifically at the role of lay members on the Employment Appeal Tribunal and shed light on the government proposals to remove lay members. While these changes were justified on grounds of cost and speed they had received very little support during the consultation from employers' and employees' organisations. Contrary to expectation, research conducted with Sue Corby had demonstrated that the presence of lay members had an impact on the success rate of appeals. Firstly, judges sitting alone were generally more likely to grant appeals although this effect was more significant with appeals from claimants. While the reasons for this are not clear, survey evidence showed that in most cases lay members did contribute to decision making and most judges found this useful in terms of assessing evidence, making findings of fact and in reaching decisions on liability and remedy.

More broadly, as suggested above, it was argued that employers' perception of the nature of employment regulation and of the government's reforms could be a key factor in determining their impact. As Fiona Hobbs from the EEF argued, a fear of breaching employment law could create 'procedural stasis' and crowd out common-sense approaches to workplace disputes. Interestingly, as Hugh Collins pointed out, the government's own 'Employers' Charter' acknowledges that employer perceptions of employment regulation are often inaccurate – however, the government in effect adds to this anxiety and fear – particularly through the discourse of 'red tape' and regulation, which is then used to justify additional legislative change. Consequently he suggested that it was unlikely that reform

would significantly change the behaviour and conduct of employers, a view shared by David Coates.

Outside of the government's reform agenda, the seminar discussed the potential of change in two areas. Firstly there was some discussion over the practicability of radical change to the employment tribunal system – and a return to the original ideal set out by the Donovan Commission more than 40 years ago. The general view of delegates and panellists was that the system and the context had changed so substantially that a return to a less adversarial and legalistic tribunal system was not realistic. Secondly, David Coats argued that broader changes to the employment relations system were required to address the 'problem' of workplace conflict. In particular, there was a need to rebuild structures of employee representation and participation. Interestingly, this has been an argument made throughout the series. The difficulties of achieving this were once again discussed with Coats arguing that the Information and Consultation of Employee (ICE) Regulations were one route through which this could be done. However as was pointed out by John Purcell from the University of Warwick, the limited role of the regulations in triggering the adoption of consultative bodies and the ambivalence of national trade unions towards the ICE regulations suggested that this was also problematic.

5. Conclusion

The debate over the future of employment dispute resolution in the UK has largely been driven by employer concerns over the perceived burden of regulation and in particular an alleged vulnerability to speculative employment tribunal claims. More broadly, it is argued that anxiety over the prospect of litigation deters employers from employing new staff and from pursuing 'common-sense' and invariably informal solutions to difficult employment situations. Accordingly, the government has sought to reduce the risk of litigation by introducing a system of charges for bring an employment tribunal claim to hearing, facilitating financial settlements when terminating employment and extending the role of Acas in offering early conciliation for claims bound for the tribunals.

Curiously however, the government has done relatively little to address concerns, held by both employers and employees, over the daunting nature of tribunal proceedings. Thus there has been little policy discussion over radical alternatives to the adversarial and legalistic system that has developed over the past 40 years. In fact, the consensus of the seminar was that any return to Donovan's original conception of tribunals was probably now unrealistic.

While the concerns of employers are undoubtedly genuinely held, the seminar heard evidence that employers' perception of the regulatory burden did not match the reality. Consequently, it was suggested that the government's raft of changes would do little to alter the conservative and risk averse approaches adopted by many employers, and particularly those with limited access to specialist advice and expertise. Perhaps more

fundamentally, current policy arguably neglects the impact of fundamental changes to the structure of employment relations. More specifically, the absence of representative structures in the majority of British workplaces not only makes the early resolution of conflict less likely but threatens to undermine employee engagement.

6. References

Dickens, L. (2012) *Making employment rights effective: issues of enforcement and compliance*, Oxford: Hart Publishing.

Jordan, E., Thomas, A., Kitching, J. and Blackburn, R. (2013) 'Employment Regulation – Part A: Employer perceptions and the impact of employment regulation' *Employment Relations Research Series,* 123, Department for Business, Innovation and Skills.

Peck, F., Mulvey, G., Jackson, K. and Jackson, J. (2012) *Business Perceptions of Regulatory Burden*, report for BIS, online at: http://www.bis.gov.uk/assets/biscore/better-regulation/docs/b/12-913-business-perceptions-of-regulatory-burden.pdf

7. List of Presentations

Mel Simms (Associate Professor of Industrial Relations, University of Warwick) – *'Nature and implications of collective bargaining decline'*

Ed Heery (Professor of Employment Relations, Cardiff University) – *'Emerging/new forms of regulation'*

Steve Williams (Head of Equality, Acas) – *'Regulating through guides and codes'*

Hugh Collins (Professor of English Law, London School of Economics) – *'Reflections on the current labour law reform agenda'*

Sue Corby (Professor in Employment Relations, University of Greenwich) and **Paul Latreille** (Professor of Management, University of Sheffield) – *'Changing nature of employment tribunals'*

Practitioner perspectives roundtable, Chair: Ed Sweeney (Acas); Participants: Mike Emmott (CIPD), Fiona Hobbs (EEF), Matthew Percival (CBI), Hannah Reed (TUC)

David Coats (Founder and Director of WorkMatters Consulting) – *'The need for workplace institutions'*