Reading at Work and Industrial Christian Fellowship presented

Law and Justice in the Workplace

with Laurie Anstis,

Employment Lawyer & Chair,

Law Society's Employment Law Committee.

Preamble

What is the role of the law in establishing and promoting justice in the workplace?

Laurie Anstis looks at how the law approaches workplace justice, and considers both the strengths and limitations of law as a means of achieving justice between workers and employers.

- What does the law say about fairness in the workplace?

- How can workers and employers enforce their legal rights?

- How does the law relate to other means of achieving workplace justice?

- Is there more that the law can do, or has it already gone too far?"

In the parable of the workers in the vineyard (Matt 20, 1-16), Jesus described how those who had worked through the heat of the day complained that they received the same pay as those who had only worked for an hour or two. They had received exactly what they were promised, but that didn't seem fair to them when others received the same for less work.

If he had told that story in the UK today, Jesus might have gone on to say that those who had worked through the day lost their subsequent claim for higher wages in the employment tribunal.

Law, as set out by Parliament and interpreted by judges, has a greater influence in the workplace than ever before. When looking at the subject of workplace justice, how often do we think of law and those involved in forming it? In the past month alone, Parliament has been debating restrictions on a trade union's right to call a strike, and judges in the Employment Appeal Tribunal have been considering whether an employer can insist on a worker speaking English in the workplace.

Introduction

Dave Law welcomed everyone to the event on behalf of Reading at Work and Revd. Phil Jump outlined the history of ICF, being founded at the Navvy Christian Fellowship and welcomed Laurie Anstis as speaker on behalf of the co-sponsor of the event, the Industrial Christian Fellowship (ICF).

History of Employment Law

Laurie began by outlining his career of twenty years as an employment lawyer, including now with his chairmanship of the Law Society employment law committee, which considers what interventions and suggestions should be made into the UK legal system by the Law Society in the field of Employment Law. Laurie referred to a quote from 1970: a man wants nothing more than to have nothing to do with the law.

In 1349 a law was passed under Edward III shortly after Black Death, when 30-40% of the English workforce had died and those remaining had a strong position to bargain for betters terms. The King determined this was bad balance of power and passed the Ordinance of Labourers, meaning that workers could not demand more than they had been paid before the Black Death had swept across the Country.

The law sometimes thinks that market forces cannot provide the answer to all problems, which has led to legislative intervention in employment law ever since (even if less so under right of centre Governments).

One weakness is how is the law to be enforced – how could this law of Edward III be enforced, for instance. After ten years a further Ordinance for Workers was passed with a prison sentence if the law was not upheld. Since then, Laurie noted the problems remain the same for employers and employees that the law needs to be enforced as well as passed in Parliament.

From this point in the 1300s until 19th Century little happened to develop employment law – which was known at this time as Master and Servant law – and the balance of power lay probably more with the Master than the Servant. *Thomas v Mason* from 1845 was a case involving a servant asking for time off to visit her dying mother, which was denied by her master, after she left anyway and

was subsequently and accordingly dismissed. The court upheld the master's right to dismiss in the circumstances of the case. This case is still applicable to some extent today, that the employee needs to follow the instructions of the employer as set out in their contract of employment. Is that a fair outcome? Possibly not – the law was not about was is fair or not fair. Whilst not studying theology in detail during the seminar, Laurie referred to the parable of the vineyard as noted in the preamble included above. The defence of the freedom of contract could be seen as the summary of the case – a continuing principle that is applied today.

The 19th Century was the rise of collective labour and trade unionism. The authorities passed a number of Master and Servant Acts – e.g. 1867 – with criminal sanctions for those who breached their contracts. A weakness of the law is that generally it is the powerful who form the laws that are passed and can therefore hold a position against the weaker in the society. Whilst there is the hope that the Government of any day will pass laws to redress the balance, this may not always be the case. Collective law was then the focus, with law covering industrial relations – covering primarily strikes by the workers and the requirements for them to be permitted. Generally, the employment law that we currently know and focusses on the individual has come into force since late 1970s and increased exponentially the volume of law that needs to be considers in matters of employment law.

20th Century Radical Changes

Barbara Castle's study in the late 1960s showed that between five and ten million days a year were lost to strikes (which can be contrasted with now around seven hundred thousand days a year). Often generated by the dismissal of a colleague, it led to union action through industrial strike action of the workers, being in support of redress for the individual dismissed by their return to employment or other remedy. The late 1960s saw a Royal Commission review conducted by The Rt. Hon. Lord Donovan, who was a lawyer by background, and suggested new laws that would cover unfair dismissal (the Commission itself being 1965-1968.) A lot of the law arising in 1970 from the Royal Commission is very familiar to current employment law in its general approach and principle. It included a requirement of valid reason for the dismissal, and cited specific reasons why someone cannot be dismissed, including social origin (class), which are still very important to workplace justice (Paragraph 1058 of the Commission's report). It also referred to pre-litigation discussion, which should always be examined (Paragraph 584), and can be seen as a forerunner to ACAS in conceptual approach (ACAS being the Advisory, Council and Arbitration Service, which is a Crown non-departmental public body of the Government of the United Kingdom). Some may also link this approach with 1 Corinthians 6 ("Is it possible that there is nobody among you wise enough to judge a dispute between believers? But instead, one brother takes another to court—and this in front of unbelievers!", NIV Vs 5b-6) and Paul's desire not to see Christians go to court against each other, and this still echoes now with going to court on employment law being universally considered the measure of last resort.

Employment law steps in where market forces do not lead to a just resort. So here in the 1970s some will argue that employment law stepped in with the individual approach where the 'left-wing' collective bargaining approach previously adopted had not stepped in leading to a just and right result. Employment law moved from one approach to another in seeking a just and fair result.

Thus to the modern era, and the 21st Century, and apart from one element, all law starts with these reforms of 1970 and the move to an individual basis of employment rights. Through the Victorian era and before, the England had developed a very sophisticated system of land and company law by contrast, seen as world leader, but before 1970 there was really very little individual employment law in existence.

So to now in our present age, employment law sets minimum standards: minimum wage, working time directive regulations derived from the EU requirements setting an effective minimum downtime threshold. There is continued development of discrimination and human rights legislation and how this impacts on employment rights of the worker, and the employer. Other examples in common currency at the moment include the nature of flexible working and the impact on the law upon this for both employer and employee – agency workers, zero hour contracts, parental and adoptive leave.

All of this development has led to contrarian views, including a criticism of employment law that it is now too complicated. Recently England has seen the requirement to pay fees to the Court as well as to lawyers in order to take an employment law claim – in 2013 the number of claims appeared to fall by around half following the adoption of these fees. Is this a sign that Employers changed their behaviour at that time? Undoubtedly not the case. The present Government is currently reviewing whether these fees should be retained.

Employment Law Themes & Discussion Points

Firstly, on the matter of the national minimum wage and the current rates, slightly higher rates will apply from 1 April 2016. Are they the right rate and what they should be? Should exceptions be granted? Think too more widely of volunteers and also those who are returning to employment but do not yet have a full skill set, and whether they should be held to the same wage rates. Also apprenticeships and whether these are used to reduce employment cost in an inappropriate manner by employers. As the current Government considers this, so too do the Law Society, for instance the tiers for those under 18, under 21, and soon another tier will arrive at age 25 - how do these match up with age discrimination legislation?

Secondly, maximum numbers of hours to work before a rest break. Regulation 12/1 stipulates that when working time is longer than six hours, then entitled to a rest break, that should be 20 minutes (unpaid). The seminar considered whether six hours was too long – and whether overall productivity would be improved with breaks provided after a shorter period. ACAS was doing a lot of work around why UK's productivity was reducing and the factors involved with this, which might include the timing and nature of breaks in work time. One argument suggested for reducing productivity in the UK might be the lack of investment in technology as the labour is too cheap to make the investment relatively worthwhile for employer organisations.

Thirdly, looking at holiday entitlement, which has a minimum of four weeks, arising from the working time directive, plus the eight English bank holidays (recorded as 1.6 weeks, making a total of 5.6 weeks, allowing part time worker apportionment to be made easier).

Fourthly, the minimum time off in a week is generally 24 hours rest in each 7 day period. If this cannot be done, then have a requirement for two consecutive days within a two week period. The latter might apply to certain medical professions, and forms part of the current discussions by Junior Doctors with the NHS over their terms and conditions.

Fifthly, employment tribunals charge a fee to have a claim lodged as noted earlier. One fee is to start the claim and another fee to have a tribunal hearing, being £250 and £900 respectively, with both required to see the process through. Remission of fees is available for those in certain circumstance – for instance on benefits. If and when employees win cases then their fees will be repaid by the employer, but of course have to be paid first at the time of taking the case. Employees have to have been employed for two years before an unfair dismissal claim can be raised. The length of time of employment before a case can be taken appears to change with the political complexion of the Government – generally being longer under right-wing Governments. The median settled claim is around £5,000 (middle value if all listed) and the mean claim is around £10,000, being the numeric average when including the few, very large claims. The time taken to have a tribunal hearing settled is around five months for an unfair dismissal claim. In 2015, the number of cases where the employee had to be offered their job back was five out of 5-6,000 cases being heard in the year. Worth noting that originally in the Royal Commission it was expected that the remedy for unfair dismissal was not primarily financial settlement but the re-instatement of the worker making the claim to the employment role. Practically it is not surprising that few workers wish to work for the same employer after having their claim heard and winning.

Sixthly, whether employers can dictate what language an employee can use within the workplace. It will depend on the circumstances like most legal matters, but where it is important to hear the words being said, the employer could enforce that only English was being spoken. An example might be an environment where security of staff and premises was of utmost importance.

Seventh, how wide a remit can employers dictate over the conduct of employees outside of working life, and can this go further to an ultimate owner of the work through a contract for services via an outsourcer employer to the individual employee. (So Company A employs Company B to carry out a task, Company B employs person C – how much can A dictate the restrictions of C's employment by B.) Where the employer has done all they can to ensure compliance, there would not be an unfair dismissal case to be heard, as the employee cannot take a case to the ultimate contract owner as they are not their employer. In this area it would seem that employment law has not caught up with the current employment situation where outsourcing and sub-contracting is increasingly prevalent, even when the terms of employment make the worker aware of the requirements.

Eighth, what duty of care due employers have to ensure workers are non-discriminatory to each other, include on account of discriminatory comments regarding relations of the worker. Employers do have a defence if they have taken all reasonable measures, however it is possible to bring a claim against co-workers where discrimination has taken place, and the legal remedy would be financial settlement, generally in the range of £1k to £30k. One person's humorous comment can be another person's perceived harassment and victimisation.

Questions from the meeting audience

Q. Disable staff quotas – still applicable? Laurie explained that this was no longer the case regarding quotas, but employment law was assymetric on the matter of disabled staff, so if an employer took on an entirely disabled workforce, there are no legal grounds to argue discrimination for able bodied staff being denied employment being they are able bodied.

The seminar closed with gratitude being expressed to Laurie by Dave and Phil.

The above notes are a personal reflection on Laurie's talk – any errors are the author's – based on Laurie's remarks made in a personal capacity.

Magnus Smyly

Reading at Work