Unfair dismissal legislation

Environment, Air

In this paper we will examine the tension between unfair (employee) dismissal legislation and the autonomy of managers to run their departments as they see fit.

Interestingly, the question refers to ‘ managers’ right to manage their employees’: It should be stated at the outset, unlike the rights afforded to employees by legislation and the common law, which are enforceable rights per se; there is no such right enshrined in the law to protect the autonomy of managers.

It is also interesting to note that the question does not ask us to d iscuss the degree to which unfair dismissal legislation takes away managers’ right to manage their employees effectively or well, or ask us to comment upon whether or not the suppression of managers’ autonomy is a good or a bad thing for the development of a healthy and effective commercial workplace.

We will argue in this essay that such an assessment is central to the question of this paper. After all, for example, the Police and Criminal Evidence Act 1984, which seeks (inter alia) to regulate the conduct of Police Officers, might well be seen to ‘ take away rights of the police to arrest citizens’, but only does so to protect the citizen from unconstitutional and unacceptable authoritarian practices. Likewise, in the case of unfair dismissal legislation, if the effect is to prevent poor management practice, then this cannot be seen as a negative thing.

The worry is that such legislation will interfere with good management, by creating expectations in the minds of employees regarding the standard ‘ acceptable’ processes which govern their employment and as such, might

prevent managers from taking the initiative to be creative and progressive in their management approach.

The question therefore boils down to whether or not the current unfair dismissal legislation in the UK is sufficiently flexible to allow management creativity to blossom to the advantage of all stakeholders in the employee-management-employer relationship.

Unfair dismissal of employees is governed by Part X of the Employment Rights Act 1996, as amended by Part 3 of the Employment Act 2002. The right to not be unfairly dismissed is defined is s94 of the 1996 Act, and s95 of the same act outlines the circumstances which are capable of giving rise to a breach of this employment right.

Hepple and Morris (2002) p255 comment upon the amendments to the unfair dismissal legislation introduced by the Employment Act 2002: “[T]he new statutory standard and modified disciplinary procedures, broad in conception but minimalist in their requirements, ‘ are so rudimentary in nature that they afford little protection to employees’…[and] ‘ fall significantly short of the requirements of the current … ACAS Code and of the standards of reasonableness developed by tribunals’”. This would seem to suggest that this legislation has had little impact upon curtailing the right of managers to manage their employees, especially in light of the fact that there is no significant deterrent effect arising from the remedy contained in s34(6) of the 2002 Act, which only entitles an unfairly dismissed employee to four weeks’ pay compensation.

It also seems apparent that s34(2) of the Employment Act 2002 has reversed the case law decision of Polkey v A. E. Dayton Services [1988] in which it was decided that employers (and, more importantly, their managers) should be reasonable in their choice and use of employee dismissal procedures.

S34(2) of the Employment Act 2002 introduced s98A into the Employment Act 1996, subsection 2 of which states: “[F]ailure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of section 98(4)(a) as by itself making the employer’s action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.” Again, there is nothing in this section which would suggest that managers’ rights to employ their own styles of disciplinary procedure have been curtailed: As long as the procedures employed lead to a decision identical to that which would have been generated through adherence to the standard dismissal procedures contained in the UK Employment Acts. It might be argued that that this procedural latitude will not be enforced to its full extent, and therefore that employers and their managers cannot rely upon its provisions to escape liability for nonprocedural conformance, but, as Collins (2004) reports: “ The potential width of this exception should not be underestimated”.

In regards to this amendment and also to the introduction of the ACAS code under the Employment Act 2002, Smith and Morton (2006) write: “ In spite of government declarations…, it is not clear how the ACAS Code and case law can impose a higher procedural standard than the statutory procedures in an unfair dismissal claim, although the test of a reasonable employer (whose

action will fall within the range of reasonable responses) remains. Henceforth an employer defending a dismissal may argue that adherence to a procedure above the statutory minimum or the ACAS Code would not have led to a different outcome." It would therefore seem that, under the new unfair dismissal regime, employers have even more latitude to escape liability for unfair dismissal by procedural unfairness and therefore, even less reason to reign in their managers by insisting on extra training or standard management practices.

It should also be noted that under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, the maximum award available to an employer from an employee who unsuccessfully brings a claim in the employment tribunal has been substantially increased as it now, by virtue of the Employment Tribunal Regulations 2004, can also include non-legal preparation costs. This must serve as a deterrent to employees from making frivolous and/or poorly constructed claims for unfair dismissal.

Ans so, our analysis of the UK legislative framework on unfair dismissal all point to a conclusion that this regime does not have any significant effect upon the right of managers to manage their employees, so long as the procedures utilized are synonymous by result. However, there is often a big difference between the legal impact of legislation and its cultural effect. Let us now perform a literature review of several key sources in the field of employee management to see if the practical and real effect of the amended unfair dismissal legislation has been to curtail the creativity of managers' or

otherwise interfere with their ‘ right’ to manage their employees, effectively or otherwise.

The first point which can be identified from the literature is that the legislation on unfair dismissal has had different effects on different sized of business. Whilst the research is relatively out of date, it seems clear that the small business sector has been the least affected by the formal dismissal regime. As Harrison et al (1998) write: “ The major studies (e. g. Dickens et al., 1985) are now dated and there have been few attempts to up-date earlier assessments of the impact of unfair dismissal legislation on small firms (e. g. Clifton and Tatton-Brown, 1979; Daniel and Stilgoe, 1978; Evans et al., 1985). This research and the periodic WIRS surveys (Millward et al., 1992) indicated that small businesses were less likely to have formal disciplinary procedures than larger businesses. This would suggest that small business managers’ autonomy to manage in their own way has not been significantly ‘ taken away’ by the UK’s unfair dismissal legislation and its enshrined standard procedures.

This is confirmed by the findings of a case study analysis by Harrison et al (1998) who found that: “ The presence of a formal written disciplinary procedure does not, of itself, ensure that it is applied/observed by all managers, nor that common disciplinary standards will be applied to all employees, or even to all employees in the same occupation, grade, etc. For example, two instances were found where the senior site manager in multi-site companies in the catering sector was not familiar with the requirements of their companies’ written procedures.

Harrison et al (1998) also found, from their interviews, that managers in this sector took a flexible approach to disciplinary action. The problem with this is that the approach is likely to differ from manager to manager with the result that the only way companies can maintain consistency is not to change, remove or replace senior managers: “[T]here was evidence from many of the interviews of a “ flexible approach” being taken to disciplinary action…This “ flexibility” plainly has its strengths, but it inevitably also raises issues of perceived consistency or inconsistency among employees of actions taken by different managers… [I]ts potential effect on both employee morale and on potential unfair dismissal claims and outcomes, was a principal reason why many organizations have restricted the right to dismiss to senior managers.”

Interestingly however, the interviews conducted across multi-site organizations revealed that “ managers were able to draw on the wider resources of their organizations, including the advice and expertise of HR/personnel specialists. In some cases these specialists became involved in helping line managers to handle disciplinary cases, usually with the effect of avoiding major discrepancies.” This would suggest that the UK unfair dismissal legislation has had a noticeable impact upon the rights of managers in larger organizations to manage their employees, the procedures clearly being taken seriously if outside help is being drafted in regularly.

In pages 457-458, Harrison et al (1998) discuss the effect of unfair dismissal legislation on ‘ management style’. They confirm our earlier conclusion that

Managers are still acting autonomously despite the unfair dismissal legislation: “ There are acknowledged difficulties in attempting to categorise management styles in organisations, not least because they may vary from one manager to another, and from one situation to another.”

McCabe and Rabil (2001) write convincingly on the rights of employees and the impact of these rights on employers and their managers. At page 34 they write: “‘[T]he most critical right of employees is the right to due process’ (Velasquez, 1982, p. 327)…[D]ue process involves a system of checks and balances, it increases the objectivity of decisions…‘ the topic of due process in work organizations calls for much greater conceptual development, practical experimentation, and systematic research’ (Aram and Salipante, Jr., 1981, p. 198). Prima facie, these respective statements seem to conflict with one another: On the one hand, McCabe and Rabil talk of ‘ objective’ decision making, and yet on the other, they talk of the need for ‘ practical experimentation’. However, I would argue that, rather than being mutually exclusive, these observations demonstrate the ability for fair management autonomy to co-exist with principles of due process, if not necessarily consistency. Managers can implement their own style of disciplinary procedures into a workplace as long as these implementations are perceived as subscribing to the princinple of due process and the end effects of these implementations are consistent with the outcomes which would have been reached under the statutory procedures.

This confirms what we postulated earlier in this essay; namely, that the unfair dismissal legislation does not significantly impede effective and fair

management autonomy, but simply prevents managers from managing their employees in ways which are inappropriate or do not follow the principle of ‘ due process’. As McCabe and Rabil (2001) write: “ Not all managers know how to manage their work force effectively, nor do they all treat their employees fairly. A good due process system cannot make managers manage more fairly. It may provide a strong incentive for them to do that, but if they don’ t know how, the process itself will not teach them.

In conclusion, I would argue that since the inception of the Employment Act 2002, which amended the unfair dismissal legislation contained in the Employment Rights Act 1996, the UK’s legislation on the unfair dismissal of employees is sufficiently flexible to allow employers and their managers the autonomy to create and implement their own employee management procedures, so long as these procedures are capable of yielding fair and equitable decisions.

Thus, in response to the specific question, to what degree has the unfair dismissal legislation taken away managers’ right to manage their employees? I would argue that it has significantly taken away this ‘ right’. However, in relation to the more important question, to what degree has the unfair dismissal legislation taken away managers’ right to manage their employees fairly and effectively? I would argue that it has not taken away this right significantly.