Workplace Dispute Resolution in the Era of Individual Rights

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Overview

- Transformations of industrial relations
- A model of individual rights employment relations
- Examples and applications: Organizational ADR; Canada-US comparisons; Mandatory arbitration
- Policy implications
- Conclusions: Organizational primacy; Inequality of workplace justice
Transformations of Industrial Relations
Transformations in Industrial Relations #1

- Decline of union representation, collective bargaining, and industrial conflict
  - Public policy shifts away from support of collective bargaining coverage, esp. post-Thatcher and Reagan
  - Shrinking collective bargaining coverage and declining strike rates (prediction: recent upturn in Australian strike rates will be temporary…)
  - Disruption of existing models of labour relations
- Industrial relations on a historical downward arc.
Transformations in Industrial Relations #2

• Rise of individual employment rights
  – U.S. enactment of Civil Rights Act of 1964 at height of New Deal collective bargaining system
  – Steady expansion of individual rights across multiple countries
  – Rising numbers of conflicts over individual employment rights

• Individual rights employment relations on an upward historical arc
The Challenge for Industrial Relations Theory and Policy

• Leading models of industrial relations built around union representation and collective bargaining
  – Founders of field of industrial relations writing in era of union emergence: Webb & Webb (1897); Commons (1909)
  – Mid-20th century analyses of mature industrial relations: Dunlop in the U.S.; Flanders, Fox, Clegg, etc. in U.K.
  – 80s onward theories of union decline or revitalization: e.g. Kochan, Katz & McKersie; Kelly.

• Lack of theories of individual rights era employment relations to guide policy development
• Absent an industrial relations model of individual employment rights....

• Default assumptions of legalistic models of dispute resolution.
Assumptions of the Legalistic Approach to Individual Employment Rights

• Tribunals and courts are concerned with the enunciation and application of substantive rights.
• Focus is on resolution of the individual case.
• Justice is determined between the immediate parties to the specific case presented to the tribunal.
• Goal of tribunal providing access to the universe of potential cases.
• Value of enhancing access by simplification
• Value of limitation of jurisdiction by damage amount caps.
Alternative: An Industrial Relations Model of Individual Rights Employment Relations
How to analyze workplace dispute resolution in the individual rights era?

• Build on the cornerstones of the industrial relations analytical approach:
  – Conflict inherent in employment relations
  – Institutions shape interactions
  – Power affects outcomes
  – Importance of workplace practices
A Model of Individual Rights
Employment Relations

- Structures of Rights
- Processes of Enforcement
- Mechanisms of Representation
- Sources of Power
- Patterns of Practices
Structures of Rights

• Extent of substantive protections
  – Discrimination
  – Employment standards
  – Unfair dismissal
• Coverage of rights
• Status as employees
• Convergence across the Anglo-American countries in structures of employment rights
  – U.S. outlier of employment-at-will
Processes of Enforcement

• Investigatory processes
  – Specific agencies
  – General labor inspector models

• Adjudicatory processes
  – Specialized tribunals v. general courts
  – Public v. private processes
  – U.S. growth of private ADR procedures
Mechanisms of Representation

• Traditional collective union mechanism:
  – Collective organization and identification in the workplace
  – Collective membership based financing of representation

• Individual rights mechanisms
  – Union variants, e.g. Working Together, community unions
  – Worker centers and other NGOs, but limited diffusion
  – Private attorney representation, cost barriers
  – U.S. system of contingent fee based representation
Sources of Power

- Strike power the source of bargaining leverage in collective bargaining
- Legal claims as a source of power in individual rights employment relations
- U.S. litigation power model
  - High damage awards: $150-300,000 median
  - Procedural complexity imposes costs on employer
  - Variation in power: resources, jurisdiction
Patterns of Practices

• Impact of individual rights claims pressures in altering patterns of employment practices
• U.S. evidence of defensive HR practices in response to legal pressures
  – Adoption of internal conflict management procedures associated with legal pressures
Examples and Applications
Organizational response to individual rights conflict in the U.S.: TRW Example

• TRW a diversified auto parts and aerospace company.
• Conducted first layoffs in company history in 1991-2 in response to cutbacks on defense spending after end of Cold War.
• Layoffs mostly of older, long-serving engineers, in context of industry wide contraction, in Southern California – strong employee rights state, heavy concentration of plaintiff attorneys.
• Results in employment litigation spike, $5 million/year damages.
• Company decides to upgrade ADR procedures.
• Adopts conflict management systems including informal review, internal mediation, peer review, external mediation, arbitration.
• High resolution rate including continued claimant employment
The Systemic Impact of Legal System Pressures: Canada v. U.S. Comparison

- No direct requirements to adopt dispute resolution procedures in U.S., up to organizational decisions.
- So how widespread is the effect?
- Canada (just cause) v. U.S. (At-Will) comparative study:
  - Just cause in Canada, but lower damages, less variability
  - Survey of 171 organizations in both countries
- Levels of concern about legal pressures:
  - Higher levels of concern in the U.S. than Canada
  - Greater probability of being subject to a claim in the U.S.
- Extent of organizational responses:
  - Higher incidence of internal grievance procedures in the U.S.
  - Similar flexibility in hiring and firing decisions in U.S. and Canada
A Caution - Institution Design Matters: Mandatory Arbitration in the U.S.

- Growing support for ADR in U.S. from 70s onward
- Courts increasingly deferring to private arbitration
- *Gilmer v. Interstate Johnson/Lane (1991)*: Courts will defer to arbitration of statutory employment claims, e.g. discrimination
- Procedures required as a term and condition of employment
- Mandatory arbitration now covers about a quarter of workforce
- Reduced employee wins and damages:
  - Average outcome of $23,000 in arbitration v. $150-300,000 in litigation
- Problem of repeat player advantage of employers:
  - Greater likelihood of employer winning cases if same employer and arbitrator pairing involved in multiple cases together
Policy Implications
Three policy implications

• Deterrence not just dispute resolution
  – Focus beyond the individual case

• View management practices as an outcome
  – Pressure on organizations to support positive employment relations

• ADR is good, but not all ADR is equally good
  – Institutional and organizational context matters
Conclusions
Conclusion #1: The Rise of Organizational Primacy

- Premise of universality of individual rights
- But organizations exercise strategic choices in how to respond to pressure of individual rights mandates
- In organizational primacy, the *organization* is increasingly the key actor in individual employment rights
- But actions dependent also on outside pressures (law, unions)
- Public institutions including tribunals and courts can influence the shape of organizational primacy:
  - Support organizations adopting effective internal procedures
  - Discourage organizations that suppress rights claims and insulate themselves from outside pressures
Conclusion #2: Inequality in Workplace Justice

- Individual employment rights hold promise of broad reach of basic protections
- But see inequality in individual rights too:
  - Coverage limitations
  - Difficulty of obtaining representation
  - Variation in sources of power
  - Variation in organizational responses
- Challenge for the future:
  - What institutions or policies will most effectively promote equality in workplace justice?