Abstract title: ‘Third party dispute resolution in the UK workplace – a better way than litigation?’

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Abstract

This paper will address how issues of ‘felt fairness’ and organisational justice are addressed by workplace alternative dispute resolution (ADR); a topical aspect of employment relations in the UK in view of a government policy objective to encourage early workplace conflict resolution and the recent repeal of its statutory grievance and disciplinary procedures following the recommendations of the Gibbons review (2007). There will be an exploration of the benefits and limitations of independent third party intervention in individual dispute resolution through an analysis of four case studies taken from the author’s experience as a national mediator and arbitrator. The proposed paper will also draw upon findings from a qualitative study of dispute resolution in SMEs undertaken for the UK’s Advisory, Conciliation and Arbitration Service (Harris et al. 2008).

It will be argued that for the past 20 years the emphasis in workplace disputes by has been on issues of procedural justice driven by a concern to provide and demonstrate fairness through consistency of treatment. This has been encouraged by the increasing likelihood of employers facing legal claims of unfairness or unequal treatment being brought by employees against an employer. This increase in litigation is illustrated in the growth in employment tribunal claims in the UK, for example In 1990 the Arbitration, Conciliation and Advisory Service (ACAS) received a total of 52,071 cases for conciliation with 26 per cent of these proceeding to employment tribunal but by 2007/8 this had increased to 151,249 cases although the percentage of claims proceeding to an Employment Tribunal (ET) is virtually unchanged. One interpretation of these statistics is that individuals are becoming more litigious but the escalating number of tribunal claims may well be better explained by the increase in employment rights compared to 20 years ago. For example, the number of jurisdictions that can be heard by employment tribunals doubled in the years between 1981 and 2001.

Whatever the cause of this escalation in legal claims, it has become a cause of consternation for UK governments and employers, not least because of the costs involved. As a result, a principle aim of the statutory procedures introduced in 2004 was to encourage employers and employees to engage in early workplace dispute resolution but it was predicted from the outset that these regulations would lead to increased complexity, formality, legalism and costs arising from the involvement of lawyers at an early stage (Hepple and Morris, 2004). This proved to be the case leading the UK government to commission a review of dispute resolution which concluded that the application of these procedures had resulted in ‘unintended negative consequences which outweighed their benefits’ (Gibbons, 2007: 8) leading to their repeal after only four years of implementation.

As the potential for litigation to resolve individual work place issues has grown so has employers’ preoccupation with procedural compliance rather than placing an equal value on approaches to dispute resolution which provide sensitive, flexible solutions which take account of the circumstances in a particular case. Concerns about growing adversarialism in resolving differences through legal processes rather solution seeking in the workplace have led organisations such as ACAS and the Chartered Institute of Personnel and Development (CIPD) to promote the principle of workplace dispute resolution (Emmott, 2009) and Edwards (2007) to argue for a new public policy initiative for workplace justice. There is growing organisational interest in in-house mediation and mediation, arbitration or a final adjudication stage involving
an independent third party. Yet, there is a continuing lack of analysis about what independent third party resolution actually offers to the parties in terms of justice or its limitations as a means of resolving areas of conflict compared to legal remedy and without such understandings it can easily become just another ‘fashionable fad’.

The paper will consider what third party intervention can offer in terms of distributive, procedural, interactional and retributive justice through an examination of four case studies and their outcomes. Adopting an ‘exploratory’ case study approach (Yin, 1993) will provide the flexibility to consider the justice issues that emerged in a range of selected scenarios. The approach is one of induction with the aim of theory building about the application of workplace ADR. The advantage of using selected cases as the subject of analysis is the richness of insights provided to a researcher who was both participant and observer with access to whatever information was required for the specific purpose of reaching a fair solution. The disadvantage is that the available evidence was obtained without any prior categorisation in mind. The discussion will not only explore the benefits of ADR for the parties but its potential limitations to identify those issues that need to be considered in its promotion as a better way to resolve individual workplace disputes than seeking legal remedy.

References
