
The gap between rights ‘on paper’ and ‘in reality’: a case study of employment disputes

Findings from ‘New sites of legal consciousness:
a case study of UK advice agencies’

Prof Morag McDermont, University of Bristol

Employment – a story of disappearing rights

- Complexity of law leading to loss of rights
- Loss of expert support
- Advice agencies attempting to fill the gap
- Juridification of tribunals
- Introduction of ET fees
 - 80%+ drop in applications

Why employment rights are a critical issue for equality

- Work – provides livelihood, dignity, purpose
- Loss of employment
 - leads to debt, loss of home, ill-health
- Public perceptions
 - child protection, housing and employment top priorities for state funding for advice services
- Employment: as testbed for judicial system

Rosa's story: the dispute

- Rosa: from Southern Europe, masters degree, moved to the UK in search of work
- Obtained job as cleaner: eventually resigned, pay could not cover travel to work costs
- Rosa claimed that she was owed pay; employer said overpaid and owed tax
- Directed to CAB by friend: appointment with pro bono solicitor

Pre-hearing

- Rosa struggled to complete ET1
 - Needing more advice
 - Administrative struggles
 - Address: moved to Scotland after losing her job
 - Legal struggles
 - Who was Rosa's employer?
 - Rosa assisted by her new employer, a solicitor.
 - Rosa's anxieties
 - Practical and emotional, about attending the hearing.
-

Hearing and Judgment

- Rosa's interaction with the judge
 - Cross-examination
 - by Employer A (also unrepresented)
 - Rosa's concerns about length of hearing
 - Pre-booked travel in order to get back to work
 - Rosa's perception
 - Lack of understanding of judgment
 - Rosa still not received any of the money awarded
-

Unrepresented claimants experiences of 'justice'

- Intimidating environment
 - outnumbered
 - not understanding language
 - respondent's legal professionals as 'bullying'
- Difficulties of representing yourself
 - cross-examination by bullying employer
- The human cost
 - financial; health; family; future employment relations

Impact of juridification

“I felt as though it was the barrister and the judge together, backwards and forwards for different things and in all fairness the barrister produced a wonderful documentation of his laws and everything, well he would do, he’s been doing it all his life. And the judge did say ‘because of the evidence put in front of me and the very good submission of the barrister’s documentation’ and I did feel like saying well that’s not fair, he’s been to university and Law school and been doing it for years. So I do feel as though ... it’s not kind of like I suppose, a level fight. ... they’ve got all this experience and I’ve got none ... if I do fail I do think it’s going to be on their laws, procedures, time limits.” (Alice)

Bringing rights back in

- Importance of independent adjudication systems
- Need for legal support
 - Role for TUs, advice agencies, but need funding
- Regulatory mechanisms for simpler issues
 - E.g. Minimum wage enforcement; HMRC
- Would inquisitorial system support rights?
 - *“If justice is to be administered fairly and efficiently it will have to become more inquisitorial” (Austin Mitchell)*

What might an inquisitorial system look like?

- Much greater degree of inquiry by judge into evidence brought forward
 - examination phase (usually written): judge's active role collecting evidence, interrogating witnesses
 - hearing/trial: evidence already collected, available equally to all; judge questioning witnesses, claimant

*“increase in LiPs and the need to secure a fair trial whilst doing so within limited and reducing resources that have to be distributed evenly between all those who need to resort to the courts”
necessitates move towards inquisitorial system (Ld Ch Just Thomas)*

Reducing the rights gap?

- Changing the relations of power
 - Judge has role of principal interrogator
 - no aggressive examination and cross-examination of witnesses by barristers
- Claimants can tell their story
 - rather than responding to respondent's legal team
- Not justice on the cheap
 - inquisitorial judges need resources and time
- A change in culture – threats of appeal?

Last words : from the advisers

- .. *“they’ve made it so hard for people to enforce their statutory rights that I don’t really see that statutory rights are still that.”*
- .. *“if someone has .. discriminated against you, and you have a reasonable case, I don’t see why you should have to pay to actually progress a discrimination case .. if as a nation we’re trying to promote equality I can’t understand why we would charge for that... It’s going to slow down our progress to becoming a more equal society.”*