EMPLOYMENT RIGHTS MEDIATION: MORE INDIVIDUALISM LEAKING IN?

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Abstract

Mediation promises efficient dispute resolution and high party satisfaction as well as sometimes even social justice and conflict transformation. It is therefore often seen as a more modern way to deal with workplace conflict than the "old fashioned" involvement of social partners like unions and works councils. But is mediation actually equipped to deal with the individual as well as with the structural power imbalances of the employment relationship or is it on the contrary a means to cement or even magnify them? This paper argues that the individualistic approach to conflict resolution inherent to mediation differs very much from the traditional collectivist approaches to labour law and before this background wants to instigate a discussion about the possible shortcomings of this approach when dealing with employment rights disputes.

1. The enforcement of employee rights: development and present challenges

It is common knowledge that just having a right is not enough - it is also important to be able to enforce it. This holds especially true in relationships which are very much shaped by an imbalance of power like the employment relationship. This imbalance makes it likely that existing rights are not enforced because one party is able to use his/her power to discipline the other and make him/her refrain from enforcing the right. In this context the appropriateness

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and the effectiveness of the rights enforcement mechanisms provided by an industrial relations system play an important role: of major importance are especially means to counterbalance the disequilibrium of power, the costs and other barriers to the access to justice as well as the trust of the parties concerned in the fairness of the system.

Theoretically disputes about rights and obligations stemming from the individual employment relationship can be dealt with in different ways:

- **Negotiations** between the parties to resolve the dispute – often with the informal support of collective actors like unions or works councils;
- Third-party interventions in negotiations like **mediation** or **conciliation** – sometimes involving neutrals, sometimes boards consisting of representatives of both sides of the industry;
- **Adjudication**, i.e. a third-party decision in employment courts, tribunals or other adjudicative bodies – those may be provided for by law or may be autonomous institutions installed by agreement, especially collective agreements.

Though there is a wide diversity and a complexity of different dispute resolution mechanisms for dealing with individual rights disputes and that they are often running parallel[1] one may generalize that side by side with the development of Labour Law some emphasis was also put on the enforcement: On the one hand side the British system was very much based on voluntarism not only as it concerns the regulatory aspect but also when it came to the enforcement of employee rights.[2] As most of the employment conditions used to be based on collective agreements (and then incorporated into the individual contract) they also provided for dispute resolution mechanisms which were not part of the judicial system. The trade union movement supported this preference for 'voluntarily-determined' rather than statutory standards, which was combined with a reliance on voluntary procedures for dispute settlement

[1] Purcell, *Individual Disputes at the Workplace – Alternative Dispute Resolution*, Eurofund: Dublin 2010, 2.
[2] Dickens, *Introduction – Making Employment Rights Effective: Issues of Enforcement and Compliance*, in: Dickens, (ed.), *Making Employment Rights Effective*, Hart: Oxford 2012, 1.

negotiated by the collective parties rather than resorting to litigation.[3] But nowadays the former residual role of statutes as a source of regulations has been transformed over the past 50 years - and in parallel also the enforcement procedures. In general, statutory employment rights in Britain are enforced by individuals taking cases to the Employment Tribunals, which were first established in 1964 under the name of 'industrial tribunals' – like in many continental European countries those tribunals are tripartite bodies composed of a legally qualified chair and two lay members from both sides of the industry.

The continental European approach was different from the original British one as it put more emphasis on influencing legislation and changing state institutions which correlates with the general policy of the trade union movement to using also the political arena to advance its goals.[4] Rather early in some countries – notably France (1806), Belgium (1809), Italy (1893) and Germany (1890, 1904 and 1926) – special courts or tribunals were introduced to deal with the problem of class bias and lack of experience of the judiciary as well as the cost, delays and formalities of the ordinary courts.[5] Those institutions involved employee and employer representatives in the adjudicative procedure and therefore made the decisions acceptable to both sides of the industry.

Another avenue chosen by some countries is the involvement of social partners (especially of unions and – where they exist – works councils) in more informal conflict resolution which takes place at an earlier stage before the issue has been taken to court. A recent Eurofund-Study names a total of four countries, with long-established patterns of cooperative working between the social partners and an underlying reliance on 'corporatist' values and behaviors, which place particular emphasis on non-judicial ADR – namely, Austria, Denmark, Germany and

[3] Morris, *Employment Rights and Enforcement Mechanisms*, in: Dickens, (ed.), Making Employment Rights Effective, Hart: Oxford 2012, 8.
[4] See Frege, *Industrial Relations in Continental Europe*, in: Ackers & Wilkinson, Understanding Work & Employment. Oxford: Oxford University Press 2010, 250.
[5] Ramm, *Workers' Participation, the Representation of Labour and Special Labour Courts.* In: Hepple, *The Making of Labour Law in Europe – A Comparative Study of Nine Countries up to 194.* London: Mansell Publishing 1986, 270.

Sweden.[6] The underlying notion behind this is the collectivization of individual workplace conflicts – as the collective representation of employees' interests gets involved the individual conflict the issue is lifted from the individual to the collective level. The power imbalance immanent to the employment relationship is thereby countered via the involvement of unions or works councils – the negotiations then take place between equal bargaining partners and the outcome is – so the theory – acceptable for both parties.

One may say that in the past collective actors, especially unions and other collective representatives of employees' interests played a major role – especially because workers did not trust the state not to be biased and promoting only the interests of the dominant ruling class (aristocracy or later "capitalists"). To achieve acceptance states often either opened up spaces for unions to act in or involved them not only in the rule making processes but also when it came to the enforcement of workers' rights. Very often unions were also involved in the informal settlement of individual rights disputes on the workplace or company level.

Nowadays these traditional processes are often considered lengthy and costly or intransparent as well as ineffective due to the decline of union-strength. Also criticized is the fact that they often leave both parties unsatisfied with the outcome as well as the process itself. 'Alternative' forms of dispute resolution, especially mediation, are seen as viable means to deal with employment rights cases more efficiently as well as better suiting the parties' needs. Policy makers also argue that this form of dispute resolution may result in a wider access to justice, the empowerment of the parties and the promotion of a cooperative dispute culture.

On the other side these new approaches to dispute resolution shift the emphasis from the collective aspect of the enforcement of employee rights involving unions and works councils towards the individual and therefore break with decade-long traditions on how to counter the imbalance of power that is immanent to the employment relationship.

[6] Purcell, *Individual Disputes at the Workplace* 10.

2. The wider context – individualization of employment law

This finding – the shift from the collective to the individual – is not confined to the enforcement of employee rights alone but there has been a general move in the discipline away from collective solutions (especially collective bargaining) towards individualization whether in the form of the contract of employment, human rights or anti-discrimination law, or employment standards. In official accounts of labour law, redistribution and protection have given way to competition and flexibility.[7] Though the rhetoric as well as the thrust of social policy is similar in most Western industrialized countries the basis for the changes in the last decades as well as their effects could not be different. And, of course, this is not a linear development but the main trend seems to be obvious – a move away from collective solutions, i.e. those which involve collective actors like unions and works councils, to problems connected with the employment relationship to solutions which stress the role of the worker as an individual.

The argument developed in this paper is that this general trend is not confined to substantial employee rights and their creation but extends also to the enforcement of employee rights. The indicators for the individualization of enforcement mechanisms differ very much depending on the industrial relations system but may include the following, which will be exemplified in the two case studies of New Zealand and Austria below:

- The shift away from **dispute resolution mechanism provided for in collective agreements** and involving joint committees **to the court system** based on statutory law;
- Within the official court system the move away from settlement-facilitation and decision-making by a **tribunal or court bench involving representatives of both sides of the industry to neutrals** (judges or mediators);
- The shift from **collective mechanisms** to facilitate joint solutions involving unions and works councils **to solutions negotiated by individuals**.

[7] Fudge, *Labour as a ‚Fictive Commodity'*, in: Davidov & Langille (eds.), *The Idea of Labour Law*. Oxford: Oxford University Press 2011, 24.

In my view mediation is one of those symptoms of this shift from collective solution finding mechanisms to individual solutions – problems in the employment relationship are not seen as immanent to the economic system, i.e. capitalism in its variations, with a need to design enforcement mechanisms to mirror the duplexity of the problem having not only an individual but also a systemic aspect. Therefore the traditional conflict resolution mechanisms in the employment field had two directions: to deal with the individual problem at hand but also to involve collective representatives of interest to be able to also take into account the common cause of the labour movement.

Mediation as an individualistic concept of conflict resolution on the other hand has other promises …

3. What are the "Promises of Mediation"?

The header of this chapter refers to the certainly most influential book on mediation in the last decades – "The Promise of Mediation – The Transformative Appraoch to Conflict" be Robert A. Baruch Bush and Joseph P. Folger[8], which is also the theoretical foundation of a distinct approach to mediation. These authors in their attempt to save the originally good intentions of the US-American mediation movement and in the first chapter use some stories about the mediation process and its promises.

- According to the **Satisfaction Story** mediation is a powerful tool for satisfying human need and reducing suffering for parties to individual disputes. Because of its flexibility, informality and consensuality, mediation can open up the full dimension of the problem facing the parties. Not limited by legal categories or rules, it can help reframe a contentious dispute as a mutual problem – the mediation process therefore is able to produce superior quality solutions for disputants of all kinds – that is, solutions that best

[8] Bush & Folger, *The Promise of Mediation*. San Francisco: Jossey Bass 2005.

satisfy the parties' need and remedy all their difficulties. Empirical research actually confirms high satisfactions rates of the participants.[9]

- The **Social Justice Story** stresses the possibility of the mediation process to organize individuals and to strengthen communities in many different contexts – it may also increase the access to justice as it can reach those members of society who do not trust the court system and may be deterred by its formalities. Mediation can especially help individuals who think that they are adversaries perceive a larger context in which they face a common enemy.

- According to the **Transformation Story** the unique promise of mediation lies in its capacity to transform the quality of conflict interaction itself, so that conflicts can actually strengthen both the parties themselves and the society they are part of – it may therefore initiate and facilitate a learning process and thereby change the conflict culture within a society.

- The **Efficiency Story** refers to the aspects of mediation as a fast and cost efficient way to deal with disputes – policy makers[10] often stress these aspects and point out that a large part of the cases that get filed with the courts get settled anyway. Accordingly mediation is a way to help parties achieve this goal without investing too much time and costs into the adversarial legal aspects of the dispute by concentrating on possibilities to a joint solution. Also agreements resulting from mediation are seen as more likely to be complied with voluntarily and more likely to preserve an amicable and sustainable relationship between the parties.[11]

But there is also a critical view of mediation and its effects, the **Oppression Story**: Even if the field began with the best of intentions, mediation has turned out to be a dangerous instrument

[9] Menkel-Meadow, *Dispute Resolution*, in: Cane & Kritzler, *The Oxford Handbook of Empirical Legal Research*. Oxford: Oxford University Press 2010, 596.
[10] E.g the sixth recital of the preamble to the Directive 2008/52/EC "cost-effective and quick extrajudicial resolution of disputes".
[11] E.g the sixth recital of the preamble to the Directive 2008/52/EC.

for increasing either the power of the state over the individual or of the stronger party over the weaker. Because of the informality and consensuality of the process, it can be used as an inexpensive and expedient adjunct to formal legal processes, seeming to increase the access to justice but actually – given the lack of procedural and substantive rules as well as social control because of the confidentiality of the process – can magnify power imbalances and open the door to coercion and manipulation by the stronger party. Because mediation often handles disputes without reference to other, similar cases and without reference to public interest, it results in the disaggregation and privatization of class and public interest problems.

4. What is actually going on? - Two case studies

I will use two case studies, Austria and New Zealand, to exemplify two possible different directions a development towards the promotion of workplace mediation might take: Both countries that have (had) a long tradition of strong collective actors and their involvement in dispute resolution. They now stand apart as in New Zealand due to a major policy change unions have been weakened whereas in Austria the neo-corporatist structures are still in place and seem to have been reinforced during the crisis. The two countries therefore have different approaches to the individual and the collective side of employment relations. Using these very different examples the paper undertakes to answer how employment rights mediation fits into different employment relations systems and what future role it may play within them.

3.1. New Zealand[12]

New Zealand as a forerunner in this field began using conciliation and arbitration for collective bargaining over wage and working conditions as early as 1894. However, formal procedures for handling individual employment rights disputes only came much later, in the 1970s. Only the **Industrial Relations Act 1973** introduced the 'personal grievance' of 'unjustifiable dismissal' and that concept of 'unjustifiable action of the employer' causing the employee either dismissal or a lesser 'disadvantage' remains the basis of most personal grievances even today. The

[12] McAndrew & Risak, *Models of Employment Dispute Resolution in New Zealand: Are there Lessons for Europe?*, Paper to be presented at the ELERA-Conference, Amsterdam 21.5.2013.

protection of the personal grievance provisions, when introduced in 1973, was **available only to union members** covered by union-negotiated documents. This very much differs from the continental European tradition with a extensive though often scattered body of statutory employee rights that mostly dates back to the beginning of the 20th century and which could be enforced in courts (which were often specialized labour courts involving employee representatives).[13] The first New Zealand Department of Labour Mediation Service was also established in the early 1970ies and the mediators played a key role in the first model of individual employment rights dispute resolution, chairing **tripartite grievance committees** that included union and employer representatives. The committees were a forum for achieving a mediated settlement between the parties, but, failing agreement, the mediator could make a ruling on the grievance or dispute, or that part of it that remained unresolved.

Those tripartite grievance committees remained in place until 1991. Then all of the existing institutions were swept aside by new legislation, the **Employment Contracts Act 1991** (the 'ECA'). While the ECA effectively deregulated the bargaining environment for interest matters and extended the regulatory framework for rights matters. Grievance procedures were now incorporated by law into every employment contract in New Zealand, substantially expanding the 'catchment area' and significantly increasing the employment disputes caseload. With the dramatic decline of union density under the ECA, employment lawyers emerged as a legal specialization to fill the representation void. The ECA promoted institutions and processes to match its main theme – employment relationships were now to be seen as individual legal contractual relationships, and dealt with accordingly in an individual way. The central institution for enforcing employee rights was the Employment Tribunal which was assigned both mediation and adjudication functions for rights disputes. Its members who now acted not in tripartite committees but as single adjudicators or mediators were independent statutory officers. Thereby not only the basis of the employment relationship was changed from

[13] Ramm, In: Hepple, *The Making of Labour Law in Europe* 270.

collective agreements to individual contracts but also the enforcement was stripped of the influence of the social partners.

With another change in government, the Employment Tribunal was disestablished by the **Employment Relations Act 2000** (the 'ERA') and the Mediation Service of the Department of Labour was (re-)introduced again. Though promoting collective bargaining again (with modest success) the ERA's approach to dispute resolution stayed concentrated on the level of the individual employment relationship not involving social partners in any form. The declared main objective of the ERA is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment. This is to be achieved, in part, by promoting mediation as the primary problem-solving mechanism and by reducing the need for judicial intervention (ERA 2000, s 3 (a) (v) and (vi)). Employment relationship problems were therefore seen as individual problems which have to be resolved individually – following this approach there is no need for the involvement of collective actors in the resolution process.

3.2. Austria

The Austrian industrial relations system differs very much from the present New Zealand model and the route to the individualization of enforcement mechanisms is less obvious. Austria is well known for it's unique manifestation of **neo-corporatism** which is commonly referred to **social partnership** (Sozialpartnerschaft). This system is based on close voluntary cooperation between the organizations of interest representation of employers and employees as well as the state. Social partnership goes beyond a mere system of labour-management relations or of collective bargaining but constitutes a highly institutionalized cooperation between the actors that covers all important matters of economic and social policy. At its core the Austrian concept of social partnership is indeed based on the principle of voluntarism, i.e. that this system of close cooperation is mostly of an informal nature and not regulated by law. But over time it has become formally institutionalized and the main social partners (Trade Union Council, Chamber of Workers, Economic Chamber) are also equipped formally with numerous statutory rights: to evaluate draft legislation and to even draft texts for legislation in their sphere of interest; to

make recommendations to law-making bodies; to be represented on numerous commissions, advisory boards and committees dealing with socioeconomic issues (especially the social insurance institutions); and to nominate candidates to act as lay judges at labour and social courts as well as members of conciliation boards dealing with some sorts of works agreements. On the company level the law provides for mandatory works councils elected by the employees for a four-year term – they have statutory co-determination rights and complete the corporatist structure down to the workplace level.

The Austrian system for formally enforcing employee rights for a long time was centered on the **Labour Courts**. In all three instances (Labour Courts, Courts of Appeal and even at the Supreme Court) the courts hear and rule in **tripartite benches** consisting of professional judges and lay judges of both sides of the industry. The access to justice is promoted by a rather informal procedure and the fact that parties do not have to be represented; and even if they are the costs of their representation are borne by the union if they are members or the Chamber of Labour. The membership of the latter is compulsory for all private-sector employees and the Chamber has a statutory duty to do provide legal advice and, when necessary, legal representation.

Another, lesser researched way to deal with workplace conflict is the use of **employees' interest representatives** (the works council, the union or the Chamber of Labour) to resolve individual employment disputes: Adam[14] comments that in the case of an individual employment dispute, the employee concerned will normally contact either the works council or the relevant trade union (in the case of membership) or the Chamber of Labour for obtaining information, advice and – possibly – assistance in legal procedures. In particular, the latter organization is specialized in providing such individual advice and assistance, with hundreds of thousand contacts with employees seeking legal advice in all fields related to labour law annually. Actually, in most cases of individual employment dispute, either the Chamber of

[14] Adam, *Austria: Individual disputes at the workplace – alternative disputes resolution*. Country Report for EIRO 2010, available http://www.eurofound.europa.eu/eiro/studies/tn0910039s/at0910039q.htm.

Labour or the trade unions try to intervene (by contacting the employer) in order to bypass formal litigation before the courts. According to records of the Chamber of Labour, in most cases of such informal intervention a settlement out of court can be reached when organized labour has managed to confer with the employer. One could arguably classify such informal intervention launched by organized labour on behalf of an employee as a de facto ADR method which plays an important role in Austria's system of individual dispute resolution.[15]

Therefore it can be concluded that the Austrian system of formal court based employee rights enforcement as well as the informal resolution of employment disputes features a **high involvement of the social partners** and is very much in line with the concept of Social Partnership. But this seems to be changing … more recent developments tend to go into a another direction that is very much in line with the international trend described above: the individualization of the conflict and the involvement of (allegedly) neutral third parties to deal with the inequality of power inherent to the employment relationship: In 2003 was a first attempt made in this direction with the adoption of the Act on Mediation, which establishes the legal framework for the practice of mediation and also covers individual employment rights disputes. This was complemented by the EU-Mediation-Act that implements the Mediation Directive 2008/52/EC. These acts have not had any significant effect on the usage of mediation in the employment field yet but can be seen as an indicator for a changed approach to conflict at the policy level.

In some **sub-areas of individual employment law** the last decade saw legislation that stresses the importance of ADR by obliging the parties to take this route before filing a law suit. These processes usually do not involve the Social Partners and depend very much on the individual worker.

[15] It has to be stressed that these findings are based on anecdotal and circumstantial evidence as statistics about the use of either formal or informal ADR methods in Austria are not available; Adam, *Austria: Individual disputes at the workplace*.

- Since 2005 if **workers with special needs** claims damages because of discrimination or if they wish to contest a dismissal, they must instigate a conciliation or mediation procedure offered by the Federal Social Authority. Only if a settlement is not reached within three months (one month in the case of dismissal) may they file a lawsuit with the Labour and Social Court. The conciliation is conducted by trained employees of the Authority; alternatively mediation provided by private mediators but paid for from public funds is also provided for but seldom used in practice.

- The other procedure, introduced in 2008, that explicitly refers to mediation deals with the **dismissals of apprentices**. The employer has to initiate mediation, the costs of which she/he must bear; only if this proves unsuccessful and if at least one session with a mediator has taken place the employment contract may be terminated.

- Sometimes new legislation involves individual and collective elements: Employees that work for a minimum of three years in enterprises with more than 20 workers are since 2004 entitled to **parental part-time-work** until their child is seven years or age or enters school. The law provides for a multi-step-procedure: The employee has to demand the conclusion of an agreement with a concrete proposal – the employer may either accept or pose a counter-proposal. This is to be followed by negotiations between the individual employer and the employee, then the involvement of the works council (if one exists) and the involvement of the employers' and employees' interest groups (if both parties agree) and finally by a settlement conference before the judge at the Labour Court. If all this fails the Labour Court decides – but may only grant success to the original offer of the employee or the employer and may not deviate from them.

5. Conclusions

Though the intensity differs there are two notable international trends concerning the enforcement of employee rights and the increased promotion of mediation in the employment field:

- Employers and employees shall settle their disputes out of court; and
- the role of the social partners in conflict resolution is reduced by the use of "neutrals" instead of joint tri-partite committees or the intervention of collective actors in settlement negotiations.

This trend may be also be an effect of the decline of organized workplaces and the legislator closing the gap (as it certainly was the case in New Zealand in the 1990ies) but it may also result from a policy decision to offer employees more individualistic routes as an alternative to the conventional way of dealing with workplace conflict via collective representations of interest.

The change is often framed as mediation holding the promise of efficiency, high party satisfaction and even increased social justice as well as the possibility for conflict transformation - mediation is promoted as a viable, more modern way to deal with workplace conflict than the "old fashioned" involvement of social partners. But it is not sure that mediation actually equipped to deal with the individual as well as with the structural power imbalances of the employment relationship as it has bears the possibility to actually cement or even magnify power imbalances. To my knowledge theorists as well as practitioners have avoided this important debate from with all stakeholders would very much benefit … if this presentation is a spark to initiate some participants to think about this problem and to start this discussion, it has fulfilled its purpose.