Naming and Shaming in the Free (Employment) Market

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With knowledge is said to come power. If that's true then employees in 2017 have more power than ever before as they navigate the job market. There's nothing new about internet literate candidates scouring corporate websites, industry forums and job sites where employees anonymously review their employers, for information on a role. But increasingly there is new Government sponsored information to consider; the roll calls of shame where errant employers will be listed for breaches of employment legislation.

Enforcement action and litigation by employees has always been (mostly) public. However, recent legal changes increasingly weaponise information as an agent of change. Consider the Gender Pay Gap Reporting legislation, which requires employers of 250 or more employees to publish statistics of their gender pay gap from April 2018. The publicity associated with these figures is essentially the only meaningful sanction for those with significant aggregate pay gaps or those who fail to publish as required. Other examples include HMRC's decision to publish the names of employers who fail to comply with minimum wage requirements, the remuneration reporting obligations for public companies and the notorious – and quickly abandoned – proposal at the Conservative party conference that employers should publish the percentage of international staff they hire.

The most recent development in this vein is that the government has rolled out a new online database of Employment Tribunal decisions which means that soon all judgments made by

the Employment Tribunal will be easily available online.

Presumably, the logic behind all of these changes is to encourage employers to treat their employees fairly by creating a name and shame culture and the ability for employees to have a fuller picture on what life is like at a prospective employer – a free market theory on employment rights.

As in all free markets, there will be winners and losers but publicising Tribunal judgments has far reaching and unintended implications for both employers and employees.

The 'super public' hearing

All hearings in Employment Tribunals are public and the press and public may attend so at first blush, placing judgments online may not seem significant.

However, reporting tended to be quite high level and the results of cases were quite rarely reported unless they resulted in significant awards. Whilst theoretically, the judgments were public before, they were all held in Bury St Edmunds in a central register, access to them was traceable and they were not available online.

The online database will change that. Judgments will be instantly and readily available to anyone who may wish to look, for whatever reason. A simple google search could pull up adverse Tribunal findings on employers and employees alike.

If previously judgments were public, they are now 'super public'.

Who might look?

There are potential advantages to the ‘name and shame’ approach from an enforcement perspective. For example, prospective employees may look at the records of a prospective employer in deciding whether or not to join them. Interested third parties like recruitment consultants may also be able to pull together league tables of the ‘worst offending’ employers in any given year.

Whilst theoretically, this could be an incentive for employers to adhere to the law, it is very much a double-edged sword that will have a serious impact on employees who have brought a Tribunal claim. It is not difficult to envisage certain employers incorporating searches for previous Tribunal claims as part of standard pre-employment checks and little to prevent them doing so.

Very limited legal protections exist to protect employees who are not hired for this reason. In theory, discrimination law protects claimants who are not hired (or subjected to any other detriments) because they had brought discrimination proceedings against an employer in the past. However, there would be no protection for employees who are not hired because of claims of whistleblowing or unfair dismissal against a previous employer and even those who did have protection would in practice be hard pushed to show that the reason they had not got the job was because of a previous Tribunal complaint.

There is also the potential for quite cynical exploitation of the publicity associated with the judgements. Threats to defend claims on the basis of exaggerated reports of poor performance, difficult personality or embarrassing correspondence will take on a new power, in this highly-public system.

Other unforeseen consequences

There are also other individuals who are likely to get caught

in the cross fire of free market enforcement.

Depending on the outcome of the case, witnesses including managers or members of HR involved in a Tribunal claim may well not be portrayed in a favourable light. These managers who are criticised in Tribunal judgments will also be readily discoverable online. Whilst a worker giving evidence in connection with proceedings is also technically protected under the Equality Act, it seems unlikely that protection would extend to shielding them from detrimental findings arising from a Tribunal judgment.

Tribunals have a power to prevent or restrict reporting aspects of Tribunal proceedings. This is not commonly used (and factors pointing towards the interests of open justice will weigh against it) but, given the introduction of 'super public' judgments, it may be much more common to see applications being made to protect certain individuals rights to privacy or confidential information.

The impact on Tribunal tactics

The introduction of 'super public' judgments raises the stakes significantly for both parties and will doubtless have an impact on litigation tactics going forward.

Employees may be reluctant to bring Tribunal claims for fear of the negative taint of publicity. Witnesses may be more reluctant than ever to risk their own reputation in a public forum. Win or lose they may be marked out as a trouble maker and hard nosed employers defending prospective claims will doubtless point out that, whilst they may also be negatively hit by the publicity, the employee is likely to fare worse than they will, whatever the outcome.

However, those arguments may come full circle. In whistleblowing and discrimination claims, the losses an

employee suffers are uncapped. As outlined above, an employee's duty to mitigate those losses could be severely hindered by the mere fact that they have brought Tribunal proceedings. This will doubtless be an argument raised in remedies hearings and it will be interesting to see how much weight Tribunals give to them and, whether it changes the way employers defend proceedings. For example, could employers become more averse to portraying employees in a negative light in Tribunal proceedings for fear of the impact of these accusations on the award they would have to pay if they lose?

Nor are the arguments about publicity one sided. A judgment will go much further than to say whether the claimant has won or lost the claim. The Tribunal will have to make findings of fact on the claimant's allegations – which could involve confidential information or salacious or damaging information about the employer being disclosed for the world, including its clients, competitors and business partners, to see in more detail than press reporting would usually allow.

The drawbacks of a free market economy

Whilst, on paper, the spirit of naming and shaming employers who treat employees poorly seems reasonable, the application of a free market to the employment market assumes everyone has equal bargaining power and that there are readily available alternatives. The reality is that only those employees in the most powerful bargaining positions, who arguably are the most protected in any event, will have the luxury of this choice. Sadly, those in the weakest position may be also be poorly informed and have access constraints to discovering this information at all. As such, the sanction of negative publicity may have little deterrent effect for those whose practices are already the worst and whose business model involves exploiting those with little alternative.

In reality, the consequences for the individuals, whom this regime is probably not intended to 'show up' are likely to be much further reaching. There is also something inherently unfair about the retrospective nature of this change. The general principle of any change in law is that it should not apply retrospectively. Forewarned employees and employers bringing or defending a claim now are fully aware of the nature of these 'super public' judgments and can make the decision whether to make or defend a claim accordingly. Those bringing or defending a claim in 2010 were not.

Irrespective, the trend of naming and shaming employers will inevitably continue and it is not hard to see why. Ostensibly, it's a low-cost, high-impact method of enforcement. As a tactic it sits neatly at the crossroads of the information age and the current era of government austerity. However, we should not ignore its limitations, particularly as an alternative to real access to justice or to more interventionist methods to enforce compliance. As such, the rise of name and shame techniques should be considered alongside the huge reduction in Tribunal claims prompted by fees, reduced budgets for government enforcement and the introduction of at least one new law where the only meaningful sanction is bad publicity. Information is certainly a good weapon to have in the arsenal but surely it should not be the only one?

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