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Placing British Employment Law In Context

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Hugh Collins, Employment Law (2d ed. 2010).

It is probably fair to generalize that the best American legal scholarship in the fields of labor, employment, and employment discrimination law has found little inspiration in the study of comparative law. Hugh Collins's analytic and insightful but succinct overview of British employment law — republished in 2010 in a second edition to account for significant developments in response to European Union law — should teach any perceptive American reader that this need not be the case. This two hundred sixty page volume demonstrates that studying how other developed countries have addressed common issues presented by the employment relationship not only can help define practical and conceptual problems for American law to address but also can help spark creative thinking about solutions.

Professor Collins, who has served as general editor of the Modern Law Review and twice successfully led the law department at the London School of Economics, places the employment law of Britain in both an historical and political-social context. The historical context includes our common nineteenth century liberal tradition of free contracting and our common twentieth century response of industrial pluralism to the "commodification" of labor and the resultant threats to economic and political stability. The political-social context includes the sometimes divergent influences from America and Europe, with the latter becoming more dominant through European Union directives.

The volume has great breadth, ranging from employment discrimination law to labor relations law, from wrongful dismissal law to privacy law, from restrictions on employee competition to health and safety law. Collins covers all topics treated in any common American law course in labor, employment, or employment discrimination law. The book does not purport, however, to be a comprehensive treatise or any kind of definitive research source for those unfamiliar with British law. Instead, it is a descriptive and prescriptive review and conceptual organization of a field of law by a clever intellectual, equally comfortable with the tools of legal analysis and the findings of modern social science.

In an attempt to provide a conceptual underpinning for his review, Collins, who is also a scholar of contract law, illuminates what is distinct about the employment contractual relationship, including its general take-it or leave-it quality, its usual incompleteness and necessary assignment of authority, its frequent expectation of relatively long duration, and its necessary attendant distributive and time-control issues. Collins then uses three complementary goals of European Union law to organize the legal topics he addresses under three general headings: social inclusion (which features employment discrimination law); competitiveness (which features labor relations law as well as wrongful dismissal and economic security law); and citizenship (which features rights-based principles, including those protecting freedom of speech and association and privacy).

The book is written at a level of generality that makes a comparison with American law both easy and instructive. The description of the current British law governing collective bargaining, for instance, reveals its close tracking of the American system of work-place, rather than sector-wide, bargaining through exclusive agents who must fight employer resistance to achieve recognition and then rely on their own economic leverage rather than the coercive power of a state regulator to achieve more

favorable terms for their constituents. This description also reveals the same limitations of the system in an age of global competitiveness and capital mobility. Yet, one difference in the systems, as presented by Collins, is suggestive of a possible change in American law that could help revivify American labor. Collins stresses that British law allows employers "to negotiate a recognition agreement that confines the scope of collective bargaining to topics where the employer can perceive advantages in more cooperation and consultation," even while avoiding a topic such as pay. Imagine the possibilities for growth for American labor unions, protected by a robust section 8(a)(2) from the competition of company unions, if employers were both free of the constraints of Majestic Weaving and also desirous of some benefit that a union could provide, such as a fair arbitration system to handle employment discrimination grievances in the wake of Pyett.

Collins's review of the British law governing the topics encompassed by American employment discrimination law also is both instructive and suggestive. The development of British law has generally followed the lead of American law on these topics, disparate treatment is denominated direct discrimination, disparate impact is termed indirect discrimination, retaliation is victimization, and affirmative action is positive discrimination. The concepts are the same, however, and the defenses seem to be similar as well, though all encompassed within an ostensibly vague principle of proportionality derived from European Union law. As described by Collins, British employment discrimination law highlights the same legal problems, but seems not to have offered solutions beyond those offered by American law, except perhaps for the problem of unequal pay for work of comparable value. Here, the more flexible concept of proportionality may offer a balance that allows employers to account for labor market constraints without being completely unfettered in the depression of wages in female-dominated jobs.

Perhaps the most interesting and suggestive section of the volume for American readers is the treatment of British law on discipline and dismissal, including chapters on wrongful dismissal and on economic dismissals. British law on these topics, though derived from similar common law traditions, has been more influenced by the European Union and thus varies more from American law than do current British labor or employment discrimination law. Collins description of British dismissal law is sufficiently rich to infer multiple ideas for legislation to mitigate the less employee-protective American common law. But Collins does not overstate the efficacy of the British variations. As a good lawyer, he understands the importance of limited remedies and the lack of bite in standards like a "band-of-reasonable responses" test for assessing employer reasons for disciplinary dismissals. Thus, even while his description of British law suggests possible reforms in American law, Collins highlights potential difficult unresolved issues such reforms would present.

Collins, I should add, is a felicitous writer. If one reads this volume as one should, not as some heavy tool for research, but for inspiration, as one might read a good novel or history, it reads as easily and with as much, or at least almost as much, forward impetus. I can suggest some good relevant British novels or histories for inspiration for those who wish to email me. For those who wish inspiration from a book on law, however, I suggest this work.

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