Organizational Primacy after the Demise of the Organizational Career: Employment Conflict in a Post-Standard Contract World

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I. Introduction

There is a contradiction at the heart of dispute resolution in the contemporary workplace. The locus of determination of the terms and conditions of employment, including processes for the resolution of disputes concerning these terms and conditions, has become increasingly decentralized to the organizational level, at the same time that long term attachment of employee careers to these same organizations has been diminishing. The result is a disconnect between the nature of current employment disputes, which increasingly involve issues relating to entry to and exit from relationships with organizations, including questions of the formation and content of employment contracts, and dispute resolution procedures that assume membership within an organizational community and acceptance of its rules and norms.

In this paper, I examine these two trends in employment dispute resolution and explore the tensions between them. I begin by discussing the increase in organizational ordering of terms and conditions of employment and how it is reflected in the development of organizationally focused dispute resolution mechanisms. Then I turn to examining examples of types of growing employment conflicts that revolve around issues relating to the formation and termination of employment relationships. Following this, I conclude by discussing how dispute resolution procedures and systems might be re-envisioned to better fit a world in which standard long-term employment contracts with a single organization are no longer the paradigmatic model.

II. Decentralization and the Primacy of the Organization

One of the great oddities of contemporary employment relations is that as the individual's attachment to the organization in the form of standard long-term employment contracts and career progression through internal labor market structures has weakened, organizations have assumed greater primacy in the determination of terms and conditions of employment. The first of these trends has been well documented by many researchers. Manifestations of it include the increasing mobility of employees between employers over the course of careers, greater willingness of employers to hire for all positions from the external labor market, and decreasing willingness of employers to offer long-term employment guarantees including attendant retirement and other benefits (see e.g. Cappelli 1999). Notably, even in a debate over whether "Career Jobs are Dead", Sanford Jacoby, taking the contra position, argued that, rather than being unchanged, the employment relationship had been transformed within a context of continued relatively long job tenure for many employees (Jacoby 1999).

The second trend is the growing primacy of the organization and its human resource strategies in employment relations. The theoretical groundwork for this development can be found in the field of Strategic Human Resource Management (SHRM). The core idea of SHRM researchers is that organizations can gain competitive advantage through the adoption of employment strategies that maximize the effectiveness of the human resources of the organization. One version of the SHRM analysis argues for the adoption of the human resource strategies that are best matched to the business

strategy of the organization. So, for example, an organization that competes as a low cost producer should adopt a human resource strategy focusing on the control of labor costs. Meanwhile an organization that competes based on quality and customization might be more effective if it adopted a human resource strategy focused on investing in a highly skilled workforce that could achieve greater flexibility and quality in production (Arthur, 1992, 1994). Another version of the SHRM analysis takes an alternative, universalist perspective arguing that there are a set of human resource best practices that will maximize competitive advantage for all organizations. This type of strategy, often associated with the concepts of "high commitment", "high involvement", or "high performance" practices tends to be associated with recommendations for greater investments in employee knowledge, skills, and abilities, along with mechanisms for enhanced employee involvement in decision-making and incentives for employees to contribute to the success of the organization (Appelbaum et al 2000). Although predominantly originating in the United States, the ideas associated with this type of strategy have also been influential in Europe, particularly in the U.K., where they have often been described as a "Human Resource Management" or HRM strategy.

Research suggests that the emphasis in SHRM theory on organizations developing distinctive human resource strategies has been paralleled by a growing variation in patterns of practices and strategies in organizations. In his surveys of a representative sample of U.S. establishments, Osterman (1994, 2000) found widespread and continuing variation in the adoption of the some of the key workplace practices associated with High Involvement strategies. Similarly, the periodic WERS surveys of British workplaces have found substantial innovation and variation in methods of managing employees (Brown et al 2009). The argument for growing divergence in employment practices at the organizational level in many countries is most strongly advanced by Katz and Darbishire (2000) in their *Converging Divergences* analysis. In a study of work and employment practices in seven countries (the U.S., the U.K., Australia, Germany, Japan, Sweden, and Italy) they find a common phenomenon of growing divergence at the organizational level in practices, which they argue fall into four common patterns: Low Wage; HRM; Japanese-Oriented; and Joint Team-Based.

In the next section, I examine how this primacy of the organization in determination of terms and conditions of employment is being reflected in employment dispute resolution procedures.

III. Organizational Primacy in Dispute Resolution Procedures

Two major recent trends in employment dispute resolution are the growth of individual disputes, with a corresponding decline in collective conflicts, and the expansion of alternative dispute resolution (ADR) procedures for resolving these disputes. The growth of individual employment disputes is manifested in both in the expansion of individual employment rights in many countries and growing numbers of employment disputes involving claims brought by individual employees against their employees. This has happened at the same time as declining numbers of collective conflicts, evident in phenomena like the widespread decrease in strike rates. What it indicates is that we are seeing a growing individualization of workplace conflict and a

focus on disputes around individual employee rights and contracts. The rising numbers of individual employment disputes is putting strains on standard public dispute resolution systems, such as the courts, public tribunal systems, and governmental agencies. One response to these strains is the adoption of ADR procedures to, ideally, more efficiently and effectively resolve employment disputes. ADR procedures, generally involving some form of arbitration or mediation, hold out the promise of simplifying the process of resolving disputes and transferring greater control to the parties, with the attendant potential to achieve more integrative solutions to conflicts. Yet it is important to recognize that the choice between different dispute resolution procedures, including ADR procedures, involves a balancing of different objectives and interests, such as efficiency, equity, and voice, which may involve trade-offs between these goals (Budd and Colvin, 2008). When we turn to examine specific types of ADR mechanisms that are increasingly being used to resolve employment disputes, it will become clear that they embody particular choices about the locus and priorities of dispute resolution. This is illustrated by three rising phenomena in employment ADR: peer review panels; ombudspersons; and integrated conflict management systems.

Peer review panels are one of the most interesting innovations to arise in ADR in the United States. Under a peer review procedure, a panel that includes fellow employees who are peers of the complainant decides the outcome of workplace grievances. The critical feature of peer review panels is that while they may include managerial members, a majority of the panel members are peers of the employee bringing the grievance (Colvin, 2004). These procedures were first developed in the nonunion sector in the United States, where they are often used as union substitution devices to provide workers with an alternative to the grievance-arbitration procedures common to American unionized workplaces (Colvin, 2003a). Peer review panels establish something akin to an internal arbitration procedure within the organization, with the key difference that fairness in the decision-maker comes not from selection of an outside third-party neutral, but rather from the inclusion of fellow employees who are putatively more likely to identify with the employee grievant's perspective than that of management. Research on usage of peer review procedures suggests that they do enhance the likelihood of employees being able to successfully challenge managerial decisions compared to more typical nonunion grievance procedures that only involve appeals to higher management (Colvin, 2003b). However, it is important to understand that while peer employees may be involved in decision-making under these procedures, the nature and function of them is deeply embedded within the organization. In particular, a common approach to designing the rules of peer review procedures is to specify that the panel's decision-making criteria should be based on whether or not the organization's own rules and procedures have been fairly applied and to exclude challenges to these rules themselves (Colvin, 2004). Thus the function of the peer review panel becomes to ensure that the organization lives up to the rules and norms that it is has enunciated for governing itself, rather than to question these organizational rules and norms themselves such as through reference to external standards of fairness and justice. In this way, peer review procedures provide an enhancement of organizational justice while also reinforcing the primacy of the organization in determining the terms and conditions of employment.

Ombudspersons had their origin as a mechanism for assisting citizens in gaining access to governmental assistance. While governmental ombudsperson offices continue to perform this function in many countries, recent decades have also seen the expansion or corporate or organizational ombudspersons. Organizational ombudspersons serve as an in-house neutral who employees can go to for a variety of problems in the workplace, ranging from personal issues to more traditional disputes with management (Fernie and Metcalf, 2004). These ombudspersons use various dispute resolution and problem solving techniques, from serving a mediator type role to helping the employee navigate complex organizational structures and procedures. A hallmark of the ombuds role is that the ombudsperson is a neutral within the organization and explicitly operates outside of the standard hierarchical management structure. Practices that reinforce this idea include locating the ombudspersons office outside of the organizational chain of command and physically locating the office from which it operates apart from other management offices in a way that facilitates confidential access. Organizational ombudspersons generally emphasize the confidentiality of any complaints brought to their offices. However it is important to recognize that this confidentiality is being offered in relation to the rest of the organization, particularly to the company's managers and supervisors. In an important analysis of the legal status of the organizational ombudsperson, the 8th Circuit Court of Appeals noted in *Carman v. McDonnell Douglas*[1] that the purpose of this confidentiality was to protect the employee against retaliation within the organization, unlike the confidentiality offered by third party mediators which is designed to encourage settlement discussions in legal cases. Given this critical difference in roles and the reality that the ombudsperson, unlike the third-party mediator, remains an employee of the organization, the court held that the privilege granted to mediators against testifying should not be extended to an ombudsperson in a case where the employee sought to introduce this testimony in support of a discrimination claim against the employer. As with peer review panels, ombudspersons represent a significant ADR innovation that helps resolve workplace disputes, but also operates as a method of helping employees receive fairness within the context of the operation of the organization, rather than with reference to external norms or entities.

The move towards organizationally focused ADR mechanisms receives more general expression in the trend towards development of "integrated conflict management systems" (ICMS). The idea of ICMS is that organizations should develop an integrated approach to identifying, managing, resolving, and preventing workplace conflict, drawing on a range of different procedures and mechanisms that operate in an integrated fashion (Lipsky, Seeber, and Fincher, 2003). As described in guidelines developed by the Association for Conflict Resolution, an ICMS should have the following five characteristics: broad scope to include all people in the workplace and all types of problems; a culture that welcomes dissent and encourages resolution of conflict through negotiation at the lowest possible level; multiple access points for individuals seeking to resolve conflicts; multiple options for resolving conflicts, including rights based and interest based options; and support structures for conflict management. A growing number of organizations, particularly in the United States, are adopting an ICMS approach as a strategy for managing workplace conflict (Lipsky et al. 2003). The advent

[1] 114 F.3d 790 (8th Cir. 1997).

of ICMS certainly represent a greater willingness of organizations to accept the inevitability and legitimacy of workplace conflict, as well as the need to resolve rather than simply attempt to suppress employment disputes. However the ICMS approach also reinforces the idea that employment disputes are something internal to the organization and that the organization has primary control over the process of managing conflict and procedures for dispute resolution. Notably the ICMS emphasizes organizational culture as a key determinant of dispute resolution and the idea that conflicts can and should be handled informally at lower levels in organizations without reference to external actors or rules. In their leading description of the ICMS approach, Lipsky and his co-authors analyze the adoption of ICMS as an organizational strategy (what they dub the "Prevent" strategy to dealing with conflict) driven by key organizational leaders who serve as ADR champions. In this vision, ICMS emerge as the embodiment of a successful organizational centric approach to conflict resolution, in which employees receive workplace justice through their membership in an organizational community run based on the precepts of progressive human resource management policies.

The rise of organizational focused ADR mechanisms is clearly driven by the interests and strategies of the organizations themselves, whether these involve human resource strategies, union avoidance, or litigation avoidance. However the growth of organizational primacy in employment dispute resolution is also being reinforced by the legal system itself. This is most strongly evident in the United States, but also emerging in other countries as well.

In the United States, the strongest example in the legal system of an organizational centric approach to dispute resolution is the advent of deferral to employer-promulgated arbitration procedures for the resolution of statutory claims. During the 1980s, the U.S. Supreme Court reversed its historical suspicion of the use of arbitration for resolving statutory claims. This led to two key decisions involving employment disputes, *Gilmer v. Interstate/Johnson Lane* in 1991 and *Circuit City v. Adams* in 2000, which indicated that the courts would enforce arbitration agreements that employers required employees to sign as a mandatory term and condition of employment even where the legal dispute involved important statute-based individual rights such as claims of employment discrimination. Over the past two decades, mandatory employment arbitration has grown to the point where it likely covers around a quarter to a third of the nonunion workforce in the United States. Deferral by the courts to mandatory arbitration for resolving employment disputes reinforces the primacy of the organization in determining how disputes are resolved. Mandatory arbitration agreements are presented to the employee as adhesive, take-it-or-leave-it contracts. It is the employer that designs and drafts the arbitration agreement and arranges for the administration of the procedure. The employer designates which, if any, organization will provide arbitration administration services and where the arbitrators will come from. The leading providers of employment arbitration services in the United States, such as the American Arbitration Association and JAMS, are private organizations with little regulation of the industry by government. For an employee covered by mandatory arbitration who has a potential legal claim against his or her employer, this means that place to turn to determine how that

claim will be resolved is no longer the public legal system, but rather the organization's own arbitration procedures designed by management.

The legal affirmation of organizational primacy is also reflected in two important U.S. Supreme Court decisions on sexual harassment. In the 1998 cases of *Farrager v. City of Boca Raton* and *Burlington Industries v. Ellerth*, the Supreme Court established a new affirmative defense in cases where supervisors or managers engage in unauthorized harassing behavior towards employees. Under this affirmative defense, the employer could avoid liability if it could show that the organization had taken reasonable steps to prevent harassment and the employee unreasonably failed to take advantage of procedures to prevent and complain about the harassment. This new defense has the salutary effect of creating an incentive for organizations to adopt effective policies and procedures against sexual harassment in the workplace. However it also makes the organization and its internal policies the locus of dealing with disputes concerning sexual harassment. Under the affirmative defense, the key issue is not whether the employee suffered from conduct that would violate general public standards against sexual harassment, but rather whether the organization was reasonable in the preventative steps it took. Reasonableness continues to be defined as cases arise in this area, but it is a standard that opens up the concept that steps which would be reasonable for one organization to take might not be reasonable for another to take due to differences in size, organizational structure or other factors. Similarly under the second prong of the defense, the inquiry about the employee plaintiff's conduct focuses on the reasonableness of his or her behavior in using or failing to use internal organizational procedures. This presupposes the idea that employees suffering a violation of their rights should be attempting to resolve disputes internally within the organization. The presumption is that the organization has primacy as the initial locus of dispute resolution, with public systems only serving a secondary role.

The United States represents the strong case of legal deferral to organizational primacy in employment dispute resolution, however examples also exist in other countries. In the United Kingdom, employees have been able to bring unfair dismissal actions through a system of public employment tribunals since the Industrial Relations Act of 1971. More recently, this public system for resolving unfair dismissal disputes was supplemented by a 'statutory grievance procedure' established in the Employment Act of 2002. This legislation set out a standard to be followed where an employee wished to bring a grievance at work, including for unfair dismissal. Under the statutory grievance procedure, the employee must file a grievance in writing. Then there must be a meeting to discuss the grievance, at which the employee has the right to be accompanied by a representative, such as a union official or a legal representative. The employee then has the right to appeal the decision, which leads to an appeal meeting where the employee again has the right to representation and after which the employer must issue a final decision. Under the initial legislation, an employment tribunal would not hear an unfair dismissal case unless the employee initially went through the statutory grievance procedure and the employer would be presumed to have engaged in an unfair dismissal if it did not follow the statutory procedures. However in response to complaints that this structure was overly rigid for handling disputes, the legislation was amended in 2009 so

that the mandatory standard procedure became an advisory Code of practice. Instead of barring claims, employment tribunals were given the authority to increase or decrease award amounts by up to 25% if the parties unreasonably fail to follow the recommended procedures provided in the Code. The U.K. disciplinary and grievance procedures set up a system similar to the U.S. in that the organization's establishment of internal procedures gives it protection against legal liability in the public realm. The 2009 amendments soften the extent of protection against liability, while also making the required procedures less rigid and subject to a standard of reasonableness, which has echoes of the affirmative defense standard in U.S. sexual harassment cases.

These developments, both in law and practice, in the area of employment dispute resolution procedures resonate strongly with the ideas of self-regulatory theory which have gained currency in recent scholarship. Self-regulatory approaches seek to channel the internal structures and impulses of the targets of regulation to attain desirable public objectives. As its name suggests, this approach emphasizes strategies directed towards encouraging self-regulatory behavior by private organizations rather than direct regulatory oversight by governmental agencies. Advocates suggest that these self-regulatory approaches can be both more efficient and effective than traditional regulation in the modern world. For example, Cynthia Estlund in *Regoverning the Workplace* argues, "A forward-looking agenda for labor should embrace and try to steer the movement toward self-regulation – toward relying on, encouraging, and channeling the impulses and resources that lie within and among private firms toward public-regarding ends."[2] The positive side of this vision can certainly be seen in aspects of the development of organizational centric systems in employment dispute resolution. In my own earlier empirical research, I found evidence that the new American nonunion ADR procedures were providing significantly greater workplace protections for employees than traditional nonunion grievance procedures (Colvin, 2003b). Similarly, although it has limitations, it is hard to argue that the new grievance procedures encouraged by the U.K. legislation are not a step forward compared to no encouragement for internal workplace procedures. At the same time, there may still be a cost to the privileging of self-regulation. In analyzing U.S. nonunion ADR procedures, I have argued that they involve a trade-off in which employees are granted greater rights within the firm as organizational citizens, yet at the price of according the organization greater protection against oversight from outside actors such as the public court system or independent unions, what I described as strengthening the organizational citadel (Colvin 2003a).

Going beyond the question of whether the trade-off of greater organizational citizenship for less external oversight is worthwhile, an additional set of questions need to be posed for the self-regulatory approach when we consider the advent of the post-standard contract world. A key assumption of self-regulatory theory is that an organization that should be engaging in self-regulation can be identified and that its reach includes the desired targets of the regulatory initiatives. This may make sense in many employment situations involving conflict arising as part of well-established and ongoing employment relationships. But what if membership within the self-regulatory organization is itself the question in dispute? Should we then be encouraging self-

[2] Estlund at 29.

regulatory dispute resolution procedures that give primacy to this same organization? In the next section, I will discuss three rising types of employment disputes that implicate exactly this question of the boundaries of membership in an organizational community and the issues they raise for self-regulatory strategies.

IV. Conflicts over Entry and Exit from the Self-Regulating Community

In this section I discuss three characteristic and growing types of disputes in the modern workplace that challenge the self-regulatory approach to dispute resolution, which builds on the primacy of the organization as the key actor determining employment terms and conditions and the resolution of conflicts concerning them.

The first characteristic type of employment dispute in the contemporary workplace concerns the basic question of who has status as an employee. With the rise in SHRM theory and practice of the idea that the firm's HR strategy is the key determinant of the nature of the employment relationship has also followed the idea that the organization itself should also determine to what degree it owes obligations as an employer to those who perform work for it. In SHRM theory, the idea is that a distinction can be drawn between the core workforce that provides the organization with the unique, valuable and rare human resources that give it competitive advantage (Barney, 1991) and the non-core workforce that the organization does not need to make significant investments in or even owe obligations to if possible. This concept has helped drive strategies of outsourcing parts of the firm's workforce and shifting others to relationships such as that of independent contractors, where the organization's obligations to the workers are dramatically reduced compared to its obligations to its core workforce. Initial versions of this involved practices such as outsourcing custodial, cafeteria, maintenance or payroll functions. However, the growing extent of the core/non-core strategy became evident in the widely publicized U.S. case of *Vizcaino v. Microsoft Corp*[3].

The *Vizcaino* case dealt with Microsoft's practice of using large numbers of temporary workers. Unlike the traditional image of temps as short-term workers filling relatively low-skilled positions, the Microsoft temps were performing high-skill jobs and had often worked for the organization for many years. Indeed, testimony in the case indicate that these workers, sometimes referred to as "perma-temps", would often be working alongside regular employees and were indistinguishable from them apart from the different color of their employee badges and the fact that a different organization (the temp firm "employer") sent them their paycheck each month. The perma-temps in *Vizcaino* sued Microsoft arguing that they were being misclassified as an independent contractors and unfairly denied the benefits, particularly valuable company stock options, that they should have been entitled to as employees. The plaintiffs in the *Vizcaino* case were ultimately successful in obtaining a $97 million settlement from Microsoft (van Jaarsveld, 2004), however the broader impact of this case has been more to encourage firms to take greater care in the design of their independent contractor arrangements to avoid findings of employment status than to discourage this practice. Indeed, the trend in legal decisions in the U.S. concerning employee versus independent contractor status has

[3] *Vizcaino v. Microsoft Corp.* 102 F.3d 1006 (9th Cir. 1997).

been in a direction of facilitating efforts of organizations to avoid employer status. In the key U.S. Supreme Court decision in *Nationwide Mutual Insurance Co. v. Darden*[4], the court held that statutes should be presumed to incorporate the common-law test for employment status, which provides a relatively narrow definition of employment status, rather than the alternative economic-realities test, which tends to include more workers within its definition of employee. Notably, one of the main justifications the majority of the court gave for favoring the common-law test is that it revolves around the question of controlling and directing the performance of work, which involves objective factors under the control of the employer. Put alternatively, the common-law test makes it easier for the employer to design the relationship with the worker in such a way that it corresponds to its own organizational decision of whether or not it wants to owe the obligations of an employer.

This legal rule may appear as a natural outgrowth of an organizational centric vision of economic life. However, even accepting this substantive rule for determining employment status, the question arises of how best to resolve cases in which the very question of employment status is in disputes. The new ADR procedures such as peer review, ombudspersons, and ICMS, are deeply embedded in the organizational itself and focus on ensuring justice in the application of its rules, policies and norms. But what if the organization's own definition of the worker's status explicitly excludes him or her from membership as an employee in the organizational community? Should we then expect the worker to be satisfied with resolving disputes through a procedure that emerges from the system that denies him or her status as a citizen of the organization? In disputes over who is an employee, we see the limitations of the organizational centric ADR system.

A second growing category of employment-related disputes in recent years concerns issues of intellectual property, trade secrets, and covenants not to compete. Unlike traditional employment disputes where the employee is alleging some type of unfair treatment by the employer, in these cases it is the employing organization which initiates a claim against the employee. Often the cases involve some allegation that the employee is appropriating some type of intellectual property or trade secret that belongs to the employer by virtue of the employment relationship. A notable feature of these types of claims is that they commonly arise in situations where the employee has left employment with the organization and is now attempting to use the contested ideas or information for his or her future career advancement. A similar dynamic occurs with disputes concerning the enforcement of covenants not to compete. By definition, these disputes involve employer attempts to restrict the behavior of someone who is a former employee and is now attempting to pursue new career opportunities that do not involve being an employee of the organization. At the same time that these disputes commonly arise after exit from the organization, they often turn on interpretation of agreements formed on entry into the organization. Covenants not to compete and agreements regarding ownership of intellectual property created by an employee are both commonly included in initial hire contracts. As such, both the key events in this type of dispute – the circumstances of entry into the contract and the conduct after exit from employment –

[4] 503 U.S. 318 (1992).

occur during time periods when the “employee” is not actually employed within the organization. This makes it problematic to assign resolution of this type of disputes to a an organizationally centric resolution procedure that emphasizes fair enforcement of the norms and rules of the organization, for example as in peer review, or the effective internal management of conflict, as in an ICMS.

A third example of the disjuncture between organizationally focused dispute resolution procedures and the nature of contemporary employment disputes is the conflicts that have arisen around mandatory arbitration. As described earlier, the expansion of mandatory arbitration is a key feature of the transformation of employment dispute resolution in the U.S. towards organization centric private ADR procedures. A major advantage of mandatory arbitration for employers is their ability to unilaterally design and adopt these procedures. When an individual is entering into employment with the organization, he or she is then presented with agreeing to the procedure as a mandatory term and condition of employment. To the degree that employees wish to challenge the applicability of mandatory arbitration procedures to their disputes, they have tended to focus their arguments on the circumstances in which they entered into the agreement or on the conduct of the employer in drafting the procedures. Either or both of these events are likely to have occurred prior to the individual becoming an employee of the organization. For example, one set of challenges focused on whether the entry into the arbitration agreement by the employee was knowing and voluntary. The questions here dealt with what information was communicated to the employee before he or she entered into the agreement, which was generally presented at the time of initial hiring and employee orientation.

Interestingly, while challenges to mandatory arbitration have commonly focused on conduct immediately prior to entry into the organization, the underlying disputes that are subject to mandatory arbitration largely involve issues of exit from the organization. In a study of 320 mandatory arbitration cases that I conducted with Kelly Pike, we found that almost all of the disputes involved cases where employment was already terminated, either through dismissal or quitting. What this means is that we have an organizationally designed and focused mandatory arbitration procedure that primarily resolves post-termination disputes involving individuals who have already exited the organization and where the applicability of this procedure is determined by questions relating to conduct before entry into the organization. In addition, over half of the cases involved claims of discrimination deriving from public statutory rights and many of the rest involved arguments based on exceptions to the employment-at-will doctrine developed by the state courts. Cases generally did not involve issues of application of internal organizational norms and rules of the type that would seem particularly suitable to resolution by internal organizational ADR procedures.

Despite these apparent tensions, the trend in judicial decisions concerning mandatory arbitration has been to expand rather than narrow its reach. Recently, in 2010 the U.S. Supreme Court was confronted with the question of who should decide challenges to the applicability of a mandatory arbitration agreement that argued the

agreement was unconscionable. In the case of *Rent-a-Center West v. Jackson*[5], the majority of the court held that such challenges should be decided by the arbitrator designated under the procedure, not by a court, unless the challenge specifically related to the unconscionability of having the arbitrator decide the issue of unconscionability rather than the validity of the arbitration agreement as a whole. The effective result of this case is that it is the arbitrator designated under the procedure designed by the organization that will in most cases determine his or her own jurisdiction in a dispute where the individual is no longer an employee and may often be arguing that they never properly entered into an agreement to have the arbitrator decide the dispute.

V. Alternative Approaches for a Post-Standard Contract World

The phenomenon of long-term employment relationships with a single employing organization regulated by Standard Contracts of the form discussed earlier is common across most advanced economies. Similarly, systems of labor and employment law in these countries were often developed in the context of this being the dominant form of employment and reflect the need to regulate this type of employment relationship. However, there are some examples of recent labor and employment reforms that provide potential avenues for better resolving the new types of post-standard contract conflicts.

As discussed earlier, disputes over competition by former employees and the question of enforcement of noncompetition clauses is a characteristic type of post-standard contract conflict. One alternative approach to these disputes is found in the employment law of France. The French law of employment traditionally recognized an employee's duty of loyalty to the employer and generally supported the enforcement of noncompetition agreements. More recently, French courts have begun to narrow their interpretation of noncompetition agreements, holding them null and void if they are not limited in duration and reach, focused on a specific job and based on consideration proportional to the employee's salary. Furthermore, a 2003 amendment to the law setting out the duty of loyalty (Law No. 2003-721), permits an employee to set up a new business while still employed without violating the duty. Noncompetition agreements can be suspended for one or two years if the employee is setting up or taking over a business (Blanpain et al 2007: 447). What this law does is to recognize and facilitate the process of employees moving in and out of employment relationships and transitioning between status as an employee and an independent business person or entrepreneur, behavior that is characteristic of post-standard contract economic life.

For resolving employment disputes in a post-standard contract world, there is an advantage to systems that are not tied to any individual employing organization. Systems that use specialized public employment tribunals, such as the British employment tribunal system, may have an advantage in this regard over systems like the American and Canadian labor arbitration procedures that are tied to a specific workplace labor contract. The French system of Conseils de Prud'homme is an interesting variant on the public employment tribunal approach in that it includes representatives of employer and employee groups who are elected on a general basis rather than for any specific

[5] (No. 09-497)

organization. Although the origins of this system are quite old, the idea of regional or industry focused dispute resolution panels might be a useful avenue to pursue where employees are pursuing careers that involve moving between various organizations in a particular regional industry cluster. For example, in the American setting, one might envision something like a Silicon Valley employment dispute tribunal including employer and employee representatives who would be well versed in the nature of careers in that region and able to resolve conflicts that emerge in the context of its environment of high employee mobility and frequent organizational turnover.

Another approach would be to search for ways to connect the organizationally centric innovations in dispute resolution that have emerged to the public realm. One interesting step in this regard is the establishment of a "Fair Work Ombudsman" as part of the recent Australian labor and employment reforms introduced by its Labour Party government. The Fair Work Ombudsman is a public agency that provides advice to both employees and employers on workplace rights and responsibilities. It can investigate and enforce workplace laws, but also operates through education and establish best practices for employment. The mixed set of tactics and strategies for promoting workplace rights used by the Fair Work Ombudsman echoes the diverse approaches used by private organizational ombudsman offices to promote fairness within organizations. However as a public office, the Fair Work Ombudsman has much broader reach and has the potential to address concerns and conflicts of individuals transitioning between organizations in post-standard contract careers.

VI. Conclusion

I will conclude by suggesting three problems that need to be addressed in thinking about how to resolve conflicts in a post-standard contract employment world. First, how will employees obtain representation? In the old standard contract world, many labor organizations built their representational strength through organizing workers in individual workplaces. Even where unions were organized at the national or industry level, they were commonly built on membership centers in individual workplaces. If workers have diminished attachment to an individual workplace that will not only hurt union membership, but also weaken representational structures for individual employees with grievances or complaints. Absent the connection to the shop steward, staff representative or works councilor of the old standard contract representation systems, who will the employee in the post-standard conflict world turn to for assistance in resolving an employment conflict?

Second, in the field of employee benefits the decline in employer-linked benefits such as employer-provided defined benefit pension plans has led to calls for more easily transferrable benefit packages. A similar problem exists with the loss of employment rights that accrue with long-term employment. In particular, entitlements tied to seniority, such as greater protections against arbitrary dismissal or longer notice periods for terminations, lose their value in post-standard contract careers that lack long-term attachment to any one organization. Under the old standard contract system, there was an idea that over time an employee developed some set of rights in relation to his or her job,

akin to a type of property interest in the job. For post-standard contract careers we could also think of the idea of a transferrable bundle of employment rights. Perhaps someone who has developed a long career of working with and for a number of different organizations in an industry should have that taken into account in how he or she is being treated in an employment conflict. In this way the post-standard contract version of seniority rights might be in resolving disputes to accord a degree of respect for contributions made over a career to an industry, profession or community.

Third, where will employees find sources of power in a post-standard contract world? In the old standard contract model, employees derived bargaining power in part from their ability to withhold their labor from the employing organization though strikes and other work action. Even for the white-collar nonunion employee in a classic internal labor market, his or her personal bargaining power derived from the accumulation of firm specific human capital that the organization would be loathe to lose. These sources of bargaining power deriving from the strong attachment of employees to the organization provided the underpinning for negotiation of favorable contracts and inhibited the employer from taking negative actions towards the employees in the event of a dispute. However in the post-standard contract world, the weakening of the attachment of the employee to the organization reduces bargaining power and limits the employee to the strength of his or her position in the external labor market. This issue of power becomes acute in the context of an organizationally centered structuring of the employment relationship. Absent a source of employee power in relation to the organization in s post-standard contract world, why should an employing organization listen to the employee in determining its internal rules, practices, and norms? How then do employees engage and participate in the process of ordering this organizationally centered world when their careers are increasingly disconnected from any individual organization?

The danger is that as employees become disconnected from their employing organizations in a post-standard contract world operating under the philosophy of self-regulation, they will find that when disputes arise over their employment relationships, they will come into contact with the new organizationally centered dispute resolution procedures as outsiders pleading their cases to organizations of which they are no longer citizens.

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