

**From Employment Law to Labour Market Regulation: Employability and Skills
for the Future**

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Dear Editor,

In contemporary discussions of higher education and training, there is much discussion of the notion of ‘employability’, namely, that higher education and training institutions should provide labour market entrants with the ‘skills’ they need to function in the labour market. Higher education institutions thus compete to ensure that their graduates are the most ‘employable’ in an attempt to encourage potential students to attend their institution over any other. The notion of ‘employability’, however, does not solely concern higher education institutions and their marketing ploys; it also raises profound questions for the regulation and structure of the labour market as a whole and most especially employment law, the traditional vehicle for the regulation of the labour market.

As you well know, the traditional object of employment law is to remedy and address some of the imbalances of power in the employment relation between employer and employee.¹ However, this object is increasingly being displaced by a more individualist approach, precipitated by the growing contractualisation of social relations,² namely, as one commentator puts it, the ‘contractualisation of labour law’³ itself. By ‘contractualisation of labour law’, that commentator suggests:

the gradual migration of people’s working lives out of the model of the employee and into the model of a mere contractor. Where once we would have found people with jobs, we might well now find people with ‘gigs’, undertaking work assignments without any standing relationship with the person for whom the work

¹ Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law* (Stevens 1983).

² Hugh Collins, *Regulating Contracts* (OUP 1999) 17 citing Karl Marx, *Capital: Volume I* (Penguin 1976) ch 1(4) and Max Weber, *Economy and Society* (University of California Press 1978) 669.

³ John Gardner, ‘The Contractualisation of Labour Law’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018).

is performed, or if in a standing relationship then in one that is not characterised by any commitment to its continuation...⁴

Therefore, there is a growing trend towards the increasing dominance of an ethic of efficiency in economic and social relations, whereby all major relationships in society are characterised by a demand for the satisfaction of consumer needs in the most efficient manner possible. This disregards the implications for traditional structures and relations of domination and subordination—such relationships being characteristically those of employment, including non-standard employment relationships. The implication of this trend for labour law is the displacement of its traditional goals of ameliorating imbalances in bargaining power in the contractual relationship between employer and employee. Indeed, if anything, it suggests that instead of the employer (or labour market intermediary, etc) carrying the main share of the risk—financial, moral, etc—it is the worker who carries a significant proportion of the risk, being required to look after their own career and carve out their own path in the labour market. While the worker remains largely dependent on the employer to be supplied with work—and therefore remains characteristically vulnerable and dependent—the object of employment law is now rather to ensure sufficient flexibility on behalf of the worker so that her skills can be deployed when the employer (or labour market intermediary in the case of certain ‘platform employers’⁵) sees fit.⁶

The question for labour lawyers and scholars is, therefore, where to next? The answer, it seems to me, is skills. If consumers and employers are demanding greater flexibility, availability and skills on behalf of workers, then labour law should turn its attention to the recognition, development and enhancement of skills, as well as the regulation of same. Interestingly, international labour law has long recognised the importance of this in the form of ‘human capital’ or ‘human resources’ regulation. The ILO’s Human Resources Convention 142 of 1975 and its companion Human Resources

⁴ *ibid* 39.

⁵ See Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP 2018).

⁶ Hugh Collins, ‘Regulating the Employment Relation for Competitiveness’ (2001) 30 *ILJ* 17.

Development Recommendation 150 of 1975 (now replaced by the Human Resources Development Recommendation 195 of 2004), as well as the Employment Policy Convention and Recommendation of 1964, acknowledge the significance of education and training, employability and qualifications in the development of human resources for the purposes of contributing to the overall welfare of society and the sustainable development of the economy.

It is interesting to note that many Irish higher education institutions are institutionalising so-called ‘employability and skills awards’, providing a formal qualification or award in employability and labour market readiness. Trinity College Dublin has three such awards, two being linked with Intel and a third—the ‘Professional Services Pathway Award’ linked with professional services firms such as EY, Deloitte, KPMG and PwC. Such awards constitute important industry and higher education institution collaboration, tailoring education for labour market outcomes. But they also indicate, in a formal way, the heretofore largely informal acquisition of labour market skills. Similar initiatives have been launched in National University of Ireland Galway, Queens University Belfast, University College Cork, University College Dublin and Dublin City University.

It therefore seems that in an increasingly competitive labour market, employment law—or the law in general—should turn to the regulation of education and training for competitiveness, so that graduates are prepared for entering a market in which they bear greater responsibility for their own career development.

Is mise, le meas,

Dáire McCormack-George