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A Big Step Forward: But Bigger Steps Required - A Note on the Employment Rights Bill

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Introduction

1 The Employment Rights Bill is a big step forward in improving workers' rights, addressing a number of abusive employer practices, and removing unwarranted restrictions on trade unions.

2 The Bill's success will be judged, however, on how well it addresses six major problems of contemporary British labour law. These are as follows:

- The problem of status and the confusion between those who work on a subordinate basis for others, and those genuinely running a business on their own account;
- The problem of low pay and growing inequality as a result of years of deregulation and de-unionisation;
- The problem of insecure jobs affecting the capacity of people who work to have a decent standard of living;
- The problem of lack of worker voice and lack of worker power, with only a minority of those who work protected by a recognised trade union;
- The problem of lack of effective remedies, and – as revealed by the P&O Ferries Ltd case - the failure of our labour law to ensure that employers are required to comply with their legal obligations; and
- The problem of British labour law's incompatibility with international labour standards ratified by the United Kingdom.

The Problem of Employment Status

3 As a general principle, labour law should be universal in its application: labour rights should apply to everyone who works for others, unless there are compelling reasons for exclusion in any particular case. At the moment, however, there are a variety of different legal categories. The three most well-known are:

- those who are employees;
- those who are so-called 'limb (b) workers'; and
- those who are self-employed genuinely in business on their own account.

4 However, there are others, including the false self-employed (people told they are self-employed with self-employed contracts but who are, on examination by the court or tribunal, in fact, employees). There are those employed by an umbrella company – a third-party employer which contracts their services to the real employer. There are those employed by a 'personal service company' owned by the worker but which has a commercial contract with the real employer (so limiting all the worker's employment rights enforceable against her

company but not against the real employer), There are agency workers. And there are anomalous cases which do not fit any of these categories, such as some foster carers.

5 The category within which a person falls will determine the extent to which they are protected by labour law and which employment rights they enjoy. As a general principle, those who are employees are most favourably treated, and those who are neither employees nor limb (b) workers are least favourably treated. Those least favourably treated include many who have the most vulnerable and precarious jobs.

6 Determining into which category a person falls is often complicated, arbitrary, and unpredictable, and some employers create working arrangements deliberately to deny people who work from having the status of employee. Following the Budget and the increase in employers' National Insurance ('NI') costs, there is a risk that more employers will adopt strategies of this kind to avoid the extra costs of NI, but which will have the incidental effect of denying people the protection of employment rights.

7 It is widely recognised that this is a problem that needs urgently to be addressed, having been the subject of widespread discussion at official levels and beyond for at least ten years. Since the Taylor Review was published in 2017, there have been two well received private member's bills to try to resolve or at least minimise this problem, one in the House of Commons and the other in the House of Lords.

8 The latest Bill provides a tailor-made opportunity to solve this problem.[1] It is difficult to see what purpose will be served by further consultation and delay. As it is, the impact of this confusion will be felt on the provisions of the Bill in which the various enhancements of statutory rights are currently bestowed on various different categories of worker. Thus, the following provisions relating to employment rights apply only to employees:

> The right to request flexible working; the reforms to statutory sick pay; parental leave; paternity leave; bereavement leave; prevention of sexual harassment; changes to unfair dismissal (including removal of two-year qualifying period, pregnancy dismissals, dismissals following period of statutory leave, and fire and rehire dismissals).

9 In contrast, the following provisions relating to employment rights apply in relation to workers (a term that may or may not include employees):

> Right to an offer of guaranteed hours; right to reasonable notice of a shift; right to payment for cancelled, moved, or curtailed shifts; the provisions relating to the allocation of tips; and protection for transferring workers in outsourcing contracts;

10 Similarly, in regard to trade union related rights, the following provisions apply in relation to employees:

> pay arrangements for school support staff; reforms to collective redundancy information and consultation requirements; equality action plans; deduction of trade union subscriptions from wages; facilities for trade union representatives, learning

[1] https://bills.parliament.uk/publications/53285/documents/4124.

> representatives and equality representatives; and dismissals for taking part in lawful industrial action.

11 In contrast, the following provisions with regard to trade union related rights apply in relation to workers (a term that may or may not include employees):

> pay arrangements for adult social care workers; right to a statement of trade union rights; trade union access rights; protection against detriment for taking part in lawful industrial action

12 It is difficult to understand what possible justification exists for the perpetuation of this chaos, particularly after the Supreme Court decision in the *Deliveroo* case that food delivery riders are not to be treated as limb (b) workers (neither are they employees). This means that, because of the exploitation of a loophole in the existing law, these individuals are regarded as being self-employed for labour law purposes and are denied all the rights enjoyed by employees and limb (b) workers, a loophole which the Bill continues to ignore.

The Problem of Low Pay and Growing Inequality

13 A major feature of contemporary British society is the high levels of inequality, fuelled by low wages, leading to in-work poverty on a significant scale. The government's *Employment Rights Bill: Economic Analysis* (2024) notes that 'average salaries have barely increased from where they were before the 2008 financial crash', and that today 'the average German household is 20% wealthier than their British peers', adding that 'the average worker would be 40% or roughly £11,500 a year better off if wages had continued to grow as they did leading into the 2008 financial crisis (para 50).

- **Importance of Collective Bargaining**

14 It is now widely accepted that low pay and income inequality are associated with low levels of collective bargaining coverage. The point is well made in the recitals to the EU's Adequate Minimum Wage Directive of 2022, which of course is not binding on the United Kingdom. Nevertheless, the recitals acknowledge that 'sectoral and cross-industry level collective bargaining is an essential factor for achieving adequate minimum wage protection and therefore needs to be promoted and strengthened', adding that 'Member States with a high collective bargaining coverage tend to have a small share of low-wage workers and high minimum wages. Member States with a small share of low-wage earners have a collective bargaining coverage rate above 80 %'.

15 In addressing the problem of low pay, the EU Directive provides that each Member State must 'promote the building and strengthening of the capacity of the social partners to engage in collective bargaining on wage-setting, in particular at sector or cross-industry level'. It also provides that

> each Member State in which the collective bargaining coverage rate is less than a threshold of 80 % shall provide for a framework of enabling conditions for collective bargaining, either by law after consulting the social partners or by agreement with them.

Such a Member State shall also establish an action plan to promote collective bargaining, which must be made public, notified to the Commission, and reviewed at least every five years.

16 The United Kingdom is currently below the OECD average, and lower than almost every EU Member State in terms of collective bargaining density. Yet the Employment Rights Bill contains few measures to address the problem of low wages. In particular, it makes very little provision for collective bargaining, referring only to Adult Social Care and School Support Staff respectively. These are clearly important sectors and give effect to the proposals in *Make Work Pay* which stated that:

> We will start by establishing a new Fair Pay Agreement in the adult social care sector, empowering workers and the trade unions that represent them to negotiate fair pay and conditions, including staff benefits, terms and training, underpinned by rights for trade unions to access workplaces, in a regulated and responsible manner, for recruitment and organising purposes. This will help us tackle the serious recruitment and retention crisis facing the sector, deliver higher standards for those receiving care and help us to tackle NHS waiting lists.
>
> Labour will consult widely on the design of this Fair Pay Agreement, learning from those economies where they already operate successfully, ensuring the highest standards of representation and accountability. We will monitor the implementation, ensuring it delivers for workers and employers in the sector.
>
> We will publish a full and transparent review of the agreement. We will also assess how and to what extent FPAs could benefit other sectors and tackle labour market challenges.

- **The Statutory Framework**

17 It is a notable feature of Part 3 of the Bill dealing with 'Pay and Conditions in Particular Sectors', that the arrangements for pay determination in the case of adult social care workers and school support staff respectively are subject to tight control by the responsible ministers. In truth what the Bill is proposing is a form of pay determination, but not pay determination by collective bargaining as that is normally understood by industrial relations experts, trade unionists, HR managers, lawyers, and most importantly, by the International Labour Organisation (ILO).

18 The latter has a number of Conventions on collective bargaining, including Convention 98, long ago ratified by the UK, and Convention 154 which has not yet been ratified, together with much jurisprudence identifying what is, and is not, collective bargaining. ILO Convention 98 provides that

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

19 ILO Convention 98 does not define what is meant by collective bargaining for these purposes. However, ILO Convention 154, Article 2 provides that:

> collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for:
>
> > (a) determining working conditions and terms of employment; and/or
> > (b) regulating relations between employers and workers; and/or
> > (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.:

As explained in the seminal ILO text on collective bargaining:

> The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to the bargaining. [2]

20 The foregoing is very different from what is being proposed in the Bill for adult social care workers and school support staff respectively:

- both procedures limit the subject matter which may be discussed to specified items;
- both procedures give the minister the power to appoint who the representatives of the two sides will be:
    - In the case of adult social care only from amongst those who are union 'officials' (thereby excluding lay representatives)
    - In the case of school support staff any person representing the interests of a prescribed organisation
- both procedures make provision for third parties to be in the room:
    - In the case of ASC, it appears that the Minister has power by Regulations to give these third parties voting rights;
    - In the case of SSS, it is expressly provided in the Bill that third parties present may not vote.
- neither procedure make express provision for facilities for trade union representatives, such as access to members, and time off for lay representatives; and
- neither procedure make provision for a dispute resolution procedure independent of the minister, who appears, in both cases, to have the power to impose a settlement regardless of the wishes of the parties and notwithstanding that in both cases the minister is conflicted by representing a government with a clear financial interest in keeping expenditure on labour costs in the public sector low.

21 In addition to the foregoing, there are other provisions in the Bill which reinforce the view that what is proposed is not collective bargaining and that the outcomes of the processes are not collective agreements:

[2] B Gernigon, A Odero, H Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *International Labour Review* 33.

- It is expressly stated in the case of the adult social care body that regulations may provide that nothing done by the negotiating body is to be regarded as collective bargaining for the purposes of TULRCA 1992, s 178.

- It is expressly stated in the case of school support staff (without the need for regulations) that nothing done by the negotiating body is to be regarded as collective bargaining for the purposes of TULRCA 1992, s 178.

It is not clear what purpose these latter provisions serve beyond confirmation that the Bill is not proposing pay determination by collective bargaining.

22 Nevertheless, one very positive effect of the procedure is its *erga omnes* effect, in the sense that recommendations approved by the respective ministers will apply to everyone in the sector in question, including employers who are not directly represented in the negotiations, and workers in the case of adult social care and employees in the case of School Support Staff who are not members of the unions which are responsible for negotiating the terms and conditions (including pay) from which they will benefit.

- **The Need for Additional Powers**

23 In light of the distancing in the Bill from collective bargaining and anything relating thereto (on which see also the proposed new TULRCA 1992, s 70ZJ, referred to below), it is unsurprising that no provision is made to give effect to the undertaking in *Make Work Pay* to review the operation of the Adult Social Care procedure, or 'assess how and to what extent FPAs could benefit other sectors and tackle labour market challenges'. Apart from addressing the concerns about the procedure identified above, there is a case also for an amendment to ensure that the review takes place before 2028.

24 In addition, provision needs to be made to enable the Bill's procedures for adult social care (suitably modified to comply with international legal obligations relating to collective bargaining) to be extended to other sectors in accordance with the undertaking in *Make Work Pay*. Because the Bill provides no mechanism for establishing collective bargaining in other sectors, fresh primary legislation will be required, the need for which could be avoided by the simple expedient of an amendment to the Bill empowering the Secretary of State to make provision for the establishment of sectoral collective bargaining arrangements in sectors where prescribed statutory criteria are met.

25 An amendment of this kind would include a template procedure agreement, which would deal with the bargaining structure, the bargaining parties, the bargaining purposes, the procedures for dealing with disagreements and disputes, and the facilities for those involved. Power would also be required to ensure that bargaining outcomes had *erga omnes* effect as explained in para 22 above. But there is no reason why it would be necessary to follow the example of the Bill which provides that pay elements of the ASC and SSSNB procedures are to be enforced as statutory rights and the rest as mandatory contractual rights. The latter is sufficient.

The Problem of Insecure Jobs

26 The problem of job insecurity is one identified in the government's *Economic Analysis* (above) which points out that 13% of workers, 3.8 million people, are on 'flexible' contracts particularly amongst monopsony employers (paras 69 and 77). The Bill makes three principal provisions to deal with job insecurity, these relating to (i) qualifying periods for unfair dismissal and other rights; (ii) zero hours contracts; and (iii) fire and rehire respectively. The obvious antidote, sectoral collective bargaining, is not deployed.[3]

- **Qualifying periods**

27 One of the most obvious causes of insecurity under the existing law relates to the power of the employer to dismiss without cause for the first two years of employment. The proposal to remove the two-year qualifying period is welcome, but the proposal to give power to the minister to reduce the right not to be unfairly dismissed by the proposed new ERA 1996, section 98ZZA is unnecessary. What is proposed is a lower form of protection for dismissal during the first period of employment on grounds of capability and qualifications, conduct and breach of a statutory duty, as well as a 'some other substantial reason relating to an employee' (the latter is a different and narrower formulation than the one used in ERA 1996, section 98(1)(b)). The power to specify by regulation a lower standard of procedural protection in these cases has not been justified except on grounds of political expediency, and will help to perpetuate the insecurity of employment noted by the *Economic Analysis*.

28 Although some employers appear to be concerned that the removal of the two-year qualifying period will open the floodgates to litigation, that will be true only to the extent that employers dismiss employees unfairly. Under unfair dismissal law as it currently stands, it is perfectly possible for an employer to dismiss because the employee is not capable of doing the job or if the employee has been guilty of misconduct. The existing rules are already sensitive to the different circumstances of different cases, and have been developed by judges to ensure that employers have sufficient evidence to justify dismissal. There is no need for special protection or diluted standards as a form of protection against dismissed employees who have limited means and for whom the cost of bring a claim will greatly exceed its value.

- **Zero hours contracts**

29 According to the government's *Economic Analysis*, above, 'the number of workers on zero hours contracts has risen significantly over the last decade to over 1 million, and only 1 in 6 low paid workers ever fully escape into better paid work' (para 48). But although the Bill proposes measures to limit their use, there are three major problems with the zero hours provisions of the Bill.

30 The first relates to the proposed new ERA 1996, section 27BB(8) which will enable employers to offer a guaranteed hours contract where the work is for a short term nature:

- What is the justification for this loophole?

[3] On which see M Pittard and K D Ewing, 'Fire and Rehire: Four Lessons from Australia' (2024) 53 *Industrial Law Journal* 370-406 where the importance of sectoral regulation is highlighted as a significant factor in the absence of fire and rehire in Australia.

- Does it mean that the people engaged on such terms will be engaged on a zero hours basis, or will they be employed on a guaranteed hours basis? It is not clear.
- If the former, why is it not possible for such workers to have a guaranteed hours contract if they otherwise meet the proposed statutory criteria?
- What safeguards will there be to ensure that this power is not abused in order to avoid a guaranteed hours contract? There is nothing in the Bill.
- What is the difference – if any – between a short-term contract and a fixed-term contract?
- What will be the legal status of someone engaged on a short-term contract? Employee, limb (b) worker, or neither?
- Will non-renewal of a short-term contract be a dismissal for the purposes of unfair dismissal in the case of workers who are employees?

31 The second major problem relates to proposed new ERA, section 27BE (acceptance or rejection of a guaranteed hours offer), and the lack of formality relating to the worker's right to refuse an offer of a regular hours' contract. There is a risk that workers could be coerced into rejecting an offer if it is clear that the employer would prefer existing arrangements to continue. There are similar arrangements in the Working Time Regulations relating to the right of workers to opt out of the 48-hour working week. In contrast to the provisions of the Bill relating to ZHCs, the provisions of the WTR do not apply to all workers, and those who do opt out may revoke their decision to do so. But arguably there are no adequate safeguards there either.

32 It is true that the Secretary of State has power to make regulations about the form and manner of a notice under proposed new ERA, section 27BE(1), and reference is made to a response time, which is undefined. The question is whether it would be appropriate for Parliament to give stronger guidance to the minister by requiring that

- The response period should be at least one week;
- The worker has the right to seek advice from an independent trade union before making a decision;
- The worker has a right to be accompanied by a trade union official under the Employment Relations Act 1999, section 10 in any meeting to discuss the offer; and
- The worker may revoke a rejection of an offer at any time on giving one week's notice to the employer, following the model of the Working Time Regulations.

33 Finally, the third major problem relates to the following: the Bill

- permits the employer to continue to deploy ZHCs to workers employed by a personal service company or umbrella company, or (currently – subject to consultation) by an agency;
- will continue to permit the employer to refuse a guaranteed hours contract to limb (b) workers in the knowledge that the latter have no right to sue for unfair dismissal; and
- would appear open to an employer to repeatedly vary the hours of ZHC workers in order to defeat whatever requirements are specified in the regulations as to 'number, regularity or otherwise as are specified' of hours in the reference period.

- **Fire and rehire**

34 The Bill provides that a dismissal will be unfair where an employee is dismissed for refusing to accept a contractual variation or has been dismissed to enable the employer to employ another employee or re-engage the dismissed employee on inferior terms. The dismissal will be unfair unless an employer can show a reason in proposed new ERA 1996, s 104I(4), and unless the employer complies with proposed new ERA 1996, s 104I(5). The proposed new ERA 1996, s 104I does not appear to apply in cases such as P&O Ferries where the reason for the dismissal is not to employ another person but to replace the employee with someone supplied by an agency. See the proposed new ERA 1996, s 104I(3).

35 In terms of the robustness of these provisions, the government will no doubt wish to explain how many of the high-profile fire and rehire cases known since 2010 would fall foul of these requirements. Close scrutiny will be needed to ensure that the drafting of the Bill is sufficiently tight to justify the government's claim that 'employers can only use the practice of fire and rehire if they can demonstrate that they were facing financial difficulties that threatened their viability, and that changing the employee's contract was unavoidable (for example, it was the only way to prevent insolvency)'.

36 That apart, there are a number of points which may need to be addressed:

- No provision is made to deal with terms in contracts of employment that entitle employers unilaterally to change terms and conditions without the trouble of deploying hire and re-hire (this is a continuing blight on UK labour law since *Bateman v ASDA* [2010] IRLR 370);
- No remedy of any kind is provided for employees who are dismissed for refusing to accept a variation of terms where the employer does succeed in showing 'financial difficulties'. Yet such workers should surely be entitled to stand on the contractual provisions they have agreed. In any event, the employer may be using the occasion to dismiss the worker for other unfair reasons. Even if not, such dismissals are effectively redundancy dismissals and those dismissed should be entitled at least to the equivalent of a redundancy payment;
- No provision is made in proposed new ERA 1996, s 104I(5) for situations where – as in P&O Ferries - the employer fails to comply with the terms of a collective agreement (in particular in that case, one with an elaborate disputes procedure) which may require much more than a duty to consult.

37 The last of these bullet points is informed by the recommendations of the ILO Freedom of Association Committee in the P&O case.[4] The Committee noted the company's failure to comply with collective agreements, and robustly responded by reminding the British government of the need 'to ensure mutual respect for the commitment undertaken in collective agreements, which is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground'.

[4] ILO, 404th Report of the Committee on Freedom of Association, November 2023, Case 3432, paras 644-650, pp 189-192.

The Problem of Worker Voice

38 So far as worker voice is concerned, the Bill makes a number of improvements to allow workers to be heard through their trade unions (as ECHR, Article 11 requires).[5] These improvements include (a) a right to a statement of trade union rights, (b) a right of trade unions to access workplaces, and (c) amendments to the legislation (albeit limited in nature) creating a right for trade unions to be recognised for the purposes of collective bargaining.

- **Right to statement of trade union rights**

39 Although welcome in principle, this provision (proposed new TULRCA 1992, s 136A is not without difficulties

- The proposed new section refers to the right to join a trade union. There is no such right in TULRCA 1992. The right there is a right to join an *independent* trade union. The word 'independent' is important:
    - It means a union which is not under the control of an employer, group of employers or an employers' association and not liable to interference from an employer, group of employers or an employers' association (TULRCA, s 5).
    - A union may apply for and be granted a certificate as legal proof of its independence. This is an important safeguard against employer abuse, meets requirements in international law, and should be reflected in the proposed new TULRCA 1992, s 136A.

- The section heading (proposed TULRCA 1992, s 136A) is in the plural, but the content of the section is in the singular. That is to say that it applies only to trade union membership, but not also the activities of an independent trade union. TULRCA 1992, ss 146 and 152 refer to both.

- It is unclear to what extent it will be possible for the employer to add information other than that required by the statute. For example:
    - Will it be possible for the employer to state that recipients of the notice have the right not to be a trade union member? The answer is almost certainly yes, even though no express provision is made.
    - Will it be possible for employers which 'recognise' a non-independent trade union to refer specifically to or highlight only that union in their s 136A notice?

And will it be possible for the employer to bury the statement in verbiage about other matters?

[5] As demonstrated by *Wilson and Palmer v UK* (2002) 35 EHRR 20 as well as other cases.

- **Trade Union Access**

    - *'Listed' Not 'Independent' Trade Unions*

40 The trade union access provisions are welcome in principle but flawed in scope and enforcement, beginning with its application to 'listed' trade unions. As explained above, and following international law, the practice in the United Kingdom is that trade union rights apply to 'independent' trade unions (e.g. TULRCA 1992, s 146, 152), while only 'independent' trade unions can make an application for statutory recognition.

41 The Certification Officer maintains a 'list' of trade unions to which an organization may request to be added. 'Listed' unions are not necessarily 'independent' and thus include trade unions under the domination of employers created to discourage organising attempts by bona fide independent trade unions. A review of the list maintained by the Certification Officer yields a number of examples of such bodies. By virtue of ILO Convention 98, the UK is required to discourage rather than encourage such anti-union organisations.

42 Presumably the intention of permitting unions under the domination of the employer to invoke the access procedure is to allow some employers to argue that, having given a non-independent union access, it would be unreasonable to require them to give access additionally to an independent union. No alternative explanation has been provided for the inclusion of sweetheart unions in the right of access, and no provision of which we are aware was made for this in any of the government's or Labour Party's policy documents.

    - *No Enforceable Duty to Permit Access*

43 Also important is the content and enforcement of the right of access. The Bill provides that a trade union will be able to ask an employer to enter into an access agreement, and that if the employer refuses, the union will be able to complain to the Central Arbitration Committee (CAC), which can effectively impose an access arrangement on the employer. The problems arise where the employer refuses to comply.

44 Here we find that there is currently no way by which the employer can be compelled to comply. If it is so minded, the union can make another reference to the CAC to have a financial penalty imposed on the employer. This will be done at the union's own expense, and the procedure will, inevitably, be contested, which means that the costs to the union are likely to be significant.

45 Moreover, any penalty imposed by the CAC is to be payable to the government and not to the union. No provision is made for any remedy to the union for the violation of its 'right', or even for the recovery of its costs in enforcing the law. The arrangements are similar to those operating under the ICE Regulations, though in the latter case the power to impose the financial penalty payable to the Treasury lies with the EAT rather than the CAC. In the twenty years these procedures have been operating there been only a handful of instances where parties have pursued an employer for failure to comply with CAC orders.

    - *No Right without a Remedy*

46 If the right of access is similarly not to become a dead letter, it is likely that the sanctions for non-compliance will need to be greatly improved. To this end, it ought to be possible for:

- a court or other judicial body to issue an order (enforceable by contempt of court proceedings) to require an employer to comply with a CAC access order, and
- a trade union to recover compensation for the violation of its right to access, including associated legal costs.

47 At the same time, the proposed new TULRCA 1992, s 70ZJ should be removed. There is no possible justification for denying access agreements made under this procedure the status of collective agreements. Indeed, the proposed new TULRCA 1992, s 70ZJ(2) risks extending the restriction to existing agreements, with the effect of taking away rather than extending rights.

- **Trade Union Recognition**

48 As pointed out above, only very small steps (relating to admissibility and the ballot threshold) have been taken to deal with the failures of the statutory recognition procedure to arrest the decline in levels of collective bargaining coverage. These problems are long-standing but have been brought into sharp focus by the recent failure of the GMB union to secure recognition at Amazon. The latter experience shows the pressing need for radical changes if the current statutory procedure is to be rescued from irrelevance.

49 In a powerful report in the aftermath of the Amazon case, the GMB exposed a number of failings with the statutory recognition procedure. The GMB identified the

(i) feigned neutrality of the law,
(ii) high statutory thresholds that unions need to cross to bring a recognition application,
(iii) unfair and old-fashioned ballot processes;
(iv) lightly controlled power of the employer to disrupt applications by threats and intimidation;
(v) severe limitations on access to justice when employer wrongdoing is alleged; and
(vi) the shutting out of the union from the procedure for three years if its application fails.

The need to overcome these shortcomings underpins the legal changes that are necessary if a deeply flawed procedure is to operate at all effectively as an instrument for promoting collective bargaining.

50 With this in mind, the need for a ballot must be reduced, since this almost inevitably becomes the focus for the exposure of workers to hostile campaigning. To this end it should be able to claim automatic recognition if it can show a minimum level of membership (of between 2% and 10%) and that there is evidence of majority support for the union within the proposed bargaining unit. The latter change would be consistent with the position in Australia where the enterprise bargaining process can be initiated by a majority support determination.

51 In rare cases where a ballot is to be held, the ballot rules need to be revised, so that

- only those workers who are in employment at the time the recognition application is accepted are permitted to vote, in order to stop the employer from ballot rigging;

- access to the workforce is organised on an equitable basis to ensure campaign fairness, prohibiting captive audience meetings by employers;
- the vote is conducted electronically wherever the union requests, in order to reduce the risk of employer interference and intimidation.

In addition, if an application is unsuccessful, the opportunity to make a fresh claim should be reduced from three years to three months, to remove the reward for bad practice on the part of the employer (and to reflect high staff turnover in some sectors of the economy).

52 Beyond the foregoing, there is a need to deal directly with employer conduct. Existing law in the form of unfair practices is addressed to specific activities of employers (such as bribes, inducements and threats of various kinds). This needs to be strengthened so that it is unlawful as a matter of labour law, generally applicable during a statutory recognition process and all at all other times, for an employer to:

- interfere with the relationship between workers and their trade unions, for example by encouraging, facilitating or inducing them to resign from membership; and
- interfere with trade union recognition whether voluntary or statutory, for example by encouraging or seeking to persuade workers not to support it.

53 One final matter exposed by the Amazon case identified by the GMB relates to the time limits within which unions must bring complaints of an unfair practice by the employer. The procedure allows a union to complain to the CAC about any such breaches, but the complaint must be made within 24 hours of the ballot closing. It is difficult to understand the purpose of this tight time scale which contrasts sharply with the leisurely pace at which much of the rest of the procedure is conducted. This is particularly so since in most cases, delay suits the interest of the employer. Trade unions should have at least three months from the date of the alleged conduct in which to bring a claim.

The Problem of Remedies

54 A major problem of British labour law is the lack of effective remedies where worker or trade union rights are violated, or effective sanctions where companies break the law. The point was most vividly revealed during the P&O Ferries Ltd dispute when in an exchange with Andy McDonald MP a representative of the company told a joint meeting of two Select Committees that the UAE-owned operation chose not to comply with its legal obligations despite being in ‘absolutely no doubt’ about what the law required.

55 It is far from clear that if the facts of the P&O Ferries Ltd case were to be repeated after the Bill is enacted that the company would be constrained by the proposals in the Bill – though it might be slightly inconvenienced.

- It would have to give advance notice of proposed redundancies to the DBT, which means that they would lose the advantage of ambush which they had in 2022.

- The company would be required to inform and consult a recognised trade union after the decision to fire and rehire has been taken. But as in the P&O Ferries case the company could choose not to comply with this requirement, and it could choose to

dismiss employees wrongfully and unfairly, and in principle replace them with agency workers recruited from lower wage states overseas.

- It is true that by virtue of other initiatives announced by the government, the company would be required to ensure that the replacement workers were paid at least the national minimum wage. But the national minimum wage was, in the P&O Ferries Ltd case (and will in most cases where the employer seeks to be rid of a union organised workforce), set at a rate likely to be significantly lower than applicable collective agreements.

- Because of continuing legal restrictions, trade unions would continue to be powerless to take steps by way of inviting or organising solidarity or secondary industrial action to put commercial pressure on the company to ensure that it complied with its legal obligations and otherwise treat its employees decently.

- Despite failing to comply with the law, the company in question would still be eligible to be awarded government contracts and other taxpayer funded benefits.

56 In saying that the company would remain free to choose to break the law, it would, of course, have to compensate anyone whose rights were violated as result. Although the government is considering steps to increase compensation in the event of failures to comply, it will remain a matter for companies to decide whether non-compliance would be an economically rational step to take, balancing short term costs against long term gains. This is likely to have been the computation undertaken by the owners of P&O Ferries Ltd.

57 Such a computation is facilitated by the fact that most categories of compensation for breach of statutory rights have statutory limits on the amounts recoverable. Labour originally proposed to remove the statutory arbitrary limits on compensation so that workers (as in most other fields of law) would be entitled to receive the full measure of the loss caused by a breach of the employer's statutory duty to them. This has been abandoned in the Bill, another major failure of which is that it does not empower any rights-holder or any public body acting on their behalf to obtain a Court Order to restrain unlawful action until the procedures have been fully complied with.

58 The proposed new Fair Work Authority under the Bill is to have the power to apply to an appropriate court to apply for a Labour Market Enforcement Order to 'prohibit or restrict' the respondent from doing anything set out in the Order. But this applies only in relation to labour market offences (as defined) and does not apply to labour market abuses, a category into which it could be argued the P&O Ferries mass dismissals fell. Yet it ought to be possible for the FWA to seek a restraining order in such cases, and where appropriate to impose fines of the kind that currently may be imposed by the Financial Conduct Authority or the Information Commissioner in their respective fields.

The Problem of International Law

59 The current government inherited a labour law framework which for multiple reasons fails to comply with international law. The importance of complying with international law generally was addressed by the Attorney General in a recent lecture where he presented the case for 'rebuilding our reputation as a leader in the field of international law and the

international rules-based order'. Lord Hermer continued: 'International law is not simply some kind of optional add-on, with which states can pick or choose whether to comply'.

60 In the case of trade union and workers' rights, the questions of compatibility with international law arise mainly in relation to industrial action and the right to strike. For this purpose, the main international treaties ratified by and therefore binding on the UK are:

- ILO Conventions 87 and 98 (on freedom of association),
- European Convention on Human Rights,
- European Social Charter (both treaties of the Council of Europe by which the United Kingdom continues to be bound), and
- EU-UK Trade and Co-operation Agreement, as well as
- Numerous bilateral free trade agreements post-Brexit in which we have re-affirmed our commitment to the ILO freedom of association conventions.

61 It is to be emphasized that the EU-UK Trade and Co-operation Agreement (the Brexit Deal negotiated paradoxically by the Johnson government) reinforces the obligation to comply with international labour standards by providing that the UK and the EU) are required to comply with all international labour conventions to which they are a party (which would include ILO Convention 87), as well as, for the first time ever in an international free trade agreement, the Social Charter of the Council of Europe.

62 The Bill addresses directly issues arising under a number of treaties, with clause 59 being a direct response to the UK Supreme Court decision in *Secretary of State for Business and Trade v Mercer* [2024] UKSC 12. Other provisions – dealing with restrictions introduced by the Trade Union Act 2016 and the Strikes (Minimum Service Levels) Act 2023 - have the effect of dealing with some of the critical Observations of the ILO Committee of Experts concerning the incompatibility of these measures with ILO Convention 87.

63 But although these are all welcome developments, it should be pointed out that

- The concerns of the ILO Committee of Experts did not begin with the Trade Union Act 2016. There is the legacy from the Thatcher and Major years of restrictive legislation (1980, 1982, 1984, 1988, 1990, and 1993) which has yet to be addressed.
- There are also concerns raised repeatedly for many years by the Council of Europe's Social Rights Committee (ECSR) which have so far been ignored. Indeed, in its most recent Conclusions (in 2022), the Committee found that the United Kingdom failed to comply with ten of the 13 obligations examined.

64 These latter failures deal with a range of different issues, including the right to strike. According to the Committee, the United Kingdom is not in conformity with the European Social Charter, Article 6(4) (Right to Strike) for the following reasons:

- lawful collective action is limited to disputes between workers and their employer;
- the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive; and
- the protection of workers against dismissal when taking industrial action is insufficient.

(Council of Europe, European Committee of Social Rights, Conclusions XXII-3 (2022) (March 2023), p 22)

As pointed out above, the concerns expressed by the third bullet point are now partly addressed in the Bill. But the Bill is silent on the other two concerns raised by the ECSR (and by the ILO), while the government's consultation document on creating a modern framework for industrial relations makes no reference to these breaches, despite Lord Hermer's remarks quoted above.

65 The Bill is silent too on the question of sympathy or solidarity action, despite the recent conclusions of the ILO Committee on Freedom of Association which produced a powerful report in the wake of the P&O Ferries Ltd case, which highlighted the implications of the case for trade union freedom and the government's obligations under ILO Convention 87. Despite the strong opposition of the then Conservative government, the Committee nevertheless recalled that a general prohibition of sympathy action could 'lead to abuse' and that workers should be able to take such action 'provided the initial strike they are supporting is itself lawful'.

66 The ILO supervisory bodies have for several decades requested the United Kingdom to address regulatory failure in the United Kingdom. It is important to emphasise, however, that the areas that need to be addressed and the restrictions that need to be removed to meet the concerns of these bodies are not confined to the right of strike (any more than they are in the case of the Council of Europe's Social Rights Committee). Although it is not possible in the space available to list all these matters here, fuller details can be found in K D Ewing, 'The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Social Charter in the United Kingdom' (2021) 32 *King's Law Journal* 306-343, which is available online.[6]

Conclusion

67 So while the Employment Rights Bill is a big step forward, it is clear that there are bigger steps yet to be taken to undo the restrictions and address the neglect of the last 14 years. Moreover, much remains to be done if the Bill is to meet the objectives identified in para 2 above. Indeed, the Bill is silent on much of what needs to be done, as we point out in the paragraphs above.

68 This is not to say that all that is needed is a return to how life was in 2010. There were many failures of the Blair/Brown governments, which did not adequately attend to the core problems at the heart of British labour law, namely declining trade union power and low collective bargaining coverage. These problems will continue to grow unless more urgent steps are taken to deal with them now.

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[6] https://www.tandfonline.com/doi/epdf/10.1080/09615768.2021.1969757?needAccess=true.