

Three Threats to Trade Union Autonomy under New Labour

Introduction

1 Despite 12 years of New Labour and despite a significant body of legislation on trade union and employment rights since 1997, trade union rights in Britain remain among the most restrictive in Europe. In this paper, I address the general situation facing trade unions: if it is the case that the sun is setting on New Labour as many in the media are predicting, the current situation relating to labour law make trade unions ill-equipped to deal with the inhospitable climate likely to arise under a Tory government. As part of a general introduction to the conference, I would like to address three very basic concerns - the right to organize, the right to bargain and the right to strike – and to show how each has been easily undermined in recent years despite the swell of trade union friendly legislation. These problems are not addressed by the Employment Act 2008, and although there are political solutions to all of them, the unlikelihood that such solutions will be adopted leads me to think that other ways will have to be explored to advance the trade union agenda for fairer laws. International human rights law may provide one way forward.

Trade Union Autonomy and Human Rights Treaties

2 The starting point is the International Labour Organisation which is responsible for advancing labour standards throughout the world. There are now 182 countries which are members of the ILO (a United Nations agency), and at the present time there are 188 international labour conventions (treaties binding in international law, when ratified). These conventions include a number of Conventions dealing with what are regarded by the ILO as human rights issues, as follows

- Freedom of association and the effective recognition of the right to collective bargaining (Conventions 87 and 98);
- Effective abolition of child labour (Conventions 138 and 182);
- Elimination of all forms of forced or compulsory labour (Conventions 29 and 105);
- Elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

3 In addition to the ILO, a second source of human rights obligations designed to

constrain the activities of business is the Council of Europe. Here the European Social Charter of 1961 includes a number of obligations addressed to States though designed to deal with the protection of workers from abuse by business (and other employers). They include the

- The Right to Organise (article 5)¹
- The Right to Collective Bargaining (article 6(2));
- The Right to Strike (article 6(4)).

There is now a Revised Social Charter of 1996, which includes a more comprehensive list of rights and a procedure (the Collective Complaints procedure) for their better supervision. The United Kingdom has signed but not ratified this treaty, though we have proposed in the past that it should do both.

4 So far as the Council of Europe is concerned, reference should also be made to the developing jurisprudence of the European Court of Human Rights on article 11 which provides protection for the right to freedom of association 'including the right to form and join trade unions for the protection of his interests'. These include the decision in *Wilson v United Kingdom* [2002] IRLR which related to the conduct of Associated Newspapers in withholding benefits from Mr Wilson because he refused to surrender his rights relating to collective bargaining; and more recently the breath-taking decision of the Grand Chamber in *Demir and Baykara v Turkey*, 12 December 2008, where the Court repudiated earlier jurisprudence on article 11. Influenced by ILO Convention 98, the European Social Charter and the national traditions of member states of the Council of Europe, the Grand Chamber said that

having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the 'right to form and to join trade unions for the protection of [one's] interests' set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.

Reference should also be made to the OECD Guidelines on Multinational Enterprises,¹

¹ Revised 2000.

which have been endorsed by all 30 OECD member states, as well as 11 other countries.²

The Right to Membership of a Trade Union

5 The right to membership of a trade union is recognized by a host of human rights treaties: ILO Conventions 87 and 98, the ECHR, article 11, and the European Social Charter 1961, article 5. It is also protected by British law, in the form of the Trade Union and Labour Relations (Consolidation) Act 1992, which makes it unlawful for an employer to refuse to employ someone because of his or her trade union membership (widely construed by the courts). It is also unlawful to subject someone to a detriment because of his or her membership of a trade union or participation in trade union activities, and unfair to dismiss someone or select someone for redundancy for the same reasons. These provisions were strengthened by the Employment Relations Acts 1999 and 2004, the latter amendments having been introduced only after the European Court of Human Rights found that the discrimination against a trade union activist by **Associated Newspapers** (the publisher of the *Daily Mail* and the *Mail on Sunday*) violated article 11 of the ECHR. The Employment Relations Act 1999 makes additional provision for the making of regulations to deal with employer blacklists, though these powers have never been invoked.

6 In addition, trade union membership data is sensitive personal data for the purposes of the Data Protection Act 1998, and as such cannot be processed without the consent of the individual to whom it relates. This, however, has not been effective. On 6 March 2009, the Information Commissioner's Office issued a Press release in which it was alleged that 44 construction companies had used the services of the Consulting Association Ltd run by a man called Mr Ian Kerr.³ According to the ICO, this man is believed to have 'run the database for over 15 years', and it was said to have included the details of 3,213 workers. According to the ICO. 'it uncovered evidence at Kerr's premises that named construction firms subscribed to Kerr's system for a £3,000 annual fee' It was stated further that '[c]ompanies could add information to the system and pay £2.20 for details held on individuals', and that '[i]nvoices to construction firms for up to £7,500 were seized during the raid'. According to press reports, details of workers'

² Reference might also be made also to the UN Global Compact which provides by principle 3 that: 'Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining'; and to the ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (4th ed, 2006).

³ http://www.ico.gov.uk/upload/documents/pressreleases/2009/tca_release_060309.

trade union activities and past employment conduct were said to have been recorded on cards, with one individual said to be a "poor timekeeper, will cause trouble, strong TU [trade union]", while another card referred to a member of the Union of Construction, Allied Trades and Technicians as "Ucatt ... very bad news".⁴

7 The companies alleged to have been involved were: **Amec Building Ltd; Amec Construction Ltd; Amec Facilities Ltd; Amec Industrial Division; Amec Process & Energy Ltd; Amey Construction** Ex-member; **B Sunley & Sons** Ex-member; **Balfour Beatty; Balfour Kilpatrick; Ballast (Wiltshire) plc** Ex-member; **Bam Construction (HBC Construction); Bam Nuttall (Edmund Nuttall Ltd); C B & I; Cleveland Bridge UK Ltd; Costain UK Ltd; Crown House Technologies; (Carillion/Tarmac Construction); Diamond (M & E) Services; Dudley Bower & Co Ltd** Ex-member; **Emcor (Drake & Scull)** Ex ref; **Emcor Rail; G Wimpey Ltd** Ex-member; **Haden Young; Kier Ltd; John Mowlem Ltd** Ex-member; **Laing O'Rourke (Laing Ltd); Lovell Construction (UK) Ltd** Ex-member; **Miller Construction Ltd** Ex-member; **Morgan Ashurst; Morgan Est; Morrison Construction Group** Ex-member; **NG Bailey; Shepherd Engineering Services Ltd; Sias Building Services; Sir Robert McAlpine Ltd; Skanska (Kvaerner/Trafalgar House plc); SPIE (Matthew Hall)** Ex-member; **Taylor Woodrow Construction Ltd** Ex-member; **Turriff Construction Ltd** Ex-member; **Tyson's Contractors** Ex-member; **Walter Llewellyn & Sons Ltd** Ex-member; **Whessoe Oil & Gas Ltd; Willmott Dixon** Ex-member; **Vinci plc (Norwest Holst Group)**.⁵

8 According to the BBC, Mr Kerr 'faces prosecution and a £5,000 fine if found guilty of breaching the Data Protection Act', while the businesses using his services 'would be issued with a legal order not to repeat the offence, and if they breached it they too would face prosecution'.⁶ That, however, does not seem an adequate response to the very real hardship suffered by the blacklisted individuals, as reported in the national and regional press. A scheme should be introduced to compensate these people, with a template for this purpose to be found in the Employment Act 1980.⁷ This established a publicly funded retroactive compensation scheme for workers who claimed that they had suffered loss as a result of having been excluded from employment because of their non-membership of a trade union where a union membership agreement was in force. The

⁴ *The Guardian*, 6 March 2009.

⁵ See http://www.ico.gov.uk/upload/documents/pressreleases/2009/tca_release_060309.

⁶ According to the BBC, 'Balfour Beatty said it would co-operate with the ICO investigation, and that it did not condone the use of blacklists "in any circumstances". Other companies either said they would conduct their own investigation, or had "inherited" their links with the Consulting Association from previous firms they had taken over'.

⁷ See K D Ewing and W M Rees, 'Closed Shop Dismissals 1974 – 1980 – A Study of the Retroactive Compensation Scheme' (1983) 12 ILJ 148.

individuals who appear on Mr Ian Kerr's blacklist should be informed of that fact; they should be informed of the identity of the companies which were supplied with their personal data (if that information is currently available); and they should be also entitled to make an application under the proposed compensation scheme if they are able to demonstrate the likelihood of having suffered loss because of unemployment relating to their blacklisting. Legislation which may be necessary for these purposes should also impose a levy on the employers who used the services of Mr Kerr, to pay for the compensation of the workers affected. This would be in addition to any other possible legal remedies the blacklisted workers may have against Mr Kerr, his company, and the businesses that used Mr Kerr's services.

The Right to Bargain Collectively

9 The right to bargain collectively is also protected by a number of the international human rights treaties referred to above; it has also been read into article 11 of the ECHR, with potentially important implications for domestic law, particularly in view of the Court of Appeal's reluctance to engage with the issue in a case involving **Mirror Group Newspapers**.⁸ According to the Court of Appeal, 'the right to be recognised for the purposes of collective bargaining does not fall within the rights guaranteed by Article 11' (para 35).⁹ In that case the company had recognized a small union (BAJ) which had at most one member, in a deliberate attempt to prevent recognition by the NUJ which was thought to have a majority of the workers of the bargaining unit in membership. This dispute arose in the context of the statutory recognition procedure, which enables trade unions to make an application for recognition to the Central Arbitration Committee with a view to a bargaining order being imposed unless the employer agrees to recognize the union voluntarily in the meantime. The process, which requires the union to demonstrate majority support, is complicated and provides employers with many opportunities to resist the union's application. The TUC has also made complaints to the ILO that the procedure fails to comply with Convention 98. Many businesses have resisted collective bargaining arrangements and have usually been able to avoid extending bargaining rights to their workers despite the procedure.¹⁰ These include household names such as **Amazon, Asda, Black and Decker, BSkyB, Gatwick Express, Kettles' Foods, Kwik-Fit, Ryanair, Shoezone, and T Mobile**. Others include the

⁸ *R(NUJ) v CAC* [2005] EWCA Civ 1309.

⁹ *Ibid*, para 35. Following *Demir and Baykara v Turkey* (para 2.3 above), however, that is no longer an accurate statement of the law.

¹⁰ In the sense we understood to be contemplated by Convention 98, that is to say bargaining with independent trade unions.

following.

10 **News International**, like media companies all over the world relies heavily on human rights instruments as the foundation of its business, including the right to freedom of expression, which it is assiduous in promoting, through the courts at the highest level if necessary. News International derecognized the print and journalist unions in the 1980s in controversial circumstances, and ceased collective bargaining with them. Since then the company has established the News International Staff Association which it recognized for the purposes of collective bargaining, but which has been denied a certificate of independence from the Certification Officer for Trade Unions and Employers' Associations (the trade union regulator) on the ground that while it was no longer subject to domination or control by the company, it could not be said that it was not 'liable to interference'. Nevertheless, independent trade unions are not permitted to make an application for recognition under the statutory procedure because the Employment Relations Act 1999 prevents an application being made by one union where another is already recognized. Although an application for recognition can be made only by an independent trade union, an application by such a union can be blocked by the pre-existing recognition of a non-independent trade union. This is despite the fact that ILO Convention 98 provides that 'workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration' (article 2). It is also provided that 'Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles' (article 3).

11 **Cable and Wireless plc** has a Code of Conduct in which it is committed 'to providing a working environment in which employees can realise their full potential and contribute to business success'. It also declares that the company will 'respect the dignity of the individual and support the Universal Declaration of Human Rights and the ILO Core Conventions'. The latter include the right to freedom of association, which for this purpose includes the right to bargain collectively. In 2007 the CWU made a request for recognition which was refused. The company contested the admissibility of the claim, it contested the union's proposed bargaining unit before the CAC and then all the way to the High Court), it successfully contested the union's right to automatic recognition (despite the union having a majority of members in the bargaining unit), it resisted a union complaint that it had indulged in an unfair practice, for example by means of a letter from the CEO of the company to staff during the balloting period 'which mentioned, in

the first paragraph, the successful trading year and the size of the consequent bonus payments and then, in the second paragraph drew attention to the union recognition ballot and urged colleagues to vote 'No', and it won the ballot, with the union winning 77 votes (23% of those voting), despite having 185 members (55.2%) at the start of the balloting period. The CAC procedure took over a year to complete, the company was represented by blue chip solicitors (Herbert Smith) and a member of the Bar at key stages, and it employed the services of labour consultants The Burke Group, whose web site brazenly states that it has expertise in 'union avoidance', and 'preventive labor relations – union free workplaces'. Such organizations are sometimes referred to colloquially as 'union busters'.

12 **General Electric** has an impressive code of conduct, entitled *The Spirit and the Letter*, in which it commits to

Fair employment practices do more than keep GE in compliance with applicable labor and employment laws. They contribute to a culture of respect. GE is committed to complying with all laws pertaining to **freedom of association**, privacy, **collective bargaining**, immigration, working time, wages and hours, as well as laws prohibiting forced, compulsory and child labor and employment discrimination. Beyond legal compliance, we strive to create an environment considerate of all employees wherever GE business is being conducted.

General Electric is also a participant in the UN Global Compact, as well as a TOP Olympic sponsor, and as such enjoys various legal privileges bestowed upon it by the British State in the Olympic and Paralympic Games Act 2006. GE companies have, however, strongly resisted collective bargaining in the United Kingdom:

- **GE Caledonian** is a company based in Scotland; its website proudly carries both the GE and the Olympic logos. The company refused an application for recognition by AMICUS as it then was, and in the process tried unsuccessfully to persuade the CAC to provide the company with a list of the names of its employees who had signed the union's petition requesting recognition (a claim can only get off the ground with the support of 10% of the workforce). If that application had succeeded, it could have had very significant implications for the statutory procedure as a whole, though this was denied by the company's legal representative (Mr Martin Warren), as placing 'too much reliance is placed on unsubstantiated allegations of employer victimisation'. In that case a union activist

formerly employed by the company told the CAC that a company circular sent around the time of the application for recognition invited employees to attend small group meetings during which the company would present both sides of the argument in respect of union recognition. He then explained that these meetings had in fact been management presentations as to why union recognition had to be resisted. Support for collective bargaining was overwhelmingly rejected in a ballot (by 449 to 243 on a 95% turnout).

- In another case involving a GE company (**GE Thermometrics UK Ltd**), the union (Amicus) had 47.1% membership (49 members) in a bargaining unit of 104 workers, with support from 55% of the workforce. The union claimed that there had been large scale anti union activity from the company, and ‘provided evidence of briefings for the workers indicating that recognition will bring about a loss of flexibility which the parent company would not stand for and would endanger the future of the plant and their jobs’. The union also ‘pointed out that all this went on at a time when the Union had no official access to the workforce and coupled with the one-to-one meetings where pressure was put on workers to resign from the union and a “25th hour” speech on the issue by the worldwide CEO of the company placed unreasonable pressure on the workers to vote against recognition’. The latter were said to be ‘personal views which the Company had sought to distance itself from’, the company also dismissing ‘allegations of intimidation as a misrepresentation or misunderstanding of the company’s attempt to make its views about recognition know[n] by the workers. On another high turnout (95%), a majority voted against the union, with only 38 workers voting in favour of recognition.

The Right to Strike

13 It is widely recognized as a human right in international human rights treaties, and indeed has incongruously (in light of the current state of English law) been recognized as such by the Court of Appeal. British law has been widely criticized by international human rights agencies over many years for failing to comply with minimum international standards. These criticisms have been levelled by the UN Committee on Economic, Social and Cultural Rights, the ILO Committee of Experts (on which sits an English High Court judge) and the ILO Freedom of Association Committee, as well as the Social Rights Committee of the Council of Europe. These criticisms relate to the circumstances in which

trade unions may be restrained from taking collective action and the circumstances in which individual workers can be dismissed without a remedy for taking such action. In recent years a number of businesses have exploited legal rules operating in the United Kingdom to undermine the right to strike as recognized in international instruments.

14 One of the most notorious cases on the dismissal of strikers in recent years relates to the conduct of **Friction Dynamics** in 2001. The details are to be found in an article published in *The Lawyer* magazine by Mr Andrew Chamberlain, a partner in the law firm Addleshaw Goddard which acted for the company in unfair dismissal claims from August 2002 until the company went into liquidation. According to Mr Chamberlain,

On 30 April 2001, having followed the correct balloting and calling procedures, 86 of [Sir Bill] Morris's members at the company commenced industrial action. On 1 May 2001, company management wrote to each striker telling thme that 'you have . . . repudiated your contract of employment. The company accepts your repudiation'.¹¹ Following several ACAS brokered meetings between ACAS and T&G officials, the company wrote a further letter to each striker on 27 June 2001, just over eight weeks after the strike started, in which it purported to dismiss them with effect from the following day.

The story is continued by Ward LJ, according to whom the 86 strikers 'brought claims before the Employment Tribunal in Liverpool and in December 2002 that Tribunal found that they had been unfairly dismissed', with 'the compensation which would have become payable to the strikers by Friction . . . estimated to amount to approximately £3 million'.¹² There is evidence that the company's owner, a Mr Craig Smith, told an employee that 'Friction would not be paying the strikers following the decision by the Liverpool Employment Tribunal', and soon thereafter the company went into voluntary liquidation. However, the business was reformed as Dynamex Friction, buying back the assets from the administrator, but leaving the dismissed strikers to pursue their claim against the empty shell that was their former employer. In subsequent unfair dismissal claims by a number of the non striking employees one member of the Court of Appeal referred to the employer (Mr Craig Smith) as having 'stage-managed the placing of the company in administration', engaged in 'Machiavellian machinations', of having 'cynically manipulated the insolvency of Friction', and of being guilty of 'scheming' and 'lacking in

¹¹ According to Ward LJ in *Dynamex Friction Ltd v Amicus* [2008] EWCA Civ 381, it was the company that repudiated the contracts: The company's response was to repudiate the contracts of employment with the result that 86 of the strikers were dismissed.

¹² *Dynamex Friction Ltd v Amicus* [2008] EWCA Civ 381.

fair play’.

15 **Gate Gourmet** is a large airline catering company, owned by a US private equity firm called Texas Pacific, which boasts that it is ‘a leading global private investment firm with over \$50 billion of capital under management.’¹³ According to Hendy and Gall,

on 10 August 2005, ‘667 low paid workers, mostly middle-aged Asian women, and mostly members of the TGWU, gathered in the works canteen top discuss the implications of the introduction by the company that day of 130 agency workers on lower rates of pay than themselves. Whilst the union representatives were talking to management, the workers in the canteen were instructed by megaphone to return to work within three minutes or be sacked. Those who failed to return to work (virtually all) were sacked. Those who turned up the next day were given the choice of signing new contracts on worsened terms or being unemployed’.¹⁴

According to the ITUC there were ‘strong suspicions that Gate Gourmet management had deliberately provoked industrial action to give it the excuse to dismiss staff and replace them with cheaper labour’, and that a ‘management plan [to] that effect came to light, but Gate Gourmet, while acknowledging the existence of the plan, claimed that it had been drawn up under its previous directors, and the existing directors had rejected such a plan’. It is further claimed that ‘the Transport and General Workers’ Union (TGWU) tried to negotiate the reinstatement of the sacked workers with Gate Gourmet did appear ready to reinstate the sacked workers, but the talks collapsed when it the company said it would only do so selectively’. Because the action was unofficial none of those dismissed fro taking part in the industrial action was entitled to bring a claim for unfair dismissal, and although 272 workers were reinstated, another 411 given the equivalent of redundancy, 130 workers got nothing.

16 **British Airways** is one of the largest airline companies in the world. A document on its website states that the company ‘aspire[s] to work together as one team, to treat each other fairly, respecting individual and **collective rights**, and striving for high levels of employee motivation and satisfaction through training, development and honest communications’. In 2007, BA announced plans to offshore part of its operation to France following the liberalization of the rules relating to transatlantic flights. This caused some concern on the part of BALPA the airline pilots union, which balloted its members for

¹³ <http://www.texaspacificgroup.com/about/index.html>

¹⁴ J Hendy and G Gall, ‘British Trade Union Rights Today and the Trade Union Freedom Bill’, in K D Ewing (ed), *The Right to Strike* (IER, 2007), p 248.

industrial action. A large majority voted in favour and the union duly gave notice of industrial action, to be threatened by the company's lawyers that if it proceeded with the action (which appears to have been perfectly lawful under British law - said by Tony Blair to be the most restrictive in Europe), would be unlawful under the newly created liability for collective action created by the European Court of Justice on 11 December 2007 in its notorious *Viking* case. What is more, the union was also advised that the company's losses would run to £100 million per day, a sobering prospect which could have the effect of liquidating the union if the action went ahead, if the company was able to establish liability, and if the company then sought to recover the losses in question. The union took the unusual step of seeking a High Court declaration that its proposed industrial action was lawful, but this aborted as futile, in the light of BA's vigorous defence which meant that the exercise of collective rights (to the limited extent protected by British law) had to be called off. BALPA has made a formal complaint to the ILO alleging a breach of Convention 87 on Freedom of Association and Protection of the Right to Organise.

Conclusion

17 BALPA are not alone. We now have a case in Belgium where passengers (not the employer) are suing strikers (not the union). Where will all this end? At the same time, we have another decision of the ECJ which attracted prominence in the East Lindsey Oil Refinery dispute in January 2009. In the *Laval* case, it was held that Swedish trade unions could not take collective action to require a Latvian contractor to observe the terms of a Swedish collective agreement in the construction sector. This decision has major implications for the right to bargain collectively, a right which is to be found in the EU Charter of Fundamental Rights, but which the ECJ failed to acknowledge. According to the Court, businesses posting workers from one EU member state to work in another cannot be required to observe the terms of collective agreements except to the limited extent provided for by the Posted Workers Directive. This means that where the latter does not apply, businesses which have won contracts in this country cannot be required to observe collective agreements here, with an obvious risk to the integrity of these agreements and the rights of those protected by them.

18 As suggested in para 1 above, all of these problems could be resolved quickly if there was the political will to do so, at national, European and International levels. For example –

- **Right to Organise:** Invoke the power in the Employment Relations Act 1999, s 3, to make it an offence to compile, hold, trade in, solicit, or use blacklists which include details of people's trade union membership or activities. This would be in addition to the retroactive compensation scheme referred to above, and to the powers available to the Information Commissioner under the Data Protection Act 1998.
- **Right to Collective Bargaining:** Amend the statutory recognition procedure to remove the barrier to applications where there is already a non independent union recognized by the employer; remove the requirement that recognition can only be awarded where there is majority support; and take steps to improve the weak unfair labour practice provisions in the statutory procedure, including a ban on the use of union busters.
- **Right to Strike:** Amend the existing legislation so that (i) lawful strike action is not regarded as a breach but as a suspension of the contract of employment; (ii) employers are required to re-employ workers at the end of collective action; and (iii) collective action may be taken in line with international standards, as developed under ILO Convention 87 and the Council of Europe's Social Charter.

In the absence of a political response, paradoxically trade unions may be required to adopt more effective legal strategies to secure the kind of laws they want. In recent cases, the European Court of Human Rights has set itself on a collision course with the European Court of Justice,¹⁵ and it is in exploiting these differences that strategic work may now need to be done.

¹⁵ See especially *Demir and Baykara*, above