consultation response

review of the ERA 1999

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THE INSTITUTE OF EMPLOYMENT RIGHTS

Introduction

This is the response of the Institute of Employment Rights drawn up as a briefing document to aid trade unions to respond to the Government's invitation to consult on its *Review of the Employment Relations Act 1999* ("the *Review*") published on 27th February 2003.[1] The *Review* proposes little by way of change to Britain's industrial relations law. There is no detectable acknowledgement of the important work of the TUC in its publication in 2002, *Modern Rights for Modern Workplaces*. The same is true of the fuller *A Charter of Workers' Rights* by the Institute of Employment Rights in the same year.

More significantly, the *Review* also ignores, save in one respect, Britain's obligations to uphold those international obligations which apply in those areas of the law reviewed by the *Review*. It is not simply that no justification or defence is offered in respect of Britain's several breaches of its international obligations, more striking is the absence of any reference (save one) to the applicable international laws. Yet the international bodies have pronounced on the UK's relevant laws many times in recent years and, indeed, in the last few months. It might be thought that in inviting consultation on its *Review* the Government would already have considered the judgments of the various international authorities on many of the very issues under review. It appears that this is not the case despite the fact that the "DTI has assembled a large amount of evidence upon which to base the review's findings"[2] and despite the claim that the Government's legislation is intended "to build a durable and fair basis for constructive employment relations."

Within days of the publication of the *Review*, the Government also published a parallel consultation paper, *Labour Standards and Poverty Reduction*,[3] with a press release stating:

> In this consultation paper we aim to show that the realisation of workers' rights, particularly those known as the core labour standards, can contribute to global poverty reduction… The paper goes on to outline a positive agenda for action… which will promote respect for labour standards and support poverty elimination.

A few months earlier Malcolm Wicks (Parliamentary Under-Secretary of State for Work and Pensions) had said:[4]

> The Government strongly condemns international violation of the rights of trade unions, their members, and their members' families. We fully support the work of the International Labour Organisation, which is the UN specialist agency with specific responsibility for protecting and promoting workers' rights worldwide.
>
> …I want to assure the House that the Government will continue to work actively and constructively with our partners in all international forums to promote the implementation of all ILO core labour standards and to bring an end to the violations and abuses of the rights of our fellow human beings

It is evident from the *Review* that the government's policy of promoting the core labour standards applies only to foreign countries and not to the UK. The government appears to have no defence to a charge of hypocrisy for it is a fact that several of the core labour standards are fundamentally breached by the current legislative régime (see below) and the *Review* pledges that the government will not reform the law in these respects.

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1 By DTI. Consultation ends on 22nd May.
2 *Review*, p.7
3 Published by DFID. Consultation on it ends on 31st May.
4 HC Debs., 27th June 2002, col.1069.

Chapter 3 of the *Review*: Trade Union and Industrial Action Law

The *Wilson* and *Palmer* case

International law

The ***Wilson and Palmer*** case concerned the denial of a pay increase to workers who refused to sign new contracts of employment which excluded their hitherto recognised union from representing them. The European Court of Human Rights found that the current law in s. 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 failed to give effect to a worker's right to freedom of association established by Art.11 of the European Convention on Human Rights and Fundamental Freedoms.

This case was decided by the House of Lords in 1995[5] since when both the International Labour Organisation and the European Social Charter machinery of the Council of Europe have repeatedly held that UK law, as declared by the House of Lords in that case, was in breach of core labour standards ratified by the UK. Thus in June 2002 the International Labour Conference once again adopted the report of its Committee of Experts.[6] Amongst other findings, the Committee[7] repeated its previous conclusions (expressed over the best part of ten years[8] and consistently ignored by Conservative and Labour Governments) that the UK was in breach of ILO Convention 98 (which it had ratified in 1950), one of the "core labour standards" referred to earlier. The reason was the lack of legal protection in the UK against anti-union discrimination evident in the ***Wilson and Palmer*** case. The Committee equally criticised the "Ullswater amendment," s.148 (3) Trade Union and Labour Relations (Consolidation) Act 1992, which instructs tribunals to find that there is no anti-union discrimination where the discrimination was intended to change the employer's relationship with employees, for example, by derecognising a union and substituting "individualised" contracts of employment. The Committee wearily repeated that it "once again requests Government to take steps to review and amend [s.148(3)]."

In October 2002 the Council of Europe published its *Survey of Member States' Implementation of the European Social Charter*.[9] Amongst the breaches of no less than fifteen of the Articles which the UK had ratified in the European Social Charter (sister to the European Convention on Human Rights and Fundamental Freedoms), the *Survey* noted long standing breaches of Art.5 (which protects the right to organise) by reason of the employers' freedom to discriminate on anti-union grounds demonstrated in ***Wilson and Palmer***.

In November 2002 the Council of Europe's "European Committee of Social Rights" reported.[10] It held that the UK remained in breach of Art.6 of the European Social Charter by reason of the ***Wilson*** situation and the "Ullswater amendment." It held:

> While s.17 of the ERA provides that such an agreement may not interfere with the worker's right to trade union membership and that the more favourable terms and conditions must reasonably relate to the service performed by the worker, it makes it impossible for other workers to claim that such favourable treatment constitutes detriment to them, i.e. that they are discriminated against by omission.
>
> The Committee has repeatedly found the situation in the United Kingdom not to be in conformity with the Charter because of the scope allowed to employers to undermine collective bargaining in this manner. As section 17 of the

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5 [1995] ICR 406.

6 Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III (Part 1A)), presented to the 90th Session of the International Labour Conference, 2002.

7 At 399-400.

8 See K.D.Ewing, *Britain and the ILO*, (2nd ed.), 1994; J.Hendy, "Industrial action and international standards," in K.D.Ewing (ed.) *Employment Rights at Work*, 2001, IER.

9 Secretariat of the European Social Charter, *Implementation of the European Social Charter, Survey by Country – 2002*, 2002, Council of Europe.

10 European Committee of Social Rights, *Conclusions XVI-1*, vol.2, 2002, Council of Europe.

> Employment Relations Act 1999 has not resolved this problem, the Committee therefore concludes that the situation in the United Kingdom is not in conformity with Article 6(2) of the Charter.

The Government has been consistent in ignoring these and the earlier rulings but has now finally conceded in the *Review* that it will change this area of the law in order to comply with yet another international decision against it in relation to this case, this time by the European Court of Human Rights[11]. It is not understood on what basis the Government felt able to disregard, when drafting the Employment Relations Act 1999, all the earlier rulings of the other international bodies on this matter which were likewise binding on the UK.

Necessary changes

The Institute of Employment Rights has considered in its *Briefing Note for Trade Unions* the implications of the E.Ct.H.R. ruling and the consequential requirements for change to UK law in the light of it.[12]

The Institute recommended that conformity with international law required a radical restructuring of the s.146 right not to have action short of dismissal taken against the worker on trade union grounds and corresponding changes to ss.152 and 153 of the 1992 Act (right not to be dismissed on trade union grounds). Consequential changes were also required to s.148 of the 1992 Act and s.17 of the Employment Relations Act 1999 (which has not yet been brought into force) since the 1999 Act failed to address the shortcomings identified by the court.

Review proposals

The *Review* proposes to repeal s.148(3) of Trade Union and Labour Relations (Consolidation) Act 1992, the Ullswater amendment,[13] and also s.17 of the Employment Relations Act 1999.[14] These changes are to be welcomed.

The Review also proposes "to establish a clear positive right for members of independent unions to use their unions' services."[15] This is welcome and necessary because the European Court essentially overturned the House of Lords which had refused to consider Art.11 of the European Convention and had held that the right of union membership protected by s.146 was simply the right to hold a union card. The European Court held, following earlier cases, that the limited protection of UK law failed to measure up to Art.11 of the European Convention which guarantees the right of union membership "for the protection of [the member's] interests" and so protects rights incidental to and inherent in the right to be a union member. Thus the protection of Art.11 goes further than just the right to hold a membership card and extends to the use of incidental union services and benefits.

S.146 and union representation

But it would be wise to go further than the *Review* proposes. The House of Lords judgment in ***Wilson and Palmer*** had held that s.146 did not prevent an employer taking action short of dismissal against a worker in order to induce the worker to give up union representation. The European Court held that this was a breach of Art.11 of the European Convention on Human Rights:[16]

> Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their

11 *Wilson and others v UK* [2002] IRLR 128; judgment given on 2nd July 2002.
12 Institute of Employment Rights, 2002. See also KD Ewing, "The Implications of *Wilson and Palmer*," [2003] 32 ILJ 1.
13 Paragraph 3.10 of the *Review*.
14 Paragraph 3.13 of the *Review*.
15 Paragraph 3.11 of the *Review*.
16 See paragraph 46 of the judgment.

> freedom to belong to a trade union, for the protection of their interests, becomes illusory.

So, s.146 should be further amended to put beyond doubt that any act or deliberate failure to act by the employer which has the effect of preventing or deterring employees from instructing or permitting their union from making representations to their employer or taking action in support of their interests on their behalf is, in all cases, a contravention of the right contained in s.146.[17]

S.146: purpose and effect

A further amendment is necessary too to give effect to the E.Ct.H.R. judgment and those of the other international bodies. In paragraph 47 of its decision, the E.Ct.H.R. noted that s.146 did not prohibit employers from offering an inducement to employees who relinquished the right to union representation as long as the employer did not act with the 'purpose' of preventing or deterring the individual employee from simply being a member of a trade union. A majority of the House of Lords in ***Wilson and Palmer*** had found no reason to doubt the employers' statement that the employers' purpose was not to discourage the workers from being members of a trade union (instead it was, of course, to deter trade union representation). The use of the word "purpose" in the section compels tribunals to undertake a difficult investigation of the subjective intent of the employer. This could be simply overcome and the section given proper scope to give protection by directing the tribunal to have regard also to the *effect* of the discriminatory measure. *Thus the European Court decision requires s.146 to be changed on this point to make it unlawful to take action short of dismissal whether for the purpose or 'with the effect' of preventing or deterring an employee from union membership or taking part in union activities.*

A right to representation

Though its boundaries are not entirely clear, without doubt, ***Wilson and Palmer*** establishes a right of union representation. The European Court held that Art.11 of the European Convention requires the State to protect such a right. This right vests in both member and union.[18] Thus the judgment held that:[19]

> the union and its members must be free …to seek to persuade the employer to listen to what it has to say on behalf of its members.

Further:[20]

> …it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer … If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State[21] to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers.

And:[22]

> by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant unions and the individual applicants.

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17 This would go most, but not all, of the way to restoring the judgment in *Discount Tobacco Ltd v Armitage* [1995] ICR 431.

18 Though there is no implication that a member can compel a union to represent him or her. The rights established by the European Court are rights vis-à-vis the employer.

19 Paragraph 44 of the judgment.

20 Paragraph 46.

21 And see too paragraph 41 of the judgment.

22 Paragraph 48.

The representational right inherent in Art.11 is not, of course, a right to collective bargaining, as the European Court made clear.[23] The employer is not obliged to reach agreement with the union nor even to negotiate with it.[24] But the judgment is explicit that the law must ensure the freedom of the union and its members "to seek to persuade the employer to listen to what it has to say on behalf of its members."[25] Indeed the Art.11 right implies that the employer (though not obliged to respond) is obliged to listen to what the union is saying:

> A trade union must thus be free to strive for the protection of its members' interests, and the individual members have a right, in order to protect their interests, that the trade union should be heard.[26]

Not only is the union entitled to make representations it is also to be free to press for negotiation:

> it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it…[27]

The members too are to be protected:

> employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf.[28]

Currently British law does not establish or protect any such right of representation at the workplace.[29] The "right to be accompanied," in disciplinary and grievance procedures granted by the s.10 of the Employment Relations Act 1999 is not sufficient to fulfil this right. This is because the 1999 Act right:

a) is not a right to be represented as the European Court specifies, but merely to be "accompanied" – whilst the *Review* proposes to clarify "the circumstances in which the companion is allowed to address hearings,"[30] it does not propose to permit the "companion" to become a representative;

b) can only be exercised in a disciplinary hearing or in a grievance hearing whereas the European Court right is not limited to any particular established procedural context – the *Review* proposes no change here;

c) limits the right of accompaniment, so far as grievances are concerned, to a worker's grievance about "the performance of a duty by an employer in relation to a worker" – the only limits on subject matter in the right to representation established in the European Court judgment are the union members' interests[31] (so, for example, including pay claims) - the *Review* proposes no change here;

d) vests the right to accompaniment solely in the individual being disciplined or raising the grievance, whereas the right should equally be vested in and enforceable by the member's union: the European Court made explicit that:[32]

> > failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant unions and the individual applicants.

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23 Paragraphs 44 and 45 of the judgment.
24 Paragraph 44 of the judgment.
25 Paragraph 44 of the judgment.
26 Paragraph 42 of the judgment.
27 Paragraph 46 of the judgment.
28 Paragraph 46 of the judgment.
29 See J. Hendy, *Every Worker Shall Have the Right to be Represented at Work by a Trade Union*, Institute of Employment Rights, 1998.
30 Paragraph 3.43 of the *Review*.
31 Both (or either) individual and collective.
32 Paragraph 48 of the judgment.

The *Review* proposes no change here.

The recognition procedure established by the 1999 Act (now schedule A1 of the 1992 Act) is also insufficient to fulfil the ***Wilson and Palmer*** judgment. This is because:

a) as above, the right to representation under Art.11 is vested in "everyone" and hence cannot be permissibly confined to a member in a recognised union, nor to a union which has achieved recognition - the *Review* proposes no change here;

b) the schedule A1 path to recognition is excluded for many workers (small employers, where there is a sweetheart deal and so on) - the *Review* proposes no change here;

c) recognition under schedule A1 when and if achieved is confined to a procedure agreement with the limited subject matter of pay, conditions and holidays – whereas under Art.11 a union is to be free to seek collective bargaining "on those issues which the union believes are important for its members' interests"[33] - the *Review* proposes no extension to the three listed issues and indeed proposes that the issue of pensions (held to be part of pay) be removed from them;[34]

d) whilst the *Review* states that the government will keep the issue under review,[35] it proposes no increase in the protection against employer interference during a union campaign to seek recognition by the schedule A1 path – such protection is currently limited and is not, as experience has shown[36] as would appear necessary to prevent it being "possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests."[37]

The Review does not propose the introduction of a legislative right to union representation. It should do so and should make that right exercisable and enforceable either by a union[38] or by the member or by both. Such a right would need to respect the preferential treatment due to recognised unions - and the European Court has in the past approved systems which involve unions proving representivity - however, the Article 11 right appears so profound that it could not be confined only to recognised unions.

Individualised contracts

The *Review* proposes that:[39]

> the law should be amended to specify that the entering of individualised contracts would not constitute unlawful union discrimination against those union members not offered them, as long as there was no inducement to relinquish union representation and pre-condition in the contracts to relinquish it.

This proposal is not understood. If it is intended to mean that a tribunal may only find unlawful union discrimination if the inducement is to relinquish union representation but not if the inducement is simply to enter into an individualised contract, then by and large the breach of Art.11 in ***Wilson and Palmer*** would not appear to be rectified. It is hard to understand what might be the circumstances in which the employer could demonstrate the latter purpose without the former: the only conceivable attraction to an employee of an individualised contract in place of collective union representation must be the anticipation of some benefit (save in the very rare case of the individual who

33 Paragraph 46 of the judgment.
34 Paragraph 2.56 of the *Review*.
35 Paragraph 2.100-103 of the *Review*.
36 KD Ewing and S Woods, *Defeating trade union Recognition: Anti-union conduct by employers*, Institute of Employment Rights, 2003, forthcoming.
37 Paragraph 48 of the judgment.
38 A vital avenue where individuals may feel vulnerable.
39 Paragraph 3.13.

does not want to be associated with a union on grounds of conscience). Correspondingly it is hard to imagine what the employer's purpose might be in inducing an employee to agree to an individualised contract of employment in place of union recognition if not as a means to the end of union recognition, an objective with the underlying motive of reducing labour costs, a longer term objective for which the employer is often prepared to pay (in wages or benefits) more in the short term.

If the proposal is intended to mean that an inducement will amount to unlawful union discrimination whether it is intended to encourage an individualised contract of employment or whether it is intended to discourage union representation, that is not what the proposal says.

It might appear from the wording that the proposal is intended to permit discriminatory inducements as between those who are offered individualised contracts but to make it unlawful as between those who are offered such contracts and those who are not. The logic of such a proposal is not understood and discrimination between those who are offered inducements to enter individualised contracts was precisely the situation in the ***Wilson and Palmer*** cases which the E.Ct.H.R held to be outwith Art.11.

In short it is not clear what the Government's proposal means here. The E.Ct.H.R. has made clear that union representation is a right and its removal by inducement or threat is not to be permitted by the State. Discrimination in favour of those who might be tempted to enter individualised contracts where collective representation (recognition) exists is not to be permitted. Further legislation should give explicit effect to these principles.

Furthermore any special protection of such contracts, in such a context, would formalise the extraordinary primacy given in the UK to the contract of employment over collective agreements in distinction from the rest of western Europe where:[40]

> "almost all Continental systems contain in a weak or strong form...[t]hat principle, which we may call "inderogability", [which] requires that the employee must not be deprived of his or her rights under an applicable collective agreement even if he or she has agreed to alternative, less favourable conditions."

Such a preservation of individualisation would also breach the UK's obligations under:

- Art.6(1) of the European Social Charter to promote joint consultations between workers and employers;
- Art.6(2) of the European Social Charter to promote machinery for voluntary negotiations between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements;
- ILO Convention 98(4) to encourage and promote the full development of machinery for voluntary negotiation between employers and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements.
- Article 28 of the Charter of Fundamental Rights of the European Union[41] and Art.12 of the Community Charter of the Fundamental Social Rights of

40 Lord Wedderburn, "Companies and Employees", in Lord Wedderburn (ed), *Labour Law and Freedom*, 1995, p85. And see the same at p85-6; Lord Wedderburn, "Collective Bargaining at European Level: the Inderogability Problem", in the same at 212-236; and Wedderburn and Sciarra, "Collective Bargaining as Agreement and as Law: Neo-Contractualist and Neo-Corporative Tendencies of our Age", in Pizoruss, (Ed.), *Law in the Making*; 1988, especially at p187-196.

41 Adopted in Nice in 2000 and likely to become part of the European constitution through the European Convention process, see e.g. Final Report of the Working Group XI on Social Europe, CONV 516/1/03, 4th February 2003.

> Workers[42] to guarantee the right to negotiate and conclude collective agreements.

"Trade disputes" and "collective bargaining"

A further amendment to current law is necessary in the light of ***Wilson and Palmer***. In paragraph 44, the European Court said:

> The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. However, the union and its members must be free in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members.

In the UK industrial action can only lawfully be organised in contemplation or furtherance of a trade dispute. The definition of a trade dispute is found in s. 244 of the 1992 Act. Consequently the union *freedom* "to seek to persuade the employer to listen to what it has to say on behalf of its members" can only include a lawful threat of industrial action where the issue to which the union wants the employer to listen falls within the definition of a 'trade dispute'. This definition (particularly as interpreted by the English courts) has been restricted (see below) to a significantly narrower range of circumstances than "those issues which the union believes are important to its members' interests." *The definition of a trade dispute in s. 244 thus requires amendment to reflect this aspect of the court's decision.*

In paragraph 46 of its judgment the European Court said that a trade union must be able

> to take steps, including if necessary organising industrial action with a view to persuading the employer to enter into collective bargaining.

It was not suggested that the subject matter about which such collective bargaining might be sought was restricted in any way. But in the UK the definition of "collective bargaining" is restricted by s.178 to a similar list of issues as those in the definition of a "trade dispute." Whilst a dispute about collective bargaining would appear to fit into that list (s.178(2)(g)), there cannot be certainty and *s.178 should be appropriately clarified.*

Incorporation of international standards

As noted above, the European Court in ***Wilson and Palmer*** in criticising the decision of the House of Lords (and, by implication the substance of the Ullswater amendment), was following a well worn path. The Council of Europe (up to the level of the Council of Ministers) had reached similar critical conclusions in this case finding breaches of Arts.5 and 6 of the Social Charter of 1961. Likewise the International Labour Organisation found breaches of Conventions Nos. 87 and 98. The European Court held these international standards and the fact that the UK had been found to be in breach of them relevant. The European Court set out the international standards and (at length) some of the decisions holding the UK in this case in breach of them.[43]

The fact that the European Court did so means that these standards are now material considerations in applying articles of the European Convention.[44] It is to be hoped that in future cases, where there have been findings by the Council of Europe bodies that the UK has breached the Social Charter (which is after all the sister body of the same parent body as the European Convention) or breached fundamental Conventions of the ILO (in particular Nos.87 or 98), English courts will take such breaches into account in considering whether a breach has been established of a European Convention right. In this respect the English courts are bound to follow the European Court because

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42 Of the European Community, 1989

43 Paragraphs 30-37of the judgment. The applicants had drawn the attention of the European Court to this material – see paragraph 39.

44 In earlier cases the European Court had held that the Social Charter articles were of negative significance in applying the European Convention since, being optional, they permitted lower standards than the compulsory provisions of the Convention itself.

s.2(1)(a) of the Human Rights Act 1998 requires English courts to "take into account any judgment, decision, declaration or advisory opinion of the European Court." *It would avoid doubt, however, if that section of the Human Rights Act were amended so as to require the English courts to take into account also any judgment, decision, declaration or advisory opinion of the supervisory bodies of the Social Charter or of the International Labour Organisation in relation to articles and conventions which have been ratified by the UK. This is not proposed by the Review. It should be.* It is to be noted that the international material was cited to the House of Lords in ***Wilson and Palmer*** but none of the speeches made any reference to it.

Industrial Action

The Employment Relations Act 1999 was the first legislation to confer any legal benefits to unions in respect of collective action since 1978. It was therefore welcomed by the labour movement. The Act's changes to industrial action law were nonetheless small and fully justified the Prime Minister's promise shortly before his overwhelming victory in the 1997 election that "the changes that we do propose would leave British law the most restrictive on trade unions in the Western World".[45]

The proposals in the *Review* to the law on industrial action are still more modest. They certainly leave the Prime Minister's claim untouched. Notwithstanding that the law in this area both before and after the 1999 Act largely offends the UK's international obligations (see below), the *Review* states that the Government "re-affirms its commitment to retain the essential features of the pre-1997 law on industrial action."[46] The Institute of Employment Rights in its *A Charter of Workers' Rights*, 2002, made a substantial number of recommendations for reform in order to bring UK law into line with its international obligations. These recommendations and the findings of the international supervisory bodies in relation to the UK have been wholly ignored by the *Review* with the result that the UK will continue to be in breach of the international laws which bind it.

The right to take industrial action is a right of the individual worker; the right to organise industrial action is a right of a trade union as well as an individual right. These rights are fundamental human rights and must be protected as international law requires. But they are not rights without limits; and the permissible limits on industrial action have been well established by the international legal bodies. In this field, regrettably, UK law is consistently in breach of its international obligations.

The right to strike

The most noticeable failure of UK law is the absence of the right to strike, a right guaranteed by the international laws on the subject ratified by the UK (and found in most civilised jurisdictions).

International law

The government purports to uphold international standards in the field of labour law. Malcolm Wicks (Parliamentary Under-Secretary of State for Work and Pensions) recently said in the House of Commons:[47]

> In 1948…a convention on freedom of association and protection of the right to organise was launched. The UK was the first country to ratify the convention, and we are proud of that. The right to organise is fundamental to democracy…
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> Some 140 countries have now ratified the ILO convention on freedom of association and protection of the right to organise. In 1998, more than 50 years after adopting that convention, all 175 member states of the ILO signed up to a

45 The Times, 31st March 1997. For a consideration of the values behind the 1999 Act see P Smith and G Morton, "New Labour's Reform of Britain's Employment Law: The Devil is not only in the Detail but in the Values and Policy too," (2001) 39 BJIR 1.

46 Paragraph 3.22 of the *Review*.

47 HC Debs., 27th June 2002, col.1069.

> declaration of rights and fundamental principles at work. All those member states agreed to respect, promote and realise the ILO core labour standards, regardless of their level of economic development and—crucially—whether or not they had ratified the relevant ILO conventions.
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> …The UK has continually supported the ILO's work in defending trade union rights. We have ratified all the ILO core conventions, including those relating to freedom of association and collective bargaining, and we encourage other countries to do so.

The most fundamental of the core conventions of the International Labour Organisation are "those relating to freedom of association and collective bargaining" i.e. Nos. 87 and 98. These are so fundamental[48] that arguably they constitute part of customary international law, binding without need for ratification[49]. These are in fact the most ratified of all ILO Conventions.[50] In each case the UK was the first State to ratify the conventions.

The right to strike is inherent (though not express) in Convention 87.[51] The Committee on Freedom of Association[52] as early as their second meeting in 1952 held that the right to strike was an "essential [element] of trade union rights"[53]. The Committee of Independent Experts[54] first endorsed the right to strike in 1959[55]. Both Committees founded the right to strike on the freedom of association provisions of Convention 87[56]. The *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 1996[57] states that: [58]

> While the Committee [of Freedom of Association] has always regarded the right to strike as constituting a fundamental right of workers and of their organisations, it has regarded it as such only in so far as a means of defending their economic interests.

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48 Freedom of Association is a fundamental principle enshrined in the ILO Constitution by the *Declaration of Philadelphia*, 1944, and in the *Declaration on Fundamental Principles and Rights at Work* 1998. The ILO pursuant to an agreement in 1946, is the specialised agency recognised by the UN to deal with labour matters. Hence Art.8(3) of the International Covenant on Economic, Social and Cultural Rights 1966 (above) and Art. 22(3) of the International Covenant on Civil and Political Rights 1966 (above), both provide that nothing in those articles authorises laws which would prejudice the guarantees of ILO Convention 87.

49 See Creighton, "The ILO and protection of Freedom of Association in the UK", in Ewing, Gearty and Hepple (eds.) *Human Rights and Labour Law*, 1994, p.2, and see ILO, *International Labour Standards*, 3rd ed., 1990 at p.106. See also Novitz, "Freedom of Association and Fairness at Work: an assessment of the impact and relevance of ILO Convention No. 87 on its fiftieth anniversary", (1998) 27 ILJ 169.

50 Convention 87 had been ratified by 120 States by 1999. None of the countries to which the European Convention applies have failed to ratify Convention 87.

51 *General Survey*,1994, paras 136-141, 146-151. The right to strike was taken as read from the outset, see International Labour Conference, 30th session, 1947, Report VII, *Freedom of Association and Industrial Relations*, pp.30, 31, 34, 46, 52, 73-4, 109, 121.

52 A tripartite body of 9 members of the Governing Body.

53 *Second Report*, 1952, Case No.28 (Jamaica), para.68.

54 "The Committee of Experts on the Application of Conventions and Recommendations" is an elected body of some twenty extremely eminent international jurists, including presently an English High Court Judge (Hon. Mrs. Justice Cox), the former Chief Justice of India, the former Chief Justice of Barbados, the Hon. First President of the Supreme Court of Madagascar, the President of the Second Section of the Council of State of Spain, a Judge of the Constitutional Court of Senegal, the former President of the Senate of the Republic and President Emeritus of the Constitutional Court of Mexico, the former Deputy President of the Industrial Court of South Australia, ten Professors of Law and two distinguished advocates.

55 *General Survey*, 1959, para.68.

56 See the *General Survey,* 1994, pp. 64-5, paras. 146 and 147.

57 4th ed., revised.

58 *Digest*, para 473. And see the *General Survey*, 1994, p.62, para.142.

And the "*General Survey*" (properly entitled *Freedom of Association and Collective Bargaining*) 1994,[59] in summarising the position of the Committee of Independent Experts states: [60]

> The promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met. In a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour, according to various methods, thus inflicting a cost on the employer in order to gain concessions…[early on the Committee was led] to the view that the right to strike is one of the essential means available to workers and their organizations to promote their economic and social interests.

In its 1998 Report to the Governing Body of the ILO marking the 50th anniversary of Convention 87, the ILO Committee of Experts berated the continued restrictions "on the means which can be used by workers' organisations for the furtherance and defence of their members' interests. This is particularly flagrant with respect to the right to strike."[61] The Committee of Experts held in 1983 that:[62]

> the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers.

Mr Wicks' promotion of ILO Convention 87 is therefore to be welcomed.

Whilst he did not mention the International Covenant for Economic, Social and Cultural Rights 1966 (the "ICESCR)," this is another international treaty ratified and therefore binding on the UK. It is one of a pair of international conventions under the auspices of the United Nations.[63] Article 8 of the ICESCR (which elaborates freedom of association as it applies to trade unions) includes the following provision:

> 1. The States Parties to the present Covenant undertake to ensure:
>
> …
>
> (d) the right to strike, provided that it is exercised in conformity with the laws of the particular country;

The European Court of Human Rights is, of course, the supervisory body for the European Convention on Human Rights and Fundamental Freedoms (which has become, by legislation, part of domestic law in the UK by virtue of the Human Rights Act 1998). For many years the E.Ct.H.R. declined to acknowledge the right to strike as inherent in the right to trade union membership guaranteed by Art.11. That time has now gone and though the E.Ct.H.R. has accepted substantial restrictions on the right to strike its existence is not now in doubt.[64] The Court has also[65] placed positive reliance

59 The *General Survey* of the Reports of the Freedom of Association and the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention is periodic the latest having been published in 1994.

60 *General Survey,* 1994, p.66, para.148.

61 *Committee of Experts' Report* to the 68th Conference, 1998, p.15.

62 *General Survey* 1983, para. 200; *General Survey* 1994, para. 147.

63 Interestingly the President of the Supreme Court of Norway, the country with the oldest written constitution in Europe (1814), considers that these two covenants (the other being the International Covenant on Civil and Political Rights of the same year) together with the European Convention "may present the Norwegian Courts with some of their greatest legal challenges in the near future:" Hon. Justice Carsten Smith, "Judicial Review of Parliamentary Legislation: Norway as a European Pioneer," (2000) 32 Amicus Curiae 11 at 13. In contrast the covenants, the European Convention, the European Social Charter and the ILO Conventions were all cited in argument in the House of Lords in *Associated Newspapers Ltd. v Wilson; Associated British Ports PLC v Palmer*[1995] 2 AC 454, but received not a mention in the speeches of their Lordships.

64 *UNISON v UK* [2002] IRLR; *OFS v Norway* (2002) case 38190/97.

on the provisions and jurisprudence of the ILO, the European Social Charter, and the *Charter of Fundamental Social Rights of Workers* adopted by the European Union in 1989 in order to construe the European Convention as a "living document."[66]

The Council of Europe established not only the European Convention on Human Rights and Fundamental Freedoms 1957, but also the European Social Charter 1961, revised in 1996. Art.6(4) of both is identical providing that ratifying states recognise:

> the right of workers… to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreement previously entered into."

Art.6(4) has been ratified by 27 of the 32 states which have ratified either version of the Charter in the (newly enlarged) Council of Europe.[67]

The Parliamentary Assembly of the Council of Europe has, in relation to Art.6(4):[68]

> stress[ed] the fact that collective action, an essential element of freedom of association, is recognised in international law as one of the fundamental rights of workers, and that accordingly States should make every effort to prevent infringements thereof.

The consequences of there not being a right to strike in the UK are profound and are explored below. Apart from anything else the absence of a right to take industrial action has led to UK law having become so complex that the ILO has suggested only the implementation of a right to strike can simplify it.

The right to strike is recognised not only by the Council of Europe but also by the European Union where it finds form in Art.13 of the Community Charter of the Fundamental Rights of Workers 1989[69] and in Art.28 of the Charter of Fundamental Rights of the European Union[70] and may yet find a place in the European Constitution.[71]

Other European jurisdictions

In "the European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the rule of law"[72] there is associated with the right to form and join trade unions, an almost universal recognition of the right to strike,

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65 In *Sigurjonsson v Iceland* (1993) 16 EHRR 462 at para.35; see KD Ewing, "Article 11 and the Right to Freedom of Association," in KD Ewing (ed.), *Human Rights at Work*, 2000, Institute of Employment Rights at 103-104; and of course in *Wilson and Palmer* [2002] IRLR 128 at paras.30-37 (above).

66 Referring to *Soering v UK* (1989) Series A, No.161, p.40, para.102.

67 See the European Committee of Social Rights, matrix on *Acceptance of provisions*, 19th November 2002, Council of Europe. The exceptions are Austria, Luxembourg, Greece, Poland and Turkey. Luxembourg has failed to provide an explanation, and according to the European Committee of Social Rights (*7th Report on certain provisions of the charter which have not been accepted*, September 2000, council of Europe, p.9) the "delay in acceptance" of Art.6(4)…by Austria is due, in particular, to the fact that participation in a strike is a ground for termination of contracts and dismissal;…by Greece is due, in particular, to restrictions on the tight to join trade unions, to the prohibition of lockouts and to the possibility of arbitration being imposed;…by Poland is due, in particular, to the fact that only trade unions have the right to call a strike and to the excessive nature of restrictions on the right of civil, servants to strike;…by Turkey is due, in particular, to the fact that only trade unions have the right to call a strike and only with the aim of concluding collective agreements, and to the fact that all categories of civil servants are denied the right to strike. See also the more detailed analysis country by country at pp.17-56.

68 Opinion No. 145 (1989), para. 9, adopted by the Assembly on 9.5.89. Art. 6(4) is one of the "*particularly important*" provisions of the Charter: Opinion No. 64 (1973) adopted by the Assembly on 26.9.83. This point of general application was specifically addressed to the UK by the Committee of Experts: Opinion No. 145, para.16(v); and, subsequently, by the Committee of Ministers: Resolution Ch S (89)1, adopted 13.9.89.

69 COM(89) 471, final.

70 2000/C, 364/01.

71 See Final Report of Working Group on Social Europe, CONV 516/1/03, 4th February 2003.

72 Preamble to the European Convention.

subject to varying degrees of regulation.[73]

Often such a right is found in the constitution of the state.[74] Some constitutions expressly provide for the right to strike, others grant trade union freedom of association from which a right to strike has been inferred by the relevant courts. It is noteworthy that courts in Europe tend to insist that each freedom must be given its proper ambit, including trade union rights of organisation. Although some constitutions state that subsequent laws may regulate some of the rights set out (for instance, in respect of the ambit or modalities of strike action), this happens comparatively rarely.

In Italy, the constitution affords rights: of association, of peaceful assembly, to form and join trade unions and conduct union activity (at the workplace and generally) as well as a right to strike[75]. The constitution of France [76] recognises an individual right of

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73 For which I am indebted to Prof. Lord Wedderburn of Charlton QC, FBA, joint author with John Hendy QC of the application to the E.Ct.H.R. in the case of *UNISON v UK* case no.5357499. I am solely to blame for any errors in this summary. For a general and comparative survey, see Lord Wedderburn, Chap.4 "Laws about strikes", in W. McCarthy (Ed.) *Legal Intervention in Industrial Relations* (1992), 147-209. A strike which conforms to the following requirements would appear to be lawful in most western European countries:
the strike may not be in breach of a peace obligation of a collective agreement, contract or award;
the strike must be called after exhaustion of available procedures for resolution;
the strike must be the last resort;
the strike may not be in breach of statutorily required conciliation or arbitration process;
the strike must be in furtherance of an occupational and economic demand(s);
the dispute must be a conflict of interests rather than of rights;
the demand may not be to alter or challenge the validity or interpretation of an existing collective agreement nor to demand a new agreement before the existing one has expired;
the strike must be called by a union;
the union calling the strike must have status to represent the strikers;
the union calling the strike must be representative or most representative;
the demand must be made of an employer;
the demand must be made on the employer of the workers;
the employer must be capable of satisfying the demand;
the employer must have refused the demand;
the demand if met must be capable of being put in the form of a collective agreement;
the strike must be conducted without unlawful accompanying measures;
the strikers must not be within a prohibited class of worker e.g. military, police, state security service, certain categories of other public servant;
the strike must not threaten life or health;
the strike must not be "gravely unreasonable" (e.g. because the dispute could be resolved by legal process);
the strike must not be a disproportionate measure;
strike notice must have been given to a specified state official or to the employer in the case of certain classes of worker;
the strike may not be for the purpose of supporting an unlawful strike by another union, nor to support workers employed by an employer who is not an ally of the strikers' employer, nor to support other workers where the secondary strikers have no interest of their own to protect (France), nor to support other workers where the secondary strikers do not have the interest required, i.e. that laid down by a collective agreement or the test of "life, honour, or welfare"73(Denmark);
the strike must conform to laws which impose legitimate restrictions on strike action, e.g. a statutory requirement to have a pre-strike ballot;
the strike must not constitute an abuse in the form of an attack on the whole nature of the enterprise.
The full text of the *UNISON* application is available (with the kind permission of UNISON) on the website: www.oldsquarechambers.co.uk.

74 The constitution of a state gives also a flavour of its social context: the commentary of Sir Otto Kahn-Freund on the relationship between constitutions and labour laws is well known: O. Kahn-Freund, "The Impact of Constitutions on Labour Law" (1976) Cambridge Law Journal 240.

75 The most relevant articles of the constitution are: 17, 18 (rights of association and peaceful assembly), 39, 40 (guarantee of trade union freedom and activity at local and higher levels, and right to strike "within the limits of later laws"), 41 (guarantee for private economic initiative, within the limits of social benefit, of safety of society, liberty and human dignity); see too the "Workers' Statute" law 300/1970 (rights at the workplace for trade unions - "rappresentanze aziendali sindacali" - and penalties for anti-union behaviour). For an introduction for Italian readers: Lord Wedderburn, Cap.1 "Il diritto del lavoro inglesi: un' introduzione comparata" in *I Diritti del Lavoro*, (1998), Ed. S. Sciarra. There is no overarching "duty" to bargain, but many statutes elsewhere place an "onus to bargain" on employers: this telling phrase is from S. Sciarra, *Contratto Collettivo e Contrattazione in Azienda* (1985) 144.

employees to resort to strikes. In Sweden a constitutionally guaranteed right to strike is given only to trade unions. Andorra, the Czech Republic, Georgia, Greece, Iceland, Lithuania, Moldova, Poland, Portugal, Romania, San Marino and Slovenia all have constitutional rights to strike.[77] There is no express right to strike in the Spanish constitution but the right has been derived from the provision guaranteeing trade union freedom of association, and the Spanish Constitutional Court has given a wide meaning to constitutional trade union action[78] saying:

> it is not necessary for the interests defended in a strike to be those of the strikers themselves, but only the interests of a 'category' of workers…the claim that *l'interêt professionel* must have a direct link with the strike, is unconstitutional, and secondary action is lawful.[79]

In Germany the constitution guarantees persons the right to form and join associations generally and "the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions."[80] This simple formula, together with the Collective Agreements Act, has been used by the German courts as the basis of wide areas of labour law including the right to form and join trade unions and engage in union activity including strikes and collective bargaining (much taking place within Works Councils). The right to strike is limited by such doctrines as "parity of arms", proportionality, the *ultima ratio* rule (the last recourse in a deadlock in bargaining), a new category of lawful short "warning strikes," and other rules such that the obligee employer must be an entity that can make a collective agreement[81].

In Switzerland too the constitutional right to strike is specifically derived from the right to freedom of association[82].

In Ireland, the right to strike also does not derive from the Constitutional "right of the citizens to form associations and unions"[83]. But instead:

> The right to dispose of one's labour and to withdraw it seem to me a fundamental personal right which, though not specifically mentioned in the Constitution as being guaranteed, is a right of a nature which I cannot conceive to have been adversely affected by anything within the intendment of the Constitution.[84]

In other Contracting States, the right to strike is established by legislation or (as in the Netherlands) by the Courts. In Finland, certain forms of industrial action are expressly

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76 The right to strike was in the preamble of the 1946 Constitution and subsequently incorporated in the 4 Octobre1958 Constitution as a fundamental right.

77 So too do other many non-European countries with modern constitutions, e.g. South Africa (see below), Mexico, Brazil, Argentina, Burkina Faso, and Rwanda.

78 The main provisions are: Constitution Arts.6, 7, 14, 28; also: the Workers' Statute 10th March 1980, (as later amended), Decree-law 1977 (in part repealed) and law 11/85 with law 4/86 (on trade union rights and liberties): see T. Sala Franco, *Derecho del Trabajo* (5th ed. 1990) 99-118. The Constitutional Court has from the outset interpreted the rights of workers and unions very broadly: see decisions 11/81, 23/83, 98/85: and Judge of the Constitutional Court, M. Rodriguez-Pinero*, Le Tribunal Constitutionel Espagnol* in *Les Transformations du Droit du Travail* (for G.Lyon-Caen, Dalloz (1989) pp.104-122.

79 Sentenza 11/81 interpreting the Constitution, Art.28 and Law 11/85, and declaring unconstitutional that part of the decree-law 1977 which purported to render solidarity (sympathy) strikes unlawful.

80 Art.9 (3), Constitution (Basic Law).

81 Op. cit.; see M. Weiss, *Labour Law and Industrial Relations in Germany* (1990) p.33, 105-9 on constitutional freedom of association, "positive" and "negative".

82 Which right is guaranteed, respectively, by article 56 of the Swiss Federal Constitution and by article 9(3) of the Basic Law (Constitution of the Federal Republic of Germany). In Germany, the Federal Labour Court and the Federal Constitutional Court have played a fundamental role in interpreting the Basic Law and inferring a right to strike.

83 Art 40.6 of *Bunreacht na hlireann*.

84 *Education Co. V. Fitzpatrick (No.2)* [1961] I.R. 345,Kingsmill Moore J at 397. As an unenumerated right, this right would derive its protection from Art. 40.3 and accordingly would be subject to considerations of practicability and justice (see Casey, *Constitutional Law in Ireland*, 1992 pp.491-2) which would have to be constitutionally justifiable and for the common good: *Ryan v. A-G* [1965] I.R.294 at 312.3.

prohibited by the Collective Agreements Act of 1946. However, based on the principle that what is not forbidden is allowed, other forms of industrial action are permitted. This principle is also applicable in Norway[85] and in Austria. In Denmark most forms of industrial action are lawful.

By contrast, the courts in the Netherlands had no constitutional or even legislative assistance in making their fundamental labour law, leading them to adopt the Council of Europe's Social Charter 1961 as their basic norm (even before the Charter was ratified in that country) and after 1976 they varied old principles judicially in the light of it (for example, on "blockade" of the employer, traditionally common in the Netherlands as in the Nordic countries for non-payment of wages). [86]

Industrial action and the worker

The absence of the right to strike in the UK is characterised by the fact that a strike[87] is unlawful at common law. Consequently, as the UK Government pointed out in its 1998 Report to the ILO:[88]

> Under UK law, individuals are almost invariably breaking their contracts under which they work when they take any form of industrial action, irrespective of whether the action is official or unofficial, or whether the action is lawfully or unlawfully organised. They can therefore be sued on an individual basis by employers for damages.

The taking of strike action is a breach of the employee's contract of employment in virtually every case. This applies even where the worker's trade union has fulfilled the onerous obligations imposed by Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 to secure protection for the union.

A strike will be in breach of the contract of employment for two reasons. Firstly, the striker is failing to perform the obligations of work in the contract. Secondly, by seeking to cause disruption to the employer's business, the striker is breaching the "implied term to serve the employer faithfully within the requirements of the contract"[89].

It is not merely a "strike" which is in breach of the contract of employment. Because of the inevitable breach of the duty of faithful service, virtually all other forms of industrial action save where the worker is "refusing to do things altogether outside their contractual obligations"[90] will breach the contract of employment.[91]

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85 See the useful analysis of the right to strike in *Federation of Offshore Workers' Trade Unions v The Norwegian State represented by the Ministry of Local Government and Labour* case no.24/1997, 10th April 1997, Norwegian Supreme Court, (English translation made by the Ministry of Local Government and Labour).

86 The Netherlands Supreme Court directly applied Art.6(4) into domestic law to found a right to strike: Hoge Raad, Nederlands, *Jurisprudentie* 1986, p.688. See generally, Heringa, *Sociale Grondrechten*, 1989. See the references in *Hier et Demain* (op. cit. above, note 45) pp.64-66.

87 The notion of a strike is defined in s. 246 of the Trade Union and Labour Relations (Consolidation) Act 1992 : "'strike' means any concerted stoppage of work." There is a further definition found in s.235(5) Employment Rights Act 1996 for other and different statutory purposes:
"'strike' means -
(a) the cessation of work by a body of employed persons acting in combination, or
(b) a concerted refusal, or a refusal under a common understanding, of any number of employed persons to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer or any employed person or body of employed persons, or to aid other employees in compelling their employer or any employed person or body of employed persons, to accept or not to accept terms or conditions of or affecting employment."

88 "UK Government's Reply to the Committee of Experts' 1996 Observations", para.6.

89 Per Ralph Gibson LJ giving the judgement of the Court of Appeal in *British Telecommunications PLC v Ticehurst* [1992] ICR 383 at 398D-399D.

90 Per Lord Hoffman giving the judgment of the Privy Council in *Burgess v Stevedoring Services Ltd.* [2003] IRLR 810, at para.27. (Union overtime ban, worker only obliged to work overtime if assigned to a gang, no gangs assigned. The case gives the most gentle guidance on the practice in relation to obtaining interlocutory injunctions without notice to a trade union defendant.)

91 Apart from *Burgess* it has been held that the following are breaches of the contract of employment: working strictly according to contract (*Secretary of State v ASLEF (No.2)* [1972] 2QB 455), or refusing to

The consequence of industrial action being in breach of contract is severe for the worker. "Any form of industrial action by a worker is a breach of contract which entitles the employer at common law to dismiss the worker...."[92] or to refuse to pay wages[93] or to sue for damages[94]. The employer's power to impose these penalties is not diminished to any extent whatever by the fulfilment of the union's statutory obligations under Part V of the Act.

Independent of the contract of employment but to some degree protecting it, there is, of course, a right to claim reinstatement and/or compensation for unfair dismissal by virtue of Part X of the Employment Rights Act 1996. However this right is subject to a number of limitations amongst which are that such a right is denied to any worker dismissed whilst participating in a strike which is not "official", i.e. supported by his or her union.[95] Where a strike is denied protection by reason of a failure by the union to comply with the requirements of the 1992 Act, the consequences of the union making the strike official would be unlawful and restrainable by injunction and render the union liable in damages if sued. Consequently, such a union will not make such a strike official or, if the strike commences, the union will be obliged to repudiate it in writing through the burdensome machinery of ss.20-21 of the 1992 Act. Any person thereafter striking in pursuit of the dispute would therefore be denied the right to complain of unfair dismissal if dismissed. The only remedy for non-compliance with an order for reinstatement or re-engagement is an award of further compensation.

Compensation for refusal to comply with a reinstatement or re-engagement order made on trade union grounds used to be on a basis which was greatly enhanced beyond the rate for other unfair dismissals.[96] The Employment Relations Act 1999 Act changed that and applied the same formula as for refusal to reinstate in other unfair dismissal cases, namely an additional award of between 26 and 52 weeks pay.[97]

S.16 and Schedule 5 of the Employment Relations Act 1999 enlarged the rights of strikers to claim unfair dismissal by inserting a new s.238A into the 1992 Act. The 1999 provisions limited[98] the right to claim unfair dismissal to those engaged in industrial action which is protected.[99] S.238A(1) guaranteed an automatic finding of unfair dismissal and consequential compensation. It did not guarantee reinstatement or re-engagement.

The Review

The *Review* proposes no change to the existing arrangements.[100] It notes that most strikes last less than 8 weeks but suggests no justification for not extending protection of the right to strike to those unfortunate enough to be engaged in a dispute which lasts longer than 8 weeks. The *Review* rejects extension of the 8 weeks partly because "such an extension would also mean that employers could never take lawful action to dismiss strikers and recruit a permanent replacement workforce."[101]

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carry out some aspects only of contractual duties (*Ticehurst* above). The only other exceptions might be where industrial action followed notice to terminate the contract of employment (*Boxfoldia v NGA* [1988] ICR 752), or where the strike consisted in not renewing contracts of employment (*Allen v Flood* [1898] AC 1), or where the contract of employment expressly provided a right to strike. Perhaps surprisingly *Ticehurst* was not cited in *Burgess*.

92 Lord Templeman in *Miles v Wakefield MDC* [1987] ICR 368 at 389.

93 *Wiluszynski v Tower Hamlets LBC* [1989] IRLR 259.

94 *NCB v Galley* [1958] 1 WLR 16.

95 Schedule 5 of the Employment Relations Act 1999 and s.238(2A) of the 1992 Act provide rights to strikers to complain of unfair dismissal in limited circumstances but do not give any such rights where the strike is unofficial: s.237 of the 1992 Act.

96 S.125 Trade Union and Labour Relations (Consolidation) Act 1992.

97 In consequence of s.33 Employment Relations Act 1999.

98 By virtue of the new s.238A (1) of the 1992 Act.

99 By s.219 of the Act.

100 Paragraphs 3.37-3.38.

101 Paragraph 3.37.

The *Review* notes the employment tribunal decision in ***Davies v Friction Dynamics***,[102] now under appeal. In that case 86 workers were dismissed for taking strike action to resist adverse changes to terms and conditions. The employer sought to exploit s.238A by purporting to sack the workers at Friction Dynamics the day after the eighth week. But the tribunal found that a letter sent by the employer on the second day of the industrial action amounted to a dismissal. So the later purported dismissal was irrelevant and the workers were dismissed within the eight weeks.[103] But whilst the workers will be entitled to compensation the fact remains that their jobs have been lost and reinstatement orders are not automatic – indeed they are only ordered in less than half a percent of cases. Even where reinstatement is ordered the employer may disregard the order, though enhanced compensation will follow. The *Review* states that it is too early "to reach a definitive assessment of [the case's] implications." However, one thing is clear and that is that there are employers prepared to wait 8 weeks in a dispute in order to sack and replace their workforces. This is not permissible under international law binding on the UK and legislation is required to prevent it – see below.

The *Review* also proposes[104] to retain jurisdiction in the employment tribunals but refuses to contemplate interim relief of the kind available in dismissals for trade union activity (and paralleled by the interim injunctions used so frequently against trade unions in the civil courts in dispute cases). No justification is offered for this stance other than it would be "clearly inappropriate where strike action is in effect ongoing." But if dismissal of strikers is unlawful on the premise of s.238A, there appears every reason for providing a legal remedy at the earliest moment. *The legislation should therefore be amended to allow for interim relief.* The retention of jurisdiction in the tribunals also means that injunctions cannot be made to restrain dismissals of strikers. *Yet this is the preferable remedy and could be achieved by legislation which deemed that a lawful strike suspended but did not breach a contract of employment – see below*.

The *Review* also asks for views on whether days when a striker is locked out by the employer should be excluded from the calculation of the 8 week period. *Clearly this is an improvement if this unfair dismissal structure is to be retained.*

Other European jurisdictions

Categorisation of lawful industrial action as suspending rather than breaching the contract of employment is the real legal answer to the challenge of appropriate protection of those engaged in lawful industrial action. That is the position in most European countries So, notably, in France[105] the *Code du Travail* provides that a strike does not break the contract of employment except where the employee is guilty of serious and extraneous misconduct[106]. Suspension of the contract of employment during industrial action is not universal, however, in Europe. That is the rule in Norway but (surprisingly) not in Denmark where industrial action terminates contracts of employment.[107] But even some common law jurisdictions have rendered the common law consistent with the right to strike by holding that the effect of an otherwise lawful strike is not to break but merely to suspend the contract of employment. In Canada legislation at Federal level (and in different ways in most Provinces) has provided that employees do not lose their employment status and their contracts are not terminated

102 Liverpool employment tribunal, 4th December 2002, unreported.

103 The tribunal went on to find that the employer had also failed to take reasonable steps to resolve the dispute.

104 Paragraph 3.38.

105 Since 1950.

106 Art. L521-1 Code du Travail which has provided since 1985 that any dismissal inconsistent with this is null and void.

107 See O. Hasselbach, "Lawful Industrial Action and the Employment Relationship in Denmark," (2000) 16 Int. Jo. of Comp. Lab. Law and I.R., 143. Where the workers are unionised and there is a collective agreement there is no contract of employment to terminate, it seems.

by reason of taking part in a lawful strike but their contracts are suspended[108]. In Ireland the Supreme Court[109] reached the same conclusion as a matter of common law. The consequences of the doctrine of suspension do vary, as expected, among different countries.

The suspension doctrine once had support of the Court of Appeal in the UK but is now regarded as having been decisively rejected though the decision has never been overruled[110].

International law

The current state of the law is not merely inconsistent with the laws of other European states, it is also in breach of the UK's international obligations.

The requirements of the Council of Europe's European Social Charters of 1961 and 1996 are clear.

The Governmental Committee of the Council of Europe have described Art.6(4) of the Charters in the following terms:[111]

> ... Art. 6(4) recognised those aspects of the right to strike which were essentially common to the Western democracies, and the Committee's approach was to attempt a definition - albeit incomplete - of this common denominator by clarifying the maximum restrictions on the right to strike permitted by Art. 6(4), and to ascertain whether any particular feature of existing national rules would be liable to conflict with it".
>
> ...
>
> As it had already had occasion to point out in its 5th report to the Committee of Ministers, the Committee reiterated that it would be difficult to reconcile recognition of the right to strike with termination of the work contract, and so the majority of the Committee (excepting one delegation) considered that termination of the work contract, as a result of strike - unlike the suspension of that contract - was not compatible with Art. 6(4).

The Governmental Committee: [112]

> takes the view that the existence of a legal possibility whereby the employer can refuse to take back a worker who has struck constitutes a violation of the Charter, even if actual practice shows that such dismissals are extremely rare.

The Governmental Committee, specifically considering the UK situation, have observed that: [113]

> The British situation had been criticised by the Independent Experts because of the possibility for an employer to dismiss all employees who took part in a

108 See the extensive review of the statutory provisions by McIntyre J in *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987) 38 DLR (4th) 161 at 230, and, more up to date, Arthurs, Carter, Fudge, Glasbeek, and Trudeau, *Labour Law and Industrial Relations*, 1993, pp. 276-277.

109 In *Bates v Model Bakery Ltd.*[1993] 1 IR 359, and see *Becton Dickinson & Co. Ltd. v Lee* [1973] IR1, discussed by Kerr in Murphy and Roche *Irish Industrial Relations in Practice*, 1997, revised ed., pp.363-376.

110 *Simmons v Hoover Ltd* [1977] ICR 2, EAT, declining to follow Denning M.R. in *J.T. Stratford & Son Ltd. v Lindley* [1965] AC 269 at 285 and *Morgan v Fry* [1968] 2 QB 710 at 727, where Lord Denning was supported by Davies LJ at 733. (Lord Denning was followed by the Irish Supreme Court in the cases cited above). Several English academics have supported the approach, e.g. O'Higgins (1968) Camb. L.J. repeated in (1973) 2 ILJ 145; Wedderburn, *The Worker and the Law*, 1971, pp.109-111, 195-6; Foster (1971) 34 MLR 275; Pitt, *The Limits of Industrial Action*, 1995, pp8-9; Pitt, "The Right to Strike: a Shift in Focus" in McColgan (Ed) *The Future of Labour Law*, 1996 pp115-6. See also Ewing, "The Right to Strike" 1986 15 ILJ 143 at 149-151.

111 Report 10 (1), pp.13-15.

112 9th report (I) Doc. T-SG (86) 1.p.16.

113 Report 11(I), p.55, United Kingdom.

> strike, a possibility which, though rarely used, unduly restricted the right to strike …
>
> It also …confirmed (10th Report (I), No.71) that termination of the contract of employment as a result of a strike was incompatible with Article 6 paragraph 4.
>
> A majority of the Committee accordingly concluded that the United Kingdom did not comply with this provision and hoped that United Kingdom law would be brought into greater conformity with the Charter.

The European Committee on Social Rights[114] of the Council of Europe have also examined the position in the UK on a number of occasions. In 1989 it recapped: [115]

> The Committee had considered in its previous conclusions that the possibility, in the United Kingdom, for an employer to dismiss all employees who take part in a strike stood in contradiction with the right to collective action protected by Article 6 paragraph 4 of the Charter.
>
> …
>
> Recalling its previous conclusions, the Committee …stressed that the possibility for all strikers to be dismissed, although rarely resorted to by employers, represents a threat of such an importance that it unduly restricts the exercise of the right to collective action as protected by Article 6 paragraph 4 of the Charter. It therefore had to confirm once again that on this substantial point the situation in the United Kingdom was not in conformity with the Charter.

In 1991: [116]

> The Committee recalled that in previous conclusions it had consistently considered that the United Kingdom was not in conformity with Article 6 paragraph 4, of the Charter because United Kingdom legislation allows an employer to dismiss all employees who take part in strikes. It further noted that an employer may lawfully re-hire dismissed striking workers on a selective basis, provided three months has elapsed from the time of the dismissal.
>
> The Committee considered that this provision could only be considered as making the situation even less acceptable and could only reaffirm its negative conclusion."

These criticisms were repeated many times over the next decade – to no avail. In 2002, the Committee considered the change to the situation brought about by the Employment Relations Act 1999 provision of 8 weeks unfair dismissal protection. The Committee regarded this as "an improvement." However, it held that "This arbitrary threshold does not afford adequate protection." Its report continued:[117]

> Moreover, Schedule 5 [of the 1999 Act] applies only to industrial action that, in addition to being lawful, is also official (i.e. authorised or endorsed by a trade union). Article 6(4) of the Charter provides for the right of all workers to take industrial action, whether supported by a trade union or not. The limitation of protection against unfair dismissal to official action is not in conformity with the Charter. Furthermore, it is not lawful for a trade union to take industrial action in support of workers dismissed in such circumstances, which is a serious restriction on the right to strike.

It might have been thought that the *Review* might have offered some justification for flouting this ruling which is binding on the UK. Instead the *Review* declines to mention it at all.

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114 Formerly the Committee of Experts.

115 Conclusions C XI-1, p.90, United Kingdom. These conclusions were held also to apply to Ireland with its similar common law and unfair dismissal provisions: C XI-2, p.24-26; Governmental Committee Report 11(II), p.27-29.

116 Conclusions C XII-1, p.130-1.

117 *Conclusions XVI-1*, vol.2, 2002, Council of Europe, p.689.

The UK situation in relation to dismissal of strikers is also in breach of ILO Conventions. The dismissal of strikers has been held to be in breach of Convention 98.[118]

More extensive is the case-law on Convention 87. In the landmark decision of the Committee of Experts in 1989 (Case No.1439). The Committee (upheld by the 76th International Labour Conference 1994) held: [119]

> (f) Dismissals in connection with industrial action
>
> The Committee considers that it is inconsistent with the right to strike as guaranteed by Articles 3, 8 and 10 of the Convention for an employer to be permitted to refuse to reinstate some or all of its employees at the conclusion of a strike, lock-out or other industrial action without those employees having the right to challenge the fairness of that dismissal before an independent court or tribunal. The Committee on Freedom of Association has adopted a similar approach (see Digest of Decisions and Principles of the Committee on Freedom of Association, 3rd edition, 1985, paragraphs 442,444,445,555 and 572).

These points were reiterated in similar detail in 1991 when the Committee insisted on "legislative protection against dismissal or other disciplinary action."[120] in 1993,[121] in 1995 (when the Committee again called for amending legislation),[122] in 1996[123] and again in 1997.[124] The 1999 Report of the Committee, written and published before the Employment Relations Act 1999 became law on 27th July 1999, contained the following:[125]

> 3. Dismissals in connection with industrial action.
>
> In its previous comment, the Committee had drawn the Government's attention to paragraph 139 of its 1994 General Survey[126] in which it noted that sanctions or redress measures were frequently inadequate when strikers were singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal) and that this raised a particularly serious issue in the case of dismissal if workers could only obtain damages and not their reinstatement. The Committee indicated that legislation should provide for genuine protection in this respect, otherwise the right to strike would be devoid of content.

The reference to a paragraph of the *General Survey* 1994 in the preceding citation was a reference to the following: [127]

> The Committee also emphasizes that the maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike. However, in some countries with the common-law system strikes are regarded as having the effect of terminating[128] the employment contract, leaving employers free to replace strikers with new recruits. In other countries, when a strike takes place, employers may dismiss strikers or replace them temporarily, or for an indeterminate period. Furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal); this raises a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement. In the Committee's view legislation

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118 239th *Report of Committee of Freedom of Association*, Case No. 1271, para 274.
119 *Committee of Experts' Report* to 76th International Labour Conference, 1989.
120 *Committee of Experts Report* to 78th Conference, 1991, pp.220-222.
121 *Committee of Experts Report* to 80th Conference, 1993, pp.237-8.
122 *Committee of Experts Report* to 82nd Conference, 1995, pp.199-200.
123 *Committee of Experts Report* to 83rd Conference, 1996, p.165.
124 *Committee of Experts Report* to 84th Conference, 1997, pp.204-5 at 204.
125 *Committee of Expert Report* to 87th Conference, 1999, pp.289-291.
126 Set out in the next following paragraph of this Application.
127 *General Survey*, 1994, pp.61-2, para.139.
128 This puts it too mildly: termination is not automatic, the employer has an unrestrained choice as to whether to treat the contract as terminated or not.

should provide for genuine protection in this respect, otherwise the right to strike may be devoid of content.

That passage was consistent with a decision of the ILO Committee on Freedom of Association on a reference by the National Union of Seafarers[129] about the dismissal of 2000 members employed by P&O European Ferries in 1988, in which that Committee had held: [130]

> Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike.

To this a further observation from the Committee on Freedom of Association may be added in a case involving a member State other than the UK:[131]

> The Committee could not view with equanimity a set of legal rules which; (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein; (ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and (iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests.

Again it might be thought that these findings warranted some mention by the *Review*. There is none, however.

It will be recalled that Article 8(1)(d) of the International Covenant for Economic, Social and Cultural Rights 1966 requires ratifying countries to guarantee the right to strike. In that connection UK law has been assessed by the United Nations Committee on Economic, Social and Cultural Rights (the supervisory body for the ICESCR) which, on 4th December 1997, held in its (four yearly) periodic survey of the application of the Covenant to the United Kingdom:[132]

> 11. The Committee considers that failure to incorporate the right to strike into domestic law constitutes a breach of Article 8 of the Covenant. The Committee considers that the common law approach recognising only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. The Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal. Employees participating in a lawful strike could not *ipso facto* be regarded as having committed a breach of an employment contract . . .
>
> 23. The Committee recommends that the right to strike be established in legislation, and that strike action does not entail any more the loss of employment, and it expresses the view that the current notion of freedom to strike, which simply recognises the illegality of being submitted to an involuntary servitude, is insufficient to satisfy the requirements of Article 8 of the Covenant . . .

These findings of breach of Article 8 and consequential recommendations were repeated again in the Concluding Observations of the Committee on 5th June 2002[133]

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129 Now part of the National Union of Rail, Maritime and Transport Workers' Union.
130 277th *Report of the Committee on Freedom of Association*, para 444.
131 *Digest*, op cit., para 594 (Australia).
132 Concluding Observations of the Committee on Economic, Social and Cultural Rights: the UK of GB and NI, E/C.12/1/Add.19, 4th December 1997.
133 Concluding Observations of the Committee on Economic, Social and Cultural Rights: the UK of GB and NI, E/C.12/1/Add.79, 5th June 2002.

Again there is no reference to these findings and recommendations in the *Review* and hence no explanation for continued breaches of the UK's international obligations.

The 1999 Act's change to unfair dismissal law is unequivocally insufficient to comply with international law. Legislation should be introduced to deem that lawful industrial action suspends but does not breach a contract of employment. If this were the law in the UK there would be no need for complex unfair dismissal rules to protect strikers. If a lawful strike suspended the contract of employment, there would be a need for incidental rules dealing with incidental matters, e.g. pay, pensions, seniority, holidays, unrelated misconduct, redundancy, replacement labour and so on.

If this is not to be the legal framework then the arbitrary period of 8 weeks should be substantially extended as the period during which there is some protection for those dismissed whilst on lawful, official industrial action. Furthermore, reinstatement orders must be made enforceable, obtainable urgently and supported by penal compensation.

Since industrial action breaches the contract of employment the worker is not entitled to be paid for time whilst taking industrial action. This would obviously equally apply if the contract were suspended during the action. But nowadays employers often deduct from wages on an unfair daily basis where the sum deducted is more than the worker would have earned had he or she performed all their duties that day. That is why the Institute continues to propose *that a worker taking industrial action should not be penalised by losing more than the sum that he or she would have earned had they not taken industrial action.* The *Review* does not deal with this.

Industrial action and the trade union

There is judicial dicta recognising the right to strike as an aspect of collective bargaining, the very purpose of trade unionism. Lord Wright said in *Crofter Hand Woven Tweed v Harris*[134]:

> Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining.

Notwithstanding the provenance of this explicit recognition of the right to strike, the cases show that in reality there is no such right in the UK.

With (so far) minor exceptions,[135] trade union organisation of or support for industrial action is governed by the central feature that the calling or supporting of a strike by a trade union (or other person) will be prima facie unlawful because it will constitute an inducement of breach[136] of the contracts of employment of the workers called on strike[137]. It may also constitute breach or interference with the performance of other

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134 [1942] AC 435 at 463.

135 There are statutory restrictions on the right to strike in relation to the police by virtue of s.1 Police Act 1996 and prison officers by virtue of s.127 Criminal Justice and Public Order Act 1994 (see J Hendy, D Brown and G Watson, *The Prison Officers' Association and the Right to Strike*, Institute of Employment Rights, 2000). There are also statutory restrictions on certain classes of worker many of whom were in the public sector but who are now found in the private sector, e.g. telecommunications workers - s.45 Telegraph Act 1863, s.1 Communications Act 1985 (mentioned in *Mercury Communications Ltd. v Scott-Garner and the Post Office* [1984] ICR 74 (CA)); and Post Office workers - ss.58, 68 Post Office Act 1953 (mentioned in *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL)). The settlement (which is non-statutory) reached by the present Government in relation to GCHQ was to agree that the workers may now be union members but that strikes remain impermissible.

136 Or, in more sophisticated form, interference in the performance of a primary obligation: *Merkur Island Corp. v Laughton* [1983] ICR 490 (HL) at 505-506.

137 E.g. *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426. There is in this principle deep in the heart of English trade union law, a special contrast with the way that French law handles trade union vicarious liability with its very different rules, see e.g. Lord Wedderburn, chap. 4 "Trade Union Liability in Strikes in Britain and France" in *Labour Law and Freedom*, 1995, at pp.164-179.

contracts by reason of the breaches of contracts of employment[138]. It can also amount to any one of a wide variety of "economic torts" developed by the common law.[139] All these depend on proof of an element of unlawfulness as a preliminary element in the establishment of the tort. This element of unlawfulness is usually, but not invariably,[140] fulfilled by demonstrating the inevitable breach of the contract of employment by the worker[141].

In consequence of the unlimited liability of trade unions for calling strikes which breach the workers' contracts of employment,[142] freedom for unions to organise and support strike action was procured in 1906 by the grant of protection from legal action for certain acts done "in contemplation or furtherance of a trade dispute".[143] This phrase ("the golden formula"[144]) has remained unchanged over the years. But the protection the golden formula has given has been subject to expansion and diminution in response to judicial innovations and parliamentary activity at various times over the years. Particularly relevant here is reduction in the golden formula protection achieved by legislation passed under the Conservative governments of the 1980s and 1990s (which is now to be found in the Trade Union and Labour Relations (Consolidation) Act 1992).[145]

The situation was well described twenty years ago by Patricia Hewitt, the present Secretary of State for Trade and Industry:[146]

> Economic torts and the labour injunction are the chief weapons of private property against labour; they are perhaps the most naked example of the real interests of the law. The courts will readily protect an employer against a threat to his business: they will not protect an employee against the loss of his livelihood. They will not even defend the only means available to workers – collective industrial action.

As she pointed out: "virtually all industrial action is now at the mercy of the courts."[147] The situation she described was in 1982 yet it has become far more restrictive since then by reason of the many further restrictions imposed by the legislation of the 1980s and 1990s which the *Review* she introduces does not propose to ameliorate.

Statutory restrictions

This legislative whittling away of the statutory immunities has led to the findings of the international bodies that UK law is in fundamental violation of international law. Today, industrial action only attracts statutory immunity if, amongst other requirements (see below)[148] it is in contemplation or furtherance of a dispute that is "wholly or mainly related" to terms and conditions of employment, or to other matters specified in the

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138 E.g. *Thomson (DC) & Co. Ltd. v Deakin* [1952] Ch 646, *Torquay Hotel Ltd v Cousins* [1969] 2 Ch 106.

139 See Lord Wedderburn, "Economic Torts" in *Clerk and Linsell on Torts*, XXX ed., 2000.

140 E.g. "breach of an unenforceable statutory duty" will constitute unlawful means where the union has shown an "*intention to harm*": *Associated British Ports v TGWU* [1989] ICR 557 CA; so will "economic duress": *Dimskal Shipping Co. v ITWF* [1992] 2 AC 152 HL.

141 E.g. *Rookes v Barnard* [1963] 1 QB 623, *Stratford (JT) & Son Ltd. v Lindley* [1965] AC 269.

142 *Taff Vale Railway* (*op.cit.*).

143 s.3 Trade Disputes Act.

144 Per Lord Wedderburn, *The Worker and the Law*, 1965, 1st ed., p.236.

145 The recent restrictions (sometimes further restricting the previous restrictions) were imposed by the Employment Act 1980, Employment Act 1982, Trade Union Act 1984, Employment Act 1988, Employment Act 1990, all of which were mostly consolidated in the Trade Union and Labour Relations (Consolidation) Act 1992, which was further amended by the Trade Union and Employment Rights Act 1993.

146 P.Hewitt, *The Abuse of Power*, 1982 at p.133-134.

147 As before, at p.131.

148 The Conservative legislation, preserved by the present government imposed many further restrictions on industrial action. For example: industrial action to enforce trade union membership is outside the scope of protection (s.222), as is industrial action to support dismissed unofficial strikers (s.223). So too is industrial action to press for a requirement that union recognition be a condition in a commercial contract or to press for the refusal of normal commercial relations with enterprises which refuse to recognise unions (ss.225 and 187). Such restrictions are inconsistent with a right to strike and should be repealed. Indeed, all UK restrictions on the right to take industrial action should be repealed save for those explicitly permitted by the supervisory bodies of the ILO and the Social Charter.

legislation such as job losses, disciplinary issues and trade union recognition/derecognition. If, according to a court, a union's predominant motive is outside the statutory 'trade dispute' issues; for example if it is held to be 'political' then immunity will be lost.

The Review

The *Review* proposes no change to the substantive law on industrial action and re-affirms the government's "commitment to retain the essential features of the pre-1997 law on industrial action."[149] The only area for potential reform is in relation to ballots and notices.

The restrictions placed on the statutory protections for trade unions by the legislation of the 1980s has been roundly condemned by the international supervisory bodies. Thus in the important decision of the Committee of Experts on the UK in 1989 (Case No.1439). The Committee (upheld by the 76th International Labour Conference 1994) held: [150]

> …
>
> (e) <u>"Immunities" in respect of civil liability for strikes and other industrial action</u>
>
> The Committee has always considered that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests as guaranteed by Articles 3, 8 and 10 of the Convention (General Survey, paragraph 200). It has also taken the view that restrictions relating to the objectives of a strike and to the methods used should be sufficiently reasonable as not to result in practice in an excessive limitation of the exercise of the right to strike (General Survey, paragraph 226. See also paragraphs 218-220).
>
> The Committee notes that the common law renders virtually all forms of strikes or other industrial action unlawful as a matter of civil law. This means that workers and unions who engage in such action are liable to be sued for damages by employers (or other parties) who suffer loss as a consequence, and (more importantly in practical terms) may be restrained from committing unlawful acts by means of injunctions (issued on both an interlocutory and a permanent basis). It appears to the Committee that unrestricted access to such remedies would deny workers the right to take strike or other industrial action in order to protect and to promote their economic and social interests.
>
> It is most important, therefore, that workers and unions should have some measure of protection against civil liability. There has been legislative recognition of this imperative since 1906 in the form of a series of "immunities" (or, more accurately, "protections") against tort action for trade unions and their members and officials.

However, the Committee concluded that the restrictions on the statutory protections for industrial action since 1980 were not in conformity with ILO Convention 87 and asked that the UK introduce amendments to bring the law into line with the Convention. These points were reiterated in similar detail in 1991,[151] in 1993,[152] in 1995 (when the Committee again called for amending legislation),[153] in 1996[154] and again in 1997.[155]

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149 Paragraph 3.22.
150 *Committee of Experts' Report* to 76th International Labour Conference, 1989.
151 *Committee of Experts Report* to 78th Conference, 1991, pp.220-222.
152 *Committee of Experts Report* to 80th Conference, 1993, pp.237-8.
153 *Committee of Experts Report* to 82nd Conference, 1995, pp.199-200.
154 *Committee of Experts Report* to 83rd Conference, 1996, p.165.
155 *Committee of Experts Report* to 84th Conference, 1997, pp.204-5 at 204.

So far as the European Social Charter is concerned, as long ago as 1991 the European Committee of Social Rights[156] reported:[157]

> The Committee also noted, from information contained in the report under the Charter and in the 1989 and 1991 Observations of the Committee of Experts of the ILO in respect of Convention No. 87, that the immunities from civil liability provided to trade unions, their officials and members, had apparently been substantially eroded by employment legislation enacted over the past ten years…
>
> As examples of these limitations the following could be mentioned:
>
> - all forms of picketing (other than at the worker's own place of work) and other secondary action are no longer lawful;
>
> - lawful "trade disputes" have been more narrowly defined making it more difficult to ensure that a strike is lawful;
>
> - trade unions may now take action only against "their" employer, making it impossible for them to take action, amongst other things, against the company which is the true "employer" but which may hire the workers through an intermediary company;
>
> - strikes are only lawful if they have been approved by a majority of workers, through a secret ballot, the legal and regulatory provisions regarding which are highly complex and limiting.

The 1991 conclusions of the European Committee of Social Rights[158] were confirmed by the Governmental Committee[159] and culminated in a "recommendation" by the Committee of Ministers in 1993.[160]

> The Committee also noted the recent observations of the ILO Committee of Experts recommending that the legislation be amended to conform with the principle of freedom of association in accordance with ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise, 1948).
>
> Having regard to this information and having noted that there is no immunity afforded to individuals in respect of:
>
> - secondary industrial action other than inducement in the course of peaceful picketing;
>
> - industrial action organised in support of employees dismissed while taking part in unofficial action;
>
> the Committee reiterated its previous negative conclusion for the reasons cited in the twelfth cycle of supervision."[161]

In 1995 the Committee again repeated its negative conclusions in relation to dismissal of strikers and made a number of observations about other statutory restrictions on the right to strike, including further legislation which "changed the conditions allowing a trade union to be protected by statutory immunity for acts done 'in contemplation or furtherance of a trade dispute'." [162] In 1996 the Governmental Committee too reiterated its negative conclusions[163] and proposed a further "recommendation" which the

156 Formerly the Committee of Experts.
157 Conclusions C XII-1, p.130-2.
158 Formerly the Committee of Experts.
159 Report 11(I), p.55
160 R.Ch.S (93)3.
161 Conclusions C XIII-1, p.160
162 On: immunity of unions; the Commissioner for Protection against Unlawful Industrial Action (now abolished: S.28 Employment Relations Act 1999; strikes by Seafarers. See C XIII-3,p.144-5 and under Art.5 see 108-111, and under Art.6(2) see 127-9.
163 13th Report (III), p.101-3. On Art 5 see pp.84-88, on Art.6(2) see p.92-3.

Committee of Ministers of the Council of Europe duly adopted on 15th January 1997[164]. In 1997 the European Committee of Social Rights[165] recalled the limitations it had identified in 1991 and stated:[166]

> The Committee considers that the combined effect of the various regulations of the right to strike in the United Kingdom are such as to constitute a restriction of this right going beyond what can be justified under the terms of Article 31.[167]

The conclusions of the European Committee of Social Rights[168] were substantially repeated again in 2000 in a concise and damning 4½ page summary of the UK law on industrial action.[169] The Committee concluded:[170]

> that the situation in the United Kingdom is still not in conformity with Article 6 para.4 of the Charter. It finds the scope for industrial action to be unduly narrow, in particular in view of the ballot requirements, which include an obligation to notify the employer of the identities of those participating in the industrial action, the fact that secondary action is prohibited and the possibility for consumer actions. Furthermore, the possibility for an employer to dismiss all employees who participate in industrial action is in breach of the Charter.

The cycle of condemnation has continued. In 2002 the European Committee of Social Rights reviewed the Employment Relations Act changes and concluded that:[171]

> The United Kingdom does not guarantee the right to take collective action within the meaning of Article 6(4) of the Charter: the notion of lawful industrial action is restrictive, the procedural requirements are onerous, the consequences for unions where industrial action is found not to be lawful are serious, and the workers have limited protection against dismissal when taking industrial action.

Plainly therefore, the changes proposed by the *Review* to the Employment Relations Act 1999 in relation to industrial action, will not be enough to restore the UK to compliance with Convention No.87.

Secondary action

Under current UK law, all forms of sympathetic or "secondary action" are specifically excluded from protection[172] and this is fortified by the restriction of the definition of a "trade dispute" to restrict the disputes to which protection is given to those between "workers and their employer."[173] The *Review* proposes no change to the prohibition of all forms of secondary action and instead re-affirms the government's "commitment to retain the essential features of the pre-1997 law on industrial action."[174] The *Review* does not even deal with (or even refer to) the injustice of the ***University College Hospital NHS Trust v UNISON*** case[175] which held that, by reason of the statutory provisions restricting secondary action, it was unlawful to call industrial action in furtherance of a demand on the employer to secure that NHS terms and conditions for the workforce applied after transfer to a privatisation consortium.

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164 R Ch S(97)3. In fact this was the third "recommendation" in relation to Art 6(4): see R Ch S(89)1, above.

165 Formerly the Committee of Experts.

166 Conclusions C XIV-1, pp 804-5.

167 Art.31 permits restrictions on the various rights provided for by the Charter.

168 Formerly the Committee of Experts.

169 Conclusions C XV-1, vol.2, (April 2000), pp.637-641.

170 At 641.

171 *Conclusions XVI-1*, vol.2, 2002, Council of Europe, p.689.

172 S.224.

173 S.244(1), (5)(a) and (b). The definition of a trade dispute was also altered to exclude disputes between workers and workers, and to exclude a trade union from being a party to a dispute. Disputes with overseas connection are also restricted in protection: s.244(3). A protected trade dispute is one which "relates wholly or mainly" to the various permissible matters listed in s.244(1), previously the protection extended to disputes which were merely "connected with" the listed matters.

174 Paragraph 3.22.

175 [1999] ICR 204 CA.

The *Review's* silence on secondary action is notwithstanding that the ILO and the Council of Europe have condemned the blanket ban.

The Prime Minister made the case in 1990 against the ban whilst he was Shadow Employment Secretary.[176] His argument is as powerful today as it was then:

> I suggest that the abolition of any form of sympathy or secondary action is an extreme step that takes us out of line with most other western or, indeed, eastern countries…It is worth considering a couple of examples where the provisions would apply. In the current ambulance dispute, National Health Service managers would be entitled to contract out the work to a private ambulance firm. Under [this proposal], NHS workers would not be allowed even to ask the workers in the private ambulance firm not to do their work, or to ask them for solidarity with those in the original dispute. That is extraordinary…Under the Bill, an employer would be entitled to shut one factory, open another under a different corporate identity, and have the same work done by the second group of employees. The first group would have no right even to ask the other employees who were doing their job to take sympathetic action. How can anyone justify that as being fair or reasonable? The proposition is all the more grotesque because the first group of employees can only ask, not oblige, the second group to take action…
>
> The abolition of sympathy action is unreasonable, unjustified and way out of line with anything that happens anywhere else. Coupled with the provisions for unofficial action, it is the best example of why this is a Bill too far. It cannot be said that it is fair or even-handed to allow employers to have unrestricted commercial action, but to insist that unions should act only in a private dispute. When we vote … I hope that those Conservative Members who have suggested that a limitation to a primary dispute cannot cover all circumstances will realise the justification for not restricting the law in that way. I hope that they will have the courage of their convictions and vote with us against [this proposal].

Mr. Blair cited the International Labour Organisation. He asked of the Conservative Minister: "If the ILO were to determine – that is a possibility this year – that the provision is in breach of its Convention, will the hon. gentleman withdraw it?…" After 1990, the ILO did condemn (and has many times repeated its condemnation of) the outlawing of secondary action as in breach of Convention No.87 which Mr. Blair had in mind.

Indeed, before 1990 the ILO Committee on Freedom of Association had declared in relation to Convention 87 (and in relation to other countries):

> A general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful.[177]
>
> Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike; workers and their organizations should be able to call for industrial action in support of multi-employer contracts.[178]

Furthermore:

> The right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement; workers and their organizations should be able to express in a broader context, if necessary,

176 Hansard, 22nd February 1990, cols.171-172.

177 See 248th *Report of the Committee on Freedom of Association*, Case No.1381, para.417; and 277th Report, Case No.1549, para.445; the Digest, para.486.

178 292nd *Report of the Committee on Freedom of Association*, Case No.1698, para.737.

their dissatisfaction as regards economic and social matters affecting their members' interests.[179]

In 1989 when secondary action had been severely restricted in the UK but not outlawed altogether, the ILO Committee of Experts (Case No.1439), upheld by the 76th International Labour Conference 1994, held in relation to the UK: [180]

> The scope of [the UK's statutory trade union] protections has been narrowed in a number of respects since 1980. The Committee notes, for example, that section 15 of the 1974 Act has been amended so as to limit the right to picket to a worker's own place of work or, in the case of a trade union official, the place of work of the relevant membership, whilst section 17 of the 1980 Act removes protection from "secondary action" in the sense of action directed against an employer who is not directly a party to the given dispute. In addition, the definition of "trade dispute" in section 29 of the 1974 Act has been narrowed so as to encompass only disputes between workers and their own employer, rather than disputes between "employers and workers" or "workers and workers" as was formerly the case.
>
> Taken together, these changes appear to make it virtually impossible for workers and unions lawfully to engage in any form of boycott activity, or "sympathetic" action against parties not directly involved in a given dispute. The Committee has never expressed any decided view on the use of boycotts as an exercise of the right to strike. However, it appears to the Committee that where a boycott relates directly to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to "sympathy strikes":
>
> It would appear that more frequent recourse is being had to this form of action [i.e. sympathy strikes] because of the structure or the concentration of industries or the distribution of work centres in different regions of the world. The Committee considers that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is itself lawful.[181]
>
> Other changes to the definition of "trade dispute" in the 1974 Act also appear to impose excessive limitations upon the exercise of the right to strike: (i) the definition now requires that the subject-matter of a dispute must relate "wholly or mainly" to one or more of the matters set out in the definition - formerly it was sufficient that there be a "connection" between the dispute and the specified matters. This change appears to deny protection to disputes where unions and their members have "mixed" motives (for example, where they are pursuing both "industrial" and "political" or "social" objectives). The Committee also considers that it would often be very difficult for unions to determine in advance whether any given course of conduct would, or would not, be regarded as having the necessary relation to the protected purposes; (ii) the fact that the definition now refers only to disputes between workers and "their" employer could make it impossible for unions to take effective action in situations where the "real" employer with whom they were in dispute was able to take refuge behind one or more subsidiary companies who were technically the "employer" of the workers concerned, but who lacked the capacity to take decisions which are capable of satisfactorily resolving the dispute; and (iii) disputes relating to

179 292nd *Report of the Committee on Freedom of Association*, Case No.1698, para.741(m); and see also 295th *Report of the Committee on Freedom of Association*, Case No.1793, para.603; and *Digest*, para.479.

180 *Committee of Experts' Report* to 76th International Labour Conference, 1989.

181 *General Survey*, para.217.

matters outside the United Kingdom can now be protected only where the persons whose actions in the United Kingdom are said to be in contemplation or furtherance of a trade dispute relating to matters occurring outside the United Kingdom are likely to be affected in respect of one or more of the protected matters by the outcome of the dispute. This means that there would be no protection for industrial action which was intended to protect or to improve the terms and conditions of employment of workers outside the United Kingdom, or to register disapproval of the social or racial policies of a government with whom the United Kingdom had trading or economic links. The Committee has consistently taken the view that strikes that are purely political in character do not fall within the scope of the principles of freedom of association. However, it also considers that trade unions ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies (General Survey, paragraph 216). The revised definition of "trade dispute" appears to deny workers that right.

> The Committee considers that the overall effect of legislative change in this area since 1980 is to withdraw protection from strikes and other forms of industrial action in circumstances where such action ought to be permissible in order to enable workers and their unions adequately to protect and to promote their economic and social interests, and to organise their activities (General Survey, paragraphs 200 and 226). Accordingly, it would ask the Government to introduce amendments which enable workers to take industrial action against their "real" employer and which accord adequate protection of the right to engage in other legitimate forms of industrial action such as protest strikes and sympathy strikes, as guaranteed by Articles 3, 8 and 10 of the Convention.

In 1991 the Committee again called on the UK Government to "introduce amendments which would enable workers lawfully to take industrial action against their 'real' employer and which accorded adequate protection to the right to engage in other legitimate forms of industrial action such as protest and sympathy strikes." [182] It repeated its criticisms and calls for law reform in 1993,[183] in 1995,[184] in 1996[185] and again in 1997:[186]

> The Committee notes that the Government once again maintains its view that nothing in the Convention requires the law to give special protection against proceedings concerning the organization of industrial action among workers who have no dispute with their own employer and that it is unaware of any potential abuse which could arise from a general prohibition on sympathy strikes. The Committee notes that, under section 224 of the Act, there is secondary action in relation to a trade dispute when a person threatens to break a contract of employment or induces another to break a contract of employment and the employer under the contract of employment is not the employer party to the dispute. It would point out in this respect that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute.

That report predated Labour's election in May 1997. But the 1999 Report of the Committee (written and published before the Employment Relations Act 1999 became law on 27th July 1999) repeated the ILO's criticisms:[187]

> (b) Immunities in respect of civil liability for strikes and other industrial action (section 224)

182 *Committee of Experts Report* to 78th Conference, 1991, pp.220-222.
183 *Committee of Experts Report* to 80th Conference, 1993, pp.237-8.
184 *Committee of Experts Report* to 82nd Conference, 1995, pp.199-200.
185 *Committee of Experts Report* to 83rd Conference, 1996, p.165.
186 *Committee of Experts Report* to 84th Conference, 1997, pp.204-5 at 204.
187 *Committee of Expert Report* to 87th Conference, 1999, pp.289-291.

> The Committee recalls that its previous comments concerned the absence of immunities in respect of civil liability when undertaking sympathy strikes. It pointed out in this respect that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute.
>
> The Committee notes that the Government reiterates its previous comments concerning secondary action and adds that permitting forms of secondary action would be a retrograde step and would risk taking the United Kingdom back to the adversarial days of the 1960s and 1970s when industrial action frequently involved employers and workers who had no direct connection with a dispute.
>
> The Committee further notes the comments made by the Trade Union Congress (TUC) of 7 November 1996 that it is a common tactic of employers[188] to avoid the adverse effects of disputes by transferring work to associated employers and that companies have restructured their businesses in order to make primary action secondary. The Government, while indicating that there is no official information collected to measure the extent of this phenomenon, considers that it is fully consistent with its legislation and the Convention for employers to mitigate the adverse financial consequences of a strike.
>
> The Committee must note that, beyond the effects that these provisions may have in respect of secondary action, it would appear that the absence of protection against civil liability may even have a negative effect on primary industrial action. In these circumstances, the Committee can only reiterate its position that workers should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful and requests the Government to indicate any developments in this regard.

The ILO Committee of Experts' Reports for 2000, 2001 and 2002 did not consider the UK in relation to Convention 87 but nothing has changed and the *Review* makes clear that nothing will change in relation to the breaches perpetrated by the ban on secondary action. If the Committee considers the UK again in 2003 in relation to ILO Convention 87, it may be assumed that the UK will be reported to continue to be contravening its obligations.

The breaches of the European Social Charters of the Council of Europe by reason of the prohibition on secondary action (amongst other things) over many years are documented above. The European Committee of Social Rights considered the situation after the 1999 Act changes. It held in 2002: [189]

> that the right to strike or take other industrial action in the United Kingdom is subject to serious limitation. The notion of a trade dispute, as defined in s.244 of the Trade Union and Labour Relations (Consolidation) Act, is limited to disputes between workers and their employer. Accordingly secondary action is not lawful, effectively preventing a union from taking action against the *de facto* employer if this is not the immediate employer. The Committee notes that the courts have interpreted the law so as to also exclude action concerning a future employer and future terms and conditions of employment, in the context of a transfer of part of a business (University College London NHS Trust v UNISON[190]). The scope for workers to defend their interests through lawful collective action is thus excessively circumscribed in the United Kingdom.

The UK's blanket ban on secondary action is out of step with most European countries which accept the legality of some kind of sympathetic or "secondary" action, none

188 And an extremely easy tactic by the simple expedient of registering a few subsidiary companies and arranging the group of companies in an appropriate way: see Lord Diplock in *Dimbleby & Sons Ltd v National Union of Journalists* [1984] ICR 386 at 409F-410F.

189 *Conclusions XVI-1*, vol.2, 2002, Council of Europe, p.688.

190 [1999] ICR 204 (CA).

without limitations. In Germany such a right is very narrow as where the second employer is an “ally” of the employer in primary dispute (some say so narrow as to be theoretical). In Italy it is very wide indeed (necessarily in a system which permits “protest strikes”). France distinguishes lawful action *externe*, where the interests of a large number of workers are touched (even nationally) from solidarity action *interne* where legality involves a more direct interest of the workers in the dispute inside the enterprise[191]. Spain makes no such demand.

In accordance with international law secondary industrial action should be lawful, provided that it is intended to support lawful primary industrial action.

Secondary action and the individual

Workers taking secondary action do not have any rights to unfair dismissal protection. This applies to a worker refusing to cross a picket line (see below). Employers have exploited this provision by dividing up business operations between a network of associated companies, or hiving off aspects of a business to another operator. There may of course be circumstances where workers do not want their trade union to act in a particular way, and in particular may not want their trade union to assist another group of workers. But the requirement of trade union freedom and autonomy means that the internal affairs of an organisation should be left to that organisation to resolve within the terms of its own rules. In particular it should not be open to outsiders such as employers to intervene through the courts on an issue of trade union democracy.

Because of the bar on secondary action, workers may only picket their own place of work even though, as in the Wapping dispute in 1986, the employer is no longer based there. This is contrary to international law as above. With freedom of assembly now guaranteed by the Human Rights Act pickets should be freely entitled to assemble and peacefully to attempt to persuade people not to cross the picket line. Accordingly a worker should have the right to peacefully assemble and picket anywhere.

The present Secretary of State for trade and Industry in her book drew attention to the fact that under the Conservative legislation of the 1980s “the courts are once again given the power to overrule a union’s own judgment of the need for sympathetic industrial action.”[192] She observed:

> The freedom to strike is an essential part of the right of workers to bargain collectively with their employers. The organisation of a picket is, in turn, an essential part of the freedom to strike. But industrial pickets are also a particular form of the use of a general right, the right to assemble peacefully…[193]
>
> Trade unionists may be standing outside their own place of work while in dispute; they may be picketing another factory in the hope of persuading members of another union to take sympathetic action; they may be picketing a shop to persuade the public not to use services or goods from the firm in dispute; they may be joining the picket line at another workplace in order to show solidarity. In every case people are seeking to demonstrate their views through their physical presence at a particular place. In every case the main or only aim of the assembly is to let other people know what the dispute is about and to persuade people to join the strike, to cease supplying a firm which is in dispute or to cease using its products …a firm may obtain an injunction preventing a picket from taking place at all… The use of such injunctions is an obvious and unjustified denial of the freedom of assembly and communication.[194]

The right to peaceful picketing of any workplace should be restored.

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191 See: Lord Wedderburn, “The Right to Strike: Is there a European Standard?” in *Employment Rights in Britain and Europe* (1991), 276 at 293-6, 304; and for comparative assessments of sympathy action, ibid. Chap.4 “Laws about strikes” in McCarthy Ed. *Legal Interventions in Industrial Relations* (1992) at 165-168; and *Hier et Demain* (op. cit., above, note 45) at 74-83.

192 P. Hewitt, *The Abuse of Power*, 1982, at p.131.

193 As above, at p.128.

194 As above, at p.133.

Ballots and notices

Even where industrial action falls within the narrow statutory definition of a trade dispute, immunity will still be lost by a trade union if it fails to comply with highly complex procedures requiring a fully postal strike ballot.[195] Furthermore, pre-ballot and pre-strike notices in due form must be sent to the employer in dispute in accordance with a strict timetable. These complicated technical requirements have meant that minor and unintended failures have enabled employers to obtain injunctions to stop the industrial action. Whilst a legal requirement for pre-industrial action ballots does not breach international law, and is something that unions have accepted in this country, the procedural requirements surrounding these ballots and notices are such as to impair the right to organise lawful industrial action and confer protection on those taking it. The government itself conceded to this to the ILO but the changes so far brought about by legislation in 1999 have not achieved the right to strike in compliance with international law.

The Employment Relations Act made a number of useful changes. It simplified the workplace and nationally aggregated balloting regime.[196] It simplified the notices and information which must be provided to employers, in particular by removing the obligation to identify those who will be called upon to strike; instead it imposed the obligation to supply "such information in the union's possession as would help the employer to make plans and bring information to the attention" of employees.[197] The Act also eased to a minor degree the strictness with which some of the balloting provisions are to be applied.[198]

But even after the 1999 Act, the procedural provisions are onerous to such a degree that "the complexity of the law…makes it relatively easy for the employer to obtain an injunction against the organisers of industrial action" as the European Committee of Social Rights concluded in its 2002 report.[199] It found yet again that the UK's trade union laws were in breach of the European Social Charter in part because "the requirement to give notice to an employer of a ballot on industrial action is excessive."[200] The Committee also referred to cases[201] which showed "the very considerable efforts that are required of trade unions seeking to comply with the [balloting] laws." They held that "the complexity of the law…makes it relatively easy for the employer to obtain an injunction."

The Committee referred to two decisions of the Court of Appeal: ***RMT v London Underground Ltd***[202]and ***RMT v Midland Mainline Ltd***[203] which indicated "the very considerable efforts that are required of trade union seeking to comply with law"[204] on ballots and notices.

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195 S.226, 227-231, 232-234 on ballots; and 226A, 231A and 234A on notices to employers. There are also requirements for the appointment of scrutineers (s.226B, 231B)

196 Sched.3, para.2 and para.5.

197 Sched.3, para.3(1), 11. This remedied an injustice which was rejected as a breach of Art11(1) of the European Convention in *National Association of Teachers in Further and Higher Education v United Kingdom* (case No. 28910/95), which was effectively an appeal from *Blackpool and Fylde College v NATFHE* [1994] I.C.R. 648, CA. The question remains as to whether the new obligation may not be yet more onerous by requiring a union to disclose confidential information sought by the employer in order to enable him to make strike breaking plans.

198 Sched.3, para.9 by allowing accidental failures which do not affect the outcome of the ballot. The Act also allows extension of the period of a ballot's effectiveness by agreement: para.10.

199 European Committee of Social Rights, *Conclusions XVI-1*, vol.2, 2002, Council of Europe, at 689.

200 European Committee of Social Rights, *Conclusions XVI-1*, vol.2, 2002, Council of Europe, at 689.

201 *RMT v London Underground* [2001] IRLR 228 (CA); *RMT v Midland Mainline Ltd.* [2001] IRLR 813 (CA).

202 [2001] IRLR 228.

203 [2001] IRLR 813.

204 *Conclusions XVI-1*, vol.2, 2002, Council of Europe, p.689.

This is the one area of industrial action law in which the *Review* proposes some changes, minimal though they are. The *Review* makes reference to these two cases[205] and proposes:[206]

- To simplify the minimum information a union needs to provide in the notices so as to avoid the need to supply matrices by requiring only that the total number of employees involved be listed "and to list the categories and workplaces affected." The proposal is thin on detail and the requirement to provide an accurate total is still onerous. Furthermore it is not clear that the workplace and category is no longer to be required in relation to each employee, though that may be the intention. Again to correctly identify every workplace and every category is still a major task in a big dispute. *There really is no justification for unions to have to give any notices to employers at all and this requirement should be withdrawn. If notices are to be retained then they should simply indicate that a ballot or, as the case may be, industrial action is to take place without more.* This always used to be the law and remains the law in all the countries of Europe.
- To restrict the information required of unions in notices to that which is stored electronically or on paper at national or regional offices. This will be an improvement but it does not remedy the "onerous" nature of the obligation to serve notices remarked on by the European Social Rights Committee. *In order to comply with international law, the requirement to serve notices, as noted above, should be removed.*
- To replace the requirement to serve notices on employers to enable the latter "to make plans" with "a more precise formulation." No such formulation is supplied. Since the current formulation evidently means 'primarily to enable the employer to make strike breaking plans,' it is hard to think of a more precise formulation. There is little evidence that employers value the information in these notices as anything other than a source of potential errors to utilise in putting together a case for an injunction. Good managers will know without formal notices what is going on and what is planned in the workplace. *This requirement should simply be removed.*

The *Review* makes a minor drafting amendment[207] and proposes a reform to disregard small accidental failures on a scale which would not affect the outcome of the ballot to allow members to be called to take industrial action even where (subject to those conditions) they were not balloted.[208] *This is to welcomed though the proposal is not to be finalised until after a current appeal is concluded.*[209]A further disregard is suggested concerning accidental errors in the pre-ballot and pre-strike notices where the error was accidental and "on a scale which would not significantly reduce the practical help provided through the notices to the employer."[210] *This is to be welcomed even though it must be doubted what practical help these notices ever give to employers and what justification there is for requiring such help where given.*

This is the limit of the *Review's* proposals for the reform of industrial action law on ballots and notices. It seems unlikely that these proposals, if enacted, will come near compliance with the UK's international obligations. The *Review* itself notes that "the law on notices is complex and gives rise to costly legal actions on minor points of law;"[211] and in relation to ballots "there is still scope in the legislation for unions to trip up on points of detail;"[212] and "there is plenty of scope for unions to make accidental errors at

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205 Paragraphs 3.27 and 3.32; it also refers to *P v NASUWT* [2001] IRLR 532 CA.
206 Paragraph 3.28.
207 Paragraph 3.30.
208 Paragraph 3.32(a).
209 In the case of *P v NASUWT* above.
210 Paragraph 3.32(b).
211 Paragraph 3.27.
212 Paragraph 3.31.

the margin."[213] The reforms suggested do not cure these problems: a more radical change is required.

It is submitted that it is necessary to remove the technicalities of pre-strike ballots and to remove the requirement of notices altogether. The reasons for and the circumstances of industrial action vary enormously. It should be for the workers and their unions to decide how best to ascertain their collective views. This would not prevent dissatisfied members from challenging their unions in the courts if the union's rules were breached but *no employer should have the right to complain to a court that a trade union has failed to ballot or ballot properly before industrial action.* International law on trade union autonomy does not permit employers, relying solely on the ground of some irregularity in trade union democratic decision making, to interfere in a trade union decision to take industrial action: such a complaint should be for the members alone to take up.

Workplace ballots might be more suitable in some circumstances, and in emergency situations the ballot might have to come after the industrial action had started – e.g. where an employer imposed a unilateral change to terms and conditions of employment or announced redundancies without consultation or sacked a shop steward. Indeed, where workers spontaneously walk out in such circumstances there would appear to be no need to ballot them as well. *What is required is that unions should have appropriate rules to ensure that decisions to take industrial action are made by members democratically. The Certification Officer could check for this as a part of the certification of the union annually.*

Injunctions

The effect of the unlawfulness established by the common law in calling or supporting industrial action is magnified by the use of the interlocutory injunction.[214] This emergency procedure (and injunctions against industrial action are always emergencies) does not require the claimant (usually the employer) to prove the facts alleged either beyond all reasonable doubt or on the balance of probabilities: it is sufficient to assert the facts[215] which, so long as they appear credible, will be accepted by the Court, notwithstanding challenge by the defendant. The claimant need not even demonstrate that its case is stronger than that of the defendant (usually the union). It is enough for the claimant to show "*a serious issue to be tried*"[216]. If credible facts are asserted and an arguable case on the law demonstrated in the claimant's favour, the Court will grant an injunction if the "*balance of convenience*" favours it. In practice the Court will almost invariably grant an injunction to stop the industrial action unless the union shows the employer's legal argument is unsustainable, since the balance of convenience[217] usually tilts towards protecting the employer (and, it is usually alleged, the public) from the inconvenience of the consequences of the action.

That is why Patricia Hewitt, the present Secretary of State for Trade and Industry, wrote some years ago that "economic torts and the labour injunction are the chief weapons of private property against labour…"[218] consequently "virtually all industrial action is now at the mercy of the courts."[219]

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213 Paragraph 3.32(a).

214 As to which see Lord Wedderburn in "The Injunction and the Sovereignty of Parliament" in *Employment Rights in Britain and Europe*, 1991, Lawrence and Wishart.

215 Which had to be supported by an affidavit at the material time, but now by a signed statement of truth.

216 *American Cyanamid Co v Ethicon Ltd.* [1975] AC 396.

217 Which includes the weighing of the "public interest" which "*is clearly an important consideration in evaluating the balance of convenience*", per Stuart Smith LJ in *Associated British Ports v TGWU* [1989] ICR 557 at 558C.-G. This is a concept a long way short of a need to protect essential services, as Stuart Smith LJ acknowledged. In English law, with its absence of a right to strike, it is a concept facilitating the grant of an injunction in all strikes with any impact on the public.

218 P.Hewitt, *The Abuse of Power*, 1982 at pp.133-134.

219 As before, at p.131.

The ease with which injunctions can be granted to prevent industrial action has been noted by the international bodies. In 1991 the European Committee on Social Rights, in observing the effect of the restrictions on statutory protection of industrial action: [220]

> recalled that it is open to an employer to seek an interlocutory injunction in cases where a strike may be unlawful and that such an injunction may be granted provided the employer can show that there is a case to answer, without the court deciding the issue on the merits. Thus, any removal of "immunities" provides for more situations where a strike may be halted, quickly, reducing the effectiveness of the right to strike in achieving collective agreement."

The *Review* does not deal with the question of injunctions. *It should do since they pose a major restraint on the unions' rights to call for industrial action. No injunction should be granted to restrain industrial action without a full trial.*

Conclusions

The UK is, and the *Review* proposes that the UK should remain, in breach of international laws in relation to trade union rights by which it is bound. This is most regrettable. There can be no excuse for a developed country to be in breach of international standards to which it volunteers to adhere and which it promotes for the rest of the world (or at least for the less developed world). The significance of these laws in a global economy is obvious:[221] the fact that the UK continues to break the international standards which should regulate the entire world is argument enough.

The Institute maintains that further legislation must implement the following recommendations:

i. Every worker should have the right to take industrial action.

ii. Every trade union should have the right to organise, encourage and support industrial action by its members.

iii. These rights should be subject only to those limitations recognised by international law.

iv. UK law should provide that lawful industrial action does not constitute a breach of the contract of employment but merely suspends the contract.

v. Any dismissal of a worker taking lawful industrial action or by reason that she took or intended to take industrial action should be void.

vi. A worker taking industrial action should not be penalised by losing more than the sum that he or she would have earned had they not taken industrial action.

vii. The right to take industrial action should extend to taking industrial action as a means of resolving any dispute which relates to the workers' interests at work; this should certainly extend to economic and social matters on which a trade union has a policy.

viii. Secondary industrial action should be lawful, provided that it is intended to support lawful primary industrial action.

ix. A worker should have the right to peacefully assemble and picket anywhere.

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220 Conclusions C XII-1, p.130-2.

221 See, for example: D Chin, *A Social Clause for Labour's Cause: Global Trade and Labour Standards - A Challenge for the New Millenium*, 1998, Institute of Employment Rights; A Forsyth, *Trade Union Rights for the New Millenium*, 1998, International Centre for Trade Union Rights; S Gibbons, *International Labour Rights - New Methods of Enforcement*, 1998, Institute of Employment Rights; KD Ewing and T Sibley, *International Trade Union Rights for the New Millenium*, 2000, International Centre for Trade Union Rights and Institute of Employment Rights; Public Service International, *The Missing Link*, 2000, Public Services International.

x. All UK restrictions on the right to take industrial action should be repealed save for those explicitly permitted by the supervisory bodies of the ILO and the European Social Charter.

xi. The obligation to serve pre-ballot and pre-strike notices should be abolished.

xii. Though union rules should make provision for ballots before industrial action, unions should be free to ballot at the workplace or by post or, in emergencies, not at all.

xiii. No employer should have the right to complain to a court that a trade union has failed to ballot or ballot properly before industrial action.

xiv. Refusal to cross or an invitation not to cross a picket line should not require a ballot in order to be lawful.

xv. No injunction should be granted to restrain industrial action without a full trial.

John Hendy QC

Chair, Institute of Employment Rights

23rd April 2003

Reviewing the Review: A Comparative Chart

The chart on the following pages has been compiled to allow readers to compare the changes proposed by the government to those requested by the TUC in its document *Modern Rights for Modern Workplaces* and by the Institute's *A Charter of Workers' Rights.*

As John Monks reminded us in his Foreword to the Institute's *Charter*, the 2001 TUC Congress overwhelmingly carried a resolution highlighting a number of areas where reforms were still needed to achieve the "fairness at work" promised by Tony Blair in 1997. In particular, the resolution noted that the government still had some way to go to ensure that UK workers enjoyed the same standards of protection as workers in most other EU member states. Responding to the Congress call for a charter of rights, the excellent document , *Modern Rights for Modern Workplaces* was subsequently approved by the TUC General Council and formed the basis of the TUC's submission to the government's Review of the Employment Relations Act.

At the same time, the Institute gathered together its own impressive network of experts to develop *A Charter of Workers Rights*. This *Charter* was sponsored by a total of 28 labour movement organisations and has been the focal point of a regional tour organised jointly by the TUC, the Institute of Employment Rights and the regional TUC centres.

To what extent have these impressive pieces of work influenced the government's current Review? In what way does the government intend to use the Review to correct the fault lines in the legislation identified by trade unions? Is it possible that the "limited changes" proposed by the government will assist in bringing UK law back in line with international standards?

Readers can reach their own conclusions to these questions. A quick glance at the following chart, however helps to explain why Brendan Barber responded to the Review by saying it was "extremely disappointing". Things can get better and it is possible that during the different stages of the Review our proposals for change will be given more consideration. As the rest of this Briefing highlights, international law is on our side. In the name of justice, fairness and basic human rights – the extent of this Review needs to be reviewed.

Carolyn Jones
Director