

# submission

## by the Institute of Employment Rights

Joint Committee on Human Rights



Inquiry into the Concluding  
Observations of the UN  
Committee on Economic,  
Social and Cultural Rights

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**THE  
INSTITUTE  
OF  
EMPLOYMENT  
RIGHTS**

## **Introduction**

1.1 The Institute of Employment Rights welcomes the decision by the Joint Committee on Human Rights to conduct a programme of inquiries into the United Kingdom's implementation of obligations under the principal international human rights treaties. We particularly welcome the decision to examine the implications of the recent observations of the UN Committee on Economic, Social and Cultural Rights. The Institute of Employment Rights was established in 1989 as a think tank supported by the trade union movement. The Institute conducts a wide range of research and educational activities, and in 1994 was granted charitable status. We have attracted a great deal of support for our activities, and our members include the general secretaries of Britain's largest trade unions, most of which also make generous donations to help fund our activities.

1.2 Our first concern in this submission is to draw attention to the fact that the ICESCR is only one of a number of international treaties which deal with economic, social and cultural rights. Also relevant are the conventions of the International Labour Organisation, a UN agency which is the source of a number of treaties protecting the rights of workers and trade unions. The ILO is particularly important for present purposes in view of the fact that ILO Convention 87 is expressly referred to in article 8(3) of the International Covenant on Economic, Social and Cultural Rights as setting the minimum standard with which countries should meet. The other treaty to which we refer is the Council of Europe's Social Charter which deals with a range of social and economic rights including trade union rights and the right to strike.

1.3 These different treaties are supervised by different supervisory bodies. We give an account of the conclusions of the supervisory bodies of both the ILO and the Council of Europe on trade union rights, including the right to strike. After considering the conclusions of the different bodies, our second concern is to assess what needs to be done (a) to prevent violations of international human rights obligations on the scale we are about to relate; and (b) to remedy the violations that have been identified by the different supervisory bodies of the UN, the ILO and the Council of Europe. In light of the interests of the Institute and the terms of reference of the Joint Committee,

our main focus in the latter part of the submission is with the right to strike. We note in passing that the right to strike has been robustly defended in a recent decision of the Constitutional Court of South Africa:

[The right to strike] is of both historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system.

(NUMSA v Bader Bop (Pty) Ltd 2003 (3) SA 513)

## **2 The International Covenant on Economic, Social and Cultural Rights**

2.1 The ICESCR covers a wide range of economic, social and cultural rights. It has been ratified by the United Kingdom. Our main concern in this submission, however, is with article 8 which deals with core trade union rights. Article 8 provides as follows:

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take

legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

*The 1997 Report of the Committee on Economic, Social and Cultural Rights*

2.2 In its Report on the United Kingdom in 1997, the Committee on Economic, Social and Cultural Rights addressed a number of issues. These included the following:

10. The Committee also finds disturbing the position of the State party that provisions of the Covenant, with certain minor exceptions, constitute principles and programmatic objectives rather than legal obligations, and that consequently the provisions of the Covenant cannot be given legislative effect.

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 recognizing 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 should not ipso facto be regarded as having committed a breach of an employment contract. The Committee is also of the view that the legally accepted practice of allowing employers to differentiate between union and non-union members by giving pay raises to employees who do not join a union is incompatible with article 8 of the Covenant.

2.3 The Committee made the following suggestions and recommendations:

21. The Committee suggests that the State party take appropriate steps to introduce into legislation the International Covenant on Economic, Social and Cultural Rights, so that the rights covered by the Covenant may be fully implemented. It is encouraged that the State party has taken such action with respect to the European Convention on Human Rights and is of the view that it would be appropriate to give similar due regard to the obligations of the Covenant...

23. The Committee recommends that the right to strike be established in legislation and that strike action no longer entail the loss of employment, and expresses the view that the current notion of freedom to strike, which simply recognizes the illegality of being submitted to an involuntary servitude, is insufficient to satisfy the requirements of article 8 of the Covenant. The Committee further recommends that the right of employers to grant financial incentives to employees who do not join unions be abolished.

Jean Corston MP  
 Chair  
 The Joint Committee on Human Rights  
 House of Commons  
 London SW1A 0AA

Dear Ms Corston

**Submission by the Transport and General Workers Union**

I write to convey this union's support for the Submission on this subject made to your Committee by the Institute of Employment Rights, drafted by Professor Ewing and John Hendy QC and dated 31<sup>st</sup> March 2004. Whilst my union supports the entirety of the submission we would wish to draw to your attention a particular example of the impact on working people in this country of the UK's failure to implement the right to strike guaranteed by Art.8(1)(d) of the International Covenant on Economic, Social and Cultural Rights. The case concerns workers formerly employed by *Friction Dynamics Ltd*. The facts of the case may be well known to your Committee but I hope I will be forgiven for setting them out again, in summary.

In Caernarfon in North Wales, an area of high unemployment, 86 workers – all members of the TGWU and the whole of the production workforce – were dismissed for taking strike action. The strike was the last resort available to resist action taken by the employer effectively to derecognise the TGWU which had long standing collective agreements with the firm. The employer's purpose in by-passing the union was in order that it could unilaterally impose on the workforce changes to terms and conditions (including pay cuts) which were very adverse to them. The employer sought to exploit s.238A of the Trade Union and Labour Relations Act 1992 (inserted by the Employment Relations Act 1999) which provides a remedy for unfair dismissal to workers dismissed for taking lawful industrial action within 8 weeks of the start of the industrial action (or a longer period if the employer has failed to take reasonable procedural steps to resolve the dispute): "the 8 week rule". The employer wrote to the workers at Friction Dynamics the day after the eighth week and sacked them all. But the workers, supported by the TGWU, took their case to an employment tribunal which decided that a letter sent by the employer (unwisely) on the second day of the industrial action technically amounted to a dismissal. So the later attempted dismissal was irrelevant and the workers were held to be dismissed within the eight weeks. Consequently the workers were held to be unfairly dismissed and became entitled to compensation.

In fact the employer then went into liquidation and the former employees will only be eligible to receive basic awards (equivalent to redundancy payments) paid not by the employer but by the Secretary of State for Trade and Industry, ie. the tax payer. The employer now trades under the name of Dynamics Friction, I understand.

More importantly, the workers lost their jobs. And even if the employer had not gone into liquidation my union was advised that it might prove impossible to secure re-instatement orders since the employer would have argued that it was not practicable to take the workers back because the employer had taken advantage of the very depressed labour market in Caernavon to fill those jobs that were needed with non-union labour at reduced rates of pay. We were also very conscious that reinstatement orders are not automatic – indeed employment tribunal statistics show that they are only ordered in less than half a percent of unfair dismissal cases. And even where reinstatement is ordered the employer may disregard the order, though enhanced compensation will follow. There is no provision for the contempt of court proceedings, daily fines, sequestration and other remedies for disobeying a court order visited on trade unions which do not comply with a court order, for example to call off industrial action.

The injustice of the *Friction Dynamics* case is obvious. The lack of protection for the right to strike is evident. Only by reason of a technical error on the part of the employer did the workers succeed in their unfair dismissal claim. But that proved virtually worthless to them. It most certainly did not protect their jobs. The case proves that the right to strike is not protected in the UK: it is a right that British workers do not have. My union intends to draw this case to the attention of the supervisory authorities of the International Covenant on Economic, Social and Cultural Rights, the International Labour Organisation, and the European Social Charter.

The International Committee on Economic, Social and Cultural Rights considered, in its Report of December 1997, in relation to Art.8(1)(d), the proposed introduction into the UK of the 8 week rule (then before Parliament in what became the Employment Relations Act 1999):

*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 . . .*

*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 . . .*

In other words unfair dismissal protection is not enough. The very basis for dismissing a worker for taking industrial action is invalid under the International Covenant because industrial action should not amount to a breach of contract.

It is indicative of the government's attitude to its international obligations that it ignored this judgment and persisted in introducing the 8 week rule in the 1999 Act.

Since then the tragedy of the *Friction Dynamics* case has been played out. Indeed, the case was referred to in the White Paper entitled "The Review of the Employment Relations Act 1999," published in February 2003 and which led to the Employment Relations Bill currently before Parliament. Notwithstanding the case, the Review did not propose any significant amendment to the 8 week rule.

This is particularly remarkable since only months before the publication of the Review, the International Committee on Economic, Social and Cultural Rights in its Report on the UK reiterated once again its 1997 conclusions on the point. Even more remarkably, the Review did not even mention the fact that twice the International Committee had unambiguously concluded that the 8 week rule was insufficient to provide the protection guaranteed by the International Covenant, a treaty ratified by and binding on the UK. Still less did the Review put forward any explanation as to why the UK arrogated to itself the right to flout its treaty obligations in this manner.

Needless to say the current Employment Relations Bill and the government's proposed amendments to it take no heed of the obligations of the International Covenant exposed by the International Committee.

My union therefore finds it galling, to say the least, to note that the Minister introducing the current Employment Relations Bill told the House of Commons that "the Government take their international obligations very seriously" (Standing Committee D on the Bill, Hansard, col.114, 5<sup>th</sup> February 2004). On the 3<sup>rd</sup> Reading Debate Mr John McDonnell MP proposed some amendments which would have brought UK into line with Art.8(1)(d) in the terms expressed by the International Committee (29<sup>th</sup> March 2004, cols.1350-1353). Mr McDonnell specifically mentioned the International Covenant as well as the International Labour Organisation and the European Social Charter. He touched on the breaches of all three treaties, now fully documented in the Submission of the Institute of Employment Rights to your Committee. The Minister (col.1355) did not see fit to respond in relation to the International Covenant or the European Social Charter. But he did refer to the International Labour Organisation claiming that:

The ILO gives due regard to our opinions, and understands that it is perfectly possible for different parties to interpret in good faith the implications of its Conventions in different ways. As a result, the ILO's governing body has never formally reprimanded us for failing to comply with key Conventions 87 and 98. Our standing with the ILO is as high as ever.

The minister appears to have overlooked that the findings of the ILO Committee of Experts (on which the hon. Mrs. Justice Cox, a judge of the Queen's Bench Division of the High Court sits) on the absence of the right to strike in the UK are unambiguous (they are set out in terms in the Institute Submission). They are most

certainly *not* open to interpretation. Furthermore the International Labour Conference, which is the supreme authority of the ILO, has approved them – repeatedly.

The suggestion that the standing of the UK remains high in the ILO notwithstanding that almost every year since 1989 its strike and other industrial relations legislation has been condemned by the ILO as being in breach of fundamental Conventions 87 and 98 is, with all due respect, absurd. Britain's standing has slipped a very long way since 1949 and 1950 when the British Foreign Secretary, Ernest Bevin (a former General Secretary of this union), signed his name to make this country the very first to ratify Convention 87 and then Convention 98 (which British civil servants had been instrumental in drafting).

By the same token the decisions of the International Committee on Economic, Social and Cultural Rights in this sphere are equally clear and equally authoritative as, indeed, is Art.8(1)(d) itself.

In most European countries the constitution provides the right to strike – and a lawful strike does not break the contract of employment it merely suspends it. It is therefore unlawful to sack a worker on lawful strike and the courts will prevent it. If this were the law here there would be no need for complex unfair dismissal rules to protect strikers.

What is fundamentally needed therefore is that the right of every worker to take industrial action and the right of every trade union to call or support industrial action is protected in UK law subject only to the restrictions permitted by the international obligations ratified by the UK.

At the very least, in order to approach compliance with Art.8(1)(d), what is required is an amendment to the 1992 Act which deletes s.238A and provides that where a worker is engaged on industrial action called by a trade union lawfully pursuant to s.219, such industrial action shall not under any circumstances be held to constitute a breach of the contract of employment but instead shall suspend the obligations under the contract of both the employee and the employer during the currency of the industrial action. Any dismissal of a worker taking lawful industrial action or by reason that she had taken or intended to take industrial action shall be void and of no effect. Such provisions would need some elaboration to deal with consequential matters such as pay, pensions, seniority, holidays, misconduct outside the industrial action, redundancy, replacement labour and so on. 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.

This proposal does not go as far as the right to strike guaranteed by ILO Convention 87 as the Institute makes clear. For the ILO requires that the right to strike is an individual right not dependent on approval by a union. On the other hand it would be a significant step forward and could be achieved by simple amendment to the current legislation. It would avoid the need for detailed alternative limitations on the “lawfulness” of the workers' industrial action.

For completeness I should add, in fairness, that the Employment Relations Bill does propose some changes to current law on dismissal during industrial action.



But the Bill does nothing about the heart of the problem, the breach of contract rule. It does not change the 8 week provision.

The Bill will allow the period to be extended by the length of any lock-out by the employer. The 8 week period is also to be extended where the employer has failed to take reasonable procedural steps to settle the dispute. In addressing that question the Bill will require the tribunal to take into account, where there is an agreement to resolve the dispute by mediation or arbitration, whether either party has: failed to send a representative with authority to settle, or not co-operated in making arrangements for the mediation or conciliation, or not fulfilled any commitment given in the course of mediation or conciliation, or failed to answer any reasonable question in the mediation or conciliation. The Bill will also render inadmissible in evidence: the notes of the mediator or conciliator, and also communications to him except with the permission of the communicator. The mediator or conciliator may refuse to answer whether a question was or was not reasonable.

Quite why these amendments are thought to be important is mystifying, although the TGWU does not, of course, oppose them. In *Friction Dynamics* these issues did arise but the tribunal found that failure to turn up at conciliation meetings or send someone with authority, failure to co-operate in arranging meetings and failure to fulfil commitments in relation to conciliation were all failures by the employer to take reasonable steps to settle the dispute and hence would have lengthened the 8 week period had it been necessary in that case to do so. So the Bill as amended, had it been law, would have not assisted the Friction Dynamics workers one jot.

Yours sincerely  
**Tony Woodley**  
 General Secretary

### *The 2002 Report of the Committee on Economic, Social and Cultural Rights*

2.4 Some of these concerns were addressed again in the Committee's report for 2002:

11. The Committee deeply regrets that, although the State party has adopted a certain number of laws in the area of economic, social and cultural rights, the Covenant has still not been incorporated in the domestic legal order and that there is no intention by the State party to do so in the near future. The Committee reiterates its concern about the State party's position that the provisions of the Covenant, with minor exceptions, constitute principles and programmatic objectives rather than legal obligations that are justiciable, and that consequently they cannot be given direct legislative effect (see paragraph 10 of the Committee's concluding observations of December 1997 (E/C.12/1/Add.19)).

12. The Committee regrets that the State party has not yet prepared a national human rights plan of action as recommended in paragraph 71 of the 1993 Vienna Declaration and Programme of Action, and is deeply concerned about the delegation's statement that there is no intention of doing so.

13. The Committee is concerned that human rights education provided in the State party to schoolchildren, the judiciary, prosecutors, government officials, civil servants and other actors responsible for the implementation of the Covenant does not give adequate attention to economic, social and cultural rights...

16. The Committee reiterates its concern that the failure to incorporate the right to strike in domestic law constitutes a breach of article 8 of the Covenant (see paragraph 11 of the Committee's 1997 concluding observations).

2.5 Again a number of suggestions and recommendations were made to address these and other concerns:

24. Affirming the principle of the interdependence and indivisibility of all human rights, and that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (see paragraph 21 of its 1997 concluding observations) and strongly recommends that the State party re-examine the matter of incorporation of the International Covenant on Economic, Social and Cultural Rights in domestic law. The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order. In this respect, the Committee draws the attention of the State party to its General Comment No. 9 on the domestic application of the Covenant.

25. The Committee further recommends, recalling its previous recommendation (see paragraph 33 of its 1997 concluding observations), that the State party review and strengthen its institutional arrangements, within the government administration, which are designed to ensure that its obligations under the Covenant are taken into account, at an early stage, in the Government's formulation of national legislation and policy on issues such as poverty reduction, social welfare, housing, health and education. Given that its general comments are based upon experience gained over many years, including the examination of numerous States parties' reports, the Committee urges the State party to give careful consideration to its general comments and statements when formulating policies that bear upon economic, social and cultural rights.

26. The Committee encourages the State party, as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the

obligations of States parties under the Covenant, in particular with the obligations contained in articles 2.1, 11.2, 15.4 and 23 concerning international assistance and cooperation.

27. The Committee urges the State party to prepare, as soon as possible, a national human rights plan of action in accordance with paragraph 71 of the 1993 Vienna Declaration and Programme of Action.

28. The Committee strongly recommends that the State party establish a national human rights commission for England, Wales and Scotland, with a mandate to promote and protect all human rights, including economic, social and cultural rights. . .

30. The Committee urges the State party to ensure that human rights education curricula and training programmes for schoolchildren and for the judiciary, prosecutors, government officials, civil servants and other actors responsible for the implementation of the Covenant give adequate attention to economic, social and cultural rights. . .

34. The Committee reiterates its previous recommendations (see paragraph 23 of the Committee's 1997 concluding observations) that the right to strike be incorporated in legislation and that strike action no longer entail the loss of employment. . .

44. The Committee requests the State party to disseminate the present concluding observations widely at all levels of society, in particular among State officials and the judiciary. It also encourages the State party to involve non-governmental organizations and other members of civil society in the preparation of its fifth periodic report.

### *The Status of the Covenant in the Domestic Legal Order*

2.6 It is important to recall that ratification of the ICESCR carries with it the corresponding duty of states parties to give effect to the Covenant in the domestic legal order. The UN Economic and Social Council set out the obligation as follows:

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision

obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see para. 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

(Economic and Social Council, The Domestic Application of the Covenant: 01/12/98; E/C12/1998/24, CESCR General Comment 9)

### 3 The ILO and Freedom of Association

3.1 The United Kingdom has ratified 86 ILO Conventions which give rise to binding obligations under international law. The government also reaffirmed its commitment to the core ILO Conventions when in 1998 – along with the other members of the ILO – it signed the ILO Declaration on Fundamental Principles and Rights at Work. For present purposes the most important ILO Conventions are conventions 87 (the Freedom of Association and Right to Organise Convention, 1948) and 98 (the Right to Organise and Collective Bargaining Convention, 1949). Both of these conventions have been ratified by the United Kingdom, as have a number of other freedom of association conventions. Both are part of a group of ILO Conventions which are classified as ‘human rights’ instruments.

#### *ILO Convention 87 and 98*

3.2 ILO Convention 87 is designed to protect trade unions from state interference. Its two central provisions are articles 2 and 3. These provide as follows

#### **Article 2**

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

#### **Article 3**

1. Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

There is no express protection of the right to strike in Convention 87. But it has been implied by the supervisory agencies (on which see para 3.4 below) from the wording of article 3(1). According to the Committee of Experts:

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. (ILO Committee of Experts 1989).

3.3 Convention 98 in contrast is designed to protect workers and trade unions from employers, but also imposes a duty on the part of the State to promote collective bargaining. So far as relevant, it provides as follows.

#### **Article 1**

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to-

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

#### **Article 2**

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

#### **Article 3**

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

#### **Article 4**

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

3.4 These instruments are supervised in two ways. The first is by the Committee of Experts and the other is by the Committee on Freedom of Association. The former is an independent committee of independent jurists (whose members in the past have included Earl Warren, later to become a distinguished Chief Justice of the US Supreme Court). Current members include Mrs Justice Laura Cox. The Committee on Freedom of Association is a tripartite body on which workers' representatives sit with employers' representatives. Since 1989 both Committees have found the United Kingdom to be in breach of both of these Conventions. It is true that since the election of the present government in 1997, a number of reforms have been made to British labour law. It remains the case nevertheless that these reforms do not address all the concern made by the ILO supervisory agencies, with the result that we remain in breach of our legal obligations. In view of the terms of reference of the Joint Committee, we concentrate here on Convention 87, though there may still be issues of non compliance in relation to Convention 98. These relate to:

- The right of employers to establish staff associations in order to block an application under the statutory recognition procedure by an independent trade union.
- The right of the employers to offer financial inducements to workers to surrender trade union representation following trade union derecognition.
- The failure to restore the duty on the part of ACAS to promote collective bargaining, which is facilitated by the 1999 Act but not actively promoted.

#### *The United Kingdom and Convention 87*

3.5 The areas where we remain in breach of Convention 87 relate principally to the right to strike. Since 1989 a number of concerns have been expressed by the supervisory bodies. We include here extracts from the Observations of the ILO Committee of Experts for 1989 when these concerns were first raised, and also the Observations made in 1999, 2001 and 2003. We have not included the Observations made in the intervening period, as these have been

generally repeated in the more recent Observations. The areas of concern include:

**The narrow definition of trade dispute**

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 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 has 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.

(ILO Committee of Experts, 1989)



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Dear Ms Corston

**Submission by UNISON**

I understand you have received a Submission on the International Covenant on Economic, Social and Cultural Rights from the Institute of Employment Rights, written by Professor Ewing and John Hendy QC and dated 31<sup>st</sup> March 2004.

In supporting that submission, UNISON would like the Committee to take into account the difficulties experienced by the members of our union when trying to organise what we believe was legitimate industrial action in two specific cases – the first against Nottingham City Council, the second involving University College London NHS Trust.

The details of both cases are included in the enclosed document. We very much hope that the evidence we provide of the problems experienced by UNISON and its members will assist your Committee in deciding whether UK law meets its international obligations.

Yours sincerely

**Dave Prentis**

General Secretary

1 UNISON welcomes the inquiry by the Joint Committee on Human Rights into the failure of the United Kingdom to comply with the International Covenant on Economic, Social and Cultural Rights. UNISON believes that the government should comply with international obligations (especially in this case where they have been voluntarily entered into). It is also UNISON policy that trade union rights in this country should comply with minimum international obligations. These obligations are set out clearly in the ICESCR, ILO Conventions and the Council of Europe's Social Charter of 1961. It is well known that the United Kingdom is in breach not only of the ICESCR, but also ILO Conventions 87 and 98, and the Social Charter of 1961.

2 UNISON understands that the Joint Committee seeks views on the following questions:

- Is there a case for incorporation of guarantees of economic social and cultural rights in UK law? Can the Covenant rights be adequately protected without incorporation?
- Can you provide evidence of areas where you believe the lack of such guarantees leads to lesser or unsatisfactory protection of economic social and cultural rights, such as to breach the UK's obligations under the Covenant?

In dealing with these two questions in this submission, we confine our attention specifically to the right to strike. As the Joint Committee pointed out in its press release, the CESCR recommends that the right to strike be incorporated in legislation and that strike action should no longer entail the loss of employment, in accordance with Article 8.1 (d) ICESCR. For details about the scale of Britain's failure to comply with international obligations relating to the right to strike, UNISON would draw the attention of the Joint Committee to the submission by the Institute of Employment Rights which we support.

### **Incorporation of guarantees of economic social and cultural rights in British law**

3 UNISON believes that the right to strike should be formally recognised and enforced in British law. At the present time the taking of industrial action is a breach of contract by those taking part. The organising of industrial action is also tortious on the ground that the organisers are interfering with the trade, business or employment by unlawful means. This is the case even though the industrial action may have been provoked by the unlawful conduct of the employer (such as the unilateral variation of terms and conditions of employment) for which the existing law provides no effective redress. A trade union can be restrained by injunction (or interdict) from organising unlawful industrial action, and can be required to pay damages as well as the legal costs arising out of any litigation for exercising what is recognised by international law and acknowledged by the Court of Appeal as a 'fundamental human right': London Underground Ltd v NUR [1996] ICR 170, at p 181.

4 It is true that there is protection against dismissal for those taking part in a strike. But this applies only in the case of a lawful strike, a term which is narrowly defined in a way which is in breach of UN, ILO and Council of Europe of standards. In any event the protection has unequivocal protection for only 8 weeks, again in apparent breach of international standards. It is also true that there is a statutory immunity from tortious liability for those who organise industrial action, and that such immunity has existed since 1906. But there are two problems with the immunity approach as a way of giving legal protection to industrial action. The first is that it can provide immunity only from known liabilities. This means that as new torts are invented by the courts, there is no protection, even though the union may have satisfied balloting and other obligations imposed by legislation. The second problem is that the immunity is too narrow and safeguards the exercise of a fundamental human right only in very limited circumstances. Thus in order to be protected by immunity, the action

- Must be taken in contemplation or furtherance of a trade dispute
- Must satisfy detailed balloting and notice obligations
- Must not constitute secondary or solidarity action

Evidence of areas where the lack of proper guarantees leads to unsatisfactory protection of economic social and cultural rights, such as to breach the UK's obligations under the Covenant?

5 The failure to comply with international legal obligations directly affects UNISON and the human rights of our members. An example of this earlier this

year is provided by an unreported case in which Nottingham City Council obtained an interim injunction in the High Court against UNISON. The injunction was later overturned on our application – on narrow grounds. One of the reasons the injunction was first granted was that UNISON was allegedly involved in breaching the employer’s statutory duty. Inducing breach of statutory duty is a tort rarely referred to, and there is no immunity from liability in relation to this tort in the Trade Union and Labour Relations (Consolidation) Act 1992, s 219. This is an extremely important matter and UNISON is concerned that this cause of action could be deployed against us and other public sector unions in the future with devastating effect. An effective and clearly defined right to strike would protect trade unions from litigation of this kind.

6 Another example of how the failure to comply with international legal obligations is provided by University College London NHS Trust v UNISON [1999] ICR 204 (CA). Here UNISON was restrained by injunction from taking industrial action because it did not fall within the current narrow definition of a trade dispute in the Trade Union and Labour Relations (Consolidation) Act 1992, s 244. UNISON challenged this restriction on our human rights by making a complaint about a violation of article 11 of the ECHR. The application was ruled inadmissible. However, the fact that industrial action could not be taken in the circumstances of the UCL NHS Trust case was a breach of other international human treaties which – unlike the ECHR – provide clear and specific protection for the right to strike. Thus in an unusual move, the Social Rights Committee of the Council of Europe has specifically referred to this case in its criticisms of the United Kingdom for its breach of article 6(4) of the Social Charter (which expressly protects the right to strike):

The Committee considers 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 Section 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 [1999] ICR 204). The scope for workers to defend their interests through lawful collective action is thus excessively circumscribed in the United Kingdom. (Emphasis added)

(Council of Europe, Social Rights Committee, Conclusions XVI – 1, p 18)

### **Conclusion**

7 UNISON considers it to be wholly unacceptable that British law on the right to strike should continue to be governed by common law liabilities with their origins in Victorian times. A modern legal system - informed by a modern human rights culture - would ensure that fundamental social rights were effectively protected in accordance with minimum standards established by international human rights treaties. It should not be possible for an employer to obtain an injunction (which the union has to discharge) on the specious ground that industrial action constitutes a tort which no one had ever thought about. Consequently it is

UNISON's view that there should be a right to strike as required by the ICESCR. This should mean that any dismissal of a worker for exercising this right should be void, and that trade unions should not be liable in tort or any other ground for organising such action.

8 In terms of the content of any such right, UNISON believes that this should meet the minimum standards established by the ICESCR, the ILO, and the Council of Europe. We are at a loss to understand why there should be any difficulty about this and why Britain's shameful record of violation of fundamental social rights should not be urgently addressed. The current position is all the more extraordinary in light of the fact that the United Kingdom continues to subscribe to these obligations. We understand that the British government has signed the Council of Europe's Revised Social Charter of 1996, as well as the ILO Declaration on Fundamental Principles and Rights at Work of 1998. Both of these instruments protect the right to strike, either directly or indirectly. In committing itself to these instruments, the government surely has some commitment to their contents. It seems hardly credible that the government would sign these instruments (a) in ignorance of their provisions, or (b) indifferent to its obligation to ensure that domestic law complied with their terms.

### **The Exclusion of Secondary Action**

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 (ie. 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. (General Survey, paragraph 217.)

(ILO Committee of Experts, 1989)

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 Trades Union Congress (TUC) of 7 November 1996 that it is a common tactic of employers 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.

(ILO Committee of Experts, 1999)

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.

(ILO Committee of Experts, 2001)

The Committee recalls that its previous comments concerned the absence of immunities in respect of civil liability when undertaking sympathy strikes. It notes the Government's indication that no changes have been made in this respect. The Committee once again recalls 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. This principle is of particular importance in the light of earlier comments made by the Trades Union Congress (TUC) that employers commonly avoided 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 Committee must reiterate 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 reply as soon as possible to the issues raised by the TUC and by UNISON in this respect.

While taking due note of the information provided by the Government, the Committee must recall once again 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, and that they should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. It requests the Government to continue to keep it informed of developments in this respect in its future reports.

(ILO Committee of Experts, 2003)

### **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).

In this connection, the Committee notes that common law strikes and most other forms of industrial action constitute a repudiatory breach of the individual worker's contract of employment. This has the consequence that the employer may lawfully treat the employment relationship as at an end without more ado. This happens only infrequently in practice. But it can happen, and the Committee is aware that there have been a number of situations in recent years where employers have used the fact that their employees were on strike as an excuse for dispensing with the services of their entire workforce, and recruiting a new one.

The Committee also notes that a lock-out would also constitute a repudiatory breach of the contracts of employment of the workers concerned. However the common law does not provide a means whereby those workers could obtain reinstatement in their employment, no matter how arbitrary or unreasonable the employer's behaviour had been. Furthermore, it would be in only very exceptional circumstances that such workers could obtain other than nominal damages at common law.

It is clear, therefore, that the common law does not accord workers who have been dismissed in connection with a strike, lock-out or other form of industrial action the right to present a complaint against that dismissal to a court or other authority independent of the parties concerned. The same is true of statutory provision relating to unfair dismissal – subject to the limited measure of protection which is afforded to those who are subjected to “discriminatory dismissal” within the meaning of section 62 of the Employment Protection (Consolidation) Act 1978 (as amended by section 9 of the 1982 Act). The Committee considers that this latter provision does not provide adequate protection for the purposes of the Convention: (i) because it still permits an employer to dismiss an entire workforce, even where the employer has initiated a lock-out or has provoked a strike through entirely unreasonable behaviour; and (ii) because an employer can re-hire on a discriminatory basis so long as there is a gap of three months between the dismissal of the “victimized” workers and the re-hiring. Consequently, the Committee asks the Government to introduce legislative protection against dismissal, and other forms of discriminatory treatment such as demotion or withdrawal of accrued rights, in connection with strikes and other industrial action so as to give effect to the principles set out above.

(ILO Committee of Experts, 1989)

In its previous comment, the Committee had drawn the Government's attention to paragraph 139 of its 1994 General Survey 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 Committee notes with interest the Government's indication that it intends to allow in certain circumstances those dismissed for taking part in lawfully organized official industrial action to complain to a tribunal of unfair dismissal, even where all workers have been dismissed. The Committee intends to examine the progress made in respect of the Government's proposals in this regard...

(ILO Committee of Experts, 1999)

Jean Corston MP  
Chair  
The Joint Committee on Human Rights  
House of Commons  
London SW1A 0AA

Dear Ms Corston

**Submission by the National Union of Rail, Maritime and Transport Workers**

I would like to commend to your Committee the Submission on the International Covenant on Economic, Social and Cultural Rights made by the Institute of Employment Rights on 31<sup>st</sup> March 2004, which was written by Professor Ewing and John Hendy QC.

This union has suffered and been thwarted in its representation of its members by the denial of the right to strike in the UK which, as the Institute submission points out, is contrary to the International Covenant on Economic, Social and Cultural Rights, the European Social Charter and the International Labour Organisation Conventions. On many occasions we have wished to support members in dispute with their employers but have been advised by our lawyers that, notwithstanding the moral legitimacy of the members' case, the unjust laws on industrial action would put the union into risk of legal proceedings, injunctions and the rest. In 2002, for example, we were the subject of an injunction upheld by the Court of Appeal because members could not be balloted because they had failed to tell the union they had changed jobs. I attach a copy of the law report *NURMT v Midland Mainline*.

The hideous complexity of the law on the definition of a trade dispute, the difficulties involved in the conduct of industrial action ballots, the rigours of the obligations to serve notices and the ease with which injunctions are granted against unions are well known. The Institute report makes clear how each of these features of UK law are in breach of our international legal obligations.

I would like to draw particular attention though, to the fact that whilst the protection of the right of trade unions to call and support industrial action is very limited, for workers it is practically non-existent.

The problem arises from the fact that in UK law all forms of industrial action constitute a breach of an individual worker's contract of employment allowing the employer to dismiss them. As the government stated in its 1998 Report to the International Labour Organisation ("UK Government's Reply to the Committee of Experts' 1996 Observation", para.6):

*"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."*

This lamentable state of affairs is precisely the consequence of the absence of the right to strike in the UK. A strike (or industrial action less than a full stoppage of work) will be in breach of the contract of employment for two reasons.

Firstly, the striker is failing to perform the contractual obligations to work and to obey lawful instructions. 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" (Ralph Gibson LJ giving the judgement of the Court of Appeal in *British Telecommunications PLC v Ticehurst* [1992] ICR 383 at 398D-399D). It is to be particularly noted that the taking of strike action is a breach of the employee's contract of employment, even where all the onerous obligations imposed on trade unions by Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 have been fulfilled.

Not only is a strike in breach of the worker's contract of employment. Because of the inevitable breach of the duty of faithful service, virtually all other forms of industrial action will breach the contract of employment including working strictly according to contract (*Secretary of State v ASLEF (No.2)* [1972] ICR 19, esp. Buckley LJ at 62B-G, and see Denning MR. at 54F-56E), or refusing to carry out some aspects only of contractual duties (*Ticehurst* above). The only 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 there was no obligation to work (*Burgess v Stevedoring Services Ltd* [2002] IRLR 210).

The consequence of a strike being in breach of contract is severe for the worker in the UK. "*Any form of industrial action by a worker is a breach of contract which entitles the employer at common law to dismiss the worker...*" (Lord Templeman in *Miles v Wakefield MDC* [1987] ICR 368 at 389) or to refuse to pay wages (*Wiluszynski v Tower Hamlets LBC* [1989] IRLR 259) or to sue for damages (*NCB v Galley* [1958] 1 WLR 16). The employer's power to impose these penalties is not diminished to any extent whatever by the fulfilment by the trade union of its statutory obligations under Part V of the Act.

The only protection for workers is a very limited right to claim reinstatement and/or compensation for unfair dismissal under Part X of the Employment Rights Act 1996. That right is denied to any worker dismissed whilst participating in a strike which is not "*official*", i.e. supported by his or her union (s.237 of the Trade Union and Labour Relations (Consolidation) Act 1992). Where the calling of the



strike is denied protection by reason of a failure to comply with s.219 (including ss.226-234A which require the pre-strike ballot) 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, the 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 extremely onerous 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.

S.16 and Schedule 5 of the Employment Relations Act 1999 inserted s.238A into the 1992 Act. This allows strikers to claim unfair dismissal only if they are engaged in industrial action which is protected by s.219 of the Act. If the strike turns out not to be protected by s.219, then strikers who are dismissed have no right to claim unfair dismissal, let alone succeed in such a claim. For those to whom it does apply, the section makes a finding of unfair dismissal automatic (s.238A (2)) but does not guarantee reinstatement. Reinstatement is a discretionary remedy granted in only 0.5 % of successful unfair dismissal cases. Even where reinstatement is ordered, the employer is entitled to disregard it though it will have to pay extra compensation. A reinstatement is not mandatory and enforced by contempt of court procedures as are injunctions such as that granted against this union in *Midland Mainline*. Furthermore the unfair dismissal protection only lasts for 8 weeks (subject to extension if the employer is unreasonable and, if the Employment Relations Bill becomes law, where there is a lockout). The total inadequacy of the 8 week rule was demonstrated in the *Friction Dynamics* case recently.

UK law requires protection of the individual worker's right to strike as the International Committee on Economic, Social and Cultural Rights made clear in their Reports on the UK in 1997 and 2002, referred to in the Submission of the Institute of Employment Rights. It is hoped that your Committee will endorse this view and ensure that such a law is introduced.

Yours sincerely

**Robert Crow**

General Secretary

### **“Unjustifiable discipline”**

The Committee notes that section 3(1) of the 1988 Act provides that all members or former members of a union have the right not to be “unjustifiably disciplined” by that union. “Discipline” for these purposes includes being expelled from the union or a branch or section thereof; the imposition of a fine; deprivation of, or denial of access to, the benefits, services or facilities which would otherwise be available by virtue of union membership; or being subjected to “any other detriment” (section 3(5)).

The grounds upon which disciplinary action would be regarded as “unjustified” are set out in section 3(3). They relate principally to disciplinary measures imposed because of: a refusal to participate in industrial action; encouraging or assisting another person to refuse to

participate in industrial action; and complaining that a union or an official thereof has acted, or proposes to act, in an unlawful manner.

The Committee recalls that one of the basic rights which is guaranteed by Article 3 their constitutions and rules free from any interference which would restrict this right or impede the lawful exercise thereof. It is clear that provisions which deprive trade unions of the capacity lawfully to give effect to their democratically determined rules are, *prima facie*, not in conformity with this right. Section 3 of the 1988 Act clearly has this effect, and on that basis is not in conformity with Article 3.

The Committee, nevertheless, considers that the right of organisations to draw up their constitutions and rules must be subject to the need to respect fundamental human rights and the law of the land (bearing in mind that Article 8(2) of the Convention stipulates that the law of the land shall not be such as to impair the guarantees provided for in the Convention). This means that it would not be inconsistent with the requirements of the Convention to require that union rules must not discriminate against members or potential members on grounds of race or sex. The same is true for provisions (such as section 3(3)(c) of the 1988 Act) which state that unions may not discipline members who, in good faith, assert that their union has breached its own rules, or the law of the land. However, the Committee is also of the view that the nature and extent of legislative incursions upon union autonomy must be limited to that which is absolutely necessary in order to achieve these objectives – otherwise the rights guaranteed by Article 3 would be deprived of all practical effect. It follows that proper respect for the guarantees provided by Article 3 requires that union members should be permitted, when drawing up their constitutions and rules, to determine whether or not it should be possible to discipline members who refuse to participate in lawful strikes and other industrial action or who seek to persuade fellow members to refuse to participate in such action. Section 3 of the Act should be amended so as to take account of this view.

(ILO Committee of Experts, 1989)

The Committee recalls that the previous comments on this matter concerned the above-mentioned provisions of the 1992 Act which prevented trade unions from disciplining their members who refused to participate in lawful strikes and other industrial action or who sought to persuade fellow members to refuse to participate in such action.

In its latest report, the Government states that it strongly supports the principle that workers should be free to join the trade union of their choice as trade unions provide important services to their members. According to the Government, it therefore follows that the rights of unions to discipline and expel members need to be balanced against the rights of individuals to acquire and retain their membership. The Government adds that, under the law of the United Kingdom, 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 organized. These workers can therefore be sued on an individual basis by employers for damages. In contrast, unions cannot be sued for damages if they organize industrial action within

the law. In these circumstances, the Government considers that individuals should be free to decide whether or not to take part in lawfully organized industrial action since the potential liability is the individual's and not the union's.

The Committee must, nevertheless, once again recall that Article 3 of the Convention concerns the rights of trade unions to, inter alia, draw up their constitutions and rules and to organize their activities and to formulate their programmes, without interference by the public authorities. The free choice to join a trade union can clearly be based on a careful consideration of the provisions in such constitutions and rules. Furthermore, the Committee would recall that the prohibition of such disciplinary measures carries with it heavy financial penalties. The Committee considers unions should have the right to determine whether or not it should be possible to discipline members who refuse to comply with democratic decisions to take lawful industrial action, and that the financial penalties imposed by the legislation in this respect constitute undue interference in the right of workers' organizations to draw up their constitutions and rules freely and would therefore once again ask the Government to refrain from any such interference. As concerns the Government's argument in respect of the liability of individual workers, the Committee recalls the importance it attaches to the maintenance of the employment relationship as a normal consequence of the recognition of the right to strike.

(ILO Committee of Experts, 1999)

'The Committee recalls that its previous comments concerned sections 64-67 of the 1992 Act which prevented trade unions from disciplining their members who refused to participate in lawful strikes and other industrial action or who sought to persuade fellow members to refuse to participate in such action. In its latest report, the Government maintains that these sections provide necessary protections for individual workers in their relationship with their unions and the consequent constraints on union freedoms are justified. The Government adds, however, that they do not operate a system of prior vetting or approval of union constitutions or rule books by a public authority.

The Committee takes due note of this information. It once again recalls that unions should have the right to draw up their rules and to formulate their programmes without the interference of the public authorities which should restrict or impede the exercise of freedom of association and so to determine whether or not it should be possible to discipline members who refuse to comply with democratic decisions to take lawful industrial action. It requests the Government to continue to keep it informed of any developments in respect of these provisions and, in particular, to provide in its next report any information concerning complaints brought under section 66 and awards granted in this respect under section 67. It further requests the Government to reply as soon as possible to the observations made by the TUC in respect of these provisions'.

(ILO Committee of Experts, 2001)

The Committee recalls that its previous comments in this respect concerned provisions which prevent trade unions from disciplining their members who refuse to participate in lawful strikes and other industrial

action or who sought to persuade fellow members to refuse to participate in such action.

The Government indicates that only 49 such complaints have been brought in the reporting period, in spite of an increase in the number of days of strike, which confirms that unions have adapted to the law and are not inhibited by it when taking industrial action. With respect to the TUC comments on the subject, the Government maintains that these sections provide necessary protections for individual workers in their relationship with their unions and do not represent an undue interference in internal affairs of trade unions, and that there is a need to reconcile the freedoms of individuals and those of unions.

The Committee takes note of this information. It recalls that unions should have the right to draw up their rules without interference from public authorities and so to determine whether or not it should be possible to discipline members who refuse to comply with democratic decisions to take lawful industrial action. It requests the Government to continue to keep it informed of developments in this respect in its future reports.

(ILO Committee of Experts, 2003)

#### **4 The European Social Charter**

4.1 Also relevant for present purposes is the Council of Europe's Social Charter of 1961. This is the sibling of the European Convention of Human Rights which forms the basis of the Human Rights Act 1998. The United Kingdom has ratified the Social Charter (but has not ratified the Revised Social Charter of 1996). Unlike ILO Conventions and unlike the ECHR, a State ratifying the Social Charter is not required to accept all of its terms. The United Kingdom has accepted 60 of the 72 numbered paragraphs in the Social Charter. This is the lowest level of acceptance of all the member states of the European Union, with the exception of Denmark. The United Kingdom has not ratified the Additional Protocol to the Social Charter (which introduces additional rights), nor the Collective Complaints Protocol (which allows complaints to be made to the Social Rights Committee), nor the Revised Social Charter of 1996.

##### *Articles 5 and 6*

4.2 So far as trade union rights are concerned, there are two provisions of the Social Charter which are particularly important. These are articles 5 and 6,

with article 6(4) being particularly important as the first recognition of the right to strike in an international treaty. Unlike the ICESCR (and indeed the International Covenant on Civil and Political Rights (article 22), there is no reference to ILO Convention 87 in either articles 5 or 6 of the Social Charter. However, article 26 of the Social Charter provides that the ILO is to be invited to participate in a consultative capacity in the deliberations of the committee of experts. Although the standards set by ILO Conventions and the Social Charter are similar on most issues, there are differences. A good example of this on the banning of trade unions at GCHQ in 1984: although a breach of ILO Convention 87, it was not a breach of the Social Charter (or the European Convention on Human Rights). In recent years, however, the Social Rights Committee appears to have adopted a position less tolerant of restraint than the ILO supervisory bodies.

4.3 Articles 5 and 6 provide as follows:

**Article 5 – The right to organise**

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

**Article 6 – The right to bargain collectively**

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;

and recognise:

4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

The European Social Charter is supervised by the European Committee of Social Rights (hereafter the Social Rights Committee). Its function is 'to judge the conformity of the law and practice of States party to the European Social Charter'. This is a body of distinguished jurists whose number in the past have included Professor Sir Otto Kahn Freund (an eminent labour lawyer) and Professor David Harris CMG (an eminent human rights lawyer). There is not now a British member of the Committee, an omission which the government may be able to explain. There have now been 16 cycles of supervision by the committee. In the last cycle of supervision, the Committee found that the United Kingdom was complying with 23 of the 43 treaty obligations examined, and that it was failing to comply with 16 of these obligations. In another 4 cases the Committee was unable to comment because of a lack of the necessary information.

#### *The Right to Organise: Article 5*

4.4 The Social Rights Committee found that the United Kingdom was in breach of both articles 5 and 6 of the Social Charter, while noting that a number of improvements had been introduced by the Employment Relations Act 1999. But notwithstanding these improvements, in the 16<sup>th</sup> (and most recent) cycle of supervision, the Committee found the United Kingdom to be in breach of articles 5 and 6 on a number of grounds. So far as article 5 is concerned, it was found that there were 4 breaches, as follows:

- The obligation on the part of a trade union to give notice to the employer that it intends to hold an industrial action ballot was said to be 'excessive', in view of the fact that 'a trade union must in any event give notice before proceeding to industrial action'. The legislation was an 'unjustified impairment' of trade union rights.
- Section 15 of TULRCA 1992 makes it unlawful for a trade union to indemnify an individual union members for a penalty imposed for an

offence or contempt of court. This provision was said to constitute 'an unjustified incursion into the autonomy of trade unions that is inherent in article 5'.

- Section 174 of TULRCA 1992 limits the grounds on which a person may be excluded or expelled from a trade union. This is 'an excessive restriction on the right of a trade union to determine its conditions of membership and goes beyond what is required to secure the individual right to join a trade union'.
- Section 65 of TULRCA 1992, 'by severely restricting the grounds on which a trade union may lawfully discipline members', was said by the Committee to 'constitute an unjustified incursion into the autonomy of trade unions that is inherent in article 5 of the Charter'.

4.5 As a result of the foregoing, the Committee concluded that TULRCA 1992, sections 15, 65, 174 and 226A are in the view of the Social Rights Committee 'not in conformity with article 5 of the Charter'. In the Council of Europe's Governmental Committee which subsequently examined the report of the Social Rights Committee the British government representative is reported as having said that the DTI review of the Employment Relations Act 1999 'would take into account the views of all relevant actors, including the comments of the [Social Rights Committee]'. The Employment Relations Bill does not appear to address any of the findings of non compliance with article 5 (with the possible exception of s 174 to a very limited extent). The Institute of Employment Rights believes that the Joint Committee should press the DTI to explain how it carried out the government's undertaking to the Council of Europe's Governmental Committee and to produce the minutes of the meetings at which the Social Charter points were considered but evidently rejected.

Jean Corston MP  
 Chair  
 The Joint Committee on Human Rights  
 House of Commons  
 London SW1A 0AA

Dear Ms Corston

**Submission by the Communications Workers Union**

I believe you will have received a Submission on the International Covenant on Economic, Social and Cultural Rights from the Institute of Employment Rights, written by Professor Ewing and John Hendy QC and dated 31<sup>st</sup> March 2004. The CWU fully supports that Submission. I thought it might be helpful to your Committee if I drew attention to a specific case which shows the limitations imposed on this and other unions by the UK's failure to implement the right to strike guaranteed by Art.8(1)(d) of the International Covenant on Economic, Social and Cultural Rights.

I should point out that many of the restrictions imposed by UK law on the right to take industrial action have had an impact on this union. It is not only that the union has many times in the past been obliged to desist from taking what it has been advised would be unlawful industrial action in circumstances where it has considered that by any standard of fairness and, indeed proportionality to the power of employers over our members at the workplace, such industrial action was wholly justified in order to defend our members legitimate interests. More than that the union has felt obliged not to support its members to the extent of repudiating action they may have felt compelled to take in circumstances where the law, which is highly complex, has been uncertain and so offered the real risk of an employer (or affected third party) obtaining an injunction against the union. Such injunctions are, as you know, granted on the lowest conceivable legal threshold - that of demonstrating merely that "there is a serious issue to be tried", an "arguable case." The penalties for non-compliance with an injunction are fines, sequestration and imprisonment – even if the injunction at full trial is shown to have been unwarranted as a matter of law.

The point is demonstrated in the recent case of *British Telecommunications plc v Communications Workers Union* [2003] IRLR 58. In that case BT sought to impose a new productivity scheme called "self motivational team working." The members objected. The union therefore proposed a strike of all its engineering members in Customer Services Field Operations and Northern Ireland. There were 14,001 such members comprising some 90% of those workers. The members were balloted and the ballot was in favour.

The union had given notice of the ballot as s.226A of the Trade Union and Labour Relations Act 1992 required it to do. After the ballot and prior to the commencement of the industrial action, BT challenged the ballot notice. S.226A requires that the notice must contain "such information in the union's possession as would help the employer to make plans and bring information to the attention of" the voting employees. Furthermore, "if the union possesses information as to



the number, category or workplace of the employees concerned” the notice must contain that information too.

The union’s notice identified that it intended to ballot the 14,001 members in the categories specified across all BT’s workplaces.

The court held that

“it will, or at least arguably may, be of practical assistance to BT to have numbers broken down beyond the simple information that 14,001 is the total number concerned.”

Further

“it is arguable that the union has information as to numbers employed in different categories in Scotland, England and Wales, information which would be capable of being helpful to BT in making plans to address the strikes which have been called.”

This was not withstanding that since 90% of the relevant workforce were union members BT knew perfectly well that what was intended was a strike by, so far as possible, the entire identified workforce. It was also the case that BT were unable to tell the court what kind of plans they would have made had they had more information as to numbers in England, Wales and Scotland.

Because there was an arguable case, an injunction was granted preventing the union calling or supporting the industrial action. If any members had nonetheless gone on strike the union would have had to repudiate their action and they would have been unprotected by unfair dismissal law if they had been sacked.

The decision, of course, defeated the democratic decision of the members expressed in accordance with the onerous provisions of the law. More than that the denial of the right to strike to the union and to these members plainly conflicts with the guarantee contained in Art.8(1)(d) of the International Covenant. Furthermore the case illustrates the extent to which UK law breaches the European Social Charter and Convention 87 of the ILO. These points are well made in the Submission of the Institute of Employment Rights. But I would like to draw attention in particular to the most recent report of the Conclusions of the European Social Rights Committee under Art 6(4) of the European Social Charter which is similar, of course, to Art 8(1)(d) of the International Convention: On 6<sup>th</sup> April 2004 the European Social Rights Committee reported (Conclusions XVII-1) its conclusions in relation to the right to strike in the UK and found, once again, that UK law was not compliant with the Charter. The CWU considers that the Committee’s analysis could have been written with the *BT v CWU* open in front of it. I attach to this letter the section of the Conclusions introducing its consideration of the UK and the section dealing with Art.6 of the Charter. I trust these will be of interest to you.

The Government in its Review of the Employment Relations Act 1999, “reaffirms its commitment to retain the essential features of the pre-1997 law on industrial action” apart from small changes to the information required to be given in pre-strike notices and to minor accidental balloting failures. The CWU and its lawyers have studied carefully the changes to be introduced to s.226A and we find that a substitute obligation is to be introduced which will require the union to supply the employer with lists and figures “together with an explanation of how those figures were arrived at”:

“The lists are-

- (a) a list of the categories of employee to which the category of employees concerned belong, and
- (b) a list of the workplaces of the employees concerned.

The figures are-

- (a) the total number of employees concerned,
- (b) the number of employees concerned in each of the categories in the list mentioned [above], and
- (c) the number of the employees concerned who work at each workplace in the list mentioned [above].

The lists and figures supplied under this section must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it [gives the notice of the ballot].”

Quite frankly, we consider these obligations to be more onerous than the existing law. It seems most unlikely to us that the government has taken into account the findings of the international supervisory bodies, in particular the Conclusions of the Economic and Social Rights Committee appended to this letter which found, as you see, that current ballot notice requirements were “excessive.” We can see no basis on which a breach in this respect of Art.6(4) of the European Social Charter would not equally amount to a breach of the similar right guaranteed by Art.8(1)(d) of the International Covenant on Economic, Social and Cultural Rights. We conclude that even after the changes proposed, UK law will remain in breach of its international obligations.

I hope that the above gives your committee some insight into the problems faced by working people and their trade unions by the UK’s failure to implement the International Covenant on Economic, Social and Cultural Rights which it has voluntarily submitted itself to be bound.

Yours sincerely

**Billy Hayes**

General Secretary

### *The Right to Bargain Collectively: Article 6(2)*

4.6 So far as article 6 is concerned, in the 16<sup>th</sup> cycle of supervision, the Committee found that British law was in breach of both articles 6(2) and 6(4). So far as the former is concerned the Committee was particularly troubled that ‘the law does not prevent an employer offering more favourable terms and conditions of employment to workers who agree to forgo collective bargaining or representation by a trade union’. The Committee referred here to TULRCA 1992, s 148, as amended by the Employment Relations Act 1999. In drawing this conclusion, the Committee referred to s 17 of the 1999 Act, which in its view ‘has not resolved this problem’. As a result the ‘situation in the United

Kingdom 'remains in violation of the Charter'. The Committee reported that it had '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'. These earlier findings were also referred to by the European Court of Human Rights in Wilson and Palmer v United Kingdom [2002] IRLR 128 where it was held that British law in this area not only violated the Social Charter but also article 11 of the ECHR. The crucial passage of the Court's decision on article 11 reads as follows:

46. The Court agrees with the Government that the essence of a voluntary system of collective bargaining is that 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 on those issues which the union believes are important for its members' interests. 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 freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State 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.

47. In the present case, it was open to the employers to seek to pre-empt any protest on the part of the unions or their members against the imposition of limits on voluntary collective bargaining, by offering those employees who acquiesced in the termination of collective bargaining substantial pay rises, which were not provided to those who refused to sign contracts accepting the end of union representation. The corollary of this was that United Kingdom law permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or restraint on the use by employees of union membership to protect their interests. However, as the House of Lords' judgment made clear, domestic law did not prohibit the employer from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise was to bring an end to collective bargaining and thus substantially to reduce the authority of the union, as long as the employer did not act with the purpose of preventing or deterring the individual employee simply from being a member of a trade union.

48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of

criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association (see paragraphs 32-33 and 37 above). It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has 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 trade unions and the individual applicants.

4.7 The Employment Relations Bill currently before Parliament purports to implement the Wilson and Palmer decision. It is regrettable that the government chose to wait until the Strasbourg court had decided and did not move to change the law in direct response to the much earlier findings of the ILO Committee of Experts and the Social Rights Committee. As it is, the Employment Relations Bill fails to implement the Strasbourg court's decision adequately, with the result that a number of matters remain outstanding. This gives rise to the possibility that on this matter the United Kingdom will remain in breach of both the ECHR and the Social Charter. There are three specific concerns which arise:

- An employer will still be entitled to refuse to permit an employee to be represented by a trade union official when the employee is seeking to re-negotiate the terms and conditions of his or her employment
- An employer will still be permitted to make financial inducements to workers to persuade them to give up trade union representation: the provisions of the Bill will only prohibit inducements when the union is recognised. They do not apply after the union has been derecognised.
- A trade union will still be denied the right to sue an employer who offers inducements to employees. This is because the legislation applies only to permit an employee to sue, despite the recognition by the Strasbourg Court in the Wilson and Palmer case that the practice violates the right of the union as well.

*The Right to Strike: Article 6(4)*

4.8 So far as article 6(4) is concerned, in the 16<sup>th</sup> cycle of supervision it was found that 'the right to strike or take other industrial action in the United

Kingdom is subject to serious limitation'. The reasons for violation are as follows:

- The 'scope for workers to defend their interests through lawful collective action' is 'excessively circumscribed', in view of the restricted concept of trade dispute which determines when such action may be taken.
- As defined in TULRCA 1992, s 244 a trade dispute is 'limited to disputes between worker 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 referred to the decision in UCL NHS Trust v UNISON [1999] ICR 204 to show how '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 the transfer of part of a business'.
- The Committee took note of TUC comments about the complexity of the statutory procedural requirements for taking industrial action and the 'appreciable difficulties encountered by trade unions who endeavour to act within the law'. The Committee referred to the 'very considerable efforts that are required of trade unions'.
- Apart from the narrow definition of a trade dispute the Committee concern was expressed about TULRCA s 235A which allows for consumer actions against trade unions. In the view of the Committee 'the continued existence in force of this provision is not in conformity with the Charter'.
- So far as the position of individual workers is concerned, the Committee noted the improvements made by the Employment Relations Act 1999. But the 8 week protection against dismissal is 'an arbitrary threshold' that 'does not offer adequate protection'.
- The changes introduced in 1999 apply only to official industrial action. But 'article 6(4) of the Charter provides for the right of all workers to take collective action, whether supported by a trade union or not. The limitation

of protection against dismissal to official action is therefore not in conformity with the Charter’.

- Concern was also expressed that ‘it is not lawful for a trade union to take industrial action in support of workers dismissed [for taking part in an unofficial dispute]’. This was said to be a ‘serious restriction on the right to strike’.

4.9 The Committee concluded that, in view of the restrictive notion of lawful industrial action, the onerous procedural requirements and the serious consequences for unions where industrial action is found not to be lawful, and the limited protection of workers against dismissal when taking industrial action, the United Kingdom does not guarantee the right to take collective action within the meaning of Article 6(4) of the Charter’. In the Council of Europe’s Governmental Committee which subsequently examined the report of the Social Rights Committee the British government representative is reported as having said that the government would reflect on the criticisms of the Social Rights Committee in the process of reviewing the Employment Relations Act 1999. The Employment Relations Bill does not appear significantly to address any of the findings of non compliance with article 6(4) (with the possible exception of attempts to simplify the balloting procedures). The Institute of Employment Rights believes that the Joint Committee should press the DTI to explain how it carried out the government’s undertaking to the Council of Europe’s Governmental Committee and to produce the minutes of the meetings at which the Social Charter points were reflected upon but evidently rejected.

## **5 The Incorporation of International Standards into Domestic Law**

5.1 It is clear from the foregoing that United Kingdom law is in breach of a number of international treaties dealing with social and economic rights, and that the breaches are extensive. Although the problem began seriously to emerge in 1989, it shows no signs of abating despite the legal changes that have been introduced since 1997. The pace of change has been too slow to deal with violations that ought never have been allowed to happen in the first

place. The Institute of Employment Rights believes that these violations reveal the need for the effective incorporation of international standards into domestic law. This has already been done with the ECHR, and in our view it also to be done with either the ICESCR or the Council of Europe's Social Charter of 1961 (or the Revised Social Charter of 1996 which we believe the government should ratify). The arguments in favour of incorporating one of these social rights treaties in the same way as the ECHR are strong and compelling and indeed some of the arguments which applied to the incorporation of the ECHR apply with equal force if not greater force to the ICESCR or the Social Charter. These are as follows:

### *Britain Isolated*

5.2 Most of the countries of the European Union have incorporated social rights provisions into their constitutions. These are France, Spain, Portugal, Italy, Greece, Netherlands, Belgium, Sweden, Finland, Ireland and Denmark. Although there is no express reference to social rights in the German Basic Law, the Constitutional Court in Germany has been able to develop a social rights jurisprudence from the general principles of the constitution and has been able to develop a right to strike from the constitutional protection of freedom of association. Only Austria and Luxembourg are like Britain in failing to recognise the constitutional status of any social and economic rights.

5.3 It is important to emphasise that the scope of social rights provisions in the national constitutions of the foregoing countries varies enormously as does the provision for and method of their enforcement. Nevertheless, all ten of the accession countries make (generally full) provision for social and economic rights in their national constitutions, and most include express protection of the right to strike. It is also the case that Norway has recently incorporated the ICESCR along with the ICCPR and the ECHR. Outside of Europe, modern constitutions now include economic and social rights, the most notable example being the South African constitution, article 23 of which deals with labour relations. This includes express protection of the right to strike, as well as protection to join trade unions and take part in their activities.

5.4 Apart from these developments at national constitutional level, a notable feature of the EU Charter of Fundamental Rights concluded at Nice in

December 2000 is that it includes both civil and political rights on the one hand, and social and economic rights on the other. Not only that, but each of these different rights has the same status as the other. The provisions of the 'solidarity' chapter of the Charter include in article 29 provisions relating to the 'right of collective bargaining and action'. This seeks to guarantee not only 'the right to negotiate and conclude collective agreements' but also 'in cases of conflicts of interest, to take collective action to defend their interests, including strike action'.

### *The British Record*

5.5 One of the most compelling reasons for incorporation of one of the social rights treaties into domestic law is the British record of non compliance with our treaty obligations. This is much worse than our record of non compliance with the ECHR before it was incorporated. One authoritative study showed that in the years between 1975 and 1990 the United Kingdom had been found in breach of the Convention on 21 occasions. Yet in the 16<sup>th</sup> cycle of supervision alone, the United Kingdom was found to be in breach of 23 provisions of the Social Charter, which is higher than in the previous cycle of supervision when 14 cases of non conformity were identified by the Committee.

5.6 But not only is Britain's record of non compliance poor and getting worse. Research conducted by the Institute of Employment Rights suggests that it is the worst among EU member states: K D Ewing, The EU Charter of Fundamental Rights: Waste of Time or Wasted Opportunity? (2002: 28), though the position may be changing in view of falling standards in other countries. An examination of compliance records with the 'hard core' provisions of the Social Charter showed that during the 14<sup>th</sup> cycle of supervision the United Kingdom was in breach of more provisions than any other EU member state. The hard core provisions are a group of 7 articles (articles 1, 5, 6, 12, 13, 16 and 19), of which countries ratifying the treaty must accept to be bound by at least 5.



5.7 The United Kingdom has accepted 25 of the 28 paragraphs in the 7 hard core articles of the treaty, including articles 5 and 6 in their entirety. The research conducted at the end of the 14th cycle of supervision revealed that all EU Member States were in breach of at least two of the hard core provisions that they had accepted. But the research also revealed that with 10 violations, the United Kingdom outstripped most of the other EC members of the Council of Europe, though Denmark and Ireland ran us close with 8 violations each. The British record may, however, have been even worse in comparative terms in view of the fact that unlike the United Kingdom many countries have accepted all of the hard core provisions, and that in the case of several paragraphs the United Kingdom is in breach on multiple grounds.

### *The Problems of Enforcement*

5.8 At the present time British citizens have only limited opportunities to raise concerns about the breach of human rights treaties dealing with social rights. Complaints can be made to the ILO Freedom of Association Committee about the alleged violation of Conventions 87 and 98. But it is not possible for British ngos to complain about a breach of the Social Charter, despite a mechanism now in place for collective complaints to be made to the Social Rights Committee. With the recent ratification by Belgium, the United Kingdom is in the minority of seven of the 15 current EU member states not to have ratified the Collective Complaints Protocol of 1995.

5.9 So while it is possible to seek to enforce the European Convention on Human Rights in the domestic courts and to take a complaint alleging a breach of the European Convention on Human Rights to the European Court of Human Rights, the position with the Social Charter is very different. It is not possible to enforce the Social Charter in domestic law and the government will not permit complaints alleging its breach to be made to the Social Rights Committee. The latter could and should be addressed by either ratifying the Collective Complaints Protocol of 1995 or ratifying the Revised Social Charter of 1996 into which the collective complaints procedure has been incorporated.

5.10 But even if it were possible for collective complaints to be made from the United Kingdom, this would not address the concerns that were made by judges and others before the Human Rights Act in relation to the ECHR. Why should it be necessary to refer complaints for determination by the Social Rights Committee when these complaints – which raise legal questions – could be determined by British judges sitting in British courts? The process of allowing these matters to be dealt with here would make enforcement more accessible, and the resolution of complaints more speedy than is possible under the collective complaints procedure as currently operated. It would also help to increase the visibility of social rights as human rights.

*The Problem of Non Compliance.*

5.11 The problem of enforcement is worse because the government routinely ignores the findings of the international supervisory bodies. The United Kingdom has a good record when it comes to complying with the decisions of the European Court of Human Rights, though the proposed implementation of the Wilson and Palmer decision leaves much to be desired. But the United Kingdom has an appalling record when it comes to responding to the findings of the UN Committee on Economic, Social and Cultural Rights, the ILO supervisory bodies, and the Council of Europe's Social Rights Committee. The government has failed to address violations of the right to freedom of association and the right to strike, despite repeated observations by the ILO Committee of Experts and the Social Rights Committee.

5.12 Yet the problem is not just one of failing to comply with decisions of the supervisory bodies. A related concern is the failure to ensure that fresh violations do not continue to occur. This points to a lack of respect for international human rights obligations on the part of the government and a failure of Parliament effectively to scrutinise legislation for potential human rights breaches. A good example of this is provided by the Employment Relations Act 1999 which allows employers to establish staff associations as a way of defeating an application for recognition by an independent trade union under the statutory recognition procedure introduced by the Employment Relations Act 1999. It is hard to see how this could possibly be compatible

with articles 2,3 and 4 of ILO Convention 98 and difficult to understand how this could have been missed by either the DTI or Parliament.

5.13 Another example of inadequate supervision of bills for compatibility with international human rights obligations is the exclusion from the same statutory recognition procedure of small businesses (that is to say those employing fewer than 21 workers). This has the effect of denying almost one in four workers of the right to be represented by a trade union. It is difficult to see how an exclusion on this scale can be said to be consistent with ILO Convention 98, article 4. The obligation to promote collective bargaining is unequivocal: there is no exception for workers employed by small businesses. Similar concerns about the practice of continuing violations exist in relation to the protection against dismissal for employees taking part in lawful industrial action. There is nothing in the jurisprudence of any of the supervisory bodies to suggest that an arbitrary provision of this kind would be considered compatible with treaty obligations.

#### *The 'Ethical Aimlessness' of the Common Law*

5.14 The final concern relates to what was once described as the 'ethical aimlessness' of the common law: A Lester and G Bindman, Race and Law (1970), p 70. Beyond the right to liberty and the right to private property, the common law fails to recognise or accommodate what would be recognised in international law as human rights. Employers are free to discriminate on the grounds of race, sex, sexuality, disability or trade union membership. Trade unions have no rights recognised by common law: there is no right of the individual to join a trade union, no right to be represented by a trade union, and no right to strike.

5.15 Indeed so far as the common law is concerned trade unions were and remain in restraint of trade from which they need statutory immunity (TULRCA 1992, s 11). When trade unions organise industrial action they are committing a tort by unlawfully interfering with the trade, business or employment of the employer or third party who is the intended victim of the union's action. This is a situation which has attracted the concerns not only of the UN Committee on

Economic, Social and Cultural Rights but also the ILO Committee of Experts which wrote in 1989 that:

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 strikes 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.

5.16 This is a very fragile basis on which to protect a human right in a modern human rights culture: a series of statutory immunities from presumed common law liability. It is all the more fragile for the fact that the immunities are granted only for liabilities which are known to exist at the time the legislation granting the immunities is introduced. But the immunities are built on the shifting sands of the common law. This means that a fundamental human right (and the right to strike has been so recognised by the Court of Appeal as well as by international law) can be undermined by the creation of new heads of liability which were not anticipated at the time the legislation was passed.

## **6 The Human Rights Act as a Template**

6.1 There is thus a strong and compelling case for raising the status in British law of human rights treaties dealing with social and economic rights. The question which then arises is to consider how this can best be done. It is clear from the judgments of the international supervisory bodies that this is not a matter that can be left to the government and Parliament alone to secure. In the new human rights culture that we now inhabit there is a strong case for saying that the courts must also have a part to play, and that it is unacceptable that we should enhance the status of civil and political rights but not also social and economic rights. As the UN Committee on Economic, Social and Cultural Rights (para 2.5 above) makes clear, human rights are 'indivisible'.

6.2 This indivisibility of human rights has a number of consequences. But it means that we cannot have effective civil and political rights without adequate social and economic rights. The reasons are obvious. Indivisibility also means equal status, which for domestic purposes means that social and economic rights should have the same status as civil and political rights. Yet at the present time Parliament has incorporated through the Human Rights Act only civil and political rights and have ignored social and economic rights, despite the problems of violation that we have outlined above. By using the Human Rights Act as a template, this is a matter that can be addressed in one of two ways:

- amend the Human Rights Act by expanding the scope of its coverage to include other international human rights treaties; or
- introduce a new Human Rights Act which by dealing exclusively with social and economic rights would complement the 1998 Act.

#### *Which rights?*

6.3 The first matter for consideration is to determine which rights would be appropriate for inclusion in a statute modelled on the Human Rights Act 1998, or an amendment to the Human Rights Act. Here there are two issues that arise, one being to determine which treaty would be the most appropriate for incorporation in the same way as the ECHR. The UN Committee on Economic, Social and Cultural Rights recommends that the ICESCR should be incorporated into domestic law. However, the same result could be achieved by the incorporation of the European Social Charter of 1961 (or the Revised Social Charter of 1996) which is a longer established treaty with a longer record of supervision to give guidance to its provisions.

6.4 If the Social Charter (or the Revised Social Charter) were to form the basis of an incorporated text, it does not follow that all of it would have to be incorporated. We have in mind here section 1 of the Human Rights Act which does not incorporate all of the European Convention on Human Rights, but only selected articles. It would be possible to follow this example and to provide that the social rights to which an amendment to the Human Rights Act

applied were those paragraphs of the Social Charter (or the Revised Social Charter) which the United Kingdom had accepted. It would of course be desirable for the United Kingdom to increase its level of acceptance, and to do so also by ratifying the Additional Protocol.

6.5 The other issue which arises here relates to the jurisprudence of the supervisory bodies, in this case the Social Rights Committee which has given important guidance on the meaning of the treaty. Under the Human Rights Act the British courts are bound to take into account the decisions of the different supervisory bodies (the Council, the Commission and the Court) when considering Convention rights. But the courts are not bound by the decisions of the Strasbourg bodies and are free to take a more or less expansive view on any particular matter. The same obligations on the courts ought to apply in relation to the Social Charter, which – it may be noted in passing – is now used as an aid by the European Court of Human Rights.

#### *Social Rights and Legislation*

6.6 Turning to the effect of incorporating a social rights treaty in this way, the first consequence would be to impose a duty on the part of the courts to interpret domestic legislation consistently with social rights wherever possible to do so. This would be an important step forward, particularly in view of the fact that neither the ICESR nor the Social Charter of the Council of Europe has to our knowledge ever been considered by a British court. Although the Social Charter was cited in argument by counsel in Associated Newspapers Ltd v Wilson [1995] 2 All ER 100, it was not referred to in the judgment of the court.

6.7 A full consideration of article 5 of the Social Charter in Associated Newspapers Ltd v Wilson could have led to a construction of domestic law which would have been consistent with human rights obligations. By restoring the decision of the industrial tribunal and upholding the decision of the Court of Appeal, the House of Lords could have spared the respondent a seven year delay in vindicating his right to freedom of association. As is well known, the European Court of Human Rights held in that case that British law violated

article 11 of the ECHR by permitting pay discrimination against trade unionists: Wilson and Palmer v United Kingdom, above. In reaching that decision the Strasbourg court referred to the Social Rights Committee for guidance.

6.8 There may, of course, be cases where it is not possible to construe domestic law consistently with social rights obligations. In these cases the Human Rights Act provides that the court may make a declaration of incompatibility, though the legislation in question remains effective until amended by Parliament. It is open to the government to decline to bring forward amending legislation, though there is a fast-track procedure which may be used in some cases should the government decide to bring forward an amendment. This would be an appropriate procedure to use for the purposes of social rights drawn from a social rights treaty. That is to say, it ought to be possible for a court in an appropriate case to be able to declare legislation incompatible with selected fundamental social rights.

### *Social Rights and Public Authorities*

6.9 Apart from the impact of social rights on legislation, the other issue relates to the conduct of public authorities. Again following the model of the Human Rights Act, there would be a duty on the part of public authorities to comply with social rights obligations unless required by legislation to do otherwise. This means in particular that the discretionary powers of public authorities of a wide and varied kind would have to be exercised in a manner which was consistent with social rights obligations. An example might be a decision to dismiss someone for taking part in a strike. The Institute of Employment Rights is aware that the Joint Committee has recently concluded an inquiry into the meaning of 'public authority' for the purposes of the Human Rights Act.

6.10 The other feature of this aspect of the Human Rights Act is the definition of a public authority which expressly includes a court or tribunal. Depending on how it is construed, this would be particularly important in the social rights arena where the challenge to international human rights comes not only from

the government but also from employers. An example is where a strike is called and the employer seeks an injunction to restrain a trade union from taking industrial action on the ground that it violates his or her common law rights. Adopting the template of the Human Rights Act it is possible that it would not be open to a court to grant relief in such a case.

6.11 It ought not to be possible for employers to secure injunctions because the granting of the injunction in breach of social rights guarantees would mean that a public authority (the High Court) was violating the obligation that it should not breach social rights (which it would be doing by issuing an injunction if the injunction banned action protected by the relevant treaty). This would apply to both interim and permanent injunctions, though for this purpose the Human Rights Act again provides a useful template. In prohibiting improper interim relief, the provisions of s 12 of the Human Rights Act are stronger than the corresponding provisions of TULRCA 1992, s 221.

### *Social Rights and the Courts*

6.12 One concern about using the Human Rights Act as a template in this way is the role that the courts would have in administering social and economic rights. There are timid voices who would claim that these rights are not justiciable, or that they would draw the courts into making decisions about the allocation of economic resources which are decisions for the executive and the legislature rather than the judiciary. That myth has, however, been scotched by the Constitutional Court of South Africa which has the task of reconciling representative government with entrenched human rights.

6.13 In a statement issued after the first judicial forum in South Africa for more than 70 years, South Africa's judges recently made clear that they had an important role in developing an effective judicial voice under a constitution seeking to 'establish an open democracy committed to social justice and the recognition of human rights': [2004] SALJ 648. But that role is necessarily a limited one, though it is nevertheless significant, and the following passage repays careful reading, forming part of a groundbreaking decision of the Constitutional Court:



Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

(Minister of Health v Treatment Action Campaign (No 2)  
2002(5) SA 721)

6.14 But even if there is cause to be squeamish about the judicial role in the area of fundamental social rights, it is not to be overlooked that there is now a growing European jurisprudence on the application of social rights in the national constitutional courts of our European partners. There is also a growing jurisprudence of the Social Rights Committee under the Collective Complaints Protocol. At the time of writing there have been 25 applications to the Committee under this procedure. Nor is it to be overlooked that parts of the Social Charter have been enforced in national courts, most famously in the Dutch engine drivers' case to prevent an interdict being imposed to prevent industrial action by the drivers: NV Dutch Railways v Transport Unions FNV, FSV and CNV [1988] 6 Int Lab Reps 3.

### *Pre-Legislative Scrutiny*

6.15 The final matter for consideration here relates to the question of pre-legislative and legislative scrutiny of Bills to ensure that they are consistent with the requirements of international social rights obligations. At the present time there are a number of procedures in place to ensure that legislation is not introduced unwittingly in breach of Convention rights. The Ministerial Code directs ministers that in bringing proposals to Cabinet, they must first assess the 'consequences for European Union, European Court of Human Rights and other international obligations'.

6.16 This is a provision that could be strengthened with explicit reference to a number of other treaties, including the ICESCR, ILO Conventions 87 and 98, and the Social Charter of 1961 (or the Revised Social Charter of 1996). There

are also provisions in the Human Rights Act which are designed to promote better executive and parliamentary scrutiny of legislation. Thus section 19 provides that all Bills introduced by a minister must contain a statement by the minister stating whether he or she considers the Bill to be or not to be compatible with Convention rights. This should be extended to include the Social Charter (or the Revised Social Charter).

6.17 There is also the role of the Joint Committee on Human Rights, the terms of reference of which include a duty to examine ministerial statements and generally to ensure that legislation complies with human rights obligations. There may be a role for a more rigorous examination of bills by the committee to ensure compliance with social rights obligations. As already indicated some of the defects of the Employment Relations Bill currently before Parliament appear to have evaded close forensic scrutiny by the Committee. There are questions here under a number of the human rights treaties considered in this submission.

## **7 International Standards and the Right to Strike**

7.1 In the last few years the United Kingdom has thus been on the receiving end of damning conclusions from the supervisory bodies administering not one but three sets of international treaties. The criticism of these bodies has covered a large area, but all three have drawn attention to important violations of international law so far as the right to strike is concerned. The implications are far reaching. If the United Kingdom is to meet minimum international standards, some radical surgery will be required to labour laws which remain the most restrictive in Europe, notwithstanding the Employment Relations Act 1999 and the enactment of the Employment Relations Bill currently before Parliament.

7.2 In this section we indicate the changes that we believe would be necessary in order to bring British law into line with international human rights standards. In drawing attention to these areas where restrictions need to be removed, we are not advocating an escalation of industrial action. It is for individuals and their organisations to decide when they will use their human

rights, and not for government to make that decision for them. The government is no more justified in restraining the right to strike by legislation than it is restraining the right to freedom of expression. It should be emphasised that this is not an academic matter, but that the current violations of international standards have a real impact on the rights of trade unions and their members. This arises in three ways.

- The first is the chilling effect of the law, in the sense that trade unions do not exercise human rights for fear of the legal consequences.
- The second is that trade unions are sued by employers and in some cases restrained by the courts for exercising what are internationally recognised human rights.
- The third is that workers are dismissed and not reinstated for exercising what is recognised by international law as a human right.

Individual trade unions will be able to provide the Joint Committee with specific and detailed evidence on each of these points.

### *A Right to Strike*

7.3 The first step that needs to be taken is that there should be a legally protected right to strike. This could be by direct incorporation of one of the international treaties, or by legislation based on one of these treaties. The right would – as international human rights law requires – vest in both the individual worker and the trade union – with a number of important legal consequences, as follows:

- Participation in a strike would not be a breach of contract by the workers concerned (though there is no suggestion that people should be paid while on strike)
- Participation in a strike would not be grounds for dismissal, either at common law or under the statutory unfair dismissal regime.
- There would be no civil liability for trade union officials or workers who organise, call or take part in strike action

- There would be no liability of a trade union in damages where their members or officials have organised, called or taken strike action.  
(UN Committee on Economic, Social and Cultural Rights, 1997, 2002)

*International Standards and the Scope of the Right to Strike*

7.4 In terms of the form of action that is permitted, the second step is that the legislation needs to be amended so that there is legal protection for action which has been identified by both the ILO Committee of Experts and the Social Rights Committee of the Council of Europe as falling within the scope of human rights obligations. Specifically, this means that

- The definition of a trade dispute in TULRCA 1992, s 244 needs to be amended on the ground that the existing definition of trade dispute provides too narrow an ambit for lawful industrial action.

(ILO Committee of Experts, 1989;  
Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- Legislation should make clear that workers may take industrial action to promote and protect their social and economic interests, and that workers may lawfully take action against the de facto employer as well as the de jure employer.

(ILO Committee of Experts, 1989, 2001;  
Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- The legislation should make clear that trade unions are free to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies.

(ILO Committee of Experts, 1989)

- TULRCA 1992, s 224 should be repealed so that workers are free to take secondary industrial action in support of other workers involved in a dispute provided the secondary action 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

(ILO Committee of Experts, 1989; also  
Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- In repealing section 224 of TULRCA 1992, it should be made clear that trade unions and workers are able lawfully to take sympathy industrial action provided the initial strike they are supporting is itself lawful.

(ILO Committee of Experts, 1989, 2001, 2003)

- TULRCA 1992, s 244 should be amended so that workers are free to take industrial action to ensure that future employers (such as privatised utilities or service providers) observe collective agreement to which the union is a party.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- TULRCA, s 223 should be repealed so that workers are free to take industrial action to support other workers who have been dismissed for taking unofficial industrial action.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- The definition of a trade dispute in TULRCA 1992, s 244 needs to be amended to ensure that workers are free to take industrial action in support of workers overseas who are involved in a dispute with their own employer.

(ILO Committee of Experts, 1989)

- TULRCA 1992, s 235A (permitting legal action to be brought by consumers affected by the disruption of services as a result of unprotected industrial action) should be repealed.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

*International Standards, the Right to Strike and Trade Union Autonomy*

- TULRCA 1992, s 15 should be repealed so that trade unions may lawfully indemnify members and officers for losses incurred when acting for the union.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- The requirement in TULRCA 1992, s 226A that trade unions must give notice to employers that they propose to hold a strike ballot should be repealed.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- The legislation requiring trade unions to ballot their members before industrial action should be greatly simplified.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- TULRCA 1992, s 65 should be repealed so that trade unions are free to discipline members who fail to take part in a strike in accordance with the rules of the union.

(ILO Committee of Experts, 1989, 1999, 2001, 2003);  
Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

*International Standards, the Right to Strike and Protection of the Individual*

- The protection against dismissal should not be confined to eight weeks, but should apply to the duration of the dispute.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

- A dismissal for taking part in a strike should be void, and anyone dismissed for this reason should be entitled to return to work at the end of the strike.

(UN Committee on Economic, Social and Cultural Rights)

- The protection against dismissal should be extended to other forms of disciplinary action, including the transfer and demotion of striking workers.

(ILO Committee of Experts, 1999)

- There should be protection against dismissal for workers who take part in unofficial industrial action: the protection should not be confined to cases of official action.

(Council of Europe Social Rights Committee, 16<sup>th</sup> cycle)

## **8 Conclusion and Recommendations**

8.1 The International Covenant on Economic, Social and Cultural Rights is only one of several treaties dealing with social and economic rights that the United Kingdom has fallen foul of in recent years. The others include ILO Conventions 87 and 98, as well as the Council of Europe's Social Charter. The observations of the different supervisory bodies are a timely reminder about the failure of human rights protection in the United Kingdom. This is a failure operating at a number of levels.

8.2 The first failure highlighted by these reports relates generally to the decision in the Human Rights Act to sever civil and political rights from social and economic rights. As we have pointed out, this decision is all the more curious for the fact that modern constitutions accept the indivisibility of human rights. Indeed when Norway moved recently to incorporate the ECHR and ICCPR it did so also by incorporating the ICESCR. As we have also pointed out, there can be no suggestion that this severance of civil and political rights from social and economic rights can be justified because the latter are well enough protected by the ordinary law. That is self-evidently not the case.

8.3 The second failure highlighted by these reports relates to the gulf between international human rights standards and British domestic law. We have concentrated in this submission on the right to strike, as one of the issues about which the Joint Committee specifically invited comments. As we have pointed out there is a great deal that needs to be done in terms of statutory amendment if British law is to be brought fully into line with what are minimum standards set by the international human rights community. These are standards which it is to be recalled we voluntarily accepted and to which we have recently re-affirmed our commitment on more than one occasion. Having made these choices, we should fulfil our obligations.

8.4 There are thus several steps that need to be taken to deal with what is frankly a shameful catalogue of human rights violations relating to trade union rights, reflecting a shameful disregard for the persistent and consistent observations of various international supervisory bodies:

- There is a need formally to incorporate either the ICESCR or the Council of Europe's Social Charter into domestic law along the same lines as the ECHR.
- There is a need to sweep the statute book clean of the existing restraints on fundamental social rights generally and the right to strike in particular.
- There is need to join with the majority of EU members of the Council of Europe and ratify the Collective Complaints Protocol.
- There is a need for much better scrutiny of bills by government and Parliament to ensure compliance with fundamental social rights as well as the ECHR.
- There is a need for much greater legal and judicial training on human rights, which should include training about fundamental social rights.

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