

Starting from Scratch: A Manifesto for UK Labour Law

British laws on trade unions are the most restrictive in the Western World

In the same month as the Brexit referendum result, the UK's Institute for Employment Rights (IER) has published its *Manifesto for Labour Law: towards a comprehensive revision of workers' rights*. The IER's proposals on reform of the UK's labour laws could not be timelier. Forty-three years of EU membership may have contributed some gains for the rights of British workers, but current comparisons with Europe present a stark picture of working life in the UK:

'On average, British workers work more hours per week, more days per year, more years before they retire, after which they receive lower levels of pension than most of their European counterparts. In comparison to other European workers they have generally received less education and training, and (because of lack of employer investment) their productivity is lower. They get fewer paid holidays than almost all European comparators (the Working Time Directive notwithstanding). Their pay is so low that a great proportion of them are in poverty (and the State subsidises employers' low wages in respect of a higher proportion of workers) than almost anywhere elsewhere in Europe. The gender pay gap is at a wholly unacceptable level'.

As the manifesto's authors explain in detail, the UK has *'a framework of law born out of 19th century conditions, which has bypassed many advances of the 20th century, which ignores today's economic and workplace realities, and which is not fit for purpose in 21st century Britain'*. A debate on the future of British labour law is long overdue.

The authors address head on the relationship between the dire state of workers' rights in the UK and the current legal restrictions on the exercise of trade union rights, which have increasingly made collective actions such as striking so burdensome as to be almost impracticable. British laws on trade unions in 2016 remain *'the most restrictive in the Western World. This is indisputable in relation to the right to trade union autonomy, right to strike, and the right to bargain collectively'*.

The Conservative government's latest legislative attack on trade unions – the Trade Union Act 2016 – was roundly criticised for containing provisions which violate ILO Convention 87, and concerns were raised about its compatibility with the European Convention on Human Rights. Some of these aspects were watered down in response to pressure from trade unions. Nonetheless, many contested provisions – concerning ballot thresholds and the expanded role of the trade union Certification Officer – have

now been enacted. The Manifesto calls for that Act to be repealed in its entirety, immediately.

The restoration of collective bargaining

The Manifesto's principle recommendation for reform is to shift the balance of regulation from legislation to collective bargaining. The IER's 25 comprehensive policy recommendations are founded on building *'extensive sectoral collective bargaining structures underpinned by strong trade union rights'*.

The authors acknowledge that such a shift is *'contingent on strong State support for [collective bargaining] and for trade unions (and employers' associations), upon whose shoulders will lie a heavy responsibility for delivery'*. Legislation therefore continues to play a key role. But the authors also amply demonstrate that legislation alone is an ambivalent and sometimes ineffective tool: the rampant levels of inequality in the UK at present are not an *'unavoidable product of the operation of the 'labour market'*. Rather, *'the law has been moulded purposefully to achieve these outcomes'* – in particular since the Thatcher-era. One of the principle effects of this has been the cynical destruction of collective bargaining since 1980. Once the preferred method of regulation, collective bargaining has been largely displaced by legislation:

'By 2011 Britain had fallen to the second lowest in Europe in terms of the level of collective bargaining coverage. Coverage is probably less than 20% today, lower than at any time since before the First World War'.

The result is in *'an unnecessarily legalistic, inefficient and immensely complex system of rules, contained in an ever-growing statute book too heavily dependent on lawyers, tribunals, judges and courts for their enforcement'*. The weakness of this labour regulation, combined with the cost and complexity of legal proceedings, has simply meant that *'some of the rights on the statute book are unenforceable'*.

Towards comprehensive reform

The manifesto therefore proposes *'changing the way in which working conditions are regulated by embedding the voice of workers at national, sectoral and enterprise levels and moving responsibility for regulation from legislation to collective bargaining'*. The *'restoration'* of the principles of collective bargaining is necessary *'to provide a means of workplace democracy, to bring some measure of balance to the otherwise disproportionate power of employers, to redress wage inequality, to prevent the exploitation of migrants,*



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to raise wages, increase demand and reinvigorate the economy, and to fulfil the UK's binding legal obligations'.

Some of the highlights of the IER's extensive 80-page analysis include the following:

- A new Ministry of Labour should be established – led by a Secretary of State with a seat in the Cabinet, and mandated to represent the interests of workers in government
- A National Economic Forum should be created to encourage greater tripartite engagement in and ownership of major economic decisions and the direction of economic policy
- The Ministry of Labour should establish Sectoral Employment Commissions with responsibilities including to promote and negotiate Sectoral Collective Agreements, set minimum terms and conditions of employment, mechanisms for the resolution of collective and individual disputes, and health and safety standards for the sector as a whole
- Sectoral based bargaining should be complemented by enterprise based bargaining, applying the principle of favourability so that workers are entitled to the most favourable terms and conditions
- Regulatory legislation should underpin collective bargaining on a range of matters such as pay, working time (including zero hours contracts), discrimination, equality, and health and safety at work. Existing statutory standards should be universal in scope and effective in application
- Steps should be taken to resolve more disputes without recourse to the law, under collectively agreed procedures, or summarily by labour inspectors with powers to cancel dismissal notices and order reinstatement
- Reforms to the law on freedom of association should be made to ensure a better balance between trade union autonomy and trade union democracy (with trade union elections conducted in accordance with trade union rules and procedures)
- Recognised or representative trade unions should have the right to check off facilities on request
- More effective legislation should be introduced to stamp out blacklisting, which has a *'long and pernicious pedigree in the UK'*. To this end, the Employment Relations Act 1999 (Blacklists) Regulations 2010 should be amended to ensure that it is always illegitimate to refuse to hire workers on grounds of past trade union activity
- It should be made unlawful to dismiss a workplace representative except for good cause, requiring the prior approval of a senior labour inspector, whose decision should be subject to possible review
- With regard to the right to strike, it should be lawful for everyone to be able to take collective action with others in defence of their social and economic interests in the workplace, and for their trade unions to organise such action. The Manifesto calls for the repeal of the existing statutory duty to give notice of an intention to take industrial action, as well as the duty to give notice of an intention to ballot for industrial action. It proposes that a simple duty to give no less than 3 days strike notice would be ample

"The IER provides us yet again with a significant contribution to the debate now underway in the Labour Party about reforms to Employment Law that will be implemented when Labour returns to power. This expert advice is a vital element of our policymaking process.....The Institute's Manifesto will be used as a blueprint for future Labour policy"

John McDonnell, Shadow Chancellor

- Trade unions should also be permitted to take or to call for 'secondary' or 'solidarity' industrial action in support of any other workers in dispute (including industrial action involving another employer) where the primary action is lawful. There should be a *'presumption that solidarity action is lawful'*, because *'the whole point of trade unionism is not only collective strength, but mutual support in times of trouble'*.
- Moreover, lawful industrial action should not be regarded as a breach of the contract of employment or service, but as a temporary suspension only. To this end, those participating in lawful collective action should have the right to be reinstated at the end of the strike, if it is their wish to be reinstated
- A Labour Court should be established, with specialist judges and exclusive jurisdiction to deal with all employment and labour related matters

These policy recommendations take inspiration from contemporary and historical experiences of the labour movement, in Britain and beyond. In effect, they call for a complete overhaul of industrial relations in the UK – and not before time. The Brexit result makes such reforms even more imperative. In the wake of the referendum, the Manifesto has already won strong support from Labour Party leader Jeremy Corbyn and Shadow Chancellor John McDonnell and from Labour MP Ian Lavery (all of whom helped launch the Manifesto in June) and from the British trade union movement, with six national unions publicly endorsing it.

"We are delighted to support the IER's Manifesto for Labour Law, which provides us with the policy framework we need to move forward with a more progressive agenda in 2020..."

"Not only has policy since Thatcher held us back from harnessing the potential of our workforce, it has also left the lowest paid and the most vulnerable workers in our society in dire straits. British workers have some of the most stressful and most uncertain working lives in Europe, and CEOs are profiting from it. Our wage gap is higher than anywhere else in the EU."

Len McCluskey, General Secretary, UNITE

"Few sectors have felt the impact of neoliberalist policy quite like the food industry, where many of our members are faced with perpetual insecurity through zero-hours contracts... It is time for unions to stand in solidarity against blatant attacks on our membership, such as the Trade Union Act, and propose a strong alternative to neoliberalism. We support the Institute's Manifesto, which provides a progressive legal framework that could bring security back into the workplace and growth into our economy"

Ronnie Draper, General Secretary, Bakers and Allied Food Workers Union (BAFUWU).

The Institute for Employment Rights' manifesto for reform focuses on building 'extensive sectoral collective bargaining structures underpinned by strong trade union rights'

The Institute for Employment Rights' Manifesto for Labour Law: towards a comprehensive revision of workers' rights (edited by Keith Ewing, John Hendy and Carolyn Jones) is available from: www.ier.org.uk

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tions of officers, administration and finances. This on top of the Government's own assessment that complying to these new powers by trade unions would cost over £1m per annum. Unions will have to report on all industrial action (and ballots), all payments made for political purposes and all payments – for any purpose – from their political funds. Unions will now have to supply a Membership Audit Certificate to be supplied by an “assurer” to say that the union has met the requirements to keep a register of members safely. The assurer will have access to the union membership records. The assurer's costs will have to be borne by the unions themselves.

The certification officer or his appointee (there is no explanation on who that can be may be, and in the wake of the blacklisting scandal there is surely a risk that undercover police officers, the security services or the human resources manager for the company that may be in dispute with a particular union may seek to manipulate this process) can view the union's membership records and demand that documents be produced. The legislation also allows the Certification Officer or his appointee to disclose the union membership list if there are criminal investigations. Failure to comply by the trade union would result in penalties of up to £20,000.

The TUC has said ‘There is no reason why the trade union regulator needs new powers now’, and that ‘giving the Certification Officer the power to confiscate copies of membership records and other documents is an intrusion on union members’ privacy and their right to have an independent relationship with their union’¹ What is more remarkable is that the outgoing Certification Officer himself expressed considerable scepticism as to whether the powers are at all necessary. On retiring from his position the outgoing Certification Officer wrote in his 2016 annual report:

‘the purpose of these additional powers is said to be to enhance transparency and accountability. I was not, however, consulted on whether I had evidence of an unmet demand for further powers prior to the introduction of the Bill. [...] The role of the Certification Officer will change from being mainly the adjudicator of members’ complaints to become one with more general policing and enforcing responsibilities. This is not the role to which I was appointed in 2001. [...] My concern is that trade unions may find themselves subjected to a myriad of references to the Certification Officer by persons and/or organisations seeking to pursue them for industrial, political or other purposes and who have the motivation and money to put any given situation under a microscope. Each case will, of course, be dealt with on its merits by the Certification Officer but, at the very least, trade unions will have to bear the financial burden of contesting such cases and the levy imposed by the Certification Officer may be increased as a result’.²

In effect, the state has empowered the Certification Officer in a wide range of areas to act on its behalf. Importantly, the fines that he can now impose are no different in amount to the fines that would be imposed in situations where a criminal offence has been made. For the trade union movement they will not only be concerned about these changes but what if this gov-

ernment decides to go further? There are plenty of examples worldwide of state interference not least highlighted in this magazine. But worryingly, it does now beg the question how free from state interference are trade unions in the UK now? The Certification Officer has morphed from someone where members could complain about their union to someone who can now enforce penalties on trade unions.

Notes

- 1 Trade Union Bill, TUC submission to ILO Committee of Experts on the Applications of Conventions and Recommendations, <https://www.tuc.org.uk/sites/default/files/LLOcomplaintontheTUBill.pdf>
- 2 Introduction, Fortieth Annual Report of the Certification Officer, 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537916/12450_C.O._00001_A_Introduction_Ann._Rep.pdf

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‘Following the vote to leave the EU, it is imperative that the labour movement has a progressive plan for our economy and for workers’ rights in this country – the IER has provided the blueprint for this’
Dave Ward, General Secretary, Communication Workers’ Union (CWU).

‘The Manifesto starts by analysing the growth in insecure and precarious work, including a rise in companies misclassifying workers as self-employed so that they can shrug off basic responsibilities such as paying the minimum wage. GMB has been tirelessly fighting this dangerous trend, and we believe the Institute of Employment Rights’ Manifesto for Labour Law would help us in this aim. By more clearly defining the term ‘worker’ in the law, as proposed, we can prevent employers from claiming those who work under their umbrella are ‘self employed’ when in fact the employer has significant control over them. We also fully support the IER’s proposal to negotiate a minimum standard for workers’ rights at a sectoral level. Sectoral standards will offer certainty and security for workers and turn the tide of business competition based on bosses cutting corners around employment rights’
Tim Roache, General Secretary (GMB).

‘The Trade Unions Act, which has made it even more difficult for teachers’ voices to be heard, has gone too far. We desperately need a robust strategy to fight back and offer a real alternative to austerity and to the market agenda in our education system. The Institute’s Manifesto provides the legal framework required for a more progressive society and puts us in good stead to build a brighter future in 2020’
Kevin Courtney, General Secretary, National Union of Teachers (NUT).

‘For the last 35 years, policy has aimed at destroying collective bargaining and our trade union rights, making it easier to hire and fire workers. With Labour’s leadership the most sympathetic to our cause for decades, and the Tories determined to tear us down with draconian laws like the Trade Union Act, now is the time for the labour movement to pull together to fight for a better future. The FBU wholeheartedly supports the Institute’s plan to turn the economy and the British workplace, around: providing a strong voice to workers and offering the UK a real opportunity to reduce the inequality that has sadly become endemic in our society’
Matt Wrack, General Secretary, Fire Brigades Union (FBU).

The TUC has called the expansion ‘an intrusion on union members’ privacy and their right to have an independent relationship with their union’