AN IER SUBMISSION

To the Ministry of Justice on the General Observations of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) 7th Report

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WRITTEN EVIDENCE FROM

INSTITUTE OF EMPLOYMENT RIGHTS

By

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The Institute of Employment Rights is an independent charity established in 1989. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER response, kindly drafted by the expert named, reflects the views of the author not the collective views of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

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1. Since the last periodic report, what are the areas you consider to have improved in the UK? (please provide specific examples, including jurisdictional region)

We refer to the 'Human Rights Tracker' of the Equality and Human Rights Commission that appears to find little evidence of sustained progress in the area of Economic, Social and Cultural Rights, or in human rights generally.

The Tracker finds no instances of 'Sustained Progress' in any of its monitored areas[1].
It finds just two areas of 'Moderate Progress', one of which concerns 'data gathering'. We feel unable to celebrate any progress in this area, for the reasons that are discussed in our commentary on blacklisting. Another area of 'Moderate Progress', according to the Tracker, is 'Access to Employment'. Similarly, for reasons we hope are clear from our analysis of the failed response to the blacklist scandal, we are equally unable to celebrate progress in this area.

We note several findings by the Commission of 'Limited Progress', including on 'Just and Fair Conditions of Work'. This is not an assessment we share, and we feel it is important to note that even though this is (apparently) an area of 'Limited Progress' it is still one in which the Tracker identifies:

- Persisting discriminatory pay gaps
- Bullying and harassment in the workplace 'remain widespread'
- Sexual harassment 'is prevalent in many workplaces'.
- Research on pregnancy and maternity-related discrimination at work 'found 77% of mothers experienced at least one potentially discriminatory or negative experience'
- There have been concerns about 'failures to ensure safe and healthy working conditions, including for pregnant women, those with long-term health conditions, and those working in frontline sectors such as health and social care (mainly women and ethnic minority employees) due to shortages and delays in sourcing effective Personal Protective Equipment during the early stages of the pandemic'.
- And a 'lack or denial of basic employment rights, such as sick pay [which] means many gig economy workers have had no choice but to continue working during the pandemic'[2].

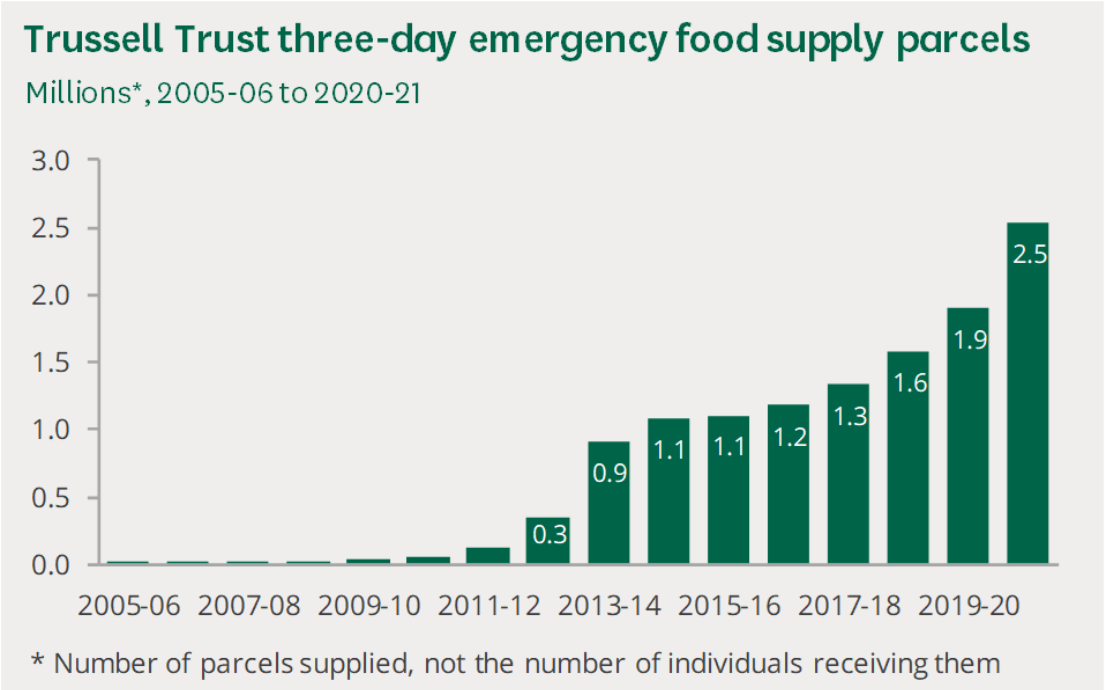
In the interests of providing some constructive contribution we note with interest the Government's commitment to 'levelling up' in society. While cautious as to what this will amount to in reality we welcome, in principle, the notion that 'levelling up' should occur.

[1] Human Rights Tracker, Equality and Human Rights Commission, at: https://humanrightstracker.com/en/overarching-progress/
[2] 'Just and Fair Conditions at Work' Human Rights Tracker, at: https://humanrightstracker.com/en/progress-assessment/just-and-fair-conditions-at-work-uk-government-assessment/

2. What are the areas the UK Government should be focusing on in its 7th periodic report?

In our assessment the UK has very significant work to do to achieve compliance with ICESCR rights across – broadly speaking – all areas regulated by the Covenant. Among these is the urgency of addressing significant problems with poverty, inequality and housing, among other areas. For an indication as to the severity of food poverty in the UK see the graph below (produced by the House of Commons Research Library and reproduced here), which highlights the vast growth of food poverty and emergency support in the UK. We urge the Committee to pay particular attention to the dates at which food bank dependency began. There is clearly a link to the 2008 financial crisis and the shocks to the economy and to employment, which that crisis heralded. But the real acceleration of food bank dependency in the UK actually began five years later in 2013, following the massive roll-out of the Government's austerity programme, when between 2010 and 2013 the Coalition Government 'claimed to have found £14.3bn of savings'[3].

Graph: Emergency Food Supplies in the UK 2005 – 2021[4]



We note that the above graph shows only Trussell Trust food banks. In February 2021 there were over 1300 Trussell Trust food banks in the UK 'in addition to over 900 independent food banks'[5].

3 R. Merrick, 'Chancellor Philip Hammond accused of more 'failed austerity' after demanding extra spending cuts before the election', The Independent (28 February 2017), at: https://www.independent.co.uk/news/uk/politics/chancellor-philip-hammond-latest-budget-spending-cuts-austerity-social-care-john-mcdonnell-a7603096.html

[4] Graph from G. Tyler, 'Food Banks in the UK', House of Commons Library (Research Briefing), at: https://commonslibrary.parliament.uk/research-briefings/cbp-8585/

[5] G. Tyler, 'Food Banks in the UK', House of Commons Library (Research Briefing), at: https://commonslibrary.parliament.uk/research-briefings/cbp-8585/

Notwithstanding the urgency of action on food poverty, inequality, and poverty generally, as well as numerous areas of Economic, Social and Cultural Rights, we nonetheless urge that must also be an emphasis on all areas of workplace rights, trade union rights and freedom of association, including the areas discussed in our response to Recommendations 38 and 39, below.

3. **Any views on the recommendations made by the Committee on Economic, Social and Cultural Rights. (please specify the recommendation(s) you are referring to**)

Our responses concern the Committee's recommendations in respect of trade union rights, specifically Recommendations Nos. 38 and 39, in respect of which there remain deep and continuing problems with UK law and practice, which have been exacerbated rather than remedied by recent developments, including the continuing and further implementation of provisions under the Trade Union Act 2016 and a grave failure to properly address, resolve or understand the extent of the problem of blacklisting, and an apparent strategy to avoid any proper investigation of the extent of State collusion that occurred during the blacklisting period (and potentially continuing).

> 38. The Committee notes with concern the recent adoption of the Trade Union Act 2016, which has introduced procedural requirements that limit the right of workers to undertake industrial action. The Committee is also concerned about the shortcomings in the implementation of the Employment Relations Act 1999 and its Regulation 2010, prohibiting blacklisting of trade union members (art. 8).
> 39. The Committee recommends that the State party undertake a thorough review of the new Trade Union Act 2016 and take all necessary measures to ensure that, in line with its obligations under article 8 of the Covenant, all workers enjoy their trade union rights without undue restrictions or interference. The Committee urges the State party to take all necessary measures to ensure the effective implementation of the Employment Relations Act 1999 and its Regulation 2010, which prohibit blacklisting of trade union members, and guarantee that all workers who have been blacklisted have access to effective legal remedies and compensation.

An outline of the restrictions to trade union rights prior to 2016

In post-War Britain, and to an extent also pre-War, industrial relations machinery at national and sectoral levels was extensive and collective bargaining and standard setting by various wages boards was very high. In 1946, it peaked at 86 percent, and remained steady thereafter, with a density of 82 percent being reported for 1980. From the 1980s this changed dramatically as the Conservative Government began a widespread programme of intervention in industrial relations. Bargaining and wage setting machinery was dismantled and collective bargaining density rapidly collapsed (current estimates are around 26 percent, most of which is in the public sector). The wages councils were abolished (even the lone surviving Agricultural Wages Board was abolished in 2013, although it persists in Scotland and Northern Ireland, and was re-introduced in Wales under devolved government powers).

As well as decimating collective bargaining machinery, the Conservative government from 1980 also began to enact an increasingly complex and far-reaching set of restrictions over the organization of industrial action, made possible in part due to the historic lack of a positive 'right to strike' and the conceptualization in law of trade union rights as a set of so-called 'immunities' from the ordinary principles of the common law. Balloting for industrial action became highly complex and expensive for unions. If a union fails to comply with any aspect of an increasingly sophisticated web of obligations the action can be restrained. The preferred strategy seems to be to arrest strike action by obtaining an injunction for non-compliance with seemingly trivial or technical aspects of the legislative prerequisites. Legislation outlaws strikes on any grounds other than a 'trade dispute', which restricts the grounds on which legal strikes can be held to core workplace issues. Where employees take strike action, they are inevitably in breach of their contract. This takes them outside of the typical employment law framework and places them at risk of dismissal unless their circumstances fall with the protection of a limited statutory scheme. Additionally, unions may be liable for damages for any losses suffered during a strike, unless the statutory 'immunities' apply.

A major concern of the existing legislation is thus the 'inordinate complexity of the statutory procedures', as the position was described by Mrs Justice Cox in the *British Airways* case[6]. The legislation includes detailed provision for notices of various kinds to be given to the employer, and ballots to be held in advance of industrial action taking place:

- unions in Britain must give *notice to the employer of their intention to hold a ballot* about industrial action, at least seven days before the ballot takes place (s. 226A of the 1992 Act);

- once the ballot is held the union has the additional duty of giving *notice of the ballot result* - this must be given to both the employer (s. 231A of the 1992 Act) and to all those entitled to vote (s. 231 of the 1992 Act);

- if thereafter the union decides to call industrial action it must give *notice of the industrial action* to the employer, at least seven days (now extended to 14 days, see below) before the action is due to start (s. 234A of the 1992 Act).

It is not just the number of notices that must be given that is an issue; there is also the question of the detail that each notice must contain. In order to comply with the statutory obligation to give *notice of an intention to hold a ballot*, the union must provide a list of the categories of employee to which those who are to be balloted belong and a list of the workplaces at which the employees concerned work (s. 226A(2A) of the 1992 Act) as well as the total number of employees concerned and the total number in each category and at each workplace (s. 226A(2B) of the 1992 Act). In the case of a national strike in the postal service, for example, the effect is that the notice to the employer may be

[6] British Airways plc v Unite the Union [2009] EWHC 3541 (QB)

several hundred pages long – in view of the large number of individual workplaces. The information provided '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 complies with [this obligation] (s. 234A(3D) of the 1992 Act).

Also important has been the duty to give *notice of the ballot result*, a simple requirement which has also been rendered needlessly complicated. For the obligation under s. 231 and 231A of the 1992 Act is not just an obligation to give information about the ballot result, but an obligation to inform members 'as soon as is reasonably practicable after the holding of the ballot', the trade union being required to 'take such steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed of the number of—(a) votes cast in the ballot, (b) individuals answering "Yes" to the question, or as the case may be, to each question, (c) individuals answering "No" to the question, or, as the case may be, to each question, and (d) spoiled voting papers'. In addition to the duty to inform members of the ballot result, the legislation (s. 231A of the 1992 Act) requires the union 'as soon as reasonably practicable after the holding of the ballot' to 'take such steps as are reasonably necessary to ensure that every relevant employer is informed of the matters mentioned in section 231' (that is to say the provisions relating to the ballot result). The same amount of detail must thus be provided to both employer and member.

The *notice of intention to strike* substantially reproduces the obligations relating to the duty to give *notice of the intention to ballot*. As with the industrial action notice, the ballot notice must provide a list of the categories of employee who will be called upon to take action, along with a list of the workplaces at which the employees concerned work (s. 234A(3A) of the 1992 Act); as well as the total number of affected employees and the total number in each category and at each workplace (s 234A(3B) of the 1992 Act). As in the case of notice of intention to ballot notices, an 'explanation' must be provided as to how the s 234A(3B) figures were arrived at, and also like the ballot notice (though not referred to above) where the union members have their union subscriptions deducted at source by the employer (a system known as the check off), the union may provide such information as will enable the employer readily to deduce the relevant numbers, categories and workplaces. This becomes a particular problem where the group of workers includes both check off and non-check off members. Although there are thus many identical provisions in the two notices, one important difference is that in contrast with the ballot notice (where for obvious reasons the information is not necessary), the industrial action notice requires the union to state additionally whether the action in question is to be continuous (such as an indefinite strike) or discontinuous (such as strikes to be held on particular days), see s. 234A(3)(b) of the 1992 Act.

The demand for precise and specific information to be supplied over and over during the prelude to industrial action is presented as an attempt to improve democratic accountability and the supply of information. Its real impact – and purpose – has been to supply employers with opportunities to

litigate every minor infraction so as to achieve an injunction, thus preventing the strike from taking place.

Alongside the far-reaching framework that has tied industrial action balloting in knots the government from the 1980s also sought to impose a framework of control over trade unions in the guise of democratic accountability. These actions included the introduction of statutory rights of the members as against the union in respect of internal decision-making, accounting, discipline, balloting, etc. To support this framework a project was developed to advocate for the rights of trade union members as against the union in the form of the Commissioner for the Rights of Trade Union Members ('CRTUM'). The Labour Government abolished this post with effect from 25th October 1999 under the Employment Relations Act 1999, although a limited framework of regulatory powers were transferred to the Certification Officer. As will be seen below, the Trade Union Act 2016 seems to want to re-invigorate 'CRTUM'-style powers by handing more investigatory responsibilities to the Certification Officer along with extensive reporting obligations imposed on trade unions, including now rights for the initiation of complaints by third parties.

The Trade Union Act 2016

The Trade Union Act 2016 introduced significant changes to the Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act) and laid the foundations for further implementing Regulations. The Trade Union Act 2016 was regarded by many trade unionists as a double-fronted attack on trade union rights, attempting to make it either 'extremely difficult' or 'impossible' for workers to engage in lawful industrial action, while also attempting to starve the trade unions and the wider labour movement of funds. A further aspect of the Act introduces powers that tie-up trade union administrative and regulatory functions in unnecessary and costly bureaucratic knots. Seven years on from the description, by a sitting judge, of the 'inordinate complexity of the statutory procedures'[7] for industrial action ballots, the complexity was deliberately exaggerated by the demands of the 2016 Act, which restricted ordinary aspects of workplace trade unionism, interfered with union funding, and introduced still further limits on trade union strike ballots, industrial action and picketing. Amongst its measures, the Act:

- Required that employers in the public sector (and some private sector employers that provide public services) have to publish information on 'facility time' such as the amount of paid time off for union duties and activities. Under new Section 172B of the 1992 Act the Trade Union Facility Time Publication Requirements Regulations 2017 were introduced and require that public sector workplaces employing more than 49 people now need to collect, report and publish data on:
    - the total number of union reps employed
    - The number of full-time equivalent reps

[7] British Airways plc v Unite the Union [2009] EWHC 3541 (QB)

- The total amount spent on facility time
- The percentage of the total pay bill used on union facilities
- What proportion of facility time is used for union activities
- And a measure that seems designed to produce exaggerated results, being a requirement to select from four pre-scripted options to specify the number of reps who spend: zero percent, 1-50 percent, 51-99 percent and 100 percent of their work time on paid facility time. These brackets deliberately conflate anything above zero with up to 49 percent, while anything above 50 is bracketed alongside an answer of up to 99 percent.

- By amendment to Section 234A of the 1992 Act extended the requirement for unions to give notice of industrial action to a period of fourteen days. It was previously 7 days (an employer can still agree to accept a 7 day notice period).

- Also by amendment to Section 234 of the 1992 Act, strike authorisation granted by a ballot now expires after six (or, by agreement with the employer, nine) months. This requires that unions comply with all of the complexities of the system again (and its costs, and the potential for legal challenge - which arises at numerous stages of the balloting process) to organise follow-up ballots in the event of a protracted dispute.

- By amendment to Section 229 of the 1992 Act unions now have to include additional information on ballot papers, including a description of the trade dispute and the planned industrial action.

- By amendment to Section 231 of the 1992 Act there is a new requirement for unions to report information about ballot results to members and employers. These cover
  - the number of individuals who were entitled to vote in the ballot,
  - the number of votes cast in the ballot,
  - the number of individuals answering "Yes" to the question, or as the case may be, to each question,
  - the number of individuals answering "No" to the question, or as the case may be, to each question,
  - the number of spoiled or otherwise invalid voting papers returned,
  - whether or not the number of votes cast in the ballot is at least 50% of the number of individuals who were entitled to vote in the ballot, and
  - where section 226 (2B) applies, whether or not the number of individuals answering "Yes" to the question (or each question) is at least 40% of the number of individuals who were entitled to vote in the ballot.

The purpose of much of the above appears to be complexity for the sake of complexity. The requirements place an unnecessary bureaucratic burden on unions and open up still further grounds where employers might seek to challenge a technical failure as grounds for an injunction, which would have the result of restraining action from taking place.

- By amendment to Section 32 of the 1992 Act a requirement to report annually to the Certification Officer on any industrial action taken.

- Most controversial is an amendment to section 226 of the 1992 Act, under which a new voting quorum – a fifty percent turnout – is now required among all who are *entitled* to vote. This applies in respect of all ballots authorising industrial action. But in 'important public services' (under new sub-section 2B-E - and these are defined as health, transport, education, border security and fire) not only is a majority needed in the ballot, but 50% of all who are entitled to vote must vote, and 40% of all who entitled to vote must vote 'Yes', otherwise industrial action will not be authorised. Therefore, in these specific sectors, if 100 members are balloted, a minimum of 50 must actually vote and of these at least 40 must vote 'Yes' for there to be a valid mandate. And of course, in addition to these thresholds, the majority of those actually voting must still win the vote.

- By amendment to Section 219 and 220 of the 1992 Act a 'picket supervisor' must also now be appointed. Unions (or the supervisors) must tell the police where a picket will be held, the name of the supervisor and how they can be contacted. Picket supervisors must:
    - Be a union official or member.
    - Be familiar with the Code of Practice on Picketing.
    - Carry a letter which confirms the union approves the picket.
    - Show the letter to the employer or their representative (e.g. managers or security staff) if asked.
    - Remain at the picket or be able to return at short notice.
    - Be easily contactable.
    - Wear something that identifies them (e.g. a hi-vis jacket).

The obligations place further bureaucratic responsibilities on those organising industrial action.

- The Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017 came into force on 10 March 2018 and place a new encumbrance on payroll deductions of union dues (known as 'check-off'). Under a new Section 116B of the 1992 Act these are now only permitted in the public sector so long as unions cover

'reasonable' administrative costs and members are also given the option to pay by other means (e.g. direct debit).

- Under a revised Section 84 amending the 1992 Act new members joining from 1 March 2018 will need to specifically 'opt in' to support a union's political funds. The default position is that trade unions will no longer be able to collect funds from new members to use for any political purpose. Further information on the right and process to 'opt out' from such contributions must be provided to members on an annual basis.

- Unions were already required to comply with the Political Parties, Elections and Referendums Act 2000 when campaigning or making political donations, but the effect of the Trade Union Act 2016 is to tied them up with even more 'red tape' and makes unions subject to more scrutiny than any other civil society group. By inserting a new Section 32ZB into the 1992 Act unions are now required to include with their annual report to the Certification Officer information about spending from the political fund on:
    - Political party donations, including funding for any events or meetings.
    - Publicity designed to influence people to vote a certain way.
    - Non-political campaigns.
    - Donations to charities and campaign groups. Unions will need to gather the information from branches, and regional and national offices.

New powers under the Trade Union Act now further threaten trade union rights

In June 2021, the Government announced plans to implement Sections 17, 19 and 20 of the Trade Union Act 2016, extending the powers of the Certification Officer. The three major changes will extend the role and powers of the UK's trade union regulatory office and include: a levy placed on trade unions to fund the Certification Officer's costs (Section 20); activation of the power of the Certification Officer to levy fines for breaches of trade union legislation (Section 19); and a power to investigate third party complaints about unions by members of the public and third party organisations (Section 17). The Officer will have the ability to apply financial penalties of up to £20,000 and will be funded by a levy on the organisations it oversees, set to come into force in April 2022. The Government claims that the levy is 'affordable', and states that it will be capped at 2.5% of a union's annual income.

The Conservative Government has claimed that the move will see the regulator 'modernised to uphold high standards across the sector and provide reassurance to union members' and boasts that the new Section 17 powers mean that 'the Certification Officer will be able to respond when a third party raises concerns that a union or employers' association may have breached its statutory duties'. But these powers raise concerns due to the potential for abuse by third parties hostile to trade unions on ideological grounds and entail a real risk of tying up trade unions with time-consuming and

expensive investigations prompted by outside organisations (which may include right-wing pressure groups) potentially forcing trade unions to waste time, energy and resources defending vexatious investigations that have no merit. In this regard, the Section 17 power echoes powers proposed under Australia's controversial Fair Work 'Integrity' legislation (proposed in 2019 but defeated in the Senate).

The Government consultation into the extension of these powers received 15 responses to the consultation from the TUC and from other trade unions[8]. Revealingly 'no businesses, employers' associations, other organisations, or individuals responded to the consultation'[9]. Responses from unions were highly critical, summarised as 'strongly opposed to the reforms to the role of the Certification Officer as a whole as these represent a serious intrusion into the internal affairs of trade unions by the state' and 'The reforms, and in particular the extension of the Certification Officer's investigatory powers, do not comply with international obligations as the Certification Officer will be too powerful and able to act as the complainant, investigator, prosecutor, and judge in contravention of international obligations, including Article 6 of the European Convention on Human Rights (ECHR)'[10]. The TUC has argued strongly that there is no basis for these measures to be implemented, and that trade unions have a good record of compliance with statutory obligations, and raised the following further specific concerns:

- The Certification Officer will have access to confidential information (e.g., membership records), which the TUC argued would breach privacy rights.
- There should be guidance that financial penalties will be used in exceptional circumstances only and unions should be consulted on the guidance before final regulations are laid in Parliament.
- The six-week consultation period on financial penalties was insufficient.
- There was no impact assessment provided in the consultation; and
- The proposed level of penalties is disproportionate. The Government should reduce the minimum and maximum penalties which can be applied by the Certification Officer.

The Government, broadly speaking, dismissed these concerns – without any apparent concession to the fact that the *only* parties who had responded to the consultation *universally opposed it*[11]. Who is this new penalty regime supposed to be helping?

The financial burden of these new powers also needs to be recognised, irrespective of any findings of wrong-doing. The Trade Union Act Impact Assessment (the Act IA) estimated that for all the Certification Officer reforms, there would be a transitional cost to unions of £548,000

[8] Consultation on the Certification Officer's Enforcement Powers: Government response, Department for Business, Energy and Industrial Strategy (June 2021), at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991739/certification-officer-enforcement-powers-consultation-govt-response.pdf

[9] Consultation on the Certification Officer's Enforcement Powers

[10] Consultation on the Certification Officer's Enforcement Powers

[11] Consultation on the Certification Officer's Enforcement Powers

(familiarisation and legal advice)'. Without acknowledging any imbalance the next sentence in the report blithely continues, 'The transitional cost for employers' associations is £2,400'[12]. The Impact Assessment also set out that 'there would be annual on-going cost of around £36,000 to trade unions from dealing with additional investigations'[13].

The Government is fully aware that these regulations impose financial costs on unions simply due to the expense entailed in familiarising their operations with the new obligations, but seems completely unconcerned that these costs are estimated at five times the anticipated level of fines that might be imposed in the event that any infractions are discovered, 'The costs to trade unions associated with familiarisation with the financial penalties' regime are anticipated to be […] below £500,000', which figure the Government cheerfully dismissed as 'low'[14]. So, half a million pounds will be needed to protect unions from accidentally falling foul of a new range of financial penalties that are not needed, that no-one is asking for, and that purport to resolve a problem that does not exist. Even the Government recognises that the compliance costs for unions are going to be far in excess of even the maximum penalties that might be imposed even if substantial and significant breaches were found

> In the unlikely event that all breaches being subject to the maximum penalty allowed for the type of breach and the membership size of union we estimate that around £45,000 would be imposed as penalties on unions on average on an annual basis. This is based on the Certification Officer's declarations of non-compliance over the past five years. This could rise with the introduction of the Certification Officer's proactive investigatory powers. However, even if these are concentrated on larger unions and most serious potential breaches, and penalty maxima are applied for each breach, we estimate that on average penalties imposed would not be greater than £105,000 a year[15].

TUC General Secretary Frances O'Grady has said

> These reforms are based on politics rather than the real problems working people face. They will hit unions with expensive new levies – that's money straight from the pockets of care workers, nurses and supermarket staff. And unions will have to spend more time dealing with baseless complaints. Ministers should be working with unions to improve working lives – not looking for new ways to undermine us[16].

UK law not in accordance with Freedom of Association

The provisions of the ICESCR

There are a number of aspects of the existing UK legislation that fail to conform to Article 8 of the ICESCR Covenant, specifically Article 8 'The right of everyone to form trade unions and join the trade union of his choice', and '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

[12] Consultation on the Certification Officer's Enforcement Powers
[13] Consultation on the Certification Officer's Enforcement Powers
[14] Consultation on the Certification Officer's Enforcement Powers
[15] Consultation on the Certification Officer's Enforcement Powers
[16] TUC slams government for "trying to tie unions up in red tape", TUC (8 June 2021), at: https://www.tuc.org.uk/news/tuc-slams-government-trying-tie-unions-red-tape

national security or public order or for the protection of the rights and freedoms of others', and 'The right to strike'. The systematic undermining of collective bargaining, the inordinate complexity of the strike legislation (particularly the number and precision of procedural and technical prerequisites required), the weight of bureaucratic burden placed upon trade unions, and the interference in the right of trade unions to raise their owns funds and to decide freely how to allocate these funds to political purposes all violate Article 8 of the ICESCR. In all of these areas the Trade Union Act 2016 and the latest extension of those provisions constitute further and on-going restrictions of ICESCR rights.

> ***Article 8***
> 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.

ILO Freedom of Association provisions

A brief survey of findings from the ILO's Committee on Freedom of Association and reference to instruments ratified by the UK illustrates how the various restrictions outlined above are incompatible with respect for international standards on freedom of association:

- **Strike technicalities**

The technicalities imposed by the UK's strike legislation are far too demanding and complex. The ILO's Committee on Freedom of Association has stated clearly that 'The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations' (*Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, ILO, 6th Edition, 2018[17], para. 789), and that 'The legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike' (*Freedom of Association*, para. 790). 803. The information asked for in a strike notice 'should be reasonable, or

[17] Hereafter '*Freedom of Association'*

interpreted in a reasonable manner, and any resulting injunctions should not be used in such a manner as to render legitimate trade union activity nearly impossible' (*Freedom of Association*, para. 803).

Although the ILO has accepted in certain cases that notice periods may be required, 'The obligation to give prior notice to the employer before calling a strike may be considered acceptable, as long as the notice is reasonable' (*Freedom of Association*, para. 799 – and see *Freedom of Association*, para. 801-802) it has indicated that this ought to be a mechanism to 'enable both parties to come once again to the bargaining table and possibly to reach an agreement without having recourse to a strike' (*Freedom of Association*, para. 802), rather than simply a blunt delaying tactic. Perhaps a better insight is the Committee's position on what might constitute an appropriate notice period 'Prior notice of 48 hours is reasonable (*Freedom of Association*, para. 800).

- **Thresholds and quorum for industrial action**

The thresholds and requirements for a certain quorum of voting to take place in order to authorize a lawful strike are too high. The Committee has explicitly described as 'excessive' the requirement for a 50 percent threshold, 'The requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises' (*Freedom of Association*, para. 806). The Committee further argued that 'The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult, especially in the case of unions which group together a large number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike (*Freedom of Association*, para. 807), and the Committee has 'requested a government to take measures to amend the legal requirement that a decision to call a strike be adopted by more than half of the workers to which it applies, in particular in enterprises with a large union membership (*Freedom of Association*, para. 809).

- **Restrictions on trade union funds**

The restrictions placed on both the mechanisms for the collection of funds including through 'check-off' deductions appears also to be clearly in breach of positions set out by the ILO, with the Committee observing that, 'The withdrawal of the check-off facility, which could lead to financial difficulties for trade union organizations, is not conducive to the development of harmonious industrial relations and should therefore be avoided' (*Freedom of Association*, para. 690), and that, 'The deduction of trade union dues by employers and their transfer to trade unions is a matter which should be dealt with through collective bargaining between employers and all trade unions without legislative obstruction' (*Freedom of Association*, para. 701).

The Committee has also raised concerns about excessive reporting obligations placed on trade unions, 'The control exercised by the public authorities over trade union finances should

not normally exceed the obligation to submit periodic reports. The discretionary right of the authorities to carry out inspections and request information at any time entails a danger of interference in the internal administration of trade unions' (*Freedom of Association*, para. 711).

The limitations placed on the right of unions to utilize funds for political purposes without interference similarly flag concerns with the ILO positions, 'Provisions which restrict the freedom of trade unions to administer and utilize their funds as they wish for normal and lawful trade union purposes' (*Freedom of Association*, para. 683) and 'Provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes for normal and lawful trade union purposes' (*Freedom of Association*, para. 706) are both 'incompatible with the principles of freedom of association' (*Freedom of Association*, paras. 683 and 706).

- **Duration of a strike**

The Committee has expressed its concern 'at the imposition of a limit on the duration of a strike which, due to its nature as a last resort for the defence of workers' interests, cannot be predetermined' (*Freedom of Association*, para. 815).

- **Essential services**

While the Trade Union Act does not completely ban strikes in any sectors it does significantly 'restrict' the possibility of industrial action within a range of 'important public services'. It is necessary to point out both that even where the ILO does permit limitations on the right to strike, extensive compensatory measures are required to be put into effect, and that some of the groups whose rights are restricted under the Trade Union Act 2016 are emphatically not essential service workers, 'The following do not constitute essential services in the strict sense of the term' 'transport generally, including metropolitan transport' (*Freedom of Association*, para. 842) and '…the education sector does not constitute an essential service…' (*Freedom of Association*, para. 844).

- **Facility time**

ILO Convention 151 has been ratified by the UK. Article 6 of that instrument states that 'facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently' and that 'The nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means'. Article 7 states that 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters'. Thus, under international obligations accepted by the UK concerning freedom of association – and specifically in the public services – the appropriate mechanism for the

determination of trade union facility time is collective bargaining. The interference with trade union facility time established by the Trade Union Act 2016 is in violation of the Convention 151 framework, which is a binding commitment under international law that has been accepted by the UK government.

ICESCR blacklisting: whether effective steps have been taken to prevent blacklisting and to secure justice for the victims of blacklisting?

In 2009 an extraordinary scandal unfolded as evidence was uncovered of a vast blacklisting operation in the construction industry by an organisation called the Consulting Association, which acted on behalf of multinational companies in the sector. The Consulting Association had been running for years and had collected huge databases of information on thousands and thousands of individual construction workers, cataloguing both public and private information, including some information that victims believe was supplied by police or security services. Companies paid to carry out searches on individuals prior to hiring them, running tens of thousands of such searches each year to screen out union activists. Extensive litigation has been proceeding as the victims have attempted to obtain redress for the unlawful intrusion into their lives and for the destructive impact of anti-union discrimination which left many of them unable to work in their industries.

The Employment Relations (Blacklisting) Regulations 2010 came into force 2 March 2010 and establish a general prohibition (Article 3, subject to a limited range of exceptions under Article 4) against the compilation, use or supply of a 'prohibited list', this being a list that 'contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions'. The Regulations cover refusal of employment (Article 5) or access to the services of employment agencies (Article 6). They provide protection against detriment (Article 9) or unfair dismissal (Article 12), and establish a cause of action for breach of statutory duty (article 13) in relation to the general prohibition under Article 3.

The TUC broadly welcomed the new Regulations but the civil law regime established was seen as a very significant climb down from an earlier proposal that would have made blacklisting a criminal offence. Continuing concerns were raised at the 2010 TUC Congress, which adopted a decision calling 'on the General Council to mount a campaign to ensure that new legislation is introduced to ensure that the disgusting practice of blacklisting is stamped out once and for all'[18]. The TUC Congress Decision said new legislation should include:

- blacklisting becoming a specific criminal offence
- protection for workers undertaking unofficial industrial action

[18] Congress Decisions 2010, at: https://www.tuc.org.uk/research-analysis/reports/congress-decisions-2010

- protection from blacklisting for workers undertaking 'activities associated with trade unions' and not the narrow definition of 'trade union activities'
- an automatic right to basic compensation for any blacklisted worker
- an automatic right for any worker to be informed, should a blacklist be discovered on which their name appears.

So far there is little sign of any new legislation to implement these further demands raised by the unions.

In *Blacklisting: the need for a public inquiry*[19], Dave Smith explains the nuanced reasons why many of the blacklisted workers from the construction industry scandal continue to feel let down by the system, despite apparent victories comprising: a settlement and a formal apology in the High Court case; an inquiry held by the Scottish Affairs Select Committee; and the adoption of a statutory prohibition against future blacklisting in the form of the Regulations. The failure of the Employment Tribunal system to protect their interests has been another source of rancor. In summary these concerns amount to the following sources of frustration:

The High Court settlement was certainly welcome both in terms of providing some financial redress and for the public statement that was made that admitted the companies' participation in the scandal. However, many of the victims felt that the companies had used a legal mechanism to evade a full hearing in open court that would have forced senior executives to answer real questions under pressure and that would have therefore brought greater insight and more revelation of the truth concerning what had taken place. And there remains a feeling that a judgement against the blacklisters would have been a more satisfactory victory. There was no doubt among the complainants that they would have won their case, but when the defendants offered a 'Part 36' settlement, the victims were advised by their own lawyers to accept the settlement.

As Dave Smith writes

> Many of the activists who spent years campaigning on the issue would have happily foregone some of their compensation for the chance to see the directors of the multinational companies give evidence under oath in a court of law. Unfortunately, this never happened[20].

The claimants' lawyers advised the claimants against an insistence on 'having their day in court' as this would have placed them at risk of liability for the defendants' legal costs, which would have been vastly beyond the means of the complainants. The claimants feared that they would 'risk bankruptcy'[21] if they proceeded, facing legal fees 'far higher' than any compensation they might expect to secure (and for which they might be liable *even in the event of victory*, if final compensation was equal to or lower than the settlement originally offered). This situation is an ordinary consequence of the Part 36 settlement process, which was intended to provide for the

[19] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[20] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[21] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)

speedy settlement of complaints, however, as Dave Smith notes, it is a system that can 'allow mega-rich companies to effectively buy their way out of a court case. This does not just have implications for blacklisted workers, but also affects every civil case brought to expose wrongdoing by large corporate interests'[22].

The Scottish Affairs Select Committee was not a Public Inquiry. The Committee itself is recognized by many as something of a high point in that it is the closest the case ever came to a public inquiry. Dave Smith called this episode 'One of the few examples of the British state apparatus actually fulfilling its duties to its citizens' and 'the only time the main actors in the blacklisting scandal were asked to account for their actions'[23]. However, the Committee hearings were not equivalent to a public inquiry. 'On numerous occasions', Smith recounts, one of the Directors of a company complicit in the blacklisting 'refused to answer questions that may have been incriminating in the then upcoming High Court action'[24]. This was 'repeated by others giving evidence'. The Select Committee was unconvinced that these witnesses 'were telling the truth, the whole truth and nothing but the truth, despite being under oath'[25]. Blacklisted workers, campaign groups, and trade unions continue to support calls for a proper Public Inquiry.

The 2010 Regulations are 'toothless'. The Regulations do provide a legal framework for the prohibition of blacklisting, but it was not one that met with approval from many blacklisting victims. Dave Smith described the Regulations as 'toothless'[26]. His fellow campaigners are unimpressed with the scale of ambition which the Regulations represented. They had campaigned for blacklisting to be made a criminal offence and for the regulatory and investigatory powers of the State to be brought to bear on anyone suspected of committing the offence. What they got instead was a civil liability regime under which the obligation to uncover evidence of blacklisting and to bring a legal challenge lies with the victim. Ordinary workers subjected to blacklisting, they quite rightly claim, have far less legal capacity to deal with the problem of blacklisting, they have fewer investigatory powers, less capacity to uncover evidence, and just generally less power than a formal State-backed criminal law regime. To add insult to injury, Dave Smith has described the minimum rate at which the compensation regime begins as 'insultingly low'[27].

The Employment Tribunal cases. Hundreds of Employment Tribunal claims were submitted, all within the standard three-month timeframe for the submission of an employment tribunal claim. This was done, however, within three-months of the blacklisted workers receiving their blacklist files from the Information Commissioner, which was regarded as not within time by the tribunals. One victim submitted his claim

[22] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[23] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[24] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[25] Scottish Affairs Select Committee, Blacklisting in Employment: interim report, 26 March 2013, as cited in *Blacklisting*
[26] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[27] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)

> a mere 11 weeks after receiving his TCA documentation from the ICO. The Pre-Hearing Review ruled that the claim was 'presented out of time and the time will not be extended' explaining that the construction worker with no legal training had 'sat on his hands for too long'[28].

Only a handful of cases overcame the three-month limitation, but to no avial. Further setbacks came as the tribunal ruled that employment arrangements made via a subcontractor and an agency frustrated any remedy that might have existed. The decision in Smith v Carillion states

We have reached our conclusions with considerable reluctance. It seems to us that he has suffered a genuine injustice and we greatly regret that the law provides him with no remedy[29].

State collusion and the 'SpyCops'. The blacklist victims have long argued that many of the statements entered onto their files could only have been supplied by the police or other state security and intelligence agencies. And not only did it appear that police were supplying information to the blacklist, but they were apparently receiving information *from it*. As a report in *The Times* put it, a 'two way exchange of information' was established between the political policing unit and the blacklisting operation[30]. At the same time as the blacklisting conspiracy was unfolding, another major scandal led to the Undercover Policing Inquiry (UCPI) also known as the 'SpyCops' Inquiry, prompted by public outrage at emerging evidence around the activities of undercover police and their use of tactics that included entering into long-term relationships with activists. Police spying on trade unionists is not new – in the 1970s the Special Branch Industrial Unit appears to have had a specific remit to do so. But as evidence emerging piecemeal from the blacklist scandal and the ongoing SpyCops Inquiry suggests these practices appear to have continued and may well still be continuing. The outrage for the blacklist victims and for many trade unionists who share their concern is that not only has there been no Public Inquiry into the blacklist, not only was the High Court action settled (thus preventing cross examination of witnesses in open court), but the SpyCops Inquiry (which is, at least) taking place, has expressed an intention to limit the scope of its investigation into police surveillance of trade unionists

> My Instructing Solicitors have sought further disclosure in relation to the files, the existence of which have been revealed by this document. On 19 October the Inquiry team responded and included the following statement: 'We do not hold Special Branch Registry Files and are not investigating Special Branch interest in Trades Unions – only reporting on them by SDS undercover officers, according to the Inquiry's terms of reference'[31].

To add insult to injury the Covert Human Intelligence Sources (Criminal Conduct) Bill was apparently rushed through – while the SpyCops Inquiry was underway – with the aim of giving multiple new strands of legal protection to those involved in conducting 'covert human intelligence', that is to say protecting, from public scrutiny and from liability in law, the individuals known as 'SpyCops', before the 'SpyCops' Inquiry has completed its (already limited) investigations.

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[28] Smith, D. and Just, A. *Blacklisting: the need for a public inquiry*, IER (2017)
[29] Smith v Carillion (19 March 2012)
[30] B. Kenber, 'Police were briefed on industry extremists and bad eggs', *The Times* (23 January 2013)
[31] Opening Statement By Lord Hendy QC on behalf of Fire Brigades Union and Unite the Union, Undercover Police Inquiry 6 November 2020, at: https://www.ucpi.org.uk/wp-content/uploads/2020/11/20201104-Opening_Statement-FBU_Unite-AMENDED.pdf

UK law not in accordance with Freedom of Association

The provisions of the ICESCR

The extensive practice of blacklisting now known to have taken place in the UK raises significant concerns with respect to the country's compliance with the ICESCR Covenant, and fails to respect fundamental aspects of workers' rights, including most notably Article 6 'the opportunity to gain his living by work'; Article 7 'the right of everyone to the enjoyment of just and favourable conditions of work', 'A decent living for themselves and their families', 'Equal opportunity for everyone to be promoted in his employment'; Article 8 'The right of everyone to form trade unions and join the trade union of his choice', and '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'. Each of these principles was systematically violated by the blacklist. The failure to hold a full public inquiry, the frustration of attempts to interrogate evidence in open court, the failure to criminalise the practice of blacklisting, creating only an individual civil law mechanism, and the enactment of new powers to further restrict public awareness and to protect SpyCop secrecy all constitute continuing failures to properly remedy the situation and thus to respect the rights granted under the Covenant.

> ***Article 6***
> 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

> ***Article 7***
> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:
> (a) Remuneration which provides all workers, as a minimum, with:
> (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
> (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
> (b) Safe and healthy working conditions;
> (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
> (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

> ***Article 8***
> 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;

(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

ILO Freedom of Association provisions

The ILO's Committee on Freedom of Association has made clear its view that the practice of blacklisting is completely incompatible with respect for international standards on freedom of association, 'The establishment of a register containing data on trade union members does not respect rights of the person (including privacy rights) and such a register may be used to compile blacklists of workers' (*Freedom of Association*, para. 273). The CFA has added even more assertively that, 'All practices involving the blacklisting of trade union officials or members constitute a serious threat to the free exercise of trade union rights and, in general, governments should take stringent measures to combat such practices' (*Freedom of Association*, para. 1121).