Reconstruction after the Crisis:

Repaying the Nation's Debt to our Workers

A paper from the Institute of Employment Rights on the future of labour law

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The COVID-19 crisis has proved what a number of labour lawyers connected with the Institute of Employment Rights have been saying for years: labour law (the law of the workplace) in the UK is not fit for purpose. Indeed, labour law can now be seen to have almost totally failed in its ostensible primary purpose of protecting and empowering workers. It has failed to protect workers' jobs, incomes and their health and safety. In particular, our labour laws have failed to ensure that workers have the right to be heard in the determination of the conditions under which they work.

In the reconstruction after the COVID-19 crisis a transformation of labour law must be an essential element, both for workers and for the economy. Given the prospect of a decline in GDP of 30% (Bank of England) or 35% (Office of Budget Responsibility) and post-pandemic unemployment estimated at between 2.95 million (BoE) and 3.36 million (OBR), the transformation of labour law is essential if the working class is not to be reduced to penury.

Background

There is an inherent imbalance of power at the workplace between the worker and the employer. This is recognised even by the courts. The history of the labour movement

has, in large part, been a struggle to put in place laws which redress this imbalance of power. Some of these laws operate by direct effect (banning slavery and child labour, prohibiting payment in kind, limiting hours of work, providing remedies for injury, disease and death at work, unfair dismissal, redundancy and so on). Other laws achieved by labour movement struggle operate indirectly: for example, by overriding laws which would otherwise make all trade unions and all industrial action unlawful.

In addition to the laws which protect workers and permit their empowerment, there are policies and administrative measures which governments can use to achieve their objectives. Thus, for example, it was largely by the use of public procurement, persuasion and influence (though there were laws as well) that successive governments ensured broad coverage of collective bargaining for most of the twentieth century. Naturally the labour movement had had a big role in pressing the State to use such policies.

Were it not for the capacity to exercise collective power by workers, together with the restraints imposed on employers by labour laws, a free 'labour market' would inevitably result in the most intense exploitation of and profit extraction from labour.

Over the last 200 years or so, capitalism has accepted many of the constraints on the exploitation of labour. Invariably such acceptance followed initial resistance, followed by attempts at mitigation. No-one now suggests the removal of the legal prohibition on slavery or argues for the repeal of the legislation against child labour (though many end-users in some industries appear content to accept the use of bondage and child labour in their supply chains).

Indeed, there was a sort of unsteady balance of power at the workplace during most of the twentieth century, especially after the Second World War. Though it was significantly tilted against workers, this fluctuating accommodation was destroyed by the advent of neo-liberalism given free reign by the Thatcher and Reagan governments. The scales became seriously weighted against the protection and empowerment of workers. Rights were diminished, enforcement mechanisms defunded, managerial prerogative reinforced, trade unions excluded from any role in the State, and the power to bargain collectively and to strike was subjected to

systematic destruction. This process was not reversed in the 13 years of Labour government and, in the decade since 2010, the attack, under the flag of austerity, has been ruthlessly renewed, as the COVID-19 crisis so starkly reveals.

The consequence of the removal of legal and collective protections for the vast majority of workers was that, before the crisis, their job security, pay, hours, terms and conditions of work were almost exclusively in the hands of the employer on a take it or leave it basis.

The pandemic has illuminated the point. It revealed to many the remarkable and otherwise forgotten irony that some 7 million 'key' workers, essential to maintain the fabric of society, are (doctors excepted) amongst the worst paid and least legally protected of the entire workforce. Too often they suffer from poor terms and conditions, precarious legal status, insecure and unpredictable hours, income and jobs, and lack of protection of their health, safety and wellbeing. Despite the vital role they play (and their dignity and bravery), labour law has wholly failed to achieve for them decent terms and conditions, health protection and security of work. The contrast between their critical role and the terms and conditions under which they work reveals the irrational and unjustifiable nature of the so-called 'labour market' in which working people are no more than disposable commodities, 'human resources'.

The economic crisis now unfolding shows the extent of workers' powerlessness. Workers are dumped and wages slashed even in well-organised workplaces such as British Airways ('a national disgrace' as the Transport Select Committee described BA's conduct). The failure of labour law has never been so starkly visible. Some facets of this failure are considered briefly below.

The failure of labour law – industrial democracy

To the European labour lawyer the most striking feature of the labour law landscape in the UK is the almost total absence of any mechanisms by which worker voice is entitled to be heard in industrial relations at the workplace.

Apart from the minimal effect of the statutory recognition procedure, the law since 1980 has been stripped of the supports for collective bargaining as Conservative governments reversed what had been the accepted policy of the State from (at least) 1909 to Mrs Thatcher's election in 1979. The many restrictions on trade union action successively imposed since then have also undermined collective bargaining. In consequence, the proportion of workers covered by a collective agreement from 80% plus in the period from the Second World War until 1979, thereafter steadily declined to less than 25% coverage today.

Even where collective bargaining continues, it has been widely undermined. In the public sector, where collective bargaining has most coverage, government has refused to bargain over pay, instead imposing pay caps or Pay Review Bodies to determine wages. In the private sector, firms that used to follow national sectoral agreements now set their own terms and conditions, so that collective bargaining in non-publicly owned business is no down to 13%.

In the result collective bargaining has largely collapsed and young people have lost even the folk memory of it. There is no industrial democracy outside the few remaining islands of collective bargaining. There is no legislation requiring workers on boards despite the promise of Mrs May. There are few co-operatives. In the discussions about reconstruction the request of the TUC for the formation of a National Council with unions, employers and government working together has been ignored.

The failure of labour law – health and safety at work

The abject failure of the law to protect the health, safety and lives of workers in the pandemic is evident to all. Scores of essential workers have lost their lives to COVID-19 and thousands of others have become infected. Yet it remains the statutory duty of employers to ensure adequate protection for the life and health of workers in all occupations, and the duty of the State to ensure that this obligation is met. The obligations to provide adequate personal protective equipment, to maintain a safe

place of work, to make risk assessments and to report illness and injury caused by work are not merely statutory duties but are backed by criminal liability. Yet, through the crisis, employers and government have treated what are clear legal duties as no more than matters of good practice which can be ignored with impunity. The powers of the Health and Safety Inspectorate and Local Authority Environmental Health Officers in their respective spheres of responsibility are well established but their resources have been so badly cut that they are unable to enforce the law.

The failure of labour law – job security

Labour law has also failed to provide workers with security of employment. Research by the TUC found that, before the crisis, 3.7 million people – one in nine of UK workers – were in insecure work. These included people on zero-hours or short-term contracts, agency workers and temporary casuals, those in low-paid, often bogus, self-employment, and those obliged to employ themselves through personal service companies. The number of workers on zero hours contracts alone increased from 168,000 in 2010 to 900,000 in 2019. The growth of casual work has reinforced existing social inequalities, since casual workers are more likely to be young, female, to identify as non-white and to be on low pay.

It is not the technology of the gig economy that has driven casualisation but rather employers seeking to exploit the gaping cracks in the law on employment status in the UK so as to avoid the obligations to their workforce which follow from permanent employment. The law has spectacularly failed to keep pace with the ingenuity of the 'armies' of employers' lawyers who have modified worker contracts with the avowed intention of avoiding statutory obligations. Employer's costs are kept down by paying the worker only for the hours (or even minutes) when she is actually working whilst avoiding all liabilities when the worker is not required.

The exploitation of these lesser forms of engagement has been highlighted by the COVID-19 crisis in which casual workers have been the first to be disposed of in the tsunami of redundancies – without being furloughed and without redress.

At the heart of the problem here is the fact that the contract of employment (and contracts for other forms of engagement of labour) is a relationship of subordination, reflecting the economic disparity of power between the seller and the buyer of labour. The doctrine of 'freedom of contract' disguises this as a bargain between notionally equal negotiators to make it more palatable. But the reality cannot be hidden.

There are laws to protect security of engagement but their impact is minimal. The most obvious is the law of unfair dismissal. But this only applies to 'employees', thus excluding some 5 million workers who are not classed as 'employees'. It only bites after two years of employment thus excluding a further 9 million plus of the employed workforce who have not been employed so long. The legal test for 'unfairness' is weighted in favour of the employer. Only 7% of unfair dismissal claims are successful at final hearing. Reinstatement or re-engagement occurs in only a fraction of 1% of successful cases. Awards of compensation are low and, where made, only 49% of claimants receive payment in full, 16% receive part payment and 35% receive nothing. Delay (exponentially increased by COVID-19) and the legalised nature of tribunal hearings discourage applications.

Of course, labour law cannot, of itself, prevent unemployment and is not capable of preventing the predicted loss, consequent on COVID-19, of 2 million jobs on top of the 1.36 million unemployed before lockdown. But labour law could establish a framework in which decisions ae taken fairly, job loss is properly compensated, and the burden is more equitably distributed. The reduction of the working week is, for example, well within the sphere of labour law. Crucially, it falls to labour law to establish the mechanisms by which the democratic voice of workers influences these critical decisions.

The necessity to make massive investments in new green jobs (and in accessible training for them) is also not within the scope of labour law. But the establishment of industrial democracy in the creation of those jobs and in setting the terms and conditions under which they are done most certainly is.

The failure of labour law – a decent income

The low pay of Britain's key workers, nurses and cleaners, care workers and food factory workers, warehouse workers and delivery drivers, farm workers and supermarket workers was highlighted by the pandemic. Instead of the decent income which international labour law obliges States to secure, these 'essential' workers had their low earnings supplemented with mere praise and thanks.

But the failure of labour law to protect decent levels of pay goes far wider. The right of men and women workers to equal pay for work of equal value has been established for fifty years yet equal pay claims were running at some 27,500 a year in 2019. The gender pay gap among full-time employees stands at 8.9%, and among all employees at 17.3%.

Pay levels are left to the tender mercies of the contract of employment with little legal intervention. The prime means of achieving a decent level of income is, of course, collective bargaining. Yet, as noted, the extent of collective bargaining has virtually collapsed. Where collective bargaining still persists, in the public sector it has been largely gutted by the imposition of pay review bodies and government pay caps preventing collective bargaining over the central issue of pay.

The share of national income going to workers has been relentlessly declining for forty years, while company profits and dividends to shareholders increase at the expense of wages and salaries. In 1976 65.1% of GDP went to wage earners; but by 2019 wage earners' share had slumped to 49.2%. This is a stark marker of the rising tide of inequality.

Inequality of income is one of the starkest consequences of the failure of labour law. After the work of Wilkinson and Pickett, inequality is widely accepted as a pernicious, destabilising and threatening aspect of the economy – by the OECD, for example. Societies that are more unequal are less happy and less healthy than those which are more equal. Yet this understanding has not translated into measures to redress inequality.

The last decade has seen the biggest squeeze on wages since the Napoleonic Wars, with pay for the average worker immediately before the COVID-19 crisis still lower, in real terms, than it was ten years earlier. OECD data shows that UK performance on pay since the 2008 crisis is one of the worst of all OECD countries.

The national minimum wage legislation, whilst benefitting the lowest paid, has a number of drawbacks. It is, of course, not the subject of collective bargaining. Indeed, worker voice in setting the level of the NMW is totally absent. It does not provide a minimum wage at all; it merely sets a minimum hourly rate (currently £8.72 outside London). It is so low that it breaks international law.

Many who are entitled to the national minimum wage are not paid it. The Resolution Foundation estimates that just prior to the pandemic 25% of workers over 25 were paid less than the NMW. In 2018-19 HMRC identified over £24.4m in arrears for over 220,000 workers, and imposed penalties totalling just over £17m.

As wages take a smaller share of GDP, it is notable that the distribution of wages amongst earners has become more dispersed. In the UK prior to the pandemic, the top 20% of earners took 40% of total income, while the bottom 20% of earners received just 7%. The average chief executive of the biggest companies was paid 117 times more than the average worker. The typical FTSE CEO had earned, by their third working day of January 2020, the same amount of income as the typical full-time employee would have earned, but for COVID-19, in the entire year. The disparity after COVID-19 is likely to be greater.

Low pay, of course, is the prime driver of poverty and hardship. The proportion of people in poverty who are in work has increased from 40% in the mid-1990s to 60% pre-pandemic.

In a damning report to the UN in July 2019, the UN Special Rapporteur on Extreme Poverty and Human Rights found that, in the UK, on government figures:

> Four million workers live in poverty, an increase of more than half a million in the last five years. In-work poverty is rising faster than employment and is higher than any time in the last 20 years, driven by rising poverty among

> working parents. Half of working-age people in poverty are working, and one in six people referred to Trussell Trust food banks is working.

Before lockdown, 9 million of those below the poverty line (including 3 million children) were living in households with at least one person in work. In 2010-2011 two out of ten working single parents were in poverty; by 2019 it was three in ten.

A survey of shop workers by USDAW in 2018 found that 50% of those surveyed had missed meals to pay essential bills with well over a third missing meals on a regular basis.

Lockdown has, of course, made a bad situation worse. The Food Foundation has reported that almost a fifth of households with children had been unable to access enough food in the five weeks from lockdown to the end of April 2020, with meals being skipped and children not getting enough to eat. It estimated that the number of adults who were 'food insecure' in Britain quadrupled to more than 16% in the first three weeks of lockdown. This included significant numbers of those in work.

Low income leads to worse health and significantly shorter life expectancy. The levels of ill health consequential on low pay is a significant cost to employers, as well as to the NHS and the economy.

Sir Michael Marmot's 2020 Report pointed out that:

> health inequalities are not confined to poor health for the poor and good health for everyone else: instead, health follows a social gradient. Everyone below the top has greater risk of worse health than those at the top.

The coronavirus disaster is illustrative of Marmot's proposition. The characteristics of those vulnerable to the virus were evident at the outset and the government advocated 'shielding' for the most vulnerable. But what was not immediately remarked upon was that a greater preponderance of the most vulnerable (and hence the fatalities) were to be found amongst those who were poorest, and it was the worst paid (with the exception of doctors) who were the most exposed to risk. The ONS found that men working in low-skilled or caring, leisure and other service occupations had the highest rates of death involving COVID-19. The disproportionate number of BAME people in these low paid and exposed jobs largely explains why a significantly greater

proportion of the BAME population contracted coronavirus than are represented in the population as a whole.

The failure of labour law – other aspects

There are many other aspects of labour law which demonstrate its failure. The UK culture of long hours of work (the longest hours in Europe and the longest number of years of work before retirement) coupled with the lowest productivity in Europe is one. The exploitation of supply chains to the detriment of both overseas and UK workers is another.

The future

To mitigate the current crisis of capitalism, the law has a major role in protecting workers, their incomes, their jobs, their health and safety and, above all, in enabling them to exercise the collective power necessary to maintain and advance the condition of their working (and non-working) lives.

A large team of labour law professors and practitioners has, after extensive consultation with unions and the Labour Party, attempted to spell out the pre-requisites in the Institute of Employment Rights' *A Manifesto for Labour Law* (2016) and *Rolling Out the Manifesto for Labour Law* (2018). The proposals cover almost every aspect of the law at work. Most of these are Labour Party policy. Some have been adopted by other political parties. We summarise the IER proposals below beginning with the two most important recommendations.

A **Minister of Labour** (the Secretary of State for Employment Rights and Protections, as Labour currently designates it) will be the driving force to implement the proposals. This office guarantees that the voice of workers is heard at the cabinet table. The Ministry will ensure the orderly and fair conduct of industrial relations. It will make sure that the UK has the workforce it needs and that workers are equipped for the jobs

the UK needs to be done. It will ensure that the UK abides by the international obligations it has undertaken. Above all it will roll out Sectoral Collective Bargaining.

Sectoral Collective Bargaining is the 'beating heart' of the IER's proposals. This means that minimum rates, terms and conditions for each sector of the economy will be set by employers and unions negotiating in Bargaining Councils in each sector. The agreements reached in a Bargaining Council will be, after publication on the Ministry website, legally binding on every employer and every worker in the sector. Local agreements will be able to improve on but not worsen the sectorally agreed minima.

The legislation to enable this system builds on the Wages Councils Act 1979. (The Wages Councils originated in the Trade Boards Act 1909 and the Tories abolished most of them in 1993 with the last remaining one ended in 2013.) Sectoral collective bargaining is the system deployed widely across Western Europe.

The IER's proposal for sectoral collective bargaining requires that Bargaining Councils negotiate (not necessarily every year) a raft of 58 subject matters including, for example, dispute resolution procedures, rates for different skills, qualifications and experience, overtime, night and other rates, elimination of gender, ethnic and disability pay gaps, career development and promotion procedures, union facilities, data handling, surveillance, disciplinary and grievance procedures, training and education, green measures, investment, new technology, hours of work and job sharing.

There are several reasons why the reintroduction of sectoral collective bargaining is so important. Much recent research by economists has demonstrated that sectoral collective bargaining is the most effective means of raising wages and improving terms and conditions. This has the triple effect of improving living standards, diminishing the huge amount spent by the Treasury on benefits to subsidise low wages, and increasing the tax take. In particular, increasing wages across the board has the significant effect of increasing demand in the economy, thus stimulating new jobs and investment.

Except amongst the neo-liberals, it is now widely accepted (even by the OECD) that sectoral collective bargaining also has the effect of diminishing that corrosive factor of contemporary capitalism: inequality. Workers and their families are lifted out of poverty, gender, ethnic and disability pay gaps are narrowed and the differentials between the highest and lowest earners are narrowed.

For employers, sectoral collective bargaining has attractions beyond the stimulation of demand in the economy. In particular, it precludes undercutting on labour costs, the race to the bottom in which employers seek ever cheaper and more disposable labour. By imposing a more level playing field on wage costs, investment in innovation, research and development to make firms more efficient and productive is encouraged. Lack of investment caused by reliance on cheap labour probably the key reason why the UK lags behind most countries in the OECD on productivity.

Collective bargaining at sector level stimulates collective bargaining at enterprise level and collective bargaining at all levels is the most effective way to enable industrial democracy, the expression of worker voice. This is not to dismiss the proposal for worker directors on boards, but collective bargaining avoids the inevitable conflict of interests that arises between workers and their employers.

Finally, universal collective bargaining, sector by sector, when underpinned by the rights to collective action required by international law, is the only realistic way of redressing the fundamental imbalance of power at the workplace which characterises work in a capitalist society. Furthermore, the right to bargain collectively is also an obligation of international law binding on the UK.

The IER proposals also contain two further fundamental changes. The first is that the Ministry will establish and properly fund a unified **Workers' Protection Agency** to enforce every aspect of workers' rights and have the power to inspect premises, serve improvement and prohibition notices, to inspect and seize documents and to prosecute. With the emphasis on collective bargaining it is expected that State enforcement and enforcement of rights by litigation will be much less needed in the future than in the past but a properly funded labour inspectorate is essential, as the COVID-19 catastrophe has shown.

The second fundamental proposal is to change the law so that there is a **single legal status of 'worker'** for everyone who works – except those who are genuinely self-employed in business on their own account. This will end precarious gig and casual work and the blight of false self-employment and artificial personal companies. Accompanying this is the proposal that all workers will have **all employment rights and protections guaranteed by statute from day one** of their engagement.

In addition and in summary, the IER also propose the following:

- **Agency workers** to have rights against the end-user firms they actually work for as well as against the agency which supplies them, including the right to move onto substantive employment terms with the end-user employer.
- The minimum breaks between shifts and at weekends currently guaranteed by law to be extended, to **reduce average working time** – without loss of pay. Breaks during shifts to be paid.
- **Four new public holidays** (to mark each of our four nations' national days). All work on bank holidays to be properly paid.
- **Zero hours contracts to be regulated** so that each worker gets guaranteed pay for a working week; there will still be flexibility for employers, but they will have to pay extra for such flexibility.
- Any unplanned **reduction in the number of hours** work (such as the cancellation of a shift) **to be paid for** as if worked; and any increase to be paid at a higher rate.
- Proper **notice of changes to shifts** to be given.
- Workers to have the right to ask for **flexibility** and, unless it is unreasonable or impracticable, employers will have a duty to accommodate such requests.
- **Unpaid work to be ended** except where a part of an educational course.
- The **public sector pay cap to end**. **Pay Review Bodies to be abolished** except where agreed between employers and representative unions. Pay to be negotiated between public employers and unions.
- The **Trade Union Act 2016 to be repealed**, trade union autonomy to be restored
- The **right to take industrial action**, in accordance with international law, to be recognised.
- Some of the **restrictions on industrial action** to be eased, though with the roll out of sectoral collective bargaining the level of industrial action is not expected to increase since most points of dispute to be negotiated through dispute resolution procedures before they lead to a breakdown causing industrial action.

- **Ballots may be conducted at the workplace or electronically** as well as by post, so long as the vote is secret, secure and free from interference or undue influence.

- **Notice of industrial action to be simplified**.

- **No-one who takes lawful industrial action to be dismissed** without the prior approval of a Labour Inspector from the Workers' Protection Agency.

- **Abolition of the rule that says workers can only take strike action against their own employer**.

- **Trade unions to be given reasonable access** to workplaces to speak to members and new employees.

- Every worker to have the **right to be represented by a trade union** at work.

- A range of **amendments to equality and diversity law** to be made to make it properly effective.

- Employers to be obliged to ensure **workplaces are free of violence, bullying and harassment**.

- **Equal pay protection to be extended**.

- **Dismissal of a pregnant woman to be unlawful** and **reasonable adjustments** for those going through the menopause and other non-permanent conditions.

- **Maternity and parental leave to be extended**.

- Employers required to facilitate the election of **equality representatives and environmental representatives**.

- Government and employers required to abide by those **international labour standards** which the UK has ratified.

- The law on **unfair dismissal to be improved**: the test to be fairness, it will be unfair not to follow a fair procedure, and compensation will be the full measure of loss.

- The protections for workers transferred when a business transfers **(TUPE) to be secured and improved**

- The **protection for whistle-blowers to be improved**.

- **Minimum notice periods and redundancy pay to be increased**.

- Employers' **duties in the event of redundancy to be extended**: the consultation period, slashed by the Coalition government to 45 days, to be restored to 90 days. Assistance to be given to workers to find other work and training.

- Employment **tribunals to have employer and trade union members** sitting with the judge, and their powers to be extended.

- A **Royal Commission** to update every aspect of the law on health and safety at work.

- All workers to have a **Lifelong Learning Passport**, and to be able to access education and training to enhance their knowledge and skills.

- Each sector to establish a **Knowledge and Skills Framework** to advance the skills, training, education and qualifications of workers.

- Re-establishment of the **Union Learning Fund**

- Implementation of an **ethical trade policy** which ensures that supply chains observe minimum standards for which the UK supplier is responsible and ensures that the UK trades with countries that uphold ILO standards

- A **public inquiry to be appointed to report on blacklisting –** so that this practice becomes a thing of the past.

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