IER
Institute of Employment Rights

CAMPAIGN FOR TRADE UNION FREEDOM

Workers' Rights in Times of Crisis

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ISBN: 978-1-906703-57-8
Published: December 2022

Design: www.kavitagraphics.co.uk
Print: Rap Spiderweb (www.rapspiderweb.com)
Cover artwork: Martin Rowson.

Contents

Preface

We have prepared this booklet to outline the changes trade unions need to reverse the chain of events which have led to the worst collapse in living standards since the Great Depression of the 1930s. Although written from a legal perspective, we thought it important to look more widely at the current situation to set the context of the attacks on living standards and workers' rights now taking place.

We begin by outlining the nature and effect of the current crisis and the abject failure of the government to take steps to protect the bulk of the population from the unfolding disaster brought about by Tory ideology, indifference and incompetence. We then set out the nature of the legal attack to reduce the rights of workers and to undermine the capacity of trade unions to fight back, a legal onslaught which substitutes for government action to reverse the chaos.

In our Conclusion, we set out the bare bones of what is required to enable workers, through their unions, to restore control over their standard of living, their dignity and their rights. We add a Workers' Bill of Rights to articulate what ought to be demanded, informed in part by our assessment of the international legal obligations by which the government is bound.

1 The Current Crisis

Workers are facing a catastrophe. The Office for Budget Responsibility predicts that we are in a recession which will last two years, the longest since the 1930s. Recession means a repeated contraction of the economy, the very opposite of Truss's avowed objective of 'growing the economy'. Millions (including children) face poverty, hunger and cold. Unemployment is predicted to rise until the summer of 2024. The Bank of England estimates a rise in unemployment of 1 million. The years of austerity are back (if they ever ended). Public services, already on their knees, will be cut further. The government is run by a far-right cult of neoliberal ideologues, intent on squeezing the last drop of profit from those whose work sustains the whole economy.

As if malevolence were not enough, the incompetence of the Truss administration crashed an economy already badly damaged not only by COVID-19, but also by decades of Tory policy designed to drive down wages and conditions. It is a bitter irony that even the ultimate service industry, the financial market, fetishised by the Tories and by the Truss government in particular, could not put up with her shameless measures to increase the wealth of the richest at the expense of everyone else on the absurd pretext that this would grow the economy.

Meanwhile the Bank of England (the Governor of which, this year, urged pay restraint on workers) repeatedly pushes up interest rates in a futile attempt to curb inflation which is not caused, or even contributed to, by cheap money but by energy producers hiking prices. Under Sunak we face yet more austerity, more regressive taxes, and continued lack of investment. Instead of taking obvious measures to seize the profits of those who manufactured the inflation crisis, to protect workers, to invest in infrastructure and public services (it has been calculated that every one pound invested in the NHS adds £4 to the economy), and to reset the economy, the Tories have launched a vicious legislative attack on the already limited means by which workers can fight to maintain their standard of living.

This attack is underpinned, as always, by the belief that workers' terms and conditions should be driven down to the lowest level they and their families will tolerate. It is no surprise that in October 2022 a survey by the British Psychological Society reported that:

'52 per cent of all respondents were concerned about not being able to afford food over the next year, and 50 per cent were concerned about affording fuel over the next year.'

Only just over a quarter (27%) said they felt confident they could get by financially this winter. The Chief Executive of the Society, said:

'The cost-of-living crisis is critical, immediate and severe and disproportionately impacting those that need support the most. As well as the practicalities of being able to heat homes and put food on the table, people are also carrying the mental health load of living under this strain. We are incredibly concerned that many simply will be unable to cope, with nowhere to turn to get help as services are already stretched and struggling to cope with soaring demand.'

The prices of the ordinary things that people need in order to live – food, housing and power – have shot up. Inflation is rising faster than at any time over the last fifty years. A significant number of unions in many sectors, are now organising strikes or balloting to do so. Turnouts are very high and majorities in favour are overwhelming. The reason is that, with disaster looming, workers are now in a desperate fight to maintain their standard of living. It is estimated that some 1.7 million workers have taken or have voted for industrial action. While this is impressive and a marked increase in the number of strikes in recent years, it must be recognised that:

- Strikes are all but unknown amongst those who are not union members; there are 6.5 million union members in a workforce of 31 million;
- Strikes are very rare where unions have not been recognised for collective bargaining;
- Even where the workforce is unionised and there is collective bargaining, only those who are well enough organised, take strike action.

Consequently, the number of workers who can realistically use the ultimate lever of strike action is necessarily a small proportion of the workforce. Of course, strikes can be made more effective by co-ordinating the timing of multiple, different disputes.

2 Economic Context

Let us step back for some context on how we got to where we are. From the end of the Second World War, the real value of wages grew and took a larger share of the economic cake (i.e., the UK's gross domestic product, 'GDP'). In the 1950s and 1960s wages averaged 59% of GDP. Wage share grew to a peak of 65.5% in 1975. The 1970s were the UK's most equal decade. Since then, wage share has fallen (and the proportion taken by profits has correspondingly increased). At the end of 2019, wage share had fallen to 48.7%, a scale of contraction unmatched by any other European country. After the ravages of COVID-19 and current inflation, wage share today is lower still, even though the economy is itself contracting.

As is well known, the policies imposed by the Thatcher governments from 1979 caused the collective power of the working class to decline. The crash of 2008 brought hardship and austerity, though interest rates have been low since, and wages and prices largely static. In fact, wages have not risen in real terms for nine out of the last 14 years. Overall wage growth has been stagnant. But inequality and poverty have been steadily increasing and the quality of life declining for the vast majority of the population. COVID-19 and successive lockdowns bore down heavily on workers and their families. It was the lowest paid who were most exposed and most affected. The pandemic showed the utter failure of our labour laws either to protect workers from the dangers to which they were exposed at work, or to protect their incomes or job security. Weekly clapping for our service workers was no substitute. And the memory of that applause is no comfort for the sudden fall in the value of their wages today. For as the cost of everything has soared this year, the situation has dramatically got worse.

Causes of Inflation and Increased Prices

The primary cause of the rise in inflation is the rising cost of energy. This has driven up the costs of practically all goods and services. Some prices have been increased beyond that required to meet rising energy costs (i.e., profiteering). The rise in the price of energy demonstrates one of the fundamental flaws of capitalism. The cost of extracting, transporting, refining, storing and supplying energy has not increased. It is simply that the producers and suppliers have increased their selling price, in what is a crude exploitation of a helpless market.

This was engineered by reducing the amount of gas and oil produced. The cartel of OPEC countries mutually agreed to reduce production at the beginning of 2022 and again in September 2022 as the crisis unfolded.[1] The corporations which produce the oil and gas loved it. The corporations and nations which buy energy to supply to consumers were then forced to compete with each other by offering higher prices to secure their supplies. Competition law outlaws such behaviour in national markets but not internationally – at least not against the wealthy oil and gas producing nations and corporations.

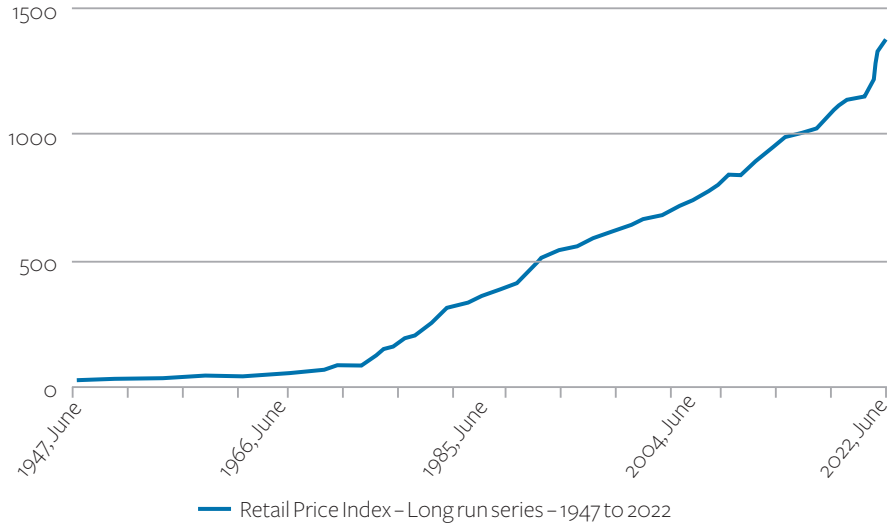
Though the government and the media continually blame Russia rather than OPEC for the rise in energy prices, Russia's cutting off the Nordstream gas supply to Europe (as part of its war on Ukraine) made only a modest contribution to the increase in demand which drove up prices (the UK imported only 4% of its gas from Russia).The point is that capitalism allows corporations to charge way beyond the actual cost of production if purchasers are prepared to pay. Where the producers act as a cartel and the purchasers have nowhere else to turn for something as essential as energy, purchasers outbid each other to secure supplies, so increasing prices. That is how the oil and gas corporations have made such massive profits this year. And because oil and gas sets the price of energy, the renewables (wind, solar, hydro, wave, tide etc), which are produced at virtually no cost, likewise made fabulous profits.

Comparing January to September 2022 to the same nine months of 2021 the global profits look like this:

Shell	**$30.1bn** compared to **$12.8bn**
BP	**$20.7bn** compared to **$8.7bn**
Exxon Mobil	**$42.7bn** compared to **$14.3 bn**
Chevron	**$27.3bn** compared to **$10.7bn**
Total Energies	**$28.7bn** compared to **$11.3bn**
Eni	**$10.3bn** compared to **$2.6bn**
Conoco Phillips	**$13.8 bn** compared to **$5bn**

Rising energy prices drove up the prices of everyday goods as compared to the same month one year earlier. By October 2022 (the latest ONS figures as we write) the Consumer Price Index in the United Kingdom was increasing year on year by 11.9% for low-income households, and by 10.5% for high income households. In other words, goods and services cost, on average, that much more than they did a year earlier. The cost of housing in October 2022 rose by 12.2% for subsidised renters, 11.5% for owner occupiers, and 9.1% for private renters, compared to the previous year. The price of food and non-alcoholic beverage in October 2022 rose by a staggering 16.4%, year on year, the steepest increase for 45 years (vegetable oil increased by 65.2%, pasta by 59.9% and tea by 46%).

Figure 1: Retail Price Index – Long run series – 1947 to 2022



Credit: Office for National Statistics, Nov 2022

It is true that the government has capped the price of energy to consumers by agreeing to subsidise the prices they are charged (the Energy Price Guarantee). But even with the cap, by October 2022, the price of electricity had risen by 65.7% over the previous year and gas by 128.9%. From October 2022, the average household bill is estimated to rise to £2,500 pa, an increase of approaching 150% over last year. The EPG cap will be increased by 20% in April 2023, with the consequence that the average household will then pay £4,000 pa, i.e. a rise of some 400% over October last year.

Notwithstanding the cap, some 6.7 million households (about 12 million people) are expected to be in fuel poverty this winter. Many families will not be able to keep warm or cook hot meals. And 5.6 million small businesses (including 70% of pubs) will be unable to pay their energy bills. After the ravages of COVID-19, seen in every high street, our very way of life is at risk. Yet the government refuses to control the price at which producers sell energy.

Instead, by capping the price which consumers pay, it has stepped in to subsidise the full price charged by the producers which are holding us to ransom. In fact, the producers' extravagant profits are subsidised by an estimated £100bn a year of public money. If the government was not prepared to take on the producers itself, it could have taken steps to help establish a cartel of energy consuming nations to put up a united front to set the price they were prepared to pay for energy. But there was no political will to make this happen.

Alternatively, the government could have taxed the excess profits made by the energy corporations at say 90% or 100% and used that to reduce the prices to consumers. This it refuses to do, save for a one-off 'windfall tax' full of legal loopholes, in consequence of which Shell, for example, pays no windfall tax at all. In fact, overall, the tax is expected to raise a mere £5 bn for the year 2022-23, a fraction of the cost of the subsidy the government will pay to the energy companies.

Inflation and Deflated Wages

The other side of the equation is income. It is obvious that anybody whose income does not increase at an equal rate to the rise in the costs they pay for the necessities of life is suffering a pay-cut, a fall in the real value of their earnings. That is the situation of most people in this country.

Those on pensions and benefits have been struggling. Though benefits and pensions will rise in line with inflation (the triple lock for pensions is preserved), the Treasury figure is 10.1% (the CPI inflation figure for September) which, as we show above, is lower than the October figure. Even after the increase, the basic amount of Universal Benefit will be worth £43 a month less than in 2010. Furthermore, the increases will not be paid until April 2023. Even with the Cost of Living Payments for those on means-tested benefits

(£900), pensioners (£300) and the disabled (£150) payable from April 2023, these sums will not meet the increases in the cost of living of those who receive them.

Turning to those who work for a living, they are well aware that the value of their wages in real terms has been stagnant for more than a decade. Many also lost a lot of earnings (and exhausted any savings) because of COVID-19. But this year inflation has really knocked the bottom out of the value of wages.

Let's look at the ONS figures. By September 2022, average pay was £578 per week. Average wage increases were running at 5.7% more than the previous year (6.0% for those fortunate enough to receive bonuses). This sounds reasonable until you allow for the effect of inflation which means that on average wages have fallen in value by 2.7% since September last year. The OBR estimates that real average weekly earnings are not expected to rise above their value in 2008 until the year 2027 – a 19-year period of stagnation. But for those who spend most of their earnings on necessities, the fall in value is, of course, much larger. As the OECD point out in its annual Employment Outlook 2022 published in October:

> *'[t]he impact of rising inflation on real incomes is larger for lower-income households which have already borne the brunt of the COVID-19 crisis.'*

The average figures hide some even harsher realities. In the private sector average pay (without bonuses) rose by 6.6% (year on year), but in the public sector it rose by a pitiful 2.2%. And this is after 12 years of pay freeze and restraint. For the public sector workers, the November budget offers little comfort. The increases to NHS, social care and schools budgets were a drop in the ocean, nothing like what is necessary to increase wages in line with inflation.

The UK has 67 million inhabitants. The entire economy is supported by a workforce of 31 million. Though half of them earn more than the average £578 pw, the other half, more than 16 million of them, earn less. Some earn very significantly less – the ONS estimate that more than 500,00 earn less than £9.50, the National Minimum Wage rate, for each hour they work. There are more jobs paying at or close to that National Minimum Wage rate than any other point on the distribution. It is true that the NMW is to rise to £10.42 per hour but that is still 1.1% less in value than it was two years earlier. More than 3 million

jobs pay less than £14.77 per hour. Many people cannot work enough hours to sustain themselves. There are more people claiming Universal Credit who are in work than those claiming it who are out of work. In the UK, 56% of people in poverty (and seven in ten children in poverty) are in a family where at least one parent works.

The consequences of pay not keeping up with prices is becoming more and more obvious and painful. People are going without meals and turning off their heating, and food banks are overwhelmed particularly since inflation means that fewer people are able to donate food. In a survey even before the inflation crisis, 35% of members of the Bakers' Food and Allied Workers Union reported that they had gone without food to make sure others in their house could be properly fed. In June 2022 a survey by USDAW showed 25% of its members had skipped some meals every month in order to pay other bills. A more recent survey of nurses found that 14% had used foodbanks.

There are 1,400 Trussell Trust food banks plus at least 1,172 independent food banks in the UK. In the year to March 2022 (before the sharp rise in prices) the Trussell Trust had given out 2.2 million three-day food parcels. As incomes are squeezed so are donations to food banks, compounding the misery. Yet if the effect of the falling value of wages on workers and their families is obvious, it also has a wider economic impact. As wages decline people buy less and so the level of demand in the economy for the goods and services offered by employers drops. In consequence, businesses close, jobs are lost, and the economy contracts. Indeed, the OBR expects consumption to fall by 2.7% in 2022-23, recovering only in 2024.

At the other end of the spectrum, those at the highest levels of the wage distribution have seen their salaries rocket during and since COVID-19. The High Pay Centre reports that the annual salary of chief executive officers (CEOs) of the FTSE 100 companies increased to £3.41m in 2021 from £3.25m in 2019 (it had dropped in 2020 because of lockdown and furlough). According to one source, the average CEO is now paid 109 times the average full-time worker, and many times more than a worker on the National Minimum Wage.

1 This was partly because they enjoyed greater profits from a smaller output, partly because it is clear that oil and gas are on their way out and they sought to maximise profits while they could, and partly, it must be said, because the OPEC countries considered it beneficial that the consequential price hike might destabilise democracies, favour autocratic governments and delay the measures which ought to be taken at COP27.

3 Neo-Liberalism and Labour Law

The period since 2010 has seen an erosion not only of workers' living standards but also of workers' rights, as a direct result of a simultaneous attack on trade unions, employment rights, and social security arrangements. The ineffectiveness of workers' rights was to be seen most recently when P&O Ferries controversially announced the dismissal of 786 UK employees and their replacement by agency supplied workers at significantly lower rates of pay.

In doing so the company openly acknowledged that it had intentionally decided not to comply with the law, which required it to inform and consult workers' representatives with a view to avoiding job losses or minimising their impact. Instead, its sole intent was to ambush the workforce so they could not organise any resistance, and replace them with a cheaper alternative. This it could do with relative impunity provided it paid compensation in anticipation of any potential liabilities for its failure to inform and consult workers' representatives, as well as any potential liabilities to the workers individually for unfair dismissal.

Erosion of Collective Bargaining

The P&O Ferries' affair was a shocking example of naked employer power, unconstrained either by collective agreements or legislation. The failure of the latter is a reflection of the inadequacy of legal enforcement of workers' rights. The failure of the former reflects the retreat of a properly functioning system of collective bargaining in the UK, which, had it been in place, would have made it impossible in practice for the company to have contemplated doing what it did. So how did we get into a position where collective bargaining became so ineffectual or non–existent?

At the beginning of the Second World War about 50% of the UK workforce was covered by collective agreements. With the commitment of the Atlee government, by 1950 total coverage had risen to around 70% and this figure remained relatively stable until it began to rise again in the second half of the 1960s. By 1970 coverage was at about 78%. By the mid-1970s it had risen to a peak of about 86%. By then, the UK was amongst the European countries with the highest levels of collective bargaining coverage. That coincided with the

greatest share of GDP going to wages as opposed to profits and other items. All this came to an end with the election of Mrs Thatcher in 1979. The government was committed to the doctrine of neoliberalism in which the presence of effective trade unionism and collective bargaining was considered abhorrent because it 'distorted the labour market'.

Workers were expected to compete with each other to work at the lowest possible wage. In pursuit of this doctrine, the government adopted measures to reduce the percentage of workers covered by collective bargaining. This was achieved by a combination of means. In consequence, collective bargaining coverage slid downwards. It barely paused in 2000 when a Labour government introduced a statutory recognition machinery, which neither halted nor slowed the decline.

As a result of government policy, the Labour Force Survey for 2022 estimates that now only 26% of UK workers are covered by collective bargaining. A more realistic estimate is probably lower. These are the only workers who have any say in setting the terms and conditions under which they work. In reality, these are the only workers who are in a position to take strike action.

So far as wage setting is concerned, collective bargaining about pay applies to even fewer workers because:

- most workers in the public sector, though they nominally retain collective bargaining, are not permitted to bargain collectively in relation to wages which are instead set by Pay Review Bodies or overridden by public sector pay freezes;
- amongst those workers in the private sector who have notionally achieved collective bargaining, there are many who do not have the industrial strength to negotiate wage rates; they may be consulted over pay (but are often not).

It is important to recall how collective bargaining coverage was dismantled:

- Repeal of the Wages Councils legislation (originally established in 1909). This covered, at its peak, 3.5 million workers. It legally compelled collective bargaining;
- Revocation of the Fair Wages Resolutions of the House of Commons which required contractors and sub-contractors to observe relevant collective

agreements as a condition of the award of public contracts (which represent a significant proportion of GDP);

- Legislation imposing extensive restrictions on industrial action, which severely constrain trade union power to maintain (still less to extend) collective bargaining on a sectoral or even enterprise level basis.
- The absolute prohibition on all forms of secondary action. In consequence of losing the right to act in solidarity, unions were denied the power to compel the extension of collective bargaining to employers where they were weak by applying pressure to employers where they were strong;
- Repeal of the legal mechanism by which a union could apply to seek extension of the coverage of an existing collective agreement to new employers not party to it;
- Removal of the duty to promote collective bargaining from the government's Advisory, Conciliation and Arbitration Service (ACAS);
- Encouragement by both government and media to employers to derecognise unions and end sectoral and enterprise agreements;
- Privatisation of public sector services, particularly by outsourcing. This eroded or ended collective bargaining coverage in the outsourced operations (notwithstanding the *Transfer of Undertakings (Protection of Employment) Regulations*);
- Fragmentation of employers in the private sector into legally separate businesses, though with common ownership or control (plus outsourcing), making industrial action much more difficult to co-ordinate, where the direct employer is not the decision-maker;
- Globalisation of many manufacturing enterprises (and to a lesser extent service activities) where collective bargaining had been long established, by transferring operations to less developed countries with cheaper labour, even less powerful unions, and legal regimes permitting greater exploitation.

This is not to deny of course that collective bargaining still takes place in some sectors, even though it is now a benefit directly enjoyed by a diminishing minority of workers.

But returning to the P&O Ferries' example, there were longstanding collective agreements between the company and trade unions. But these agreements were not legally binding and had no meaningful legal effects. More importantly, they applied only

to staff directly employed by P&O Ferries which meant that it was easy for the employer to fire the staff and have the work performed by others supplied by an agency.

If in contrast there had been a sector wide agreement setting mandatory terms and conditions for all ferry workers or all maritime workers, there would have been no incentive for the company to have fired the crew. Whoever replaced them would have been entitled to the same terms and conditions as those who were dismissed, regardless of the identity of the new employer.

The P&O Ferries' affair provides a compelling example of why sector-wide collective bargaining is necessary, and why its loss is so devastating. If collective bargaining for some is to be effective, it will only be because the collective bargaining rights of others are effective. Collective agreements will always be vulnerable unless the employer is prohibited from replacing those on collectively agreed terms with those who are not. The best way of ensuring that does not happen is by insisting that there is a collective agreement in every sector, with terms and conditions to which every worker is entitled.

Erosion of Employment Rights

As well as demonstrating the ineffectiveness of British collective bargaining arrangements, the P&O Ferries' dispute also revealed the ineffectiveness of British employment rights. This is a problem which has grown since the election of the Coalition government in 2010 and the ambition revealed in the Beecroft Report commissioned by David Cameron to strip out employment rights. Beecroft's plans were frustrated in part by EU obligations at the time, and by the political outrage the Report provoked.

Since then, however we have seen, firstly, the growth of precarious employment and low pay, whether it be the gig economy, work on demand (and wages paid accordingly), or zero hours contracts, with workers unable to get enough hours to guarantee even an adequate standard of living. These forms of employment have created a segmented 'labour market' in which workers have been commodified and stripped of their dignity. Employers have exploited a segmented labour law which sees employees theoretically enjoying the full suite of employment rights (such as they are), 'limb (b) workers' a smaller range of protections, and the bogus self-employed next to nothing.

Secondly, we find employers using their unilateral power to set the terms and conditions of contracts of employment in order to dominate and completely subordinate workers to their demands. Workers are now required by their contracts to be flexible about how they work, where they work, and when they work, as well as to be functionally flexible in terms of the duties they can be required to perform. Through these contracts – which now appear to be pervasive throughout the economy – employers have total control over the workforce, at least from a contractual point of view. The courts are prepared to accept and enforce these 'master and servant' clauses - including in one notorious case where the term was unknown to the worker and posted on a website in a language she did not understand.

Thirdly, we have the problem of 'fire and rehire' applied in cases where the employer does not have the contractual authority to impose changes to working conditions. The nature and scale of fire and rehire was revealed by the House of Commons Treasury Select Committee, excoriating in its criticism of British Airways for having made use of the practice in the early stages of the COVID-19 public health crisis. More recently, the TUC has reported that 'nearly 1 in 10 workers have been told to re-apply for their jobs on worse terms and conditions or face the sack'. Again, this is something employers can do with relative impunity. Even where the contract explicitly guarantees that contractual terms will not change, the courts refuse to enforce them.

Moreover, if workers are dismissed for refusing to accept imposed changes in breach of contract, the courts often conclude that the dismissals are not unfair. For the purposes of unfair dismissal law, refusing to accept anything other than a seriously detrimental change to working conditions as part of a business re-organisation is regarded as a substantial reason justifying the dismissal of the employee. Contracts of employment and statutory unfair dismissal guarantees are being revealed by the experience of many to be worthless. The situation at P&O Ferries took this to new depths. Here we had a group of highly skilled workers, many with a long record of service and commitment to the employer, who were nevertheless fired and replaced (not fired and rehired), and evidently powerless to do anything about it.

They were sacked without warning in a most egregious manner in breach of the employer's legal obligation to inform and consult workers' representatives. The obvious

thing for the union to have done was to organise secondary action by its members in the sector who were employed by other companies involved in loading and unloading the ferries, supplying them with necessary fuel, goods, and equipment, or providing the services required to ensure safe passage to and from the different ports where the ferries berthed. But that response is prohibited by legislation first introduced by the Thatcher government, and ostentatiously retained by Labour governments under Blair and Brown.

The P&O Ferries' case, however, is a good reason why the right to take secondary or solidarity action is essential, and why trade unionists should not be defensive or embarrassed in demanding that it be restored. It is about workers acting together - in solidarity – to support those in distress, in the expectation that the action will be reciprocated as and when necessary. It is the very essence of that international legal right: 'freedom of association'. With the union shackled by legal prohibitions, breach of which might well have led to the sequestration of its assets, the company was free to fire and replace. It could break the law at the cost of paying out no more than the limited compensation recoverable if the workers' representatives had sued for the failure to consult, or if the workers themselves brought unfair dismissal proceedings.

In commercial terms the price of breaking the law was perfectly rational for the company, even more so if any costs could be written off as business expenses for tax purposes, thereby enabling the cost to be met in part by the taxpayer. Such is the logic of capitalism. The costs incurred in terminating the contracts of employees were priced into what was a commercial decision. Presumably these costs would quickly be recouped by transferring responsibility for the recruitment and management of staff to a labour hire agency, which, as already pointed out, will have felt no obligation to comply with collective agreements to which P&O had been a party.

4 The Attacks Continue: The New Bonfire of Workers' Rights

In 2019, the IER correctly predicted that one effect of a Tory led Brexit would be that in the field of employment rights in particular:

> *'British law will fossilize, it will lose the dynamic input from the CJEU, and it will be at risk of erosion and repeal by a new breed of ideologues, many of whom worship at the altar of Margaret Thatcher.'*

Much of British employment law has its origins in EU obligations, which frustrated the efforts of previous Tory governments from deregulating as far as they would have liked. That obstacle is about to be removed, with the *Retained EU Law (Revocation and Reform) Bill* proposing what the Tories have brazenly described as 'a bonfire of EU law' so far as it applies in the United Kingdom. Fuelling the bonfire will be a wide range of employment rights, on which British workers have been heavily dependent, since EU law is the source of many statutory rights, none of which can now be presumed likely to survive in their present form. Subject to a small number of exceptions, all EU sourced employment rights could disappear as a result of the Bill.

Retained EU Law (Revocation and Reform) Bill

The *Retained EU Law (Revocation and Reform) Bill* had its Second Reading in the House of Commons on 25 October 2022, the day Mr Sunak became Prime Minister. Its technocratic short title does not do justice to the purpose of the Bill, which has been described as being 'absolutely ideological and symbolic rather than about real policy'. Nor does it do justice to the menace of the Bill's contents.

The ambitions for the Bill are, however, set out clearly enough on a government website, with civil servants explaining the government's post-Brexit free market agenda:

> *'Now that we have taken back control of our statute book, we will work to update it by amending, repealing, or replacing [Retained EU Law] that is no longer fit for the UK. This will allow us to create a new pro-growth, high standards regulatory framework that gives businesses the confidence to*

innovate, invest and create jobs, transforming the UK into the best regulated economy in the world.'

According to the Minister who introduced the Bill:

'it will help us to sweep away outdated and obsolete EU legislation, paving the way for future frameworks better suited to the needs of the UK.'

There is no secret that 'outdated and obsolete' EU legislation includes legislation protecting workers' rights. Indeed, in an earlier parliamentary exchange, Mr Boris Johnson, then Foreign Secretary, expressed the view that:

'stuff such as the working time directive, ... the Data Protection Act, ... and the solvency II directive, many directives and regulations emanating from Brussels have, either through gold-plating in this country or simply because of poor drafting or whatever, been far too expensive .... They are not ideally tailored to the needs of this economy.'

The effect of the Bill is that much, though not all, EU retained law, will 'sunset' on 31 December 2023, which means that the next day, they will simply cease to have any legal effect. It is true that this applies only to workers' rights that were made by regulations made under the *European Communities Act 1972* to give effect to EU obligations, and that it does not apply to measures – such as equal pay for work of equal value, the collective redundancies procedure, and some health and safety regulations – which were introduced by or made under a different Act of Parliament. But that is little consolation: most EU retained law was introduced by and remains in regulations made under the 1972 Act, and will therefore sunset as a result of the Bill's proposals.

It is also true that before the sunset at the end of 2023, the government has the power to prolong any regulations until 2026, and that it also has the power to reclassify existing EU law as British law. This means in effect that it is up to the minister what stays and what goes. But the problem with this is that the government estimated there are over 2,400 EU derived laws (including employment rights) which will have to be reviewed. It is widely believed that government departments do not have the resources for what is demanded

(even though the government claims to have u-turned on the threat to make 91,000 civil servants redundant), with the result that many protections will simply disappear without proper consideration.

Fears of chaos on the anvil of ideology were reinforced by the revelation on 8 November 2020 that a further 1,400 EU derived laws had been discovered, taking the total to 3,800 and rising. Apart from the incompetence of ministers, there are constitutional concerns about what is being proposed. Even if the regulations are reviewed by civil servants and ministers, their continuation will depend on departmental whim rather than review by Parliament, the restoration of the sovereignty of which, ironically, was one of the apparent objectives of Brexit. But the government has yet to say which, if any, workers' rights are to be kept. Nor has it said whether any rights it plans to retain will be diluted - as is now possible.

The fear must be that some employment rights will simply disappear, and that in due course those that are retained – if any – will be heavily amended.

> *'the Bill creates substantial uncertainty for businesses and workers risking business investment into the UK, is a significant threat to core British rights and protections for working people, consumers and the environment as signalled by the wide body of organisations opposed to the Bill, could jeopardise the UK's need to maintain a level playing field with the Single Market under the terms of the Trade and Cooperation Agreement, and contains powers which continue a dangerous trend of growing executive power, undermining democratic scrutiny and accountability.'*
> Shadow Secretary of State for Business and Industrial Strategy (Jonathan Reynolds), HC Debs, 25 October 2022, col 190.

EU Derived Employment Rights

So, to which rights will this apply? We should not under-estimate the impact and reach of EU employment rights. To this end the government has produced an admittedly unhelpful (and we now know incomplete) 'dashboard' which contains all the 2,400 EU retained laws which were known to the government departments which are responsible

for their administration – before they discovered an additional 1,400. The workers' rights include

- Various regulations listed in a long list of measures, which in relation to employment rights deal with fixed term employees, the information and consultation of employees, maternity and parental leave, part-time workers, paternity and adoption leave, posted workers, temporary agency workers, and working time (including paid holidays).
- The list includes in addition a wide range of other measures dealing with written statements of terms and conditions of employment, the transfer of undertakings and outsourcing of businesses, rights relating to parental leave, the protection of pregnant workers, and measures dealing with the right to equal treatment.

Also mentioned are the procedures for collective redundancies, and the extensive range of occupational health and safety law, though it is unlikely that the former will be caught by the Bill, and likely that only some of the latter will be affected.

Nevertheless, this is a significant body of law to lose, a significant body of law about which there should not be any uncertainty. It is impossible in the space available to explore the implications of the potential loss of all of these measures. There are, however, two that stand out at this stage, as the government seeks to be more 'competitive' as a global trading nation, and to allow UK employers to undercut EU labour costs:

- **The right to paid holidays**, at least to the extent that four weeks of the current statutory entitlement is derived from the *Working Time Directive*. What will happen to the 'Additional Annual Leave' introduced as an amendment to the Working Time Regulations by the *Work and Families Act 2006* will no doubt be clarified in due course. This means that the right to paid holidays will depend exclusively or largely on the contract of employment and the bargaining strength of the individual in the 'labour market'. The employers of most workers will in practice be able unilaterally to withdraw the existing right to paid holidays. Even if the law is retained, given that the Bill provides for the end of the 'supremacy of EU law' will ministers respect decisions of the Court of Justice of the European

Union that outlawed 'rolling up' holiday pay with wages? This prohibited employers from claiming that holiday pay is part of weekly or monthly wages rendering it unnecessary for the employer to make any payments when the worker is on leave. And what about decisions enabling workers to carry forward unused holiday pay from one year to the next, where for example because of maternity they have been unable to take holidays in the year in which they fell?

- **The protection of temporary agency workers**: one consequence here of course will be the effect of the revocation of these regulations on the agency workers concerned, who will no longer have the right to equal treatment with regular employees, and making it possible lawfully to treat them less favourably. A second potential consequence will be the effect that revocation of the Temporary Agency Workers' Regulations will have on wages more widely. Subject to government approval, will it now be open to employers to deal with the chronic labour shortages by organising the supply of workers from overseas through intermediary labour-supply companies?

  The workers recruited will be employed by the labour-supply company, to be engaged on terms and conditions which do not meet even national minimum wage standards in this country. Their contract is not with the user, but with a company in another country, by the laws of which the contract will be governed. The risk is that low paid workers will not only be supplied to meet a labour shortage, but that it will be possible for more employers to follow the example of P&O Ferries by firing and replacing existing workers. The danger is that wages will be depressed generally as a result.

So, it is not just the loss of protection for individual workers that is a concern. Also troubling is the more general impact of the loss of a whole body of rights by this quite extraordinary route. Extraordinary in the sense that no one's rights should be left to depend on the political judgement or personal whim of a Secretary of State or a government department.

The *Retained EU Law* (*Revocation and Reform*) *Bill* is bad enough. But losing what we have is not the only problem we now face. As predicted by the IER in 2019, Brexit under the Tories means not just a loss of rights hitherto enjoyed but the denial of new rights to be enjoyed by European workers.

That is now happening, perhaps more quickly than expected. The EU's adoption in 2022 of its *Adequate Minimum Wages Directive* discussed below, with its obligation on Member States to take measures to achieve at least 80% collective bargaining coverage would have been transformative in the UK. But, of course, it will have no application here. So, while EU workers can look forward to the strengthening and expansion of collective bargaining rights on the one hand, and the enriching of employment rights through the implementation of the European Social Pillar on the other, the rights of British workers are not only frozen in time but in danger also of melting away.

5 Renewed Attacks on Trade Unions

As part of the government's response to trade union resistance to the fall in living standards, we are also seeing what appears to be the resumption of the sustained attack on trade union rights which began with Thatcher's anti-union legislation in the 1980s. This was most recently supplemented, prior to the current barrage, by the *Trade Union Act 2016*. The present bombardment started early in 2022:

- the *Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022* enable employers to use agency workers as strike-breakers – in clear breach of international labour standards.
- the *Liability of Trade Unions in Proceedings in Tort (Increase of Limits on Damages) Order 2022* increases the cap on damages that can be recovered by employers from trade unions for losses caused by unions exercising their right to strike.

These measures were introduced without any consultation or any public demand by employers. In this chapter we consider two other measures: the *Public Order Bill* which was given a Second Reading in the Commons on 23 May 2022, to be followed by the *Transport Strikes (Minimum Service Level) Bill* which was published on 20 October 2022. The former has some potentially dramatic implications for all trade unionists; the latter crosses new boundaries in terms of the State control of free trade unions, limited at the moment in relation to unions operating in the wider transport sector.

Public Order Bill

The Public Order Bill currently before Parliament has been rightly condemned across the spectrum for its severe implications for the right of peaceful protest generally. However, some of its remarkable provisions present a clear danger to trade unions in particular, even where undertaking perfectly lawful and peaceful activity. Important in this context are the proposals for serious disruption prevention orders (SDPO). These are like the 'control orders' applied to terrorist suspects.

Those who are subject to an SDPO are prohibited from doing anything specified in the order (including peaceful picketing as the Bill is currently drafted). It is proposed that

an individual against whom an SDPO has been made can be required to:

- attend a police station at particular times of the day,
- stay at home (in what is in effect a disguised form of house arrest), and
- wear an electronic leg tag.

Failure to comply with a SDPO is an offence. Anyone found guilty can be fined, and/or jailed for a period of up to 51 weeks.

The Bill proposes that the police should have the power to apply to magistrates for an SDPO which can be imposed in two circumstances. The first is following conviction of an offence, and secondly *where there has not been a conviction*. It is the latter situation with which we are concerned here. A condition of granting the order is that the court is satisfied on a balance of probabilities – not beyond reasonable doubt, it will be noticed - that the respondent individual has, on at least two occasions within the previous five years, done one of a number of things. These include:

- 'carried out activities related to a protest that resulted in, or were likely to result in, serious disruption to two or more individuals, or to an organisation, in England and Wales'; or
- caused or contributed to someone else carrying out such activities.

This raises three acute concerns:

- First, it begs the question how the police would know that someone who has not committed an offence has been engaged in protest related activity over the previous five years. Presumably what we have here is an open and bare-faced acknowledgement that all those engaged in public protest which challenges powerful and malign organisations can expect to be the targets of police surveillance and record-keeping. How else could this proposed power work?
- The second cause for concern, of course, is that it targets people whose conduct is effective, not those whose conduct is unlawful. An individual or group of individuals could be the subject of SDPOs even though they have never been convicted of an offence, even though their conduct does not involve the

commission of an offence (and there are plenty of public order offences to dodge), and even though – as already suggested - their conduct is peaceful.

- Thirdly, it is obvious that these provisions are wide enough to put trade unionists at risk of an SDPO if their picketing could be said seriously to disrupt two or more individuals, the employer being picketed, or a supplier or customer of the picketed employer. Not just that, but any General Secretary or member of an NEC which supported such picketing could be said to have 'caused or contributed' to it and hence also be in line for an SDPO.

There is no definition of a 'protest' for these purposes, and there is no protection for trade unions or trade unionists here, not even where the activities in question constitute picketing 'in contemplation or furtherance of a trade dispute'. The potential application of these powers to trade unions (thereby threatening to criminalise lawful activity) are in stark contrast to other provisions of the Bill which, amongst other things, create new offences of obstruction of major transport works, and interference with the use or operation of national infrastructure. These provide a specific defence if the person accused of committing the offence was acting 'in contemplation or furtherance of a trade dispute'. The omission of protection for trade unionists in relation to SDPOs was unlikely to have been an oversight.

Transport Strikes (Minimum Service Level) Bill

The Transport Strikes (Minimum Service Level) Bill is a full-frontal assault on the right to strike which seeks to turn trade unions into strike-breakers and collaborators with employers to undermine industrial action. The starting point is an obligation on trade unions (including one not recognised by the relevant employer for collective bargaining) to enter into a minimum service agreement with the employer. This will establish the minimum services the union will in effect be required to guarantee during a strike. It is of course deeply ironic that a trade union which the employer refuses to recognise for collective bargaining over terms and conditions is required by this proposed legislation to bargain collectively over minimum service levels!

Anticipating the likelihood that an agreement will not be reached, the Bill proposes that in these circumstances a trade union and an employer can make a joint application to the Central Arbitration Committee to decide on the minimum service required. And

anticipating the likelihood that trade unions are unlikely to agree to any such joint reference, the Bill menacingly provides as a backstop that the Secretary of State for Transport may make minimum service regulations 'setting out levels of service to be provided'. There is no indication as to what transport services will be covered by the Act. This is a matter for the government to decide in regulations yet to be drafted.

Nor is there any indication of how the minimum service is to be provided. Is it a fixed percentage of services throughout the day or week; or is it defined services at particular times of day (for example during commuting periods)? This too, it seems, will be for the government to determine in minimum service regulations. Whatever those answers, a matter of even greater concern is that when a strike takes place in the services to which this legislation will apply, an employer will be empowered to issue a 'work notice' which will 'identify the persons required to work during the strike', and 'specify the work to be carried out'. The unions are to be consulted but the employer has the last word and can impose a work notice, contrary to the ILO requirement that such specifications should be negotiated and not imposed unilaterally.

A matter of greater concern still is that unions will be under a duty 'to take reasonable steps to ensure that the persons identified in the [work] notice do not take part, or continue to take part, in the strike'. It is to be noted that the duty of the union is not to refrain from inducing members to take part in industrial action in breach of an employer's unilaterally determined work notice. Rather, it is a duty to take active steps to stop workers from doing so, a duty which extends to all workers – members and non-members alike. Quite what a union has to do to discharge its duty to non-members is not revealed. What is clear is that the union will have a legal duty to take steps to ensure the ineffectiveness of its own strike, including potentially by disciplining its own members.

It goes without saying that serious penalties face workers who fail to comply with demands that they should be requisitioned for strike-breaking purposes. If they are dismissed, they lose the protection against unfair dismissal for taking part in a lawful strike: the dismissal will not be automatically unfair. Unions which refuse to comply with the proposed duty to take 'reasonable steps' to ensure that workers break the strike will face injunctions – at the hand of the employer or potentially third parties under existing but so far little used powers introduced by the Major government. They also face liability

in damages which may be more attractive to employers now that the ceiling on damages has been increased to £1 million in the case of the larger unions.

Proposals for Further Restrictions

The *Transport Strikes (Minimum Service Level) Bill* will impose unprecedented obligations on trade unions actively to undermine the interests of their members. For that and other reasons, there are obvious questions about its compatibility with international legal obligations. But as the third specifically anti-union measure introduced in a short period of time, it begs the question of what next? An insight was provided by Grant Shapps who - while Boris Johnson's Secretary of State for Transport - published a 16-point plan 'to smash the rail unions'.

Shapps's manifesto is all the more significant for the fact that he is now the Business Secretary in the Sunak government, and in a position to do something to implement his anti-union proposals. Indeed, three of the measures (agency workers in strikes, increased trade union liability in damages, and minimum service levels) have already been adopted or are in the process of being adopted. The others are wide-ranging and far-reaching, and go well beyond the fantasy of crushing the rail unions.

Some of Shapps's plans are inexplicable, such as the plan to outlaw the check off (whereby a worker can agree with an employer that their union contributions are deducted from wages by the employer for transmission to the union), and to introduce even further restrictions on facility time for trade union representatives in the public sector, beyond those introduced by the Trade Union Act 2016. Others are designed clearly to tighten legal restrictions on trade unions still further, including a strike ballot support threshold of 50% in important public services. Shapps himself managed only 27,394 votes in a constituency of some 70,000 voters at the 2019 general election, that is to say around 40%.

Further restrictions would require unions to give four weeks' notice before industrial action could begin, with a ballot authorising only 'one event' of industrial action. That apart, even more information would have to be included on the ballot paper, including the employer's response to the union position. In addition, it

should be 'easier for employers to put pay offers directly to workers, rather than via their union, by removing risk of legal sanctions'. This is presumably designed to overturn the decision of the Supreme Court in *Kostal UK Ltd v Dunkley,* which gave effect to legislation introduced to implement the decision of the European Court of Human Rights in *Wilson and Palmer v United Kingdom.*

Shapps also proposed 'absolute limits on numbers attending', as well as other picketing restrictions including picketing in the vicinity of Critical National Infrastructure sites. If this was not enough, even more chilling is the proposal to permit the *Civil Contingencies Act 2004* to be used to stop strike action. This would enable a senior minister to make emergency regulations to ban strikes by transport workers, dockers, food distribution workers, fuel tanker drivers, postal workers, and health service workers. Powers in the same Act would enable regulations to make it an offence to take part in such action, and to impose criminal sanctions on those doing so.

6 The Government's Legal Obligations

The changes and initiatives outlined above are taking place contrary to the obligations the Conservative government agreed in the EU–UK Trade and Co-operation Agreement which was concluded to prevent a no-deal Brexit and which was approved by the United Kingdom Parliament in the *European Union* (*Future Relationship*) *Act 2020*. The preamble to the legally binding agreement commits both parties (including the United Kingdom, it should be emphasised) to a 'level playing field for open and fair competition and sustainable development, through … a commitment to … high levels of protection in the areas of labour and social standards'.

Post-Brexit and the ILO

Two articles of the Trade and Cooperation Agreement are particularly relevant for present purposes. The first is Article 387(2) which provides that:

> *'A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards.'*

The term 'labour and social levels of protection' is defined to include fundamental rights at work, occupational health and safety standards, and fair working conditions and employment standards. The scope and content of these terms are not defined, though they seem to be designed to preserve EU employment rights in force at the time of Brexit. They will undoubtedly include many provisions now vulnerable to removal because of the *Retained EU Law* (*Revocation and Reform*) *Bill*.

The second relevant provision is Article 399 dealing with what are called 'multilateral labour standards and agreements'. A wide-ranging measure with wide ranging commitments, this requires both parties (including the United Kingdom) to comply with certain ILO declarations and principles, as is now standard practice in free trade agreements. It also:

'commits both parties specifically to implement all the ILO Conventions they have ratified, and to implement provisions of the Council of Europe's Social Charter that they have accepted.'

The latter is an international treaty which continues to apply despite Brexit: it is not an EU treaty, and is now one of our last lines of defence. The responsibility of the British government is thus to improve standards and to raise them to the level of these commitments, not to weaken them further in the manner we have described in Chapters 3 and 4 above. It is well known that the United Kingdom is in breach (in some cases on multiple grounds) of a significant number of *ILO Conventions* that previous governments have ratified. It is less well known that the United Kingdom is also in breach of the *European Social Charter*.

So far as ***the ILO*** is concerned, doubts and more have been expressed over the last ten years or so by the ILO Committee of Experts about the United Kingdom's compliance with the following:

- Workmen's Compensation (Accidents) Convention, 1925 (No 17)
- Forced Labour Convention, 1930 (No 29)
- Labour Inspection Convention, 1947 (No 81)
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)
- Migration for Employment Convention (Revised), 1949 (No 97)
- Right to Organise and Collective Bargaining Convention, 1949 (No 98)
- Equal Remuneration Convention, 1951 (No 100)
- Social Security (Minimum Standards) Convention, 1952 (No 102)
- Discrimination (Employment and Occupation) Convention, 1958 (No 111)
- Radiation Protection Convention, 1960 (No 115)
- Employment Policy Convention, 1964 (No 122)
- Labour Relations (Public Service) Convention, 1978 (No 151)
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144)

ILO Convention 87 deals with trade union rights, with which British law fails to comply on many grounds, relating mainly though not only to the right to strike.

These failings include the prohibition on unions lawfully to take protest action against the government, the total ban on solidarity action, and the ballot thresholds in education and transport introduced by the *Trade Union Act 2016*. These should all be abolished, and a new legal framework introduced. Instead, we have new regulations facilitating strike breaking agency workers, proposed new legislation to enable SDPOs to be imposed on trade unionists, and minimum service levels to be required in transport strikes.

The ILO has repeatedly criticised the lack of protection in British law for workers who engage in strike action. So far as other obligations are concerned, it is perhaps *ILO Convention 102* that has drawn the strongest criticism of the United Kingdom. In 2016 the ILO Committee of Experts condemned statutory sick pay rates, with similar concerns raised about unemployment benefits and survivors' benefits, which also fell below the minimum standards in *Convention 102* by a significant distance. In excoriating criticisms of the United Kingdom, the Committee responded to what it saw as the intention of the United Kingdom not to comply with its obligation to maintain social security benefits at least at the minimum level guaranteed by these international instruments:

> *'the Committee considers that the policy of keeping the basic standard of living of those who are on benefits and not in work below the absolute poverty line results in using social security as a means of economic compulsion to labour. While such policies were indeed common in Europe in the nineteenth century, in the twenty-first century the international community believes that 'basic income security should allow life in dignity' and 'secure protection aimed at preventing or alleviating poverty'.'*

Post-Brexit and the European Social Charter

In the case of the *European Social Charter* the position is, if anything, even more grim. The *European Social Charter* contains a large number of separate obligations. The United Kingdom has accepted only 59 of the 72 numbered provisions of the *Charter,* not all of which deal with workers' rights. However, there are 13 workers' rights guarantees that the United Kingdom has expressly accepted, compliance with which was recently examined by the European Committee of Social Rights. According to the Committee, the United Kingdom conformed to three, and failed to comply with ten.

In some cases – relating for example to the right to strike - the failure to conform is on multiple separate grounds (as in the case of *ILO Convention 87*). But in essence, the failures under the *European Social Charter* cover some of the most important issues in labour law: the minimum wage, the right to bargain collectively, and the right to strike. The list would be longer if we had ratified some of the additional obligations which have been introduced since the *Charter* originally came into force in 1965. According to the most recent review by the Social Rights Committee, the United Kingdom's lack of conformity included the following:

- Article 2(2) (paid public holidays), breached on the ground that the right of all workers to public holidays with pay is not guaranteed.
- Article 2(5) (weekly rest period), breached 'on the ground that there are inadequate safeguards to prevent workers from working for more than twelve consecutive days without a rest period'.
- Article 4(1) (decent remuneration), breached on the ground that 'the minimum wage does not ensure a decent standard of living'.
- Article 4(2) (overtime rates), breached on the ground that 'workers have no adequate legal guarantees to ensure them increased remuneration for overtime'. (The statutory minimum wage is based on a flat hourly rate and does not have overtime rates.)
- Article 4(5) (deductions from wages), breached on the ground that 'the absence of adequate limits on deductions from wages equivalent to the National Minimum Wage may result in depriving workers who are paid the lowest wage and their dependents of their means of subsistence'.
- Article 5 (right to organise), breached on the ground that 'legislation which makes it unlawful for a trade union to indemnify an individual union member for a penalty imposed for an offence or contempt of court, and which severely restricts the grounds on which a trade union may lawfully discipline members, represent[s] an unjustified incursion into the autonomy of trade unions'.
- Article 6(2) (collective bargaining), breached on the ground that 'workers and trade unions do not have the right to bring legal proceedings in the event that employers offer financial incentives to induce workers to exclude themselves from collective bargaining'. (Only a worker who has been directly induced may bring a claim, a right denied to other workers affected and to the union itself.)

- Article 6(4) (right to strike), breached on multiple grounds, undermining the scope for workers to defend their interests through lawful collective action, which is 'excessively circumscribed' as a result:
  - lawful collective action is limited to disputes between workers and their employer, thus preventing a union from taking action against a de facto employer if this was not the immediate employer;
  - the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive;
  - the protection of workers against dismissal when taking industrial action is insufficient.

These findings were made on the basis of data from the first half of the 2010s. The position has deteriorated since. It is expected that if the Social Rights Committee's attention is drawn by the TUC to the *Trade Union Act 2016* and other restrictions since, the position would be even worse, in the sense that the list of *European Social Charter* violations would be even longer. Aspects of the *Trade Union Act 2016* have been found to breach *ILO Convention 87.* It would be a great surprise if the same provisions (relating, for example, to ballot thresholds) were not also found to be disproportionate restrictions on the right to strike, as guaranteed by the *European Social Charter.*

But that apart, this is a spectacular record of lawlessness, particularly when it is considered, first, that the United Kingdom had no difficulty in accepting the *Charter* when it was ratified in 1962 by 'a wide margin' on the basis that existing law and practice at the time was broadly compatible with its terms; and, secondly, that the UK willingly re-endorsed *European Social Charter* standards in the EU-UK Trade and Co-operation Agreement. We have fallen a long way short of those standards, and are likely to fall still further as a result of the *Retained EU Law* (*Revocation and Reform*) *Bill,* the *Public Order Bill,* and the *Transport Strikes* (*Minimum Service Level*) *Bill,* together with the *Conduct of Employment Agencies and Employment Businesses* (*Amendment*) *Regulations 2022* (authorising the use of agency workers as strike-breakers), and the *Liability of Trade Unions in Proceedings in Tort* (*Increase of Limits on Damages*) *Order 2022* (increasing the level of damages payable by trade unions).

7 Rebalancing Labour Law

In light of the above, one of the first commitments of any future Labour government should be to:

- undertake a comprehensive review of the statute book to identify ILO and Social Charter violations; and
- commit to legislate at the earliest opportunity to bring British law fully into line with these obligations.

That is something neither the Blair nor Brown governments ever undertook, and indeed it is a matter of shame that the legacy of restrictions on trade unions and hence inadequate protection for workers survived 13 years of Labour government.

It is not entirely clear that the Labour Party's *New Deal for Working People* unequivocally commits a future Labour government to perform any better than its immediate predecessors. The language used leaves room for backsliding:

> *'The laws regulating industrial action should ensure that UK law complies in every respect with the international obligations ratified by the UK, including those of the International Labour Organisation and the European Social Charter, as reiterated in the Trade and Cooperation Agreement with the European Union' (p 11).*

Yes, the law *should* comply with these obligations. But what 'should' happen is some way short of a commitment to ensure that it 'will' happen 'in every respect'. The reader will forgive the scepticism, especially in view of the more robust language used to underpin other commitments in *New Deal for Working People*. The real question is whether an incoming Labour government will have the political will to roll out this principle in legislation.

That said, full compliance with international law is only the start of what needs to be done. What the P&O Ferries' case reveals is that there is a need for a root and branch

overhaul of British labour law that will not be met by individual palliative measures dealing with temporal abuses, whether it be the gig economy, zero hours contracts, fire and rehire, or fire and replace, obviously important though it is to address these abuses. The P&O Ferries' case reveals above all the need for a fundamental rebalancing of power in the workplace, which in turn needs a fundamental rebalancing of social, economic, and political power which will not be achieved by labour law reform alone. Trade unions must be at the heart of that shift in social, economic and political power, without which such rebalancing is impossible to contemplate.

Four decades of deregulation have left trade unions in a weakened state – as was intended. Trade unions need not only to have restraints removed, but to have the State on their side by promoting social, economic and political policies within which trade unions will flourish. But that is not enough. Trade unions also need the State's commitment to be enshrined in law with a strong body of statutory rights that will embed the right to organise, the right to bargain collectively, and the right to strike.

That said, the single most important step that could be taken would be to invest heavily in collective bargaining, repeating the achievements of the Attlee government, which began the dramatic ascent of collective bargaining coverage which ultimately peaked at 86% of British workers covered either by a collective agreement or by a wages council order.

Central Importance of Collective Bargaining

To this end, it is worth restating the benefits of high collective bargaining coverage shown by extensive research over the last 25 years.

- Extensive collective bargaining coverage reduces the inequalities in society – of every kind, in wealth and income (including eradicating or diminishing pay gaps and other differentials based on sex, ethnic origin, disability, region or sector), in health and life expectancy, and almost every other metric; this, in turn, increases stability in society, reduces deprivation and exclusion, and diminishes the risk of industrial and social disorder;
- Collective bargaining raises income levels. This is good for workers, of course, but also good for employers since it increases demand in the economy; it is good for governments too, since it increases the tax take and decreases expenditure on

benefits subsidising low wages;

- Collective bargaining, particularly at sectoral level, decreases the tendency for employers to undercut each other on labour costs and therefore increases the incentive for them to compete on efficiency, innovation and investment;
- Collective bargaining is a form of industrial democracy that gives workers, through their unions, a say in their terms and conditions of employment. Without it most have no voice and terms are offered by employers on a take-it-or-leave-it basis.

Some of these benefits were highlighted by the OECD in 2022, identifying a principal cause for the fall in the value of real wages over the last decades:

> *'the proportion of workers who are covered by collective agreements in the OECD has steadily declined over the last three decades (from 1985 to 2019), weakening the bargaining power of workers.'*

The OECD explained:

> *'in the absence of countervailing power by organised labour, employers typically retain significant power to unilaterally determine wages and working conditions. Bargaining power is typically lower for vulnerable groups: while this is a source of concern even in low-inflation conditions, it becomes more serious in the current relatively high-inflation situation, as these workers are not in a position to negotiate wage increases to keep up with price increases.'*

The OECD recommendation is straightforward:

> *'Protecting living standards also requires rebalancing bargaining power between employers and workers, so that workers can effectively bargain for their wage on a level playing field.*
> ...
> *Rebalancing bargaining power, however, also means giving a new impetus to collective bargaining and, therefore, accompanying the efforts of unions and employer organisations to expand their membership and enlarge the coverage of collective agreements.'*

The OECD has encouraged the enlargement of coverage of collective bargaining amongst developed countries in its annual *Employment Outlook* since at least 2017 – its 2022 contribution is mentioned above. Even the IMF published research as long ago as 2015 reporting on the benefits of collective bargaining. Nowhere is the need to follow the OECD's advice more necessary than in the UK where collective bargaining coverage has collapsed from 85% of workers with the benefit of terms and conditions set by collective agreement in the 1970s to less than 25% today: from one of the highest coverages in Europe to one of the lowest.

Rebuilding Collective Bargaining

Extensive collective bargaining was the reason for decent wages in the 1970s. How can it be restored? The levels of collective bargaining coverage in the past were achieved partly as a result of active government support. The Ministry of Labour was established as a government department with a minister of Cabinet rank in 1916. One of its responsibilities was to promote collective bargaining, which it did very successfully through the medium of sector wide Joint Industrial Councils. Where it was not possible to establish a JIC in any sector, the role of regulating core employment conditions was undertaken by trade boards (renamed wages councils), which were bodies established by statute.

It was the active role of the State promoting collective bargaining at a multi-employer sectoral level that was responsible for the high levels of coverage of collective bargaining achieved in the past. Although the responsibility of the State is now underpinned by international law *(ILO Convention 98,* the *European Social Charter,* Article 6(2), and the *European Convention on Human Rights,* Article 11), State support for collective bargaining in the United Kingdom has been largely withdrawn, and there is now no government department which would feel obliged to promote it. The Ministry of Labour has been long abolished, along with the progressive ideas it nourished.

In terms of a template for what now needs to be done, the European Union has produced the most ambitious proposal to emerge in recent years. In doing so, it has given some substance to the claim that Brexit would serve the interests of workers in its 27 Member States, with the deadweight of the United Kingdom no longer around to restrain social developments. It is impossible to believe that the *Adequate Wage*

Directive adopted in 2022 would have been approved in its present form (if at all) if the United Kingdom had still been an EU member.

This is despite the fact that with the exception of Lithuania, the United Kingdom has a lower level of collective bargaining density than any EU Member State, and that British workers would have had the most to gain from the Directive. Nevertheless, the Directive (the title of which may intentionally downplay its significance for legal reasons), provides a framework that could be adopted and adapted in the United Kingdom, and draws on the recognition of the right to bargain collectively established in *ILO Conventions 87* and *98,* the *European Social Charter,* the *Charter of Fundamental Rights of the EU,* and the *EU Pillar of Social Rights.*

Article 4 of the Directive imposes on EU Member States a legally binding obligation to promote collective bargaining on wage-setting, in particular multi-employer bargaining 'at sector or cross-industry level', and to protect its exercise. The Directive requires:

> *'each Member State in which the collective bargaining coverage rate is less than a threshold of 80% shall provide for a framework of enabling conditions for collective bargaining'*

This is to be done either by law or by agreement between the social partners (i.e., trade unions and employers). Where the 80% level has not currently been achieved, the Member State in question is obliged to prepare an action plan to ensure that it is achieved. Opinions in the United Kingdom may be split about Brexit, but few will fail to recognise the transformational effect that this Directive could have if it applied to the UK. If a procedure based on this Directive had been in place in the shipping industry or international ferries, it would have made no sense for P&O Ferries to fire and replace, since the company would have been legally obliged to pay the untrained replacement workers the same as those who were dismissed (and maintain all other terms and conditions).

But legal instruments of this kind would not be enough unless there was sufficient commitment in government to implement them. In order to make sectoral collective bargaining effective, not only is legislation necessary to establish the structures and enforcement mechanisms, history teaches that so too is the need for a dedicated Secretary of State for Labour of Cabinet rank based in a dedicated Department of Labour,

with its own purpose, culture and ethos to promote, at the heart of government, the interests of workers and trade unions. History also teaches that workers' interests cannot be protected as effectively by a junior minister in a Department for Business, Energy, Innovation and Skills, where there is an inevitable conflict of interest, and from which workers' interests are not directly represented at Cabinet level. A Minister for Employment Rights is no substitute for a Secretary of State for Labour.

Developments Elsewhere

Steps have been taken in several jurisdictions recently to promote sectoral collective bargaining.

On 28 December 2021 Spain passed *Royal Decree-Law 32/2021.* It facilitates further extension of sectoral collective bargaining.

On 7 February 2022, President Biden's *White House Task Force on Worker Organizing and Empowerment* published a Report encouraging collective bargaining, including sectoral collective bargaining.

On 5 September 2022, the State of California signed into law the *Fast Food Accountability and Standards Recovery Act (AB257)* providing for sectoral collective bargaining for 500,000 fast food workers in California.

On 27 October 2022, the Australian Government introduced the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.* A central feature is its facilitation of multi-employer bargaining, particularly in the least organised sectors.

On 1 November 2022, the *Fair Pay Agreements Act 2022* passed into law in New Zealand. Its central focus is to enable multi-employer bargaining leading to sectoral collective agreements.

On 16 November, the State of Illinois amended its constitution to provide for the right to bargain collectively.

8 Conclusion: A Workers' Bill of Rights for an Age of Crisis

The Institute of Employment Rights demonstrated how sectoral collective bargaining could be achieved legislatively in its *Rolling Out the Manifesto,* 2018. The principles were adopted by the Labour Party in the 2017 and 2019 Election Manifestos and are found in *A New Deal for Working People* adopted by the Labour Party Conference in 2021 and reiterated in the 2022 Conference and the speeches of the Labour Leader and Deputy Leader. This should be at the heart of a new *Workers' Bill of Rights for an Age of Crisis.* Indeed, *Rolling out the Manifesto* was a blueprint for the complete transformation of the whole of our labour law. The main elements should be reflected in the new *Workers' Bill of Rights.*

Programmes for reform must of course adapt as circumstances change and new priorities are exposed by government and employer behaviour. They must take account of developments elsewhere. In this respect there is much to be learned from the new EU *Adequate Wages Directive,* whatever we may feel privately about the EU or Brexit. We should not be so content with the virtues of Brexit that we cannot see the significance of a legal obligation on the State to work towards collective bargaining density of 80% of the workforce, or of the importance of encouraging this to be done by sector wide procedures. Equally, we should not exaggerate the transformative potential of a single initiative.

Nevertheless, the restoration of sector-wide multi-employer collective bargaining is the single most important step that could be taken to improve pay and working conditions. But more is needed. So, for example, sectoral bargaining will be effective only if workers are entitled to strike on a multi-employer basis to support a sector wide agreement. The latter would have to apply to everyone in the sector, whether or not their particular employer was a party to the agreement. Likewise, such an initiative will not fulfil its potential unless it is running with the grain of economic policy. It is thus necessary to win the battle for economic policy to win the political battle for workers' rights.

In presenting below a *Workers' Bill of Rights for an Age of Crisis,* we do so in the knowledge that there are already many such Bills or Charters. These include the ILO *Declaration of Philadelphia,* the *International Covenant on Economic, Social and*

Cultural Rights, and the *European Social Charter* to all of which the United Kingdom is a party. There are also many such Bills, Conventions, and Charters to which the United Kingdom is not a party, including the *EU Charter of Fundamental Rights* as well as the national constitutions of many countries throughout the world (including Italy where the constitution opens with the immortal if implausible line that 'Italy is a republic founded on labour').

Rather than reheat the timeless provisions of these different texts, which were written in more optimistic times in our history, we borrow from them and adapt them to the current crisis of workers' rights in the United Kingdom, to take into account the situation faced by British workers. These include rampant income inequality; falling pay; precarious exploitative working practices; job insecurity as revealed by the pernicious practice of fire and rehire or the even more pernicious practice of fire and replace; the uncertainty of workers' EU derived rights after Brexit; the continuing legal attacks on trade unions; and the low levels of collective bargaining coverage.

With all this and other considerations in mind, we propose a ***Workers' Bill of Rights for an Age of Crisis*** as follows:

Workers' Bill of Rights for an Age of Crisis

I

– Every worker (however classified and except for the genuinely self-employed in business on their own account) shall be entitled to all employment rights from day one of their engagement. Labour law shall be universal in its application.

II

– Every worker shall have the right to full transparency about the terms and conditions of employment, which shall clearly define the worker's obligations in relation to when, where and what work is to be done.
– Every worker shall be entitled to a just wage having regard to (i) the social value of the work undertaken, (ii) the principle of equal pay for work of equal value, and (iii) the principle of fair differentials where work is of different value.
– Every worker shall be entitled to the regulation of working time which guarantees (i) a sufficient number of working hours to earn a just wage, (ii) a maximum

number of working hours weekly or monthly; and (iii) reasonable paid rest breaks, meal breaks, breaks between shifts, weekly breaks, and holidays.
- Every worker shall be entitled to a safe and healthy working environment, free from harassment, protective of and accommodating their particular needs and vulnerabilities, upholding their dignity, and governed by rules in the making of which workers' representatives participate, and which are effectively enforced by a tripartite, fully committed, properly funded and staffed inspection and enforcement agency with full powers.

III

- Every worker shall have the right to join an independent trade union - whether national or international - for the protection and promotion of their economic, social and political interests.
- Every worker shall have the right to be represented by an independent trade union on all matters arising at work, at every level including that of their workplace, their employer, their trade, and their industry.
- Every worker shall have the right to be protected by collective bargaining, and to this end it shall be the responsibility of the State to take steps to ensure that collective bargaining machinery operates at enterprise and sectoral level.
- Every worker shall have the right to participate in trade union activities and not to be penalised for doing so, and every union shall have the right to reasonable access to its members and prospective members at the premises of the employer.
- Every worker shall have the right to participate in industrial action for the protection and promotion of their economic, social and political interests and not to be penalised for doing so, and every union shall have the right to organise and support industrial action, subject only to the rules of the trade union in question.

IV

- Every worker shall have the right to equality of opportunity and freedom from discrimination, and shall have the right to insist on barriers to employment being removed, including access to free or affordable high-quality child-care.
- Every worker shall have the right - either directly or indirectly through their trade union - to be informed and consulted about changes to contractual or working practices and to agree before any such changes are implemented.

- Every worker shall have the right to job security, and the right not to be dismissed for (i) refusing to agree to a change in the terms and conditions of their employment, or (ii) before dismissal or other procedures are fully complied with. Any such dismissal shall be void.
- Every worker shall have the right to (i) social security benefits in unemployment, ill-health, or incapacity and to (ii) pension in retirement, which will guarantee a just income and a decent standard of living, without the need for charitable supplements.

V

- Every worker shall have the right to insist that EU employment rights in force at the time of Brexit shall continue to apply in the United Kingdom, until such time as legislation makes provision for higher levels of protection.
- Every worker shall have the right to *effective* labour standards. To this end, it is the responsibility of the State to ensure that rights at work are enforced in practice by a tripartite, fully committed, properly funded and staffed labour inspection and enforcement agency with full powers.
- Every worker shall have the right of access to justice in tripartite independent, impartial and speedy labour courts with effective and uncapped remedies to restrain employers from, and to compensate workers for, unlawful acts by employers, and to which trade unions may, on the instruction of a relevant member(s), be parties.
- Every worker shall have the right to representation in government. To this end, a Ministry of Labour shall be established to ensure that trade union freedom, collective bargaining structures, workers' rights, and enforcement mechanisms are fully and effectively created and maintained.

VI

- Every business selling goods or services in the United Kingdom and its territorial waters shall ensure that the workers in its supply chains are, in practice, accorded equivalent rights to those in this Bill of Rights.

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Institute of Employment Rights

Institute of Employment Rights

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

IER provides research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of its unique network of academics, lawyers and trade unionists.

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The Campaign For Trade Union Freedom was established in 2013 following a merger of the Liaison Committee for the Defence of Trade Unions and the United Campaign to Repeal the Anti Trade Union Laws. The CTUF is a campaigning organisation fighting to defend and enhance trade unionism, oppose anti-union laws and promote and defend collective bargaining across UK, Europe and the World.

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ISBN: 978-1-906703-57-8