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Shareholders' rights v workers' rights

By Ben Crawford and Jamie Haughton



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Executive summary

- The draft Employment Rights Bill represents a set of long overdue and necessary reforms which improve the rights of workers across the UK. However, it is a set of interventions in a deeply skewed legal landscape, where the interests of shareholders are structurally prioritised over the rights of workers via the system of corporate law and governance regulation.
- In the context of global economic insecurity, climate change and decarbonisation-related industrial restructuring, the need to enhance economic security and resilience of employees, firms, and communities has never been greater. This requires action to prevent practices of value-extraction and reconnect the operation of firms with the knowledge and interests of the workers who create this value.
- Trade-union campaigns and responses to the Employment Rights Bill should be expanded to target the contradictory effects of shareholder rights in corporate law. Prioritisation of structural rebalancing of the labour relationship is essential to the long-term objectives of the labour movement and is needed to prevent further erosion of the effectiveness of rights.
- The takeovers market and processes of finance-driven restructuring are key points of vulnerability. Reforms to takeover regulation, and to the way that the Transfer of Undertakings (Protection of Employment) Regulations 2006 function, are needed to rebalance the power of shareholders and provide meaningful voice during takeovers. Rights are needed by workers acting in the long-term interests of the company to resist bids with aggressive uses of debt and asset stripping.
- Reforms to the effect of limited liability protections for private-equity firms are needed to align the incentives of controlling parties and the portfolio companies they control, including through means to attach greater liability for control parties including the 'General Partner'. Mechanisms are also needed to limit value-extraction from portfolio companies, including through restrictions on debt-funded dividends.
- Information and consultation rights should be expanded to include changes to companies' capital structures and the taking on of debt. Debt loading of companies has employment effects and ought to trigger information and consultation proceedings. Such a mechanism could serve as an early-warning system for possible future redundancies and support the capacity of unions to anticipate and manage change.
- Contemporary corporate structures enable the power of financial actors to extend across firms, supply chains and entire sectors of the economy. Conversely, workers' power to bargain collectively and to take industrial action remains tied to the immediate employer. The Employment Rights Bill should extend the originally promised sectoral collective bargaining arrangements for the care sector to all economic sectors, recognised as collective agreements, backed by provision for extension agreements, and provide the basis for a broad scope of the matters available for negotiation.

Introduction

On 10 October 2024, the UK government introduced to parliament its flagship Employment Rights Bill. According to the government, this Bill represents the 'biggest upgrade in employment rights for a generation'.¹ As currently formulated, the Bill promises restrictions on the use of zero-hours contracts and of 'fire-and-rehire practices', a day-one right to protection from unfair dismissal, and a strengthening of collective redundancy consultation rights.

Whilst the Bill surely represents an important step forward for workers' rights, it has also been the subject of some criticism — in particular for its failure to address the UK's longstanding problems with employee/worker status,² the potential loopholes it leaves in relation to 'low-hours' contracts,³ and its failure to repeal much of the anti-union legislation of 1982-1992 which has so disempowered the trade union movement.⁴ These are undoubtedly legitimate criticisms of the Bill, and indeed, they are criticisms that we would echo. However, our aim in this pamphlet is illustrate a broader *structural* problem with the Bill that has thus far gone under-analysed.

The problem that we identify can be summarised as follows: the success of any new labour rights in rebalancing the labour relationship, including those in this Bill, is conditional on those particular rights being effective against bad employers. What we contend in this pamphlet, is that this Bill fails to speak to the ways in which the wider legal context structures the employment relationship in ways that systematically undermine, weaken and make ineffectual the rights that labour law provides. This is a problem, we will demonstrate, not with the *content* of labour-law rights themselves, but rather with the particular way that the law *constructs* the 'employer' as a legal object via contract, property, and corporate law.

In orthodox accounts of the employment relationship in labour law, the 'employer' is typically viewed as a discrete, unitary entity, against which contractual and statutory rights can be upheld.⁵ This, we argue, obscures the complex legal structuring of the labour relationship. In reality, the employment landscape is dominated by complex structures of ownership and control — the publicly listed corporation, the private-equity portfolio, the leveraged buyout market, the franchise network, the supply chain — that are made possible by the legal innovations of capital owners and carry significant implications for the labour relationship within the capitalist firm.⁶ It is via these mechanisms, we will show, that workers increasingly find themselves subject to decisions relating to pay, working conditions and productivity that are being made by those with whom they have *no legal relationship* — the shareholder, the fund manager, the corporate creditor.

Crucially, without this relationship *in law*, the legal remedies and protections that labour rights provide fail to attach and cannot provide workers with redress. Further, those exercising this decisional authority are, for the most part, shielded from liability for their decisions, shifting the risk and losses of extractive profit-maximisation strategies onto workers and communities. In this sense, the law appears here to confer certain powers, privileges and structural advantages on employers and shareholders that harm workers *beyond* the potential legal remedies that labour rights and collective bargaining can provide. It is with these legal structuring tools, we argue, that corporate employers have been able consistently to undercut, obfuscate, and frustrate labour law's redistributive and democratic goals. This appears to us to be a significant structural imbalance that new labour rights *alone* cannot rectify and that requires the attention of labour movement campaigns and reforms to *rebalance* the legal structure of the employment relationship.

Recent labour-market trends and the periodic eruption of scandals concerning labour-rights abuses provide clear evidence of this structural imbalance. Stagnating wages for UK workers over the last decade have been accompanied by increasing shareholder rewards, with dividends growing three times faster than wages. TUC analysis shows that shareholder pay-outs have soared £440bn above inflation since 2008, while wages have been squeezed, growing £510bn less than inflation.⁷ Over the same period, private-equity takeovers have boomed on the back of ultra-low interest rates, with investors using cheap credit to load companies with debt

and extract large dividends, leaving many firms hugely indebted and many workers at risk of redundancy.⁸ In the process, financialised ownership has spread across the economy, with a relatively small number of finance companies extending control across sectors from retail to care, manufacturing, utilities and infrastructure.⁹

At the heart of this structural power imbalance, we argue, is the construction of the employer as a particular kind of legal entity – *the corporation*. It is the corporation and private share ownership that makes possible the extensive range of legal tools and property rights that employers systematically deploy to undercut the efficacy of workers' rights. Thus, it is towards this particular legal organisational form and the actors that it empowers — shareholders — that the analysis in this pamphlet is addressed.

This is not to say that considerations of the corporation have been entirely absent from labour-law theory and praxis. Debates on corporate governance and the problems of 'shareholder value maximisation' for investment and employment have featured, to some extent, in labour-movement discussions since the mid-1990s. These debates have focused primarily on reforms to director's fiduciary duties, measures for worker representation on corporate boards, and the co-determination of corporate decision-making by workers and their employers. The development of these ideas has been accompanied by a set of shallow reforms associated with ideas of the 'stakeholder' corporation.

Our goal here is to move beyond these approaches. We believe that responding to the contemporary challenges of the corporate economy for workers must begin with a deeper analysis of the pathologies of the corporate form. We argue for a renewed engagement with questions of ownership across the economy, and most fundamentally the ways in which law structures ownership and control rights within the firm via the corporation. In doing so, we highlight a significant lacuna in the government's Employment Rights Bill, insofar as it fails to speak to the legal structuring power of these corporate forms of ownership.

In this pamphlet then, we seek to denaturalise and demystify these corporate forms and draw out their effects on the labour relationship. We seek to recognise the corporation for what it is, not the natural outcome of economic activity or a necessary feature of social life but rather a political-legal tool enabling a particular class of actors to produce particular economic outcomes, which cause direct harms to workers. Thus, we seek to draw out new sites of contestation for the labour movement that go to the heart of this corporate form, because it is only by addressing this particular structural imbalance that workers' rights, whether existing or novel, can be made truly *effective* against their employers.

We go about this analysis in three stages. In section 1, we examine the concept of the corporation itself as a legal instrument and demonstrate its effect on the labour relationship. Here, we outline the key features of corporate law and advance a conceptualisation of the corporation as the product of class relations and ownership. In section 2 we employ this conceptualisation to analyse the legal form of the share and outline the ways in which it provides shareholders with novel legal mechanisms for extracting value from workers, against which individual and collective regulation currently provides no meaningful remedy. Finally, in section 3, we turn to the conditions of endemic precarity observable in labour-market trends and trace the ways in which the particular legal structuring devices of the corporation are instrumental in exposing the worker to this condition and leveraging it to the benefit of corporate owners. Throughout, we point to the absence of these structural considerations in the proposed Employment Rights Bill and argue that far more is needed at both practical and conceptual levels if the government is serious about rectifying the significant structural imbalances of the contemporary employment landscape.

At the outset however, we recognise that this analysis may seem unusual from an industrial-relations perspective. It appears to eschew the typical dichotomies of production and circulation and focuses specifically on the role of the law. In doing so, we appear to be rejecting orthodox Marxian arguments that view the law as superstructural, determined by and reflective of an underlying economic base relationship rooted in ownership of the means of production.¹⁰ However, what our analysis demonstrates is that foundational legal concepts are

firmly imbricated within the capitalist order at the level of that economic base.¹¹ It is these legal concepts, we argue, that work to reify the extractive dynamic of the capitalist social order — ownership of the means of production, after all, cannot be understood without the legal concept of property. Thus, the complex legal structuring of property relations takes on huge significance in any diagnosis of the problems of contemporary employment relations. What our argument shows here then, is the law being deployed as a form of structural extractive power to the detriment of labour, and it is this power that we feel the labour movement can no longer afford to ignore.

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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.

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

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

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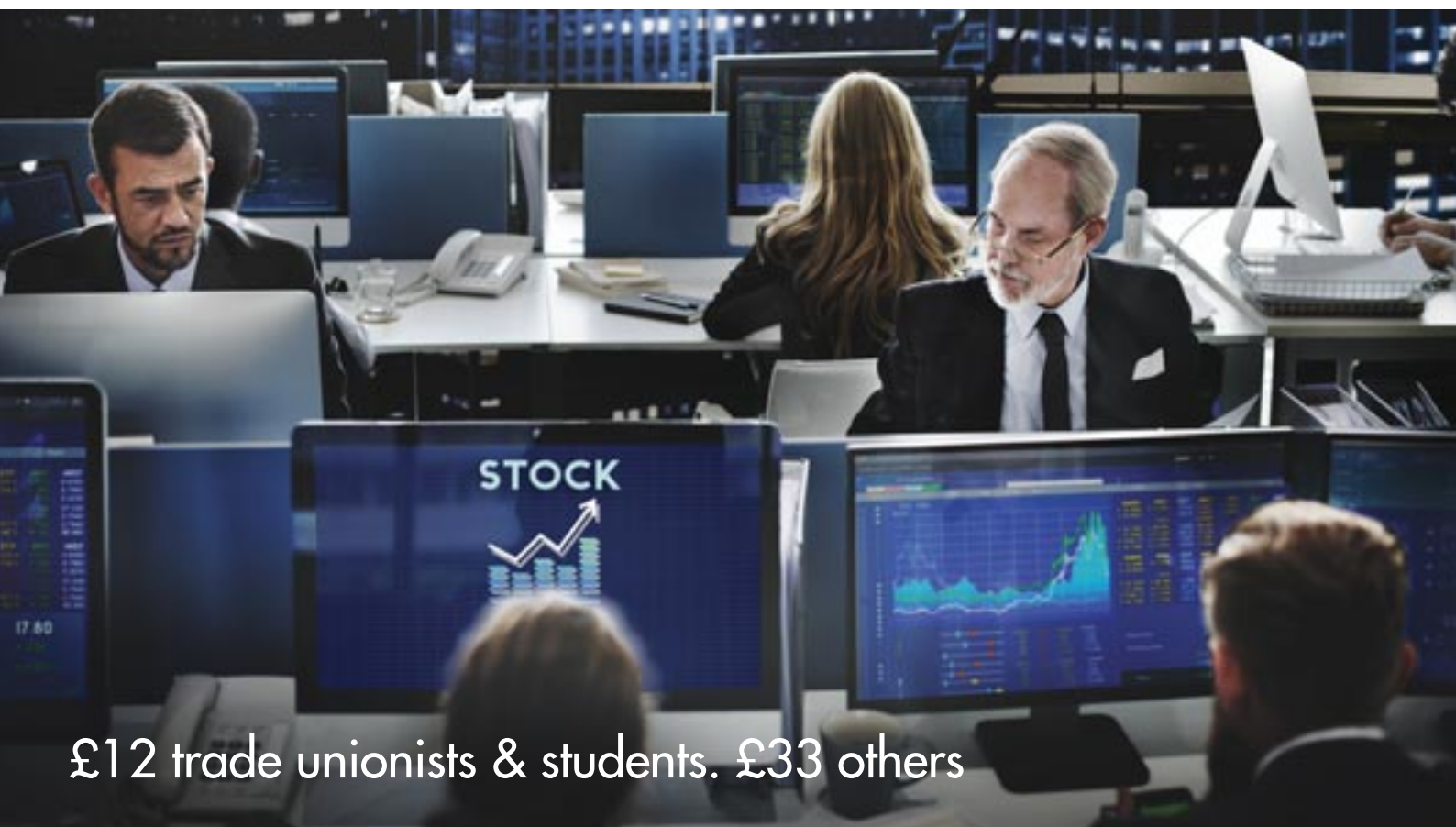
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The Employment Rights Bill 2024 sets out a series of necessary and overdue reforms to labour rights in the UK. However, these reforms represent a set of narrow interventions into a wider legal landscape that is heavily tilted in favour of the rights of shareholders over those of workers. This structural imbalance between workers and corporate shareholders manifests itself as a systematic undercutting of the *effectiveness* of workers' rights against their employers.

In the context of global economic insecurity, climate change and industrial restructuring, the need to enhance the economic security and resilience of employees, firms, and communities has never been greater. Yet the current corporate law framework undermines this, enabling shareholder value extraction, creating conditions of endemic precarity for workers, and eroding worker voice. Thus, while the Employment Rights Bill represents an important step forward for workers, deeper change is necessary if the rights it provides are to be made truly effective against employers.

This pamphlet illustrates this structural imbalance between workers' and shareholders' rights and demonstrates the legal mechanisms by which shareholding serves to both subordinate workers' interests and expose them to conditions of endemic precarity. In doing so, it shows the significance of the absence of these structural concerns in the Employment Rights Bill, and demonstrates why the trade-union movement can no longer afford to ignore corporate law as a site for labour activism.