P&O and Freedom of Association:
Memo to Starmer

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On 2 November 2023, the ILO Freedom of Association Committee released its report on the P&O case. Readers may recall that on 17 March 2022, P&O Ferries dismissed 786 seafarers and replaced them with agency workers recruited overseas on terms and conditions of employment greatly inferior to those of the staff they replaced. To compound the mischief, it was alleged that the staff in question were given letters of instant dismissal, and that workers on the on vessels at the time of their dismissal were escorted off by hired security, passing replacement crews waiting in coaches nearby.

All this was done without prior notice, without consulting the recognised trade unions, and in breach of collective agreements between the unions and the company. It will also be recalled that shortly after the decision was taken, P&O was the subject of excoriating criticism and its senior personnel humiliated by parliamentary committees. But as the company made clear, it did all this mindful of its obligations under British law, for the breach of which it was ready to pay compensation. Whatever the cost, it would presumably soon be recovered by the greatly inferior labour costs under the replacement regime.

All of which of course is a searing indictment of British labour law: it is economically expedient for an employer to dismiss a unionised workforce, repudiate collective agreements, and fail to comply with statutory information and consultation obligations. And it could do so safe in the knowledge that having paid off the workers in question it would suffer no economic pressure from trade unions, which are prohibited by law from taking any form of sympathy or secondary action. So it would not be possible for the union to target port workers to boycott all work for P&O.

One of the several steps taken by the unions concerned (RMT and Nautilus) was to refer with the TUC and others a complaint to the ILO Freedom of Association Committee claiming that P&O's actions amounted to a violation of the United Kingdom's obligations under international law. The obligation in question is the obligation to respect the principle of freedom of association, set out in the ILO Constitution, and developed in two ILO treaties to which this country is a party: ILO Conventions 87 and 98. The first of these was sufficiently important that the then Minister of Labour – George Isaacs – travelled to San Francisco in 1948 to take part in the proceedings for its negotiation and agreement.

The Freedom of Association Committee is one of the ILO supervisory bodies with responsibility for ensuring that the principle of freedom of association is implemented. It is unusual in that it is a tripartite committee in the sense that it includes representatives of trade unions, employers and governments. In this case the Committee found that British law falls far short of what international obligations require and it made a number of recommendations for change. Although Sunak is unlikely to pay any attention, the powerful report of the Committee will have to be addressed by Starmer if the United Kingdom is to rescue its reputation as a country that complies with the law.

The Committee has made clear that it is unlawful under international law for an employer to be able to resort to subcontracting to evade the rights to freedom of association and collective bargaining. It is also unlawful under international law for domestic law to fail to protect workers from dismissal because of their trade union membership and activities. True, any such dismissal is unfair in this country. But there is no right to be reinstated. According to the Freedom of Association Committee, the government must ensure an 'adequate and efficient system of protection, which would include 'sufficiently dissuasive sanctions and prompt means of redress, emphasising reinstatement as an effective means of redress'.

These matters need to be addressed. But so do two others. The first relates to collective agreements. Under British law collective agreements are not legally binding contracts as they are in most other countries. This is because of legislation first introduced in 1974 at the request of the unions, for reasons which need not be explored here, but which are no longer as compelling. Without re-opening that can or worms, the Freedom of Association Committee made clear that collective agreements should be binding and that 'mutual respect for the commitment undertaken in collective agreements is an important element of the right to bargain collectively'.

Under existing British legislation, it is unlawful for an employer to seek by financial inducement to bribe workers to cease to be covered by a collective agreement. This was introduced following an earlier scandal involving anti-union practices at the *Daily Mail* in the late 1980s. What is now required is legislation to make it clear that it is unlawful for an employer to terminate a collective agreement unilaterally before giving the period of notice to terminate prescribed by the agreement itself, or before the agreement reaches its natural termination date without being renewed. In this case, P&O's recognition and procedure agreement with the RMT and Nautilus had a six months' notice requirement.

The other issue that needs to be addressed is the statutory ban on all forms of sympathy and solidarity action, a matter also addressed by the Freedom of Association Committee. Despite the strong opposition of the government, the Committee nevertheless recalled that a general prohibition of sympathy action could 'lead to abuse' and that workers should be able to take such action 'provided the initial strike they are supporting is itself lawful'. The ILO supervisory bodies have for several decades requested the United Kingdom to take steps to ensure that the right to take solidarity action is protected, a request renewed in this case. This should have been done by Labour between 1997 and 2010.

The Freedom of Association Committee's report is a hugely important moment in the British labour law. It has parallels in other important legal moments, including the decision of the European Court of Human Rights in *Wilson and Palmer v United Kingdom*. That case – decided in 2002 after a long struggle in the domestic courts spearheaded by the NUJ and the RMT - led to the introduction of legislation in 2004 strengthening the right to freedom of association and protection for collective agreements. As the P&O case has shown, however, that legislation did not go far enough, and it needs to be updated as a result of the even more egregious anti-union practices of employers.

If the P&O affair is not to be repeated, the recommendations of the ILO Freedom of Committee will have to be implemented. The latter require better and stronger protection of the right to be a trade union member; better and stronger protection for the right to bargain collectively (by insisting that collective agreements are complied with); and better and

stronger protection for trade union action (if wholly unacceptable employer behaviour is to be avoided and restrained by what is currently a locked up trade union power). Labour is committed to ensuring that the law regulating industrial action 'complies in every respect' with international obligations. The P&O case has clearly signalled what needs to be done.

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