AN IER SUBMISSION

In response to:

Labour Party Taskforce Session 4.

Removing restrictions on trade union activities

and

Fire & Rehire

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

This IER submission represents the views of a number of IER experts, not the collective views of the Institute. The contributions of those experts were kindly edited together by Professor Keith Ewing and Lord John Hendy, QC.

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Part One: Removing restrictions on trade union activities

Trade union activities

1.1 Because of the inevitable imbalance of power between the individual worker and the employer it is essential that workers, brought together to perform work, are also able to band together to improve their bargaining power. As President Biden has affirmed, trade unions are vital institutions in the workplace and in democratic society. The right of workers to act collectively and the right of their unions to be effective, in the workplace, in each sector of the economy, and at national policy making level, are necessary for fairness, dignity and democracy at work.

1.2 The most effective way in which the voice of workers can be heard is collectively, through a trade union. Democracy at work has all but evaporated with the collapse of collective bargaining coverage from 86% of workers who had the benefit of negotiated terms and conditions in 1976. Now the terms and conditions of over 77% of workers are not negotiated but fixed by employers on a take it or leave it basis. That is an affront to democracy.

The most important trade union activity – collective bargaining

1.3 The most import trade union activity to be restored and protected is collective bargaining and, in particular, Sectoral Collective Bargaining (as dealt with in a separate session of the Taskforce). This will facilitate trade union representation of workers at sector and workplace level, recalibrating the balance of power at the workplace, giving enhanced protection to workers, and restoring the respect and dignity to which they are entitled.

1.4 Westminster should follow the lead made by the Senedd in its Social Partnership and Public Procurement Bill. The public sector must lead the way by ending the pay cap and negotiating pay in every part of the public sector and, by means of extending public procurement provisions, restoring Sectoral Collective Bargaining to cover all contractors on public contracts (including all outsourced work) and those benefiting from public subsidy, direct or indirect.

1.5 In the private sector new legislation will be required on collective bargaining. At national level, a tripartite bargaining body such as the TUC has proposed, the National Reconstruction Council, will be required. A new recognition procedure is required at enterprise level.

1.6 Underlying these proposals is the right of every worker to be represented by a trade union at work. Section 10 Employment Relations Act 1999 should be amended to provide that members and their unions will have the right for the union to appoint an official to represent any member, on the member's written request, in relation to any matter (not confined to disciplinary or grievance issues) vis-à-vis the member's employer.

Anti-union activity

1.7 Union-busting and the persecution of union representatives or members has been a key tactic used by employers, as the blacklisting scandal in the construction industry shows. Labour should hold a public enquiry into blacklisting to expose and right historic injustices, ban anti-union practices and protect union members from intimidation, harassment, threats and blacklisting. Ss. 145A-F, s. 146 and ss. 152-3 Trade Union and Labour Relations (Consolidation) Act 1992 shall be redrafted in order to accord adequate protection against discrimination of trade union members (and non-members).

1.8 In particular, trade union representatives should be protected against unfair dismissal by requiring a Labour Inspector from the Single Enforcement Agency to give prior approval (which will only be given if there is a compelling reason that is not related to the representative's trade union activities).

1.9 It should be unlawful for an employer to engage in anti-union practices designed to frustrate any lawful trade union activity (an 'unfair labour practice') with the onus on the employer to prove that an alleged unfair labour practice was not unfair.

1.10 It should be a criminal offence to commit any act prohibited by Employment Relations Act 1999 (Blacklists) Regulations 2010/493, reg 3. Such offences will be committed both by the individual responsible and by any entity for the benefit of which the blacklisting offence was committed, without any requirement of guilty intent on the part of the entity. An offender and the directors and partners of any such entity at

the time of such commission shall not be permitted for at least one year to tender for, hold or work on any public contract or be permitted to work for any entity which tenders for, holds or works on any public contract.

Trade union access

1.11 The ability of unions to recruit, organise and support their members strongly relies on them being able to access workplaces. Labour will give unions a reasonable right to enter workplaces and adequate time off for union representatives in the workplace to perform union-related duties, and to take part in union-related structures.

1.12 Trade union reps, safety reps and equalities representatives (with enforcement powers) should have statutory time off so that they have time to defend workers and to train. They should be given time off and be permitted (if trained, and if authorised by their union) to attend the premises of employers other than their own at the request of their union. Trade Union and Labour Relations (Consolidation) Act 1992, ss. 168 and 168A should be amended to cover the officials of representative trade unions where there is no recognised trade union.

1.13 The amount of time off permitted will depend on the reasonable needs of the membership and the reasonable demands of the office balanced against the reasonable needs of the employer. This should be established by collective agreement and in default, the employment tribunal. An arbitrary ceiling imposed by the employer will not be permissible.

1.14 The requirement in the public sector to report publicly the amount of time off for union duties, introduced by the Trade Union Act 2016, should be repealed.

1.15 A worker should be granted reasonable time off in working time to prepare for and to meet (for a purpose reasonably related to work), on the employer's premises, an official or lay representative of his or her union (including travel time). It should be presumed that such time off as the representative or official certifies as was necessary to attend the meeting and travel from the worker's work station to the meeting and back again is reasonable unless the employer proves to the contrary.

1.16 Trade union officials should have the right of access (including 'virtual' i.e. electronic access) to workplaces at an appropriate time for the lawful purposes of the trade union.

1.17 'Access' must be given under reasonable conditions and in a suitable place, for a reasonable duration and on reasonable notice, and should include: reasonable physical access to suitable parts of the premises which it is reasonable for the official to visit to meet privately (free from employer surveillance) such members or workers for the purposes of discussion, decision making and the provision of information; reasonable access to notice boards placed in reasonably conspicuous places; reasonable, private (free from employer surveillance) and unimpeded access to workers by email where email is provided or controlled by the employer; and the ability to place on the home page of the employer's internal website, or virtual platform accessible to workers, contact details for the applicable union and any reasonable notices

1.18 'An appropriate time' should include time at the invitation of the employer. It should also include time at the invitation of a worker outside working hours, or during working hours with the consent of the employer, which must not be unreasonably withheld. It should also include time during working hours where the purpose of entry is to advise a member who is preparing for a grievance or disciplinary procedure.

1.19 Where at least 10% of the workers in a particular workplace (whether or not it is part of another workplace) are members of a trade union:

i. the union should have the right to meet two or more members together (including with official(s) of their union) or with members of another trade union(s) (i) to transact trade union business and (ii) to meet workers who have recently become engaged.

ii. The employer should provide access to all parts of the establishment to the extent necessary for such purposes.

iii. The employer should provide a suitable private place and facilities for such meetings of a reasonable duration and reasonable frequency and grant reasonable time off to prepare and attend them, and the union shall give reasonable notice to the employer of them.

iv. The union's workplace representative(s) should have the right to enjoy reasonable facilities to carry out trade union activities at work. Such facilities shall be proportionate to the needs of the membership and the demands of the office.

v. The union's workplace representatives should have the right to such time off with pay as is necessary for them to perform their trade union duties.

vi. The union's workplace representative or full-time officer shall be entitled to refer to management any issue with collective implications and the employer shall be obliged to deal with it through collective bargaining.

Information for trade unions

1.20 The existing law on the disclosure of information needs to be revamped. Ss. 181-185 Trade Union and Labour Relations (Consolidation) Act 1992, (disclosure of information to trade union representatives) needs to be amended so that an employer shall be under a duty to disclose to the representatives of a representative union any information requested by the union for any purpose necessary for the union to represent the interests of its members, whether in collective bargaining or otherwise (and including matters which may lead to proposals to reduce labour costs). In addition, it shall be mandatory for an employer to disclose to the representatives of a representative trade union, if there is recognition or not, the information referred to in the Information and Consultation of Employees Regulations 2004, reg 20, that is to say: recent and probable development of the undertaking's activities and economic situation; the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking; and decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in sections 188 to 192 of the Trade Union and Labour Relations (Consolidation) Act 1992; and regulations 10 to 12 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The representatives of a representative trade union should be entitled to all the information in the employer's possession relating to the undertaking or an associated undertaking, which the representatives require in the performance of their duties. It should no longer be permissible to withhold information on the ground that the information is confidential. In

appropriate cases the employer's interests can be protected by a confidentiality obligation on the recipient, the need for the obligation and the nature of the obligation being subject to judicial scrutiny.

1.21 The Information and Consultation of Employees Regulations 2004 (SI 2014 No 3426) need amendment to permit the threshold for establishing an information and consultation procedure to be reduced to 2% of the employees in an establishment (rather than an undertaking). Any agreement must require: 'the exchange of views and establishment of a dialogue'; and that all consultation should take place 'with a view to reaching agreement on decisions within the scope of the employer's powers'.

Surveillance

1.22 It should be unlawful for an employer to conduct any form of surveillance of workers (whether employed by the employer in question or another employer) which relates to their trade union membership and activities, or the activities of a trade union official. Where surveillance takes place during a recognition campaign, the CAC may order that the union is recognised without any additional formality.

Industrial action

1.23 Some of the restrictions on industrial action should be eased and UK law should comply in every respect with the international obligations ratified by the UK.

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

1.25 The requirement to give notice of industrial action should be simplified and the time shortened to 7 days. Notice of ballot should no longer be required.

1.26 No one who takes lawful industrial action should be able to be dismissed without the prior approval of a Labour Inspector from the Single Enforcement Agency.

1.27 The rule that says workers can only take strike action against their own employer (the ban on secondary action) should be removed.

1.28 Workers and trade unions should have an explicit right to take industrial action and to organise, support and take part in such action. Those who organise lawful

industrial action should not be liable to an employer or any other party in law, whether in tort or on any other ground. Those who participate in industrial action to which this Part applies should be regarded as having suspended rather than terminated their employment relationship for the duration and to the extent of the industrial action, unless they indicate expressly a contrary intent.

Part Two: Fire and Rehire

Introduction

2.1 There is no easy solution to the problem of fire and rehire. The practice reflects a systemic problem of British labour law caused by the legal restrictions on trade unions, inadequate statutory protection of workers, and a common law that empowers employers (in particular, the power to terminate the contract of employment on notice). The following is no substitute for radical reform to address the balance of power in the workplace, but it provides a number of steps that could be taken within existing constraints.

2.2 It is important that any initiative addresses a range of matters, and that the debate and the campaign is not distracted by apparently simple solutions that could be counterproductive. It must be recognised that in the absence of comprehensive reform of British labour law, anything proposed is likely to be a sticking plaster. It may, moreover, have unintended malign consequences, and fire and rehire may simply mutate into other bad practices, a process to which we have become accustomed over the last decade or more.

2.3 Before addressing these matters, we should say that fire and rehire takes place in a range of different circumstances, sometimes in response to an economic crisis in the enterprise, but sometimes using the cover of the pandemic to make cuts. We also assume that the aim of reform is to encourage employers genuinely facing problems to open the books and to begin talking to the union at the earliest opportunity. We assume further that where fire and rehire is being used opportunistically, the aim is to make it prohibitive for the employer.

2.4 It should be added that the problem of fire and rehire is highlighted particularly in the case of permanent employees. This is because those who are self-employed (5 million, a figure which includes limb (b) workers), agency workers, zero hours workers and casual workers (perhaps another 3 million in all) are not in a position to complain about fire and re-hire. This is because they are at the risk of new terms being offered every time they are engaged to work.

Legal failure

2.5 As matters stand at the moment, there are a number of obvious measures which might be expected to offer some protection. The first is the employer's duty to consult trade union or worker representatives where it is proposed to make 20 or more employees redundant.[1] Because of the wide definition of redundancy,[2] this may apply to fire and rehire situations. However, what was designed as a form of protection for workers has had the unintended effect of providing an easy opportunity for employers to push through contractual variations by entering into consultation and then to impose the changes when unions refuse to agree.

2.6 The other obvious source of protection is unfair dismissal.[3] It might be thought that employees who are fired for not accepting a variation of their terms and conditions will be able to pursue a legal remedy for unfair dismissal where they refuse to accept a pay cut. But not all will qualify for unfair dismissal, for example where there is less than two years' continuous service. And under the law as it now stands, a dismissal will be fair where it is for 'some other substantial reason' (SOSR). Existing case law suggests that the courts and tribunals may conclude that dismissal for refusing to accept a less favourable contractual variation will constitute an SOSR if the employer can show a reasonable economic justification for it in the form of 'good business reasons'.[4]

2.7 In the latter type of case, the employee will be entitled to neither a remedy for unfair dismissal nor a redundancy payment. Although the employer may be required to consult about the redundancy, the definition of redundancy for the purposes of

[1] Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), s.188.
[2] TULRCA, s. 195.
[3] Employment Rights Act 1996, s.98.
[4] *Hollister v National Farmers' Union* [1979] ICR 542.

redundancy consultation is different from (and wider than) the definition of redundancy for the purposes of redundancy payments. This means that a worker who may have been employed by the same employer for many years will be entitled to nothing if he or she is dismissed for refusing to accept what may be a significant variation to his or her terms and conditions of employment.

Improving procedural obligations

2.8 There are three things that could be done. The first is to improve the employer's obligation to inform and consult when there are economic difficulties affecting the enterprise. One easy option would be to recognise that the Information and Consultation of Employees (ICE) Regulations 2004 have failed, to rescue the central provision of these regulations, and to re-introduce them in a more effective form. So we need a statutory requirement which:

(a) Imposes a duty on employers to inform and consult recognised trade unions (or in their absence, elected workers' representatives) about 'the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking'; and

(b) Imposes a duty on employers to inform and consult recognised trade unions (or in their absence, elected workers' representatives) about any 'decisions likely to lead to substantial changes in work organisation or in contractual relations'. As in the current ICE Regulations, this latter consultation should take place 'with a view to reaching an agreement'.

Unlike the current ICE Regulations, however, under new legislation either the Central Arbitration Committee (CAC) or a court should have the power to issue a status quo order if the duty referred to in para (b) has not been complied with.

2.9 In terms of remedies, it may be necessary to acknowledge that consultation will take place in a wide range of circumstances. Much of the publicity has been generated in union organised areas. But there must be a massive unreported problem in the unorganised sectors. In these cases, the consultation duty needs to be supported by a range of remedies that allow for the possibility of a union with financial means to

pursue a remedy (as in para 2.8 above), and for situations where there is an ad hoc committee with no such means. The individual remedies need also to be tailored to these latter situations. Consequently:

- Following the model of different statutory provisions (TULRCA 1992, s. 145E), an employer who introduces changes without complying with the foregoing procedural obligations should be liable to make a compensatory payment to all the employees affected individually; and
- Also following the model of TULRCA 1992, s. 145E, any changes introduced as a result of a failure to comply with these obligations should be void; they will be unenforceable by the employer, and the workers entitled to recover any wages or benefits withheld as a result of variation of terms and conditions imposed in breach of the obligation to comply.

2.10 The aim of the foregoing is principally to give unions and employers an opportunity to consider the situation facing the company and the various options available, and to consider together how any problems are to be resolved, at as early a stage as possible. These are decisions which should not be for the employer to make unilaterally. Any employer who fails to comply thus risks (i) being constrained by the courts or CAC; (ii) being penalised financially for doing so; and (iii) being unable to enforce any changes made.

2.11 This approach would be consistent with approaches to this problem in other countries, such as Germany and Spain. In both countries, consultation with worker representatives through works councils would be expected to be involved in a proposal by an employer to unilaterally change terms and conditions for economic reasons.[5]

[5] In Germany, section 111 sentence 1 Betriebsverfassungsgesetz (BetrVG), i.e. the Works Constitution Law; in Spain, section 41 of the Act on the Workers' Status (Estatuto de los Trabajadores). Notably, this is subject in both countries to the numbers of dismissals and is sensitive to the size of the workplace. See also in Germany, the requirement that a dismissal be 'socially justified' for 'urgent operational reasons' (section 1 of Kundigungsschutzgesetz (KSchG), i.e. the Protection Against Dismissal Act). For Spain, see the Judgment of the Supreme Court of 28 October 2017 (case 1140/2015), which makes clear that dismissal is unjustified on economic and organisational grounds if new hires on new terms follow the dismissal. That renegotiation should take place with existing workers' representatives.

Better statutory protection

2.12 Apart from improving information and consultation obligations, there is a need too for better protection for workers. Here we need to be mindful that employers unable to impose changes to contractual terms might simply make people redundant instead. But this is a matter of balance and calculation, not a reason for inaction. So, what can be done to protect workers? One option would be simply to provide that a dismissal because someone has refused to accept a contractual variation which has not been agreed by a recognised trade union (or worker representatives where there is no recognised union) should be automatically unfair, a right which should apply from day one.

2.13 A successful Employment Tribunal claim will usually result in an award of compensation; but employment tribunals do not currently have power to reinstate the terms and conditions removed by the employer. This could be resolved by legislation requiring tribunals to apply their existing power to award reinstatement or reengagement as the primary remedy in fire and rehire cases with a specific obligation to reinstate the terms and conditions removed by the employer. This could also be achieved by including a form of interim relief akin to the provisions of TULRCA 1992, ss. 161-4, which would empower employment tribunals to reinstate the workers on their original terms and conditions of employment pending the final outcome. Currently an employer finds it all too easy to persuade a Tribunal that there is an economic justification for changing the terms and conditions of their workers' employment.

2.14 Reform along the lines proposed in paras 2.12 and 2.13 would need to be underpinned by a number of other safeguards to stop employers undermining it by adopting other improper practices:

- Some employers have contractual terms which permit the employer to introduce contractual changes without the employee's consent. These 'master and servant' clauses should be prohibited by statute. Otherwise, they risk cutting through any fire and rehire protection;
- There is also the problem of the worker who agrees to accept a variation under threat of dismissal if no variation is accepted

- This should be treated as a form of statutory duress, and workers who agree to vary in these circumstances should be entitled as a result to recover unpaid wages or benefits at a future date as a result;
- It would be a defence to the employer in such a case that the variation has been agreed by a recognised trade union (or worker representatives where there is no recognised union).

Role of trade unions

2.15 Finally, in addition to better information and consultation procedures and better employee/worker protection, there is a need also to address the constraints under which trade unions operate. The current restrictions on industrial action are completely unacceptable, and particularly so where the union is taking defensive action to protect members' jobs and terms and conditions of employment. Without accepting the legitimacy of the current law, it ought to be possible for a trade union to take industrial action without the need to comply with the notice and balloting provisions where the reason for taking industrial action is to resist fire and rehire tactics. Power needs to be met by power.

2.16 The fact that industrial action is readily available to workers and trade unions does not mean that it would be necessary to use it: the existence of this power would inform employer responses and constrain employer behaviour. The current law imposes excessive obligations on trade unions, compliance with which takes many weeks, by which time the fire and rehire process may be underway or even complete. The agonising irony of the current law is that an employer can sue a union which organises industrial action in breach of the statutory industrial action procedures on the ground that it has induced its members to break their contracts of employment. Yet it is the employer who is seeking with apparent impunity unilaterally to change these very contracts, surely a flagrant breach by any other name.

Conclusion

2.17 To recap. There is no silver bullet, but a number of steps that need to be taken, depending of course on the purpose of any reform. But assuming the objectives in para 2.3 above, three things could be done: (i) information and consultation

procedures could be improved; (ii) unfair dismissal and redundancy legislation could be adapted (though there may be a need for consequential provisions relating to unilateral variation clauses in contracts of employment); and (iii) the notice and ballot requirements on trade union action should be waived in the case of defensive action to protect terms and conditions of employment in fire and rehire situations.

3.6.21