

# TRADE UNION RIGHTS

## **The Short Story** By Prof KD Ewing & J Hendy QC

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## **Whose rights?**

1. It is important to distinguish between workers' rights (or 'employment rights') and trade union rights. Trade union rights consist of the rights of workers as trade unionists and the rights of trade unions themselves.

## **Which rights?**

2. The scope of trade union rights are clear:
  - The right of workers to join and be active in a trade union;
  - The right of workers and unions to organise (i.e. to form a trade union or federation and to recruit members);
  - The right of a union to determine its own constitution and membership;
  - The right of a union to decide for itself what activities to undertake, including organising industrial action;
  - The right of workers to take industrial action;
  - The right to free collective bargaining.
3. These rights are very broad. Of course, much more detail is required to apply them in practice. In particular, there are – naturally – limits to how far each right goes.<sup>1</sup>

## **Rights are rights**

4. Trade union rights are fundamental human rights. This is not an matter of opinion by partisan trade unionists or sympathetic academics. It is a statement of international law. This is a very important point. It means trade unions have an unimpeachable, legal argument in favour of implementing trade union rights. The legal basis for these rights is dealt with below. First we consider

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<sup>1</sup>When one considers each right it is obvious why greater definition is required. For example:

- the tension between the right to be an active trade unionist and the duties of an employee must be reconciled.
- The rights of a union to establish its own constitution, membership and activities have to be subject to some restriction so as not to breach other fundamental rights such as non-discrimination.
- The rights to organise and to take part in industrial action are always subject to limitations, such as to exempt the military.
- The right to collective bargaining is to voluntary collective bargaining and not to compulsory bargaining so that the scope of that right is complicated.

the reasons for the existence of these rights - which is why they are recognised in international law, of course.

### **Trade union rights are vital to collective bargaining**

5. The purpose of a trade union is to defend and advance its members' interests, especially at work. (By doing so, of course, trade unions defend and advance the interests of the working class). Unions fulfil that purpose in many ways (e.g. by promoting legislation, by serving on governmental and joint bodies) but the most important and most fundamental of all is through collective bargaining. In order to achieve effective collective bargaining trade unions need trade union rights.
6. Without rights, trade unions are no more than pressure groups or providers of cheap legal insurance or discount travel services. Without an effective right to strike collective bargaining is not possible. In the absence of a right to strike collective bargaining is no more than collective begging. No employer will make concessions if the union cannot realistically threaten to withdraw labour if its demand is not met.

### **Collective bargaining is vital to all of us**

7. Collective bargaining, underpinned by the trade union rights necessary to achieve it, is fundamental to workers and trade unions and beneficial to everyone. The reasons are plain.
8. *For justice:* Collective bargaining is the principal means by which the inherent imbalance in power between the worker and the employer can be redressed. In particular, collective bargaining is usually the only means of achieving any degree of democracy at work and without it workers are denied a voice in the condition of their working lives.
9. *For an efficient economy:* Collective bargaining increases wages, equalises incomes, stimulates the circulation of money, increases demand, promotes job growth, increases tax revenue, reduces welfare budgets, and eliminates social distress - for the good of the country and the benefit of everyone. It forces

employers to compete in technological advance, investment and efficiency rather than on the basis of reducing labour costs.

10. It is no coincidence that strong and efficient economies such as in Germany, Sweden, Norway and Denmark have extensive collective bargaining coverage underpinned by strong trade union rights.
11. *For social balance*: Historical statistics show that decline in collective bargaining coverage is mirrored by growth in inequality and in poverty – with all the evils that follow from those two conditions; crime, drug abuse, anti-social behaviour, mental illness and hopelessness.<sup>2</sup> This is not just a quality of life issue – it is a matter of life and death: in Britain today the difference in the rate of infant mortality between rich and poor is widening,<sup>3</sup> as is the gap in life expectancy.<sup>4</sup>
12. Collective bargaining is obviously not the only factor in reducing inequality (just as it is not in producing an efficient economy) but it is a key component.

### **The attack on collective bargaining**

13. For 75 years Liberal governments, Conservative Governments, Labour Governments and National Governments supported collective bargaining. And unions had the power to take strike action under the Trade Disputes Act 1906.
14. It was a Conservative Minister of Labour who pressed in the 1930s for extension of collective bargaining as a route to economic recovery that restored after the great depression a bi-partisan public policy commitment that produced by the 1970s the lowest levels of income inequality this country has seen.
15. Mrs Thatcher ended all that. In pursuit of a neo-liberal agenda, collective bargaining had to be destroyed. In order to destroy it the freedom of unions to

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<sup>2</sup> R Wilkinson and K Pickett, *The Spirit Level: Why Greater Equality makes Societies Stronger*.

<sup>3</sup> ONS child mortality statistics for 2009 show 3.6 infant deaths (in their first year of life) per 1000 live births for social classes 1-4 compared to 4.8 for social classes 5-8; i.e a 33% higher mortality rate.

<sup>4</sup> ONS life expectancy tables for 2010 show males in Kensington and Chelsea can expect to live to 85.1 years whereas in Glasgow City male life expectancy is 71.6 years, a difference of 13½ years.

organise industrial action had to be crushed. Eight pieces of major legislation later the job was done.

16. Tony Blair refused to reverse this legislation. On 31st March 1997, just before taking office and a week after having a lunch with Rupert Murdoch, he wrote an article in Murdoch's "Times" newspaper declaring that the legislation would not be repealed and only trifling changes would be made. And then these ominous words: "*Even after the changes we do propose, British laws on trade unions will remain the most restrictive in the western world.*"
17. Of course, Tory and Labour Governments over the last 30 or so years have taken many steps towards the eradication of collective bargaining. But most significant are the most restrictive trade union laws in the western world. This has severely limited the capacity of unions to protect workers. Britain has now by far the lowest level of collective bargaining coverage in Europe (30% compared to the normal range of 80-90%). The decline in Britain from 85% to 30% coverage is the steepest and most sudden in the world.
18. Although collective bargaining density in Europe continues to be much higher than in Britain, it is important to note that there are growing and urgent pressures here that need to be addressed. Particularly in some Eurozone countries, there are strong pressures to undermine collective bargaining, which takes different forms in different countries. There is a growing tendency towards the decentralisation of collective bargaining, debates about the 'representativity' of the trade union, and a willingness of employers to make agreements with non-trade-union based workers' organisations. According to the ILO, the entire collective bargaining system in Greece is close to collapse, as a result of the intervention of the Troika. These are developments of great concern to workers in the countries concerned and they have implications for trade unions in every country. For that reason we all have a compelling interest in resisting them.

## **The law**

19. The emasculatation of trade union freedom has been achieved by changes to UK law. Mr Blair's reference to the comparative laws of the western world is relevant. The legal system of these countries is (or is supposed to be) regulated by international law. A series of fundamental international treaties ratified by (and hence binding on) the UK and most countries of the world guarantees trade union rights. Like it or not, trade union rights are protected by international law which sets down minimum standards with which every country must comply. International law also sets the permissible limits on these rights.

*UN Declaration of Human Rights 1948*

20. This most important human rights document provides at Article 23(4) that "everyone has the right to form and to join trade unions for the protection of his interests." This phraseology is reproduced in the European Convention on Human Rights in which the European Court of Human Rights (ECtHR) has held that that general right contains specific trade union rights.

*International Covenant on Economic, Social and Cultural Rights 1966*

21. Article 8 protects trade union rights including the right to strike. The Committee on Economic, Social and Cultural Rights regularly assesses the extent to which the countries which are members of the Council of Europe conform to the Articles each has ratified. For several years it has held the UK in breach for its failure to protect the right to strike.

*ILO Conventions*

22. The International Labour Organisation is the starting point for specific trade union rights under international law. The tripartite ILO was created in 1919 and is a UN agency, responsible for setting labour standards.
23. The two most important ILO Conventions are 87 (of 1948) and 98 (of 1949). The former deals with freedom of association and the right to organise, and the latter with right to organise and the promotion of collective bargaining. Together, these two treaties protect three core trade union rights: the right to

organise, the right to bargain, and the right to strike. At the heart of Convention 87 is article 3 which states clearly enough that:

Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

The right “to organise their ... activities” includes the right to strike<sup>5</sup>

24. The supervisory bodies of the ILO have routinely found the United Kingdom to be in breach of its Convention obligations, particularly in relation to the right to strike. The importance of these ILO Conventions has recently been emphasised by the European Court of Human Rights.

*The European Social Charter 1961*

25. Trade union rights are also protected by the Council of Europe's Social Charter of 1961. The Social Charter provides protection for the right to organise, the right to bargain collectively, and the right to strike for the purpose of collective bargaining. Although the Tory government of Harold Macmillan was the first to ratify this treaty, the United Kingdom is now one of the countries most seriously in breach of its obligations under the Charter, particularly in relation to its laws on strikes.

26. Monitoring compliance with the Social Charter is the responsibility of the European Committee of Social Rights (ECSR) of distinguished jurists. In its most recent relevant cycle of supervision (December 2010), the Committee found that the United Kingdom was in breach (sometimes for more than one reason) of 10 of the 13 obligations examined. For example (and reiterating previous condemnation of the UK) the right to strike guaranteed by Article 6(4) was said to be violated for the following reasons:

- the scope for workers to defend their interests through lawful collective action is excessively circumscribed;
- 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;

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<sup>5</sup> The Employers' group at the 2012 International Labour Conference claimed that the 60 year history of ILO pronouncements on the right to strike meant nothing because the right to strike was not expressly protected by the ILO! Capitalism never rests.

- the protection of workers against dismissal when taking industrial action is insufficient.

*Charter of Fundamental Rights of the EU 2000*

27. Notwithstanding UK attempts at an opt-out, this Charter (now part of the EU Treaty), expressly protects trade union rights, collective bargaining and the right to strike (Articles 12 and 28).

*European Convention on Human Rights 1951*

28. Article 11 of the European Convention on Human Rights and Fundamental Freedoms says:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.”

**The European Court of Human Rights (ECtHR) has made clear that Article 11 includes the right to bargain collectively, the right to strike, the right of unions to decide their own constitutions and membership, and the right of members not to be penalised for seeking union support. Permissible restrictions on these rights are set no lower than the level of the ILO Conventions and the European Social Charter.**

29. ECtHR decisions are binding on UK courts because of the Human Rights Act 1998, though so far those courts have been resistant in relation to the right to strike. But one way or another, the United Kingdom will have to yield to the over-riding supremacy of international human rights law, and fully recognise the trade union rights of British workers.

**New trade union rights for a new era of collective bargaining and equality**

30. A pre-requisite for the restoration of collective bargaining and hence the reduction of inequality and stimulation of the economy is a set of trade union rights which conforms to the international treaties referred to above, all of which the UK has ratified but which it continues to flout. In this country we must have such an internationally approved right to strike. No longer is it acceptable for industrial action to be presumed unlawful at common law for



both workers and trade unions with very limited protection from legal liability. The existing law on collective action should be scrapped and replaced with a legal framework befitting a modern democracy.

31. The scope of the right to strike should protect all industrial action which is designed to (a) promote and protect the social and industrial interests of workers, and (b) protect workers and trade unions involved in such action. The only notice that should be required – if any – is a simple notice to the employer of when industrial action is about to start. Few people will be opposed to trade unions consulting their members before calling industrial action. But it should be for trade unions to decide for themselves what their procedures should be in such circumstances, with democratic balloting obligations enforceable by union members and not by a third party, the employer. Trade unions have no right to interfere with a company's obligations to its shareholders. An employer should have no right to interfere with a trade union's obligations to its members.
32. The fundamental trade union rights necessary to support collective bargaining must be a central theme in any new social and economic strategy – the method for delivering fairness at work, better working conditions, and greater equality, and reducing poverty. Collective bargaining is essential to a fair, equal and inclusive society.
33. Collective bargaining density and economic efficiency is highest in countries where collective bargaining takes place at sector or industry wide level. Sector wide (or higher) bargaining is standard practice in the EU15 where collective bargaining density is high. It is virtually unknown in USA, Canada, Australia, New Zealand where collective bargaining takes place principally at enterprise or company level.

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