Policy Exchange

research note
September 2010

# Modernising Industrial Relations

Ed Holmes, Andrew Lilico, and Tom Flanagan

## Executive Summary

This paper is motivated by the following issues:

- Much of the current framework of industrial relations law was formulated in a different age in which many employers were the sole or main purchaser of largely homogeneous labour (i.e. they possessed 'monopsony' power).[1] Since this is no longer the case much of the framework now requires new thinking.
- In particular, there is a need to recognise a number of stakeholders in a business, including employer, employees, unions and other groups. With a greater policy thrust towards the growth of civil society, it will be important to reassess what the role of trade unions should be; for example, ensuring that their relative influence on business is proportionate with the share of the workforce they represent.
- Certain industrial relations reforms of the past 15 years such as those relating to balloting procedures, the use of agency staff, union recognition and periods of protection from unfair dismissal have been shown to be difficult to understand and apply. This has led to an undesirable proliferation of litigation, brought by both unions and employers.

To address these, this paper contains proposals for:

- Reforming the current industrial relations framework.
- Exploring alternative approaches to the employer/trade union relationship.
- Reforming political donations and taxpayer funding.
- Other policy options.

[1] Whilst a "monopolist" would, in the extreme case, be a sole *supplier* of a good or service, a "monopsonist" is a sole *purchaser* of a good or service.

Trade unions are representative organisations, one of the aims of which is to negotiate with employers on their members' behalf about pay and conditions. One mechanism that can be used to place pressure on an employer to resolve particular grievances is industrial action which could take the form of a strike – a withdrawal of labour. This is usually collectively triggered by a successful ballot of the members of a trade union when a bare majority of the votes cast is in favour.

Perhaps surprisingly, UK law does not provide a right to strike as such. The basic legal principle is that when employees withdraw their labour, they act in breach of contract. A union, by calling a ballot for strike action, is inducing that breach. Were employment contracts treated like other types of contract, both the union and the employee could be liable to be sued under tort law by anyone adversely affected by the strike, including the employer, for the financial damage caused by the strike. The employees themselves could be vulnerable to action from the employer in relation to their breach of contract, including disciplinary action and even dismissal.

However, industrial relations law, almost uniquely, provides extensive immunities from liability for tort and breach of contract. Despite trade unions often complaining of 'anti-union' laws, relevant legislation actually protects them and their members against the employer's ability to sue, provided that they follow certain rules. Both are protected against action by the employer if the union follows the requirements of the Trade Union and Labour Relations (Consolidation) Act 1992 (often referred to as "TULR(C)A") sections 226-234, setting out steps which the union must take to conduct a ballot and subsequent strike action. These are principally practical measures to ensure that the ballot process is conducted properly.[2] There is intended to be a balance between, on the one hand, the ability of a union to call a strike and gain protection for itself and its members

---

[2] In particular, Section 219(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 implicitly acknowledges that, in the absence of statutory provisions to the contrary, a trade union would be liable for the tort of inducing breach of contract if it caused its members to cease working for an employer, in breach of their employment contracts, in furtherance of a trade dispute. However, it then spells out (section 219 (4)) that if the ensuing provisions of the Act are compiled with, statutory protection comes into force – conversely, failure to comply with these requirements means a trade union (and its members) are unprotected in tort.

In summary terms, s 226(1)(a) provides that in calling for industrial action a trade union is not protected unless supported by a ballot, and s 226(2)(a)(ii) provides that there is no support by a ballot save a ballot which complies with all of the provisions of sections 227 to 231.

Section 232B (inserted by the Employment Relations Act 1999), provides that in relation to the requirement of certain sections, notably not including s 231, a failure to comply which is 'accidental. and on a scale which is unlikely to affect the result of the ballot' should be disregarded. This suggests that such accidental non-compliance is not permitted in relation to s 231.

Section 226A(2C) (also inserted by the 1999 Act), which is concerned with information communicated before the ballot, refers to that information being 'such as will enable the employer readily to deduce certain facts' including 'the total number of employees concerned'. By contrast, s 231 requires the actual numbers to be communicated.

from legal reprisal and, on the other, the ability of the employer to understand the nature of the threat which it faces and have a reasonable opportunity to manage its business against it.

Such immunities may well have been desirable in the past, when many employers possessed monopsony power over a largely homogeneous workforce. Where workers found it difficult to move jobs if they were dissatisfied with their existing pay and conditions, it would make sense to have a representative body to negotiate on their behalf with the employer. This body, a trade union, would also require the ability to call a strike against that employer as an alternative to the threat of workers defecting to another employer. However, such conditions are much less common in the UK today than they once were, and where they do exist we have other better tools to deal with them, in particular competition policy.

In the first half of this note, we examine the reasons why trade unions and striking workers should enjoy a range of legal protections. We argue that collective bargaining will be desirable if this helps to reduce the cost of negotiating wages with employees, or if firms have monopsony power in respect of labour hiring (e.g. if a large mill owner employed most of the workers in a town and workers would find it expensive or impractical to move to another town to find work). However, we suggest that the proportion of the economy in which these conditions apply is likely to be lower than in the past. Workers are much more mobile, and there are fewer monopsony employers than in the past. Modern competition law can and should be used to reduce monopsony power.

We also consider whether competition law should be applied to trade unions themselves, given that they are also providers of services to workers. The limitation of choice workers have in choosing a union is considerable when we consider the near-monopoly position of particular trade unions for particular workforces.

Several pieces of legislation since 1997 have given trade unions wider legal protections, and imposed new conditions on employers. The balance of power has shifted significantly in favour of trade unions. In the second half of the note we move on to consider some specific technical changes to the procedures of balloting, strikes, and union membership. We suggest a number of options for consideration. We also suggest a series of options relating to political donations and taxpayer funding.

## Key findings

### The balance of power between trade unions and employers has shifted towards unions

Since industrial action can occur on the basis of a bare plurality of those voting, regardless of how little of the union membership or workforce this may represent, a strike can go ahead with complete legal legitimacy with only a small minority of the trade union members – and an extreme minority of the actual labour force – voting in favour of it. This can mean that trade unions can have wide-ranging legal rights to cause commercial

harm to employers even though they represent only a small percentage of the workforce. In one recent case, only 31% of unionised staff actually voted to reject British Airway's recent pay offer.[3]

### Trade unions are consolidating into large, multisectoral organisations

The number of trade unions recorded by the Certification Officer has fallen by 26% in just a decade: from 243 in 1999/0 to 180 in 2009/10. In 2007 the TUC had 66 affiliated unions, compared with 109 in 1979. The two largest unions, Unison and Unite, each have more than a million members out of a total UK union membership of 6.7 million.

### Monopoly conditions exist for unions (vs workers) in many workplaces

Since the Employment Relations Act 1999 (EReIA 1999) gives a single trade union statutory rights to formal recognition by an employer (and unions generally do not recruit where another has significant membership as per the 'Bridlington principles'), workers usually have no choice over the union they want to join. This significantly limits the ability of employees to choose what kind of representation they are given.

### Union membership and strike action is heavily concentrated in the public sector

Union membership has decreased and become concentrated in the public sector. Only 15% of private sector employees are now union members compared to 56% in the public sector. Despite being only 20% of the workforce, 79% of the working days lost to strike action are in the public sector. Proportionately, the average private sector worker takes just 7% of the strike action the average public sector worker does.

### The nature of union activity is changing

The "wage premium" which union members appear to have has fallen to 5% in the private sector and 20% in the public sector – though this may be mainly driven by factors such as age or qualifications.

### Taxpayer funding of unions is extensive – and often hidden

Direct payments to trade unions of at least £78.5 million have been made since 1998. 34,000 personnel and industrial relations officers were employed in the public sector in 2009 (though not all representing trade unions) at a cost of £826.7 million. An estimated 750 full time equivalent union posts are taxpayer funded within the Civil Service. A total of 2,493 full-time posts in the public sector work for trade unions – costs for 2009/10 included £18.3 million in direct payments and £67.5 million in staff time.[4] Other benefits – such as statutory time off for shop stewards and use of public sector facilities for meetings, etc., are largely unrecorded but also represent a significant subsidy. For example, the Ministry of Justice has stated that up to 41,558 working hours of its staff were taken up with trade union activities in 2008-9, at a cost of £6.3 million.[5]

---

[3] http://www.bbc.co.uk/news/business-10695976
[4] http://www.taxpayersalliance.com/unionfunding.pdf
[5] http://www.theyworkforyou.com/wrans/?id=2010-07-27b.11679.h&s=trade+union

Were these costs replicated across all departments according to their size, this would mean 245,000 working hours were spent on such activities at a cost of £37 million.

### The causes of strikes are changing

As unemployment has risen, a much greater proportion of strikes are being held due to redundancy. 76.7% of working days lost were due to this reason in 2009/10 compared to just 1.7% in 2007/8. However, one of the difficulties facing both employees and employers is the lack of a requirement for a union to be precise in setting out the reason for a strike. Often, a union could have a broader agenda around recruiting members, funding and achieving collective bargaining, with the apparent, immediate, reason being only part of the picture.

### The nature of industrial action is changing

While overall numbers of days lost to strikes are lower than in the past, the number of employment tribunal cases has increased by 327% in just a decade, and trade unions are initiating new types of legal action.

## Proposals and reforms within the current framework

1) The ballot paper should contain **more information concerning the nature, frequency and length of industrial action** to be authorised, including identifying a **specific grievance.** At present it need not do so, and material is often circulated alongside the ballot which refers to a whole range of grievances and authorizes a range of unexpected industrial action options. In some recent actions union members have been shocked to discover, after the ballot, that strike action has been scheduled at unexpected times.

2) **Require that a majority of employees in the balloted workplace vote.** This is already the case in Slovakia and Poland. This would avoid strikes being triggered where only very small numbers of workers are members of a union. A variant of this option, which might either replace or supplement it, would be to **require that a minimum of 40% of the trade unionised workforce vote in favour of strike action,** in addition to a majority of the votes cast. This would avoid strikes based on very low percentage turnouts.

3) **Employers should be permitted to use agency staff to carry out the duties which striking employees would otherwise have performed.** This would undo restrictions introduced in 2004. There are considerable uncertainties in the law as it stands at present. Some have argued that this reform shifted the law from protecting individuals' right to withdraw their labour to creating ownership of jobs and a right to damage a business.

4) **Reduce the period of protection from unfair dismissal during a strike,** for example from twelve back to eight weeks, as per the Employment Relations Act 1999. This would undo changes made by the

Employment Relations Act 2004. This protection should be limited to selective dismissal, as before 1999.

5) **The standard period of notice needed for strike action should be lengthened to 14 days.** This might provide a sufficient last chance for a negotiated settlement, allow additional time for information to be given to employees on what they will be striking about and give the employer sufficient notice to help plan for the impact of a strike. (The "Overriding Principles" of the Rules of the Court on litigation require the avoiding of unnecessary disputes, saving costs and having no surprises). Alternatively, or perhaps in addition, we could **vary the period of notice needed for strike action depending on the form of the dispute** — perhaps lengthening it for collective bargaining disputes, and shortening it for other forms of action.

6) **Create different rules for "essential" goods and services where there is a lack of alternatives available.** Organisations could apply for judicial review to revoke statutory immunities for strike action if a reasonable person would assume it would cause significant economic damage or imperil the safety of the general public. The courts could grant this "essential" status, based on a set of criteria (e.g. a limited choice of alternatives or evidence of significant market power by a regulatory or competition authority). Similar criteria already exist in Poland, Slovakia, Slovenia and Hungary, where strike action is banned where it would be detrimental to life and health or threaten state security.

7) **We should require that trade union recognition must always be determined by secret ballot of the workforce, regardless of the evidence of union membership.** This would involve removing the automatic recognition that currently flows if it can be established that more than 50% of the workforce are union members, and ensure that recognition was always the free and fair choice of the workers concerned.

8) **Require that a trade union has a minimum percentage of membership in the relevant workforce,** before a ballot can be called. If that were put at 10%, this, combined with the second proposal in (2), above, would reflect and be consistent with the initial balloting requirements for an application to the CAC for trade union recognition, in Schedule 1 of TULR(C)A.

9) **Amend TULR(C)A section 145B to permit some limited communication between employers and employees under particular designated circumstances.**

10) **An annual audit of union membership** could be conducted jointly by the employer and the union providing relevant information to an authorised third party under cover of confidentiality. This would help unions to ensure that only eligible workers are balloted on action – and prevent the frustrating situation where strikes are struck down as the result of unions balloting "ghost" members. This would avoid unnecessary litigation along with complaints of "anti-union" legislation when the problem is not the legislation but simply one of poor "housekeeping" by unions.

## Proposals for changing the current framework

11) **Accept no universal right to strike**, instead limiting the "permission to strike" (i.e. statutory immunities etc.) to cases where there are high transactions costs in individual bargaining or advantages to offsetting monopsony power and such advantages of permitting strikes are not more-than-offset by disadvantages such as the goods and services provided by the firm being essential and without alternatives.

12) **Use competition law and competition policy to identify cases of monopsony power in respect of labour purchasing.** Act specifically against monopsony power in some cases (this should in general be assumed to be a superior path to the use of union power); in others where monopsony power is designated, an alternative consequence might be that the monopsonist concerned would be compelled to allow collective bargaining potentially backed by strike action.

13) **Individual strike ballots should be held for each legal public sector employer.** In the private sector people generally only strike against their own employer – they cannot take "secondary action" to support strikes against other employers. In the public sector quasi-secondary action through national strike balloting is still commonplace, but the rules could be made equivalent.

14) **Investigate whether there is sufficient competition in the supply of union services.** Where unions are in a monopoly position versus workers, action could be taken through competition law and/or competition policy.

## Proposals on political donations and taxpayer funding

15) **The Government should remove various forms of taxpayer funding for Trade Unions.** These payments, totalling at least £78.5 million since 1998, lack a clear rationale and are not managed in a very transparent way.

16) **Members should be given "opt-in" choices regarding political donations.** Instead of opt-out arrangements which default members into making political donations, donations to parties should only be made for members who choose to opt-in. The beneficiary party should be named, and increases in such fees should require consent.

17) **No union membership fee should be deducted direct from a pay packet.** Unions should also provide notice to their members if the cost rises. This would create transparency which might promote value for money.

## Part 1: The evolution of trade unions and principles of industrial relations

### The role and history of the trade union movement

Since the rapid growth of trade unions during the 1890s, trade union law has taken several turns. The 'Taff Vale' judgement of 1901[6] held that unions could be liable for the employer's losses during a strike. This was overturned by the Trade Disputes Act in 1906, giving unions immunity from liability in tort provided the action taken was 'in contemplation or furtherance of an industrial dispute'.[7] This has remained the fundamental principle of strike action ever since - immunity of the legal liabilities that would otherwise result from strike action, including limited statutory protection from unfair dismissal for individuals taking part in strike action.

The British government left matters broadly within this Trades Dispute Act framework until the Industrial Relations Act 1971, which attempted fundamental reform. It mandated that every collective agreement made in writing was to be legally binding and a National Industrial Relations Court was to be established with powers to impose a 60-day cooling off period in major strikes. In other words, this could be used to make strikes illegal for the term of a binding collective agreement. However, trade unions actively defied this Act (the TUC even expelled those unions which complied) and it was repealed by the incoming Labour Government in 1974. This government also widely extended the scope of statutory immunities to protect various forms of secondary action and limited the potential for employers to obtain injunctions in trade disputes.

The Thatcher Government adopted an incremental approach to reversing these measures. Various Acts during the 1980s curtailed the scope of statutory immunities and created various new requirements which trade unions must fulfil to take lawful industrial action. The Employment Acts of 1980 and 1982 made secondary strike action illegal and picketing lawful only if carried out by workers at their own places of work, permitted post-entry closed shops only if voted for by 85% of workers, and outlawed pre-entry closed shops entirely.[8] Secret ballots were required for union elections under the Trade Union Act 1984, and further Employment Acts of 1988 and 1990 made all closed shops illegal and made unions responsible for unofficial actions by their members unless they disavowed them in writing. Unofficial strikers could be dismissed. The Trade Union Reform and Employment Rights Act 1992 required seven days' notice of a strike to be given, tightened control over ballots for industrial action, and undermined the 'Bridlington Principles' by granting individuals the right to join a union of their choice.

---

[6] The Taff Vale Railway Co v Amalgamated Society of Railway Servants 1901 AC 426, HL. We explain this case in more detail below.

[7] A *tort* is the common law cause of action where one individual has unlawfully harmed another.

[8] *Secondary action* is when strike action is initiated in one industry and is supported by workers in another industry.

*Picketing* involves workers involved in industrial action staging a protest near their place of work.

A *closed shop* is where an employer only hires members of a particular union.

These measures were designed to curb what was perceived as irresponsible and undemocratic behaviour by some trade unions. Those provisions, slightly amended, are found in the current legislation, Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

The 1980s legislation was particularly designed to prevent wildcat strikes - strikes called at such short notice that employers had no warning of what was coming and thus had no opportunity to try to persuade their employees not to take part or make contingency plans to protect their businesses during it. To that end Part V of the TULR(C)A contains requirements that the Union provides advance notice to the employer of its intention to hold a ballot and identifying the groups of workers who will be involved.

Another major concern at the time was that strike ballots often took place in a very informal way. The 'show of hands in the car park' characteristic of union voting meant everyone could see who was voting for and against the strike. There was also concern that some workers were not able to take part in the vote. Others who could take part were put under pressure, at times even bullied into supporting the strike. The new provisions now found in Sections 226 to 232 of the TULR(C)A were designed to ensure that ballots for industrial action were secret, free and fair. In short they were designed to ensure that a ballot had democratic legitimacy.

It should be noted that these provisions are not designed to prevent unions from organising strikes, or to make it too difficult for them to practically do so. As has been noted:

> "Parliament's object in introducing the democratic requirement of a secret ballot is not to make life more difficult for trade unions by putting further obstacles in their way before they can call for industrial action with impunity but to ensure that such action should have the genuine support of the members who are called upon to take part. The requirement has not been imposed for the protection of the employer or the public but for the protection of the Union's own members."[9]

The election of the Labour Government in 1997 marked a radical departure from its predecessor. Beginning with the 1998 White Paper 'Fairness at Work', setting out various proposals for industrial law reform, statutory protection for trade unions against prosecution sharply increased. The Employment Relations Act 1999 introduced the right not to be dismissed for taking part in 'protected' industrial action and attempted to 'clarify and simplify' the law on industrial action ballots (though the effectiveness of this has often been questioned). The Employment Relations Act 2004 extended the protected period for unfair dismissal purposes from eight weeks to twelve.

The passage of the Human Rights Act 1998, incorporating the European Convention on Human Rights and Fundamental Freedoms into domestic law, means all Acts of Parliament must be interpreted in a way compatible with Convention rights (section 3) – including the TULR(C)A. Article 11(1) – allowing freedom of

---

[9] Millett LJ, *London Underground Ltd v National Union of Railwaymen, Maritime and Transport Staff* [1996] ICR 170, p. 180.

assembly and association, including 'the right to form and to join trade unions for the protection of his interests' is of particular relevance, (limited by Article 11(2), allowing these rights to be legally restricted by democratic means).

Despite this significant augmentation of the rights of trade unions, UK law has increasingly been thrown into doubt by international commitments in recent years. Various undertakings have been used by trade unions to question the legitimacy of UK legislation.[10] Restrictions on the right to strike and the right to collective bargaining, they have argued, violate the exercise of rights enshrined in these commitments. Most recently, the European Joint Committee on Human Rights in its First Report for 2009-10 confirmed its predecessors' recommendation that the UK review its industrial relations laws. Further cases were confirmed by the European Court of Justice in late 2007, making judgements under the EC Treaty (now TFEU) recognising that trade unions and their members have a fundamental right to take industrial action.[11]

## The use of industrial action in the public and private sectors

Trade union membership has fallen significantly over the last thirty years – from a peak of over 13 million members in 1979 to just 6.7 million today. However, this disguises a dramatic change within the trade union movement. The public sector has essentially replaced the traditional industrial base as the vanguard of trade union activism – last seen in the large-scale industrial actions over public sector pay restraint in 2008 and more recently with the PCS union action over civil service redundancy pay. Despite being around a fifth of the total UK workforce, the public sector now makes up a remarkable 64% of trade union members (4.1 million of a total of 6.7 million).

Over the long term, Britain's current industrial relations look particularly calm – especially compared to the major strikes in the first quarter of the twentieth century (all three of which were associated with national coal strikes) and the (smaller) large-scale action taking place during the 1970s and early 1980s. The highest level of strike action by far is that during the General Strike of 1926.

---

[10] In particular, the International Labour Organization Conventions, the UN's International Covenant on Economic, Social and Cultural Rights 1996, the EU Treaty on the Functioning of the European Union, the European Convention on Human Rights and Fundamental Freedoms and the European Social Charter.

[11] International Transport Workers' Federation and anor v Viking Line ABP and anor 2008 ICR 741, ECJ and Laval un Partneri Ltd v Svenska Byggnadsarbetareförbudet and ors 2008 IRLR 160, ECJ.

Figure 1. Strike action, 1901-1929

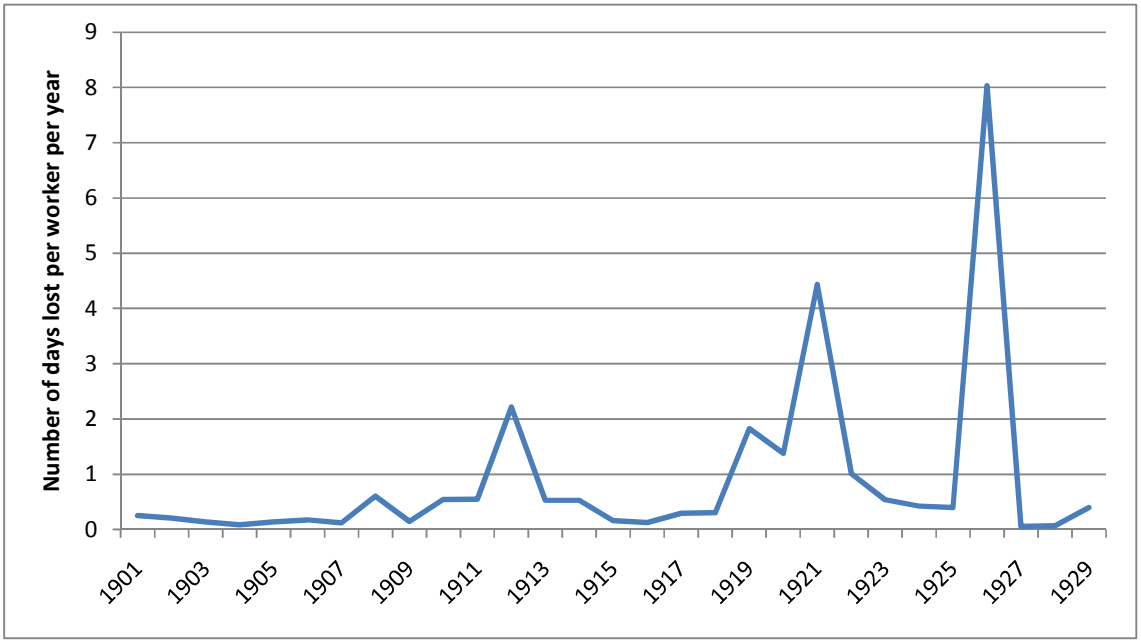
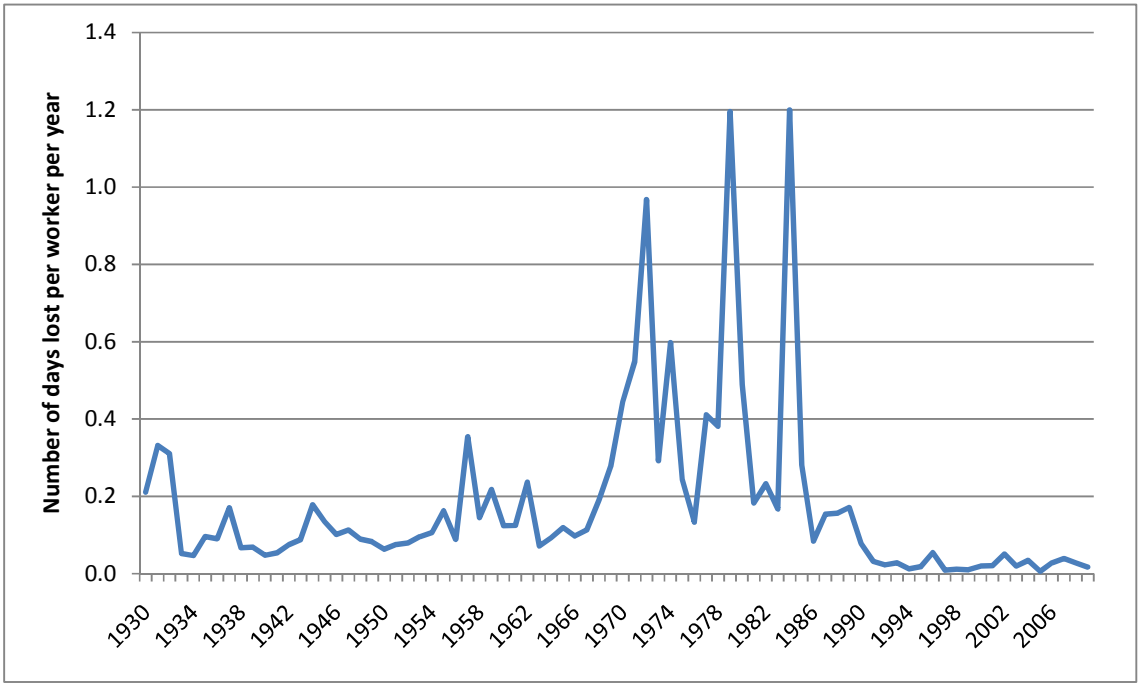


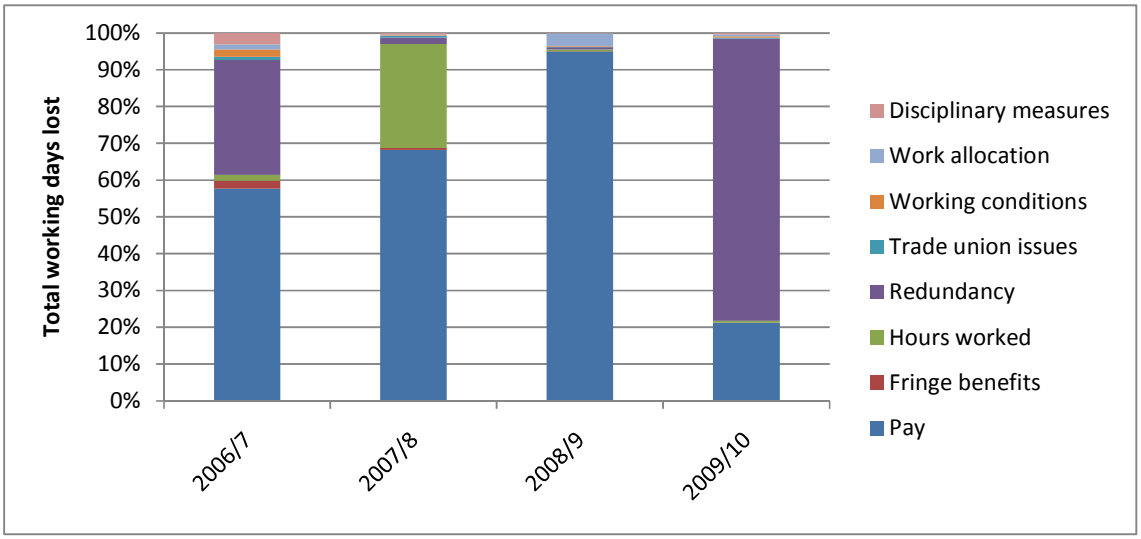

Figure 2. Strike action, 1930-2009




Source: Office for National Statistics Labour Force Survey and Butler and Butler, 'Twentieth-Century British Political Facts 1900-2000'.

The year 2009 and the beginning of 2010 have seen a dramatic shift in the causes of industrial action.

Figure 3. Causes of strikes, 2007-10




Source: Economic & Labour Market Reviews, 2007-10.

A remarkable 95% of working days lost due to strike action involved a dispute concerning pay in 2008/9; far more than previous years. This may be due to the pay freezes and cuts of 2008/9 coinciding with an unexpected upward spike in inflation. By contrast, in 2009/10, 77% of days lost were due to disputes about redundancy, presumably associated with increased layoffs during the recession.

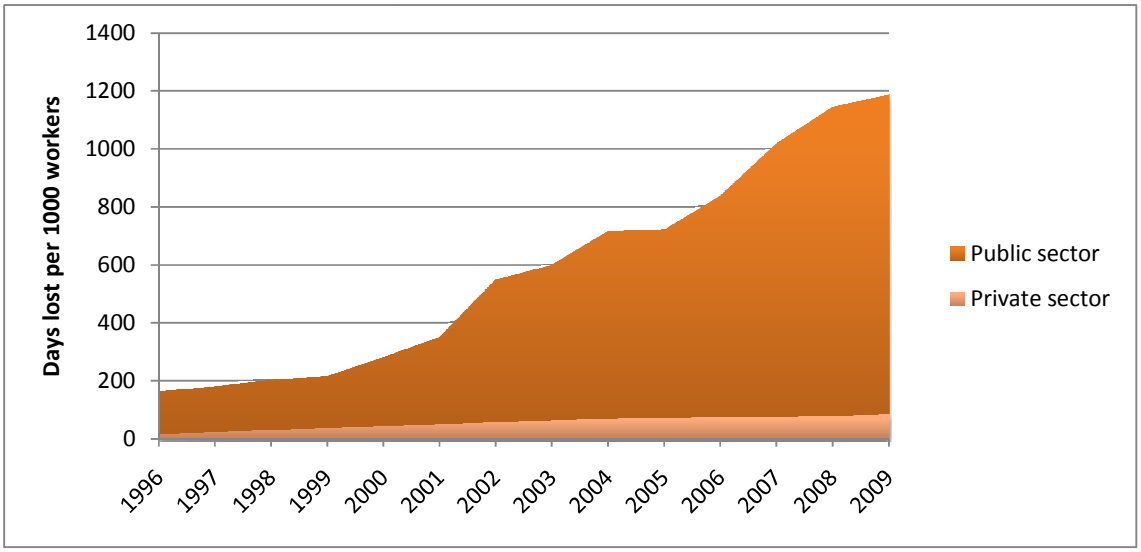
Strike action tends to reduce during recessions. The normal pattern in difficult economic times is that, while balloted union members generally reject low pay offers, (hence causing a sharp increase in trade disputes), workers rarely go on strike, perhaps because of fear of loss of pay or losing their job altogether.[12] Disputes, though more regular than in prosperous times, generally are resolved through formal or informal conciliation.

However, this disguises a very significant change in the composition of strike action. Despite being only a fifth of the workforce, 79% of the working days lost to strike action are in the public sector. Proportionately, the average private sector worker has taken just 7% of the strike action the average public sector worker has. We

[12] We ran two Vector Autoregression (VAR) Models to verify our result, one with days lost per person per year and real GDP and one with days lost per person per year and a dummy variable for recession (measured in terms of contractionary years as opposed to technical recessions) for the period from 1929 - 2009. Our results showed that real GDP (the continuous variable) had a positive relationship with days lost per worker with a coefficient of .002682 and a 95% confidence interval of -.001025 and .0063889 and recession (the binary variable) had a negative relationship with days lost per person per year with a coefficient of -.0964458 and a 95% confidence interval of -.2546904 and .0617988. That is, as real GDP rises days lost per person per worker rises and during recessions strike action falls. The real GDP model fails the Granger causality test whereas the recession model passes the Granger causality test at the 10% significance level (i.e. statistically speaking we can say that recessions lead to a fall-off in strike activity as opposed to a fall-off in strike activity causing recessions).

hence see two widely diverging trends — one for strike action to be relatively rare compared to the 1970s and for those strikes which do take place to be overwhelmingly concentrated in the public sector.

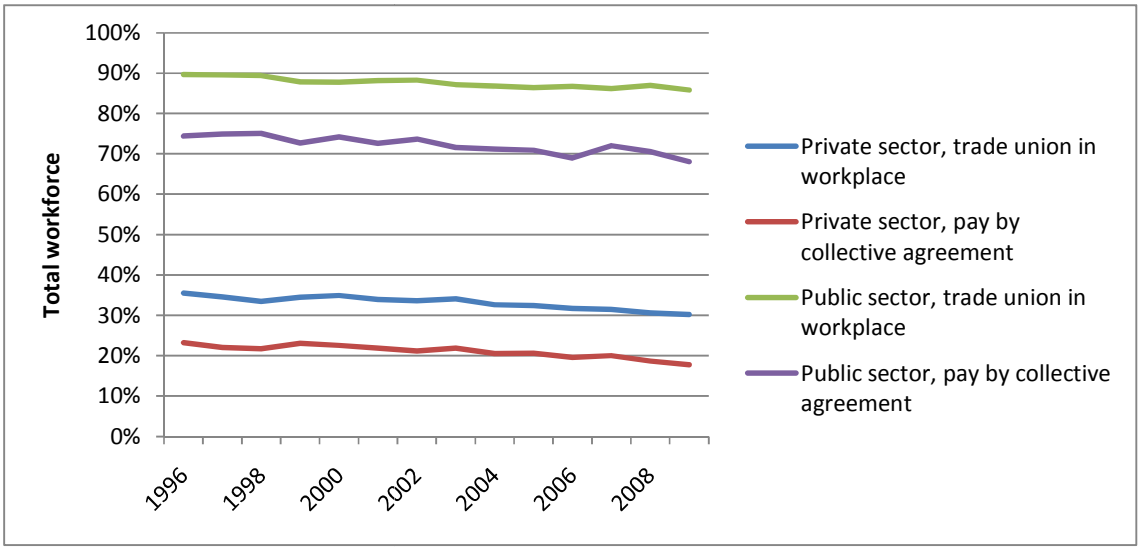
Figure 4. Cumulative days lost to strike action, 1996-2009




Source: Office for National Statistics.

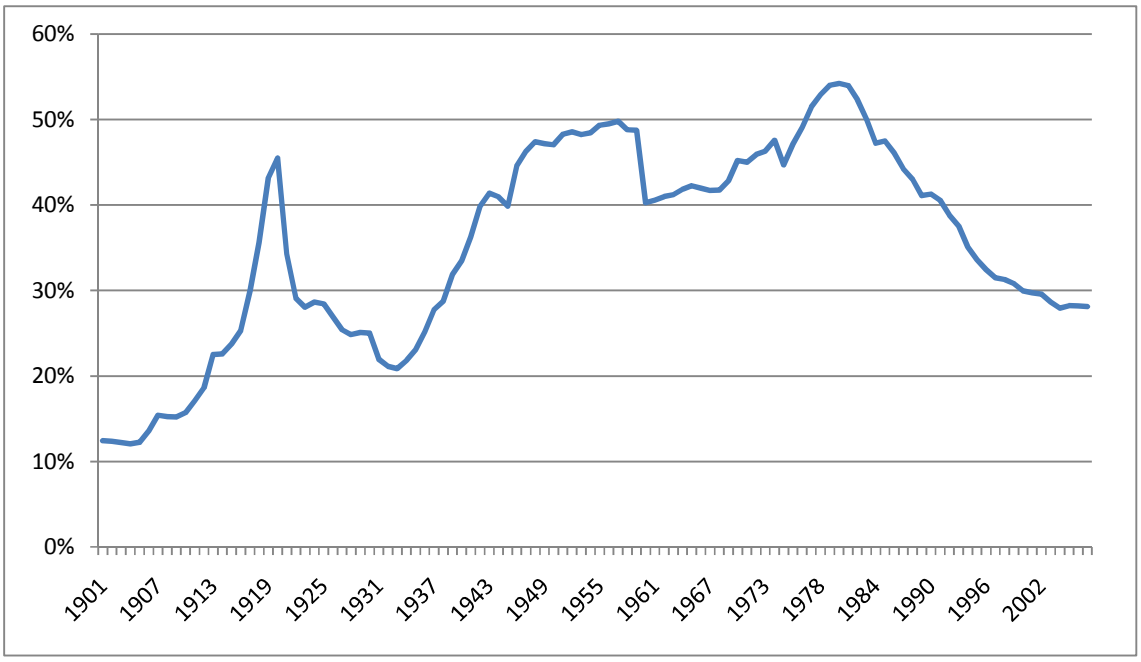
The presence of trade unions and collectively determined pay settlements are also starkly different in the public and private sectors.

Figure 5. Trade Union presence and collective bargaining coverage, 1996-2009




Source: Labour Force Survey, Office for National Statistics.

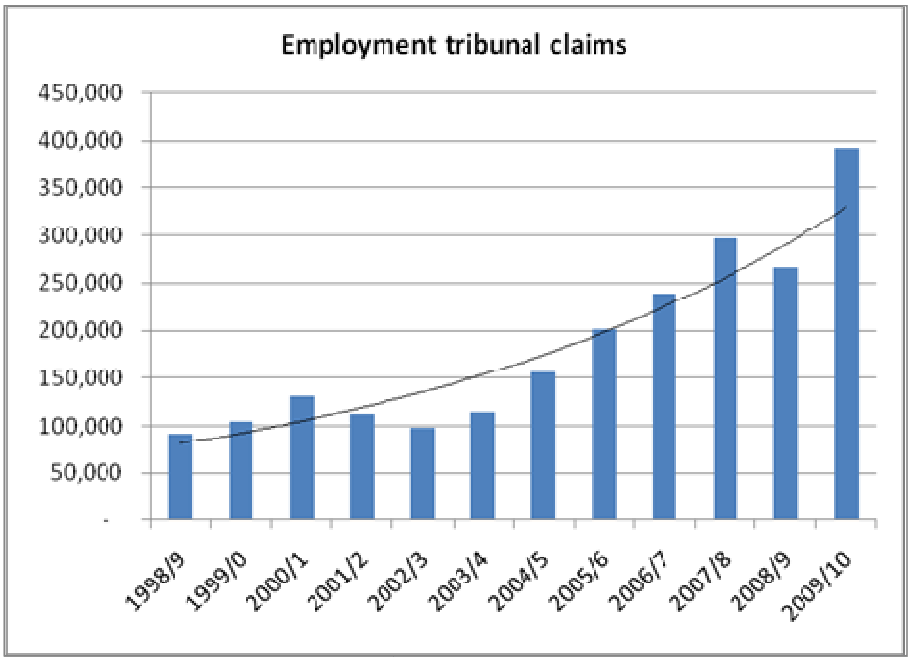
Figure 6. Trade Union membership as a percentage of the total labour force, 1901-2009




Source: Office for National Statistics Labour Force Survey and Butler and Butler, 'Twentieth-Century British Political Facts 1900-2000'. 1901-30 labour force is defined as those ages 10 years and over, 1931-50 those ages 14 years and over, 1951-78 those ages 15 years and over, 1979-2009 is defined as the total labour force employed.

Overall, membership and days lost to strike action are lower than in the past. However, these figures disguise another trend. The late Lord Denning once said that the law should be slow to interfere in industrial relations disputes. Ironically, trade unions have increasingly replaced strike action by other forms of industrial unrest – particularly litigation. Equally, the amount of individual litigations and employment tribunal cases has increased dramatically within the UK over the past decade.

Figure 7. Employment tribunal claims




Source: Tribunals Service.

## Should employees be permitted to strike at all, and if so under what conditions?

Often, a "strike" is defined as the collective withholding of labour, but in this document, instead, we shall understand a strike as the refusal of an individual employee to work according to the standard conditions of her contract. The implication will be that "striking" is something that an individual can do, of which a strike by multiple persons would be a particular case.

Our first question, then, is whether there are good grounds for permitting individuals to strike. This is not because we anticipate that individual striking would be a common occurrence — clearly, collective action is overwhelmingly the standard case. Rather, our question will be whether collective striking is an aggregation and expression of individually legitimate (or at least potentially legitimate) acts, or whether collective action would have to depend, for its legitimacy, upon something intrinsic to its being *collective*.

How we understand the rationale for permitting strikes will be, as we shall see, central to the question of what sorts of laws should regulate them.

## Limitations on strikes and consequences of striking

Particularly well-known forms of "withholding labour" include not turning up to work, turning up only to urge other workers not to do their jobs ("picketing"), falsely declaring oneself sick, 'go-slows' and 'working to rule' (whereby one adopts an extremely narrow interpretation of safety regulations, refuses to undertake any task not explicitly specified in one's employment contract, and refuses to work overtime).

If an employee refuses to work according to her contract, is she not in breach of it, and hence liable to dismissal and perhaps a civil claim for damages in respect of breach of contract? Indeed, when strike action first became common, during the Industrial Revolution, it was made illegal in many jurisdictions, and remains illegal in some countries even today.

In addition, in most countries strikes are altogether forbidden in certain sectors.[13] Restrictions on the right to strike exist above all in the public services, to which special rules apply in all EU countries. In Italy, for example, public services are treated as necessary for the realisation of fundamental rights and are established in the Constitution. The armed forces and law-enforcement agencies are not allowed to strike anywhere. In Germany, Austria, Denmark and Estonia, civil servants do not have the right to strike either (in Estonia, this extends to the whole public sector), in order to ensure the continuity of public services and in return for security of employment.

In Poland, a 1991 act limits strikes in that it prohibits those that are considered detrimental to life and health or that threaten state security. There are similar restrictions in Slovakia, Slovenia and Hungary. These countries have legislation including compulsory social-harmony clauses for trying to avoid strikes. In particular, the duty to preserve social harmony prohibits all industrial action during the negotiation of collective agreements, also known as "conciliation periods".

We are not aware of any jurisdiction which does not have some restrictions on the ability to strike for at least some categories of workers, particularly the Armed Forces and police. However, in practice such workers do go on strike without legal sanction. For example, the South African Army went on strike in 2009, though this was technically illegal. Striking soldiers were suspended without pay.

Other countries take the restriction much further. For example, UK prison officers have had no right to strike since the government revoked it in 1994 (except, in a limited sense, between 2004 and 2008).[14] This is also the case in Austria, Bulgaria, the Czech Republic, Denmark, Estonia, France, Germany, Hungary, Italy, Latvia, Luxembourg, Malta, Poland, Iceland, Japan, South Korea, Turkey and the USA (for federal employees). In June

---

[13] This is allowed under ILO conventions:
'ILO Convention 98
Right to Organise and Collective Bargaining Convention, 1949
Article 5
5. (1) The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.
Article 6
6. This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.'

[14] Criminal Justice Act and Public Order Act 1994 (Section 127) The ban was revoked in 2004 except for Northern Ireland and the private sector (albeit in conjunction with a voluntary no strike agreement with the Prison Officers Association) but reimposed by the Justice and Immigration Act 2008.

this year, the Irish Congress of Trade Unions (ICTU)'s public service committee, in the 'Croke Park' agreement, voted to formally agree to a four-year strike ban as part of a collective agreement package.

In the UK, striking was a criminal offence prior to laws introduced by Disraeli in the late nineteenth century[15]. But even after these new laws, strikers still faced civil liability for breach of contract. The landmark case demonstrating this was *Taff Vale Railway Co v Amalgamated Society of Railway Servants*. In 1900 a large railway union (the Amalgamated Society of Railway Servants) called a strike in a dispute with the Taff Vale Railway of South Wales over the treatment of John Ewington. When the company attempted to break the strike by bringing in non-union labour, the strikers responded with a sabotage campaign, including decoupling carriages and greasing rails. After resolution of the dispute, the company sued the union for the damages incurred during the strike, and in a landmark judgment (1901), the House of Lords decided that, since a union could own property and was capable of inflicting harm on others, it was liable to pay damages (£23,000 plus another £19,000 in legal costs (well over £3m at today's prices)) for the harm it inflicted – in this case the economic loss to the company. A further judgment, (Quinn v. Leathem), ruled that a strike could be regarded as a conspiracy to injure, and once again unions could be held liable for the damages.

## What arguments are there for allowing individuals to strike?[16]

If employees had a range of potential employers to choose from, and had entered into their employment contracts freely, and if general law forbade undesirable contracting (such as selling oneself into slavery or agreeing to work at an inappropriately young age in certain jobs or contracting to work in disproportionately unsafe conditions), it might seem as if there were no positive benefits to permitting individuals to strike. If an employee were dissatisfied with her terms and conditions, she could seek a job elsewhere, if the employer had violated some law on working conditions the proper course of action would be to report the employer to the appropriate authorities, whilst if the employee had some internal grievance she could follow the proper grievance pursuit procedures within her firm.

We can, however, identify the following reasons that it might potentially be desirable to permit individual strike action under certain circumstances:

- **When there are significant costs to employer or employee of absorbing a new worker into the employee's position.** If it is costly to take on a new worker — perhaps because it is expensive to train someone (think of a factory with a very unusual layout and schedule that must be memorised by a factory manager part of whose job is to know where everything in that factory is), or because each new person in a position might have very special skills or needs that have to be learnt by other members of the team (think of a striker in a football team that runs into space in a surprising way and

[15] The Conspiracy and Protection of Property Act 1875 permitted peaceful picketing and decriminalised actions taken in furtherance of a trade dispute (providing those actions were not in themselves criminal).

[16] Later we shall consider arguments as to why permission to collective striking might be desirable.

needs passes that anticipate his movements) — then it might be desirable to have means by which that employee is able to express strong and serious discontent with her pay and conditions without actually permanently changing jobs. One could imagine that a strike might be an extreme form of expressing such discontent.

- **When employees have limited choice of employer.** If the employer has a monopsony position then the employee might not be able simply to leave to go elsewhere if she is unhappy. In such a case, to limit the extent to which the employer can exploit his monopsony power, we might grant the employee the ability to strike and some protection from counter-action by the employer in the event that he does strike.

- **When general law offers limited employment conditions protection.** If broader law, for example, offered no protection to employees against unfair dismissal, we could imagine their colleagues wishing to express their discontent about an unfair dismissal, in support of their colleague, by striking.

In modern democracies, however, there tend to be superior mechanisms for dealing with all these issues. Voting for changes to employment law, internal grievance procedures and appeals to industrial tribunals allow individuals to protect their (or others') employment conditions. Going to one's employer with a job offer from another firm is a more effective individual expression of discontent than an individual strike.

Monopsony labour hiring power may be a more significant concern. It is plausible that competition authorities pay less attention to this issue than they ought to. We shall return repeatedly to this theme below.

## Default employment contracts

In certain countries (e.g. New Zealand) there are default employment contracts that apply if no other specific contract is agreed.[17] Virtually all countries circumscribe what can appear in an employment contract. It might be feasible to set out conditions in an employment contract under which a temporary withdrawal of labour were permissible without being in breach of contract and including arrangements for, for example, withholding of pay, circumstances under which replacement workers could or could not be hired, and the point at which the employer could commence plans to dismiss.

## Legal 'rights to strike': a brief review of international rules

[17] New Zealand's Department of Labour provide an 'Employment Agreement Builder', a 16 part online process where the employer can choose what clauses to add or delete (except for those that are compulsory). It shows which clauses are compulsory, which clauses reflect minimum conditions that the employee is entitled to regardless of their inclusion in their employment agreement, and which clauses can be included voluntarily to meet the needs of the employer and employee. It does not make any reference to the right to strike.

We know of no jurisdiction in the world in which an individual has a legal right to withhold labour.[18] We know of no time at which this has been so.

Indeed, quite the reverse. Strikes that have not been authorised as part of collective action by an approved union (according to procedures we shall explore in more detail in a later section) are known as "wildcat strikes" and generally prohibited. Wildcat strikes generally result in all legal immunities being removed from the strikers. This means that an employer can dismiss them without legal recourse and may result in fines – either from the state or a relevant union. In the UK, wildcat strikes are illegal and put the worker at risk of dismissal and loss of redundancy pay.

In contrast, in most modern economies, collective action is now considered a "right". The right to strike, understood as collective rather than individual action, is a principle enshrined in the 1948 Universal Declaration of Human Rights.

Most EU countries have ratified several Conventions protecting the right to strike. The most important are the ILO Conventions, especially No. 87 concerning freedom of association and No. 98 on implementing principles for the right to organise and the right to collective bargaining, and the European Social Charter.

The European Social Charter in Article 6(4) explicitly protects the right to strike, (subject to collective agreements). However, this is restricted by Article G which (in the same way as the ILO Conventions), allows restrictions on the right to strike 'for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.'

At EU level, the right to strike is enshrined in Article 28 of the Charter of Fundamental Rights of the European Union. However, the right to strike is not without limits. In the cases of Viking and Laval in 2007, the European Court of Justice held that while recognising the right to strike, this may still represent a restriction on the freedom to provide services and thus could only be conducted under EU law where it was to pursue a legitimate aim and was justified by overriding reasons of public interest.

However, a less restrictive position was taken in a case heard before the European Court of Human Rights in 2008. In *Enerji Yapi-Yol Sen v. Turkey* (Application No. 68959/01), the court held that while the right to strike was not absolute and might be subject to certain restrictions, a law that banned strikes would represent too wide a restriction.

Turning from the over-arching EU position to that in individual Member States, the right to strike is recognised in all EU states, either in constitutional law or in case-law. A number of northern European countries have adopted the principle of recognition in case-law, in particular Belgium, Luxembourg and Germany. The right to strike is not regulated in the Netherlands, but governed by case-law.

---

[18] …at least *qua* individual, as opposed to say as the total membership of a union of one person…

However, most EU member states have included this right in their constitutional law: France, Italy, Spain, Portugal, Greece, Sweden, Poland, Romania, Hungary, Slovakia and Slovenia are examples of this. Generally speaking, the right to strike and other civil rights were only reinstated in Eastern Europe along with the transition to democracy. In Hungary, Poland, Slovenia and Slovakia, a strike may be called to defend what Slovenian law calls "the social and economic rights flowing from work".

Some countries have very strict limitations — in Slovakia and Poland, a ballot is only valid if a majority of the employees vote and if a majority of votes are in favour of strike action. In Germany, only workers who have belonged to a trade union for at least three months have the right to strike. There will have to be negotiations or arbitration before a strike can be called. The unions must pay strikers at least two-thirds of the amount of their withheld salaries, a potentially huge expense for a union.

In Poland, as in Spain, negotiations must take place before a strike can start. In Finland, strikes can only take place after collective agreements have expired, adding to the pressure when a new agreement is negotiated.

### Political strikes

European countries can be divided into two groups with respect to their attitude to political strikes. The first is composed of those that disallow them altogether, such as Germany and the UK. This is also the case in Spain, where strikes conducted for political reasons or with a purpose other than work matters are illegal. In France the courts have ruled them illegal, but it is accepted that strikes may have mixed objectives and be at the same time work-related and political. Similarly, Italy distinguishes between politico-economic strikes and purely political strikes, which are prohibited.

### Secondary strikes

Sympathy strikes do not enjoy legal immunity in the UK, and in Germany they are illegal unless conducted by a party to collective bargaining, or if they contravene the duty to preserve "social harmony" in the country. Other countries adopt a more conciliatory stance.

Spain treats sympathy strikes as legitimate if they are prompted by a work-related interest, albeit indirect, of the sympathy strikers. In France, a distinction is drawn between "internal" and "external" sympathy strikes. "Internal" sympathy strikes are allowed if they have to do with a collective work-related demand concerning all the employees of the company or companies involved. Those that are "external" are subject to the same conditions and must, in addition, be associated with an initial legal strike.

In Italy, sympathy strikes are not illegal if there is sufficient community of interest between the groups of striking employees. In Poland, in order to defend the rights and put a case on behalf of civil servants (who do not have the right to strike), another union may organise what is known as a "secondary" strike.

Some EU countries have a particularly strong culture of social dialogue, an endeavour to reach compromise and a real wish not to have to strike. Countries with this culture have relatively few strikes, often through

compulsory negotiation during which only 'warning' stoppages are possible. If discussions fail, an arbitration process is necessary before a strike can be called. For example, Sweden has a "compulsory social truce" which prohibits strikes during the period when a collective agreement is still valid. Most collective agreements contain clauses prohibiting strikes or other types of industrial action during their validity. In the event of disagreement, the opposing parties are required to submit the matter to conciliation committees. Parliament may also end such a dispute through legislation.

### No strike agreements

Peace obligations during the period of validity of collective agreements exist in a number of countries, like Bulgaria, the Czech Republic, Denmark, Finland, Germany, Norway and Ireland. In the last of these, for example, peace obligations are included in the tripartite national pacts (like Towards 2016, currently in force) and also apply to the state sector. Such obligations are absent in Italy, France, Luxembourg, Slovakia and the UK, and in countries where formal collective agreements are excluded from central government mandate as in Austria, Estonia, Lithuania, Poland and Portugal.

### Sanctions

Generally speaking, breach of strike regulations may incur various disciplinary, administrative, civil or criminal sanctions, depending on the country. Not all the regulations are followed in practice, however.

In the UK, contravention may lead to termination of contract, although the employer's powers are limited here by Section 9 of the 1982 Employment Act. In some cases an employer who decides to sack a striking employee will have to sack all the strikers, and similarly the employer who re-employs someone who has been on strike will have to re-employ everyone who has been on strike. In Ireland and Austria, too, a breach of the principles governing the right to strike may result in dismissal.

## Is collective action in respect of pay anything more than an attempt to gain and exercise market power as a monopolist, and hence fundamentally undesirable?

There is something immediately paradoxical about permitting collective strike action but forbidding individual strike action in respect of pay bargaining. Suppose, for example, that all the suppliers of school desks decided to act collectively to bargain with schools over the prices at which those desks would be sold. That would be condemned as a cartel, an attempt to fix prices, an attempt to act in concert so as to achieve market power. Competition authorities would act — indeed, the managers of the companies concerned might even go to jail.

But if, instead of selling desks, we are selling labour, then not only is it permissible for suppliers (the suppliers in question being workers, in this case) to act collectively (say through a union) so as to try to secure higher prices (the price of labour — wages — in this case), but indeed the buyers (hirers of labour) are *forced* by international rights conventions to deal with the supplier cartel representatives (union reps). Why?

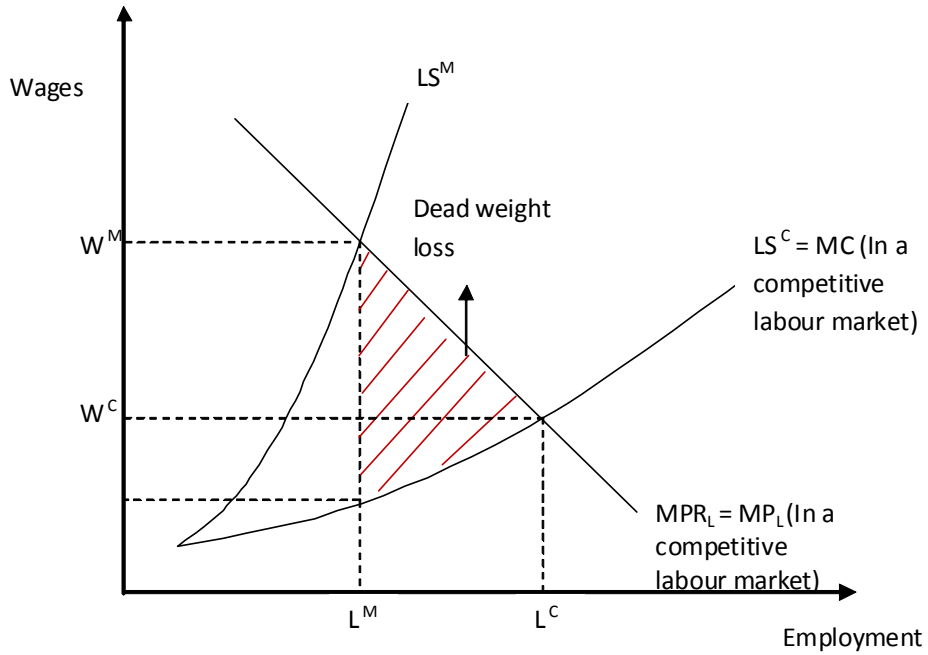
## Why is collective strike action permitted?

Suppose that there is a firm that has a large number of employees (say, tens of thousands), and that those employees have firm-specific skills that are not straightforwardly and immediately available from the wider labour market. Then let us suppose that there is some volatility in economic conditions (e.g. variable inflation rates) that means that it is necessary for the firm to review regularly (say, each year) the pay of its staff. Without collective bargaining, the firm would need to conduct a huge number of individual negotiations. There would be large transactions costs associated with these deals, and deals reached with one employee might affect whether a deal were reached with another (e.g. if an employee that had agreed to a 5% pay rise this year discovered that a less talented colleague had secured a 10% pay rise, there might be resentment).

In such a situation, there is a potentially large transaction cost saving to be made by dealing with one collective representative through a workers' union. The reduction in transactions costs to the firm might be more than the losses in terms of higher salaries to be paid because of increased market power gained by the workers acting collectively. If so, it will be in the firm's interests that it should deal with a union.

But it might be in the *social* interest that the firm deal with the union even in certain cases where it were not in the *firm's* interests. For the social efficiency lost when a union uses market power to raise wages is not the whole wage increase. It is, instead, only the "deadweight cost" illustrated in Figure 8. Hence, it is enough for it to be *socially* efficient for the firm to bargain with unions for the total reduction in transactions costs (summing together the transactions costs to the firm and the transactions costs to the workers) to be greater than the deadweight loss from increased wages through market power. This social gain could well occur even when there is a loss to the firm.

Figure 8. The effect of trade union use of market power on wages and employment



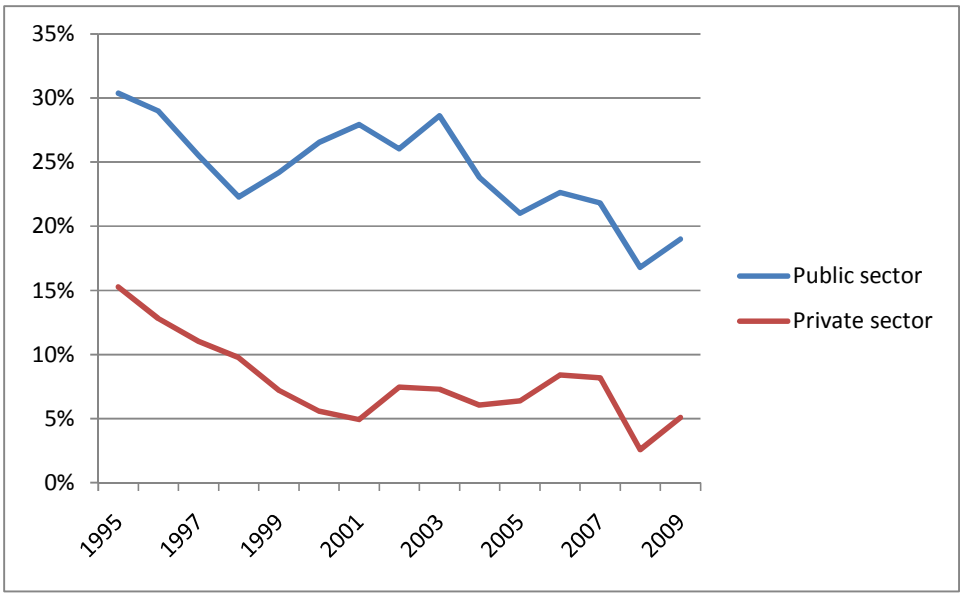
If collective bargaining is to have teeth (in particular if workers are to have an incentive to participate in it), the union negotiator must be able to offer a threat to the firm negotiator that goes beyond simply telling workers that they might prefer to seek work elsewhere. One such threat would be collective strike action.

This might lead us to a rationale for, in certain circumstances, permitting collective strike action when individual strike action is forbidden. For if the point of permitting strikes is to facilitate collective bargaining to reduce the need for individual bargaining at high transactions costs, that does not provide a rationale for individual strikes to be permitted.

## Change in the wage premium through time

The wage premium of trade union members over non-trade union members has fallen rapidly since 1995 — in the private sector to barely a third of its previous level. This does not of course imply that, in particular sectors or for particular firms, union power does not still raise wages materially.[19] In the public sector, the premium is just under 20% - still a very significant number.

Figure 9. Trade union wage premium, 1995-2009




Source: Labour Force Survey, Office for National Statistics.

### Controlling for other factors affecting the wage premium

Even in microeconomic terms, we should be cautious about interpreting this wage premium solely as the result of the trade union exercise of market power. There may be several factors which create a wage

[19] The ability of a union to achieve a wage premium depends on its ability to restrict the supply of labour to the employer (and thus enhance its bargaining strength) and the ability of the employer to pay above market wages. (Freeman and Medoff, 1984). This largely depends on the trade union's membership within the workplace. (Lewis, 1986; Stewart, 1987; Schumacher, 1999; Forth and Millward, 2002).

premium for certain types of workers, correlated with, but not caused by, greater union membership. It could be, for example, that high union density in the public sector, combined with an overall public sector wage premium, exaggerates the apparent effect of union membership on wages. Density of union membership is also associated with older workers (ranging from 9.4% for those aged 16-24 to 34.9% for those 50 or over) - who are also likely to earn more due to greater experience. Union membership is also associated with higher skill levels: 19.1% for elementary occupations to 44.9% for professional occupations - whose earning power may be intrinsically greater than less skilled workers.

Nevertheless, the decline in trade union members' wage premium might be due to a number of other factors. It might suggest that union activity is an increasingly ineffective way for workers to achieve higher wages and that it is increasingly difficult for trade unions to assert market power in a modern competitive market economy. The difficulties that a highly flexible labour market create for a union trying to assert monopoly power might also go some way to explain the decline in union membership – simply, workers recognise that trade unions are no longer as effective in achieving higher wages as they once were. This further calls into question the appropriateness of existing industrial relations procedures designed for an economy very different from the UK's today.

### Academic studies

Many academic studies have controlled for these factors. Blanchard and Bryson (2004)20 present log hourly wage estimates for the United Kingdom based on pooled years from the Labour Force Survey (LFS) and the British Social Attitudes Survey (BSAS) using data from 1985 – 2004. The purpose of the model is to show the variation in the membership premium across types of worker, and how the downward trend in the premium since the mid-1990s has affected each group. The results from the LFS show that the union premium is highest among manual workers, part-timers, and women. Conversely, the premium is lowest among the traditionally higher paid, namely, men and the highly educated.

They also find evidence of a large fall in the wage premium across most types of worker - 1993 only one group of employees (the highly educated) had a premium well below 10 per cent. In 2000, all but three out of the 17 types of worker had a premium below 10 per cent. Those worse affected were manufacturing workers, men, private sector workers and non-whites, all of whom had no significant premium by 2000.

Using BSAS data they find that, over the whole period, the wage premium was highest among manual workers, part-timers, those with low or no qualifications and women (reflecting the LFS findings). Comparing the premium for each group before the decline in the wage premium occurred (1993-95) to the end of the period (1999-2001) they find that only two types of worker (non-manuals and the highly qualified) had a union premium of less than 10 per cent. By 1999-2001, eleven types of worker had a premium of less than 10 per

[20] Blanchflower, David G and Byrson, Alex (2004), "The Union Wage Premium in the US and the UK", Industrial Relations Research Association, 56th Annual Meeting Papers and Proceedings, San Diego.

cent. For five types of worker i.e. men, younger workers, those in the private sector, non-manuals, and the highly educated, the membership premium was no longer statistically significant.

Their data suggest that prior to the decline there had been a ranking in the premium according to educational attainment, with membership raising the wages of the least qualified most. This is apparent in the second column for the period 1993-95. By 1999-2001, the premium for the highly qualified is flattened. The premium hold up well for part-timers, public sector workers, among older workers, and among manual workers, but it has all but collapsed in the private sector, among younger workers, and among non-manuals.

Blanchard and Bryson show that, whereas the premium was similar for men and women in the mid-1990s, it was considerably lower for men than for women by the end of the period. However, the picture changes on introducing a public sector control. Calculating the premia for men and women for 1993 only produces results similar to the 1993-95 pooled estimates but, with the public sector added to the pooled 1999-2001 analysis the male union premium is estimated to be 6.3 per cent, while that for women is 5.7 per cent. Thus, once the public sector control is included, men's and women's membership premium is not significantly different in the later period.

## Collective worker power to countervail firm monopsony power

There is another sort of case in which permitting collective action might be desirable. We mentioned earlier the case of a monopsony employer.[21] An employer with monopsony power would be able to exploit that market power to drive down wages below the efficient market equilibrium level. One means to "countervail" (to offset) that monopsony power would be to give the workers monopoly power through a union. In such a case bargaining between monopsonist and monopolist increases efficiency (relative to the un-countervailed monopsonist) by taking wages back up towards the competitive market level.

It is quite plausible that, in the nineteenth century in many places where unions first grew up, the workers involved faced employers that had a dominant labour-purchasing position. For example, a large mine or mill might employ a majority of the workers in a town. If you refused to work for that mine- or mill-owner, you might simply not be able to secure a job at all. In such a situation it could well have been socially desirable to permit unions and strikes.

Again, through the 1950s to the 1970s in the UK, in many industries there were firms with significant market power, either individually (especially in nationalised industries) or through cartels.[22]

---

[21] To remind the reader again, whilst a "monopolist" would, in the extreme case, be a sole *supplier* of a good or service, a "monopsonist" is a sole *purchaser* of a good or service — in this case the sole purchaser of labour.

[22] At the time of the 1956 the Restrictive Trade Practices Act, nearly half of UK manufacturing industry was subject to explicit agreements significantly restricting competition. These were not enforceable by law, but they were not illegal.

## But these arguments don't apply to every firm, and are weaker today than in the past

We have argued that collective bargaining (and hence the permission to strike, under certain circumstances) might be socially efficient when either (a) the reduction in transactions costs resulting more-than-offsets the efficiency loss from inefficiently higher wages; or (b) increased monopoly power through collective labour unions countervails monopsony power by firms purchasing labour that might otherwise drive wages inefficiently low. But it is important to recognise that these conditions do not apply to every firm — indeed, they probably do not apply to the vast majority of firms in a modern competitive market economy. In some cases that is because the firms involved have relatively few workers, and so collective bargaining only marginally reduces transactions costs. In others it will be because, although firms have large numbers of employees, those employees have skills that are relatively freely available in the wider labour market, so the firms prefer simply to offer standard contracts on a take-it-or-leave-it basis, rather than entering into any sort of bargaining.

Moreover, the world has changed very considerably in recent decades. Competition law acts against cartels rather than manages them. Monopolists face constraints through competition policy or price regulation. It is, however, plausible that competition authority concern in respect of monopsony power regarding labour purchasing could be greater. We shall later recommend that the possible reforms to union legislation that we float should be combined with a more vigorous attitude on the part of competition authorities towards monopsony labour market power.

Furthermore, when inflation (as in the 1970s or even the 1980s) or deflation (as in the 1920s and 1930s) are high, that will mean that re-negotiation of pay terms will need to be more regular and of greater significance.

---

Replacing this system, the 1956 Act required the registration of restrictive agreements between firms on goods, including both formal, written undertakings as well as informal, verbal or even implied arrangements. Registered agreements were presumed to be against the public interest and therefore to be abandoned unless they were successfully defended in the newly created Restrictive Practices Court or considered by the Registrar of Restrictive Trading Agreements as not significantly affecting competition. The Act did not immediately make restrictive agreements illegal: an agreement could be upheld if the Court was convinced that it produced positive benefits which outweighed the presumed detriment. Since the attitude of the Court could not be known for certain until the first cases had been heard, the large majority of the existing agreements were registered rather than being immediately dropped or secretly continued. The hard line taken by the Court, however, especially in its initial judgments, induced most cartels to voluntarily abandon their agreements. Of those which were defended in the Court, only a few were upheld. As the first Court cases were heard in 1959, it was not until 1959 that industries, on the whole, started cancelling their agreements.

See Symeonidis, George (2002), "Are Cartel Laws Bad for Business? Evidence from the UK", Economics Discussion Paper No 511, University of Essex.

In a modern low-inflation environment, it will be easier to sustain multi-year agreements over pay scales and individual workers will be in a much better position to take a well-informed view over the real value of pay deals in later years. This reduces the complexity, cost and regularity of renegotiation, reducing the social gains from collective bargaining.

For now, however, we note our view that there seems no compelling basis for a general right to strike — *contra* the many international conventions asserting such a right. The right to strike, if it should exist at all, should surely be limited to those cases in which collective bargaining is efficient because either it reduces transactions costs or countervails monopsony power that cannot more effectively be countered through competition law and competition policy. Thus the right to strike need not apply even to most employees, let alone all of them.

## Unions as service providers

Unions can be conceived as providers of services to their members. Some of these services are akin to those provided by traditional friendly societies.[23] Other services include being an advocate of workers in employment disputes, advising workers on their legal rights and on issues such as the financial health of the company, assisting in employment tribunals (perhaps even funding legal costs), funnelling employee suggestions for means to improve productivity, funding employee training[24], and conducting collective bargaining so as to improve the outcome of negotiations from the workers' point of view. Auxiliary services such as insurance, credit cards and representation at employment tribunals have all grown in importance.

In many of these roles, unions would seem natural participants in some of the shift towards greater communitarianism — as part of the "little platoons" alongside charities, faith groups, trusts and bodies such as the Mothers' Union.

---

[23] Friendly Societies have existed for hundreds of years. The basic principle is that people contribute to a mutual fund then receive benefits in time of need, such as unemployment, old age or ill health. In effect, it acts as a social savings and loan organisation. In this respect they behaved similarly to early trade unions, though they generally refrained from political or employment representation in the UK. They are owned by their members; there are no shareholders. Auditing and registration was introduced in 1875; by the late 1800s there were around 27,000 societies. By the late 1940s there were around 14 million members in the UK, but this has fallen consistently since (probably due to the growth of the welfare state). There are now only around 200 Friendly Societies.

[24] For example, through labour colleges such as Ruskin College in Oxford.

## Do current unions have excessive market power *qua* service providers?

Understood as providers of services, however, an interesting question arises: is there enough competition amongst unions? Whilst 243 unions were recorded by the Certification Officer in 1999/2000, by 2009/10 this had fallen to 180; a 26% fall in just a decade. In 2007 the TUC had 66 affiliated unions, compared with 109 in 1979. The two largest unions in the UK, Unison and Unite, both have more than a million members — versus a total UK membership of 6.7 million.

The limitation of union service choice is far worse when we consider the near-monopoly position of particular trade unions for particular workforces. A significant factor in this is the Employment Relations Act 1999 (EReIA 1999), which gives trade unions statutory rights to formal recognition by an employer, creating several legal rights — mainly to negotiate and receive information — without which their freedom of action is very limited. Once this recognition is granted, it is very likely that it will block another union's attempt to get recognition (even if the existing union is recognised only for limited purposes excluding terms and conditions). This is because the Act states that an application for recognition is inadmissible if a collective agreement, which recognises another union as 'entitled to conduct collective bargaining', already exists.[25] The virtual monopoly status of incumbent trade unions is reinforced by the Bridlington principles, which state that all TUC-affiliated unions are required not to recruit workers where another union has a majority and negotiating rights.[26] Where trade unions violate this, the penalties are usually severe (for example the EETPU union's practice of signing single union agreements in companies where it had few members led to its expulsion from the TUC in 1987)[27]. In short, the law and trade union behaviour generally mean that a worker's choice is between joining the union of his peers or not joining a union at all.

This lack of choice is compounded by consultation rights for recognised unions. These must be informed and consulted on large-scale redundancies and business transfers, both stemming from EU directives. Under s188 of the TULR(C)A and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the employer has an obligation to inform and consult with the recognised union.

Both s188 and TUPE originally required the employer to inform and consult where a trade union or employee representative was recognised – the employer could choose which. From 1999, this changed, so that the employer is obliged to consult with the trade union representatives where an independent trade union is recognised in respect of affected employees. In the Transnational Information and Consultation of Employees Regulations 1999 (implementing the European Works Councils Directive), the definition of 'employee

[25] This principle was confirmed in the test case Transport and General Workers' Union v Asda [2004].

[26] The Bridlington Principles, (Principle 5). These were introduced by the TUC in 1939 to prevent unions poaching members from other unions.

[27] The Electrical, Electronic, Telecommunications and Plumbing Union was also famous for signing single union 'no strikes' agreements. It once had 12 single union no-strike deals ongoing with major companies, especially in the new electronics industry.

representatives' embraced the same concept, as did the 2004 Information and Consultation of Employees Regulations' implementation of the Information and Consultation Directive (ICON). The effect of these legal obligations is to buttress the position of incumbent trade unions as monopoly providers of worker representation.

In the same way that we are suspicious that monopsony power of labour hirers may not always receive the attention from competition authorities that is warranted, we are also suspicious that some unions may now have excessive market power as providers of union services to their members. We believe that a union should properly be regarded as a supplier of services, for which it receives payment (union dues) and as such should be subject to competition law.

Workers should have choices — choices of where to work, and choices of what unions to belong to.

## Unions in the Public and Private Sectors

Private sector employers operate in a market environment, constrained by competitive pressures and the need to make profits. A private company is necessarily limited in what staff it can hire and the remuneration it can offer simply because of its financial health – if it continually loses money because wages are too high it will eventually go bankrupt, normally causing all its employees to lose their jobs. It is thus generally in the best interests of trade unions in the private sector to make reasonable remuneration demands.[28]

Public sector employers, by contrast, face very different incentive structures. They do not have the same need to make profits, but, rather, have budget cost allocations. Staffing, wages, pensions and benefits can be raised without the necessity to make a profit or improve efficiencies — the one key constraint is the government's willingness to tax and borrow — and, in consequence, the very high propensity of the bond market to absorb government debts due to the negligible risk of sovereign default. At the same time, from the national point of view, public sector employers are often effectively monopsonists.

---

[28] However, it should be noted that Britain is atypical by the standards of continental Europe in having no form of social contract involving trade unions in management and pay decisions – an idea essentially abandoned after the failure of the 1969 White Paper, *In Place of Strife*. This paper would have placed Britain's industrial relations much more on the path of continental Europe: improved recognition rights for unions, compulsory registration, 'cooling-off' periods before strikes could take place, and inter-union disputes regulated, with the possibility of unions being fined. The government was forced to back down under trade union pressure.

Relative to continental Europe, it is much rarer in Britain for trade unions to be actively consulted and genuinely listened to concerning ideas for how to improve a firm's working habits or efficiency. Particularly since the 1980s, tripartism or corporatism has been largely abandoned. It is arguable that one consequence of this reduced stakeholder role of unions is an impoverishment of the union role in the management of confrontation. Rather than the stakeholder engagement bodies they operate as in many parts of the world, genuine partners with management and workers, some trade unions are regarded as little more than militant campaigning organisations.

An implication of these factors in combination is that, when budgets are rising relatively rapidly, there may be a natural tendency for pay in the public sector to rise more rapidly than is required by labour market conditions (and hence more than is economically efficient). By contrast, in periods of austerity, public sector employers may be able to use their monopsony power to drive wages down.

This leaves the general economic desirability of unions in the public sector somewhat ambiguous. In good times, the effects of unions may be to exaggerate what might, in any event, be a tendency to agree to excessive pay rises — unions would exercise market power against employers that lacked a profit motive and may face considerably political flak if there were to be a public sector strike. But in times of austerity, unions might exercise a countervailing role against the ability of public sector monopsony employers to drive wages down. (Of course, resistance to such wage reductions might, however, be socially undesirable and inefficient if all those wage reductions achieved were the reversing of excessive wage rises in the good times.)[29]

## What difference, if any, might increased local autonomy of public service provision make to the proper scope of collective action in the public sector?

Let us suppose that, in some part of the public sector, there were reforms that shifted that public service supply from being a broadly centralised monopoly to consisting of competing, more localised suppliers. How might such a reform affect the desirability of permitting strikes?

If such reforms genuinely decoupled the more localised competing public services suppliers (e.g. if there were genuinely separate schools each offering state education services in an area), the desirability of unionisation and the permission to strike would seem to decrease, because (a) there would no longer be monopsony power in respect of employment (e.g. if you didn't like the pay and conditions at one school, you could work for another instead); and (b) with smaller school units the transactions costs reduction in negotiating pay and conditions collectively, relative to individually, would be less.

There appears to have been an appetite under successive governments for public services reform that breaks up public service management control into smaller, competing units. Current UK legislation already prevents

---

[29] It is perhaps worth highlighting two paradoxes in respect of the public sector:

The first is that in a number of public sector agreements, pay is deducted at 1/365ths per day when on strike. But a standard working year involves around 220 working days (because of public holidays, weekends and annual leave). A consequence is that a public sector worker on strike for an entire year would be paid around 145/365ths of her annual salary, despite doing no work at all!

The second is that public sector budget-holders gain, in a sense, from a strike, because they must pay less out to workers (and less for the costs that those workers would generate at work — such as business transport costs) but do not typically face a corresponding reduction in their budgets. A consequence is that in a period of tight budgeting, public sector managers may have incentives to behave in unreasonable ways that induce strikes — for which they then blame the union!

strikes in one firm within an industry in sympathy with workers in another company. We believe that public sector unions should operate under similar constraints to their private sector counterparts. If public service reforms mean that, say, health or education staff are employed by local organisations that manage their own budgets, negotiate their own pay and conditions deals and compete for staff, then it should not be legitimate for unions to bring out workers on strike in some local public sector organisation in sympathy with workers in a separate local public sector organisation.

## Conclusion

In this first part of our research note, we have questioned the existing framework of legislation relating to strikes in a number of ways:

- We note that there is no general right to strike at all, contending that permitting striking is desirable only in cases where either (a) there are large transactions cost reductions from permitting collective bargaining that outweigh the efficiency losses from the exercise of market power by unions; or (b) market power in respect of labour supply, exercised through unions, is useful to countervail market power in respect of labour demand exercised by monopsonist firms.

- We are concerned that many other concepts relating to the "right to strike" are obsolete, having arisen in former times in which monopsony labour purchasing power was common, democracy was limited, employment protections and grievance procedures were inadequate, worker education was poor, and firms employed large numbers of similar workers doing relatively similar jobs. The British economy and British state have changed since 1906, and concepts of the virtues of collective action should change, also.

- However, we are also concerned that competition authorities do not always exhibit as much concern about monopsony labour purchasing power as might be appropriate — they may be relying upon unions to do their work for them in countervailing monopsony power.

- We are also concerned that competition authorities seem untroubled by the huge increase in the concentration of union membership of recent years. Unions are, in our view, providers of services to their members, and should be subject to competition law like other service providers.

- With reforms to public service provision increasing localism and competition between public service providers, the appropriate role of collective bargaining in the public sector is likely to diminish and industrial relations legislation should reflect the new public service realities.

## Part 2: Options for reform

In this section we move on from consideration of the overall framework of industrial relations law, covered in the first part, to more technical consideration of potential changes to the law even within the existing framework.

## What the legal 'right to strike' means

UK law does not provide a right to strike as such. Rather, statutory protection for trade unions (legalised in 1871) is the mainstay of industrial relations law. The basic legal principle is that when employees withdraw their labour, they act in breach of contract. A union, by calling a ballot for strike action, is inducing that breach. Despite trade unions often complaining of 'anti-union' laws, relevant legislation actually protects them and their employees against the employer's ability to sue if they follow certain rules. Both are protected against action by the employer if the union follows the requirements of the Trade Union and Labour Relations (Consolidation) Act 1992 (often referred to as "TULR(C)A") sections 226-234, setting out steps which the union must take to conduct a ballot and subsequent strike action. These are principally practical measures to ensure that the ballot process is conducted properly.[30]

If the unions does not follow these procedures, it will be open to action — initially an injunction to prevent it going ahead with the ballot — and ultimately, sequestration of their assets under common law for incitement to breach of contract (although, as we will see, various legal changes since 1997 have significantly reduced trade unions' potential liabilities). Employees are vulnerable to being disciplined and even dismissed without the ability to bring a claim for unfair dismissal.

Trade union law should attempt to strike a balance between the ability of employees to withdraw their labour as a 'weapon' in industrial disputes and the ability of the employer to understand what is going to occur and being able to manage its business around this.

---

[30] In particular, Section 219(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 implicitly acknowledges that, in the absence of statutory provisions to the contrary, a trade union would be liable for the tort of inducing breach of contract if it caused its members to cease working for an employer, in breach of their employment contracts, in furtherance of a trade dispute. However, it then spells out (section 219 (4)) that if the ensuing provisions of the Act are compiled with, statutory protection comes into force – conversely, failure to comply with these requirements means a trade union (and its members) are unprotected in tort.

In summary terms, s 226(1)(a) provides that in calling for industrial action a trade union is not protected unless supported by a ballot, and s 226(2)(a)(ii) provides that there is no support by a ballot save a ballot which complies with the provisions of sections 227 to 231.

Section 232B (inserted by the Employment Relations Act 1999), provides that in relation to the requirement of certain sections, notably not including s 231, a failure to comply which is 'accidental and on a scale which is unlikely to affect the result of the ballot' should be disregarded. This suggests that such accidental non-compliance is not permitted in relation to s 231.

Section 226A(2C) (also inserted by the 1999 Act), which is concerned with information communicated before the ballot, refers to that information being 'such as will enable the employees readily to deduce certain facts' including 'the total number of employees concerned'. By contrast, s 231 requires the actual numbers to be communicated.

The Appendix sketches further details of the legal framework concerning strikes, covering issues such as balloting, picketing, and agency staff.

## Union Membership and industrial action

### The need for reform

In the first half of this research note, we have questioned the existing framework of industrial relations in a number of ways. But, even within the existing framework, current legislation on industrial relations is often arguably inadequate – and even the existing rules are sometimes not respected by all parties. A number of strikes have recently been declared unlawful principally due to poor records and balloting procedures.[31] For example, the Unite union does not hold a home or authorised address for nearly 8% of its members (123,000 out of 1,573,000 members in total).[32]

At present, only a bare majority of trade union members voting is needed for a strike to be authorised by the ballot (counted at a level, which, as we will see, is largely determined by the trade union concerned). Since only a minority of trade union members need vote and the trade union membership in any case may only represent a minority of the workforce concerned, this effectively means that a strike can go ahead with complete legal legitimacy with only a small minority of the trade union members – and an extreme minority of the actual labour force – voting in favour of it. For example, the PCS Union, in its recent dispute regarding alterations to civil service redundancy pay, claimed legitimacy for a strike ballot held on 25th February giving a 63.4% vote in favour. However, since only 31.6% of the union's membership actually voted, this meant that 80% of the union's membership either voted against strike action or did not vote at all.[33] Nevertheless, the strike went ahead (despite around 70% of PCS members crossing the picket lines in March).[34]

In another recent case, only 31% of unionised staff actually voted to reject British Airway's recent pay offer.[35] This can mean that trade unions can have wide-ranging legal rights to cause commercial harm to employers even though they represent only a small percentage of the workforce. They can also strike while providing very little information as to its form and how long it will last (even to their own members).

Meanwhile, whilst density of union membership may be a lot lower in the private sector, the ability of unions to call strike action among their membership is not relative to the size of their membership. Although the union can 'call out' only its members, once action starts, it can picket premises and both try to persuade other employees not to go to work and potentially damage the business by dissuading other businesses from

---

[31] For example, the proposed BA strike over Christmas 2009 and the recent RMT/Network Rail dispute (described below).

[32] The Certification Officer, Unite 2009 returns. http://www.certoffice.org/links/pdf/795T_20092.PDF

[33] http://www.pcs.org.uk/en/campaigns/cscs/cscs-updates-and-briefings/branch-briefing-25-february.cfm

[34] http://www.guardian.co.uk/politics/2010/mar/08/civil-servants-strike-pcs

[35] http://www.bbc.co.uk/news/business-10695976

trading. In some cases, a small union membership can still bring a large workforce to a halt or call a strike which would have a disproportionate impact on the business and society at large.

## Employing agency staff to cover strikes

Employers are prohibited from acquiring agency workers to specifically carry out the duties which striking employees would otherwise have performed, during the period in which they are actually on a properly authorised strike. An employer may use its own employees to do this and may use agency workers to do many things associated with a strike, e.g. clear a backlog of work.

The law relating to the recruitment of Agency Workers during a strike was introduced only in 2004 and remains largely untested. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 came into force on 6 April 2004. There is, at the time of writing, no helpful case law to provide guidance on their interpretation.

Trade unions usually put forward a very wide interpretation of this law in the media, but the actual limitations on business may actually be fairly narrow.

A key distinction in the Regulations is between an *Employment Agency* (EA) and an *Employment Business* (EB). An EA does not itself employ the workers whose services it supplies to the end user, which then employs them itself; by contrast, an EB does employ the workers whose services are supplied to the end user, which then uses these workers — confusingly usually referred to as "Agency Workers" — but does not employ them directly. It is this latter situation which is affected by the Regulations. Given that the law is, as yet untested, there is still some uncertainty, and employers may be forced to err on the side of caution.

We could return to the previous rules:

- **We should permit employers to use agency staff to carry out the duties which striking employees would otherwise have performed.**

## What a voting paper should contain

The legal requirement for what a ballot paper must contain is very limited. It must state the name of the independent scrutineer, where and when the voting paper must be returned and be marked with a serial number.[36] A statement also has to appear on every voting paper, with a warning about the potential for dismissal.

Concerning the period and nature of the strike itself, the ballot paper need state only whether the action is a strike, or action short of a strike; if a strike, whether it is continuous or discontinuous. Once that is done, and

[36] Section 229(1A) of the Act.

the action started, the union has no obligation to tell the employer how long it will last – indeed, as the BA strike showed, there is no obligation to inform the members who voted exactly what action is proposed and for how long.[37] Recently, for a proposed strike which then did not go ahead, the RMT indicated that it would last for 4 days, then every Monday for the foreseeable future.

We offer the following proposal:

- **The ballot paper should contain more information concerning the nature, frequency and length of industrial action to be authorised, including identifying a specific grievance.**

Might there be a case for more information to be given for both trade unions members and the employer about the reason for the dispute? Unions often say nothing on the ballot paper about what the strike is about — we do not say this in criticism; they are under no requirement to do so — then circulate a bulletin or similar briefing material with the ballot paper or around the same time to persuade members to vote 'Yes'. Such briefing material may contain a 'shopping list' of general grievances against the employer, many of which may not have been under specific consideration at the point at which negotiations with management broke down, and some of which may not even be capable of being a Trade Dispute.

Such extraneous material may simply be designed to stoke up feeling against the employer. Legitimate and specific causes of a trade dispute should be much more clearly delineated — with unions specifying which one their grievance is about. We suggest that ballots should state a specific grievance or set of grievances, and that the vote should concern whether industrial action is to be authorised in respect of *those* grievances.

Since the existence of a "Trade Dispute" is a precursor to the ability to call strike action, the ballot paper and notice should identify the Trade Dispute which is at the heart of the proposed action. Then, perhaps periodically, the continuing existence of a strike could be tested against the original, declared, Trade Dispute and will be invalid and capable of being injuncted if the strike is continuing but the original purpose has ceased. At that point, the continuing strike, for a different purpose, will not have the legitimate support of a ballot and the union must reballot.

Given that, at present, there is no long-stop time limit for a strike, perhaps one should be introduced, to ensure that strikes do not continue indefinitely or for reasons other than those for which it started.

## Trade union recognition

[37] The BA strike ballot which threatened a 12 day strike over Christmas 2009 did not mention the length or timing of the proposed strikes. Union officials waited until after the ballot had been held to announce when they would be held. Many of those who voted in favour expected to be out for three days at a time, starting in January, rather than for 12 days over Christmas. Many employees were dismayed about 'the twelve days of Christmas', when they found out.

As we have seen, the choice that a worker usually has is between joining the existing union and not joining any union at all. This is compounded by the procedures for trade union recognition – generally, only one union can be recognised for a given workforce. The principles in Schedule 1 of TULR(C)A gives requirements for union recognition in two stages:

- The first stage requirement is that at least 10% of all workers must request it;
- The second stage is that, if there is a doubt whether the union has a majority of membership, a ballot would take place in which at least 40% of all workers in the 'Bargaining Unit' must vote in favour of recognition. If it does not happen, the union will not be recognised by the Central Arbitration Committee.

However, these procedures are actually very vague about workers explicitly expressing their views – usually the union simply needs to produce evidence of significant membership. Unless the employer or an employee casts 'doubt' on the fact that a union has a majority of membership, the workforce has no democratic means of expressing its choice.

We therefore propose:

- **We should require that trade union recognition must always be determined by secret ballot of the workforce, regardless of the evidence of union membership.**

We should also remove the priority given to "an independent trade union" to be the body with which an employer must inform and consult in situations where statute requires it. We should return to the situation where the employer has a choice whether to consult with a union, an elected employee body or the employees direct (as is the case, currently, in relation to consultation on pensions changes).

## Thresholds for strike action

A union may call a strike when a majority of its members who vote support a strike (or other industrial action). If union membership is a small minority of the workforce one might think that a vote in favour of action would not be worth putting into effect. However, a strike can still be called, with a bare majority, and can lead to picketing and damage to the business, despite the small minority of membership and low levels of support for strike action within that membership.

Given that, as explained in the first section of this Research Note, the points of permitting collective bargaining and strikes are the reduction in transactions costs or countervailing of monopsony power, it might appear paradoxical to permit strikes for only a small proportion of the workforce. After all, an *individual* is not permitted to strike, for the reasons explained above — why, then, should two individuals (or some other small minority) out of a workforce of thousands be permitted to strike? Indeed, in some EU countries this is not permitted. In Slovakia and Poland, for example, a ballot is only valid if a majority of the employees vote and if a majority of votes are in favour of strike action.

If this objection is considered decisive, one way to address it might draw on the principles in Schedule 1 of TULR(C)A, which, as we have seen, provides for certain numerical requirements in the context of an application by a union for recognition. This Schedule 1 precedent could be adapted in a number of ways. We note that there are six key dimensions which might be used as thresholds for strike action. For a strike to go ahead, we could impose a minimum percentage of:

- Trade union membership in the workplace.
- The workforce voting.
- The trade union members voting.
- The workforce voting in favour.
- The trade union members voting in favour.
- The total in favour of those voting.

At the moment the latter dimension is the only one used (i.e. that a plurality of those voting must vote in favour).[38] We could, for example, impose a requirement for a minimum percentage of the union membership to take part on a sliding scale according to the percentage of trade union members in the workplace. We may wish to impose variations of these requirements on different industries according to their particular characteristics. However, a combination of several of these requirements could become overly convoluted (especially with sliding scales). We therefore suggest the following:

- **Require that a majority of employees in the balloted workplace vote. This is already the case in Slovakia and Poland.[39] A variant of this option would be to require that a minimum of 40% of the trade union workforce vote in favour of strike action (as per the CBI's recent report).[40]**
- **Require that a trade union has a minimum percentage of membership in the relevant workforce, before a ballot can be called. If that were put at 10%, this, combined with the second proposal above, would reflect and be consistent with the initial balloting requirements for an application to the CAC for trade union recognition, in Schedule 1 of TULR(C)A.**

---

[38] We note that the provisions on strike ballots – s219 onwards of TULR(C)A – are Primary Legislation. S286 gives the power of amendment to include or exclude employees or businesses from the provisions of the Act, s108 allows various amendments but only within the 'Chapter' of the Act in which it resides. S293, on Regulations, gives wider latitude, however. It gives the Secretary of State the power by statutory instrument to 'prescribe anything authorised or required to be prescribed for the purposes of this Act', to create 'incidental, supplementary or transitional provisions as appear... necessary or expedient'.

[39] We note that, if multiple unions existed within the same workplace, in the event they had the same grievance, this requirement would mean aggregating ballots together.

[40] 'Making Britain the place to work: An employment agenda for the new government', CBI, June 2010.

## Dismissal during strikes

Section 229(4) of TULR(C)A requires that ballot papers warn employees: 'If you take part in a strike or industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than twelve weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later.'

This twelve week limit was increased from the eight weeks that had been the law from before 2005, as per the Employment Relations Act 1999. Previous law was limited to protection from selective dismissal during this period, as opposed to protection from collective dismissal from 1999 onwards. We therefore propose:

- **We should reduce the period of protection from unfair dismissal during a strike, for example back from twelve back to eight weeks. This would undo changes made by the Employment Relations Act 2004. This protection should be limited to selective dismissal, as it was before 1999.**

## Emergency and essential services

### Prohibiting strike action for emergency services

As already stated, the European Convention of Human Rights, Article 11(2), allows the right of membership of a trade union to be curtailed in certain circumstances. These must be:

'Necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by member of the armed forces, of the police or of the administration of the state.'

The UK (as other European states) makes some use of this exemption – strike action is already illegal for the police and Armed Forces. However, some may see it as incongruous that other life-sustaining and emergency services, such as firemen, 999 operators and emergency healthcare workers – are still allowed to strike. It might be considered whether this remains appropriate.

### Key utilities or other essential services

The Appendix discusses the current law regarding the use of agency staff, of which the central fact is that employers are prohibited from acquiring agency workers to specifically carry out the duties which striking

employees would otherwise have performed, during the period in which they are actually on a properly authorised strike.

When a company is a monopoly provider of an essential service — e.g. a utility such as water — its prices are typically regulated. Price regulation, as conducted in the UK, reflects the firms' costs. But the use of market power by unions might genuinely increase the firm's costs, this then being passed through to the consumer by the price regulation process. In this way, through union power the workers secure the monopoly rents of the industry by forcing up prices, defeating the purpose of the price regulation.

Our other suggested options, particularly those in Part 1 of this note, would curtail such rent-seeking. However, a particularly important source of market power for the unions in these cases would be the inability of consumers to go elsewhere combined with their inability to do without the good or service in question. Setting aside the issue of monopsony power for now, insofar as there were a legitimate role for collective bargaining and strike action in such industries, it would relate to the greater efficiency of permanently employed workers versus those obtained from the general labour force or through agencies or consultancies. In order to protect consumers from the (potentially very negative) short-term consequences of breakdowns in relations between employers and unions in such industries, we suggest the following option:

- **Create different rules for "essential" goods and services where there is a lack of alternatives available. Organisations could apply for judicial review to revoke statutory immunities for strike action if a reasonable person would assume it would cause significant economic damage or imperil the safety of the general public. The courts could grant this "essential" status, based on a set of criteria (e.g. a limited choice of alternatives or evidence of significant market power by a regulatory or competition authority). Similar criteria already exists in Poland, Slovakia, Slovenia and Hungary, where strike action is banned where it would be detrimental to life and health or threaten state security.**

### Information on potential participants in strike action

A key issue in a number of recent legal challenges has been the requirement that the ballot (and the call to action later) must include only those of its members whom the union reasonably believes can take part in the action and no others.[41]

In a recent Network Rail application for injunction against the RMT, the ballot fell afoul of the proper procedures on several grounds. The ballot produced a 54% vote in favour. However, of the 67 locations which should have been balloted, 26 were not, whilst 11 signal boxes were balloted that did not exist, one of which was closed in 1996 and one which burned down a year previously. In some locations there were more ballot

[41] For example, this was a central issue in the recent dispute of the NUJ with the Johnston press group. The court ruled that since the journalists concerned were technically employed by subsidiaries, a ballot targeted at the Johnston company itself would be invalid.

papers than employees. Since these anomalies were on a scale sufficient to affect the result – around 300 votes when the majority in favour of industrial action was 224, an injunction was granted in April.

Despite some recent high profile cases, injunctions are now relatively rare because unions generally get it right (though some unions have hinted they would be prepared to act illegally if necessary).[42] Even when granted, injunctions do not generally end industrial action; they are rarely effective in resolving disputes. The result is often that the dispute is lengthened — the union will immediately move to re-ballot its members and union members are likely to become even more embittered. The pain is merely delayed — not done away with. Clearly, even for employers who wish to avoid strikes entirely, it is not desirable that the means of preventing their occurrence should be injunctions. Equally, it is undesirable that workers are prevented from striking when they have a clear desire to do so purely because of procedural problems.

One key point of contention is the accuracy of union records and the nature of the voting process, though the requirements are limited — there is no obligation to give a list of names, just numbers of members and generic job types/descriptions, and some unions lack up to date lists of their members. For example, the proposed BA strike over Christmas 2009 was declared unlawful on the grounds that Unite had included former BA employees who had taken voluntary redundancy and therefore had no right to vote. This happened despite 92% of cabin crew voting to strike on an 80% turnout.

One would assume that the trade unions would prefer an up-to-date list of their members as this would give them a better chance of complying with the relevant regulations and thus not have their ballots struck down by the courts.

Therefore we suggest the following:

- **An annual audit of union membership could be conducted jointly by the employer and the union providing relevant information to an authorised third party under cover of confidentiality.**

## Communication with workers covered by collective bargaining agreements

UK law denies employers the right to consult with employees on issues which are covered by collective bargaining. Section 145(B) of TULR(C)A provides that when a worker is a member of an independent trade union recognised or seeking recognition by an employer, that worker has the right not to have an offer made to him which, if accepted by the employee, and by other workers to whom the employer made offers, would result in the worker's terms of employment not being determined by collective agreement negotiated by the union.

[42] For example, the National Union of Journalists. See http://www.guardian.co.uk/politics/2010/may/20/courts-threaten-right-to-strike

The penalties for making such an offer are severe: even if it is not accepted, it can give rise to a fixed penalty of £3,100 per member to whom the offer was made — a remarkable case in tort law where the member does not have to demonstrate loss to recover compensation. So strict are the penalties, it effectively bars employers from talking to their employees about their terms and conditions. Any discussion has to take place through trade unions acting as an intermediary. The original purpose of s145B was to legislate for the impact of the *Wilson* and *Palmer* cases, so stopping employers offering inducements to employees to give up collective bargaining as a whole or agree to any term no longer being determined by collective bargaining.[43] As drafted, the clause goes much further.

- **Amend TULR(C)A section 145B to permit some limited communication between employers and employees under particular designated circumstances.**

## Notice period for strike action

A strike ballot must include a question with a simple yes or no answer in the form of:[44]

- 'Are you prepared to take part (or continue to take part) in a strike?'
- 'Are you prepared to take part (or continue to take part) in industrial action falling short of a strike?'

This can mean that, as well as not being sure what the dispute is about, union members are not told how long a strike will go on for. The current law allows this – unions have no obligation to inform their members how long a strike will last, or when it will be conducted. There is a provision in the Code of Practice on balloting about not producing *misleading* information, but is this adequate?

Currently, the required notice period for strike action is 7 days. This period appears at the same time rather short for certain kinds of dispute (e.g. if the strike concerns a dispute over pay and conditions, more notice might enable the firm to plan better in how to manage its business during the strike period) and rather long for other kinds (e.g. if the strike arises because of the poor treatment of an individual, that person might need to be taking decisions soon after seven days — e.g. over whether to obtain another job).

[43] Wilson and Palmer v United Kingdom [2002] ECHR 552
[44] Section 229(2) of the Act.

- **The standard period of notice needed for strike action should be lengthened to 14 days. Alternatively, or perhaps in addition, we could vary the period of notice needed for strike action depending on the form of the dispute – perhaps lengthening it for collective bargaining disputes, and shortening it for other forms of action.**

## The legality of national/local strike ballots – secondary action in the public sector

The Union normally has a choice whether to ballot by workplace or more widely. This choice is particularly used in the public sector to opt for national balloting.

There are a number of elements at play which contribute to the ability of unions to call a national strike in various parts of the public sector and which may mean that there might need to be changes either in the law or in relation to long standing collective bargaining practices. First, there is the employment status of public sector employees. Identifying who is the employer might produce a different type of result for different parts of the sector and may not be the complete answer to whether a strike could be called across a number of employers. Distinctions can be drawn between employees of the State, an "Emanation" of the State, NDPBs and privatised elements of the State.

Employment contracts in parts of the public sector are negotiated or even imposed centrally, such as for teachers and hospital doctors, whoever employs them. Academy staff may be employed by their school, whilst other schoolteachers are employed by Local Authorities, University lecturers by their university, local authority staff by their Local Authority, hospital doctors by their NHS Trust, GPs by their Primary Care Trust and civil servants often by the State - but the employment picture is blurred by a combination of the issues.

Since it has been a principle of industrial relations law since the 1980s (responding to "secondary picketing"[45]) that a 'trade dispute' should happen with an individual employer (including separate ballots) and there are several employers in the public sector, it is useful to consider what the legal terms of employment for public sector workers are. While departments have greatly devolved powers in terms of setting things like pay and conditions (subject to Treasury guidelines), civil servants are still notionally employed by the Crown.

School and local authority employees are generally employed by the local authority, meaning multiple employers. However, terms and conditions of employment are uniformally set by central government. There is also a central collective bargaining process with one Central Negotiating Body on which all the different unions are represented in proportion to their membership.

Hospital staff are generally employed by the NHS Trust, meaning multiple employers. Several categories of workers, such as doctors, however, have centrally set terms and conditions imposed by government negotiated through a central collective bargaining process.

---

[45] In Duport Steels Ltd v Sirs (1980), the Court of Appeal's injunction effectively denied the right to secondary picketing.

There are also very long standing central collective bargaining arrangements in various parts of the public sector; for example, the Whitley Council arrangements.[46] These are currently under review in relation to the Health sector and Local Authorities. There are statutory provisions which impact on the employment situation.[47] The Trade Union and Labour Relations (Consolidation) Act 1992, section 228 states that there must be separate workplace ballots if all those who are entitled to vote do not work in the same workplace.

However, this is qualified by section 228A, which allows ballots to be aggregated for various circumstances. These are wideranging enough to allow single ballots for all members who have 'an occupation of a particular kind or....any of a number of particular kinds of occupation' and 'are employed by a particular employer, or by any number of particular employers with whom the union is in dispute'. In effect, this allows trade unions to conduct a single ballot of union members for any number of employers as long as the union was in dispute with all of them — even if it were not the *same* dispute! It provides that the ballot 'may' be conducted across all employers — in other words, allowing the union to decide — making legal the national balloting which is standard practice across the public sector.

This seems to violate the principle that applies more effectively in the private sector — in our view, the union should provide a specific grievance for each dispute which should be treated independently as such.

Since in the private sector, there is generally no common interest among employees, especially in different sectors, this generally does not happen (it is more likely if there is a shared collective bargaining process — which there rarely is). In contrast, in the public sector, there is a perception of common interest because there is much more likely to be a series of collective bargaining arrangements for different employers and a centralised employment contract (for example, in schools).

In other words, existing law does allow for a ballot to be conducted for several different employers around the country, but the exercise of this right overwhelmingly occurs in the public sector due to the collective and contractual connection between different employers and the perceived commonality of interest.

We therefore suggest the following:

- **Individual strike ballots should be held for each legal public sector employer by amending TULR(C)A section 228A.**[48]

---

[46] Whitley Councils are regular consultative official meetings between workers and employers, covering any issue of pay and conditions.

[47] For example, section 244 of TULR(C)A deems the Minister to be the employer of those in his or her department, in given circumstances, in the context of industrial action ballots. Section 279 of TULR(C)A deems the Primary Care Trust to be the employer of primary care dental, medical and pharmaceutical employees, in given circumstances.

[48] This idea was suggested by Tim Leunig of the London School of Economics; (Financial Times, October 27th 2009).

This would be implementing the intention of the 1982 Employment Act, which stipulated that strikes should be about a dispute between 'workers and their employer.' Since the legal employer of most public workers is at a much lower level than strike ballots are currently held – a particular hospital or university, for example – and these ballots would be counted separately, this would have the effect of making strikes local rather than national, and relate to specific grievances rather than a generalised politically-motivated struggle between "public sector workers" and "the government".

## Political donations and taxpayer funding

### The Trade Union Modernisation Fund

The then government set up the Trade Union Modernisation Fund through the Employment Relations Act 2004. It is taxpayer funded, with a stated goal to 'support innovative modernisation projects which contribute to a transformational change in the organisational effectiveness of a trade union.'[49]

Though overseen by a supposedly independent Supervisory Board, many have questioned its appropriateness and called for its abolition. The board takes no minutes of meetings, and six of eight Board members have declared themselves to be involved in the Labour Party.[50] Audit reports are not published, nor even the name of the accountants involved.

This fund has so far distributed £9.4 million. Other payments have included £1.8 million to the Partnership Fund and the Strategic Partnership Fund, £50.7 million from the Union Learning Fund, £3.4 million from Regional Development Agencies and £13.2 million from the European Social Fund to the TUC. In total trade unions have received at least £78.5 million since 1998.[51]

We are unable to identify a good rationale for the existence of this fund even in periods when public spending was rising rapidly. In a time of fiscal austerity, abolition of this fund must be a clear source of savings.

- **The Government should remove various forms of taxpayer funding for Trade Unions.**

---

[49] http://www.bis.gov.uk/policies/employment-matters/strategies/umf

[50] *Hansard*, 11 March 2009, col. 592W.
http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090311/text/90311w0041.htm#09031197002801

[51] *Hansard*, 29 January 2009, col. 762W.
http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090129/text/90129w0017.htm
*Hansard*, 14 October 2008, col. 1020W.
http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081014/text/81014w0003.htm#08101466000188
*Hansard*, 4 November 2008, col. 418W.
http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081104/text/81104w0043.htm
*Hansard*, 6 October 2008, col. 64W
http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm081006/text/81006w0014.htm#0810071000835

## The Political Levy

The trade unions are the main source of funding for the Labour Party, having given over £76.7 million since 2001 or around 61% of all donations. (by coincidence this is quite close to the £78.5 million the trade unions received from Government.) The party even had to obtain a guarantee from Unite that it would continue to provide substantial funding to advert bankruptcy in 2008. The Electoral Commission's figures for Q2 of 2010 show that Unite, Unison and the GMB were the top three political donors to any political party - £3.9 million in that quarter alone. Unions are also intimately involved with campaigning for Labour MPs, including direct mail shots, doorstep and 'word of mouth' campaigns.

Trade unions have a ringfenced political fund for explicitly political activity. While members have the right to opt out of this levy, that is often not identified explicitly on membership forms or otherwise indicated to members.[52] Levies are often increased by 'under the radar' measures like direct debits or pay packet reductions. The opt-out rate is just 9% of union membership in Britain. This average opt-out rate conceals large differences between unions. Only 14,952 out of 1,374,500 members (1.1%) in exclusively public sector union Unison completed an exception notice (thus not contributing to the political fund). The opt-out rate was much higher in the public and private sector union Unite — 366,253 Unite out of 1,572,995 or 23.3%.

And yet, even in the case of Unite members, it is estimated that only 46% voted Labour in 2005, implying that, since 23% opt out, 31% of Unite members fund the Labour Party whilst voting for other parties when the opportunity arises. Interestingly, in Northern Ireland, where there is an 'opt-in', only 39% of members choose to pay the political levy.[53]

If there were proper competition between unions, such that employees had a wide choice of unions to belong to, the political levy might not seem to matter — if material numbers of workers wanted unions that were not affilitated to the Labour Party, or were affiliated to the Green Party or UKIP or the Conservatives or whatever were the political preference of workers, then in a competitive market of union services supply, such options would presumably be available. In such a case it might not even be necessary to permit all union members to opt out of the political levies. But given that most workers appear only to have the choice of not belonging to a union at all or belonging to just one, there is surely little justification for not granting proper freedom to union members to avoid making political donations that do not match their own political preferences and desires.

We do not accept that Labour (or, indeed, any other political party) is the automatic default party of all employees, such that employees should need to explicitly state that they do *not* wish to donate to its activities. Instead, we propose the following:

---

[52] For example, see Unite's membership form:
https://www.unitetheunion.org/default.aspx?page=2112&code=

[53] *Hansard*, 4 March 2009, col. 1700W, *Certification Officer*.

- **Members should be given 'opt-in' choice regarding political donations.**

If unions wish to engage in political activities they could be obliged to offer, on all membership and renewal forms, an explicit statement that the union has a political fund donating to a specified political party and an invitation to offer explicit positive consent (e.g. by ticking a box) that a specific amount of that member's unions dues should be contributed to that political fund. The presumption should be that the member does not wish to contribute unless they specifically say so, transforming it from an 'opt-out' to an 'opt in' system (as in Northern Ireland). We could require that any increase in fees must receive explicit consent from the member.

Some unions have tick boxes on their forms if members wish to opt in to additional services – the TGWU, for example, offers to send members an application form for a Driver Care scheme by ticking a box (its default position online is unticked).[54] Such a system should be extended to the political fund – political donations should be part of a separate application system.

- **We should specify that union membership fees should not be deducted direct from a pay packet.**

In addition, the Deregulation (Deduction from Pay of Union Subscriptions) Order 1998 means that trade unions do not need to give notice to their members if the cost of their political levy rises. This order should be revoked.

## Appendix: Further legal detail on certain issues

This appendix sketches further details of the legal framework relating to strikes.[55]

### Balloting

There is no legal obligation to hold a ballot prior to industrial action nor can the courts order a ballot to be held. The only limitation is that, in the absence of a properly conducted ballot, the union is deprived of statutory immunity in tort for that particular strike. Consequently, they are liable to court action (by the employer for damages, union members for inducing their participation, or indeed any member of the public who may be inconvenienced by the strike, for example). They can also no longer apply for a refund of the proportion of the balloting costs. In common law an inducement by A to B for B to break a contract with C is an actionable wrong, giving rights to C to bring an action against those committing it. Thus, unions generally follow the principle of holding a ballot to avoid these liabilities.

Before a ballot is held, the union must give employers notice in writing of the intention to hold an industrial action ballot no less than 7 days before the opening day of the ballot. [56] It must also specify what the union

[54] https://secure.rss-web.co.uk/tgwudd/

[55] We note that what follows does not constitute legal advice or opinion. In this section we will refer to the TULR(C)A as 'the Act'.

believes will be the opening date of the ballot. It must also contain a list of the categories of employee to which the employees concerned belong, a list of the places they worked, the total number of employed concerned, the number of employees in each of these categories and the number concerned who work at each workplace. There must also be some explanation as to how the figures are arrived at.

If some of the employees concerned have union payments deduced from their wages, the notice must contain either the above or such information as will enable the employer to readily deduce this. The information must be accurate as is practicable given the information in the possession of the union. The union must also supply a sample of the voting papers at least 3 days before the opening of the ballot.

Where the total number of individuals entitled to vote – aggregating different work places – exceeds 50, the union has to appoint a qualified[57] independent scrutineer[58]. The union has to ensure that the scrutineer monitors the functioning of the ballot and reports back not more than 4 weeks after the date of the ballot, comply with their reasonable requests, provide a copy of the scrutineer's report to the employer or any person entitled to vote within 6 months of the ballot if requested and put the scrutineer's name on the ballot paper.

All ballots must be secret postal votes, must be fairly and accurately counted (though inaccuracies may be disregarded if they are sufficiently immaterial) and certified as being reasonable, secure arrangements by the independent scrutineer. There must be no interference from union officials or fees.

The results must then be announced in good time (to both union employees and the employer), including the number of votes cast 'yes' or 'no'. The scrutineer must produce a report on the conduct of the ballot within 4 weeks, including whether he was able to discharge his functions without interference from the union. Employers must be given notice in writing between the result of the ballot and the 7th day before the proposed action is due to start.

## The Calling of Industrial Action

Once a ballot has been properly conducted, action may be called. However, only those entitled to participate in industrial action may be invited to take part. It is at this point that an application for an injunction is normally launched if sufficient grounds have been established.

The union must only call action in accordance with the notice of the strike; for example, did the notice indicate that industrial action would be continuous or discontinuous? After the initial action, is there a need to give further notice or conduct another ballot for future action?

Ballots typically come into effect (i.e. authorise action, if they do so) at the end of 4 weeks starting with the date of the ballot, though this can be extended up to 8 weeks by agreement between the union and the

---

[56] Section 226A of the Act.
[57] Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993.
[58] Sections 226B, 226C and 231B of the Act.

employer,[59] and may be further extended to 12 weeks if legal proceedings have intervened.[60] Once the period in which the ballot authorises action to commence has begun, it can continue indefinitely (subject to this having been properly indicated in the strike notice).

## Picketing

Many strikes involve picketing — various activities of workers designed to persuade others to join their strike or to desist delivering good and services to their employer.

To be legal, picketing must be carried out at or near the pickets' own place of work and be for the purpose of peacefully obtaining or communicating information or peacefully persuading a person to work or not work. An employee (and his or her trade union representatives) may attend the entrance of their place of work and try to persuade colleagues and even those not working for their employer not to work or not to work normally – including the use of leaflets, banners or placards. However, a picket has no power to prevent someone crossing the picket line nor to force people to listen to them.

If picketing goes beyond these permitted activities, striking workers make themselves and the union liable to civil legal action by the employer, including application for an injunction to restraining the picketing. There is also no immunity for any criminal offences committed during a picket. If a picketer tries to use other than peaceful persuasion, he may commit a criminal offence – including acts of intimidation (following non-striking workers around, intimidating relatives, invading their property, hiding tools and so on).

Unions sometimes try to distinguish between official pickets and demonstrations of people exercising their civil rights – usually in order to circumvent these rules. The legal distinction is whether the 'demonstrators' are trying to persuade others not to work – if they are, then the act constitutes a picket. An employee does not have to be a union member to picket or demonstrate.

The requirement that a picket must be peaceful places limits on how many can attend – statutory guidance states a maximum of six pickets should be placed at any one entrance or exit from a workplace. While not unlawful per se, any more than six pickets is likely to be considered illegal by a court – for example, through intimidation, by constituting a breach of the peace or intending to obstruct the Queen's highway. Pickets or demonstrations may also not take place on an employer's premises – employers may ask the police to remove any picketers on their property.

Any activity that arises during the picketing does not have protection under civil law. Proceeding may be brought against participants for any activity which involved civil wrong doing, such as assault, unlawful threat, harassment, obstruction of a path or road to the premises, interference (such as noise pollution, trespass or

---

[59] Sections 233 and 234(1) of the Act.

[60] Section 234(2) - (6) of the Act.

defamation), or action likely to lead to a breach of the peace. Should any of these occur, they may render the whole picket unlawful.

## Employing agency staff to cover strikes

Employers are prohibited from acquiring agency workers to specifically carry out the duties which striking employees would otherwise have performed, during the period in which they are actually on a properly authorised strike. An employer may use her own employees to do this and may use agency workers to do many of things around a strike, e.g. clear a backlog of work.

The law relating to the recruitment of Agency Workers during a strike was introduced only in 2004 and remains largely untested. The Conduct of Employment Agencies and Employment Businesses Regulations 2003 came into force on 6 April 2004. There is, at the time of writing, no helpful case law to provide guidance on their interpretation.

Trade unions usually put forward a very wide interpretation of this law in the media, but the actual limitations on business may actually be fairly narrow.

A key distinction in the Regulations is between an *Employment Agency* (EA) and an *Employment Business* (EB). An EA does not itself employ the workers whose services it supplies to the end user, which then employs them itself; by contrast, an EB does employ the workers whose services are supplied to the end user, which then uses these workers — confusingly usually referred to as "Agency Workers" — but does not employ them directly. It is this latter situation which is affected by the Regulations. Given that the law is, as yet untested, there is still some uncertainty, and employers may be forced to err on the side of caution.

### Restrictions on employers

An employer may not use an Employment Business to supply its own employees if this is to replace employees taking part in a strike or other industrial action.

Regulation 7 specifically prohibits an Employment Business supplying Agency Workers to carry out duties normally performed by an employee taking part in a strike, or another worker covering those duties unless the business does not know (and has no way of reasonably knowing) that the employees being replaced are taking part in industrial action. It has to rely on the end user for this information — if the Employment Business is guilty of an offence under Regulation 7, the end user can be guilty of aiding and abetting that offence.

### Rights of employers

An employer is entitled, however, to use an Employment Agency to supply workers (i.e. by employing them directly), even if the agency performs functions such as pre-recruitment screening.

The employer is also entitled to move existing employees from others parts of its business to cover the work of striking employees. These employees must not be Agency Workers provided by an Employment Business

(though they may be those recruited via an Employment Agency but employed directly by the business). Agency Workers can perform most duties relating to the business, except directly covering for those taking part in industrial action – indirect work caused by action (such as clearing up a backlog of work) is allowed.

Penalties for breaking these regulations can be severe – ranging from criminal prosecution with up to a £5,000 fine to restrictions or even bans on an agency carrying out business for up to 10 years. These penalties have allowed trade unions to use the tactic of targeting the Agencies, as well as targeting threats of action against the end user to put the Agency off supplying any workers. It is frequently the case that employers refrain from using agency workers due to trade union threat of legal action – even in circumstances where it would be allowed.

The Conduct of Employment Agencies and Employment Business Regulations 2003, it could be argued, offend the Agency Workers Directive. Article 4(1) 'Review of Restrictions or Prohibitions' states that restrictions on the use of temporary agency workers can only be implemented on the grounds of their protection, health and safety or 'the need to ensure that the labour market functions properly and abuses are prevented.'

The Employment Agencies Act 1973 gives the Secretary of the State the right to 'make regulations to secure the proper conduct of employment agencies and employment businesses [and] make provision... restricting the services which may be provided by persons carrying on such agencies and businesses.'

The tenor of the 'Conduct Regulations' goes beyond the provisions of the Directive, however. Trade unions may well argue that the reference in Article 4 to 'ensure the labour market functions properly' means that the Conduct Regulations fall within the ability to make regulations 'to secure the proper conduct of employment agencies'. This would not interfere with an attempt to revoke these Regulations however, which could be repealed through the powers granted in section 5 of the Employment Agencies Act 1973.

## Code of practice

The Code of Practice on Industrial Action Ballots and Notice to Employers came into force on 1 October 2005. Although not legally binding, a Court has to take it into account in industrial action proceedings. The Code states that the union should not contemplate industrial action until agreed procedures are exhausted, only ballot when action is genuinely intended (not as a negotiation tactic), should keep members fully informed of the issues and ensure the information given to its members about the ballot is accurate and not misleading (Para. 36).

INSERT BACK PAGE!