TUC
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Building worker power

Essays on collective rights 20 years after the Wilson and Palmer case established the right to be represented by a trade union

Foreword – Angela Rayner, Deputy Leader of the Labour Party & Shadow Secretary of State for the Future of Work

The scourge of P&O's fire-and-rehire tactics this year on top of a decade of real-terms pay cuts reminds us how the system has been stacked against working people for far too long.

Trade unions provide the best opportunity for workers to come together and defend themselves collectively against bad employers and negotiate decent working terms and conditions.

But due to hostile laws and the weakening of employment rights overseen by successive Conservative governments; the rules have too often been rigged in favour of bad bosses and against working people.

Trade unions demonstrated their enduring value and essential role during the pandemic – winning the furlough scheme, negotiating safe working practices, and preventing redundancies.

A strong union presence also means better conditions for workers over the longer term, with unionised workplaces more likely to provide decent pay, good training, and benefits such as holiday and sick pay. Good employers recognise the role of trade unions and that innovation and a collective voice at work can go hand in hand.

But as things stand, bad bosses can get away with bad behaviour.

Earlier this year, P&O suddenly sacked 800 workers and used its deep pockets to buy itself out of consulting with unions on how to reduce job cuts. As a result, unionised workers on decent salaries were replaced by agency staff on as a little as £1.81 an hour.

The fact of the matter is opportunistic bosses use fire-and-rehire to cut pay and move workers onto insecure contracts because the law is weak and because too many workers don't have a union to help them fight back.

Wages have also been at a standstill for more than a decade, leaving working people at breaking point and exposed to soaring bills and spiralling prices.

This needs to change. It is time to breathe new life back into our movement, restoring the power of collective bargaining and giving unions the ability to recruit and organise workers.

The Trade Union Act 2016, which included complicated and onerous rules around industrial action designed to hamper unions at every turn, must be repealed. Trade

union legislation needs to also be updated so it is fit for a modern economy, including allowing online voting.

Next, we need to make sure sectors have a set of minimum standards - negotiated between the very people who know how their sector works best.

That is why Labour will introduce Fair Pay Agreements in sectors, starting in the social care sector where terms and conditions are a national disgrace.

Negotiated between worker and employer representatives, these will create a “floor” of pay and conditions across industries. They will help to stop exploitative employers undercutting good ones and will give working people a voice.

Labour will also make sure that workers get to know about the benefits of being in a union and we will simplify the process of union recognition, establishing a reasonable right of entry to organise in workplaces.

This will include ending the current complexity and removing barriers to workers being collectively represented by a recognised trade union in their workplace.

This important TUC collection shows the progress that can be made by strong union organising and a robust legal strategy.

But to be at their most effective unions need a level playing field that allows them to fight for their members. Britain deserves better.

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Introduction – Sue Ferns, TUC President & Senior Deputy General Secretary, Prospect

On July 2, 2002, the European Court of Human Rights (ECtHR) made a ruling of huge significance to working people in the UK and further afield.

Its judgment in Wilson and Palmer v the United Kingdom held that employer attempts to offer sweeteners to workers to give up collective agreements violated international law, notably article 11 of the European Convention on Human Rights.

It was also the first time the court had been seen to embrace trade union rights.

The TUC is publishing this essay collection to mark the 20th anniversary of this crucial case which provides an opportunity to both assess the impact of that judgment and assess the current state of trade union rights in the UK.

The case, Wilson and National Union of Journalists, Palmer and NURMTW RMT, Doolan and others v United Kingdom to give it its full name, led to an overhaul of British union legislation a few years later.

And the principles the Wilson and Palmer case embedded are continuing to influence union legal cases today.

The case began life 13 years earlier.

Daily Mail journalist David Wilson received a letter from his employer telling him that it was not going to renew its recognition agreement with the National Union of Journalists.

On top of this, any journalist who signed a personal contract with the company before the expiry of the agreement was given a 4.5 per cent pay rise.

Meanwhile, RMT member, Terence Palmer worked for the ports in Southampton.

His employer offered him an individual contract, coupled with a 10 per cent pay increase, but on the condition that he would cease to be represented by the union, the National Union of Rail, Maritime and Transport Workers.

The men took their cases to industrial tribunals arguing that these actions by employers violated their rights not to have action taken against them to prevent or deter them from joining a trade union or penalise them for doing so.

So, a lengthy legal tussle ensued with a Conservative government intervening to help bolster the law in favour of employers who seek to derecognise a union before the ECtHR made its crucial ruling.

As Professor Keith Ewing sets out, the legislative reforms that the Labour government undertook in the wake of the ECtHR judgment both fell short and went further than anticipated.

Some of the effects of that were felt when workers recently won another significant case concerning employer inducements in Kostal UK v Dunkley, a judgment explored by Stuart Brittenden and Michael Ford QC in their essay.

"Recruiting and organising will always be crucial. But well-executed strategic cases at the right moment can play an important role in safeguarding and extending the legal framework in which unions operate."

Yet, as Rachel Halliday argues in her contribution, the legal landscape continues to be very hostile for trade unions.

This reached a particular low point, as Professor Alan Bogg delves into, with the no-notice sackings of 800 seafarers at P&O earlier this year.

Shantha David's contribution warns that the human rights law that has underpinned the development of collective rights in recent years is now in the sights of ministers via the Bill of Rights.

Crucially the Wilson & Palmer case shows the multiple fronts on which unions can fight and win to secure important rights for their members.

Recruiting and organising will always be crucial.

But well-executed strategic cases at the right moment can play an important role in safeguarding and extending the legal framework in which unions operate.

Supportive legislation is also crucial.

Today, trade unionists find themselves once more battling bad employers intent on exploiting the loopholes in the law and ministers willing to aid and abet them.

But David Wilson and Terence Palmer did not give up on their fight.

So today's trade unionists must continue to fight for collective rights that allow us to secure the pay and protections that members deserve.

The significance of Wilson and Palmer – Professor Keith Ewing

Background

British trade unionists have long been accustomed to regard judges as a threat to their freedoms.

Indeed, as Ralph Miliband wrote over 50 years ago, "the history of trade unionism" is also "the history of an unending struggle against the courts' attempts to curb and erode the unions' ability to defend their members' interests".

For that reason alone, Wilson and Palmer v United Kingdom appeared to confound history, with the European Court of Human Rights (ECtHR) embracing trade union rights for what was probably the first time by that court.

In one of the most important labour law cases of its generation, it was held that by permitting employers to discriminate against trade unionists, British law violated the European Convention on Human Rights (ECHR).

By article 11, the latter guarantees "the right to form and join trade unions for the protection of [one's] interests". The state has a "positive obligation" to ensure the enjoyment of these rights, an obligation with which the United Kingdom had failed to comply.

British law

The Wilson and Palmer decision was a direct consequence of employer de-recognition: withdrawing from collective bargaining and offering workers financial inducements to enter into personal contracts. Those who refused to accept the inducements and insisted on remaining on the collective agreements were denied the substantial "doucers" and thus penalised as a result.

Legal proceedings were brought in the British courts on the ground that the employers' conduct was unlawful under what was then the Employment Protection (Consolidation) Act 1978, s 23. But in Associated Newspapers plc v Wilson; Associated British Ports v Palmer (1995) these claims under domestic law were eventually dismissed by the House of Lords:

- The statutory protection from discrimination on the ground of trade union membership applied at the time to "action" short of dismissal, not "omissions". Workers from whom bonuses were withheld because of their refusal to give up collectively agreed terms and accept personal contracts were the victims of an "omission" rather than "action" by their employer.

- The statutory protection from discrimination on the ground of trade union membership did not extend to protection for using the "essential services" or enjoying the benefits of the union. Such an interpretation would "at best" have placed "an unnecessary and imprecise gloss on the statutory language", and "at worst" was "liable to distort the meaning of these provisions which protect [only] union membership as such".

The first of these bullet points was addressed by the Labour government (elected in 1997) in the Employment Relations Act 1999, when the law was recast in its present form: a worker now has "the right not to be subjected to a detriment as an individual by any act, or any deliberate failure to act, by [their] employer".

But this left unresolved the other questions in the Wilson and Palmer case: Labour's reforms did not address the problem of discrimination for using the services of a union; and it remained unclear just how far the new law would protect workers and unions from financial pressure to give up bargaining rights.

ECtHR judgment

All eyes were now on Strasbourg proceedings, which were initiated in 1995, while the Conservatives were still in office. It took seven years for the ECtHR to deliver a judgment, by which time Labour was now in government.

The court held in effect that the Employment Relations Act 1999 did not go far enough to meet convention obligations. According to the Strasbourg court, British law continued to be inadequate, first because protection from discrimination applied only on the ground of trade union membership or activities, but not also for the use of union services.

Secondly, British law was inadequate because it did not prohibit employers from making financial inducements to workers as a step towards de-recognition. The latter was said to violate the right of the workers induced, as well as - crucially - the union itself.

It was thus necessary for the Blair government to legislate again, this time to deal with the second bullet point above.

This was done in the Employment Relations Act 2004, which introduced what is now the Trade Union and Labour Relations (Consolidation) Act 1992, ss 145A-145F.

> "...workers now have the right not to suffer a detriment for using the services of a trade union, and they have the right not to suffer an inducement to give up various union rights set out in the legislation."

As a result, workers now have the right not to suffer a detriment for using the services of a trade union, and, in what is awkward drafting, they also have the right not to suffer an inducement to give up various union rights set out in the legislation.

But while welcome, it remains an open question whether this second round of legislation goes far enough to meet the requirements of the Strasbourg decision, as was pointed out at the time by Parliament's human rights select committee.

Indeed, and perhaps as a result of a drafting oversight, it is even contestable whether the legislation would cover the facts of the Wilson case itself were they ever to be repeated.

The new right not to be subjected to an inducement applies where the union is recognised or ceases to be recognised. The NUJ had been derecognised.

And although Mr Wilson might say that he had been discriminated against for using the services of the union, the legislation remarkably states expressly that benefiting from collective bargaining is not to be treated as a trade union service.

Otherwise, the rights of the union were overlooked in the implementing legislation. The government legislated in the Employment Relations Act 2004 – by way of an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1 - to give unions a right to complain about unfair practices used by employers to resist recognition applications.

But for reasons unknown, it was unwilling to do the same where the employer had embarked on a process of de-recognition.

Yet as the ECtHR made clear in Wilson and Palmer, the government's failure identified in that case "amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants".

Importance of the ECtHR judgment

But while we might quibble about some aspects of the legislative response to the Strasbourg court's decision, the great importance of the decision should not be diminished. Nor should its pre-eminence as a case study in the virtues of strategic litigation be under-estimated.

First, not only did the applicants secure a court ordered remedy from the government for the wrongs done to them by their employer, the decision also required a Labour government to change the law for a second time to reverse the House of Lords decision in 1995. That would not have happened without the Strasbourg judgment.

Secondly, nor should it be overlooked that in some respects the implementing legislation – now the Trade Union and Labour Relations (Consolidation) Act 1992, s 145A-145F - goes further than anticipated, as is inevitably the case: all legislation has unintended consequences; some good, some bad.

The likely unintended but positive consequences of the legislation implementing Wilson and Palmer were revealed by Kostal UK Ltd v Dunkley. In that case, the UK Supreme Court considered the implementing legislation for the first time, though in

view of the opaque reasoning of the court, it would not be surprising if they were to revisit the matter in the near future.

As pointed out by Michael Ford QC and Stuart Brittenden below, the Supreme Court decision in Kostal UK Ltd v Dunkley is not by any means a cause for unrestrained celebration. But as the court makes clear, the Trade Union and Labour Relations (Consolidation) Act 1992, ss 145A-145F apply not only in cases of de-recognition (as in Wilson and Palmer itself), but to a much wider range of anti-union practices by employers.

These include – as in Kostal UK Ltd – what some might construe as attempts to marginalise or undermine the authority of a recognised trade union during the collective bargaining process by going over its head to seek agreements with workers individually, at a time when collective bargaining procedures have not yet been exhausted.

Admittedly the employer appears to be free to approach workers individually once the collective bargaining procedures have been completed and no agreement has been reached. But such approaches are not risk free, the Supreme Court having created some uncertainty on which unions and workers ought to be able to capitalise. This uncertainty arises not only in terms of:

- what collective bargaining procedures require in any particular case, but also
- the employer's bargaining behaviour while the procedures are being operated.

Did the employer come into the process with an open mind and bargain in good faith throughout?

For probably the first time in British law, the behaviour of the employer during the bargaining process may thus now be the subject of regulation. That would not have happened either without the Strasbourg judgment.

Thirdly, apart from securing a victory for the complainants and a change to the law, Wilson and Palmer is crucially important more broadly for the willingness of the ECtHR to engage with and embrace International Labour Organization (ILO) and European Social Charter standards in the development of the ECHR, article 11.

The relevance of that material in expanding the scope of the ECHR, article 11 was re-affirmed in the sensational Demir and Baycara v Turkey ECHR judgment six years later, thereby underlining the trade union movement's essential role in keeping fresh the jurisprudence of these bodies if headway is to continue to be made in Strasbourg and elsewhere.

"Wilson and Palmer has been transformative and has provided the inspiration for trade unions throughout Europe to take convention rights seriously."

Conclusion

While we celebrate Wilson and Palmer, we should also recognise that none of it would have been possible without the remarkable courage of the litigants over a period of 13 years, as well as the perseverance and support of senior trade union officials, together with the skill and determination of the legal team.

Their legacy has been immense. Wilson and Palmer has been transformative and has provided the inspiration for trade unions throughout Europe to take convention rights seriously, with trade unionists in the Council of Europe generally enjoying spectacularly high levels of success in article 11 cases before the ECtHR.

It is true paradoxically that since Wilson and Palmer, the Strasbourg court in contrast has been much less responsive to British applications under article 11. But that may yet change if the Human Rights Act 1998 is repealed, and the British courts are no longer required under a British Bill of Rights to ensure that the United Kingdom is fully ECHR compliant.

The right to trade union representation: Kostal UK Ltd v Dunkley in the Supreme Court – Michael Ford QC and Stuart Brittenden

Introduction

Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 was introduced by the Labour Government in 2004 in response to the 2002 ruling of the European Court of Human Rights (ECtHR) in Wilson and Palmer v United Kingdom.

The ECtHR had found that the United Kingdom was in breach of its positive obligation to ensure the effective enjoyment of the right to form and join trade unions, an aspect of freedom association protected under article 11 ECHR. At that time employers were able to offer inducements to workers to entice them to surrender their rights to have their terms negotiated by collective bargaining.

On the facts of Wilson, those who refused to surrender their rights did not receive the significant pay rise given to workers who agreed to accept personal contracts in place of collectively agreed terms. On UK law as it stood, neither they nor their unions had a remedy against this sort of tactic. Section 145B of the Act was intended to fill the gap in protection exposed by the ECtHR's judgment.

To that end, where a trade union is recognised or is seeking recognition, section 145B gives union members the right not to receive offers from their employer which, if accepted, would have the result that any terms of their employment will not (or will no longer) be determined by collective bargaining. This is described as the "prohibited result". In this context, an "offer" includes the unilateral imposition of a pay award, as established in Ineos Infrastructure Grangemouth Ltd v Jones & Ors. Liability will only be established if the employer's sole or main purpose is to achieve that result.

Where a claim is upheld, an Employment Tribunal must make a prescribed award (currently £4,554 for each worker: s. 145E). The section is not particularly well drafted and employers have sought to exploit every potential loop-hole, in part because of the significant damages for breach.

A good illustration is the argument of the employers in Kostal v Dunkley that s.145B only protected against permanent and not temporary withdrawals from collective bargaining. That submission succeeded before the Court of Appeal (CA), whose judgment had the potential to make the protection in s.145B illusory. It was fortunately reversed by the Supreme Court in 2021.

Background

During collective bargaining with Unite, Kostal offered a 2 per cent pay increase and a Christmas bonus, in return for reduced overtime and sick pay. Members rejected the offer in a ballot.

Before exhausting the collective dispute resolution procedures, the employer then made direct offers to staff, telling them that they would not receive the Christmas bonus if they did not accept.

By the time the parties had arrived at the final stage of the dispute resolution procedure, about 90 per cent of staff had accepted, with the result the union's mandate was "destroyed".

Later, the company made a similar offer, without the bonus, warning that if it was not accepted it might lead to dismissal.

The Employment Tribunal and Employment Appeal Tribunal (by a majority) upheld the members' claims under section 145B in respect of both offers. The total award was £421,800.

However, the Court of Appeal (CA) allowed the employer's appeal. It held that the prohibited result only occurs where acceptance of the direct offers would have the effect of taking any term outside the sphere of collective bargaining on a permanent basis. It did not apply to offers which, if accepted, merely mean that the term was not determined by collective bargaining "on this occasion".

This sparked consternation across the trade union movement as it had potential to undermine collective bargaining.

It meant employers could ignore recognition agreements and claim that, even if in this pay round they had not engaged in collective bargaining or had ignored the collective procedures, they had not decided to do so permanently.

Owing to the very serious detrimental implications of the CA's judgment, Unite appealed to the Supreme Court (SC).

The Supreme Court's judgment

The SC unanimously allowed the Unite's appeal. Lord Leggatt delivered the speech for the majority (with whom Lords Briggs and Kitchin agreed). The SC reached the opposite view to the CA: where a trade union is recognised, the direct offer does not have to take the particular term(s) permanently outside the sphere of collective bargaining.

Lord Leggatt reasoned that "[t]here is no difference in principle between offering an inducement to trade union members to agree not to be represented by their union in collective bargaining indefinitely or for a long period or for a very short period of time…". The prohibited result will still be achieved in either case, and s.145B is therefore engaged.

The reasoning of the majority was buttressed by reference to ECtHR cases on article 11, including Wilson. Lord Leggatt commented that it was: "… incompatible with article 11 to allow an employer simply to by-pass a trade union which has been recognised for the purpose of collective bargaining and enter into direct individual negotiation with its employees…".

Where an employer refuses or fails to engage in any discussions or negotiations with a recognised union before making direct offers to workers, such conduct "denies the union its seat at the table and does not allow the union's voice to be heard".

This does not mean that an employer can never make direct offers to the workforce. There are of course limits.

The majority considered that the question of when the prohibited result arises is one of causation. To achieve the prohibited result, there must be at least a "real possibility" that, if the offers were not made, the workers' relevant terms of employment would have been determined by a new collective agreement reached for the period in question.

If there is no such possibility, then, according to the majority, it cannot be said that making the individual offers produces the prohibited result. The majority decided the parameters should be framed by reference to whatever bargaining procedure has been agreed between the employer and the union.

What this means is that an employer cannot make direct offers to its workforce in respect of any terms which fall within the scope of collective bargaining unless it "… has first followed, and exhausted, the agreed collective bargaining procedure…".

Comment

The outcome in Kostal is very much welcomed because the CA judgment had blown a gaping hole in s.145B. But there remain potential limits on the scope of legal protection.

First, there is no legal duty to enter collective bargaining or to bargain in good faith: the right in article 11 is only a right for the union's voice to be heard. An employer can sit across the table obdurately saying "no" and, so long as it does not block its ears, there is little the law can do.

> "…we doubt s.145B permits an employer simply to go through the motions of following an agreed procedure or purporting to negotiate with a union when it never had any intention of trying to reach a deal. But it will probably take further litigation to establish the point…"

Second, while the Kostal judgment shut one door on employers, it left another one half open. The causation test applied by the majority appears to permit an employer to make offers directly to individual workers, so long as

the employer first follows and exhausts the procedural steps in any collectively-agreed procedure.

When it is properly interpreted in light article 11, we doubt s.145B permits an employer simply to go through the motions of following an agreed procedure or purporting to negotiate with a union when it never had any intention of trying to reach a deal.

But it will probably take further litigation to establish the point, and in the meantime employers will no doubt seek to exploit any potential gap in protection, illustrated by the very recent Ineos case.

For the moment, and when such points arise, unions can continue to rely on the Human Rights Act 1998 to ensure that the s.145B regime is interpreted harmoniously with article 11 and the judgments of the ECtHR, just as Unite did in Kostal. If the current Bill of Rights becomes law, their task will be much, much harder.

Taking the rule of law seriously: the P&O Ferries scandal and the need for a Labour Enforcement Act – Professor Alan Bogg

How does a discussion of the P&O Ferries scandal fit in a collection of essays dedicated to the 20th anniversary of the landmark decision in Wilson and Palmer v United Kingdom?

There are some similarities, of course. Both disputes have a maritime dimension, with the Palmer case originating in a union recognition dispute at Southampton docks. Beyond this, however, there are obvious differences.

Wilson and Palmer both concerned situations where there had been a withdrawal of union recognition by the employers.

Financial bribes had then been offered to individual employees to persuade them to sign new 'personal contracts' purged of collective pay-setting. This provided a way of smoothing the transition from collective bargaining to individualised pay determination.

At that time, UK law provided no legal remedy either to employees or the union itself to respond to the employer's discriminatory practices. It required a trip to Strasbourg, prompting a legislative change in the Employment Relations Act 2004, to finally address the lacuna in protection.

In P&O, by contrast, the employer implemented peremptory mass dismissals in breach of the notice and consultation requirements for collective redundancies.

The employer alleged that it had given notice to the competent authorities in the flag states of the affected vessels (though it had not complied with the timing requirements for notification).

For the employer, it was imperative that the union and employees had no inkling of the plan so that there was no time to organise strike action to challenge the mass redundancies.

In the meantime, the employer had engaged a completely new workforce employed through agencies that were not subject to basic statutory rights such as the national minimum wage.

It is very likely that P&O had chosen to switch from a unionised workforce covered by collective bargaining to a non-unionised workforce paid at significantly lower rates. It

was a brutal instance of derecognition, relying on the fist rather than the velvet glove of Wilson and Palmer.

The firm had also prepared financial settlements offered to each employee in order to buy off any litigation. Measured against the financial remedies likely to be awarded in tribunal, the offers were attractive. Nearly every employee (bar one) accepted the settlement agreements.

This represented an extreme variant of fire-and-rehire in the use of dismissal powers to downgrade contractual terms. It was an extreme case because there was no rehire: the new workers were effectively exiled beyond the territorial scope of the most basic employment protections.

"[P&O] was a brutal instance of derecognition, relying on the fist rather than the velvet glove of Wilson and Palmer."

It is also revealing that the P&O employees subject to French and Dutch legal protections, with its superior remedies for labour breaches, were not targeted in the same way.

Attack on trade unions

Despite superficial differences, P&O is a particularly grim example of the attack on trade unions in Wilson and Palmer. On this occasion, there was no messing around with the niceties of new contracts and enhanced pay offers. Instead, a unionised workforce was dumped and replaced overnight with a non-unionised workforce.

There was no attempt to comply with the law. Financial sweeteners were used by the firm to buy itself out of an embarrassing court appearance. It was derecognition on steroids.

It made Wilson and Palmer look like the gentle noblesse oblige of a bygone era.

Summoned to appear before parliamentary select committees, the chief executive of P&O, Peter Hebblethwaite, did not attempt to argue that the actions of the company were lawful. It would have been nonsense to do so. An uncomfortable few hours in Parliament was no doubt also priced into the commercial decision to act in this way.

"The effect of these statutory caps is to make law-breaking predictable for the calculating wrongdoer. The exact price of the rule of law was no doubt contained in a complicated spreadsheet drawn up by [P&O's] lawyers in the lead up to the sackings."

The dismissals were unfair under the relevant legislation. The compensatory award for unfair dismissal is capped to ensure a fair balance between the interests of employees and the needs of businesses. The failure to consult would also have attracted a penal 'protective award'. This is capped at 90 days' pay.

The effect of these statutory caps is to make law-breaking predictable for the calculating wrongdoer. The exact price of the rule of law was no doubt contained in a complicated spreadsheet drawn up by its lawyers in the lead up to the sackings. Given the likely profits resulting from breaching the law, P&O simply decided to ignore its legal obligations.

There was much huffing and puffing in Parliament about injunctions and making P&O obey the law. By the time of Mr Hebblethwaite's appearance, of course, this was really just posturing and handwringing. There was nothing left to enjoin through an injunction because most shell-shocked employees had already signed the settlement agreements.

The game was over, and P&O knew it. And Mr Hebblethwaite's handsomely remunerated contrition was no comfort to the many hundreds of employees who had been dumped by the company.

Needed: a Labour Enforcement Act

The real scandal of P&O is political.

It is the fact that successive governments have acquiesced in a situation where the rights on the statute books are regarded as optional by employers who are determined to break the law.

When rights enacted by Parliament are openly flouted by law-breakers, democracy is undermined. Respect for the rule of law is also eroded.

It is a constitutional imperative that this is addressed through a Labour Enforcement Act. The Act should contain the following measures:

1. Where there are caps on statutory awards, the court should have a power to set aside the statutory cap and award punitive damages where the employer has made a calculation of the profits resulting from law-breaking and made a deliberate decision to breach the law. This would be a statutory codification of an existing basis for awarding punitive damages at common law in Rookes v Barnard.
2. The remedy of interim relief, which is currently available for alleged trade union dismissals, should also be available where there has been a failure to consult in respect of collective redundancies or transfers of undertakings.
3. Where there has been a failure to notify the Secretary of State or the competent authority in the flag state, or a failure to do so in accordance with the requisite time frames, any purported dismissals should be null and void. The statute should also clarify that the failure to notify the competent authority in the flag state is a criminal offence. Where there has been a calculated failure to notify in accordance with the statute, the court should have the power to impose a custodial sentence on managers involved in that decision.

4. The statute should clarify the existing scope for accessory liability where a secondary party has intentionally assisted or encouraged a primary wrongdoer who has breached legal duties. This could extend the reach of criminal liability to include those who have orchestrated the wrongdoing, such as the senior executives in companies that exercise significant corporate influence over the primary employer's decision-making.
5. Where an employer has deliberately breached its statutory duties, procedural and substantive restrictions on lawful strike action should be relaxed. For example, the prohibition of secondary strike action effectively insulated P&O from any industrial action because it had dismissed its unionised workforce. In these circumstances, there should be a separate and more permissive regime to empower trade unions to undertake 'enforcement' strike action against the employer. This would include secondary action.

The great legacy of Wilson and Palmer was the remarkable fortitude of trade unions and workers in pursuing legal action and securing significant improvements to the legal framework.

"The great legacy of Wilson and Palmer was the remarkable fortitude of trade unions and workers in pursuing legal action and securing significant improvements to the legal framework."

P&O is a salutary reminder that there is much that remains to be done.

Despondency was not an option for David Wilson and the NUJ.

On the 20th anniversary of this remarkable chapter in the story of labour law, we must ensure that 20 years from now we will be celebrating the anniversary of the Labour Enforcement Act.

The end of collective rights as human rights? – Shantha David, head of legal services, UNISON

The objective of the Human Rights Act 1998 was to "bring rights home" and allow a remedy in domestic law for breaches of the European Convention on Human Rights (convention rights). Until then, influential cases such as Wilson, Palmer and Doolan v UK, celebrated in this collection, had to go all the way to the European Court of Human Rights (ECtHR) to seek a remedy.

I describe below one of UNISON's many successful cases concerning collective rights where we fought to enshrine in domestic law, the principle that the right to collective bargaining is a fundamental human right.

However, unions need to be aware that the new Bill of Rights tabled by the government threatens to undermine and indeed reverse these achievements. It appears to weaken the obligation on governments to make legislative changes to bring the law into line with convention rights and could leave unions with no choice but to challenge breaches in the ECtHR.

Collective consultation rights

Recognised trade unions have a statutory right to receive information and to collectively consult with employers in two situations: when redundancies are proposed and where there is a relevant transfer of an undertaking.

While the provision of information is similar in both situations, the consultation requirements differ.

Where an employer proposes to make redundancies of 20 or more employees within a period of 90 days or less it must inform and consult on its proposal with representatives of the affected employees, including unions under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which implements the European Collective Redundancies Directive.

The purpose of consultation as envisaged in European case law and which is reflected in the aims of TULRCA 1992, s.188, is:

> *"…not only to avoid collective redundancies or to reduce the number of workers affected, but also, inter alia, to mitigate the consequences of such redundancies by recourse to accompanying social measures aimed, in particular, at aid for redeploying or retraining workers made redundant".*

Unlike with redundancies where there is a requirement for meaningful consultation, the duty to consult where there is a transfer of an undertaking is narrower. This is because the requirement to consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) only arises in respect of an employer who envisages taking measures in respect of each of their affected employees. The purpose of such consultations shall be "with a view to seeking agreement to the intended measures".

Information and consultation claims

UNISON has over the years run a large number of information and consultation claims, and has, through time, sought to expand the scope of redundancy consultation in domestic law.

In Wandsworth LBC v Vining, Francis and UNISON, we argued that this requirement to consult was collective in nature and so must by virtue of article 11 of the European Convention on Human Rights (ECHR), apply to the domestic interpretation of TULRCA, s.188.

This argument relied on the collective requirement that the "consultation" required under TULRCA, s.188 (2) has to be undertaken "with a view to reaching agreement".

It was buoyed by the 2008 judgment of the Grand Chamber of the European Court of Human Rights in Demir and Baykara v Turkey, that, in principle, the right to collective bargaining is a fundamental human right.

We argued that it followed that the statutory exclusion of parks police from collective consultation under TULRCA s. 280 interfered with the union's and its members' rights to collective bargaining, and so also breached article 11 ECHR.

The Court of Appeal agreed with UNISON, securing into domestic law this principle that the right to collective bargaining is a fundamental human right.

> "In the absence of an interpretative obligation, there is even less incentive on the part of government to remedy deficiencies in the law to ensure ECHR compliance."

In his judgment, LJ Underhill held that, in light of Demir, the rights of the parks police and UNISON (in representing those individuals) "falls squarely with the 'essential elements' protected by article 11" and so the UK had a "positive obligation to secure the effective enjoyment of those rights".

The Human Rights Act 1998 (HRA) s. 3, requires that so far as it is possible to do, legislation must be read and given effect in a way which is compatible with the convention rights. Therefore, the Court of Appeal held that the statutory exclusion had to be read as not extending to parks police in order for UNISON's claim to succeed and to comply with the ECHR.

The Bill of Rights

The Bill of Rights that was introduced to Parliament on 22 June 2022 does not contain an equivalent interpretative provision to HRA s. 3.

Although the UK is bound to remove incompatibilities with the ECHR to comply with article 1 ECHR, the wording in Clause 26 of the bill states that the making of amending regulations or the requirement of Parliament to legislate to remedy the domestic legislation to ensure compliance, can be left to the discretion of the relevant minister if they think "there are compelling reasons" to remove the incompatibility.

Unions should be concerned by this fundamental change to the law. The Vining judgment has shown that even when judges pointed to a lacuna in the law and expressed their inability to remedy legislative deficiencies, and suggested parliament do this, still no correcting legislation by way of a properly consulted upon and sufficiently scrutinised act of parliament was made. In the absence of an interpretative obligation, there is even less incentive on the part of government to remedy deficiencies in the law to ensure ECHR compliance.

It is also unlikely that decisions such as in Vining, will survive once the bill is enacted. In fact, clause 40 of the bill states that subject to any transitional or saving provisions, such judgments can only survive if the effects of existing judgments are preserved. The secretary of state may "amend or modify any primary or subordinate legislation so as to preserve or restore (to any extent) the effect of a relevant judgment of the court"; which includes any judgment "made in reliance on section 3 of the HRA 1998".

> "...the unintended consequences of the Bill of Rights could include more appeals to European Court of Human Rights."

As UNISON suggested in its response to the Independent Human Rights Act Review, the unintended consequences of the Bill of Rights could include more applications to European Court of Human Rights; and the more there are, the more the UK government loses credibility internationally. This has the potential to become a wider political problem for the government when wishing to assert that other countries do not respect universal human rights. A regime that makes it unduly difficult for individuals to access justice through the courts may also fall foul of the common law right to access to justice as the UK Supreme Court made clear in R (UNISON) v Lord Chancellor [2017].

> "Collective rights remain under attack, and the work of unions remains vitally important."

Worryingly, the narrower codification of judicial review law in the Judicial Review and Courts Act 2022 will make it even harder to meaningfully challenge breaches of access to justice. Finally, it may also mean that there is cause for complaint that the UK was failing to comply with article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) to which the UK

is a signatory, which requires parties to the treaty to ensure that any person whose rights and freedoms have been breached have an effective remedy.

Redress in the UK courts is essential in a fully functioning democracy, and governments of every hue should not be afraid of their decisions being challenged within a judicial system that has the jurisdiction to ensure compliance with the principles contained within the HRA and convention rights.

Collective rights remain under attack, and the work of unions remains vitally important.

Unions overcoming the legal challenges - Rachel Halliday, Thompsons Solicitors

Despite a UK legislative agenda which prioritises hostility towards trade unions the movement has managed to make advances in collective rights.

Although there were far more pressing issues worthy of legislative action the Conservatives introduced the Trade Union Bill within nine weeks of their 2015 general election victory which became the Trade Union Act 2016.

The 2016 act brought greater restrictions on organising industrial action such as the requirement for a 50 per cent turn out, and 40 per cent support requirement in "important public services" as well as additional information to be included on the ballot paper. Further burdens included a requirement for members to opt into political funds and limitations on facility time and check-off in the public sector.

"This prioritisation to attacking trade unions in the United Kingdom is the backdrop for advances in collective rights being reliant on the European Convention on Human Rights and the Human Rights Act.

The act also brought new powers for the Certification Officer – to charge a levy, to impose fines, to investigate possible breaches without receiving a complaint and other investigatory powers.

Although the Omicron Covid variant was at the time sweeping though the country the Conservatives found time in December 2021 to publish the draft statutory instruments implementing these new powers (effective from April 2022).

By contrast there is no sign of the much-vaunted Employment Bill, which we were told would strengthen protections against pregnancy discrimination, ensure restaurants hand over service charges and tips to workers and create a single enforcement body. The bill was promised in December 2019 after Boris Johnson's election victory. The legislation has yet to be published.

European Convention on Human Rights

This prioritisation to attacking trade unions in the United Kingdom is the backdrop for advances in collective rights being reliant on the European Convention on Human Rights and the Human Rights Act.

Until 2002, and despite criticism from international supervisory bodies including the International Labour Organization's (ILO) Committee on Freedom of Association, UK

law allowed employers to use financial incentives to induce employees to give up union rights.

As Professor Keith Ewing explains above, it took the European Court of Human Rights (ECtHR) in the Wilson and Palmer case to declare that UK law infringed the right to freedom of association protected by article 11 of the convention.

And in judgments just this year first the Supreme Court has in Kostal, as Michael Ford QC and Stuart Brittenden set out in their essay, interpreted that judgment so as to outlaw incentives to give up collective bargaining rights even for a single pay round.

Then, in the recent Ineos case, the Employment Appeal Tribunal (EAT) agreed with Unite members that imposing a pay increase outside the collective bargaining process amounted to an unlawful inducement to give up collective bargaining rights.

Likewise, until 2007, UK law made it unlawful for unions to expel members on grounds of membership of a political party such as the BNP. However, in ASLEF v United Kingdom the Strasbourg Court reversed that.

Human Rights Act

The Human Rights Act brought new opportunities to seek advances that weren't going to be forthcoming from a resistant UK government with the requirement under section 3, so far as it is possible to do so, for legislation to be interpreted in a way which is compatible with Convention rights, and the availability of declarations of incompatibility under section 6.

It has for decades been unsatisfactory – and out of kilter with international standards - that TULRCA does not provide protection against action short of dismissal for taking part in industrial action. In 2021 in Mercer v Alternative Futures, the Employment Appeal Tribunal was prepared to use its powers under section 3 Human Rights Act to 'read down' the relevant provisions of TULRCA so as to interpret them compatibly with article 11, as interpreted by the European Court of Human Rights, and provide for protection against action short of dismissal for a UNISON member taking part in industrial action. Although the EAT's judgment has now been overturned by the Court of Appeal in doing so it recognised that the failure to provide protection may mean that the UK continues to infringe article 11.

The overall judicial picture of using article 11 of the European Convention to advance collective rights is mixed. So that whilst in RMT v United Kingdom in 2014, the Strasbourg Court declined to agree with our contention that the requirement for a pre-ballot notice and the prohibition on secondary action infringed rights under article11 its force was demonstrated very recently in another case - Straume v Latvia - in which the European Court found that Latvia had infringed article 11 by not providing for protections against detriments imposed on the leader of a Latvian union for raising concerns about working conditions.

And even in the domestic UK courts the judicial attitude to industrial action challenges has, since RMT v Serco and ASLEF v London and Birmingham Railway in 2011 been profound. The recognition by the Court of Appeal in that case that the right to strike is an element of the right to freedom of association under article 11, which is in turn given effect by the Human Rights Act was a major breakthrough and has encouraged a 'likely and workable' construction of the industrial action legislation rather than one strictly against unions seeking the benefit of an immunity.

The Bill of Rights

The UK government has the Human Rights Act firmly in its sights precisely because it wants to curtail the ability of those such as trade unions who seek to enforce internationally recognised standards in the United Kingdom. In December 2021, the government published a consultation on replacing the Human Rights Act with a "modern Bill of Rights".

Proposals within that included making it clear that UK courts are not required to follow decisions of the European Court of Human Rights, that the interpretation of a right in the Bill of Rights may not be the same as that of a corresponding convention right, and requiring courts to give weight to parliament's intentions when considering if interference with a right is justified.

"The UK government has the Human Rights Act firmly in its sights precisely because it wants to curtail the ability of those such as trade unions who seek to enforce internationally recognised standards in the United Kingdom."

Conclusion

So long as there is a Conservative government in power in the UK, the legislative agenda will continue to be antagonistically and ideologically hostile to trade unions, and that includes rights derived from convention rights.

However, as they have always done trade unions will continue to find innovative ways to overcome that entrenched opposition and advance collective rights through the use of convention rights and the Human Rights Act.

*Thompsons was instructed on behalf of trade union clients in all but one of the cases mentioned in this article (Mercer v Alternative Futures.)

The future of UK labour law - Frances O'Grady, TUC General Secretary

It sounds all too familiar to today's trade unionists.

An employer hell-bent on breaking union organisation by exploiting loopholes in the law.

And government ministers, desperate to whip up hostility against unions, ready to offer a helping hand.

Twenty years ago David Wilson and Terence Palmer faced that same challenge. The Daily Mail sought to bribe David to opt out of his union's collective agreement. Likewise, Associated British Ports 'offered' a pay rise to individual workers, on condition that they sign away collective bargaining rights.

But the workers won. It was thanks to their determination, the unions that backed them, clever advocacy in the courts and, ultimately, a new government prepared to change the law and stop such abuses of employer power.

Today, we are seeing more evidence of employers looking to resist, or break, organised labour.

In emerging sectors, such as internet retailing and the platform economy, our organisers are already up against insecure contracts, high turnover and well-funded employer strategies to 'avoid' or bust unions.

"Despite issuing condemnations at the time, the Conservative government now is intent on 'doing a P&O' itself."

And bad bosses are getting bolder. As Professor Alan Bogg explains in his essay, P&O Ferries were prepared to flout UK law to replace unionised staff, on the union rate for the job, with agency labour on poverty pay.

Despite issuing condemnations at the time, the Conservative government now is intent on 'doing a P&O' itself. It plans to change the law so that employers can replace workers who vote for strike action with agency workers - a radical attack on workers' fundamental right to withdraw labour.

Collective bargaining works

From ferries to the gig economy, we know that collective bargaining is the best way to achieve real improvement in workers 'terms and conditions.

Representation and voice at work is a fundamental right, which also delivers higher wages, greater equality and pay solidarity, and higher productivity.

Yet, from Margaret Thatcher's repeated attacks to David Cameron's 2016 Trade Union Act, some governments have always sought to demonise working people who stand up for their rights and rigged the law to chip away at our last line of defence - trade unions.

The system is stacked against workers who want to organise and collectively bargaining. Women, young, disabled and black and ethnic minority workers - who are more likely to work on the frontline of low pay and zero hours - lose out most.

"...from Margaret Thatcher's repeated attacks to David Cameron's 2016 Trade Union Act, some governments have always sought to demonise working people who stand up for their rights and rigged the law to chip away at our last line of defence - trade unions."

Statutory union recognition is slow and bureaucratic, providing ample opportunities for employers to frustrate workers' voice and ultimately only giving bargaining rights in limited areas.

Today, UK unions do not even have rights to go into workplaces to talk to workers about what unions could offer them. This means there are huge barriers to reaching and recruiting workers in a UK labour market scarred and fragmented by outsourcing, insecure contracts and false self-employment.

Fair pay agreements

Sectoral bargaining was once widespread in the UK across the public and private sectors. It encouraged a drive to invest in higher productivity and skills, and decent work.

Few sector-wide agreements in the private sector remain.

Yet across much of the rest of Europe, sectoral bargaining is commonplace, operating alongside firm-level bargaining, to set minimum standards.

And it is clear that where it is in place, sectoral bargaining plays an essential role in maintaining collective bargaining coverage.

In a major study of collective bargaining, the OECD has concluded that "collective bargaining coverage is high and stable only in countries where multi-employer agreements (mainly sectoral or national) are negotiated".

Interest is now spreading beyond continental Europe.

Notably, New Zealand's Labour government has faced down noisy business opposition and is in the process of introducing sector-wide fair pay agreements (FPAs).

New Zealand legislation would allow a union to initiate bargaining for an FPA if it meets either a representation test of at least 1,000 employees or 10 per cent of the employees in proposed coverage.

There is an additional 'public interest' test to allow FPAs to be introduced to sectors featuring low pay, limited bargaining power, or lack of pay progression.

In the UK, there are several industries where sectoral arrangements like these are urgently needed to raise minimum standards.

The hospitality sector, whose staff bore much of the brunt of the coronavirus shutdown, is characterised by low pay and poor working conditions.

Likewise, in social care, privatisation and outsourcing has pushed the workforce - mainly women - into low pay and insecure contracts. There is also widespread non-compliance with basic employment rights, including the National Minimum Wage.

FPAs could improve conditions for workers not covered by existing national agreements by improving pay, ensuring decent contracts and working conditions, and access to training. This would be a big win for those receiving care too - a top class service is only possible with decent conditions for those who deliver care.

In the platform economy, where some employers fought a long battle against unionisation, unions are building an important presence.

The GMB has signed collective groundbreaking agreements with Evri (formerly Hermes), Uber and Deliveroo.

But a sectoral agreement would help to ensure that all companies in the sector compete on a level playing field. Corporate cowboys - some of them multi-billion profit making multinationals - who exploit workers should not be free to undercut and drive decent employers out of business.

Workplace organising

Sectoral bargaining rights would not be sufficient on their own.

Unions will always have to do the hard graft of recruiting and organising workers.

That is how we establish our power to negotiate a decent deal with employers.

But the legal framework should give unions a fair crack.

Too often, employers can prevent union recruitment by simply refusing to allow union representatives onto their premises and penalising their workforce for engaging with unions.

To change this, we propose:

- Where a union member requests the support of their union on an employment-related matter, the union representative should have an automatic right to access the workplace (in line with the legislation currently in place in New Zealand).

- Independent unions should have the right to access workplaces during working hours to tell people about the benefits of union membership and ensure compliance with employment law.
- A digital right of access that gives unions the right to reasonable electronic communication with workers would also ensure that those in work, such as food delivery or driving could be reached.

We also must reform and modernise the UK's overly bureaucratic and grossly unfair statutory process for establishing union recognition. It simply isn't right that bad employers are given ample chance to frustrate workers who want to unionise or to constrain union voice to atomised bargaining groups.

The threshold for triggering the statutory recognition scheme should be reduced to 2 per cent of the members of a bargaining unit. This would bring it into line with the threshold for UK rights to collective consultation, which was recently reduced to that level.

"The Wilson and Palmer case proves that workers and our unions can win…
"We need the same determination now to win the voice, dignity and decent pay and conditions that working people have well and truly earned."

Unions should automatically be entitled to statutory recognition where 50 per cent or more of workers in a bargaining unit are members, with no requirement to ballot.

And recognition should be awarded if unions win a simple majority in a ballot. The requirement that 40 per cent of the workers in a bargaining union must vote in favour should be removed.

The current 21-worker threshold should be removed to ensure that workers in smaller businesses can also gain the protection of the union..

To tackle atomisation, in large, multi-site organisations, unions that have recognition within one bargaining unit should have the ability to scale up their bargaining rights across the organisation without reaching the 2 per cent membership threshold within the additional unit or workforce group.

Conclusion

The Wilson and Palmer case proves that workers and our unions can win. Rebalancing power in the workplace required grassroot organising, tactical nous and a government committed to a fair framework of law that levels the current power imbalance between employers and workers.

We need the same determination now to win the voice, dignity and decent pay and conditions that working people have well and truly earned.