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Keeping the wheels turning

Modernising the legal framework of industrial relations

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Workplace disputes are best resolved by discussion between employers and employees. Strikes are regrettable and should always be the last resort. Of course, employees should have a voice – via a trade union if they choose – in decisions that affect them at work, but in this increasingly interdependent world, employers need to be sure they can meet the demands of customers and service users. Where workplace disagreements run a risk of escalating into industrial action, we need a fair balance between the interests of employees and trade unions on the one hand and employers, customers and the general public on the other.

As the government begins the essential task of tackling the budget deficit, there is an increased risk of industrial action in the public sector. This can also influence the employee relations climate in the few parts of the private sector where unions are still prevalent.

Much of the current framework of law and regulation on industrial action was formulated back in the 1980s – in an era when mobile phones were a costly novelty, email and the internet just coming into being, and before the current extensive safeguards and rights for employees in areas ranging from the minimum wage to the right to request flexible working.

At that time, union membership was near its peak, and there was a more arms-length relationship between management and staff. Since then, the profile of businesses and jobs has changed. The movement towards highly skilled work has greatly accelerated. Direct communications through face-to-face meetings and opinion surveys have in most workplaces replaced indirect forms of communication through a trade union. Now, more than half of workplaces no longer have a union presence, and in large parts of the private sector they are all but invisible.

What Britain needs now is a modernised legal framework of industrial relations. It should reflect changes in working life and communications technology, helping to keep the wheels of the economy turning during the recovery while recognising the role that trade unions have to play. This brief outlines areas where reform of labour law is necessary. Our starting point is recognition of the scale of change in employment relationships over recent years. Building on this, our approach to reform is based on three principles:

- **Minimising the disruption caused by strikes to customers and the general public**
- **Ensuring the views of ordinary employees are heard**
- **Curbing wildcat action through proactive trade union actions.**

A fairer approach to workplace relations

In *Making Britain the place to work*,[i] published in June, we set out our employment agenda for the new government. We called for action to create an updated employment framework to make Britain a leading place to do business and generate jobs. This included a call for the law to adopt a fairer approach to workplace relations, establishing a better balance between all the affected parties.

A new employment relationship has grown up...

A new employment relationship has grown up over the past 20 years.[ii] In that time, a whole new framework of statutory rights for individual employees has come into being. Through a process of consultation it has proved possible to shape that regulatory system in a way that has enabled us to retain the key elements of a flexible labour market.

But the new relationship has not only been about the law. A central element is the action employers have taken to achieve more effective employee engagement. Management has become better at explaining the ever-changing business conditions that shape the workplace. Employees have a better understanding about the challenges and opportunities that are facing their organisations. There is a greater degree of trust and willingness to accept changes – and sometimes short-term sacrifices – as essential for longer-term prosperity. In many instances, trade unions have played a constructive part in the process.

The partnership between private sector employers, their employees and trade unions in the recession amply demonstrates the transformation. The fact that there have been fewer strikes and less unemployment during the recession than most commentators expected is no accident. Our spring *Employment trends survey*[iii] showed the vast majority (87%) of employers believe employees recognised the need to cut costs and change work patterns in response to economic pressures. There has been a shared acceptance of the value of working together to seek solutions to genuine business problems rather than rushing to confrontation.

...and employee engagement is central to future success

Businesses see high levels of employee engagement as important to success in the recovery. In the spring, more than two-thirds (67%) of employers cited this as among their top objectives for the next 12 months, and 98% of respondents agreed that high levels of employee engagement will be central to business success in the recovery.

People naturally want to have a say in how their workplace is run, particularly when they face major changes. In some private sector workplaces that still comes primarily through their union – but these workplaces are few and far between. The vast majority (85%)[iv] of private sector employees are not union members. Having a say in what happens at work no longer means turning to a trade union representative. Instead, we have seen a huge expansion in direct forms of employee voice. Through face-to-face meetings between managers and employees, focus groups, employee opinion surveys and other mechanisms, that voice is coming through and matters to employers.

A more stormy industrial relations climate could lie ahead

The partnership approach demonstrated during the recession across the private sector should not, however, make us complacent. The public sector was until 2009 largely immune from pay freezes and other testing changes in response to tougher conditions. The previous government tended to back away from difficult employee relations issues, such as reform of public sector pension schemes.

The new government has started to change that, for example by implementing a two-year pay freeze across the public sector as part of recognising the extent of the budgetary challenge. But many unions seem reluctant to face up to this reality. At the 2010 TUC Congress, union leaders called for nationwide action against spending and headcount cuts, with some even urging a campaign of civil disobedience in protest at the government's essential work of tackling the deficit. This is particularly concerning for the most vulnerable members of society, who depend on reliable public services. It also threatens the hard-won reputation of the UK as a great place to invest and create jobs.

'The growing risk of industrial action makes it all the more timely to update the legal framework.'

Industrial action is not inevitable: if public sector employers, employees and unions adopt the positive approach we have seen in most of the private sector in response to economic pressures, necessary change can be achieved constructively through discussion and negotiation. This means managers must address issues in the workplace head on and make the case for change, rather than shy away from negotiation and allow disputes to develop into strikes.

Nonetheless, the growing risk of industrial action makes it all the more timely to update the legal framework. Moreover, recently there have been a number of high profile strikes which have caused significant disruption to the general public and businesses. Some of these disputes have raised questions about both the conduct of collective bargaining in the workplace of 2010 and the appropriateness of aspects of labour law relating to trade unions.

Changes to industrial relations law are now necessary

The regulatory framework around industrial action was largely shaped in the 1980s. Just as life in the workplace doesn't stand still, the framework of industrial relations law too needs to be modernised.

The CBI has developed a package of proposed reforms. Building on the proposals we released in June, the ideas below are not exhaustive: they are intended to be a constructive, reasonable package which would bring the law up to date and ensure a fairer balance. They have been developed in consultation with CBI members in the light of their experience of industrial action and key legal judgements since the last revision of industrial relations law under the previous government.

Minimising disruption to customers and the general public

Recommendation one

The law on employers using temporary workers to cover for striking employees should be rationalised

One method employers sometimes use to minimise disruption to customers and the public is to recruit suitably skilled temporary replacement staff so they can continue to provide essential products or services during a strike period.

Currently, it is lawful to do so as long as the temps concerned are hired directly by the business, but a company cannot recruit temps via an agency. The law is unclear about whether it is even legal to hire workers from another company in the same group. There is also confusion about whether an agency could supply temps to a business affected by industrial action that would normally employ a large number of them, perhaps to meet seasonal demand.

Employees have the right to withdraw their labour, and as long as the correct procedures are followed it is perfectly legal to do so. Employers have a responsibility to their supply chains, customers and employees to keep their businesses up and running during a period of strike action.

For this reason there is no logic behind this restriction. If firms can hire temps directly to provide cover, there is no reason why they should not do so via an agency. This is not a matter of threatening the jobs of strikers, but rather of providing essential cover during the period of action.

The law should be changed so employers can hire agency workers to cover for striking staff.

Recommendation two

The public and businesses need more time to prepare for strikes

Strikes are always regrettable, and it is far better to solve disputes by negotiation in the workplace, not in court or on the picket line. Some strikes are enormously disruptive to people's lives. Whether it is taking the children to school, getting to work, going on holiday or carrying out their jobs, those affected by industrial action need sufficient time to make plans.

Businesses can suffer too – and not just the organisation where the strike is happening. Companies rely on countless other businesses at home and abroad in their increasingly complex supply chains to deliver their services or products to customers. They too need time to plan for disruption.

Moreover, once a ballot result has been announced and a strike called, unions and employers should still have time to negotiate a resolution and avert the strike.

For these reasons we propose that **the notice period for industrial action should increase from seven to 14 days after the ballot takes place.**

Recommendation three

Ballot mandates should be limited to the original dispute, not extended to other matters

Unions have been known to ballot on one issue – such as proposed redundancies or a pay claim –

and call members out on strike but then, during the period of the strike, change the reason for it and call a further strike. Some recent disputes have seen the rationale for action change considerably while the ballot result is still 'in date'. At present, the law is unclear as to whether matters arising during the course of the dispute are covered by the original ballot or not.

The law should be clarified so strikes can only go ahead if they are based on the ballot relating to the original dispute, with consequential issues subject to a fresh ballot.

Ensuring the views of ordinary employees are heard

Recommendation four

Employees should be able to decide for themselves whether they want to be represented by a union

Where unions are present in workplaces, it should be because of the positive support of employees. At the moment, employers can either recognise a union voluntarily or – if a voluntary agreement cannot be reached – a union can apply to the Central Arbitration Committee (CAC) for statutory recognition. If the CAC believes that union membership in the proposed bargaining unit is greater than 50%, automatic recognition can be awarded – without any formal vote by the employees concerned.

This cannot be right. The right of individuals to join a union is one of the hallmarks of a free society. But people opt to join unions for lots of different reasons. For some, union membership is no longer primarily about wanting to be covered by collective bargaining – many unions now offer a variety of other services and benefits for members. Indeed, two-fifths of recognition ballots have resulted in the union not being recognised[v], and unions sometimes lose ballots despite membership of above 50%.

People at work should always be empowered to decide for themselves if they want to be represented by a union or take the opportunity to use other routes to communicate with their employer. **The law should be amended so ballots are always held to enable employees to demonstrate whether or not they support recognition of a trade union to represent them.**

Recommendation five

Strikes should be the result of a clear, positive decision by the workforce

In a similar spirit, where collective industrial action takes place, it should be the result of a clear, positive decision by the workforce concerned. Too often we see strike ballots that back action on small turnouts among the affected employees. Recent strikes in the public sector and some of the strikes on the London Underground have not had widespread support among the workforce and yet caused major disruption for service users. Industrial action should never be the result of apathy among mainstream union members.

For this reason we believe **the test for a legitimate strike should mirror the statutory union recognition rules, requiring 40% of balloted members to support it as well as a majority of those voting.**

This means that in a case where 1000 people are balloted, at least 400 should vote in favour of the action for it to go ahead. If turnout is, say, 600, the strike could go ahead provided 400 vote in support.

If 1000 people are balloted and turnout is only 300, the strike could not ahead even if all voters support strike action. This is because the proportion of the balloted workforce would fall below the 40% threshold.

This would help ensure the views of ordinary union members prevail, and that major disruption cannot be triggered by a relatively small but active group.

Recommendation six

Only paid-up union members should be able to vote

A number of recent strike threats have been averted because unions neglected to follow rules about balloting that are clearly set out in law. For example, in one high-profile dispute, unions failed to maintain accurate membership records and balloted former members and long-closed sites.[vi] This led to the strike being ruled out of order by the courts. These cases cause unnecessary disruption and incur significant costs for employers, unions and, ultimately, their members.

The government could provide a solution to this problem by defining union membership in law. At present, membership is defined only in individual union rulebooks, where definitions are frequently very loose, sometimes including people who stopped paying their subscriptions long ago. In the interests of fairness and simplicity, a legal definition could set out that members who have not paid their subscription for, say, three months should be ineligible to take part in a ballot. The union should also be in a position to prove that everyone who takes part in a ballot is a member.

Unions should make greater efforts to comply with the requirements of the Trade Unions and Labour Relations (Consolidation) Act 1992 (TULRCA), including maintaining accurate membership records. **The law should provide greater clarity about the definition of a 'union member' in order to ensure only paid-up members are eligible to take part in a strike ballot.**

Recommendation seven

Unions should keep records up to date

Trade unions should be required to keep records up to date in the interest of transparency, responsibility and to minimise costly litigation. Currently, the law requires unions to maintain a register of the names and addresses of their members and "so far as is reasonably practicable" keep them accurate. But simply measuring the presence or absence of data does not provide any evidence that it is accurate. There is no sanction for failure to keep accurate records unless a union member applies to the Certification Officer – the unions' regulator – or the court.

Given the cost of litigation for unions, their members, employers and the judicial system, there is no reason why unions should have less responsibility for the accuracy of their data than almost any other organisation. Computerisation and electronic communication systems have revolutionised the quality of data maintenance. Most other regulated bodies, employers and, for example, pension schemes, can be subject to civil or even criminal sanctions for poor record-keeping and data handling.

To simplify compliance and minimise litigation, **unions should be required to conduct an annual audit of their membership and make all reasonable endeavours to keep records up to date throughout the year.**

Recommendation eight

Union members should be able to hear both sides of the argument before a strike ballot

The CBI recognises unions do not take the decision to call a strike lightly. Industrial action usually comes about after protracted negotiations between employers and unions, and disputes are often complex. In the build-up to a ballot, rumours and misinformation abound, fuelled by emotional language designed to generate media coverage.

Very often, it is not clear what union members are being asked to vote about – there may be no information, misinformation, or wholly irrelevant information. Union members have been known to identify widely different issues as reasons for voting the way they did in a ballot on proposed industrial action.

Inevitably, information provided separately by the employer does not carry the same weight as information accompanying the ballot paper itself. To improve transparency and fairness and to help ordinary employees make well-informed, realistic decisions, **the information that goes out with ballot papers should include separate written statements from the employer and the union, if each wishes, up to a set limit of, say, 500 words.**

The statements would be required to cover the scope, nature and reason for the dispute, including the length of the proposed action. They could also include details of particular offers or compromises made by either side. Individual employees would then have the opportunity, in the privacy of their own homes, for a more balanced and reflective consideration of which way to vote.

Recommendation nine

Union members should understand the implications of strike action

Striking workers normally lose pay for every day they are on strike. But the experience of employers is that many union members are surprised when they find out that even if a dispute is lawful and backed by a ballot, they can still lose pay or see non-contractual benefits withdrawn. Union members need to understand the implications of strikes for them personally before they cast their vote. **Ballot papers should include a notice stating that pay and non-contractual benefits can be withdrawn by the employer if a worker goes on strike.**

Curbing wildcat action through proactive trade union actions

Recommendation ten

The law on union obligations to minimise wildcat strikes should be strengthened

There has been a worrying re-emergence of unofficial, or 'wildcat', action in the past two years. This is the term given to industrial action that is not supported by a ballot and does not comply with laws that give unions and their members immunity from legal action. It is most likely to occur where a site has many different employers, meaning strikers can use different spokesmen every day so no single individual can be held responsible – or face an injunction – and no unions appear to be at fault. Businesses are

unable to seek legal recourse to stop unlawful action.

Unofficial shop stewards are using new technology and social networks to gather people together rather than using conventional, official channels. For example, a dispute at an oil refinery last year was characterised by the setting-up of networking groups, with a website and text message and email groups, enabling participants to communicate rapidly across the country and spread the action to other strategically important sites.

Wildcat action leaves unions exposed to damages claims from employers, their supply chains and customers, who have not had any opportunity to make meaningful plans to cope with the dispute. But unions can protect themselves from such action if they deny any connection with – or 'repudiate' – the activity. The law is currently unclear on what this means and the process by which they go about repudiation and it is not adequately enforced. This led to problems last year in the oil, gas and engineering construction sectors, in particular.

Currently, the law says that wildcat action will not be deemed to have been officially endorsed by the union if it has been repudiated by the executive committee or the general secretary "as soon as reasonably practicable" after coming to the attention of any of them. Written notice should be given "without delay" to officials and every member which it has reason to believe may be taking part in the action. But even this is unclear and needs definition.

Communications technology has moved on since these rules were formulated in the 1980s and 1990s. A message of repudiation can now be given virtually instantly. There is no reason why **unions should need more than 24 hours to repudiate unofficial action after it comes to the attention of senior union officers**.

The Certification Officer, the unions' regulator, should be given greater powers to enforce the law and ensure that unions are brought to justice if found to be involved with wildcat action following an employer complaint.

Recommendation eleven

Unions should face realistic sanctions for failing to comply with the law

Where the Certification Officer finds a union is involved with wildcat action, it needs effective sanctions which will act as a deterrent.

Under current law, damages may be sought against unions which fail to comply with various obligations, such as around wildcat action. There is a cap based on the number of members the union has. The cap varies from £10,000 for the smallest unions to £250,000 for the largest – even those with more than one million members.

The union cap was introduced in 1982 and has not been uprated since. Meanwhile, capped limits faced by employers have increased significantly. For instance, the cap on compensation for unfair dismissal was £7,000 in 1982 but is now £65,300 – an 832% increase. If the limit on damages payable by trade unions were increased by a similar proportion, the upper limit would be at least £2m.

In some cases strikes have cost businesses more than £1m a day. Even for the smallest firms, the impact on the bottom line can be dramatic. When coupled with the trend towards more aggressive and disruptive rolling strikes, **we believe that a more persuasive deterrent for non-compliance with the law than the current lump sum regime would be a *per diem* penalty applied by the courts, uprated automatically over time.**

Summary of CBI recommendations

Minimising disruption to customers and the general public

1. Employers should be able to use agency temps to cover for striking workers.

2. The public and businesses need more time to prepare for strikes. The notice period for industrial action should increase from seven to 14 days after the ballot takes place.

3. Ballot mandates should be limited to the original dispute, not extended to other matters. The law should state that strikes can only go ahead based on the ballot relating to the original dispute and consequential matters should be subject to a fresh ballot.

Ensuring the views of ordinary employees are heard

4. People should have the right to decide whether they want to be represented by a union. Ballots should always be held on union recognition – it should never be automatic.

5. Strikes should be the result of a clear, positive decision by the workforce concerned. The test for a legitimate strike should be that 40% of balloted members support it as well as a simple majority of those voting.

6. Only paid-up union members should be able to vote – there should be a single legal definition of a union member.

7. Unions should keep records up to date. They should conduct an annual audit of their membership and make all reasonable endeavours to keep records accurate throughout the year.

8. Union members should hear both sides of the argument before voting in a strike ballot. Employers and unions should each be allowed to send concise statements with the ballot papers, setting out the scope, nature and reason for the dispute.

9. Union members need to understand the implications of striking for them personally. Ballot papers should include a notice warning that pay and non-contractual benefits can be withdrawn if an employee goes on strike.

Curbing wildcat action through proactive trade union action

10. Steps to curb wildcat strikes should be strengthened. Unions should be required to repudiate unofficial action within a maximum of 24 hours after it comes to the attention of senior union officers.

11. Unions should face realistic sanctions for failing to observe the law. The cap on compensation should be increased for the first time since 1982 and damages should be awarded per day of strike action.

Endnotes

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[1] The Warwick-ACAS Lowry Lecture 2010. *The labour market and employment relations beyond the recession*, delivered by Richard Lambert. March 2010. http://www.wbs.ac.uk/news/releases/2010/03/29/The/WarwickAcas/Lowry

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[1] RMT ballot of Network Rail employees, spring 2010