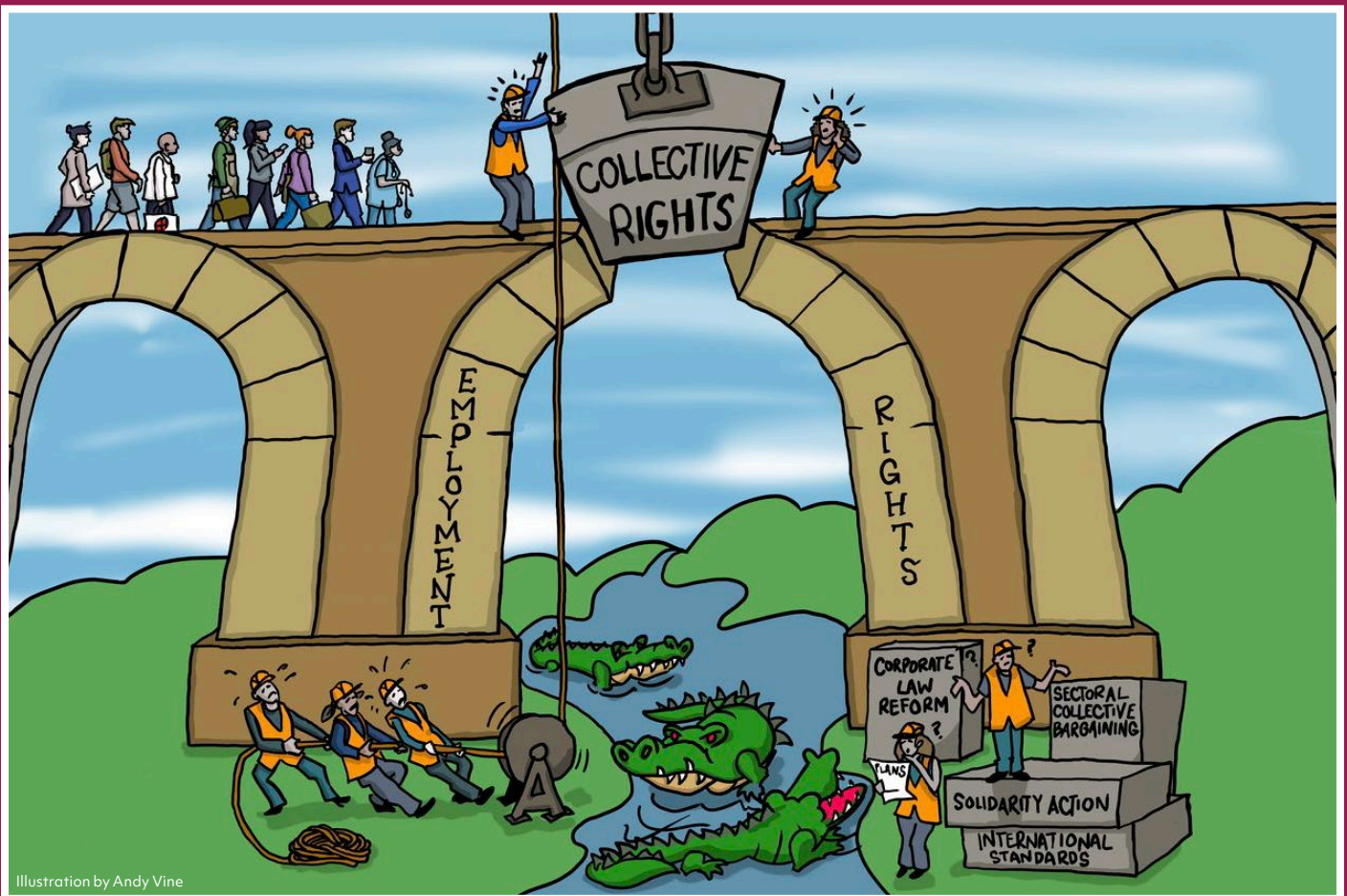


FINISHING THE JOB:

Forward to Employment Rights Bill #2



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The Employment Rights Bill and the crisis of trade-union decline

By Prof. K D Ewing and Lord Hendy KC

Introduction

As the Employment Rights Bill completes its parliamentary journey, all eyes are on the Tory and Liberal Democrat amendments made to the Bill in the House of Lords. Although these amendments have caused justifiable outrage amongst trade unionists, it is widely predicted that they will be rejected by the government wielding its majority in the House of Commons, and that the original terms of the Bill will be restored.

Once enacted, however, only a few provisions of the Bill will be implemented immediately, with the government having already published a roadmap for implementation which will see the new law rolled out gradually between royal assent and 2027. In the roll-out period a great deal of political effort will be spent on promised consultations and in preparing detailed regulations to bring the text to life, a process that will require careful scrutiny.

Although royal assent is nevertheless eagerly anticipated by many in the wider Labour movement, it is to be recalled that the Bill falls short of what the Labour Party promised in the seminal green paper, *A new deal for working people*. While welcoming the Bill, in the pages that follow we offer a critical assessment of its limitations, having regard in particular to the historic crisis currently confronting trade unions and their potential members.

The crisis of trade unionism

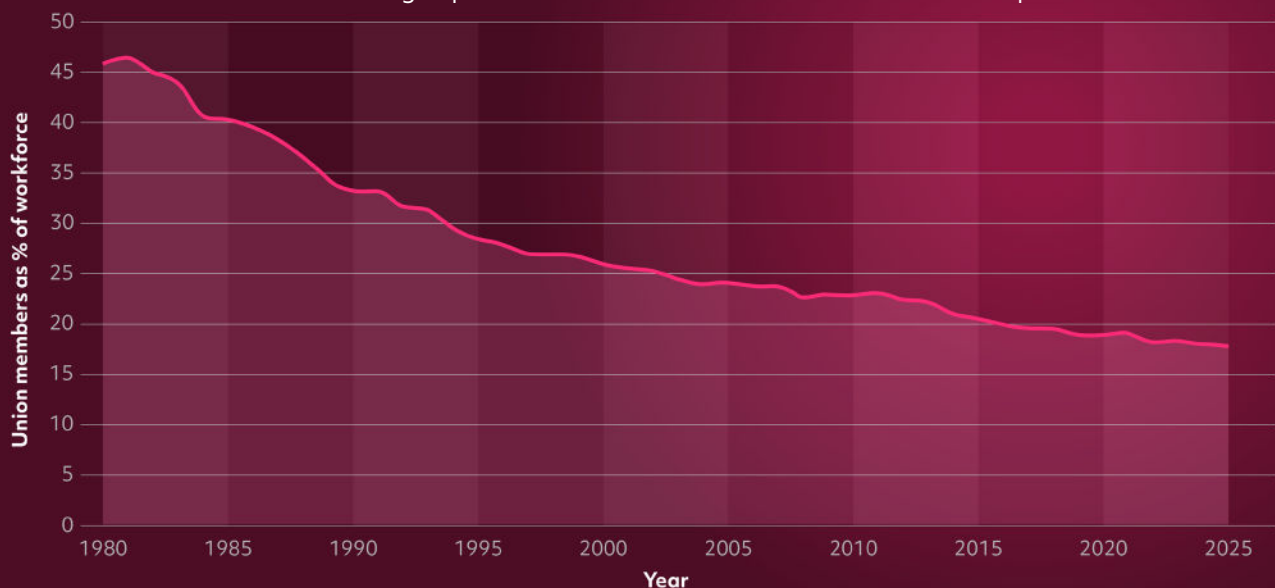
What follows is a hard message, and there is no way it can be sugar-coated. But after a period of trade-union growth from 1935 to 1980 (under coalition, Labour and Conservative governments), the period from 1980 to 2025 has been one of inexorable and unbroken decline. Trade-union influence has collapsed as sharply as trade-union power has been broken by the Thatcher-inspired legislation, which the Blair/Brown governments refused to reverse.

The point is best illustrated by looking at levels of trade-union membership and collective-bargaining coverage on the cusp of the Thatcher era, and to compare these with the corresponding levels today:

- In 1979, trade-union membership stood at about 13.2 million in a workforce of about 24 million. Almost two-thirds of workers in Britain were members of a trade union (of which there were then 485);

Trade Union Membership Decline

The continuing impact of Thatcherism on trade-union membership



Figures adjusted to correct the Certification Officer non-reporting of Unite membership for years 2022 & 2023

- In 1979, collective agreements and wages council orders combined are estimated to have covered about 20 million workers. More than four out of every five workers in Britain were covered by either a collective agreement or a wages council order;

In the period since there has been a sharp decline in the levels of trade-union membership and the levels of collective-bargaining coverage:

- Today, trade-union membership stands at 6.7 million in a workforce of about 34 million. Fewer than one in five workers in Britain are members of a trade union (of which there are now 128);
- Recent OECD figures suggest that collective agreements (wages councils having been almost wholly abolished) today cover about nine million workers. About one in four workers in Britain is now covered by a collective agreement (a figure we believe to be an over-estimate);

As a result of the foregoing, the balance of power has shifted greatly towards employers. We have seen the growth of the unregulated platform economy, the rise of insecure jobs through practices such as zero-hours contracts, and the power of employers unilaterally to vary terms and conditions of employment. We have also seen the growth of inequality and rising poverty as the share of wealth created by workers is taken in profit rather than distributed in wages.

Trade-union membership, organising and recognition

The growing power of employers is not one of purely academic or theoretical interest: it has real practical implications for trade unions and their members. These were highlighted most graphically by the P&O Ferries scandal; the failure of GMB to secure recognition at Amazon in the face of corporate resistance, and the threatened pay cuts at Birmingham City Council, where perversely it is claimed that wages are being cut in the interests of equal pay.

Yet despite the profound problems of which these examples are merely symptomatic, the Bill contains no meaningful response, as is revealed by a close examination of its key provisions designed to promote trade-union membership, trade-union organisation, and trade-union recognition:

- New measures will require employers to notify workers of their right to be a member of a trade union. That is superficially a good thing. But it is also naïve: there is nothing to stop the employer undermining the effect of this obligation by including a statement that workers also have the right not to be a member of a trade union and giving reasons why they shouldn't join. This initiative has the potential to backfire and to be a gift to union-busters.

- Employers will be required to conclude an access agreement to enable a union to enter the workplace to meet, support, represent, recruit or organise workers. But although the Central Arbitration Committee (CAC) can order an access arrangement if the employer refuses to enter into an agreement, there is no mechanism in the Bill whereby an employer can be compelled to comply with either an access agreement or arrangement. There will be no right of entry to a workplace if the employer objects.
- The Bill introduces new measures to patch up the trade-union recognition procedure introduced in 1999. But although a welcome response to the Amazon case, these measures leave the limited protections against unfair practices intact, and fail to address the restriction that prevents unions from lodging a new recognition application until three years have elapsed since a previously unsuccessful application. They also continue to deny access to the procedure by platform workers, and fail to allow multi-employer recognition agreements.

The first of these sets of measures is thus likely to be counter-productive, the second is likely to be unused, and the third will not go nearly far enough to breathe life into what has become a moribund procedure. Indeed, the CAC has dealt with an average of only one recognition application a week since the procedure was implemented in 2000, in a country where collective-bargaining coverage has been in freefall.

The uncomfortable reality is that despite the labour-law reforms introduced by the Blair/Brown governments in 1999 and 2004, trade-union membership continued to fall, as did collective-bargaining coverage. To repeat the old adage: those who ignore history are condemned to repeat it. Like the legislation of 1999 and 2004, the similarly compromised provisions of the Employment Rights Bill 2025 are likely - at best - to slow only momentarily the pace of trade-union decline.

Sectoral collective bargaining

Given the nature of the crisis by now confronting trade unionism, the biggest shortcoming of the Bill is the failure to deliver on the two key provisions in *A new deal for working people*, which had the potential to make a big difference. The first of these is the commitment to restore multi-employer collective bargaining across each industrial sector in order to '[reverse] the decades long decline in collective bargaining coverage'.

Under Labour's *New deal for working people*, sectoral bargaining would have been introduced throughout the economy, leading to the negotiation of 'fair pay agreements' to establish minimum terms and conditions of employment, 'which would be binding on all employers and workers in the sector' concerned. This was rightly seen to be the 'key to tackling the problems of insecurity, inequality, discrimination, enforcement, [and] low pay', to ensure everyone gets 'their fair share'.

International standards

Great Expectations: The government inherited a labour law framework which for multiple reasons fails to comply with international law. When in opposition, Sir Keir Starmer excoriated the Johnson Government for its disregard of international obligations and abuse of the rule of law on a number of memorable occasions — the EU withdrawal agreement, as well as the Northern Ireland Protocol.

Expectations were created following the 2024 General Election. The new Attorney General, Lord Hermer, was clear on committing to rebuild the UK's reputation on international compliance, and more recently saying that international law 'goes absolutely to the heart' of the government in its mission, 'to make life better for people in this country'.

For our purposes, the main international treaties on trade-union rights ratified by the UK are:

- ILO Conventions 87 and 98 (on freedom of association),
- European Convention on Human Rights,
- European Social Charter, and
- EU-UK Trade and Co-operation Agreement, as well as
- Numerous bilateral free-trade agreements post-Brexit in which we have re-affirmed our commitment to the ILO freedom-of-association conventions.

Falling Short: The Employment Rights Bill took a necessary step forward by repealing most of the Trade Union Act 2016, and the Strikes (Minimum Service Levels) Act 2023. Both pieces of legislation were subject to concern expressed by the ILO Committee of Experts in relation to compliance with ILO Convention 87. The Bill also addresses the statement of incompatibility provided in the 2024 Mercer judgment, concerning Article 11 ECHR rights.

As always, progress is welcome. But it should be pointed out that:

- The concerns of the ILO Committee of Experts did not begin with the Trade Union Act 2016. There is the legacy from the Thatcher and Major years of restrictive legislation which has yet to be addressed.
- The Council of Europe's Social Rights Committee (ECSR) has concluded that the UK failed to comply with 10 out of 13 labour rights examined – especially concerning the right to strike.

Not just an academic issue: Discussions of the Rule of Law and international standards can appear to be specialist academic and legal issues — but they have a significant impact on the basic rights of trade unions and workers to defend their interests and achieve better working conditions for all.

The scandalous behaviour of P&O Ferries only a few years ago was enabled by the low stakes of flouting UK labour laws, as reported by the ILO Committee on Freedom of Association:

"while breaches of the UK law entitle claims to be made in an employment tribunal, such claims are subject to statutorily fixed (and very modest) maxima; for this reason, the company was able to quantify with precision what the cost of the dismissals would be and to assess how long it would be before that cost could be recouped from future profits generated by the poverty wages and diminished terms and conditions of the new crews."

A New Bill: A second Bill will thus be necessary urgently to bring forward measures that have long been campaigned for by trade unions, as well as highlighted by the ILO Committee on Freedom of Association, in order to ensure compliance with Conventions 87 and 98. These will include restoring the right to engage in solidarity action, introduction of sufficiently dissuasive sanctions where employers breach the law, and prompt means of redress emphasising reinstatement.

Before the advent of Thatcherism, sectoral collective bargaining (together with sectorally based wages councils) was the principal method for determining the terms and conditions of most workers in this country. There was no statutory minimum wage and no working-time regulations. Instead, these matters were governed by agreements between trade unions and employers in what was said by Clement Attlee in 1948 to be 'a system of collective bargaining without parallel in the world'.

At the time of Attlee's remarks, collective agreements (and wages council orders) were claimed to cover about

86% of the workforce, conferring rights on workers through their contracts of employment. The agreements also embedded procedures for the resolution of individual grievances and collective disputes, avoiding the need to engage expensive lawyers, or to wait in long queues for employment-tribunal dates.

Trade unions stood for workers, not just members, in what was an efficient and comprehensive system for the determination of working conditions. Although the Employment Rights Bill vaguely points in this direction — with its plans for a Social Care Negotiating Body and

the restoration of the School Support Staff Negotiating Body - these fall woefully short of what is urgently required.

Apart from the fact that only two sectors are addressed, the procedures are heavily compromised by the government's power to determine the composition of the negotiating bodies, set the financial boundaries within which the bodies will be required to operate, override any agreement they may reach, and impose an outcome regardless of the wishes of the parties. Although a step forward, it is no more than a nod towards collective bargaining as that term is understood in national and international law.

The right to strike and the rule of law

Reference to international law raises questions also about the extent to which the Bill's provisions on the right to strike fulfil the United Kingdom's obligations under various international treaties binding on this country. These are set out in *A new deal for working people*, where it was accepted that:

The laws regulating industrial action should ensure that UK law complies in every respect with the international obligations ratified by the UK, including those of the International Labour Organisation and the European Social Charter, as reiterated in the Trade and Co-operation Agreement with the European Union.

Compliance by a state with its international treaty obligations is a requirement of the rule of law (a constitutional principle formally recognised by statute), which this government purports to uphold. In terms of fulfilling this commitment, the Strikes (Minimum Service Levels) Act 2023 will be repealed, as will the great bulk of the Trade Union Act 2016, though the Bill will not remove all the constraints introduced by the latter.

But apart from taking us only some of the way back to 2016, the Bill fails to address the significant body of restrictions to trade-union freedom that were introduced by Tory governments before then. The restraints on the right to strike did not begin with Cameron and Osborne in 2016, but with Thatcher and Major between 1980 and 1993, with the result that there is a whole body of anti-union legislation in breach of international law still on the statute book that needs to be removed.

So although many of the 2016 Act's restraints are to be repealed, trade unions are still required to give the employer (i) detailed notice of intention to ballot, (ii) a copy of the ballot paper, (iii) notice of the ballot result, and (iv) detailed notice of intention to take industrial

action. The cumulative effect of these obligations is not only unnecessary and expensive. They have also been criticised for their incompatibility with the European Social Charter (to which the UK is still a party), with the need for a ballot notice when unions are in any event required to give strike notice being singled out as 'excessive'.

The same is true in relation to solidarity and sympathy action, with the British ban on all such action being among the most (if not the most) restrictive in Europe. This too violates the European Social Charter, as well as ILO standards relating to freedom of association. Following the P&O Ferries case, the ILO supervisory bodies reiterated their longstanding criticism of British law, insisting that the government 'engage[s] with the social partners to overcome challenges regarding the legislative prohibition on sympathy strikes, in conformity with freedom of association'.

So far this has been met with loud silence and shocking indifference. When amendments were moved to the Bill in the House of Lords to achieve compliance, the government claimed, without reasons, that it was not in breach of its international obligations. That is a hubristic assertion utterly without merit. The violations of its international treaty obligations by the UK are an embarrassment and undermine its publicly expressed commitment and constitutional duty to uphold the rule of law.

Conclusion

Despite being a long document of over 300 pages (and perhaps several hundred more once all the regulations are made), the Employment Rights Bill is short on transformative potential, with the most progressive proposals having been lost in the politics of their development. Falling far short of what had originally been promised, the Bill is a rag-bag of measures from a government that continues to be enthralled by the Thatcher legacy, concerned now only to address some of the latter's most feral consequences.

Only time will tell whether the Bill is a cunning first step in a counter-offensive to move 'slowly but surely' to regain the lost ground of the preceding 45 years, or whether it is a timid gesture and a missed opportunity to redirect labour law and rebalance power in the workplace and beyond. But even before the Bill is finally enacted, it is already clear that it is not enough and that a major reset is required if trade unions are to flourish and collective bargaining is to survive.

Why workers need a 2nd Employment Rights Bill

Zero-hours contracts

- Loopholes in 'low-hours' or 'temporary' contracts must be addressed.
- Workers should have the right to seek advice from independent trade unions, and be accompanied by union officials in related meetings.
- Workers should be able to revoke their rejection of a guaranteed-hours contract.
- Stronger protections are needed to prevent detriment or dismissal for exercising these rights.

Single worker status

- The definition of 'worker' must be broadened to ensure universal employment rights, excluding only those genuinely operating a business on their own account.
- Full rights must be granted to anyone providing labour who isn't truly self-employed.
- In disputes, the burden of proof must lie with the employer to show that an individual is not their worker or that they are not the employer under employment law.

Day-one rights

- The 'statutory probationary period' exception should be abandoned – there is no need for a 'light-touch' probation regime at all, given that the new law proposes only to ban employers from dismissing 'unfairly'.
- There is no substantive justification for treating employees within a probation period any differently. We should therefore heavily restrict, or remove entirely 'some other substantial reasons' in the band of reasonable responses where probation is concerned.

TU access rights

- Unions need access to workplaces with short notice—or immediately if legal breaches are suspected.
- Either the CAC or a fully resourced Ministry of Labour should enforce access, issue fines, and shut down non-compliant employers.
- Fines on employers should be paid to unions and not to the state.
- The primary remedy for employer non-compliance should be an imposed default access agreement on the employer. Virtual access to remote workers should also be granted to unions.

Collective bargaining

- Upgrade the adult social-care and school support-staff negotiating bodies into full collective-bargaining mechanisms, aligned with international law.
- Enable collective agreements, in order to set agreed improved terms and conditions.
- Establish sectoral bargaining via the Secretary of State, in line with ILO Convention 98 and Article 6.2 of the European Social Charter.
- Reinstate Joint National Committees with equal union and employer representation.
- Broaden clause 31's definition to match the Courts and Criminal Justice Act 2015, ensuring sector-wide coverage for all paid adult-social-care workers.
- Guarantee union access to care workers, including in workplaces that are also private dwellings.

Fire and rehire

- The 'financial difficulties' exemption should be tightened, requiring employers to obtain a certificate from an independent auditor or a Ministry of Labour confirming that changes are genuinely essential for survival.
- Stronger remedies are needed, including immediate redress for likely unlawful dismissals—such as court injunctions to halt or reverse fire-and-rehire practices, and reinstatement with full pay until a fair judicial decision is reached.
- Any dismissal should be consistent with obligations owed by the employer under any collective agreement in force at the time of the dismissals.
- There should be no cap on compensation where an unfair dismissal has taken place.
- Solidarity strike action should be made legal as an effective defence against fire-and-rehire/replace tactics

Industrial action

- Remove the ban on political strikes and solidarity action, and relax restrictions limiting lawful industrial action to trade disputes.
- Repeal all anti-union legislation introduced since 1980.
- End the restriction limiting picketing to a worker's own workplace.
- Allow action on issues beyond the UK and against subsidiary companies where the real employer is hidden.
- Scrap the requirement to notify employers of industrial-action ballots.
- Ensure UK labour law fully complies with international labour standards, including ILO and Council of Europe treaties.