Kill the Bill

By

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1 Introduction

Described by Vince Cable as ideological and vindictive, the underlying purpose of the Trade Union Bill is to crush the remaining capacity of the unions to protect the interests of working class people in order to facilitate yet further transfers of wealth and income from them to the very rich.

The Bill has three particular features:

- The first is to single out public sector trade unionism for particular assault, as part of a strategy to suppress organised resistance to the destruction of public services and to eliminate any meaningful bargaining over pay or terms and conditions in the public sector, allowing the government to cut wages, pensions and staff.
- The second is to undermine collective bargaining by more restrictions on the lawful exercise of the right to strike. Without an effective right to strike, the right to collective bargaining is, of course, no more than a right to collective begging. So the Bill is intended to put yet further obstacles in the way of the only means that workers have to protect or improve the conditions of their working lives.
- The third is to silence the political voice of the organised working class, building on the Coalition's Gagging Act in 2014, to ensure that unions have limited resources and opportunities available to offer political resistance to the government.

These measures – and the accompanying proposals for even more controls on picketing in particular - are not intended to extinguish trade unions altogether; that would be too bold a step. Instead the plan is for a living death by a thousand cuts.

The dramatic changes to the law on industrial action over the last 35 years have already helped to reduce the proportion of British workers covered by collective agreements: from 82% (then around the European average) in 1979 when Mrs Thatcher became prime minister, to about 20% today. The Tories intend to reduce that proportion to insignificance.

Each of the many changes introduced by the Bill is not to be assessed in isolation, but as a yet further limitation on top of the mass of legal restrictions inherited from the last Tory governments. The Labour governments from 1997 to 2010 changed nothing of significance in relation to trade union rights. As Tony Blair infamously promised on the eve of the 1997 election: under a Labour government

'the changes that we do propose would leave British law the most restrictive on trade unions in the Western world.'

The result is that even before the burdens of the Bill are felt, current restrictions on trade union freedom are repeatedly condemned in international legal forums, such as the European Committee of Social Rights and the International Labour Organisation for breaching international treaties ratified by the UK.

2 The Right to Organise in the Public Sector

The Bill is particularly aimed at trade unions in the public sector since it is there that collective bargaining is most widespread, trade unions are strong and the Tories particularly wish to destroy public services. The destruction of effective public sector trade unionism is also important for maintaining the Chancellor's commitment to maintaining the 1% pay cap for public sector workers (other than MPs) in the face of rising inflation.

So in addition to the far-reaching restrictions on the right to strike, particular provisions in the Bill target workplace representation in the public sector:

- Public sector employers will have to provide information about the amount of facility time granted to trade union representatives (and the direct 'cost' of it – ignoring indirect benefits to the employer). This is an open invitation for the anti-union media to attack any public authority which abides by international law by respecting the rights of its workers to be represented by a trade union;
- The government will have power to impose limits on the amount and restrict the purposes of facility time. So, in the public sector, ministers will be able to rewrite legislation currently permitting time off for union duties and activities and will be able to 'modify' collective agreements. This is a breach of ILO Conventions 98 and 151;
- The Tories have also announced (after the Bill was published) that they will '*abolish the check off across all public sector organisation*s', as part of '*curtailing the public cost of 'facility time*'; again in breach of ILO Conventions 98 and 151.

3 The Right to Strike – Ballot Thresholds

The Bill contains an extensive range of measures restricting the freedom of unions to organise industrial action. We stress that this is in addition to the heavy burdens of existing legislation restricting the purposes for which industrial action may legitimately be called, and imposing complicated procedural requirements of ballots and notices, referred to by one High Court Judge as '*the inordinate complexity of the statutory procedures*'. It is the cumulative effect of all this which conflicts with Article 11 ECHR.

Under the Bill, industrial action will be lawful only if 50% of those eligible to vote do so, and if a majority of those voting support the action in question. In addition, in 'important public services' industrial action will be lawful only if supported by at least 40% of those eligible to vote. The sectors covered (both public and private, in fact) are: health services; education of those aged under 17; fire services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security.

These changes are almost certainly in breach of international legal obligations, notably ILO Convention 87.

Recent research by Darlington and Dobson (Institute of Employment Rights, forthcoming) has shown that:

> *Only 85 of the 158 strike ballots covered by the database reached the 50 per cent target, and the number of workers who failed to reach the target was completely disproportionate to those that did – while 444,000 workers could have taken strike action because they had a turnout rate of over 50 per cent, 3.3 million workers would have been prevented from going on strike. Even if you take out the large-scale 2011 public sector strikes, it still means 880,000 workers would, under the proposed legislation, no longer have been able to go on strike.*

So the Bill's changes will heavily impact the right of workers to strike, especially in the public sector where protest strikes are often large scale and cover a multitude of workplaces and employers.

No doubt after the Bill becomes law turnouts will increase. Unions will campaign harder and the message will be well understood by members that those who do not bother to vote will be counted as voters against. Whether this will be sufficient to overcome the new hurdles, given that industrial action ballots are denied the obvious means to make them effective such as secure and secret workplace voting or by internet, remains to be seen.

4 The Right to Strike – Raising the Hurdles

Under the existing '*detailed and complicated way in which strike action is procedurally circumscribed by the ballot provisions*' (as a Court of Appeal judge put it), trade unions are required to give various complex notices to the employer in order to achieve legal protection to organise industrial action.

The Bill adds to these extensive obligations in five different ways:

- The ballot paper will have to contain additional information, including:
  - a 'reasonably detailed indication of the matters in issue in the trade dispute to which the proposed industrial action relates';
  - if the ballot is for action short of a strike, the nature of the action must be specified; and
  - the dates of the proposed action;
- The notice of the ballot result given to members will have to include

information about whether the 50% voter participation was met, and whether the 40% voter support threshold was met (where it applies);

- The union's annual report to the Certification Officer must give details of all industrial action;
- The union will have to give 14 rather than 7 days' notice to the employer before taking industrial action;
- A ballot mandate will be valid for only four months.

These further restrictions have no legitimate purpose; they are simply further traps and hurdles to give grounds to claim injunctions to prevent industrial action or to claim damages after the event.

This is clear because the incidence of industrial action is not a major issue. The average number of working days lost in the UK is around the average for EU and OECD countries. In the week the Bill was published the Office of National Statistics commented:

> *there has been a significant decline in the number of strikes since 1995 compared with the previous years. Though volatile, the number of working days lost has remained broadly the same over this period. … The strike rate in the last 10 years is generally lower than in previous decades*.

5 Agency Workers as Strike-breakers

The Tories plan to revoke the regulation which bars agency workers from being used as strike-breakers. Employers will be permitted to use agency workers indefinitely, and there is no guarantee that workers on strike will ever get their jobs back.

This is a clear breach of ILO Convention 87, and has tightly been strongly condemned by the TUC. Writing in 2012, the ILO Committee of Experts said that

> *provisions allowing employers to dismiss strikers or replace them temporarily or for an indefinite period are a serious impediment to the exercise of the right to strike, particularly where striking workers are not able in law to return to their employment at the end of the dispute.*

Yet this is precisely what the government now plans for the United Kingdom. Employers will be permitted to use agency workers indefinitely, and there is no guarantee that workers on strike will ever get their jobs back. This will be a strategically important power of employers, especially if employers are permitted to use agency workers to both replace AND undercut those on strike.

It will also be important in the context of industrial action short of a strike, where workers may refuse to take on additional duties or boycott others. English contract law has long permitted the employer, in these situations, to hire agency workers and to send workers home until they are prepared to do

what they are told. This is not just a licence for strike-breaking – it is a licence for bullying and autocratic management.

6 Picketing and 'Leverage'

In addition to the existing, vast (and highly effective) array of civil and criminal law on picketing, the Bill introduces yet further restrictions. This is notwithstanding that the Association of Chief Police Officers told the Carr review (on picketing):

> '*In general the legislative framework is seen by the police as broadly fit for purpose and the range of criminal offences available to the police is sufficient to deal with the situations encountered*.'

Yet the Bill proposes that a union will lose protection for peaceful picketing (and will therefore be liable to injunctions not to picket or claims for damages after the event) unless:

- the union appoints a picket supervisor;
- the supervisor is familiar with the Code of Practice on picketing;
- the supervisor has taken reasonable steps to tell the police his/her name, where the picketing will take place, how s/he may be contacted;
- the supervisor has a letter of authorisation from the union;
- the supervisor shows the letter to the police or 'any other person who reasonably asks to see it';
- the supervisor wears a badge or armband readily identifying him/her as such.

The government has also 'consulted' on further proposals. Fourteen days before industrial action starts, unions will be required to give the following information to the employer, the police and the Certification Officer:

- Specify when the union intends to hold a protest or picket;
- Where it will be;
- How many people it will involve;
- Confirmation that people have been informed of the strategy;
- Whether there will be loudspeakers, props, banners etc;
- Whether it will be using social media, specifically Facebook, Twitter, blogs, setting up websites and what those blogs and websites will set out;
- Whether other unions are involved and the steps to liaise with those unions;

- That the union has informed members of the relevant laws.

Any change made by the union to these plans is also to be published.

These far-reaching powers have been widely condemned on civil liberties grounds and all those concerned with the right to protest should watch out, for if the government impose such restrictions on trade unions then it is certain that similar requirements will be imposed more widely.

Further restrictions on pickets and protests away from the workplace will be introduced as the Bill goes through Parliament aimed at the industrial dispute 'leverage' campaigns successfully conducted by unions such as the GMB and Unite (called 'Leverage' by the latter).

7 An Attack on Political Freedom

The Trade Union Bill is about eliminating trade union political influence. The aim is to reduce the income available to trade unions for political purposes. The importance of political action by trade unions is acknowledged by the ECtHR, which recognised in *ASLEF v United Kingdom* that:

> *Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues.*

It is offensive that democratic members' organisations like trade unions, dedicated to the defence and advance of members' economic and social interests, should be restricted in using their funds for political purposes to those ends. Nonetheless, in the UK, trade union political activity has been subjected to tight legal restraints since 1913.: a resolution adopting statutorily defined political objects must be approved by secret ballot every ten years, money for those objects kept in a separate political fund, members free to opt-out of payment into that fund.

The Bill harks back to the punishments imposed on unions after the 1926 General Strike, which included the requirement that union members opt-in to the political fund if they wished to contribute. This reversal of the previous rule continued until 1946. Under the new Bill trade unions will have three months to ensure that existing members opt-in. If they do not, members' obligations to pay the political levy will lapse. Members who have opted-in may opt-out at any time, effective within one month. A member's opt-in notice will lapse after five years, and will have to be renewed.

Unions are democratic organisations in which the decision of a majority on any lawful matter binds the minority. By individualising this aspect of trade union democracy, the Bill breaches trade union autonomy, and undermines the principle of solidarity fundamental to effective trade unionism. This is not

compatible with the right of trade unions to draw up their own rules free from state interference, as required by ILO Convention 87, art 3.

8 Transforming the Role of the Certification Officer

Thus the Trade Union Bill compromises three core labour rights: the right to organise, the right to bargain, and the right to strike. These restrictions are compounded by new powers to be given to the Certification Officer (CO), the 'trade union regulator' appointed by the government to issue certificates of independence and deal with complaints from members about breach of union rules.

That role will be dramatically transformed. Most striking is a new power to initiate action against a trade union even though there has not been a complaint by a member. This applies specifically in relation to trade union elections, trade union political funds, and trade union amalgamations.

As a matter of constitutional principle this is an extraordinary proposal since trade unions are not public bodies and exercise no public function. Nor do they provide services to or invest funds of members of the public. The most extraordinary feature, though, lies in the combination of powers which enable the CO (on behalf of the State) to:

- make a complaint against a trade union;
- investigate that complaint;
- hear and make a decision on the very matter about which he has brought the complaint; and
- use other new powers to impose a fine on the trade union he has investigated and upon which he has decided.

The CO has new powers to conduct investigations – or to delegate investigations to outside bodies such as the big accountancy firms. The CO will be able to require production of any document held at any level and in any form by the union. The CO will be able to act on information from third parties, which no doubt a hostile media will be enthusiastic to provide, as well, of course, as employers (who will risk no legal costs in raising a complaint in this way) and disgruntled members of the public, MPs and others.

And, to rub salt in the wound, the CO is to be given the power to impose a levy on trade unions to make them pay for running his or her office. S/he is to be funded by the very organisations he or she is to investigate. Whoever holds this office in the future will be seen as little more than the ideological pit-bull of Tory ministers. Thus the government will diminish a hitherto highly respected position.

9 Conclusion

In launching the biggest assault against free trade unionism for a generation, the Tories have revealed high levels of legal and economic illiteracy. As to the former, the distinguished judge, Lord Bingham, said in 2006 that:

> *The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious.*

This proposition applies to ILO Conventions ratified by the United Kingdom as to all other ratified treaties. The ILO Conventions relevant here were ratified by both Labour and Conservative governments. Indeed it was the government of Mrs Thatcher that ratified ILO Convention 151.

As to economic illiteracy, the consensus of economic thought today (including IMF researchers) is that the destruction of collective bargaining is both bad for the economy directly and is a significant contributor to the growth of inequality which creates its own misery. The diminution of trade unions' industrial power may appear attractive to right wing back-bench Tories but it is, in effect, shooting the economy in the foot.

Collective bargaining is also essential for the achievement of justice at work. In the absence of collective bargaining, the outcome of the conflicting interests of employer and workers simply reflects the inherent imbalance in power between the worker and the employer.

Widespread collective bargaining was the technique nearly universally adopted throughout the Western World in the 1930s after the crash of 1929 and the following Depression – and it worked over the next 50 years. It still works in the strong and efficient economies of Germany and Scandinavia.

The government's proposals ignore these truths; the Trade Union Bill is not only 'not fit for purpose', ideological and vindictive, it is also wholly irrational in design and delivery.