# industrial relations

## Trade Union Immunities – The Great Debate

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For at least two decades, the British system of industrial relations has been the whipping boy, rightly or wrongly, of politicians and commentators alike. Successive Governments have introduced legislation, sought non-statutory solutions, pleaded, threatened, cajoled. For their part, both sides of industry have tried to bring about internal reforms. Trade unions have attempted to bring some order where there was chaos; personnel managers have introduced procedures, sought consultations and devised new techniques. And yet, it appears, the system of industrial relations has failed. It has inhibited improvements in productivity, acted as a disincentive to investment, and discouraged innovation.

This, at least, is the conclusion of the Government's Green Paper "Trade Union Immunities", issued in January this year. The document summarises the legal framework within which the system operates in this country, and seeks a "great debate" on what changes, if any, should be made to the law so as to achieve a more permanent improvement, and to discover and encourage the true role of trade unions in modern society.

The Green Paper sets out a number of topics which could usefully be the subject of legal reform, and presents the arguments for and against change in an even-handed and fair manner, pointing out the practical problems and difficulties which surround each course of action. The result, however, is that the reader is left with a distinct impression that if the arguments are so evenly balanced, the case for sweeping changes has not been made out.

Nine topics are identified as areas where the law could be usefully changed.

(1) **Immunity for trade union funds**
It is well known that apart from certain minor and irrelevant exceptions, a trade union is immune from all legal action, whether or not committed in furtherance or contemplation of a trade dispute (s 14, Trade Union and Labour Relations Act 1974). To limit this immunity only to torts committed in trade disputes would achieve little, for trade unions have not taken advantage of this provision. The more radical suggestion is that s 14 immunity should be brought into line with the immunities granted by s 13 of TULRA in respect of acts committed by individuals. This would mean that an injunction could be granted in appropriate cases against a trade union, or damages could be obtained if an official committed a tortious act which was not protected by that section (eg secondary action not within the limits laid down in the Employment Act 1980, s 17). Would this lead to greater control by a trade union over its officials (eg shop stewards) or even the rank and file members? Is it right that a trade union should be held liable for "unofficial" action? The whole question of vicarious liability would have to be reviewed. Do employers want to sue trade unions for damages, or is their interest confined to getting unofficial action stopped as quickly as possible? Since the harm caused in a strike can be massive, would limits of financial liability have to be imposed? In *General Aviation Services Ltd v T & GWU* [1976] IRLR 224 the plaintiff's claim (under the Industrial Relations Act 1971) was for £2,000,000. Is it in anyone's interests that a trade union could be made bankrupt?

(2) **Secondary action**
The Employment Act 1980 placed severe restrictions on the right to take secondary action in support of a trade dispute, but the question is now posed as to whether or not this is sufficient, and whether further restrictions should be imposed. It could, for example, be outlawed altogether, or limited only to those cases where primary action is impossible, or other specified circumstances. Against these suggestions, reality and practicality are balanced. There are circumstances where it is recognised that secondary action is the only remedy available to those who wish to use industrial muscle (eg if the employer sacks all strikers).

(3) **Picketing**
The Employment Act 1980 made a major change in the legal limits of lawful picketing, though this has not yet been tested for effectiveness. Is this law adequate? What happens when an employer is faced with mass picketing which is unlawful? How do you obtain an injunction against a crowd of faceless and nameless pickets? Would it help if the police were under an obligation, at the request of an employer, to obtain the names and addresses of pickets, making it a criminal offence to refuse to supply these? Would this break the important tradition of the neutrality of the police in trade disputes? As an alternative, can the Rules of the Supreme Court be altered to enable an injunction to be taken out against "the act of picketing" by unnamed persons? A precedent exists in Order 113 of the Rules which was introduced to deal with the problem of squatters, but there is a vast difference between recovering private property and preventing people from using the highway. Other pickets can come along, and the procedure would have to start all over again. How can someone (the police?) distinguish between lawful primary pickets and unlawful secondary pickets?

(4) **Definition of a trade dispute**
To obtain legal immunities, an act must be committed in furtherance or contemplation of a trade dispute, and this latter phrase is widely defined (s 29, TULRA). As long as a dispute is "connected with" one or more of the matters contained in s 29, the statutory immunities come into operation. In *NWL v Nelson* [1979] 3 All ER 694 the dispute was part of a campaign by the International Transport Federation against "flags of convenience", the seaman working on a "blacked" ship were not in dispute with their employers, yet the House of Lords upheld the union's argument that there was a trade dispute in existence. Political strikes are not within the legal immunities (*BBC v Hearn* [1978] 1 All ER 111), but the line is sometimes hard to draw, especially in those cases where motives are mixed. Should "worker and worker" disputes be excluded from the definition?

(5) **Legally enforceable collective agreements**
If collective agreements were legally enforceable, would this lead to greater stability in industrial relations? Would employees benefit in terms of higher wages and greater job security which would result from higher productivity brought about by a strike-free period? It is conceded that this proposal would probably result in a greater number of days lost through strike action, based on American experience, where strikes tend to be called when a contract is being re-negotiated. But we need more research to tell us how many times a trade union (or an employer) acts in breach of such agreements in circumstances where the law could provide an effective remedy. The leading case on the topic (*Ford Motor Co v AUEW* [1969] 2 All ER 481) would probably have been reversed had it gone to the Court of Appeal, but the strike was settled on terms that the appeal would be dropped. Does this ploy inhibit writs for breach of contract?

As long as trade unions think they have something to fear from the law which outweighs the advantages of legally binding agreements, a reversal of the existing statutory presumption (s 18, TULRA) that collective agreements are not legally binding would merely result in the revival of the TAINLEB clause (This Agreement Is Not Legally Binding) which was used after the Industrial Relations Act 1971. The alternative is to introduce a system of compulsory enforceability against the wishes of the parties, and while there are respectable precedents for such action, it is not an attractive proposition at this point in time.

(6) **Strike Ballots**
Should ballots be taken before strike action is contemplated? Would this encourage greater participation, and (hence) greater moderation? The case is not proven, either way. It is suggested that a ballot could be "triggered" on request of a proportion of members (say

15 per cent), although the practical difficulty of getting 15 per cent of the membership of a trade union which has 1,000,000 members to combine together to force a ballot is not explored. If ballots are used for strike action, should they also not be used to call off a strike? The Employment Act enables public funds to be used for some purposes to assist unions to call ballots, but at the present time there is a distinct lack of enthusiasm among the union movement to use this facility.

(7) **The closed shop**
Potentially, this is the most explosive and emotive issue of all. The Green Paper makes it clear that the Government is opposed to the closed shop and would obviously like to strengthen the existing provisions. The recent publicity surrounding Sandwell Council in dismissing non-unionists has highlighted a weakness in that an aggrieved person may have the right to compensation, but no right of reinstatement. Should there be periodic reviews of existing closed shops, to ensure that they are still favoured by the workforce? Or would this disturb existing satisfactory industrial relations? There are a number of related practices which cause concern, eg refusing to handle work from non-union companies, refusing to work alongside non-union subcontractors, etc. Are there practical limits to the elimination of longstanding arrangements?

(8) **Essential services**
Some strikes cause great hardship to the community at large. How can the supply of essential goods and services be maintained? How should the Government react if a strike causes a national emergency? Should there be a "cooling off" period? Or should some strikes (interfering with the supply of food, water, fuel, light, transport, or affecting the nation's health or safety) be outlawed altogether? And what should be put in their place? Compulsory arbitration? And if a group of workers break ranks, and go on strike, what then? The Green Paper does not consider the public interest in this connection, but as the ultimate paymaster, surely there must be some way in which this can be brought into the reckoning.

(9) **Positive rights**
Since the existing system is based on a series of legal immunities, the Green Paper discusses whether or not these should be translated into positive rights instead. How would the picture change if there was a legal "right to strike" instead of an immunity in respect of certain types of action? What limitations, if any, would have to be imposed? The correlative of rights, as any jurisprude will know, is duties. If there is a legal right to bargain collectively, this would impose on an employer a legal duty to recognise and bargain (in good faith?) with a trade union. The question may thus be posed, if there is a legal right not to work with non-unionists, what happens to the legal right of another to work without a union card? How can the legal right to strike be squared with the legal right of an employer to dismiss strikers?

(10) **Foreign systems**
The Green Paper concludes with a brief summary of how industrial relations are conducted within the legal framework of Australia, West Germany, France, Sweden and the United States. Each have their own peculiarities, no single recipe for success (if success there be) emerges, and one is left with the distinct impression that foreigners are very odd people. If the German miracle is due to the fact that they have 16 trade unions, how do we explain the Japanese success, with its 34,000 trade unions! Australia has compulsory arbitration, in France "de facto" closed shops exist even though these are unlawful, and in America, "cooling off" periods exist. All of this is terribly interesting, but no conclusions can be drawn.

## The Great Debate?

The Green Paper has not produced the great debate which was hoped for by the Government. Partly this is due to the fact that it was priced at £5.30p, and hence there has been no great rush to buy copies or discuss the issues at conferences and seminars. A few institutions, such as employers' organisations and professional bodies, will no doubt take up the challenge, but any consensus on a scale which is likely to produce acceptable reform on any of these contentious issues will not be forthcoming. As one commentator has stated, "It is easier to describe faults than to prescribe remedies."

## Conclusion

The main reason why the Green Paper has failed to excite attention is that it asks the wrong questions. It seeks to go forward by looking backwards at an outdated and outmoded system of industrial relations which has not moved with the times. Issues are presented as if the answers which must be sought will solve the problems, instead of looking outside those issues for solutions. A pragmatic approach which deals with a problem as it arises may be politically unsound, but will achieve better results in the short term. In the longer term, the reform of industrial relations is in the hands of progressive management, which, if properly grasped, would result in the Green Paper being regarded – at the best – as an irrelevancy, – at the worst – as a document of quaint historical curiosity.