EDWARD BENSON

THE LAW OF INDUSTRIAL CONFLICT

INDUSTRIAL RELATIONS IN PRACTICE
GENERAL EDITOR: JIM MATTHEWMAN

The Law of Industrial Conflict

Edward Benson

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EDWARD BENSON

Abbreviations

ORGANISATIONS

ACAS	Advisory, Conciliation and Arbitration Service
CAC	Central Arbitration Committee
CBI	Confederation of British Industry
CIR	Commission on Industrial Relations
CRE	Commission for Racial Equality
EOC	Equal Opportunities Commission
IRC	Independent Review Committee
ITF	International Transport Workers' Federation
TUC	Trades Union Congress

COURTS AND TRIBUNALS

EAT	Employment Appeal Tribunal
NIRC	National Industrial Relations Court

STATUTES

EPA	*Employment Protection Act 1975*
EP(C)A	*Employment Protection (Consolidation) Act 1978*
TUA	*Trade Union Act 1984*
TULRA	*Trade Union and Labour Relations Act 1974*

The text explains the law as it stood at 1st October 1986.

Introduction

Most workers are motivated more by financial necessity than by industrial enthusiasm. Work, almost by definition, is something people would prefer not to have to do. But this fact alone could hardly explain the often violent tensions that industrial relations can engender, though it obviously does not improve matters. Traditionally, these tensions have been explained by the fundamental conflicts of interest between workers and their employer.

The most frequent source of conflict is the regulation of wages. The owners' judgment of what the business can afford is likely to be influenced by their desire to maximise profits, while the judgment of the workforce is likely to be influenced by their desire to maximise wages.

Most of the working population is employed not by a person but by some form of institution. Anyone involved in the management of that institution is likely to be employed in the sense that they too work for it; but with greater seniority there comes a greater association with the interests of the 'employer', at least in the eyes of those lower in the hierarchy. To any one worker, 'the employer' is represented by the immediate boss. Thus the term 'industrial relations', though sometimes described as the relationship between employer and employee, is perhaps more accurately described as the relationship between employees and those people the employees regard as representing the interests of the employer.

In the private sector, most employing institutions are limited companies. Such companies are run by the 'management', which is responsible to the board of directors. The board looks after general policy but is primarily there to protect the interests of the shareholders. The workforce therefore has only an indirect say in the running of the business. Admittedly, directors now have a statutory duty to take into account the interests of employees (s.46 *Companies Act 1980*), but this duty is owed to the company and can thus only be enforced by shareholders. Where shareholders' interests conflict with those of employees, the shareholders' enthusiasm to see that s.46 is observed may not be very forceful.

The same is broadly true in the public sector. Statutory bodies are set up and charged with the duty of providing goods or services to the

public in a reasonably efficient way, though government subsidy may remove the most pressing reason for efficiency: the threat of extinction if financial losses get out of hand. Where the interests of the workforce are inconsistent with this duty, conflict may arise in the same way as in the private sector, though there may be less commercial pressure on management to override the wishes of the workforce and workers may feel less inhibited in the demands they make. The same industrial relations problems, perhaps to different degrees, therefore occur in both the public and the private sectors.

In a competitive world, the management's prime concern must be the interests of the business. A business structured in such a way that workers have too great a say may not survive: hence the bureaucratic structure of most large enterprises which concentrates power and authority in those most closely concerned with the interests of the employer.

As against an individual employee, the management is normally in a position to dictate both terms of employment and the way in which duties are to be performed. The employer (as represented by management) has little to lose if an employee, objecting to such terms, etc., decides to leave; while the employee, particularly in times of high unemployment, has a great deal to lose. In this sense it is sometimes said that the bargaining power of the employee is less than that of the employer. Since at common law the rights of workers stem from their contracts with their employers, this inequality of bargaining power may lead workers to enter agreements which are very far from what they would have liked. The law has long upheld a person's 'freedom' to enter into an agreement which will lead them to disaster (the hallowed principle of 'freedom of contract') and, except in extreme circumstances where 'undue influence' has been exerted, will not rescue a person from a contract merely because it is not particularly advantageous for them. So the rights conferred on employees by the common law are extremely limited.

Since the law could not protect employees from low wages, arbitrary dismissal, etc., workers had to find other ways to improve their bargaining power so as to equate, or more nearly equate, with that of the employer. This has traditionally been achieved by combining together. Nowadays, bargaining in combination with others – or 'collective bargaining' – is accepted as the norm, though it took many years and a number of Acts of Parliament before the courts could overcome their distaste for anything that smacked of conspiracy.

Collective bargaining, then, is bargaining which takes place between

the employer, or someone representing the employer, and the workforce or a particular work group as a whole, via a representative. One danger with collective bargaining is that the representatives actually involved in negotiation may have very little to do with those who will be affected by the outcome. Obviously this danger is greater where the negotiators represent a large number of workers or an area of an organisation or industry; deals reached may not necessarily reflect the views of all those affected and may be wholly inappropriate for some work groups. In such circumstances, managers may be tempted to come to informal deals with particular work groups, via shop stewards, over and above those reached through the formal collective bargaining channels.

This can lead to anomalies in pay structures and in terms and conditions of employment generally. It may also encourage a wide variety of 'restrictive practices' – that is, practices which protect those in particular jobs from competition, but which restrict the efficiency of the enterprise – often, it seems, without the knowledge of the union or higher management.

Similar difficulties can arise in relation to procedural agreements. Grievance procedures laid down in industry-wide agreements may be by-passed. Where formal arrangements exist, workers with an interest in the outcome of a dispute may not be content to wait until the formal procedures have been exhausted. Moreover, such formalisation takes the resolution of the dispute out of the hands of those immediately involved, fuelling further frustration. This may be particularly so in the case of work groups with considerable industrial power, who see no need to use formal grievance procedures if the matter can be dealt with more quickly and effectively by unofficial industrial action.

'Centralised' bargaining, that is bargaining at industry-wide level or some other level higher than the workplace, may have its attractions in terms of efficiency, but it has proved, in many cases, to be too unwieldy to be a satisfactory way of conducting industrial relations. Centralised bargaining was blamed by the *Royal Commission on Trade Unions and Employers' Associations* (Cmnd 3623) for many of the problems that industry faced in the 1960s.

The reason for the appointment of the Royal Commission in 1965 was an economic one: namely the steady decline in the competitiveness of British industry. It was believed that this was attributable, at least in part, to the pattern of industrial relations in this country. The Commission was set up in 1965, under the chairmanship of Lord Donovan, to consider what, if anything, needed to be done to

reform industrial relations. They published their report in 1968.

Broadly the Commission accepted collective bargaining as the correct way of conducting industrial relations, but sought to overcome the problems they found by encouraging greater formalisation of bargaining procedures at factory or company level rather than at national or industry level.

The problem was that the informal system which had developed alongside the formal system was so firmly engrained that there seemed to be no way of forcing change without major disruption. In any case, these haphazard arrangements often suited managers and shop stewards. They were flexible and not subject to interference by outside bodies which had no knowledge of the particular circumstances and personalities involved. But the disadvantages outweighed these advantages. The informal arrangements were unfair, illogical and impossible to enforce, because so few people actually understood or even knew about them. They were unwritten and unstable, and largely based on 'custom and practice'.

Reform could only be achieved, the Commission thought, by voluntary means rather than by legal enforcement. The role of the law, they considered, should be strictly limited to assist in the smooth running of collective bargaining. Thus formal recognition by employers of unions and their shop stewards should be encouraged but not made obligatory and collective bargaining should be supported by, for example, outlawing any form of victimisation of union members. Legally enforceable rights for workers should only be granted where collective bargaining alone could not provide them.

This, they hoped, would lead to a more uniform approach which would iron out the anomalies that often gave rise to unofficial action. At the same time, it would facilitate the implementation of government incomes policy, which, it was thought, had failed in the past because of the impossibility of keeping the unstructured wage-negotiating machinery under control. It would also mean that restrictive practices would be brought out into the open and eliminated by negotiation under the improved bargaining arrangements that the Commission hoped would follow. Unions and employers' associations should no longer take part in the pretence that their negotiations had any significant impact on what went on in practice, but would take on a more advisory and supportive role.

Though not all of the Commission's proposals for legislative reform were put into effect, the general recommendations concerning the promotion of collective bargaining at the workplace strongly

influenced events in the 1970s. For example, ACAS was set up in 1975 to assist in improving industrial relations and promoting effective collective bargaining. Individual employees were given a right 'not to be unfairly dismissed' (originally under the *Industrial Relations Act 1971*) and a variety of other 'employment protection rights' for which, it was considered, employees should not be required to bargain.

The Commission's recommendation to introduce these employment protection rights perhaps indicates a weakness in the Donovan thesis. If collective bargaining was unable to protect employees from unfair dismissal, why was it regarded as effective in other areas? Another possible mistake was to assume that formalising procedures would have any **economic** impact. Ultimately, the determining factor in any negotiation is the relative bargaining strengths of the parties: something the Donovan reforms would be unable to influence. Tinkering with the means by which negotiations take place could only have minimal effect. It remains as true today as it was before the Donovan reforms that a work group with a lot of power may exercise it in its own favour, while management may still exploit work groups with little power.

The result of the reforms was certainly an improvement in terms of formalising procedures. A survey carried out by the Department of Employment, the Policy Studies Institute and the Social Science Research Council[1] found a considerable increase in the late 1970s in the extent to which trade unions were recognised and to which formal workplace procedures had been introduced. But they found that this had had little impact on industrial action. If anything, trade union recognition and high levels of membership appeared to increase the chances of industrial action.

So far as pay levels were concerned, they found a clear link between higher levels of pay and high membership or recognition of trade unions for manual workers; though for non-manual workers, trade union membership and recognition appeared to make little difference. This was during a period of supposed wage restraint. So much for the Donovan assumption that improved procedures would enable incomes policies to be imposed more effectively!

Formalisation of factory or company agreements did not appear to have had the beneficial economic effects that the Donovan Commission had predicted. No inroads were made on restrictive

1. W. Daniel and N. Millward, *Workplace Industrial Relations in Britain* (London: Heinemann, 1983).

practices and an effective incomes policy proved as elusive as ever. But this may simply indicate that too much was expected of the reforms. What they did achieve was an improvement in the process of collective bargaining: a result valuable in itself. Furthermore, the clearing of the obscurity that had surrounded collective bargaining in the past revealed some of the underlying conflict between management and workers, which is perhaps better expressed than repressed.

However, the economic problems remained unsolved. The Conservative Government elected in 1979 tried an entirely different approach. The solution, the government thought, was to reduce the effectiveness of trade unions and thereby interfere with the balance in collective bargaining in favour of management. The first assumption was that the management is in the best position to know what is good for the business – and hence, it is argued, the workforce – so that management alone should take decisions about running the business; and second, that the majority of union members realise this and would, but for a vociferous and politically motivated minority, never wish to resort to industrial action to interfere with managerial decisions. Two methods to achieve this reduction in union power were used. First, the types of industrial action that the law would allow were severely restricted. Second, the closed shop was made considerably more difficult to enforce.

The important point about recent reforms is the 'step by step' approach. Even now, much of the legislation brought in by the Labour Government in the 1970s, which was strongly influenced by Donovan, remains on the statute-book. Thus the legislation (or some of it) still encourages collective bargaining and the use of formal workplace procedures (the remains of Donovan) but the bargaining power of the unions and the ability of work groups to obstruct management initiatives have been reduced (the recent amendments).

So there are now three ways in which the law intervenes in the practice of industrial relations:

— providing, in certain circumstances, a minimum floor of workers' rights which collective bargaining alone cannot provide;
— establishing machinery to assist in the smooth running of collective bargaining;
— limiting the combined power of a workforce by restricting the closed shop and by outlawing certain forms of industrial action.

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