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Nine Years of New Labour: Neoliberalism and Workers' Rights

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Abstract

Since it was first elected in 1997, a large Commons majority won in three general elections and a benign economic environment have combined to give New Labour the authority and opportunity to implement its programme for industrial relations and employment law. This paper offers an appraisal of New Labour's neoliberalism, and its relevance for understanding the scope and limits of its reform of employment law. The conclusion calls for a campaign to restore and extend trade union rights as a prerequisite for safeguarding workers' interests within the labour market, employment relationship and society.

1. Introduction

New Labour has been in government for nine years. Elected in 1997, a large Commons majority won in three general elections and a benign economic environment have combined to give New Labour the authority and opportunity to implement its programme for industrial relations and employment law. The only imperative has been the necessity, as required by treaty obligations, to transpose directives of the European Community (EC) and to take account of the judgment of the European Court of Human Rights in the *Wilson and Palmer* case. Even here an area of discretion has revealed New Labour's values.

Three major statutes — the Employment Relations Act (ERA) 1999, the Employment Act (EA) 2002 and the ERA 2004 — and over forty statutory instruments have been enacted. The result constitutes a major reordering of employment law. A pattern is now obvious. This paper offers an appraisal of New Labour's neoliberalism, and its relevance for understanding the scope and limits of its reform of employment law. The conclusion calls for a campaign to restore and extend trade union rights as a prerequisite for

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safeguarding workers' interests within the labour market, employment relationship and society.

2. New Labour's neoliberal paradigm

The neoliberal project of Conservative governments, from 1979 to 1997, embodied an express commitment to market exchange as the basis of socio-economic policy: privatization and market proxies in the public sector and the 'rolling back of regulatory frameworks designed to protect labour' (Harvey 2003: 148) were the logical consequences. A wide-ranging programme of employment law reform included the restriction and regulation of trade union tort immunity in trade disputes, the imposition of a statutory template for union government, the removal of statutory support for collective bargaining, and the dilution of employment protection (Dickens and Hall 1995; Smith and Morton 2001a; Wedderburn 1991a). This represented a successful and historic break (distinguishing it from the failed Industrial Relations Act 1971 and emergency legislation in wartime) from the autonomy and liberties accorded to trade unions by the Trade Disputes Act 1906 and re-established in the Trade Union and Labour Relations Act 1974 and Trade Union and Labour Relations (Amendment) Act 1976.

The New Labour government of 1997 explicitly adopted much of the neoliberal inheritance bequeathed by the outgoing Conservative government (Buckler and Dolowitz 2000; Crouch 2001; Hall, S. 2003, Hay 1999, Leys 2001). Hall has argued that New Labour *is* distinct from previous Conservative governments in that it is a '*hybrid* regime' (Hall 2003: 19), a '*social-democratic variant of neo-liberalism*' (*ibid*.: 22). Its social-democratic heritage is subordinate to neoliberalism but remains evident in two ways. First, New Labour 'has adapted the fundamental neo-liberal programme to suit its conditions of governance — that of a social democratic government trying to govern in a neo-liberal direction while maintaining its traditional working-class and public-sector middle-class support, with all the compromises and confusions that entails' (*ibid*.: 14). Second, the market-state can incur high social costs and erode consent, whereas New Labour seeks 'to win enough consent as it goes, and to build subordinate demands back into its dominant logic' (*ibid*.: 20).

Although a number of commentators have remarked upon neoliberal elements in New Labour's industrial relations and employment law policy, often these have been seen as discrete concessions rather than the result of a deeper commitment. Neoliberalism is embedded within New Labour's view of the labour market and the discourse of the 'third way' — a modernized unitary perspective (Fox 1966: 3) in which 'New Labour re-legitimized collectivism but on one central condition: that it be imbricated with management objectives' (McIlroy 1998: 543).[1] One of the central themes of the third way is 'partnership'. Collins (2001, 2002, 2003) has argued that partnership is a metaphor 'invoked in order to express the highly cooperative ideal expressed

by the flexible employment relation' (2001: 24), the latter being the typical feature of, and needed for, high-performance organizations. The

> purpose of partnerships is to enhance competitiveness, through improvements in quality and efficiency. This purpose requires the exchange of information: management needs to explain its product and marketing plans to the workforce, and the workers need to use their human capital to suggest how production and products can be improved. (2002: 458–9)

The partnership metaphor 'points to the need for an incentive structure that involves a sharing of the residual profits of the enterprise', but 'the full sharing of profits [is] impossible owing to the claims of the suppliers of capital' (Collins 2001: 24–5) — a position entrenched in the current review of company law (Wedderburn 2005: ch. 7). Thus no social reordering (e.g. reform of company law) is required. This concept of partnership is based upon a 'mutual gains' model, in which the co-operative dimensions within the employment relationship are reinforced and institutionalized. New Labour's goal is 'regulating for competitiveness . . . facilitating changes in the organisation of the workplace that entails a transformation in the nature of the employment relation' (Collins 2001: 34). There is little space for any concept of workers' separate interests or distinctive outcomes to their advantage.

The power imbalance inherent in the employment relationship, so long an essential component of pluralist, radical and Marxist perspectives (although argued distinctively), is rejected: 'The case for saying that the employment relation is somehow unique or distinctive on account of systemic inequality of bargaining power . . . seems too much of a generalization' (Collins 2003: 7). Rather, it should be conceived as a symbiotic contract in which 'the basic framework of incentives is designed as two simultaneous principal and agent relations'; and although the 'interests of management and workers conflict, . . . in order to maximize their self-interest they have to engage in extensive co-operation with each other' (Collins 2002: 459–60). If the employment relationship is not conceived as asymmetrical because the parties' power is qualitatively distinct both within and outside the employment relationship (Offe and Wiesenthal 1985: 176–84), then the case for autonomous workers' collective organization — and trade union tort immunity in trade disputes — is diluted, and other forms of representation and communication are deemed adequate.

Once the neoliberal assumptions that underlie New Labour's perspective are grasped, its policy for industrial relations and employment law — and its tensions — is understandable. Neoliberal assumptions beget corresponding remedies (Wedderburn 1991a: 228), albeit distinctive. As with Conservative policy from 1982 to 1997 (*ibid.*: 204, 228), it is not claimed that neoliberalism is the sole determinant of government policy. Other factors intrude and motivate. But the thrust of government intervention is designed to improve labour-market efficiency — 'to raise employment and develop a diverse pool of skilled labour' (Treasury 2002: 6) — through initiatives such as the national minimum wage and family-friendly policies. It is in this respect that New

Labour is to be distinguished from its Conservative predecessor. Such regulation must not impose labour-market rigidities or disproportionate costs on employers; the latter must be able to 'adjust total pay, including overtime and bonuses, as well as employment numbers quickly and flexibly in response to changes in market conditions' (Treasury 2002: 8). This explains New Labour's openness to pressure from the Confederation of British Industry (CBI), *and* their differences, and its inability to accept counter-arguments and evidence (Crouch 2001: 105), leading to 'a downward drift in aspirations and achievement' (McIlroy 1998: 7).

New Labour's prescriptions are indebted to a pragmatic reading of neoclassical economic theory: 'Employers and workers in the UK generally determine the detailed terms and conditions of employment at a local or individual level . . . [which] subject to minimum standards — leads to greater diversity of employment patterns because the outcome is dependent on millions of individual decisions by individual workers and employers' (Treasury 2002: 42–3). In a similar vein, the White Paper, *Fairness at Work* (FAW) states that 'individual contracts of employment are not always agreements between equal partners' (DTI 1998: 21, para. 4.2), implying that this is so in a majority of cases. Hence it is acceptable for individuals to derogate from the Working Time Regulations 1998 'provided they freely choose to do so' (House of Commons 2005: 6). It is in this stress upon the role and value of individuals' decisions that New Labour's acceptance of a neoclassical economic framework is apparent. Moreover, the reference to 'local' bargaining with trade unions obscures how multi-divisional companies control labour costs (including pay) in subordinate business units — from their perspective only the site of bargaining is local (Smith and Morton 1993: 103).

Wedderburn (1991a: 218–19) noted that Conservative legislation on trade unions owed much to Hayek (*ibid.*: 205): 'The unionised group of workers receives special treatment because of what it *is*.' Such sentiments have now been integrated into the 'common sense' of New Labour. Thus trade unions are viewed as 'extremely important organisations that regulate, or strongly influence, the employment relationship between many millions of people and their employers. That sets them apart from other voluntary organisations' (DTI 2003c: 68), making it appropriate to impose detailed regulation (although supervision would be a more accurate term). Labour's acceptance of the bulk of Conservative legislation on industrial action means that it will not countenance any extension of unions' liberty to take industrial action beyond the enterprise (even in associated employers) and to picket beyond the workplace (even of the same employer) as it would reintroduce labour-market rigidities and raise employers' costs (Charlwood 2004: 385–6). Powerful trade unions have no place in New Labour's vision of the labour market, the employment relationship, or society.

Hence with minor amendment, Conservative legislation on industrial action and trade union government has been packaged in a language of 'fairness' and 'flexibility', 'to replace the notion of conflict between employers and employees with the promotion of partnership' (DTI 1998: 3) and to

promote competitiveness (*ibid.*: 13–14, paras. 2.9–2.19; see also DTI 2002, 2003b). In contrast to its Conservative predecessors (Smith and Morton 1993), however, New Labour seeks to domesticate, rather than exclude workers' voice, through constraints on militant trade unionism and the promotion of co-operative trade unionism (Müller-Jentsch 1985; see also Kelly 1996) by the provision of state funds to subsidize partnerships at work (ERA 1999 s. 30), training of union learning-representatives (EA 2002 s. 43), trade union 'modernisation' (ERA 2004 s. 55) (with a representative of business on the seven-member supervisory board), pensions education, awareness of equality regulations, and for international work. The goal, however, is the same — reduced scope for workers to challenge the terms of the pay–effort bargain. Yet partnership does not imply any special role or status for trade unions: relationships are 'Sometimes . . . provided by a partnership between employers and trade unions which *complements* the direct relationship between employer and employee. On the other hand, some organisations achieve effective working relationships in other ways' (DTI 1998: 12, para. 2.5, emphasis added; see Wood 2000: 130).

Although the Conservative government's derogation from the European Community's (EC) Protocol on Social Policy (the social chapter) of the Treaty of Maastricht 1992 was ended by the Labour government in 1997, it remains sceptical of the European model of a regulated labour market: *FAW* stated that 'Some aspects of the social models developed in Europe before the advent of global markets have arguably become incompatible with competitiveness' (*ibid.*: 10, para. 1.10; see also Treasury 2002: chap. 2; 2005). New Labour has continued the Conservative's policy of obstruction and dilution of EC Directives (see below) and is determined to prevent the EC Charter of the Fundamental Social Rights of Workers 1989 from having any practical impact. The most recent example was its refusal, despite appeals by the Trades Union Congress (TUC), to use the UK's presidency of the European Council for the second half of 2005 to expedite the Agency Workers' Directive. For Forde and Slater (2005: 250) agency workers are 'one of the least protected groups . . . in the British labour market', in contrast to the Treasury for which they are an essential part of a flexible labour market (Treasury 2002: 9).

The timing of Labour's programme has been important. The political commitments given to its electoral constituency and political base meant that the national minimum wage, the statutory union-recognition procedure, protection against dismissal for strikers engaged in lawful industrial action, and changes to unfair dismissal legislation were quickly implemented. They were distinctive in that no Conservative government would have initiated such measures. Later measures, however, such as changes to unfair dismissal law in the EA 2002, have been expressly intended to reduce the 'burden on business', while EC Directives have been implemented in a minimalist way. Attempts to shift the agenda to extend the liberty to strike have been decisively rejected. Nevertheless, some measures have established important new principles and practices (e.g. family-friendly rights and the extension of

anti-discrimination legislation), whereas others have had little impact (e.g. limits on working hours).

3. Workers' collective voice

The statutory union-recognition provisions of the ERA 1999, implemented since 6 June 2000, as Schedule A1 of the Trade Union and Labour Relations (Consolidation) (TURLR(C)A) Act 1992, were seen by many as an opportunity to rebuild trade unions. But a close reading of the Schedule revealed 'a series of rigorous tests that [established] a highly circumscribed right to trade union representation' (Smith and Morton 2001b: 124). The recognition procedure has not lowered the costs of unionization in any significant way; employers have learned to mitigate, control or oppose its limited provisions, including ballots (Moore 2004). This was predictable and scarcely difficult, given its features (Smith and Morton 2001b: 133–4). Two studies, using different methodologies (Gall 2004a,b; Wood *et al*. 2003), have indicated the Schedule's limited effect. In its first two years (June 2000–June 2002), of 233 applications made to the Central Arbitration Committee (CAC), 64 had resulted in statutory union-recognition by 31 May 2003, and a voluntary agreement was reached in 59 cases (Ewing *et al*. 2004: 2). By October 2003 there had been a total of 73 cases of statutory recognition (TUC 2004: 2). Wood *et al*. (2003: 124) concluded that a 'majority of both applications and successful cases have been in manufacturing or in areas where trade unions traditionally have had a strong presence, such as in transport, print or newspapers.' By March 2005 the CAC had received 444 applications in its five years of existence: 46 resulted in union recognition without a ballot and in 110 cases a ballot was held, with the union being successful in only 70 — a significant failure rate (CAC 2005: 21).

Voluntary agreements outside the procedure increased at first (149, November 1999–October 2000; 450, November 2000–October 2001), before falling (282, November 2001–October 2002; 137, November 2002–October 2003), although in the last year the average size of bargaining units increased (and hence the number of workers covered by recognition agreements was larger). Such agreements (1998–2002) have been narrow in scope (Moore *et al*. 2004: 79–83). The TUC's survey from November 2003 to October 2004 gives 154 agreements — an increase but embracing far fewer workers. It comments that 'Following a surge in recognition deals immediately after . . . [the ERA 1999] came into effect in 2000 deals are now stabilising. The current level reflects, in part, the difficulty of establishing a presence in new and smaller workplaces' (TUC 2005: 6). Unions have reported increased hostility by employers to recognition (TUC 2004: 3). This is a widespread feature: one source argues that the decline in unionization, 1984–1998, can be largely explained not by changes in the composition of the workforce, but by employer choice, that is opposition (Bryson *et al*. 2004, 139–41). Union membership has fallen slightly, from 7,898,000 in 2000 to 7,559,000 in 2004.[2]

The government's review of the ERA 1999 declared that it is 'working well' (DTI 2003a: 23, para. 1.13). A number of issues were put forward for consultation, but any change to the statutory protection of employers' recognition of non-independent trade unions — a measure that contravenes International Labour Organisation conventions (ILO) (Ewing 2000a)[3] — and the inability of an independent trade union to challenge this or the bargaining unit, was rejected. The evidence cited was that only two CAC applications had been received and later withdrawn (*ibid*.: 54–5, paras. 2.95–2.99). That this might result from the very subordination of workers that trade unionism seeks to challenge is something that the government cannot acknowledge. Moreover, the government did not address the issue of employers' recognition of independent trade unions with no viable representative base (Davies and Kilpatrick 2004: 131) — a fatal obstacle to some applications for statutory recognition.[4]

The ERA 2004 amended the statutory union-recognition procedure to give trade unions improved access to a workforce. The pattern apparent in the drafting of the 1999 Act (Smith and Morton 2001b: 124) has been repeated: improved access for unions has been imposed on employers despite their opposition, but the new procedures embody employers' wishes at almost every turn despite unions' concerns. After the CAC has accepted a union's application, a qualified and independent person, acting on behalf of a union and appointed by the CAC, may distribute material by post to workers (s. 5). The Act imposes additional duties on employers that have been informed of a ballot (s. 9), and sanctions and remedies against unfair practices by both employers *and* trade unions with respect to recognition and derecognition ballots (ss. 10, 13 and 17). Both areas of legislation are complex (Bogg 2005: 75–81).

The definition of unfair practices is 'inclusive enough to encapsulate many of the employer abuses identified by the TUC' (*ibid*.: 79), but protection is narrow and limited to the period of the ballot. Moreover, the impermissibility of 'offers to pay money or give money's worth to a worker entitled to vote in the ballot in return for the worker's agreement to vote in a particular way or abstain from voting' (s. 10(1), (2)(a)) applies to both employers and unions. For the latter, in addition to preventing recruitment on the basis of free or discounted subscriptions, it may also encompass arguments as to the benefits of collective bargaining and other union services.[5] The new Code of Practice provides guidance on access and unfair practice, but its scope is restricted: 'the employer's typical methods of communicating with his workforce should be used as a benchmark for determining how the union should communicate with members of the same workforce during the access period' (DTI 2005a: para. 28). Trade unions are not given any special access; the superior power of employers, inherent in the employment relationship, is secured.

The Act also overturns two important decisions by the CAC, to the detriment of unions. First, the CAC, in deciding the appropriate bargaining unit, must now take into account employers' views on the compatibility of bargaining units with effective management (s. 4); and second, that pay does not

include pensions (s. 20)[6] — an important issue given the abandonment by many employers of final-salary pension schemes. The issue in the former is the attempt by some employers to dilute union membership within wide bargaining units (countering the trend of recent years to devolve bargaining to subordinate business units), thus reducing the likelihood of unions winning a majority of votes and the support of 40 per cent of the workforce in a recognition ballot. In an important decision the CAC refused to accept the employer's position as to the appropriateness of the bargaining unit sought by the trade union. The ERA 2004 shifts the balance towards the employer's view.[7]

None of this should come as a surprise. The statutory union-recognition procedure is not designed to promote collective organization (Wood 2000: 130–1). It is far too weak an instrument for that. Although employers have an absolute requirement to co-operate with the CAC, the Schedule's numerous legal hurdles, which must be surmounted by trade unions, place a premium on their securing employers' co-operation. Non-independent trade unions or unions that are not representative of workers are protected. Proposals to regulate employers' behaviour during the statutory process of recognition (Ewing *et al*. 2004: 48–59) would only add another layer of legal complexity, and may in time be used as a justification to regulate unions' organizing campaigns.

The government did not address the concerns of the TUC and others, in their evidence to the review of the ERA 1999, as to the UK's failure to conform to ILO conventions on the scope and organization of industrial action and trade union autonomy (TUC 2001a): 'The Government . . . reaffirms its commitment to retain the essential features of the pre-1997 law on industrial action' (DTI 2003a: 67, para. 3.22) and therefore 'there is only limited scope to simplify this complex body of legislation further' (*ibid*.: 70, para. 3.32). It did commit itself to simplifying the procedures for industrial action ballots and notices. It has repealed the requirement, introduced by Schedule 3 of the ERA 1999 (TULR(C)A 1992 ss. 226A, 234A), for trade unions to provide information in the union's possession (if available, the number, category or workplaces of employees) that would help the employer to make plans and provide information to employees who will be engaging in industrial action, that is, to mitigate the action (Simpson 2005: 332). However, the new legislation is scarcely less onerous. Part 2 of the ERA 2004 (ss. 22 and 25) requires unions, when balloting members for industrial action, to provide employers with a list of members (by category and workplace) and the figures involved (total, number in each category, and the number in each workplace) who may take action. 'Workplace' has a complex definition. Such information 'must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time', and is declared to be in the possession of the union if held in a document, in electronic form 'or any other form', and 'in possession or under the control of an officer or employee of the union' (ss. 22(4) and 25(3)). These amendments 'underline the function of the law . . . in assisting employers to limit the impact of any

industrial action' (Simpson 2005: 333), while the new Code of Practice (DTI 2005b) 'has added significantly to the body of "soft law" with which trade unions "should" comply in the form of advice on how they should provide the "lists and figures" now required in sections 226A and 234A notices' (*ibid.*: 336). They invite challenges to industrial action on labyrinthine procedural grounds, providing further opportunities for injunctions staying industrial action.[8]

The increase, from eight to twelve weeks in the period during which an employer is unable fairly to dismiss an employee engaged in lawful industrial action, and the exclusion of a lock-out (s. 26), does not establish a right to strike. There is no protection for those who take industrial action that is not protected by one of the trade dispute immunities. Trade union action remains restricted and regulated, to the detriment of workers' capacity to influence the terms of the employment relationship.

New Labour's values are again revealed in the regulations to implement the Information and Consultation of Employees Directive (2002/14/EC), whose passage had been delayed by the UK government (Beckett and Hencke 2004). Any conception of co-determination is alien to both the Directive and the Information and Consultation of Employees Regulations 2004, which establishes bodies that bear no relation to works councils as 'institutions of market-independent industrial citizenship . . . [that bring] non-competitive "social" interests to bear on managerial decision-making' (Streeck 1997: 330). As with statutory union-recognition, information and consultation has been imposed on employers in a manner acceptable to them. The Regulations establish a narrow right of employees (itself a restrictive criterion) to receive information, subject to commercial confidentiality, and to be consulted (regs. 20, 25, 26). Pre-existing agreements are given some measure of protection. Employees' representatives are entitled only to a 'reasoned response' to their opinions (reg. 20(4)(c)). Procedures may also consist of direct communication with workers (reg. 16(1)(f)(ii)). For Davies and Kilpatrick (2004: 148) the TUC's acceptance of this is 'a measure of just how weak the negotiating position of unions is in the UK today.'

The Information and Consultation Regulations have 'disconnected union-based structures from the representative structures of information and consultation' (*ibid.*: 141), giving statutory support to a second channel of communication from which trade unions are excluded, even where they are recognized or possess members (*ibid.*: 143–7, 149–50). This is unprecedented. It is in stark contrast to existing issue-specific statutory consultative procedures (*ibid.*: 141–7), and allows employers to determine the boundaries of information and consultation procedures to fill the 'representation gap' (Towers 1997). This flows logically from New Labour's determination to restrict trade union recognition to predetermined paths acceptable to employers.

A three-stage process (from 6 April 2005 to 6 April 2008) requires employers of undertakings with 50 or more employees to establish information and consultation procedures when a request is made in writing by 10 per cent of the employees (subject to a minimum of 15 and a maximum of 2,500). If one

or more agreements already exist — which must be inclusive, in writing and 'approved by the employees' (reg. 8(1)(c) — and at least 10 per cent (but less than 40 per cent) of employees have supported the request (regs. 7(2), 8(1)), the employer must either initiate negotiations or organize a ballot. Although the latter must be conducted in a fair manner, it need not be a postal ballot (the contrast with union ballots for industrial action, principal executive committees and executive officers could not be more tellingly drawn). To succeed, the request must be supported by at least 40 per cent of the undertaking's employees and a simple majority of those voting (reg. 8(6)). The employer has wide discretion as to employee constituencies: these may embrace all employees or 'such constituencies as the employer may decide' if the employer 'considers that . . . separate ballots . . . would better reflect the interests of the employees as a whole' (Schedule 2, para. 2(a)). The employer is the judge of employees' interests: a unitary perspective with a vengeance!

Employer-dominated consultative bodies may weaken or displace trade union organization (Moore *et al*. 2004: 82) and in some cases provide the foundation for new staff associations — non-independent trade unions — to the detriment of statutory recognition applications by independent trade unions (Hall, M. 2002: 14).[9] The managerial prerogative will not be reduced or constrained; if anything, it will gain a new legitimacy. At most, some consultative bodies will be sites of contestation.

The Labour government defended the UK state's position (i.e. it defended the position established by the Conservative government) in the *Wilson and Palmer* case at the European Court of Human Rights (ECHR). It lost decisively.[10] The issue was whether or not the denial of pay increases to employees who had refused to sign new contracts of employment that removed pay from collective bargaining constituted anti-union discrimination. A succession of hearings in the UK had concluded with the House of Lords' judgment in 1995, which rejected the applicants' case. The Conservative government had intervened after the Court of Appeal's judgment in favour of the workers with the so-called Ullswater amendment[11] (to what became the Trade Union Reform and Employment Rights Act 1993), which prevented a legal challenge if the employer's purpose was to further a change in its relationship with employees (Ewing 2000b). The ECHR rejected both the 1993 Act and the Law Lords' judgment as a violation of Article 11 of the European Convention on Human Rights (Schedule 1 of the Human Rights Act 1998) as regards both the individual applicants and their trade unions.

The government responded in minimalist fashion (Bogg 2005: 72–5). For example, section 29 of the ERA 2004 gives workers the right not to be made offers to induce them not to be or seek to become members of independent trade unions, to take part in their activities (at the appropriate time), or to make use of their services. The definition of the latter expressly excludes both union representation (ignoring the Court's judgment)[12] and collective bargaining. Workers who are members of recognized and independent trade unions have the right not to be made offers which, as the employer's 'sole or main purpose', have the prohibited result that the workers' terms of

employment 'will no longer be determined by collective agreement negotiated by or on behalf of the union'. This is intended to permit employers to make offers to workers to derogate from collective agreements where the sole or main purpose is not to exclude a trade union's role in collective bargaining — 'a striking continuity with New Right perspectives' (*ibid.*: 74). Wedderburn (2004b, Appendix 2: 24–35), in a powerful critique of this part of ERA 2004 and its justification by the DTI (2004: 4–10), has argued that in its denial of a cause of action to a trade union (in addition to a worker), the motive of sole or main purpose in employers' offers, the narrow view of 'offers', and the restriction of certain rights to recognized trade unions, the Act fails to implement the ECHR's judgment. He accuses the government of attempting to introduce in the statute those legal positions that were rejected by the Court.

4. Employment protection

New Labour has improved employment protection in established areas such as unfair dismissal and discrimination, and has extended it to encompass new areas such as the national minimum wage, working time, family leave, part-time workers and fixed-term employees. At every point, however, the government has been receptive to lobbying by the CBI (e.g. its campaign against the 'compensation culture') and the Institute of Directors, so that new rights, whether of domestic or EC origin, have been introduced in a minimalist fashion. Their enforcement, in terms of knowledge, access and sanctions, remains an issue.

The reduction of the qualifying period for unfair dismissal to one year since 1 June 1999 and the increase in compensation, which is index-linked (ERA 1999 s. 34), were both significant measures. However, the formula for the basic award remains low, based upon gross pay capped at £290 a week from 1 February 2006, which for male employees is half of its real value when first established in 1976. The median award for unfair dismissal in 2004–2005 was £3,476 (Incomes Data Services 2005: 18) — a weak sanction, apart from the difficulty some applicants have in obtaining payment.

The right not to be unfairly dismissed has been diluted in three major ways by Part 3 of the EA 2002 (implemented since 1 October 2004). This was justified by empirical research stripped of all its caveats in order to support the government's case (DTI 2001: 8, para. 2.6; Hepple and Morris 2002: 251–3). The TUC's protests were ignored (TUC 2001b), as were those of others, such as the President of the Employment Tribunals for England and Wales (Prophet 2002). First, the new statutory standard and modified dismissal and disciplinary procedures, broad in conception but minimalist in their requirements, 'are so rudimentary in nature that they afford little protection to employees' (Hepple and Morris 2002: 255) and 'fall significantly short of the requirements of the current . . . ACAS Code and of the standards of reasonableness developed by tribunals' (*ibid.*: 259). Any employer that does not

follow the statutory procedures is open to a claim of unfair dismissal, with the remedy of four weeks' basic pay in compensation (s. 34(6)) — hardly an impressive sanction; under specific circumstances the compensatory award may be increased by a maximum of 50 per cent (s. 31(3)). Second, except in specified circumstances, claims to an employment tribunal are permitted only after the statutory procedures have been exhausted (a more complex claim form has been introduced). Third, s. 34(2) of the Act (inserting a new section 98A in the Employment Rights Act 1996) reverses *Polkey v. A. E. Dayton Services*,[13] which required employers to act reasonably in their use of procedure (i.e. in most cases to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures) at the *time* of dismissal. A decision to dismiss shall not 'by itself [make] the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure'. For Judge Prophet this is a 'potentially disastrous clause' (2002: 11, para. 11), while for Collins 'The potential width of this exception should not be underestimated' (2004: 48–9).

In spite of government declarations (DTI 2003b: 19, para. 37), it is not clear how the ACAS Code and case law can impose a higher procedural standard than the statutory procedures in an unfair dismissal claim,[14] although the test of a reasonable employer (whose action will fall within the range of reasonable responses) remains (see Deakin and Morris 2005: 495–6).[15] Henceforth an employer defending a dismissal may argue that adherence to a procedure above the statutory minimum or the ACAS Code would not have led to a different outcome (Hepple and Morris 2002: 263–5). Tribunal claimants face a very real fear of costs being awarded against them. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 raised the maximum award by an employment tribunal from £500 to £10,000, and the Employment Tribunal Regulations 2004 (under ss. 22–3 EA 2002) permit non-legal preparation costs to be awarded in specific circumstances.[16] There is evidence that some employers' legal representatives use this fear to obtain the abandonment of claims, especially those of claimants without representation (Citizens' Advice 2004).

For Pollert (2005: 237) the 'vulnerability of the majority of unorganised workers does not register in . . . [New Labour's] thinking or its programme.' Another route was open, given that evidence shows that trade union presence reduces claims to employment tribunals (Colling 2004: 557), but this would have had consequences unacceptable to employers and the government. Although the overall number of claims has fallen (McMullen 2005: 116–17) the CBI (2005) remains dissatisfied, and is demanding simpler rules for tribunal applications, charges and an increased number of costs' awards.

The EA 2002 (Dispute Resolution) Regulations 2004 specify that disputes involving more than one employee may be raised by representatives of independent and recognized trade unions *or* any elected or appointed employee representatives who have 'the authority to represent employees of that description under an established procedure for resolving grievances agreed between employee representatives and the employer' (reg. 9(2)). An

unrecognized, independent trade union is excluded although it may arrange for one of its officials to accompany an individual in a contractual grievance or disciplinary issue (ERA 1999 s. 10). Thus the equality between independent trade unions and staff associations or similar bodies is re-affirmed and any path to *de facto* union recognition is again prevented.

Perhaps the most vivid example of the Labour government's minimalist strategy with regard to EC legislation is its implementation of the Working Time Directives (93/104/EC and 2003/88/EC). The Working Time Regulations 1998 took every opportunity to minimize the impact of the maximum working week of 48 hours — exemption for all workers in specific sectors and occupations and those on unmeasured working time; flexible time-periods for the calculation of hours; and derogation from the 48-hour week by collective or workforce agreements (the latter made by workers not represented by an independent and recognized trade union), and individual choice (Barnard 1999, 2000). The most recent study of the Regulations' impact noted the absence of collectively agreed derogations, the prevalence of individual derogation, and the pressure exerted on some workers to agree to this (Barnard *et al*. 2003: 231–52). It concluded that the 'Directive has yet to have a significant impact on employment relations in the UK' (*ibid*.: 251). The only exception is the statutory right to payment for holidays (even here compliance had to be enforced by legal action[17]), although its impact in small companies and casual employment may be doubted. The Labour government is content with the working of the regulations and has opposed the European Commission's proposals for safeguards that regulate, but do not abolish individual derogation (Hobbs and Njoya 2005: 308–13). Trade unions have made similar charges in relation to the Road Transport Directive (2002/15/EC), implemented by the Road Transport (Working Time) Regulations since 1 April 2005, defining drivers' hours, that is, its impact has been minimal as a result of the wording of the regulations.

This critique can be extended to many of the new employment rights implemented by Labour governments since 1997. Although the national minimum wage has improved the position of the very lowest-paid workers, its impact has been reduced by its level and difficulties in enforcement in some sectors (Dickens and Manning 2003). Various strategies have been used to transpose EC Directives on atypical workers (part-time and fixed-term) in the most dilute form (Kilpatrick 2003: 150–60). McColgan (2000a: 267) concluded that the scope of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 'is so narrow and their protections so few' that embedded disadvantage will continue. The first tranche of family-friendly policies, although establishing new principles in the face of CBI opposition, were minimalist in design (McColgan 2000b: 142). Other new rights, such as changes to the law on disability discrimination (first introduced by the Conservative government's Disability Discrimination Act 1995), and the new legislation against discrimination on grounds of sexual orientation and religion or belief, have their origins in the EC's requirement of equal treatment as a social right and a labour-market resource.

5. Conclusion

In nine years of government, New Labour has developed a distinctive form of neoliberalism in which Conservative legislation on trade unions and industrial action has been integrated within a more subtle discourse of social partnership and collective and individual rights, and carefully defined intervention in the labour market and the employment relationship is designed to promote efficiency. Reality is less subtle. The UK remains in open disregard of international standards on workers' rights to organize and take industrial action (Ewing and Hendy 2004). The right to picket is restricted and regulated,[18] and is vulnerable to legislation on antisocial behaviour and harassment. No major shift in policy is contemplated: the programme of employment law reform agreed at the Labour Party's policy forum — the Warwick agreement (*Labour Research*, January 2005: 9–12) — contains no commitment to trade union autonomy or ILO standards (Ewing 2005: 2). Employment rights are diluted by their limited scope, difficulty in access and weak sanctions. The European social model has arrived in the UK as a shadow of its original pretensions. The resurgence of the managerial prerogative, which so characterized the 1990s (Brown *et al*. 1998), has continued. Regulation has been infused by a deregulatory ethos (Hall 2003: 14), which has left the UK with 'a more lightly regulated labour market than most comparable economies' (House of Commons 2005: 1).

The statutory recognition procedure has been a diversion for trade unions. It enshrines their illegitimacy:[19] they are only to be accorded limited rights under strict conditions. Trade union organization and collective bargaining has retreated since 1980, especially in the private sector where the percentage of workplaces covered by collective bargaining fell from 17 per cent in 1998 to 11 per cent in 2004 (Kersley *et al*. 2005: 20). Even where collective bargaining remains, there has been a shift to 'consultative arrangements that are less dependent than in the past upon the potential for collective worker action' (Oxenbridge *et al*. 2003: 331). Partnership agreements similarly entrench employers' power: one study concluded that the outcome 'is constrained mutuality with the balance of advantage, in terms of principles endorsed and practices in place, leaning heavily towards management' (Guest and Peccei 2004: 231); another refers to 'employer-dominant' agreements (Kelly 2004). The new information and consultation procedures create a potential framework for the incorporation of labour within the market imperatives of employing organizations.

Given the asymmetry within the employment relationship, only workers' collective power can counter the power of employers and give substance to statutory employment rights and 'reflexive' law (Hobbs and Njoya 2005: 298). 'History shows how hard it is to reintroduce shared assumptions once they are driven off the agenda' (Wedderburn 1991a: 225), but the dismissal of Gate Gourmet workers in August 2005, and the solidarity action taken by British Airways workers, have dramatically raised the issues of workers' liberty to take industrial action and to organize. The challenge is to reintroduce the

essence of collective *laissez-faire*, conceived as 'a particular type or quality of law, one which put a premium on protecting autonomous collective bargaining and which necessarily, therefore, demanded areas of liberty for trade unions' (Wedderburn 1995: 24). This requires the exclusion of the judiciary 'from certain areas of industrial life' and 'an antidote . . . [to the] poison which the common law brings to its treatment of trade unions and industrial action' (Wedderburn 1991b: 94, 95). But to create a liberty for workers to organize a new step is required, one that establishes a statutory *right* of trade unions to have access to, and assemble at, the workplace. In 1983 Wedderburn and Clark (1983: 218) argued that 'It might be preferable for British trade unions . . . to concentrate upon a legal right of "presence" and "audience" for trade union representatives; that might be a legal prop in the face of an intransigent employer.'[20] This would avoid the complexity and restrictiveness of the statutory union-recognition procedure. Inter-union competition is of course a real difficulty, although it does not invalidate the argument (and has been reduced by the amalgamation movement). The widespread and embedded hostility to anything other than a narrow role for trade unions (see Coats 2005) means that a campaign to restore and entrench trade unions' liberties will be long and arduous.

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Notes

1. Guest and Peccei's 'hybrid' category (2004: 210–11), which combines both pluralist and unitary assumptions, is too generous.
2. Figures taken from the *Annual Reports of the Certification Officer*. The lower figure for 2004 is the result of a number of large trade unions removing lapsed members from their annual returns.
3. The Certification Officer, David Cockburn, reported 'that a number of enquiries . . . about the formation of new trade unions have come from human resource departments' (2004: 123).
4. *NUJ and Sports Division: MGN Ltd*, TUR1/307/2003; *R (NUJ) v. CAC* [2005] ICR 493, QBD, upheld by the Court of Appeal in *R (NUJ) v. CAC* [2006] IRLR 53. For the exclusion of the Offshore Industry Liaison Committee, see Offshore

Industry Liaison Committee and Wood Group Engineering (North Sea) Ltd TUR1/282/2003, discussed in Woolfson and Beck (2004).

5. *Secretan v. Hart* (Inspector of Taxes) [1969] 1 WLR 1599, ChD, per Buckley, J. at p. 1603F. Deakin and Morris (2005: 842) argue that collective bargaining is excluded from the scope of money or money's worth.
6. Overturning *UNIFI v. Bank of Nigeria* [2001] IRLR 712, CAC.
7. Allowing less discretion to the CAC; see TGWU and Kwik-Fit TUR/126/2001; and *R. v. CAC ex parte Kwik-Fit (GB) Ltd* [2002] IRLR 395, CA.
8. UCATT was compelled to pay £130,458 in damages plus costs for losses incurred in a two-week strike because it had given the employer erroneous information on the members to be balloted: *Willerby Homes v. UCATT* [2003] EWHC 2608.
9. The decision in *TGWU and Jordan (Cereals) Ltd*, TUR1/258 [2003] has established guidelines that an employer must follow in order for a staff association to be judged capable of concluding a collective agreement.
10. *Wilson and NUJ, Palmer, Wyeth and RMT v. United Kingdom* (2002) 35 EHRR 523, [2002] IRLR 568.
11. S. 148(3) Trade Union and Labour Relations (Consolidation) Act 1992.
12. 'The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members', *Wilson and Palmer v. United Kingdom* [2002] IRLR 568 at para. 44.
13. *Polkey v. A. E. Dayton Services* [1988] ICR 142, HL.
14. See the contrasting views on the relevance of the ACAS Code in *Lock v. Cardiff Railway Co.* [1998] IRLR 358, EAT, at paras 11–12, 16–17, 20 (Morison J.), and *Beedell v. West Ferry Printers Ltd* [2000] IRLR 650, EAT, at paras 97–102 (Clark, J.).
15. *Iceland Frozen Foods Ltd v. Jones* [1982] IRLR 439, EAT, applied in *Post Office v. Foley*; *HSBC v. Madden* [2000] ICR 1283, CA, and now *Sainsbury Supermarkets Ltd v. Hitt* [2003] IRLR 23, CA. See Freer (1998) for a critique of this test.
16. In *Routes to Resolution*, the DTI proposed moves to full-cost regime, as in the civil courts (DTI 2001: 31, para. 5.11).
17. *R. v. Secretary of State for Trade and Industry ex parte BECTU* [2001] IRLR 560, ECJ.
18. *Gate Gourmet London Ltd v. TGWU and Others* [2005] IRLR 881, QBD.
19. *Boddington v. Lawton* [1994] ICR 478, ChD.
20. Wedderburn and Clarke (1983: 218) suggest a 'joint union representative committee'.

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