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Policy Study No 127

TOWARDS AN EMPLOYEE'S CHARTER

and away from collective bargaining

Nicholas Finney & Graham Brady

CENTRE FOR POLICY STUDIES

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52 Rochester Row, London, SW1P 1JU

1991

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Acknowledgements

The authors gratefully acknowledge encouragement and help from Charles Hanson, Lecturer in Economics at Newcastle University; Professor Cyril Grunfeld; Professor Ben Roberts; David Widdowson at Hill Taylor Dickinson; and Oliver Knox, Jenny Nicholson and David Willetts at the CPS.

ISBN 1-870265-85-8

Centre for Policy Studies, October 1991

Printed in England by Chameleon Press Ltd
5-25 Burr Road, London SW18

Preface

After more than ten years of employment law reform it is not surprising that some are now calling for a halt to the process. But the Government have refused to listen to these siren voices and instead have recently recommended further changes in their Green Paper *Industrial Relations in the 1990s*.

It is much to be hoped that the views put forward by Nicholas Finney and Graham Brady in this thoughtful paper will be taken seriously by the Secretary of State for Employment and his officials. In particular, the authors make a strong case for giving more emphasis to the individual contract. In theory, at least, this has always been at the heart of the employment relationship, and in the changing conditions of the 1990s it is desirable that the law should encourage a closer identity between theory and practice. This would involve some reform of the statutory terms of reference for ACAS, which were drawn up when collectivism was running rampant in the 1970s.

The authors have made an interesting contribution to the debate about the future of employment relations/human resource management in Britain. We should be grateful to them for stimulating us to think again about these important issues.

Charles Hanson
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Introduction

The 1991 Green Paper *Industrial Relations in the 1990s* proposes a further shift of power away from the Trade Union itself and toward the individual trade union member. The principal purpose of any legislation will be to avoid -- or at least to control -- strikes in essential services, to the benefit of the rest of the public.

Whilst thoroughly endorsing many (if not most) of the recommendations of the Green Paper, this pamphlet addresses one issue of great contention. This is the question of the proposed steps to make collective agreements legally enforceable. It would act contrary to the Green Paper's other recommendations; would indeed tend to reverse the industrial relations policies which have been so successful over the last twelve years.

The Government should be careful not to risk *strengthening* the out-dated structures of collective bargaining -- which it would do if it gave them a new footing in law -- but should encourage moves toward individual bargaining. More reliance should be placed on the individual contract of employment instead of collective agreements.

Only five years ago the Director-General of the Confederation of Australian Industry found it possible to say:

> The notion that industrial relations should be a matter for the individual employer and the individual employee is one which strikes many responsive chords but it is so far removed from reality that it is a dangerous distraction.[1]

It is sad to say, but this remark might well have been made by

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1. Bryan Noakes. Reported in *Arbitration in Contempt*, HR Nichols Society, Melbourne 1986.

a British industrialist today. It is high time that a genuine individual employment relationship, governed by contract, became something more than a legal fiction.

1.

The individual contract of employment: an employee's charter

The 1975 Employment Protection Act laid down a statutory requirement for an employer to give a written statement to every employee, setting down the main terms and conditions of his employment. This contract, which should be at the core of the employee's relationship with his employer, has been gradually weakened.

As Arthur Shenfield wrote five years ago:

> Thus is illustrated the difference between human relationships based on contract and those based on status. It was once well understood that the progress of a free and civilised order lay forward from status to contract. It is a deplorable feature of our times that the thrust of much modern social and economic legislation is backward to the primitive principle of status.[2]

The most damaging blow to the employment contract is dealt by the legal device of 'incorporation'. By inserting a phrase such as 'subject to national or industry agreements currently in force', the terms of some quite other agreement are directly incorporated into the employment contract. A contract which governs the legal relationship in the workplace is therefore variable by the employer and a trade union at a few strokes of the pen with no reference to the employee.

The myth, of course, is that trade unions represent employees incapable of representing themselves. The case against this myth must begin with the fact that the law upholds the sanctity of the individual employment contract. Just how far it does so is shown

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2. *What Right to Strike?*, IEA Hobart Paper 106 (1986).

by the recent High Court judgment in Alexander and Others v. Standard Telephones and Cables[3]. It made it plain that the court was reluctant to accept incorporation of terms except where the contract gave sufficient indication that it was the *intention* of the parties to incorporate.

> The relevant contract is between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from other available material, including collective agreements.
>
> ... Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract.

A written contract; keeping the employee informed

The best way to strengthen the individual employment contract is to require that it should be more explicit. If it was required that all material terms of the contract were to be set out in the written statement which must already be issued to employees (under the Employment Protection Consolidation Act 1978), a court would less often need recourse to collective agreements in order to ascertain the intentions of the parties.

A written statement which is sufficiently detailed would therefore become in effect, a written *contract* (at least, once there

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3. *1990 ILR 55*, High Court, Queen's Bench Division, May 25 1991.

was evidence that the employee had acquiesced to the terms in the statement). Ideally, the acceptance of the contract might be by means of some affirmative act, for instance signing the statement when issued.[4]

Legislation should at the very least be enacted requiring the employee to be informed in writing of any material change in his terms and conditions of employment which followed from incorporation of a collective agreement. Failure to inform the employee would render the change void, on the presumption that he could not have assented to new terms of which he did not know.

Where terms are intended to be directly incorporated from a national or industry agreement, this must be made clear to all employees, especially new ones. The employee's attention should also be drawn to the avenues through which he might object to the collective agreements, and he should be told which trade unions and employers' bodies were involved in their drafting.

It would be more consonant with the Government's policies -- and altogether better for everyone concerned -- if the aim was to strengthen individual contracts, rather than to let legally enforceable collective bargaining become the norm.

Reform of ACAS

It is remarkable that ACAS continues to operate under the same statutory terms of reference as at its foundation in 1975, at the height of the Labour Government's corporatism. Under these terms ACAS is charged with the duty of 'encouraging the extension of collective bargaining and the development and where necessary reform, of collective bargaining machinery.' Thus since 1979 a statutory body has been required in effect to promote policies wholly out of tune with those of the Conservative Government.

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4. Gascol Conversions v. Mercer [1974], IPLR 155.

In 1987 Tony Baldry MP introduced a Private Member's Bill with the support of the Institute of Directors, proposing a change in the statutory terms of ACAS. Charles Hanson has also made the case for amending the terms of reference in his recent book *Taming the Trade Unions*[5]. The ACAS rules come up for review in 1992, and it is clearly important to address this anomaly.

ACAS[6] should be completely recast with new terms of reference and a new name. Rechristened (for instance) the Employment and Conciliation Service, it could perform a useful role promoting and advising upon contractually based arrangements between employer and employee, and encouraging locally and individually based bargaining.

The Employment and Conciliation Service might have as its first task drawing up a code of practice for employers, setting out a stringent standard for those terms which should appear in all contracts and for those which definitely should not.

Giving Industrial Tribunals an enhanced rôle

In order to make the individual contract of employment more appealing, access to legal remedies should be made easier -- perhaps by giving industrial tribunals greater powers to deal with contractual questions in employment and simple breaches. Their brief already includes quite complex cases of dismissal and discrimination. Very often in an IT hearing there is debate on the substance of contract terms. As the law stands, they have no power to remedy breaches of contract; and for the employee remedy through the Courts is more intimidating, potentially far more expensive and consequently much less likely to be pursued.

Better rights of information

These important reforms of the law and structures which govern the relationship between the individual and the collective bargain

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5. Macmillan and Adam Smith Insitute, June 1991.

6. It is interesting to note that cases referred to ACAS for arbitration have declined significantly since 1979. See Table III.

the individual to have adequate information. The Employment Protection Consolidation Act of 1978 should be overhauled.

Trade Union rights to information for collective bargaining purposes (Section 17 Employment Protection Act 1975), and to consultation on the transfer of an undertaking[7] should be replaced with duties for the employer to inform and consult with his employees. If the workforce chooses to negotiate through a trade union, that is fair enough, but this should not negate the need for proper information to be given to those who are to be bound by the employment contract.

Similarly, a number of other provisions for consultation on redundancies, on Health and Safety issues, on pensions and on financial performance should be consolidated into a provision requiring such information to be set out clearly, in contractual terms and in a form which is regularly updated.

All these obligations to inform the employee should be backed up by effective sanctions for failure to comply.

The development and enhancement of the status of the individual employment contract would be a better way to reform the voluntarist framework of employment in Britain, than any attempt to stifle collective bargaining by making its consequences unbearable.

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7. Regulation 10, *Transfer of Undertakings Regulations, 1981.*

2.

Drawbacks of national collective bargaining

Over the last decade, six Acts of Parliament have reduced Trade Union immunities and increased rights of individual employees.

This shift of focus from trade union rights to individual rights has helped to cut the number of working days lost through industrial action -- under two million in 1989/90 compared to over 29 million in 1978/90 (see Table 1). It has also encouraged inward investment. For example, in the six years to September 1990, such investment from Japan alone totalled nearly $8 billion compared to $18 billion in the forty years since 1951.

Yet the sad fact is that, despite this background, we have failed to control our unit labour costs, which are still rising faster than those of our principal industrial competitors.

National collective bargaining -- whether at industry or company level -- which has dominated employment relationships for over a century, lies at the heart of this problem. It slows down response to change, builds in rigidities of attitude and limits the reward of individual performance. Since the dramatic improvement in days lost in strikes is not reflected in the operation of the labour market, the vast and antiquated machinery of national collective bargaining should be overhauled with greater urgency.

Professor W H Hutt[8] has long claimed that collective bargaining is based on the flawed theory that labour has an 'inherent disadvantage' which can be overcome only by exercising the power of combination. Whatever may have been thought of

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8. W.H. Hutt, *Theory of Collective Bargaining 1930-75*, IEA, 1975.

collective bargaining in the last century[9] the fact is that it has always been hard to counter the charges laid against the Unions in its pursuit: 'exclusivity'; monopolistic power, protection for members of the combination (but not for those outside it). Then as now, the strike weapon damaged the livelihoods of innocent families unconnected with the dispute - and yet the myth is still widespread that the aims of the few justify the means which are so damaging to the many.

In any event Peter Drucker, a leading American writer on management, claims that labour has already won the battle with capital for the lion's share of GDP.

> There can be no more 'more' when the labour share of gross national product in Western developed countries is around 90%, and in some countries such as Holland close to 100%.[10]

But the fight to maintain -- and even enhance -- the collective bargaining process runs clearly counter to the direction of recent techno-economic developments. We are now moving into an ever more concentrated techno-economic phase which favours flexible specialisation[11] as a company-level strategy of 'permanent innovation'. It is a strategy which seeks to accommodate ceaseless change rather than to control it. If this is right, collective bargaining in its present monolithic form is doomed anyway.

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9. Advantages of collective bargaining were sometimes extolled even by employers. For example, Sir Archibald Alison speaking in 1860 of the Glasgow cotton spinners' strike said, 'without combinations, competition would force wages down and workers would be reduced to the condition of serfs in Russia or the Ryots of Hindustan'.

10. Drucker P., *Innovation and Entrepreneurship*, Harper and Row, New York 1985, p.181. (Courtesy of Michael Cave and Mike Duffy in *Labour, Prosperity and the Nineties*, The Federation Press 1991, New South Wales).

11. Flexible specialisation may be defined as the adoption of 'flexible multi-use equipment; skilled workers; and the creation though politics of an industrial community that restricts the forms of competition to those favouring innovation'. (MJ Piore and CF Sabel, *The Second International Divide; Possibilities for Prosperity*, Basic Books, New York 1984, p.17.)

Through these and other means the trade unions' power in Britain to coerce by indiscriminate use of the strike weapon, has now been largely contained. But that must be looked upon only as a start. Against this background the recent Green Paper deserves careful study. It proposes a shift away from the presumption that collective agreements are intended not to be binding in law. In the Industrial Relations Act 1971, a similar provision was enacted. Without exception, the parties, employers and trade unions alike, declined the opportunity to be bound by collective agreements and voluntarily signed exclusion clauses known as TINALEA ('This is not a legally enforceable agreement'). Why does the Government now think this shift desirable?

It may be that American and Japanese investors, accustomed to legally binding collective agreements and having little understanding of the British system, have been making representations to the Government. If so, they should be resisted.

If history is any guide, negotiators on both sides would prefer to retain the freedom to withdraw from agreements without facing legal action. And surely any move to *force* employers and unions against their will to conclude binding agreements would be highly contentious -- from the point of view both of civil liberty, and of the apparent return to the days of intervention and corporatism.

Enoch Powell put the case against enforceable collective bargaining succinctly, over a quarter a century ago:-

> I sometimes hear the suggestion made, even in the Conservative Party, that one would wish to see the official, responsible Trade Union leaders encouraged and strengthened, given the power to make binding contracts on behalf of their members, and placed under liability to penalties if their members break them. This would be the diametrically wrong direction in which to move. It would entrench and give legal sanction to collective price-fixing itself, which is the essential economic evil. But there are more objections than on

> economic grounds alone: there are also grave political objections. If unions are to deliver a stipulated quantity, and presumably quality, of labour at a stipulated price, then they would need to be endowed with disciplinary powers over their members, in order to secure the performance of the contract: the members would have to be subject, beside the general law, to a kind of private law or code ... the idea would carry us far down the road to the fascist, corporate state, where the economic life and decisions of the individual are regulated by corporations of employers and unions.[12]

The proposed dalliance with enforceable collective agreements can perhaps be looked on as a governmental finesse. It appears to conform with the direction of *dirigiste* continental employment policy -- while silently presuming that British businessmen would have more sense than to indulge in collective bargaining if they knew a union could take them to court to enforce its provisions. So all collective bargaining would cease, all its antediluvian structures tumble.

But what if it didn't? Massive inertia weighs against any change in the management of the labour market. A great many workers in both the private and the public sector are employed subject to lengthy national agreements. Each agreement will have built up its own 'case law' over the years. It is likely that most personnel managers and most Trade Union leaders would continue to negotiate collective agreements, regardless of the changed legal status of such agreements.

Employers would find themselves suddenly bound by legal obligations whichever way they turned. Far from being dead and buried, the collective bargain would return from the grave alive and well, supported and enforced by the law. Few employers believe that their businesses would benefit by being embroiled in

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12. *A Nation Not Afraid*, Batsford, 1965, pp.132,3.

legal proceedings. Furthermore, legalistic wrangling over relatively minor points can all too easily lead to major disputes.

The conclusion must be that the risks inherent in strengthening collectivism greatly outweigh the hope of expunging it. This paper recommends that the Government should drop a proposal which is contrary to the British tradition of voluntarism; and will at best prove to be an irrelevance, at worst strengthen, by the hoops of law, the follies and rigidities of much collective bargaining.

The direction should be towards encouraging individual initiative, not collective enforcement. And here there is an opportunity -- curiously enough -- to build on a recent pre-drafting consultative document issued by the EC to UNICE and ETUC (the European Employers' and Trade Union organisations) on the subject of employment contracts, which has now been approved in principle[13]. It takes a first step towards the strengthening of the individual contract, by suggesting a requirement that employees be issued with proof that an employment contract or relationship exists and requiring confirmation in writing of the main terms, within two months of engagement.[14]

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13. *Form of proof of an Employment Relationship*, Com (91) 294 final.

14. *IDS European Report*, August 1991, p.8.

3.

The pay bargaining system examined

Industrial relations are still dominated by national and industry-wide institutions and agreements, particularly in the public sector. Most settlements have little to do with the real productivity of any individual labour force. This helps to explain why unit labour costs in Britain still exhibit a tendency to rise faster than those of our competitors, in spite of recessionary pressures[15].

Although we have less actual state intervention in pay bargaining than many of our European counterparts (hence our problems with the Social Charter), the ingrained approach among both employers and Trade Unions in Britain is still based on 'inflation plus', with little regard to profit or performance. Nor is it any great consolation that other European countries are continuing to use RPI as a basis for pay settlements.

There are of course other important pay bargaining factors. Not so long ago there was talk of extreme labour shortages in certain industries because of demographic factors; very many fewer young persons were entering the labour market. This had a temporary effect, particularly on retailers' wage-bills; Sainsbury's awarded a pay deal in 1989 worth up to 37% for some sixteen year olds.

Company profitability, too, enters into the argument. Trade unions can understandably claim that high profits rarely lead to above average pay increases, whereas low profits are always used to argue against them. Wider employee share ownership might go a long way towards overcoming this perceived unfairness.

In the private sector, there has been some movement away

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15. The recent announcement (CBI, August 1991) that pay settlements in the second quarter of this year had fallen from 8.5% to 6% in the previous quarter gives a modest hope for improvement, though this may be clutching at recessionary straws.

from national agreements into local company or plant bargaining -- albeit slowed by trade union entrenchment. Some examples:-

> In October 1990 Lewis's, the department store group, introduced performance-based pay in spite of threatened strike action by USDAW (the Union of Shop, Distributive and Allied workers).
>
> This year, Abbey National has created a new pay structure centred on a rating for performance in the staff appraisal. On this basis, individual pay increases can range from 0%-16.68%.
>
> In April of this year, Michelin workers at Stoke-on-Trent agreed to a self-funding, productivity based, two year pay deal.
>
> Following the '89 repeal of the Dock Labour Scheme, all national and port collective bargaining was replaced with individual employer bargaining. In the same year the Engineering Employers Federation national agreement broke down under the stresses of dealing with a claim from the unions for a reduced working week.
>
> The London Clearing Banks Association has also abandoned most forms of national bargaining.
>
> Single status and single table bargaining at Scott Ltd[16], (a subsidiary of the USA based Philadelphia Paper) were eventually imposed despite local union rejection. The company introduced an Employment Charter which sets out a useful creed for employment in the 1990s.[17]

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16. *IDS Report*, October 1990.

17. '... in our new way of working, we have to remove all the traditional barriers which have inhibited the ability of our people to work effectively and incorporate the principles of flexibility, adaptability, and interchangeability, with the only barriers being safety and the individual's natural level of capability.'

4.

The scene in the public sector

National collective bargaining is seen at its most harmful in the massive public sector. For all the years of Conservative government trying to 'roll back the frontiers of the state' more than one fifth of the labour force was, by the end of the last decade, still employed in the public sector (see Table II for international comparisons).

Adherence to a national norm makes it impossible to recruit specialist teachers in parts of Greater London. Strike tactics by the Union of Communication Workers feed off the state monopoly of the postal service (though the proposal in the Citizen's Charter to lower the minimum rate for competitors in letter delivery may bring a great improvement). Strikes, or the threat of strike action, has led to the collapse of talks about reforming and decentralising national pay bargaining in British Rail. LACSAB[18] -- dominated by Labour controlled councils -- consistently gets inflation-plus national awards with no compensating improvement in productivity. And at the recent TUC conference (September 1991) delegates unanimously voted for a motion demanding the restoration of full collective bargaining rights for teachers.

There *are* glimmers of improvement. In the Post Office, the Communications Managers Union recently agreed a new performance related pay scheme for 11,000 junior and middle managers. In the NHS, a few Health Authorities are starting to give managers much greater local control over pay and benefits, in the hope ultimately to opt out of national pay structures. The new Hospital Trusts are looking at decentralised collective bargaining arrangements. The 110,000 staff covered by the Administrative and Clerical Whiteley Council may get a new, flexible grading system. Twenty local councils have abandoned the national

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18. Local Authorities Conditions of Service Advisory Board -- now renamed Local Government Management Board.

agreement for APT&C Staff (Administrative, Professional, Technical and Clerical) -- some of whom may indeed use this freedom to grant higher pay settlements, but if they finance them through improved productivity their electors may well get better value and improvements in service.

The Government has been doing its best to set an example through reform of the pay bargaining process for the Civil Service, which has lately been experimenting with performance-based pay -- though both pay and conditions are still subject to a massive three-volume, nationally applicable Conditions of Service manual.

But on 24 July 1991, in a radical move linked to the Prime Minister's initiative on the Citizen's Charter, the Chancellor of the Exchequer announced far-reaching changes in approaches towards Civil Service pay:

> ... any organisation must be able to adapt to changing needs. The Government now want to introduce more flexible pay regimes for the civil service, both nationally and locally.
>
> The new pay system must meet the needs and objectives of departments and agencies: they must be demonstrably beneficial to the citizen, fair to the employee and linked to the delivery of high quality public service; and they must be affordable. This means developing pay structures which reward good performance and penalise bad.[19]

The Government's example should be followed in other state sectors -- if it is accompanied with greater involvement of the individual employee.

One benefit of privatisation of electricity and water, indeed, is

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19. Hansard, 24 July 1991, cols 606-607.

that it is hastening the demise of industry bargaining arrangements.

In the Electricity Supply Industry, privatisation has strained national bargaining to the limit. Tony Cooper, general secretary of the Engineers' and Managers' Association (EMA) is quoted as saying that national bargaining will break up by 1993. He said:

> When a large group of companies come together, they have great difficulty agreeing amongst themselves, never mind putting a joint proposal to unions.

But he added that if employers did not offer agreements that were as good as, if not better than, the national agreement, then it would remain.

5.

Further trade union reform

The evidence is clear that -- despite the advances of the last twelve years -- Trade Unions adversely affect growth of employment. In a recent study for the National Institute of Economic Research, it was shown how:

> Where closed shops were removed ... employment growth at 2.4% was close to the average figure of 2.6%, though well below the 6.7% growth rate in non-unionised companies.[20]

Step-by-step measures to alleviate some of the worst effects of Trade Union activity have been mapped out in the Government's recent Green Paper -- including stricter balloting procedures, and the introduction of 'at least 7 days notice of each day or other separate period of industrial action'.[21]

But the strike weapon, despite the reforms of the last decade, still clearly threatens people's freedoms and their livelihood in many sectors of the economy. This is especially true in the case of monopolies, both public and private; one should add to examples given in the last chapter British Rail, British Coal, the Civil Aviation Authority, British Gas, British Telecom and the Health Service.

The seven day cooling off period proposed in the Green Paper is too short[22]. What is vital is that consumers (and suppliers) have long enough notice -- at least 14 days -- to allow

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20. *Changes in Union Status and their Economic Effects in UK Companies in the 1980s*, Paul Gregg, Stephen Machin, Anthony Yates, National Institute of Economic Research, 1991.

21. Para 3.18, Cm 1602, *Industrial Relations in the 1990s*, 1991.

22. A powerful case for banning strikes altogether in essential services is made out in Hanson & Mather's *Striking Out Strikes*, IEA, 1988.

them to make contingency plans. Recent experience in other European countries about cooling-off and other limitations on the right to strike is instructive:-

In Italy in June 1990, the Government responded to a spate of wildcat strikes which paralysed education and the railways by introducing a new law limiting the right to strike in essential public services[23].

The main provisions of this legislation, applying to a long list of essential services, include:

* A requirement to give ten days' notice of strike action to the employer, and five days notice to the public.

* A guarantee to users of a minimum level of service.

* New regulations for *la precettazione*, the law under which employees may be ordered to turn up for work.

* The establishment of a new Commission to oversee the implementation of the new regulations, with powers to arbitrate.

* Sanctions short of dismissal, applicable to individuals as well as unions and including fines, withdrawal of paid leave and suspension.

In Germany, 2.5 million *Beamte*, or public sector workers, are prohibited from taking strike action. Even outside the essential services, a ballot must normally be

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23. IDS *European Report No 343*, July 1990.

held before a strike takes place and 75% of the membership must favour strike action, or the strike will not be legal. (At this percentage, many British strikes would never be legal.)

In **Spain**, proposals to draw up a strike law limiting action in 'essential services' are to be debated by the Government, without regard to the unions' persistent refusal to discuss the issue.[24]

The public is entitled to look to the state to protect it against the abuse of monopoly power whether exercised by capital or by labour. Just as OFTEL and the other regulatory authorities have the power to change prices charged to the consumer by a monopoly service, so should the public be fully protected against severe disruption and potential economic ruin by strikes in those services, which cannot be provided by an alternative source.

It has been argued recently that the Government has already achieved its aims of restricting strike action in essential service areas. It is claimed that the narrower trade dispute definition coupled with the outlawing of secondary action frustrates the holding of lawful strikes. Other factors quoted include the break-up of public monopolies (electricity, water) and tough balloting procedures.[25]

Yet it is still true that the powerful bargaining position of trade unions in these essential services not only forces up many pay settlements, but also risks grave damage to individuals' interests. Further legislation, therefore, should cover such essential services as: fire, health, gas, electricity, transport, refuse collection and prisons. Arguments can be made for extending the list; this paper recommends that the legislation should empower the Secretary of

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24. IDS *European Report*, August 1991.

25. Gillian Morris, Brunel University BUIRA Conference, Warwick, 1991.

State to add services to the list by means of statutory instrument, under an affirmative order.

The proposal in the *Citizen's Charter* to allow individuals the right to sue illegal strikers in the public sector should be given more teeth, and be made more accessible to the ordinary man, by the establishment for a trial period of a new legal aid fund to finance these actions. Such a fund would be very strictly limited in both size and scope -- possibly it should be as little as £1m. It is hoped that by providing such assistance appropriate test cases might be brought to demonstrate and define the new powers of the individual employee.

The argument is made that those employees whose legal position is changed by any new limits on strike action in essential services should be granted some specific compensation. But the fact is that they would lose nothing except their freedom to breach a contract into which they had freely entered and by which, one must presume, they intended to be bound. To quote Lord Devlin in Rookes v. Barnard:

> There is nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat...The object of the notice of January 10 was not to terminate the contract after due notice or otherwise but to break it by withholding labour but keeping the contract alive.[26]

Check-off

The recent Green Paper also examines 'check off', the means by which trade union dues and the political levy can be deducted automatically from the wages of an employee -- who has little opportunity to object, not least because employers often continue to make the contributions out of administrative convenience. Thus an employee may make continual donations to a political party for

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26. (1964) AC 1129.

which he would never vote. The behaviour of employers is all the stranger when (with their connivance) check-off is used by a union to collect strike funds.

Perhaps the two most serious examples of the check off system being used to collect special strike funds are: NALGO raising funds for industrial action in Local Government, and the AEWU and other trade unions raising funds in the engineering sector. The NALGO rulebook even provides for a 'reserve fund' which 'shall not be used by the Council for any purpose other than for financing strikes or other forms of industrial action'.

Even in the private sector, employers have shown a remarkable disinclination to act in their own best interests. There *should* be little need for government to stop employers from collecting funds which will be used to finance industrial action against them. Perhaps if the shareholders were aware of the practice, they would object to good purpose.

It is unacceptable, in any case, that employees should have political or strike-fund donations continued on their behalf, even after they have chosen not to contribute. This paper supports the Green Paper proposals on 'check-off' and trusts that the issue will be resolved in the next round of employment legislation.

6.

International developments and the social charter

Britain has a long tradition of voluntarism in industrial relations and trade union law. Ordinarily, both the relationship between employer and employee, and the processes of collective bargaining, are treated in English law as a matter for the parties. State intervention is minimal, restricted mostly to legislation relating to health and safety, discrimination and rights to information. Questions of working hours and levels of pay which in France, for example, are laid down by the state are left in our country to the parties to decide (with the exception of the few remaining minimum wages fixed by Wages Councils, and some restrictions on the employment of minors).

To quote a leader in *The Times* of 23 July, 1991:-

> Britain is unusual among capitalist democracies in consciously seeking a fair balance between the individual and society. Other European countries prefer the corporatist path, with individuals ceding power to the state, capital, labour or (as with the European Commission) all three to look after their interests. This tradition of individual freedom would seem to be worth preserving.

English law is concerned with industrial action in two principal circumstances only. Firstly, strikes and other forms of industrial action may constitute a breach of the individual contract of employment. In theory, an employer could bring a civil action for breach of contract against an individual employee. In practice this is not an attractive option.

> Civil actions for breach of contract against individual employees are fraught with practical difficulties and unlikely to be rewarding. The employer would have to

identify individuals concerned and, more difficult, quantify the financial loss he has sustained from each individual breach. If this is large -- as where key workers close down a factory -- damages are likely to be irrecoverable.[27]

The second legal impediment to industrial action lies in the law of tort. For many years, the Trade Unions have been protected from torts such as those of inducing a breach of contract or interference with the performance of a contract or a business.

Through a series of legislative moves, the Government has now much reduced trade union immunity from action on industrial torts; it is now confined to actions taken 'in contemplation or furtherance of a trade dispute', a definition which was itself narrowed by the 1982 Employment Act to a dispute between workers and their employer, and only granted subject to adherence to certain procedures (such as balloting) prescribed by law.

Conciliation and arbitration is entirely voluntary in Britain and ACAS has been called upon infrequently in recent years to intervene in disputes between the private parties to collective agreements. Most of its arbitration work concerns national public sector agreements (see Table 3).

There is no compulsory arbitration as in Denmark or Finland, no limits on public sector strikes as in Germany and, as yet, no compulsory notice period for industrial action, as in the US. Nor are collective agreements transferable by government fiat or the courts to whole sectors of industry as they are in Germany, Switzerland and Australia.

Such a very different legal culture and tradition would create great problems for Britain, if we had to adjust to the employment law and practice which the European Commission is seeking to

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27. Industrial Employment Law Handbook 50, July 1991, *Industrial Action*, p.11.

introduce by way of the Social Charter. The divergence between the continental legal systems and the traditional Anglo-Saxon reliance on non-binding agreements is a critical problem for the EC in attempting to implement social directives[28]. Will the impasse be resolved by imposition? Certainly the inter-governmental conference on political union is to discuss the possibility of extending majority voting to this area of law-making, thus removing the right of the British Government to veto legislation which could run clean counter to the legal and social culture of Britain. *This should be strongly resisted by the British Government.*

Having preserved an essentially voluntary system, but having also curtailed some of the worst trade union excesses, Britain must not now be forced to embrace an alien philosophy and tradition in industrial relations -- and thus jeopardise all the gains of the last twelve years. The smaller employer would suffer worst, with fewer resources to absorb bureaucracy and less ability to withstand industrial conflict; and it is to the smaller employer above all that we look for future job generation.

To take one example, in the then Federal Republic of Germany, the 1952 Works Constitution Act effectively 'banished unions from the shopfloor'[29] replacing them with works councils charged not with representing the workforce, but rather with a statutory duty to act in the best interests of the enterprise. The councils are required to encourage 'social peace' and cannot call a strike.

What it was possible to do with the nascent unions of a broken post-war Germany, could not be expected to happen in the modern United Kingdom. The proposed Works Councils would not here replace deeply entrenched trade union activity on the shop floor,

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28. In July 1991, IDS *European Report No 35* said that the May debate in the European Parliament had thrown up 'one major problem ..... the difficulty of reconciling continental legal systems with the reliance on non-binding agreements'.

29. Rob Atkinson, 'Trade Unions, Industrial Changes and the Effects of Recession in West Germany and the United Kingdom', in *Trade Unions and the Economic Crisis in the 1980s*, ed. William Brierley, Gower, 1987.

but would act in concert with the unions, and frequently be dominated by them.

The impact of the imposition of the EC's Social Charter on Britain would not be to transplant German labour relations to our shopfloors, but rather to throw us back to the destructive corporatism of the 1970s. The worst trouble is in three key areas, workers' participation (probably through a new European company directive), working hours and part-time or temporary work.

Each of the European directives trespasses on the fundamentally non-interventionist approach of English statute and common law. They seek instead to encourage and consolidate the practice and institutions of legally enforceable collective bargaining.

7.

Employee share ownership

One great virtue of employee share ownership is incontestable: if a significant proportion of a company's capital is held by employees at every level, collective bargaining, wherever it is seen to act against a company's best interests, will become less attractive. And the use of the strike weapon will generally be seen as inimical to the individual worker/shareholder.

As things stand, however, few employees hold any significant number of shares of publicly quoted companies. Even though the Government has made employee share ownership simpler, and provided some fiscal incentives, progress is slow. And the recession has made management/employee buyouts hard to achieve.

Company boards and institutional investors show little real enthusiasm for employee share ownership on any great scale. They often fear that share issues for employees merely dilutes other shareholders' equity, and that employees too often sell shares immediately on acquisition, depressing their price. Finally, many hold that individuals should not be encouraged to possess too great a financial stake in their workplace -- to which they already owe their basic livelihood.

Guidelines, some of them ambiguous and ambivalent, are issued by the Association of British Insurers (ABI) and the National Association of Pension Funds (NAPF) in relation to the issue of new shares. The Office of Fair Trading should be asked to consider whether such guidelines operate against the public interest by collectively discouraging the spread of employee share ownership -- and thus of individually based bargaining between employer and employee.

Conclusion

1. The step by step approach to labour reform has succeeded over the past decade, leading to reductions in strikes and strengthening the rights of individual trade union members.

2. The best way to build a new industrial relations framework is to strengthen the individual contract of employment, radically reforming the process of incorporation by which collective agreements can undermine the contract. An employee should be informed in writing of any material change in the terms and conditions of employment which followed from incorporation of a collective agreement.

3. A new 'Employee's Charter' would complement the new Citizen's Charter, setting out new rights to a written contract and new information rights.

4. ACAS should have its statutory terms of reference redrawn. It should be given a more limited rôle and renamed the Employment and Conciliation Service.

5. National pay bargaining operates against innovation and economic necessity. It is essential that we develop a modern, responsive and flexible framework in which pay bargains will come to reflect skill and performance, not a notional 'going rate'.

6. The introduction of legally enforceable collective agreements would risk giving rise to a more prescriptive scheme of national agreements, leading to the imposition of pay awards and greater rigidity in the market. Legal enforceability would be unlikely to discourage collective agreements, which have a weight of inertia behind them. On historical evidence it would be seen neither by employer nor employee as working to their advantage.

7. Strikes in essential services should be outlawed and a cooling

off period much greater than 7 days should be prescribed in other industries. It should be at least fourteen days.

8. Steps should be taken to prevent political and strike fund donations from being levied by employers, against the wishes of their individual employees.

9. The European Social Charter should at all costs be resisted in so far as it seeks to impose collective bargaining arrangements which are alien to our culture and experience.

10. Employee share ownership should be promoted further and the OFT should be asked to investigate whether present guidelines governing the extension of employee share ownership (managed as they are by the investment committees of both the Association of British Insurers and the National Association of Pension Funds) operate against the public interest.

11. These recommendations should be incorporated into a new Employment Consolidation Act.

TABLE I

Trade Union membership, numbers and strikes

Country	Total Labour Force	% in Trade Unions	No. of Unions	1985/87 strike days lost	No. days lost per person p.a.
Switzerland	3.3m	30%	20	-	-
Germany	28.2m	40%	18	32,000	0.001
Austria	3.4m	57%	15	10,000	0.002
Japan	60.8m	25%	101+	257,000	0.004
Netherlands	5.9m	24%	30+	62,000	0.01
Australia	7.8m	42%	300+	1,321,000	0.17
France	24.1m	10%+	141+*1	965,000	0.04
USA	121.6m	15%	87+	7,799,000	0.06
Sweden	4.4m	80%	64	401,000	0.09
Great Britain	**28.2m**	**37%**	**76**	**3,956,000**	**0.14**
Norway	2.2m	60%+	74+	372,000	0.17
Italy	24.0m	35%	3*2	4,694,000	0.19
Spain	14.7m	10%	8+	3,509,000	0.24
Denmark	2.8m	80%	94	854,000	0.31
Canada	13.2m	33%	900+	4,739,000	0.36
Finland	2.6m	80%	75+	1,031,000	0.40

*1 Figures reflect non-reporting of short local strikes.

*2 Many regional/industrial unions are organised under three National Union organisations.

NOTE: The strike figures shown in the right hand columns are reproduced from the ILO *Book of Labour Statistics*, 1989 (All the figures derive ultimately from *Labour relations in 18 countries* by Christian Bratt, a 'Swedish Employers Organisation' (SAF) publication, 1990.)

TABLE II

Public sector employment (as % of total labour force)		'No strike' legislation (or limits)
Sweden	32.0%	
Denmark	29.4%	yes
Australia	25.6%	
Norway	23.7%	yes
France	23.2%	
Great Britain	**21.6%**	
Finland	21.3%	yes
Austria	20.5%	
Belgium	20.2%	
Canada	20.0%	yes
Germany	16.1%	yes (75% majority)
The Netherlands	15.7%	yes
USA	15.6%	yes (Taft Hartley 80 days)
Italy	15.4%	
Spain	13.3%	yes
Switzerland	11.2%	
Japan	6.4%	

SOURCE: *Labour Relations in 18 Countries*, op.cit.

TABLE III

Cases referred to arbitration and mediation

(Source: ACAS Annual Reports)

Year	Number Cases Referred
1979	395
1980	322
1981	257
1982	251
1983	207
1984	202
1985	162
1986	184
1987	145
1988	138
1989	169
1990	200