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Court in a trap? Legal mobilisation by trade unions in the United Kingdom

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**Court in a trap? Legal Mobilisation by Trade Unions in the
United Kingdom.**

Trevor Colling

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Editors Foreword

The Warwick Papers in Industrial Relations series publishes the work of members of the Industrial Relations Research Unit (IRRU) and people associated with it. Papers may be of topical interest or require presentation outside the normal conventions of a journal article. A formal editorial process ensures that standards of quality and objectivity are maintained.

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The paper examines the challenges and opportunities confronting trade unions in engaging with the UK's burgeoning framework of employment law. Drawing on north American and British literature it develops a framework to analyse union initiatives which aim to use legal provisions and entitlements to mobilise members around key issues in the workplace. The framework is applied to the experience of two trade unions which have sought to blend legal mobilisation with longer established practices aimed at pressurising employers into improvements in working and employment conditions. The limitations, as well as the potential, of legal mobilisation as a tactic in unions' armoury are highlighted.

Paul Marginson

Preface

Abstract

This paper explores the idea of ‘legal mobilisation’, focusing particularly on the use of individual employment rights by unions to pressurise employers and to galvanise support amongst members for action on key workplace issues. Literature from north America suggests that the law can provide inspirational effects, crystallising a sense of injustice and highlighting the availability of redress, and radiating effects, where positive outcomes are diffused with a view to changing employer behaviour or mobilising broader groups of workers. Data from two critical case studies in the UK, however, highlight tensions in strategies of this kind. Minimal and complex statutory provision makes the law a cumbersome instrument to use in organising strategies. Legal mobilisation is likely to remain as a pragmatic tactic in specific circumstances, but more systematic adoption seems unlikely in the British context.

Introduction

Just two decades ago prominent employment lawyers in the United Kingdom were able to observe that, ‘most workers want nothing more of the law than it should leave them alone’ (Wedderburn 1986: 1). Collective bargaining has receded significantly since then and the law has come to play a much expanded role in the employment relationship, influencing the behaviour of collective actors (employers and trade unions) and establishing a broad range of statutory individual rights enforceable through the employment tribunal system. This shift is reflected in the changed pattern of employment disputes: whilst organised strike activity fell throughout the 1990s, claims to tribunals trebled. It is clear that workers are now much more reliant on the law than they once were. What role remains for unions in these processes?

This paper explores the idea of ‘legal mobilisation’, focusing particularly on the use of individual employment rights by unions to pressurise employers and to galvanise support amongst members for action on key workplace issues. This process is established in the United States, where the civil rights movement pioneered the use of legal strategies to strengthen constitutional rights. Increasingly, it has been observed too in the United Kingdom, advocated as part of broader union strategies. Current conceptions of a ‘Representation Pyramid’ (see Novitz 2002) can be traced back to Ewing’s (1990)

presentation of a three stage process toward trade union recognition. Addressing the legal difficulties in identifying the extent of worker support for negotiating rights, Ewing suggested that it could be built and demonstrated in stages. Recognising unions' expertise in individual representation (exercised perhaps through the right to be accompanied at disciplinary hearings), workers might come to desire collective voice in information and consultation, which in turn might eventually result in demand for full collective bargaining rights. Though the idea of 'mobilisation' does not appear in such conceptualisations, it is strongly implicit in the sense of progression through a hierarchy of legally endowed rights and the scope to establish and build on workers' support for unionisation: 'as a union builds up different levels of support in an enterprise so the extent of its recognition rights would enlarge: each step is a rung on the ladder to the next' (Ewing 1990: 212).

Use of the law in this way clearly offers important additional tactics to unions, particularly in circumstances where traditional power resources, in terms of bargaining power and worker solidarity, are not firmly established. The first section discusses changing union orientations toward the law as the range of statutory intervention in the employment relationship has increased. Engagement with the law has the potential to provide a firmer basis than organisational resources alone from which to address membership concerns and to persuade workers to join and to participate. This process of 'legal mobilisation' is then developed in the second section, drawing upon north American literature in this area. It is suggested that the law may play an *inspirational* role, confirming and consolidating a sense of shared grievance or aspiration amongst groups of workers and providing a belief that this can be pursued successfully. Litigation might also be used to secure *radiating effects*: that is use of the law might encourage changed behaviour by employers and/or trade union members in a way that might support trade union objectives. These beneficial effects, however, are not automatic and much turns on the ability to blend legal and organising expertise. These tensions are explored here by drawing on case study evidence from two British trade unions. After a brief description of the research methods used, the main findings reveal significant engagement with the law in terms of the resources committed and the seniority of the case authority achieved. Yet considerable scepticism about the value of litigation-based strategies is also apparent, so that any shift toward strategies of legal mobilisation are likely to remain contingent and incomplete.

Unions and the Law: Some Preliminary Observations

In examining the current orientation of unions to the legal enforcement of employment rights, it is as well to remind ourselves briefly of the extent to which law has been absent historically from industrial relations and why this was the case.

Kahn-Freund wrote famously in 1954 (p47), ‘there is perhaps no major country in the world in which the law has played a less significant role in the shaping of (management-labour relations) than in Great Britain.’ For the larger part of the twentieth century, workplace relations were regulated principally through voluntary agreements between employees and trade unions as their representatives. Legal process and the court system were deliberately absented from these processes, giving rise to the notion of ‘free collective bargaining’ or ‘collective laissez-faire’ (see Clark and Wedderburn 1987; Collins et al 2001; Hyman 2003). There were no general labour inspectorates, specialist labour courts or state bodies actively to oversee the operation of the employment relationship, much less to intervene in it¹. For the most part, the law did not prescribe the conduct of negotiations², their level or content and the resultant collective agreements were not enforceable at law. Law did not impinge either upon the scope of collective bargaining and most individual employment rights were determined and enforced solely through collective relations. As late as 1983, union pronouncements on employment law were limited principally to the demand for abolition of all restrictions on collective rights enacted by the Conservative governments in power at the time (Wilson 1986).

‘The strongly held view was that relations between employers and unions should be conducted on a voluntary basis. Our slogan was “keep the law out of industrial relations”. Then we had “negotiate don’t legislate”. These slogans reflected our view, powerfully endorsed by the Donovan Commission, that voluntary collective bargaining backed by a wide ranging immunity from the civil law was all that we needed for a powerful trade union movement.’ (Veale 2005: 1)

¹ Such a role was established in embryonic form by the Factory inspectorate at the turn of the century. Their further development was halted soon after, in favour of facilitating the organic growth of trade unions, and their role remained limited to overseeing working time and health and safety.

² Outside of the public enterprises, where the creation of collective channels was required by the nationalisation acts (Pendleton and Winterton 1993), the promotion of industry-level bargaining (Whitleyism) was developed through exhortation.

Explanations lie partly in the particular configuration of the English legal system, especially in the authority of common law and its almost inherent hostility to the encroachment of collective power on individual liberties. This though was compounded by the sociology of the legal system. Judges adjudicating employment disputes tended to rely on belief systems similar to those of the employers appearing before them, in large part because they came from the same social backgrounds (See Griffith 1985)³. As Lord Justice Scrutton observed with particular candour (quoted in Flanders 1975: 376),

‘Labour says, “Where are your impartial judges? They all move in the same circles as the employers and they are all educated and nursed in the same ideas as the employers. How can a [...] trade unionist get impartial justice?” It is very difficult sometimes to ensure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.’

The ability of such judges to interpret statute law and prioritise common law principles rendered the court system an unpredictable ally, even where legislation contained some elements of liberal intent. Between 1824 and 1906, for example, the main principles of employment regulation were gradually overhauled to expand the scope of legitimate collective representation but this process was not one of linear progress to enlightenment: ‘this period [...] saw the pendulum swing regularly back and forth between judge-made liabilities and cautious parliamentary protection’ (Wedderburn 1986: 17).

It is possible nevertheless to exaggerate this preference for organisational power over legal resources. As Flanders noted long ago (1975: 379), an instinctive attachment to autonomous union action never required, ‘a categorical rejection of compulsion or legislation when the case for either is proven.’ Whenever unions faced intractable organising difficulties, legislative strategies tended to come to the fore so that, as the Webbs noted in 1911, ‘the getting and enforcing of legislation is, historically, as much a

³ Further, Deakin and Morris (2001: 13) suggest that this orientation continues to be sustained in the current legal system: ‘the strong individualism of barristers.. and their close links with the commercial and mercantile classes may help to explain the persistence of anti-collectivist values.’

part of the trade union function as maintaining a strike' (quoted in Deakin and Wilkinson 2004: 43). From the late 1800s, the general unions pushed for a statutory 8 hour day and embryonic health and safety legislation, and improving and enforcing the Factory Acts became a key role for many unions.

'Some industries – cotton spinning, for example- are now so thoroughly guarded by Common Rules, enforced either by the factory inspector or by jointly-acting officials of the Trade Union and the Employers' Association, that no individual mill owner and no individual operative can go far in degrading the standard of life.' (Webb in Callaghan 2007: 3)

Later too, following several bouts of industrial action against low pay during the 1960s and 1970s, the National Union of Public Employees (NUPE, now part of UNISON) developed policy in favour of a statutory national minimum wage. The power of other unions more devoted to 'free collective bargaining' was gradually undermined through the 1980s and their positions began to shift. Employment in manufacturing fell by one third during that period (Howell 1996: 516) and organisations like the Transport and General Workers Union (TGWU), the Amalgamated Engineering and Electrical Union (AEEU), and the Union of Construction Allied Trades and Technicians (UCATT) lost over half of their members (Waddington and Whitson 1995).

In this unremittingly hostile environment, the Trades Union Congress (TUC) looked increasingly to the European Union for legislative levers to use in retaining influence in workplaces (see Colling and Dickens 1998; 2001; Monks 1992). The raft of individual employment rights expanded significantly during this period, particularly in the important anti-discrimination jurisdictions (Dickens 1997). A variety of legal gambits emerged against this backdrop, the common element of which was an attempt by unions to use the law to progress from individual rights manifest as statutory entitlements towards collective representation, organisation, and action.

'By embracing the law UK unions are trying to out-manoeuvre the approach of the Conservative government. It is envisaged that through a platform of individual worker rights opportunities will arise for unions to represent and

enforce workers' rights, even where employers do not concede union recognition.' (Waddington 1995: 40)

Some of this activity was tactical or opportunistic. Many unions, for example, were quick to use anti-discrimination legislation to bolster their position at the negotiating table (see Colling and Dickens 1998; 2001; Thornley 2006). Often in these cases the law played ultimately an auxiliary role, supporting conventional demands in existing bargaining relationships: 'by and large, unions use the legislation in order to force employers to the bargaining table... rather than simply to win cases' (Howell 1996: 533).

Increasingly however, use of the law by unions became more formal and strategic: formal in the sense of being enshrined explicitly in policy documentation and strategic in the sense that it might support organising objectives beyond the reach of existing memberships or bargaining relationships. Ewing's ideas (1990, outlined above), about the deliberative, stage-by-stage construction of support of recognition via union roles in individual representation and collective consultation, came to inform TUC policy; a booklet entitled *Your Voice at Work* developed this ladder/pyramid approach (Novitz 2002: 489) and marked a further policy departure in terms of the status of the law in union strategy.

'The rise and rise of individual litigation, much of it requested by the trade union movement either here or in Europe; the reduction in scope of the golden formula as it was qualified by a succession of Thatcher/Major employment laws; the employment laws of New Labour especially on minimum wages, recognition and unfair dismissal; the impact of the European Social Chapter; and the rise of race and gender awareness and the attendant legal rights – all these have changed the landscape.' (Veale 2005: 1)

Unions are now firmly engaged in developing and enforcing a broadened array of statutory employment rights. TUC submissions to government now routinely articulate arguments for improved legal protections: 'better employment protections have no demonstrable impacts on either employment or unemployment and moving towards the European social model will not put at risk the UK's labour market successes' (TUC

2002: 6). In 1991, unions recovered £190million in compensation from formal legal enforcement; by 2004-5, more than two and a half times as much (nearly £500million) was recovered by three unions alone (Unison, GMB and TGWU) (LRD 2005: 14). Consciously or otherwise, the law appears to have been incorporated firmly within the diminished armoury of trade unions.

Exploring ‘Legal Mobilisation’

This section identifies a process of legal mobilisation, in which unions might use legal definitions and tactics in support of their broader organising strategies. This process is more advanced in north America and it is here that much of the relevant literature has developed (see Brown-Nagin 2005: Fuller et al 2000; McCammon 2001). Fuller conceptualisation, however, requires parallel consideration of the work of British authors. This is the task of synthesis attempted here.

Civil rights groups and trade unions in the USA had to adapt to an increasingly legalistic environment and to exploit such resources as this placed at their disposal (Piore and Safford 2006). Burstein noted, for example, ‘it is in fact impossible to understand the American struggle for equal opportunity without focusing on the courts and on activities intended to influence judicial decisions’ (1991: 1204). American unions, traditionally sceptical of the value of the law, have been urged recently to use legal process, argument and procedure to influence employers and to mobilise workers behind union objectives.

‘What I advocate is using law as part of the array of actions unions are taking. In the case of law, this means a program that includes targeted litigation, the encouragement of useful research, the development of expertise in areas relevant to litigation, and the employment of creative litigation techniques.’ (Dannin 2005: 498)⁴

⁴ Equally impassioned responses have been provoked from others, less convinced by the emancipatory potential of American labor law and its practitioners. Getman finds Dannin’s arguments, ‘admirable, even touching’ (2005: 504), “I do not, however, share her hope. It is far too late in the day to fundamentally change the role of the Board or the interpretation of the NLRA.”

This north American literature highlights the growing range and power of legal remedies to workplace problems there, and the scope for unions to use them creatively, but to complete our conceptualisation of the process we must turn to a British author. The most detailed and recent exploration of mobilisation processes here is provided by Kelly (1998). The process turns on the definition of interests. Where these are perceived to be identical to those of the employer, the need for challenge does not arise. Where incongruence becomes apparent, however, workers face a series of choices. Before action of any kind is initiated, diffuse senses of dissatisfaction must crystallise into a shared perception of injustice. Leadership is critical here; those seeking to stimulate action by employers must build upon perceptions that managers have broken or gone beyond the terms of prevailing norms. Once a sense of injustice is perceived, it is necessary that this is attributed to unfair actions performed by the employer, as opposed to mistakes made by workers themselves or their representatives or forced upon the employer by uncontrollable circumstances. Finally, there are decisions to be made about the form of action that is most appropriate. Procedurally, a range of options is available, from informal individual complaints through to formal collective action. Choices between them will be proportionate to the injustice felt and subject to evaluation of which is most likely to succeed. This Kelly refers to as the *opportunity to act*.

Kelly does not give much explicit consideration to the use of law in these processes, but for writers on *legal* mobilisation potentially it intervenes at several stages. First and foremost it can help to define and crystallise the sense of injustice required before mobilisation can take place. It is commonplace to observe, for example, that gendered pay inequality often goes unnoticed by workforces until it is highlighted by formal reference to the law, often by trade unions. Second, by providing workers with a remedy to this developing sense of injustice, the law can help to influence decision-making around the *opportunity to act*. Thus, synthesising the literature on this theme, Brown-Nagin (2005: 1499) argues that the law can provide,

‘a tactic for altering perceptions and raising expectations about the prospects for change within client communities. It creates “opportunity structures” and “discursive frameworks” that can be exploited by the socially marginalized.’

Skilfully combining these two stages, unions and advocacy groups can generate *inspirational effects*, confirming injustice and providing campaigning mechanisms that promise to address it.

‘Lawyers can mobilize communities by “enhancing” a “sense of efficacy”;
providing “organizing skills and resources” and “symbols for rallying a
group”; “broadcasting awareness of grievance”; “dramatizing challenge to the
status quo”; helping laypeople “take themselves seriously” and “believe . . . in
its capabilities”; “lend[ing] an air of importance and legitimacy to what is
often a meagre group of citizens with very little political experience” (Ibid)

In turn, this provides a stepping stone to a third moment, the potential to secure *radiating effects*. That is, the ‘definition’ of unjust behaviour can be used as a basis from which to push for changed behaviour. Employers or policy makers are made aware of the unlawful nature of their actions and are invited to comply as a minimum with the requirement of the law and, beyond that, to meet the broader needs of affected groups. Equally important, particularly where employers or policy makers demonstrate reluctance to engage in this way, it can be directed at other citizens or workers, inviting them to support campaigns to rectify the now shared sense of grievance. This is the idea that implicitly underpins thinking about the escalation of expectations, from individual representation to full collective bargaining rights.

‘It seems reasonable to speculate that if trade unions are able to represent individuals in the workplace, their relevance will be clearer to employees and consequent recruitment may produce the basis for a viable recognition claim. . . . It can be argued the more confident workers feel in taking issue with employers the more, not less likely they are to join trade unions. A framework of statutory individual rights can contribute to a growth in employee confidence and collective organisation at the workplace.’ (Welch 2000: 631)

Critical in all of this is the interface between legal and organisational resources. As is clear from the preceding discussion, legal gambits alone are rarely decisive: what matters is the ability to blend legal action and collective bargaining, to shift tactically from one to the other. In the most successful episodes of legal mobilisation activists operate, “in

the shadow of the law” (McCall 1997: 692), that is, legal language and tactics are incorporated within broader campaigns of public relations exercises, political lobbying, bargaining and negotiation. This presupposes effective knowledge of the law *and* an ability to present this to groups affected by it. Often, in the contexts discussed in the north American literature, these roles are combined: since the civil rights movement, traditions of committed or social lawyering have been well established. Social movement lawyers, it is argued, have become adept at augmenting legal gambits with surrounding social campaigns.

‘Of course, litigators want to win their cases, but they do not view litigation as a “zerosum” game. These lawyers define success more broadly, in terms that cannot be captured easily, if at all, by statistical data gleaned from conventional sources such as media reports and surveys of public opinion.’
(Brown-Nagin 2005: 1499)

Of course, as might be assumed from the adversarial nature of litigation in Anglo-American societies this process does not go unchallenged and each of these processes is subject to tensions that can nullify the law’s mobilising potential.

Obstacles to Legal Mobilisation

Any *inspirational* role for the law can be undermined where rights are defined narrowly and remedies modest. In this circumstance, the law can come to play a *definitional* role, rather than an inspirational one, undermining any radical intent amongst those seeking to use it. This role has two dimensions. First, statute law and jurisprudence may be established in such a way that they are not easily understood by workers. Individual employment rights in the United Kingdom are characterised by ‘complexity and linguistic impenetrability’ (Pollert 2005: 236). Though the number of employment jurisdictions has increased, particularly since 1997, their form and the extent of protection have tended to be modest (see Dickens 2002; Dickens et al. 2005). Employers have lobbied intensively against the extension of rights and government has been receptive to such concerns, attempting to anticipate and quantify the costs to business in advance of enactment and trimming legislation accordingly. Statutory definitions of grievance in these circumstances provide limited and uncertain foundations from which to build collective action around workplace issues.

Second, movements using the law risk permitting others to define and validate grievances, rather than encouraging workers to develop their own autonomous sense of justice. Writing on current union strategies in the UK, Ewing (2005) identifies five major models of trade union action: a service function; a representation function; a regulatory function; a government function; and a public administration function. Recent public policy, he argues, has had the effect of reducing the opportunities for unions to exercise higher level functions, involving firm- or national level governance, and to confine them to servicing functions. One key manifestation of this is the growth of legal services.

‘With the retreat of the regulatory role of trade unions, trade unions thus have a role in enforcing the rules made by others, in this case Parliament. But although these are important forms of support, they are not distinctively trade union forms of support: they are not activities which are unique or unique in their effectiveness to trade unions.’ (Ewing 2005: 3)

A further difficulty in the UK arises from the ease with which *radiating effects* can be secured. This is more straightforward in the USA where legal process expressly allows for the collectivisation of individual disputes. Individual or small-group applicants may expect to be invited to join with others to form class actions, permitting the sharing or pooling of resources to a common end. If the action is at state level, it may be joined by federal government agencies. In addition, other individuals or organisations may support the legal principles at stake by filing *amicus curiae* briefs (Burstein 1991). Class action is very important for suits of this kind: it is used in nearly half of small-group applications (Burstein 1991: 1216) and its use greatly increases the chances of success at law (*Ibid*: 1221): ‘Many such combination cases are “pattern or practice” suits brought against large employers, challenging a wide range of employment practices affecting most or all employees’ (*Ibid*: 1216).

By contrast, the tribunal system in the UK is intensely individualised: ‘it has been traditional for access to justice to be restricted to those whose rights have been infringed’ (Ewing 1996: 323). By and large, that has meant a rigid demarcation between individual and collective employment law. Unions have been able to directly enforce only those rights that statute has accorded to them collectively, in relation to consultation for

example. As a corollary, cases going through the tribunal system conventionally are treated individually. To a considerable extent, this is often a legal fiction, since the individual is often, ‘a highly valuable but vulnerable ‘front person’ for litigation between collective parties on group justice issues’ (ibid). Consequently, unions and others have argued repeatedly for the right to join cases before tribunals where the collective interests of their members are at stake. These issues have been debated during the course of the current Single Equality Bill but remain unmet at present.

The third and final difficulty comes from the organisational capacities required to balance these tensions. This requires a particularly nuanced approach to blending legal and organisational resources. These capacities are of quite different orders and are potentially in tension. Brown-Nagin (2005) identifies two sets of skills integral to successful legal mobilisation: there is a need to engage with communities and a need to engage with the law in an authoritative way. There comes a point where these ‘discourses’ must merge but there are grave risks in such projects. Lawyers must present social and community issues using the language and framework of the law.

‘During this process of translating clients’ stories into legalese, as Professor Herbert Eastman explains, the “social chemistry underneath” injuries is made invisible, and “we lose the fullness of the harm done, the scale of the deprivations, the humiliation of the plaintiff class members, the damage to greater society.”’ (Brown-Nagin 2005: 1509)

Exclusive reliance on the law and on legal practitioners runs the risk of neutralising the mobilising potential of any single issue. The role of court systems, it is argued, is to interpret the intentions of legislators (embedded in statute law) and prevailing legal and social norms (embedded in common law). The consequent emphasis on constitutionalism does not readily support attempts to challenge fundamentally the existing distribution of entitlement: ‘courts can almost never be effective producers of significant social reform’ (Rosenberg in Brown-Nagin 2005: 1497).

Research Methods

This preliminary review gives rise to three broad themes in relation to the potential for legal mobilisation: the ability to secure *inspirational effects*; the ability to secure *radiating effects*; and the ability to blend legal and organising resources to these ends. These themes are explored here using data from two small but critical case studies, the National Association of Teachers in Further and Higher Education (NATFHE, now part of the Universities and Colleges Union) and Prospect.

The cases were selected on the basis of their demonstrated use of legal strategies. Both unions had developed significant case authority in key jurisdictions (see below). Moreover, the composition of their memberships provides sustained pressure for legal intervention. NATFHE organises teaching and research staffs in Further and Higher Education. Prospect's members are engineers and technical specialists in the civil service and utility industries. Consequently, both draw their members from managers, professional and associate professional occupations, the social strata most likely to use the law in employment disputes (Meager et al 2002). This membership composition also provides a basis for cautious generalisation, since professional and associate professional workers now provide almost 50 per cent of trade union members (Palmer et al 2004: 33). Finally, their shared characteristics permit focused comparison of the key research themes at issue here. Both are medium-sized unions (70,000 and 100,000 members respectively) and both have specialist legal functions with roles in managing formal enforcement through the tribunal and court system.

Fieldwork was undertaken in 2004 and involved examination of policy and case documentation the two unions findings from which were explored through a total of twelve interviews with key negotiating officers at regional and national level. Interviews focused on the extent to which the law influenced organising and bargaining activity and to identify critical cases. National officers also provided information about the broader strategic orientation of the unions and the integration of legal functions and processes within them. Perspectives on these issues were offered by legal officers who were also able to comment in detail on case management procedures. Guarantees of anonymity offered to respondents preclude the labelled attribution of quotations.

The Extent and Dynamics of Legal Mobilisation

Both unions had demonstrated preparedness to invest heavily in legal activity in ways that accord with the principles of ‘legal mobilisation’. That is, litigation was initiated often with a view to supporting collective bargaining initiatives or building membership interest and inclination to take action. One officer expressed this colourfully, “what you are trying to do is create a climate in which employers think, ‘blimey, better be careful here.’”

NATFHE had developed significant case authority around organisational restructuring in the public sector and part-time workers rights. Following incorporation of further education colleges as independent bodies in 1992, contracts of employment for college lecturers were transferred to them from local government and the new employers indicated their intentions to alter the terms and conditions of employment⁵. At the High Court, the union secured protections for collective and individual rights using *Transfer of Undertakings (Protection of Employment) Regulations* in case authority that was to last for many years. Many of the most recent examples of legal mobilisation involved employer attempts to casualise employment contracts and union objectives of recruiting amongst numerically significant groups of part-time and agency staff. This strategy was confirmed in explicit terms by one senior officer:

‘That is the very obvious one, the most stark example in HE and FE that I can think of. In some of our institutions, ...up to a third of the curriculum is being delivered by people employed as casual labour. It is building site stuff, no different. And I think amongst that membership, we have got something like 5 per cent in membership. *Very obvious that one, we can use the law to encourage membership.*’ (Emphasis added)

In *Allonby v Accrington and Rossendale College*⁶, the employer had sought to obviate the requirement to extend benefits paid to full time staff to part time workers. The college sacked 341 part time staff and required those wishing to continue their work to register with an agency and offer their services on a self-employed basis. The union contested this process through litigation and, though only partially successful at law, the

⁵ *Kenny and others v South Manchester College* (1993) IRLR 265 HCQB.

⁶ *Allonby v Accrington and Rossendale College and Others* [2004] IRLR 224 ECJ.

intention to provide a line in the sand was largely achieved: ‘we saw the end many years ago of wholesale sackings and re-employment. People like Allonby now really only provide short-term cover’.

At local level, officials reported frequent attempts to use anti-discrimination legislation to support part-time workers in particular. One case, which challenged the entry points allocated to new staff on pay spines, was conceded by the employer. The union subsequently pushed successfully to renegotiate the relevant collective agreement and to push the precedent in other branches: “she inspired at least three women that I know of to take equal pay claims.” Having represented one woman’s claim against bullying and harassment through a university’s grievance procedure, another officer simultaneously pursued the employer for damages through formal litigation and mounted a successful recruitment campaign amongst other women members in the faculty: “we had a big meeting of mainly women working in that block. It was about women and harassment, they knew this person’s case was bubbling under... We were all there, all guns blazing getting people to join.”

Prospect had augmented attempts to renegotiate devolved civil service pay systems with legal action throughout the domestic court system and on to Europe. The union had deliberately sought out a test case that ‘could basically crack the government’s pay system’. In *Cadman v The Health and Safety Executive*⁷, Prospect argued that seniority-based pay systems in the civil service had a disproportionate and adverse impact on women. Ultimately, the argument was ruled out at the ECJ, which found seniority-based systems were justified, but Prospect sought at each stage to gain the maximum bargaining advantage in support of pay reform, particularly following the initial reference from the Court of Appeal: ‘the Government and Treasury have said that they support such modernisation. They now need to put their money where their mouth is and provide the necessary funding.’⁸ In another instance, the union took action against the National Trust after the employer refused to include enhanced pension provisions in a redundancy programme, as had been made available to previous employees. After seeking negotiating rights unsuccessfully, the union supported employment tribunal

⁷ *Cadman v Health and Safety Executive* (2004) IRLR 971 EWCA; *Health and Safety Executive v Cadman* (2004) IRLR 29 EAT . *Cadman v Health and Safety Executive* C-17/05, ECJ.

⁸ Paul Noon, General Secretary, Prospect: Internal document 2004

applications by fifteen employees. The clearly stated intention was to demonstrate to potential members, and a reluctant employer, the value of meaningful collective dispute resolution supported by a trade union: ‘the staff reps kicked up a fuss about it but they didn’t know how to develop the issue. They didn’t know how to protest against a unilateral change in their terms and conditions.’ The case was contested by the employer and the union lost again in the tribunal room but its value was seen more widely, in terms of the principles at stake and the opportunity to demonstrate relevance.

‘We always knew that this was potentially difficult because the contractual position was never that clear in the first place... But from our perspective, these people felt they had been very unfairly treated. They had joined the union latterly and hadn’t had the chance early on to do that and we felt they should be supported.’

The case was used in publicity for recruitment in this organisation and other analogous ones. In the following sections, we explore tactics like this in more detail looking in turn at perceptions of inspirational effects, radiating effects and the balance between legal and organising resources. While each of these provided incentives to use the law, they also placed substantial obstacles in the way.

Inspirational vs Definitional Effects

The objective underlying many of the cases discussed above was to confirm a sense of grievance amongst members and potential members and to demonstrate union capacity to take action to remedy it. Some officers elaborated sophisticated approaches to the use of law in this way, to highlight and build upon nascent senses of injustice. One was interested in using common law principles of mutual obligation.

‘This is about control of the job... That is about, turning back on the employer and saying, “I am a nurse, you are always on at me saying you are going to report me for shoddy work. You are absolutely right. I have a duty not to work in a shoddy way. You have a duty of care to ensure that I am in an environment where I don’t do that. That means, where are the staff? Where is the training? Where is the equipment? Where is the health and safety, etc?”’

This is the sense in which use of the law might potentially be *inspirational*. It was clear, however, that many officers felt that the law did not always lend itself to use in this way. Indeed it could confine emerging senses of grievance and make it more difficult to mobilise around them. In this sense, the law performed a *definitional* role.

Two related reasons for this emerged. First, using the law to confirm and amplify a sense of grievance was beyond the capacity of many organising officers. As one put it, “many trade union officials are now becoming quasi, cheap, lower class barristers for want of a better word. And they ain’t very good at it.” To some extent the problem was one of skills and knowledge held by officers, and the organisational ability to highlight opportunities to use the law. Though many officers were familiar with aspects of the law, they knew also that regulations and case authority changed frequently and found it difficult to keep on top of developments. In both organisations, regular legal briefings were produced but these were thought insufficient in themselves to alert officers to the potential of legal initiatives.

‘I don’t know of any department in this union that actually looks at a new piece of legislation, and thinks right, how could we use that strategically from day one? I don’t think many unions do that anyway.... no-one is sitting down with the legal department and saying, ‘this is a tasty bit of legislation, lets promote it using our organising model, work out how we can support collective organisation through this, and see what it means for growth in membership. Let’s do it that way.’ There is very little of that, in my experience.’

But the broader difficulty was communicating complex legal issues to workers. The difficulties were both substantive, because most employees found the requirements and definitions within statute law difficult to understand, and procedural, because they had limited knowledge and understanding of the processes through which evidence was presented and interpreted. Often these are intertwined, as in the following case, where an officer had attempted to develop equal pay issues with a reluctant employer who refused to offer data on posts and salaries citing the Data Protection Act. Before the case could even begin, the process became bogged down in formal disclosure applications.

‘Now, do my members understand it? I am not really too worried about my members understanding it, I am even more worried about whether my non-members understand it, because that is your market. These are the people to whom you want to say, ‘we can do things like this.’ *Now if they don’t even understand the issue, the fact that you may or may not be able to something about it is irrelevant.*’ (Emphasis added)

Second, even where meaning and process are clear, officers argued that the law rarely confirms a sense of grievance but often does precisely the reverse: that is the definitions of illegitimate employer action are so narrow and conditional that they reduce the scope for mobilisation. Some expressed this in terms that echoed the strong historical preference for autonomous collective bargaining formed in the marrow of the British trade union movement: ‘there is a very clear class basis for employment law decision making.’ Another asked, ‘where does the law really help? I shouldn’t say that perhaps but it doesn’t help working people get what they should out of it. It is too weak, too flimsy. It is still far more weighed to benefit the employer in many ways.’

Older officers were able to elaborate on this perceived in-built bias with reference to the historical development of individual rights. For one, this was manifest particularly in the scope for employers to restructure workforces. The Redundancy Payments Act 1965, he argued, established a token ‘price’ to be paid by employers in the form of compensation to affected employees. As envisaged by the Donovan Report, protections against unfair dismissal did the same thing for other unilateral terminations of the employment contract.

‘Now I remember the days when, if there was a dismissal, and the group didn’t like it, they would be phoning up the union official to get them in quick, because if they didn’t get them in quick, they would all be on strike. They would all be downing tools on the basis that they weren’t going to be treated like this. Now, the phone call is likely to be to a trade union official by the individual saying, “I’ve been dismissed, I want to take them to a tribunal. How do I get your support?”’

In short, a key objective of employment law, he argued, was to legitimise employer actions according to some minimal conditions and to reduce the scope for unions to take industrial action. The ideological effect on trade unions and their members had been very powerful but had induced acquiescence amongst workforces rather than the basis for mobilisation.

Radiating Effects

For radiating effects to become apparent, use of the law must have consequential ramifications for employer behaviour or the understanding and actions of members. In the first instance, this might mean that litigation (or the threat of it) encourages employers to change course, accommodating the objectives being pursued by unions. In the second, it might encourage members to mobilise behind issues, to support the objectives of litigation through broader means including campaigning and possibly industrial action. Though such examples were evident, the law was also perceived to establish obstacles to changed behaviour of this kind.

First, use of the law by itself no longer guaranteed action of any kind from employers. Both unions perceived changes in the response to litigation they could expect from the employers they dealt with. This had been particularly marked in further education following incorporation, when colleges were removed from local authority control: “You began to see changes then, in the good old days of the LEA, they were always amenable to having a discussion and sorting something out. When you have got self-governance from the colleges, you found a different attitude emerging then on personnel issues and that became worse after incorporation.” Similar processes were evident following privatisation of organisations organised by Prospect: “with different people coming in, people with no electricity background. Certainly in HR, people coming in from (retail industry) and those sorts of groups.” Adverse publicity arising from litigation could still be effective but the potential for this was limited to one or two jurisdictions, specifically those related to discrimination, bullying and harassment. Those areas relating to termination of employment contracts, which see the bulk of employment rights litigation, carried no such social sanction and employers were increasingly willing to contest these:

‘If they think they are going to win, then they are not that worried about it. The biggest threat actually is the threat of the adverse publicity. That matters more to some employers than others.... (Some) hate it, but others say ‘so what!’’.

Even where cases were won, it was not always easy to broaden victory in the tribunal or court room across organisations. In part, this was because of the orientation of members to litigation: “we offer a confidential service. Anything you say to me will remain confidential unless you say to me otherwise. Most people don’t want their cases publicised.” But the bigger issue was the formalisation of dispute resolution, which tended to close down rather than expand the scope for negotiated outcomes. The predominant experience of litigation was a strong tendency for cases to be decided strictly on their own merits and outcomes confined to the parties immediately involved.

‘You take it to an employment tribunal – nine months later, you get a hearing. You win the case and you get damages but the damages are likely to be around £2500 to £3000. *And it has done nothing about the industrial relations in that area.*’ (Emphasis added)

For these reasons, officers were acutely aware of the need to blend legal action with membership mobilisation. The law could be used as an aid to recruitment in new employers, by using the right to be accompanied for example, but care had to be taken to ensure that the organisation was in place to support and inform any workers coming forward into membership as a consequence: “It is alright to go in there, big case, wham bam we’re in. But what are you doing to sustain it, that is my worry.”

The difficulty here was that, far from stimulating action by employees, use of the law could easily have the opposite effect. As one officer put it, “the idea, ‘oh look the union is taking our employers on,’ it just induces passivity amongst the membership”. Officers in both unions involved in the campaigns described above doubted their ultimate impact on the union’s broader recruitment and organising objectives.

‘Well, (the National Trust case) has been used in publicity for recruitment... about how strong we are and what we can do for our members. And of course, if I am a member I can sit back and say, ‘well you’ve done it all’. And if I am a

non-member, I can think, 'I don't even have to be a member'. So where is the impetus to be a member and, more than just being a member, being an active member? There isn't one is there?'

'We haven't got any evidence, for example, that we got massive recruitment amongst agency workers by taking up *Allonby*. Didn't happen. I don't know what the membership figures are for that group now, but they are very low'

But legal action invited deeper dangers than passivity: it had the potential to commodify relations between the union and its members, allowing them to see legal action as a service for which they paid a fee. Where this 'service' is not deployed in the interests of the member, or is done so ineffectively, then the sense of grievance could often be directed at the union, rather than the employer.

'People are usually only happy if they win. If you have been through the process and lose, they are probably unhappy with us as well...I would rarely say that you should do employment tribunals for the PR, that is a risky strategy.'

Both unions had faced challenges from members about the quality of legal advice and decisions not to support litigation, with discrimination being cited on more than one occasion. Such disincentives to engagement with the law have since been magnified and echoed across the union movement following findings in the Court of Appeal in *Allen and Ors vs GMB*⁹. Encouraged by no-win, no-fee lawyers, a group of GMB members challenged the advice given to them by their union in the context of negotiations over equal pay. In occasionally scathing terms, judgments at tribunal and the Court of Appeal forensically reviewed the objectives and methods used in difficult negotiations to find against the union. At the very least, it is likely that unions will consider very carefully now procedures governing engagement with formal litigation and the offer of advice.

Organising and Legal Resources

A necessary prerequisite for mobilisation around the law is the ability to blend organising and litigating expertise. For the sake of this argument, the process can be

⁹ *Allen and Ors vs GMB* [2008] EWCA Civ 810

presented in linear terms; as the development initially of a workplace problem into an organising issue, from there into litigation but with a view to re-opening negotiations when the opportunity arises. In reality, the interplay is necessarily fuller and less clearly staged than that, since knowledge of the law can inform approaches to negotiation for example. The underlying principles were recognised by union officers as an aspiration, and one that had been realised in the past when they had been expected to initiate and run tribunal cases by themselves. But the formalisation of legal procedure referred to above, had expanded the reliance upon and use of formal litigation expertise and separated it consequently from organising expertise to a greater degree than previously.

The expansion and separation of legal expertise was particularly marked in NATFHE, where challenges by members to decisions about support for litigation had ensured that all decision-making and representation ran through the solicitors department. In theory at least, officers were no longer involved directly in tribunal proceedings and this was seen as being part of a broader trend amongst British trade unions, with UNISON and the Transport and General Workers Union being cited as prominent examples. The trend was less marked in Prospect, where negotiating officers continued to run their own cases, but legal specialists here too tended to be involved in decisions about legal merits and in representation to a greater extent than previously.

This formalisation of litigation led to a secondary force separating organising and legal expertise. Increasingly distinct responsibilities and professional logics made it harder during the litigation process to shift back to organising methods. Indeed, officers reported that recourse to law often closed down options for further dialogue rather than open them up. In part, this was explained by the process itself; where arguments and evidence were to be played out in the tribunal room, there was reluctance on both sides to rehearse them through negotiation in private, in case this ultimately benefited the opposing side.

‘Once the positions get polarised by the tribunal proceedings, you are on opposite sides of the argument. I am not going to tell them anything that might help them, they are not going to tell me anything that might help me.’

For different reasons, then, there was a tendency for officers in both unions to move away from formal litigation as far as possible. Such trends were encouraged by personal experience and by the formal adoption of the organising model. This precise model and the extent of take-up varied between the two unions but one common element was apparent: there was virtually no provision in either for legal tactics. An organising focus, it was argued, required that paid officers moved away from experimentation in the tribunal room, a phenomenon referred to repeatedly in a variety of disparaging terminology such as ‘barrack-room lawyers’ and ‘hobby barristers’. Instead, officers were encouraged to focus exclusively on recruitment of new members and developing branch organisation and activity. This, it was argued, was likely to pay greater organisational dividends than expensive and time-consuming litigation, and ultimately would provide greater influence over employers too. Explaining this, one officer recalled his experience when organising a training event for workplace representatives in a privatised electricity company. After the Director of Human Resources had accepted an invitation to give a brief overview to the meeting, the board was restructured and he was made redundant. His presentation, it was said, took an unusually candid and direct tenor.

‘He said to them, ‘you need to organise, you need to recruit, and then I will listen to you. Until you do that, I won’t listen to you.’ If that is what they are thinking, I mean this guy has been a HR director and a hard nosed bastard he could be at times too. To me, that is why it works.’

NATFHE officers offered similar anecdotes to explain their preference for developing industrial strength, rather than legal advocacy. Issues are not decided on the basis of eloquence and sophistication in tribunal or meeting rooms, argued one officer.

‘I was at a meeting at Tuesday night and the branch was saying ‘are you going to come and negotiate for us, you speak so well’. And I said, well I am always more eloquent when I have a big ‘yes’ vote for strike action in my back pocket. The employer always seems to think my arguments are more coherent then.’

For these officers, the focus of their activity had shifted decisively back to recruitment, organising and mobilisation of members. With this came recognition that key elements of the law, with the potential to assist organising efforts, were probably being neglected. Officers reported a desire to be taking more cases in areas like part-

time workers rights, for example, but found that decision-making and litigation processes were no longer conducive to the flexible use of tactics of this kind.

Conclusions

The status of law in British industrial relations has changed substantially in recent years. Statutory protection has been minimal historically, focused on those parts of the workforce where collective representation was unavailable, and legal process has played relatively minor roles. Broader ranges of mainstream workplace issues now have at least a statutory floor and the legal process provides effectively the only protection against arbitrary management action for that enlarged proportion of the workforce not covered by collective representation and bargaining.

The extent to which unions have responded to this changing environment has provided the focus for this paper. Preferences for economic sanctions on employers imposed through collective mobilisation have been prominent in the past, alongside a marked distaste for legal standards and process. The capacity to discipline employers in this way has diminished dramatically in recent years, however, and there is important evidence of greater preparedness to engage with the law as a consequence. By attempting to use the law to mobilise workers unions, have sought not only to win cases but to use legal language and methods as a way of galvanising support for collective representation and action.

Drawing on literature from north America, the paper explored the potential for British unions in two specific settings to draw down *inspirational effects* (confirming a sense of grievance and encouraging action to address it) and *radiating effects* (diffusing precedents both to employers and other affected groups). Evidence of significant legal mobilisation in these terms was found, with cases planned explicitly with a view to invite workers into membership, to mobilise them into action, and to influence employer approaches to union recognition and bargaining objectives. However, strong reservations about the use of law in this way were also apparent. It provides cumbersome and complex definitions of justice which are difficult for unions to articulate and diffuse effectively. Legal process can neuter any such potential by rendering opaque the issues at stake. Partly as a consequence, whilst experience of the law varied and was

ambivalent, there was a broad move away from using it as an organising device. Legal and organising resources were being separated to a considerable degree, with a view to freeing officers to focus on 'bread and butter' trade unionism once again, recruiting and organising workers autonomously and without reference to the law.

The two union cases are small scale studies in specific contexts, namely the (quasi-) public sector. They tell a consistent story, nevertheless, in terms of experience of using the law and current shifts away from it. In the current climate, it seems likely that any movement towards legal mobilisation will remain contingent and incomplete. Unions have insinuated legal gambits into their regulatory role and this process will continue wherever its potential is apparent. The lesson for policy makers, however, is that the current construction of statutory rights and trends in legal process appear to be discouraging union roles in the enforcement of employment law.

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