

The History of Employment Law in England and Northern Ireland

The turbulent history of labourers from 1349 until at least 1562 can be seen as a record of conflict between the aristocracy of England and the growing unrest among skilled labourers. It was felt that the fruits of their own work should belong solely to them and not to the landed Gentry that employed them – usually for a pittance. As a whole the development of these statutes is quite clearly an attempt to regulate and control labourers.

The Ordinance of Labourers 1349 (The Ordinance) was a piece of legislation consisting of regulations and price controls issued by King Edward III of England on 18 June 1349. The ordinance was issued in response to the 1348-1350 outbreak of the Black Death or Plague in England. During this outbreak, an estimated 30-40% of the population died. A vain attempt by the king to freeze wages paid to labourers at their pre-plague levels, is indicative of the labour shortage caused by the plague. The Black Death caused labour to be in great demand. The Ordinance was concerned with maintaining wages at rates to be fixed from time to time by JPs. This was followed some considerable time later again by statute. The Statute of Labourers 1350 fixed wages of labourers and artisans. 1356 saw the establishment of regulations for the Trade of Masons. In 1360 Edward III approved another statute this time prohibiting annual gatherings of the said Masons. 1368 the Statute of Labourers was confirmed and the next year legislation forbidding artificers not to import wine was added to the statute book. In 1377 King Richard II carried on the previous tradition of '*restrictions to trade*'. This time it was a statute to restrict the freedom of serfs. While in 1389 he decreed that all Guilds and brotherhoods supply full information on their 'liberties, privileges, statutes, ordinance, usages and customs' and to lay before the King their charters and letters of patent.

In 1402 King Henry IV by statute prohibited the hiring of labour by the week. 1405-06 saw the confirmation of the Statutes of Labourers. Justices of the Peace had their authority extended in 1414 to '*fugitive labourers*'. In 1416 the King limited penalties for excessive wages for seven years. Henry VI (Dec. 6, 1421 - May 21/22 1471) ascended the throne of England on September 1, 1422 and that of France on October 21, 1422, ruling from 1437. As part of a long series of laws known as the Statutes of Labourers, he attempted to control the wages and working conditions of all the trades. In practice, stonemasons, viewing themselves as under the protection of the Pope, generally ignored these statutes.

Elizabeth I (Sept. 7, 1533 -March 23, 1603), ascended the throne in 1558. The Statutes of Labourers, accumulating from the time of Edward III (Nov. 13, 1312 -June 21, 1377) were codified by Elizabeth. The Elizabethan Statute of Artificers 1562 contained 48 provisions among which prohibited conspiracies to raise wages and prosecutions for criminal conspiracy at common law. The first workers associations were formed because of the legislation. These grew out of workmates meeting at public houses. Their main activity was the provision of friendly society benefits such as sick and funeral money and a '*tramping grant*' to unemployed workers willing to

move. Apprenticeships were limited by the workers associations in order to prevent depressing wage rates; some craft unions continue this tradition today.

For most of the past 500 years employment relations in Britain was governed by the traditional master and servant relationship. Breaches of these contracts were punishable by imprisonment, whipping, fines, forfeiture or compelled labour.

There then followed what can only be described as an era of revolution in every sense of the word. This began with the French revolution, the Napoleonic wars, the Rebellion in Ireland and the naval mutiny. Parliament supplemented the common law by banning groups of workers in wool, silk, and leather. The Combination Act 1799 made this into a general ban. The French revolution at that time caused fear of radicalism hence the Combination Acts of 1799 and 1800 which enacted two further offences *i*) entering into contracts for the purposes of improving conditions of employment or calling or attending a meeting for such purposes and *ii*) of attempting to persuade another person not to work or to refuse to work with another worker. JPs could order up to 3 months imprisonment for breach of these statutes. The Masters and Servants Act 1823 permitted punishment of up to 3 months hard labour on an employee absent from service before his contract expired. Between 1858 and 1875 there were 10,000 such prosecutions per year.

The unlawful combination of workmen was controlled in Ireland by the 1803 Act while its counterparts for England were the Unlawful Combination Acts 1824 and 1825. The Combination Law Repeals Act 1824 removed 35 prohibitions on combinations in various sectors of the economy and repealed most of the 1800 Act thereby ensuring that union combination was no longer criminal per se at common law (CL). The immediate aftermath was a number of violent and damaging strikes. Parliament immediately re-inacted the Combination Act 1825 and revived the CL offence. It also strengthened the law on the specific crimes of intimidation, violence, molestation and obstruction which the Courts soon applied to persuading a fellow worker to join a strike (*R v Rowlands* (1851)) and the inducing a worker to leave in breach of contract (*R v Druitt* (1867)). The Combination Act 1859 modified the decision in the Druitt case and rendered it lawful to attempt, with the aim of securing changes in wages or hours *'peaceably and in a reasonable manner, and without threat or intimidation to persuade others to cease or abstain from work.'*

The famous prosecution of the Dorset farm labourers known as the Tolpuddle Martyrs in 1834 still live on in union folklore today. Their crime was that they used an oath as a sign of allegiance to their new society because they could not read nor write. For this they were sentenced to transportation to Australia under the provisions of the Unlawful Societies Act 1799 and Unlawful Oaths Act 1797 (*used to quell naval mutinies*). The legacy of the Industrial Revolution saw the decline of the Guilds and the emergence of the new unions.

One year after its formation Robert Owen's Grand National Consolidation TU collapsed in 1834. The mid 19th century saw the first great expansion in trade unionism with the creation of federations of previously local organisations known as the new model Unions. Consisting of skilled craftsmen and combined efficient internal organisation with a sound financial base and a cautious approach to industrial

action, they began to build a structure of collective bargaining with the Masters. This has been likened by some as reminiscent of that adopted by the Society of Engineers. The Masters were keen to talk to spokespersons rather than numerous individuals. The brush making trade in 1805 agreed list of wage rates which was a historical breakthrough laying a path for that which was to follow in its wake. Naturally legislation had a big part to play. The Molestation of Workmen Act 1859 allowed for peaceful picketing in the event of strike action. A revised Master and Servant Act was passed in 1867, which supposedly limited imprisonment to “*aggravated*” breaches of contract (where injury to persons or property was likely to result). It was clear that only workers were subject to its provisions. Imprisonment even for non-aggravated breaches of contract continued when working people failed to comply with court orders for specific performance or for non-payment of monetary damages and fines.

The Reform Act 1867 (also known as the Second Reform Act) was a piece of British legislation that greatly increased the number of men who could vote in elections in the UK. This Act enfranchised all male householders and abolished compounding (the practice of paying rates to a landlord as part of rent). Due to this act working-class men gained suffrage for the first time in Britain. Naturally the Courts attention was directed to the new Unions’ legal status. The first blow came in *Hornby v Close* (1867). In that case it was held because a union *qua* union acted to restrain competition it was not entitled to the simple legal remedies available to friendly societies for recovery of stolen funds. The Trade Union Act 1871 recognised unions as legal bodies with the right to own property and funds as well as providing for their voluntary registration with the Registrar of friendly Societies. The 1873 Judicature Act rationalised the legal system in Britain by uniting seven different courts into one High Court of Justice.

The repeal of the Master and Servants Act 1867 meant that the criminal law was largely withdrawn from the regulation of labour relations. The next decades saw the widespread organisation into general unions of low-paid and unskilled workers. This trend was sparked off by the famous strike of match girls at Bryant and Mays’ London factory and achieved its greatest success in securing by the Port of London Dockers of the ‘*tanner*’ a week after a long and bitter strike in 1889. These new organisations were a new breed and injected a new spirit of militancy into the movement and were less restrictive in their membership policy. Membership increased in 1892 from 1,576,000 to 2,022,000 eight years later.

Effective TU pressure led to the Conspiracy and Protection of Property Act 1875 a very important piece of legislation. This Act gave immunity from criminal conspiracy where the Defendant was acting in furtherance of a trade dispute and the act would have been criminal if done by one person alone. (*This is significant as the Government chose to heed the views of the workers this time since many urban workers had just been given the franchise in the Representation of the People Act 1867*). The 1875 Act also recognised some forms of picketing as legitimate by providing that mere attendance at a place for the purpose of peacefully communicating information would not amount to the crime of “*watching and besetting*”.

The Criminal Law Amendment Act 1887 cut down the scope of the offences of intimidation molestation and obstruction but its effect was limited by the continued extent of the CL crime of conspiracy as revealed by the case of the striking gas stokers in *R v Bunn* (1872).

The attention of employers now turned to restraining strikes by means of the civil law especially the use of injunctions. The law of tort was pressed into service – in particular the tort of inducing breach of contract see *Lumley v Gye* (1853), applied to unions' collective action in *Temperton v Russell* (1853). The HL in *Allen v Flood* (1898) rejected any extension to the tort to include action in which no contract was breached this victory for the TUs was short lived because 3 years later in *Quinn v Leatham* (1901) the same body held that there was a tortious conspiracy where two or more person combined without justification to injure another.

This was the pressures for the famous Railway cases as activists believed that only individuals and not the TUs themselves could be sued. The case of *Taff Vale Railway Co v Amalgamated Society of Railway Servants* (1901) directly threatened unions with bankruptcy, for the HL held that they could not shelter behind their unincorporated status because the Trade Union Act 1871 had enabled them to be sued in their own name. The amalgamated Society of Railway Servants thus had to pay damages of £23,000 to the Taff Vale Railway Company for striking together with costs of £19,000.

Trade Unions reacted by doubling their support for the newly formed Labour Party. The new Liberal Government's Trade Disputes Act 1906 was passed. The statute made the funds themselves immune from any action in tort. It also relieved individual members of liability for conspiracy and inducing breach of contract whether of employment of commercial agreements but only if they were acting in contemplation of furtherance of a trade dispute as defined. This Act did for civil law what the 1875 Act had done for criminal law.

The next onslaught of the judiciary on the TUs challenged their new found political strength. The HL decision in *Amalgamated Society of Railway Servants v Osborne* (1910) held that a TU could not spend its funds on political purposes since they were *ultra vires* the purposes laid down in the Trade Union Act 1871. This decision was reversed by the Trade Union Act 1913 which regulated expenditure on political purposes by the trade unions.

First World War and the inter-war years

Pre the First World War bitter disputes and stoppages in the manufacturing industry was partly encouraged by the appearance of the shop-stewards. Unrest during the war years continued notwithstanding the prohibition of strikes by the Munitions of War Act 1915. The government established the infamous Whitley Commission under the chairmanship of the then Deputy Speaker of the House of Commons J H Whitley. The 1917 Report recommended strengthening of collective bargaining and the establishment of joint industrial committees to act as a forum for annual discussions. Several were established and are still known today as the Whitley Councils.

The 1960s and the Donovan Report

Employment protection legislation entered the statute books in the 1960's. The Contract of Employment Act 1963 ensured that all employees were provided with a contract – a written statement of contractual terms. Comparable legislation in this jurisdiction is the Contract of Employment and Redundancy Payments Act NI 1965. In 1965 the Government established a Royal Commission on Trade Union and Employers Associations under the chairmanship of Lord Donovan “*to consider relations between management and employees and the role of TU's and employers associations in promoting the interest of their members*” The Report was published in 1968. The detailed analysis provided a background to unprecedented legislative activity. Employment law legislation in Northern Ireland varies somewhat to that of mainland Britain. This paper will concentrate on the differences.

A new conservative government was elected in 1970 with Ted Heath as the Prime Minister. However in the early 1970's with industrial unrest, power cuts, and the three day working week, many people began to question who was governing the country. A labour government was returned in 1974 following a damaging national miners strike. The 1974 – 1976 legislation including the Labour governments Social Contract with the trade unions, the Trade Union and Labour Relations Act 1974 and Employment Protection Act 1975 were continually criticised by employers and pressure groups. 1978-1979 the country saw a winter of discontent when a whole series of strikes paralysed the nation. 1980 saw Margaret Thatcher the first, and to date, only woman Prime Minister elected in the United Kingdom. Upon the Conservatives coming to power a raft of employment measures were brought in to restore the balance of industrial relations; to reduce the power of the unions and to restrict the amount of industrial unrest, strikes that were crippling businesses in the country. Many employers found the legislation to be of great assistance to them.

The Conservative government was concerned about the influence Europe had upon its workplaces and they were unable to block health & safety provisions because they were voted in by qualified majority voting, employment related issues had to have unanimity. Subsequently employment legislation proposed by Europe was blocked by Britain under the Maastricht opt-out negotiated by John Major allowing Great Britain to choose its employment legislation. The Working Time Directive was forced into operation by Europe. It was treated as a health & safety measure despite the fact that it deals with such matters as hours and patterns of work, night time working, minimum rest periods, weekly working time and holiday entitlement etc. The Conservative government's best efforts failed to reject this Directive.

May 1997 saw a Labour government returned to power. Interestingly the Prime Minister Tony Blair was himself an employment lawyer. There has been another raft of employment related measures which have not stemmed to this day. 1998 saw the passage of the Working Time Regulations, The Public Interest Disclosure Act 1998 and National Minimum Wage Act 1998. This latter piece of legislation appears to be rather complicated. The government came up with four definitions of counting work and five definitions as to which fund counted for the purposes of the legislation. They increased the cap of unfair dismissal claims from £12,000 to £50,000 - today that is over £57,000. This was done without making any provision for small employers to be able to fund this.

There have been over 150 pieces of employment legislation brought in to date with at least 20 more to come onto the statute books in the future. The Labour government gave rights to employees who were on strike and taking industrial action, protecting them from dismissal for up to eight weeks, which had not been the case heretofore. With employers employing as little as 20 staff they could be forced into trade union recognition and all the shackles and problems that that creates. The statutory dispute resolution procedures introduced in 2004 could be criticised as misconceived and lacking in planning. The three step procedure introduced minimum standards in terms of disciplinary and grievance procedures that employers have to adopt in order to avoid a new penalty of automatic unfair dismissal which had not previously existed. It could be said that the concepts of discipline and dismissal have been confused or blurred to some extent. The rules are unclear and complicated and employers who fail to follow same can find dismissals deemed automatically unfair. This will lead to a consequential penalty of up to 50% additional compensation. There again has been no consideration of the means for small employers to fund this.

The details of how Regulations contained within employment legislation may not have been properly thought through despite so called extensive consultations. These regulations have been drafted by civil servants and are deemed unrealistic and unworkable in small and medium sized businesses. An example would be in recent times when a Court had to interpret what constituted a grievance procedure under the statutory provision which was vaguely described in the legislation.

Interestingly the Labour Government has now removed the Conservative's Maastricht opt-out. Since 1997 without the opt-out there has been another raft of bureaucratic red tape being forced on employers from Europe. Employers are further shackled by the Data Protection Act, the Information and Consultation Regulations as well as the Human Rights Act 1998. The Freedom of Information Act 2000 has placed an enormous administrative burden on public sector organisations.