Part I

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A brief history of labour law

Labour lawyers today commonly think about their subject using ideas about workers' rights, economic efficiency for firms or for the market as a whole, or social justice for workers. These ideas are not new. But they did not play a major role in the early history of labour law. In the 1950s, labour lawyers used sociology to make sense of their subject. This chapter will explain how rights and economics – the two key perspectives to be used in this book – started to feature more commonly in labour lawyers' thinking in the 1970s, and attained the central place they have today.[1] It will also demonstrate the importance of using more than one perspective to understand the law.

Collective laissez-faire – the 1950s

The work of Otto Kahn-Freund has exercised, and continues to exercise, a considerable degree of influence over labour lawyers' thinking. Writing in the 1950s, he drew on industrial relations theory – a branch of sociology – in order to understand the law.[2] This was essential because anyone using a 'black-letter' approach – in other words, looking solely at the legal materials – would have acquired a wholly misleading knowledge of the relationship between employers and employees. For example, there were few legal controls on the circumstances in which employees could be dismissed. At common law, the contract of employment could be terminated if the employer gave notice. The courts did not inquire into whether or not the employer had a good reason for the dismissal. And there was no statutory intervention in this area until 1971. But this did not necessarily mean that, in practice, employers had an unfettered power to dismiss their employees. Where trade unions were present in a workplace, they were often able to use their collective strength to protect individual employees against arbitrary dismissal.

Drawing on sociology, Kahn-Freund developed a sophisticated theory of labour law called 'collective laissez-faire'. Kahn-Freund's insight was that in

1 See, generally, H. Collins, 'The productive disintegration of labour law' (1997) 26 *ILJ* 295; P. Davies and M. Freedland, *Labour Legislation and Public Policy* (1993).
2 See O. Kahn-Freund, 'Legal framework', in A. Flanders and H.A. Clegg (eds.), *The System of Industrial Relations in Great Britain: Its History, Law and Institutions* (1954).

Britain, the law played a very minor role in industrial relations, particularly in comparison with other industrialised Western nations. There were relatively few statutes obliging employers to treat individual workers in particular ways or even to promote collective bargaining between trade unions and employers. Instead, employers and trade unions were left to regulate their own affairs. It was this policy of 'non-interference' that Kahn-Freund labelled collective laissez-faire.

But collective laissez-faire did not mean that the law played no role at all. In the nineteenth and early twentieth centuries, the common law courts were hostile to the trade unions. The courts cast doubt on the legality of trade unions by declaring that their aims fell foul of the doctrine of restraint of trade.[3] And they set about developing various economic torts – conspiracy, inducing breach of contract, interfering with trade or business – which exposed strike organisers to civil liability. In the infamous *Taff Vale* case of 1901, the House of Lords held that unions could be sued in tort in their own name and held liable for the actions of their officials.[4] Collective bargaining could not easily take place under these conditions. Successive governments therefore intervened with statutes which removed the common law obstacles to collective bargaining. The Trade Union Act 1871 declared that the doctrine of restraint of trade did not apply to unions. The Trade Disputes Act 1906 protected unions from tort liability and provided that strike organisers could not be held liable for the torts of conspiracy, interference with business or inducing breach of contract. Kahn-Freund used the term 'negative law' to describe this facilitative legislation.[5]

But collective laissez-faire was more than just a description of the law. Kahn-Freund also saw it as an ideal for the law to strive towards, for three main reasons. First, he argued that legal intervention was unnecessary because collective bargaining was an effective way of protecting workers. The presence of unions successfully redressed the power imbalance between workers and employers. Second, he claimed that workers' rights were more secure if they were acquired through collective bargaining rather than through constitutional or legislative guarantees. He believed that if the government had not granted the rights in the first place, it could not take them away. Third, he thought that collective laissez-faire was more flexible than legislation because it allowed unions and employers to decide things for themselves and to respond to changing circumstances.

The demise of collective laissez-faire – the 1960s and 1970s

In the 1960s and 1970s, governments became increasingly interested in promoting workers' rights and managing the economy more actively. They also wanted to reduce the level of strike action – partly for economic reasons and partly because

3 *Hornby* v. *Close* [1867] LR 2 QB 153.
4 *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* [1901] AC 426.
5 Kahn-Freund, 'Legal framework', p. 44.

strikes came to be seen as a problem in their own right. Collins has argued that the theory of collective laissez-faire exercised something of a stranglehold over labour law thinking through this period, though perhaps it is easier to recognise the significance of the changes with the benefit of hindsight.[6]

Promoting workers' rights

In the 1960s and 1970s, people began to question the fairness of a system which relied almost entirely on collective bargaining to protect workers. In the eyes of its critics, collective bargaining suffered from two major flaws. First, it did not cover all industries or workplaces. In 1967, it was estimated that 50 per cent of manual workers and 30 per cent of white-collar workers were union members.[7] Although these figures are much higher than their modern equivalents, they still suggest that many workers were not protected by collective bargaining. Second, collective bargaining did not necessarily promote the interests of all sectors of the workforce. In 1951, only 27 per cent of women workers were union members, compared to 56 per cent of men.[8] Unions naturally focused on protecting the majority of their members. This led them to ignore or even to attack women's claims for better treatment at work, particularly in the area of equal pay.

One major statutory response to the first of these concerns was the unfair dismissal legislation, introduced in 1971.[9] The legislation (discussed in detail in Chapter 9) sought to regulate the circumstances in which an employer could dismiss an employee. The employer had to have a reason for the dismissal and had to act reasonably in making the decision to dismiss. This was a radical departure from the common law, which did not inquire into the employer's reasons at all. Advocates of the legislation pointed to the unfairness of the common law position. Although unions did much to prevent arbitrary behaviour by employers, not all employees were protected by collective representation.

The concern that unions might not protect all sections of the workforce was addressed in the anti-discrimination legislation. The Equal Pay Act 1970 (which came into force in 1975) established the basic principle that women who were doing the same work as men should receive the same pay and other benefits under their contracts of employment. An important further step came with the enactment of the Sex Discrimination Act 1975 (SDA), which tackled the many other respects in which employers might discriminate: in recruitment, training, promotion and so on. It also attacked discrimination by unions against members and applicants for membership. Parliament's first attempt to tackle race discrimination, the Race Relations Act 1968, made little impact. Responsibility for enforcing the Act was given to a statutory body, the Race Relations Board, but its

6 Collins, 'The productive disintegration of labour law'. Cf. Lord Wedderburn, 'Collective bargaining or legal enactment: the 1999 Act and trade union recognition' (2000) 29 *ILJ* 1.
7 Davies and Freedland, *Labour Legislation*, p. 46. 8 Ibid.
9 Industrial Relations Act 1971, ss. 22–32.

powers were limited. The Act's weaknesses were addressed by the Race Relations Act 1976, which contained very similar provisions to those set out in the Sex Discrimination Act 1975. Individuals were given a right to bring proceedings under the 1976 Act, and the new statutory body, the Commission for Racial Equality, had much stronger enforcement powers than the old Board.

The anti-discrimination legislation was obviously a significant move away from collective laissez-faire: the idea that unions and employers should be left to determine employees' terms and conditions for themselves. It was argued that some rights were so fundamental that they should be protected for all employees, regardless of employers' or unions' attitudes. Indeed, the legislation challenged some established industrial relations practices – for example, it was common prior to the SDA for unions to agree that part-time workers should be dismissed before full-time workers when a firm had to make some workers redundant. In *Clarke* v. *Eley (IMI) Kynoch*,[10] this was held to be discriminatory because the majority of part-time workers are female.

The advocates of collective laissez-faire sought to modify their theory in order to incorporate the unfair dismissal and anti-discrimination legislation. They argued that the legislation created a 'floor of rights' on which collective bargaining could build. As Wedderburn explains:

> The statutory 'floor of rights' now extends into many facets of employment law … but it does not normally prevent the erection of superior conditions by way of collective bargaining. It was meant to be a floor not a ceiling.[11]

In some ways, this is a useful method of analysis. To use the example given by Wedderburn himself, unions have often been able to negotiate more generous redundancy payments for employees than those provided for in legislation. But Collins has strongly criticised the 'floor of rights' argument, claiming that labour lawyers' determination to cling on to the collective laissez-faire analysis blinded them to the true significance of the new developments.[12] There are certainly some problems with the 'floor of rights' idea. First, for those workers not protected by collective bargaining, the floor is indeed a ceiling. Second, as Davies and Freedland argue, it has not always been the case that the aims of legislation have coincided with those of collective bargaining.[13] As explained above, unions were slow to take up the anti-discrimination agenda, and some of the practices they agreed with employers had a discriminatory effect. The government's intervention could be seen as a way of regulating the unions, not just supporting their activities. We could therefore view the legislation of the late 1960s and the 1970s as the beginning of a shift away from collective laissez-faire. Either way, this period marks the emergence of workers' rights as a central concern of modern labour law.

10 *Clarke* v. *Eley (IMI) Kynoch* [1983] ICR 165.
11 Lord Wedderburn, *The Worker and the Law* (3rd edn., 1986), p. 6.
12 Collins, 'The productive disintegration of labour law'.
13 Davies and Freedland, *Labour Legislation*, pp. 383–4.

Managing the economy

During the 1960s and 1970s, collective laissez-faire came under attack from another direction. Successive governments began to take a more active role in managing the economy. Their main goal was to ensure that the UK had a favourable balance of trade – in other words, that the value of the products exported by the UK exceeded the value of the products imported by the UK. This was thought to be a sign of a prosperous economy. But the level of inflation was very high during this period. This meant that UK products were expensive and could not compete effectively in world markets. Since inflation was, in part, attributable to the high wage demands being made by unions, the government was bound to come under pressure to intervene more fully in industrial relations, and thus to abandon the policy of collective laissez-faire.

Economists have various ways of explaining inflation. The 'cost-push' theory links inflation most closely to the activities of workers and unions.[14] Workers always want to get paid more, and employers always want to make more profit. From time to time, workers will succeed in persuading their employer to pay them more. This will reduce the employer's profits. So the employer passes on the cost to the consumer by raising the price of its products. This restores the employer's profits to their earlier levels. But then the whole process begins again: products are more expensive, so workers start to demand further pay rises. The result is a 'price-wage spiral'. External factors can also contribute to inflation. In 1973, for example, the oil-producing countries raised the price of oil by a considerable margin. This had a knock-on effect on the price of other products and raised the cost of living generally, thus leading to further wage demands by workers.

Governments responded to spiralling inflation by trying to place limits on the wage increases unions could achieve through collective bargaining, through what were known as 'incomes policies'. One of the most extreme versions of incomes policy was that contained in Part IV of the Prices and Incomes Act 1966, which applied from August 1966 to August 1967. This allowed the government to ban an employer from paying a higher wage than that paid on 20 July 1966. It was enforced by criminal sanctions against employers, and against unions which put pressure on employers to pay more. The government used its powers to enforce a six-month pay freeze, followed by six months of 'severe restraint' in which only very limited pay increases were permitted. Compulsory incomes policies were, however, highly controversial and were used by governments as a last resort. At other times, voluntary incomes policies were pursued. In 1976–7, for example, the unions agreed to a 5 per cent limit on pay rises in order to combat spiralling inflation, which had reached 27 per cent in 1976. But voluntary incomes policies were never very stable. They were unpopular with grass-roots trade union

14 Two key assumptions underlie this theory: that governments increase the supply of money in response to demand, and that the prices of goods are essentially determined by what they cost.

members, who saw their standard of living decline during periods of restraint. And democratically elected trade union leaders had to respond to their members' concerns. By 1978–9, for example, the TUC was refusing to agree to another request from the government for a 5 per cent limit on pay rises.

It is fair to say that despite the incomes policies, no government in this period succeeded in getting inflation under control. But the incomes policies are highly significant for what they tell us about labour law. They show that governments' desire to manage the economy was so great that they did not have any qualms about intervening in the process of collective bargaining. At first, labour lawyers might have dismissed this as a temporary suspension of collective laissez-faire. But if the economic problems could not be resolved, it was hard to see when this 'suspension' might end.

Reducing the number of strikes

The other major problem faced by governments in the 1960s and 1970s was the high level of strike action. In 1964–6, for example, 190 working days per 1,000 employees were lost because of strikes.[15] Unions were in a relatively powerful position because unemployment was low. Employers could not afford to ignore the demands of workers who could easily move to jobs elsewhere. Strikes were a cause of concern for two reasons. First, it was thought that they were contributing to the UK's economic problems. If UK firms were hit by high levels of strike action, they might not be able to deliver their products to purchasers on time. This would give them a reputation for unreliability which would harm their chances of exporting goods abroad. The balance of trade might start to tip in the wrong direction. Second, there was a growing feeling that the level of strike action was a sign that the unions were out of control. Davies and Freedland suggest that the high levels of strike action at this time produced 'a crisis of truly constitutional proportions'.[16] Those on the right of the political spectrum in particular began to argue that the trade unions were running the country, not the government.

In 1965, the Labour government set up a Royal Commission, usually known as the Donovan Commission, to investigate the strike problem.[17] Much of the evidence given to the Donovan Commission advocated a stronger role for the law in regulating industrial relations. Nevertheless, the Commission broadly adopted the collective laissez-faire view set out by Kahn-Freund in the 1950s: that the law should intervene as little as possible. The Commission's main recommendation was that employers and unions should change the way in which they conducted collective bargaining.[18] At that time, bargaining tended to take place

15 See the *Report of the Royal Commission on Trade Unions and Employers' Associations* (1968) (Cmnd 3623), p. 95.
16 Davies and Freedland, *Labour Legislation*, p. 242.
17 *Report of the Royal Commission on Trade Unions and Employers' Associations*.
18 Ibid., Chapter 16.

between unions and employers' associations covering all the firms in a particular industry. But it was supplemented by informal bargaining between shop stewards (trade union representatives for small workgroups) and managers in particular workplaces. Shop stewards often called unofficial 'wildcat' strikes to protest at managers' decisions. Unions had very little control over their behaviour. The Donovan Commission attributed the strike problem to the split between the two types of bargaining. The Commission argued that bargaining should instead take place at plant or company level. This kind of bargaining would be conducted by union leaders, taking into account the needs of all the various workgroups. It was hoped that this would put an end to supplementary bargaining by shop stewards, and hence to wildcat strikes. The change was not to be brought about by law. Instead, the Commission expected employers and unions to alter their practices voluntarily. In fact, some employers and unions had already begun to bargain on this basis and the change spread rapidly.

By the time the Donovan Commission reported, in 1968, the strike problem had worsened. The Labour government accepted many of the Commission's proposals, but wanted to make greater use of the law to prevent strikes.[19] For example, it wanted to require unions to ballot their members before taking strike action. The government never managed to enact its plans – in part because of opposition from the unions. It then lost the general election in 1970 and the Conservatives came to power. They believed that the only way to reassert government control over industrial relations – and thus to achieve economic progress – was to provide a comprehensive legal framework to regulate trade unions and, most importantly, strike action. The Industrial Relations Act 1971 reflected two main policies. First, it sought to reduce or eliminate unofficial action organised by shop stewards by leaving such action exposed to the full force of the common law of tort.[20] Second, trade unions were given a strong incentive to behave 'responsibly' (as the government saw it) in their use of the strike weapon. The statute listed various 'unfair industrial practices' for which unions could be liable. This was used to ban, for example, strike action against firms not directly involved in a dispute with the union.[21] However, the government's grand scheme met with considerable resistance from the trade unions. The unions' most successful strategy was to refuse to register under the Act. Because the Act's protections were confined to registered unions, all strike action by unregistered unions was exposed to liability at common law. It might be supposed that this would have put the unions in an impossible position. But the government quickly realised that a situation in which all strike action was unprotected was unsustainable. The Act's failure was a major factor in the government's electoral defeat in 1974.

19 See the White Paper *In Place of Strife: A Policy for Industrial Relations* (1969) (Cmnd 3888).
20 This was the intended effect of s. 96. 21 Industrial Relations Act 1971, s. 98.

The Labour government elected in 1974 tried a new tactic. It did a deal with the unions, sometimes known as the 'Social Contract'. It promised to enact more favourable labour legislation if the unions would limit their wage demands and, in consequence, the incidence of strikes. The new legislation had two key features. First, it marked a return to the pre-1971 approach to regulating trade unions and strike action. It left the common law to define the wrongs committed by unions and strike organisers, but provided a set of immunities to protect them from liability.[22] Second, the legislation put in place various strategies for *supporting* collective bargaining. People sometimes describe the legislation as a return to collective laissez-faire, but this is not entirely accurate because it went far beyond Kahn-Freund's 'negative law'. For example, the Employment Protection Act 1975 included a 'recognition procedure' which could, under certain circumstances, lead to an employer being obliged to bargain with a particular union.[23] Although the unions welcomed these changes, they did not keep their side of the bargain. There was a wave of strike action in late 1978 and early 1979 which is sometimes referred to as the 'winter of discontent'. Yet again, a failure to control the strike problem contributed to the downfall of the government.

The history of industrial conflict law in the 1960s and 1970s tells us a lot about the changing shape of labour law. It shows the demise of collective laissez-faire: governments of both political persuasions were prepared to use the law much more extensively. And it reinforces the importance of the economic perspective. Although strikes were seen as a problem per se, governments were also motivated to intervene by the fact that they disrupted the national economy. But the two strategies tried during this period – comprehensive legislation and the Social Contract – were largely unsuccessful.

Individualism and deregulation – the 1980s and early 1990s

The years 1979–97 saw successive Conservative governments adopting a novel approach to labour law. The three themes we have identified so far – promoting workers' rights, tackling the strike problem and promoting economic growth – were ongoing concerns. But they were defined in new ways, and new strategies were adopted for addressing them. We will examine each of these themes in turn, and conclude by looking at the links between them.

Protecting workers' rights: individualism

One of the key ideological commitments of the Conservative Prime Minister, Margaret Thatcher, was individualism: the idea that individual rights and

22 Trade Union and Labour Relations Act 1974, ss. 13–17, as amended, Trade Union and Labour Relations (Amendment) Act 1976.
23 Employment Protection Act 1975, ss. 11–16.

interests should always prevail over collective concerns. This gave rise to an inevitable clash with labour law's traditional emphasis on collective solidarity in trade unions as the best mechanism for protecting the individual. The government identified two main categories of individual who, it argued, might be harmed by powerful unions: those who did not wish to join a union at all, and those union members who did not agree with their leaders' policies.

Those who did not wish to join a union at all were most likely to be harmed by the 'closed shop'. This term is used to describe a workplace in which all employees are required to be members of a particular trade union. The government gradually dismantled the legal protections of the closed shop until it was made wholly unlawful in 1988. Section 11 of the Employment Act 1988 gave individuals a right, as against the employer, not to be dismissed or subjected to detrimental treatment on the grounds that they were not trade union members. This had the effect of abolishing the closed shop because employers were no longer able to dismiss employees who refused to join the union. The closed shop is, of course, highly controversial.[24] Many trade unionists argue that although each individual worker loses his or her freedom of choice about union membership, a strong union is the best way to protect individual interests. A union with 100 per cent support in the workplace is bound to be in a good bargaining position. From a rights perspective, however, the closed shop is much harder to justify. Most theorists would see freedom of association as protecting people's choices: individuals should be able to choose which organisations to join and organisations should be allowed to choose whom to admit. The idea of an enforced association is hard to square with a right framed in these terms.

The second category of workers who, in the government's view, might be adversely affected by trade union power were those union members who disagreed with their leaders' policies. The Employment Act 1988, s. 3, gave individuals the right not to be 'unjustifiably disciplined' by their union. This prevented unions from taking any disciplinary action against members who refused to take part in a strike. The government argued that this protected the individual's freedom of choice. But trade unionists saw this right as yet another misguided attack on collective strength. It was claimed that individuals would ultimately lose out because unions would be weakened if they could not force all their members to take strike action.

The government's preferred interpretation of workers' rights was therefore very different from that advanced during the 1960s and 1970s. It sought to use workers' rights to protect individuals from the collective strength of trade unions, rather than to protect them from the power of their employers.

24 See Chapter 11.