Enterprise democracy and worker voice

Introduction

The new economic governance arrangements with sectoral collective bargaining at their core is the proposed centre-piece of labour law reform. But although this will impose obligations on all employers, it does not exhaust what is necessary to achieve a measure of workplace democracy. In this, it is important that the trade union voice extends horizontally across sectors, but also vertically within firms, from the shop-floor and the workplace to the boardroom and the company meeting. To this end, we deal here with:

- Trade union access to employers' premises;
- Trade union recognition and enterprise-based collective bargaining to complement sectoral arrangements under the Collective Bargaining Act;
- Corporate governance reforms giving workers through their trade unions a louder voice in corporate decision-making; and
- Worker voice through their accumulated capital.

It goes without saying that the law relating to the right to trade union membership should be strengthened, in particular relating to blacklisting (which should be a criminal offence carrying severe penalties including imprisonment). Thereafter, a feature of the legislation we propose in order to facilitate collective bargaining at every level will be a statutory right for an official of an independent trade union to gain access, under reasonable conditions, to workers at their workplaces. This right will apply to full-time officers of the union and to lay representatives of the union employed by the firm.

We consider that the right of access (on reasonable conditions) would be available where a union could show that one of its members in the workplace or in the grade, category or proposed bargaining unit identified by the union had requested access by an official of that union (whether or not employed by the employer in question). We propose that any dispute be resolved by the CAC. In respect of any worker seeking to exercise the right of access by a union official the legislation would need to provide for anonymity for anyone who required it and, in any event, to protect against victimisation by the employer. (The access condition that the union is responding to a request

from a member would help to avoid any unnecessary legal obstacles arising potentially under the European Convention on Human Rights, article 8.)

By 'access' we mean both physical and electronic (such as by email or social media) access. The purposes of such access would be:

- Recruiting members;
- Representing members (including but not confined to disciplinary and grievance matters);
- Carrying out health and safety inspections;
- Encouraging workers in relation to a recognition (or derecognition) application (and prior to making such an application);
- Consulting members over proposed and ongoing negotiations;
- Ensuring that existing relevant collective agreements are being observed; and
- Determining whether workers' statutory rights are being observed.

So the rights of worker accompaniment in ss. 10–13 Employment Relations Act 1999 should be broadened so that workers have the right to be accompanied or represented by their trade union representative (full-time or lay) either individually or collectively on any issue relating to work.

Worker voice, trade union recognition and collective bargaining

It is widely thought that the statutory machinery for enterprise-level bargaining set out in Schedule A1 of the 1992 Act is defective. It will need to be recast if it is to achieve its original objective: enterprise and establishment-level collective bargaining. One of the main problems with enterprise-based legislation of the kind operating in the UK and elsewhere (in the mainly English-speaking world) is the problem of employer hostility to trade unions and resistance to collective bargaining.

Some employers go to great lengths to exclude trade unions, gaming the legislation and hiring lawyers and union busters for this purpose. The OECD has suggested that this problem is greatly reduced where sectoral bargaining

takes place. This is partly because sectoral bargaining helps to embed trade unions and trade union influence within the industry, with many of the objections to dealing with trade unions disappearing as hostile employers are bound by trade union agreements.

Nevertheless, in order to ensure that enterprise bargaining legislation operates efficiently, amendment of the current recognition legislation is necessary to remove some of its inordinate complexity, which provides multiple opportunities at a number of stages in the procedure for employers to frustrate its underlying purpose of encouraging collective bargaining.

With 172 separate paragraphs, the 1999 Act is a poor model of accessible drafting. The new provisions on recognition would therefore aim to be short in length and written in a language which is readily understandable by those union representatives who will be involved in asserting the right to recognition. The new legislation would replace in its entirety TULRCA Schedule A1, reflecting the need to rebalance industrial power to prevent employers seeking to frustrate the process.

Making applications

We propose that a trade union should submit a claim for a declaration of statutory recognition to the CAC. It must be submitted in writing by a registered, independent trade union or by a listed, independent trade union. The current requirement that the employer should have a minimum of 21 workers should be removed. With the fragmentation of employers in recent years there appears no rational basis for excluding small employers where the workers wish to bargain collectively rather than individually.

In order to bring a claim to the CAC, it should be enough that the union demonstrates that 10% of workers in a proposed bargaining unit indicates, either through membership or in writing, that they support recognition. A union will be required to notify the employer in writing that it intends to seek statutory recognition, though it will be sufficient that it does so at least 7 days before submission to the CAC. The trade union will need only to prove that it has issued the notification, and will not need to prove that the employer has received the notice.

There will be no requirement that the trade union has sought voluntary recognition prior to making the statutory claim. However, the employer may, in response to the notification, offer a voluntary recognition agreement which the union has the right either to accept, negotiate upon or reject. If the union adopts the last option, it may proceed instead for a statutory declaration of trade union recognition. If a union has 10% support, it will have a wider right of

access in addition to the general right of access above. This will include the right to communicate with all workers in the bargaining unit proposed by the union by meeting with them (either individually or collectively as it chooses) and by distributing materials physically or electronically, both to campaign for recognition and to recruit (as well as for the other purposes set out in 5.4 above).

Where more than one independent trade union submits a claim for statutory recognition, the unions in question will have a duty to seek agreement as to which or whether both jointly will advance the claim. A failure to reach agreement will then require the CAC to identify which union has the largest membership or declaration of support in the bargaining unit and advance its case alone. Conversely, where one independent union is already recognised, no other union may submit a claim for recognition unless it can demonstrate that it has a majority of the workers in the existing bargaining unit in membership. In such a case, the CAC will hold a ballot to test which union is the most representative and award recognition to it.

Managing applications

In accord with the principle of encouraging collective bargaining, the bargaining unit selected by the trade union will be the unit for which recognition is granted (if the application is successful). The CAC will not have the power to impose a different bargaining unit. The employer will no longer have the defence of arguing that the proposed bargaining unit is not in accord with effective management. Only if it can show that unless a different bargaining unit is selected the impact on industrial relations will be unmanageable, may it advance that different unit. If the employer does advance an alternative bargaining unit on that ground the union may accept it with the consequence that recognition will be automatically awarded without the need to demonstrate either the 10% support threshold (para 5.11 above) or the majority support requirement (para 5.15 below).

Otherwise, where the CAC is satisfied by the evidence that a recognition claim is likely to be supported by a majority of the bargaining unit (expressed by union membership or in another convincing way), the trade union will be entitled to a declaration of statutory recognition. An award of statutory recognition by the CAC will cover any issue that the union or its members wish to raise, including all those matters listed as mandatory in chapter four above.

There may be scope for arguing that where a union has demonstrated majority support under the recognition procedure, it should be a permissive subject of collective bargaining that all workers in the bargaining unit must either join the union or pay a ‘fair shares’ fee to cover the costs of the union in providing

the negotiating services provided by it. Although now under sustained attack from the courts in the US, such arrangements should be permitted in this country provided any potential objections under the European Convention on Human Rights can be overcome.[28]

In order to protect trade unions and workers when a union is organising in an enterprise or seeking recognition therein, it should be unlawful for an employer to engage in anti-union practices designed to frustrate either (a) organising, or (b) recognition activity.

- Such anti-union practices should be 'unfair labour practices', defined to arise where the employer has intimidated, threatened, harassed or subjected to detriment one or more workers (including threats that jobs are at risk, or by awarding or promising a benefit to one or more workers which it withholds or will withhold from others in the event of an award of recognition).
- The onus should be on the employer to prove to the CAC that conduct alleged to be an unfair labour practice (as defined above) was not. A claim of unfair labour practice will be heard exclusively by the CAC. Where such a claim is upheld the CAC will award statutory recognition with no further requirement to demonstrate membership support.

At the end of five years, recognition will be renewed unless the employer can show that the bargaining unit has ceased meaningfully to exist or unless another independent union makes an application for recognition for that unit, as above. Moreover, an award of statutory recognition will continue regardless of any change of employer, whether through a TUPE transfer or by any other restructuring or reorganisation.

Other support for collective bargaining

Apart from the Collective Bargaining Act discussed in chapter four and the recognition provisions discussed above, other steps will also be required to support collective bargaining. Most of these other measures will be addressed to encouraging and supporting enterprise-based initiatives. These will begin with a raft of repeals to legislation introduced over the last 40 years, to restore the 'props' to collective bargaining which that legislation systematically removed. Amongst these are the following:

- Reinstatement in Trade Union and Labour Relations (Consolidation) Act 1992, s. 209 of the duty on ACAS to promote collective bargaining;

- Repeal of the 1992 Act, s. 184 which renders void a term in a contract for the supply of goods or services which requires a party to recognise or negotiate with a union(s); and
- Repeal of the 1992 Act, s. 187 which prohibits refusal to deal with a supplier on the ground that it does not recognise or negotiate with a trade union(s).

The second and third bullet points are important because the current law prevents companies from using commercial leverage to require suppliers and others to recognise a trade union. Their right to do so should be restored.

Extension of collective agreements

Two other measures will be required. The first relates to the extension of collective agreements. Where one (or more) collective agreements appear to the Secretary of State to be effective and set a precedent for the sector concerned (or engaged in ancillary or related activities and/or in the same locality), statutory powers will enable her, after appropriate consultation, to register the existing agreement and extend it to all (or a sub-sector of) other employers (and hence to their workers) in the sector. In this way, the integration of all the employers in the sector into a single collective bargaining arrangement may ultimately be achieved. Extension of an existing agreement may require expanding representation in the negotiating body.

The extension of collective agreements is common in jurisdictions across the world and is particularly common in Europe.[29] The mechanisms for doing so must avoid the flawed model adopted in the UK in the 1970s. One possible precedent is the example of Quebec, where the legislation provides that a dominant collective agreement in a sector which affects a substantial number of workers may be rolled out by Ministerial Order to all employers and workers in the sector. The Quebec legislation is not a perfect fit for the UK, but it could be adapted to ensure that a large employer with a good collective agreement is not undercut by competitors observing less favourable terms. Such extensions will be a useful device in the years before complete coverage of the British workforce by sectoral agreements.

We also consider that the Secretary of State should have the power to encourage the parties to adapt their agreement in other ways to take account of its wider application. To preserve the parties' autonomy we do not suggest that she should have powers to impose such changes.

Public procurement

The roll-out of sectoral collective bargaining along the lines proposed in the Collective Bargaining Act will reduce the need for a modern reiteration of the Fair Wages Resolution to compel all contractors for publicly funded work (together with their parent companies, subsidiaries, franchisees and all the contractors and subcontractors in their supply chains) to abide by and to support collective agreements in the sector in which each operates. This is because everyone in the sector will, in due course, be covered by the relevant sectoral agreement anyway. However, it will take time to roll out sectoral bargaining across all economic activities and, in any event, there may still be issues about workplace representation and trade union recognition. So we believe that what is nowadays referred to as 'public procurement' still has an important role to play.

To this end the trade union recognition legislation should contain provisions requiring all tenderers and contractors (and subcontractors) of public services to recognise a trade union, as well as comply with all relevant collective agreements at all levels. This would apply also to any employer who trades on the basis of a licence or franchise granted by the state or enjoys any other government or local authority benefit. This appears permissible under the current EU Public Procurement Directives and can, in any event, be imposed if the UK ceases to be bound by such EU laws. The collective bargaining and trade union recognition legislation could contain these provisions, failing which a separate Public Procurement Act could deal with these and other conditions for public contracting (such as in relation to blacklisting, whistleblowing and equality issues).

Worker voice and corporate governance

To reform corporate governance, the *Manifesto for Labour Law* made three main proposals for worker participation in companies. This was, of course, secondary to the principal mechanism of sectoral collective bargaining to attain worker voice. The proposals were:

- To require that directors owe duties to 'enhance and protect the interests of workers' as they currently do in relation to 'shareholders';
- 'Every board should have worker directors' who 'should be appointed by recognised trade unions (or, in the absence of representative unions, elected worker representatives)'; and
- 'Workers through their trade union. . . Should have a minimum percentage of the vote in general meetings of the company'.[30]

The *Manifesto* left for later consideration the 'detail of the proportions, exemptions and application to related entities.'[31] Here we describe the policy choices in such consideration in relation to votes for company boards, in different types of enterprise, especially the public sector, and in votes in pension funds (workers' capital). The purpose is to open the next chapter of democratic society by enhancing democracy at work.

Today, votes in the businesses follow a 'one pound, one vote' norm. Voting is therefore monopolised by shareholders. In turn, asset managers and banks for the most part exercise the right to vote attached to shares, all with 'other people's money'.[32] They bear no risk in insolvency, and their preferences do not necessarily (or even usually) reflect those of their clients. From most political perspectives, this is wrong and should be stopped.[33] To make recommendations as to how this might be achieved is, however, beyond the scope of the labour law proposals in this book.[34] That said, it is notable that diverse proposals for votes at work have been repeatedly made by every major political party.[35] The proposal in the Bullock Report of 1977 failed because it suggested equal representation on boards: it could not please all supporters, in the face of organised opposition. In particular, there was 'unremitting hostility' from the City. We suggest that it would be better to tolerate smaller representation on the board with a guaranteed significant voting presence in the general meeting.

Votes for workers and worker representation

First, we recommend votes for workers in their employing organisations. If workers had votes in company affairs on the basis of 'one person, one vote' (as the true investors of capital as they might be described) it is likely that those votes might be directed to the long-term interests of their employing organisation as well as their own interests in such things as a more equal society, with full employment, leisure, and a living planet. If votes were attached to workers rather than to shares, democracy would advance into the economy just as it once advanced into politics.[36] While most European countries require a minimum number of board seats allocated to workers or unions, these laws always mean workers are in a permanent minority on boards.

We propose a minimum (amendable upwards by the Secretary of State by regulation) of two worker directors on company boards, directly answerable to the workforce. Clearly, the broadest concept of 'worker' would be necessary in this context to allow workers to vote in the parent or other entity that exercised real control over their employment. The new definitions of 'worker'

and 'employer' proposed in the chapter on the employment relationship may be sufficient but may need to be further expanded in the context under discussion to prevent company structures designed to evade worker democratic input. Two directors, rather than one, are less likely to be isolated or ignored. But the critical reason why workers will be listened to is that they will have, under the proposals below, the right to vote in the general meeting for *every* director on the board.

Workers should be registered as company 'members'. The Companies Act 2006 today presumes that a 'member' has voting rights. There is no requirement to have shares to be a member. Under ss. 170-177 directors owe duties to the company to avoid conflicts of interest, be diligent, and act in its interests, with particular regard to members. In fact, directors owe no duties to 'shareholders'. That word is simply not in s. 172. 'Shareholder value' is a cultural, not a legal norm.[37] So, if workers are recognised as members they could (1) have the right to vote, on a one person, one vote basis, but also (2) have the right to enforce directors' duties. Workers could participate in amending company constitutions (usually with a 75% majority) and would have legal rights to enforce the company constitution (usually the Articles and Memorandum of Association) in court.

As between themselves, the proposal is one worker, one vote. But shareholders' votes are not distributed on an individual basis, and a workforce of 500 workers would be easily outgunned in a company with half a million shares. The proposal is therefore that the workers in the company should have the collective right to cast the votes of 20% of total registered votes in company general meetings. This initial percentage could be altered subsequently by powers vested in the Secretary of State. If preferred, different percentages could be introduced for small and large companies. The most important thing for the future is not the initial percentage, but to establish the principle.

Which companies?

Some countries, notably Germany, require worker directors only in companies employing prescribed statutory thresholds. Sweden, Norway and Denmark require worker directors where a company employs over 25, 30 and 35 staff. We propose that in *every* company workers will have 20% of voting capacity of the general meeting. This would be far better than any Enron-style employee share scheme, and bring to every enterprise an element of a worker cooperative. The 'Model Articles' of companies should be amended accordingly so that people's basic expectation is they have votes at work. We propose in the first instance that companies with fewer than 250 staff could

opt out. This would still enfranchise just over half the UK workforce.[38] The threshold should be amendable downwards by the Secretary of State, and decreased over time.

As to the legal form of employing entities, in principle everyone should have votes at work, no matter what legal form of enterprise they work for. As well as public and private companies (plc, Ltd) and companies limited by guarantee (often charities) all regulated by the Companies Act 2006, there are other forms including: partnerships (regulated by the 1890, 1908 and 2000 Acts); trusts (which include some businesses and many charities); entities regulated by the Friendly Societies Act 1992 and the Co-operative and Community Benefit Societies Act 2014; sole traders; European companies; and a multitude of entities from other EU member states exercising freedom of establishment in the UK. We consider that the reforms proposed could easily be drafted to apply to these entities. For the EU and other foreign entities, UK law can require the foreign entity to have votes at work if it operates in the UK.

In publicly owned enterprises and in some entities in which the public has a special interest (such as NHS bodies, universities, banks, the media, trains, water, gas and electricity) the government has the power, by legislation or by other leverage, to insist on the representation of workers. In such bodies there is also a strong argument that the interests of the public should be taken into account beyond the imposition of a regulator requiring accountability to (e.g.) patients, students, licence-fee payers, or passengers. There is a case to be made for citizens to have a voice in the governance of these public interest entities. This *was* the direction for the NHS, until the Health and Social Care Act 2012, and it *is* in principle the governance model of some universities. Such considerations are beyond the scope of this book but could be the occasion to set a new model of democracy in enterprise.

Role of trade unions

The *Manifesto* proposed that worker directors and votes in the general meeting should be channelled through trade unions, or elected representatives where there are none. There are reasons of history and democracy for empowering union candidates to represent workers on boards, and for union delegates to organise votes in general meetings. This would achieve consistency with policy for the role of trade unions in future.

There are many models for union engagement. In Germany, every worker has an individual right to vote for works councils and for company board representatives, but may always delegate their votes to union representatives.

In companies with over 8,000 staff, worker votes for company boards are cast by default by the union, unless the worker opts to cast his or her own vote.[39] This system fosters spectacular engagement: for instance, in works council elections the *average* turnout in 2010 was 79%.[40] Union candidates usually succeed because they are better organised. Though non-union candidates sometimes win minority representation on a works council (not board seats), this system has been embraced by German unions and faces no calls for change.

Second, in Sweden, where unions are far stronger in membership and presence, its board representation system is comparatively neglected. There, board representation only operates by trade union delegates. In many firms, the option of board representation is simply not taken up.[41] A possible reason is that workers feel distant from the board representation system, leading to disengagement among Swedish workers. In choosing a model, we propose that the UK should take from the best of both the Swedish and German models: it can retain board seats on one-tier boards, empower every individual worker to have the right to vote in general meetings, but enable those votes to be delegated to their trade union.

Worker voice and workers' capital

The huge assets of workers' accumulated 'deferred wages' in pension funds should also be the subject of worker voice. Whilst those funds have been accumulated by former and present workers, it is the latter, in the first instance, to whom we turn for democratic participation.

- First, the Pensions Act 2004 currently requires that one-third of pension trustees are 'member nominated' (elected by employees or appointed by the trade union). The Secretary of State has the power to increase this to one-half. There is no reason why this should not be done immediately.
- Second, the National Employment Savings Trust (the public-option fund manager for many people with automatically enrolled pensions) has a temporary exemption from the member-nominated trustee rules. This could also be removed immediately by the Secretary of State.
- Third, the legislation should be amended to clarify that the right to member-nominated trustees applies regardless of the legal form of a pension (whether trust or so called 'contract' pensions).

Pension funds' share of the overall UK stock market stopped growing and went into rapid decline since the 1990s because of the collapse of collective bargaining. When collective bargaining is revitalised, pension funds can again become an important segment of capital markets. With workers having democratic voice in their pensions, we will move towards a far more democratic economy. Furthermore, if pension funds were to be democratically controlled, coalitions would be likely to form with the workers voting in company general meetings. We would expect trade unions to be the channel to organise the voice of both.

Conclusion

The introduction of sector level bargaining will help encourage enterprise level bargaining, which will build on the minimum standards imposed at sector level. But for enterprise bargaining to operate effectively, the legislation by which trade unions are recognised needs urgent revision and simplification. Similarly, change is needed in corporate governance to ensure workers' voices are heard in the boardroom, in company meetings and as pension funds trustees.