

# **University of Sydney Union Research Strategy Group**

## **Annual Lecture 2009**

### **Legal Strategies for Trade Union Recovery:**

#### **Lessons from Three Continents**

##### **I**

At a conference in Glasgow a few weeks ago, I was bowled what can only be described as a googlie by one of those present. She asked the very pertinent question of why is it that British trade unions under a Labour government were so weak in contrast to their German counterparts even under a CDU government. A very good question to which one mumbles the normal platitudes by way of response: it is all to do with industrial restructuring on the one hand and weak labour laws on the other, both of which have largely survived the election of a New Labour government, which in the words of Tony Blair on the eve of the 1997 general election was committed to ensuring that British labour law remained the most restrictive in Europe. But on further reflection it struck me that that was only part of the explanation, convenient truths which absolved the trade unions of any responsibility for where they are now. The truth is that German trade union membership density is not that much higher than in the United Kingdom, yet the levels of collective bargaining coverage are almost twice as high (despite a significant decline in the last 15 years or so). The fact is that German trade unions touch many more people than their British counterparts and that they speak for many more people. They are listened to because they act for two thirds of the workforce, even if they have in membership only one third of the workforce.

## II

I will return to this matter later in the course of the lecture. In the meantime, **I propose to address the question of collective bargaining and to begin by asking why we should take it seriously.** Let me recall that this year was the 60<sup>th</sup> anniversary of ILO Convention 98 (the Right to Organise and Collective Bargaining Convention), which provides that

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

This is an undertaking that has been accepted by more governments than any other, with ILO Convention 98 having been ratified by 160 countries (but not by China, India or the United States). However, as members of the ILO all countries are bound to promote collective bargaining through the constitutional commitment of that organisation to freedom of association, which explains that while the US is not subject to scrutiny by the ILO Committee of Experts, US unions are able to make complaints to the ILO Freedom of Association Committee.

In some countries these commitments in international law find expression in national and State constitutions, including the most highly developed in the world (New York State), fairly recently established European democracies (Italy and Portugal, along with Poland), as well as emerging democracies throughout the world from Brazil to South Africa. But not only that, we find international and national courts awakening to the reality that when other treaties or national constitutions refer to freedom of association, this is a freedom hollow in content unless it contains the

right to bargain collectively. Moving only a few paces behind the Supreme Court of Canada, the European Court of Human Rights felt obliged only last year to acknowledge in a case from Turkey ‘the perceptible evolution in such matters, in both international law and domestic legal systems’, and to conclude that

having regard to the developments in labour law, both international and national, and to the practice of Contracting States [of the Council of Europe] in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one's] interests” set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.

All these political undertakings reflect a view that collective bargaining is a good thing, though why it is a good thing is never expressed in legal documents. But the reasons must be powerful and compelling if the practice is to be found in international law and national and State constitutions in these direct and indirect ways. First and foremost is its traditional economic function. When the Roosevelt administration introduced the National Industrial Recovery Act of 1933 (as a prelude to the National Labor Relations Act of 1935) it was part of a package of industrial restructuring, which had parallel initiatives in the United Kingdom under a Conservative government, and France under a socialist government. These measures seem designed in retrospect to create a virtuous circle: to raise wages, to equalize incomes, to stimulate demand, to reduce unemployment, to promote social stability. But although labour law and collective bargaining have always been subordinate to the changing fads and fashions of the dismal science, their real justification lies not in

the contested terrain of changing economic orthodoxy but in their contribution to social justice and their determination that society should subordinate rather than be subordinated by the market. The raising of wages and the equalizing of incomes are public goods in themselves, as is the tendency of collective bargaining to contribute not only to greater equality for workers but also greater equality between workers. Historical evidence suggests that collective bargaining is a much more efficient way of dealing with the gender pay gap than equal pay laws. The higher the level at which bargaining is conducted, the greater the transparency about pay, the higher the level of pay equity.

But collective bargaining is to be applauded not only as an instrument for the delivery of more equal and more socially just outcomes. It is important also as a process which enhances accountability in the exercise of power. At a time when constitutional reform is on the agenda everywhere as a way of enhancing citizen participation and in holding government to account, it is frequently overlooked that for most people the most conspicuous source of power in their lives is not the State but the corporation, and it is on the workplace that the reformers gaze needs to be fixed, in order to give workers a voice in the decisions that affect them (what we used to call industrial democracy) and to ensure that there are fair procedures fairly applied to deal with disputes and conflict when they arise (what is still called the rule of law when applied outside the workplace). Collective bargaining by independent and representative institutions with their own external sources of power remains the most effective - and perhaps the only - means by which these processes can be realized, though claims are made that the same goals could be secured by alternative means of informing and consulting workers. But such means are not strategies for worker empowerment, but instruments of worker indulgence often by cynical employers.

What happens in the absence of a trade union if the employer fails to inform and consult the workers' representatives? What resources are available to the workers' representatives even where information is provided and consultation does not take place? And what happens if consultation takes place and the employer rides roughshod over worker objections?

What then is the alternative to collective bargaining as a source of socially just outcomes and fair procedures? The answer is to leave it to the State in the shape of minimum standards legislation or (its functional equivalent) minimum standards awards for the otherwise unprotected. But legislation produces neither fair outcomes nor fair procedures. It produces minimum standards that may or may not be increased regularly but which cannot be appropriate for all workers in all contexts. It also produces laws that are difficult to enforce, a process that requires an expensive array of courts and tribunals which in most countries produce results in which workers lose more often than they succeed. But like the casino where the punter wins often enough to sustain a measure of hope, so the worker too can win in the legal lottery. But the odds are stacked against him or her. The law becomes more technical as the years pass, partly because there is more of it and partly because of the heavy burden of precedent which means that the law is known only to a few specialists. Both sides need lawyers. But an inequality of bargaining power at work becomes an inequality of arms in the legal process, as the employer outguns the worker in access to legal services. Inequality of means leads to the worker investing a higher share of personal resources in a process in which he or she is likely to lose, while the employer can set off his or her legal costs as a tax deductible business expense, to be paid for by the very worker by whom he or she has been sued.

### III

**So, given these political imperatives, why is collective bargaining coverage so low? Why do so few workers enjoy the right to bargain collectively? And why are so many workers denied the right to be protected by a collective agreement?**

Collective bargaining density is badly divided between those countries that have virtually no coverage, those countries which have low levels of coverage, and those countries that have very high levels of coverage. The English speaking common law countries tend to have levels of coverage of below – well below – 50%, and all are characterized as having what might be said to have the weakest collective bargaining structures or form, which is what might be referred to as **a model of representational bargaining**. This is a system of bargaining which is based on the company or the workplace, with the union bargaining on behalf of its members in the company, and the agreement being confined to union members or a wider group of employees in the company. Laws to support this bargaining model have been adopted in the United States, Canada, the Caribbean, the United Kingdom, New Zealand, and now Australia. These laws have certain superficial attractions: they are responsive to worker choice (workers can have collective bargaining if they want it), they introduce ideas of democracy to the workplace (workers can have collective bargaining if that is the wish of a majority of them), and it reproduces the features of the political scene and translates them to the industrial (workers can have collective bargaining if a majority of them choose it in a contested election, albeit one without candidates).

**So why is this is a problem?** The answer is that despite their superficial attraction, these laws do not so much create rights for trade unions or workers as erect barriers to collective bargaining which undermine the duty of national governments in international law. **This is because they put the onus on the union to establish the**

**required level of support, in circumstances where there is an unavoidable institutional bias in favour of the employer, which in many cases help to ensure that worker free choice can never genuinely be determined.** These problems are well known from the experience in the United States where despite legislation promoting the right to organize, the right to bargain collectively, and the duty to bargain in good faith collective since 1933, trade union membership and collective bargaining densities are the lowest in the developed world, now barely registering double figures in the private sector, with some unions such as SEIU so disillusioned by the legal process that they are trying to work outside it and without it, seeking voluntary agreements from employers not to interfere with their organizing efforts. Indeed it has been the singular achievement of the NLRA that it has managed to take collective bargaining density in the US back to where it was when the Act was first introduced in the 1930s, with the tales of woe from the United States being as formidable as they are well known:

- First is the problem of union **resources**. An organizing and election campaign entails a huge investment of resources for the trade union when faced with employer resistance. It is not simply a case of sending out how to vote cards, but a question of holding and retaining members during what might be a long and hostile campaign. Having committed itself, the union is not guaranteed success, and this is a process that would have to be conducted in thousands and thousands of companies if density levels were seriously to increase.
- Second is the problem of employer **resistance**. This is now well known as employers contest certification elections, sometimes brutally. Employers will hire the services of labor consultants who boast a 96% record in helping to

keep workplaces union free; they will hold captive audience meetings presenting an anti union message, dismissing those who refuse to attend; they will engage in unfair labor practices such as the use of threats and intimidation and the firing of key activists for the encouragement of the others, dismissal as a strategy being used with increasing frequency;

- And third is the problem of employer **reaction** by delay and the use of litigation as a key strategy to wear the union and the workers down. Former NLRB chairman Bill Gould writes that most of the delay problems have ‘emerged since the 1970s because employers have become more sophisticated in exploiting the administrative process so that it lasts a considerable period of time’. Here we are talking about delay caused by what the AFL-CIO refers to as post-election employer objections in the NLRB and then in the courts, with employers contesting, for example, who should be allowed to vote in an election. There is also the problem of delay caused by post election refusals to bargain.

**Given the problems, is this a model that can be made to work?** The Americans are currently embroiled in an anxious debate about what needs to be done to correct the system. In the one corner we have the unions promoting their Employee Free Choice Act with demands for (i) automatic recognition without the need for an election where there is evidence of majority support, and (ii) first contract arbitration; and on the other hand there is Bill Gould and others attacking the legitimacy of the first of these proposals, arguing for expedited elections instead. Both camps look to different Canadian jurisdictions to justify their proposals, though what both overlook is that despite the higher levels of collective bargaining density than in the United States, collective bargaining density in Canada is also relatively

low, certainly compared to the position in major European jurisdictions. It is hard to believe that while EFCA will lead to significant advances, it won't also lead to the creation of fresh problems as new vulnerabilities are exposed and exploited by employers, the existing battlegrounds being transferred to new and sometimes predictable sites. The problems of trade unionism and the professionalisation of employer opposition suggest that the three Rs (resources, resistance and reaction) will continue to dog this model of collective bargaining as practised in the United States, whatever amendments are introduced to the legislation.

This **scepticism is reinforced by the UK experience** where US style legislation has been introduced, albeit addressing some of the problems of the US model. These include:

- Union access to the workforce, with trade unions entitled to access workers in a bargaining unit to be balloted for the purposes of recognition. This only applies, however, where the union has established sufficient support in a bargaining unit to justify the ballot going ahead and applies only during the ballot period. Where these measures do apply the union is entitled to hold mass meetings of the workers concerned and surgeries with small groups of workers, during working time;
- Recognition without ballots, where the union can establish that it has majority membership in the bargaining unit. This, however, is subject to the proviso that a ballot may be ordered in defined circumstances, as where there it would be in the interests of good industrial relations to conduct a ballot, or there is evidence that some of the union members joined for reasons other than collective bargaining. Where a ballot is held, employers win more than they lose.

Yet despite these improvements, it remains the case that collective bargaining density in the United Kingdom has fallen since the procedure was introduced, from an estimated 36% in 1997 to an estimated 32-34% today. While it is not suggested that the procedure has caused this decline, it nevertheless indicates that the law has not been effective to stop it: at best the procedure has been a parachute slowing down the fall rather than a projectile sending density levels into the opposite direction.

**Why is this?** For precisely the same reasons that we encounter in the United States. In the first place, there is the problem of union **resources** as union income declines, so the capacity for long organizing drives also declines. This is despite the fact that unions have been more or less relieved of any pressure to organize small companies which are exempt from the legislation. Secondly, there is the problem of employer **resistance**, which has been found to take a number of forms which mimic those found in the United States. Thus there is evidence of employer pre-emption, employer persuasion (in captive audience meetings), coercion (by threats, surveillance and penalties), and frustration (undermining union access arrangements). And in some cases there is also the problem of employer **reaction** in litigation, identifying weak spots in the statute and seeking to exploit them, and litigating on every minor technicality to prolong the process, again in order to wear down the union and the workers. Perhaps more distressing, we see big companies now adopting the US practice of hiring labor consultants, the corporate gun slingers who will guarantee to keep you union free, and being used by TNCs like T Mobile, Amazon, Virgin, General Electric (various subsidiaries thereof), and Cable and Wireless (a former State corporation).

#### IV

**Given the apparently inherent weakness of the representational bargaining model (and there are other problems quite apart from the design of the scheme), are there other ways of proceeding? Are there other ways of doing collective bargaining that would address these problems and enable us better to realize the promise of international law?** The civil law countries of mainland Europe tend to fall into the third rather than the first or second of the categories, with levels of collective bargaining that continue to be eye watering or those of us in common law jurisdictions. We are looking at levels said to be as high as 98% in Austria, 96% in Belgium and Slovenia, 94% in Portugal, 93% in France, 90% in Finland and Sweden, 89% in the Netherlands, 85% in Greece, 82% in Spain, 80% in Denmark and Italy, and so on. Part of the explanation is that when we talk about collective bargaining we use the same term to mean different things. **When the Europeans talk about collective bargaining, however, they mean a regulatory process which establishes regulatory standards for an entire industry or sector in which trade unions participate as regulatory institutions.** Although it may currently be unfashionable or ‘uncool’ to say so, regulatory bargaining of this kind has huge benefits. It enhances the role and status of trade unions; (ii) it helps to ensure a high level of collective bargaining density; (iii) it reinforces the role of trade unions in people’s lives by ensuring that the agreement reaches more workers; (iv) (by the inclusion of opening clauses) it provides an incentive to employers to recognize rather than resist the union at the enterprise; and (v) (by focusing on the worker rather than the employer) it addresses some of the critical problems of contemporary labour law (such as the agency worker who would be entitled to the terms of the agreement regardless of the identity of the employer).

**What kind of laws are necessary to secure these huge benefits and how do they differ from laws to which we are increasingly accustomed in common law systems?** The first question today would be how to construct such a system, and to impose obligations on employers. These problems have been overcome in different ways in different European countries, and in Germany the system appears to be embedded in the economic constitution created after the war, so that we have a law on collective agreements but not a law on collective bargaining. But the problems were not to be underestimated where there are no functioning employers' associations or where there are functioning employers' associations with no mandate from their members to engage in collective bargaining. The second question is how to ensure that the terms of the agreement are applied to everyone in the sector in question, including those who are not members of the employers' association that concluded it. This can be done in any one of a number of ways, from (i) making the terms of the agreement universally applicable as a matter of law, to (ii) making them mandatory at the request of one or both of the parties, or to (iii) making them mandatory at the request of one of the parties. In Ireland (a country which inherited many British structures) for example, provision is made for the registration of multi-employer agreements with the Labour Court, and once registered these agreements apply to all businesses and all workers in the sector in question. The agreements themselves are not legally binding, but they operate as mandatory minimum conditions of the contract of employment and so are enforceable by the worker against the employer. Some may see the Irish legislation (which is not alone) is the equivalent of making pattern bargaining mandatory.

But apart from identifying the multi – employer bargaining party and addressing the scope of the agreement, we would need different laws on industrial

action, while it is also the case that sector wide bargaining would not remove the need for workplace representation laws. The collective agreement will typically deal with the economic issues – pay, hours and holidays; while there will be a wide range of social issues that will still have to be dealt with at the enterprise or the company – dismissal and grievances; safety, health and hygiene; equal opportunities and the elimination of discrimination; procedures for sickness and ill health, business re-organisation and other changes; redundancies and redeployment, not to forget flexibility in the implementation of the collective agreement. Workplace representation can be secured in a number of ways, in some cases (such as Germany and the Netherlands) through works councils in which all workers are free to participate regardless of their status as union members, but which work effectively only because they have been penetrated by the unions and provide a forum for what is a de facto union voice in the workplace. But it need not be like that, and there is no reason why workplace representation under such a tiered system could not be based on exclusive representation of a majority union, or the representation individual and collective of the union of the workers' choice where no union enjoys majority status. It would be normal, however, to expect the union which concluded the collective agreement at the sector level also to have representation rights at the company or enterprise level.

**But how secure is this method of bargaining? Is it not under attack from both employers and the courts?** To some extent, yet not only is industry wide bargaining standard practice in EC Member States, it also enjoys a curious measure of recognition under EC law. By virtue of article 49 of the neo-liberal EC Treaty, businesses have a freedom to provide services in other Member States. This gave rise to the problem in the now infamous Laval case where a contractor in Latvia won

a contract in Sweden to build a school, and did so on the basis that it would be posting to Sweden workers recruited in Latvia, to be paid in accordance with the wages of Latvia which are lower than the wages of workers in Sweden. Under the Posted Workers' Directive of 1996, however, the posted workers must be paid the minimum standard in the host country set down in legislation or in a collective agreement which is declared universally applicable, which means that they must be observed by all undertakings in the geographical area and in the industry concerned. Where there is no system for declaring collective agreements universally applicable, Member States may base themselves on agreements which are generally applicable in the industry or sector in question provided certain conditions of transparency and equality of treatment are observed. The problem arises in countries like Sweden where there is a high level of collective bargaining density but there is no system for declaring collective agreements universally applicable, and a reliance on industrial action to compel foreign service providers to comply with minimum terms and conditions in prevailing collective agreements in a particular locality. The European Court of Justice said that it is not lawful under EC law to take industrial action to force foreign service providers to comply with collective agreements which do not comply with the rigid requirements of the PWD in terms of universal or general applicability.

The effect of the Laval case has been to induce some countries (notably Sweden and Denmark) to strengthen their systems of industry wide collective bargaining - giving it a stronger degree of protection by removing doubts that employers posting workers from other countries can be required to comply with these agreements. Problems thus continue to arise in two situations. The first is where a government fails to take measures to declare national agreements to be universally or generally applicable. But the only example I know is the United Kingdom where

despite the representational model of collective bargaining legislation, there continues to exist regulatory bargaining activity. The Working Rule Agreement in the Construction Industry alone covers 600,000 workers. The second situation where problems continue to exist is where governments seek to require posting employers to observe supplementary or enterprise agreements which are not universally applicable. In the Ruffert case for example, the government of Lower Saxony could not make it a condition of a contract to build a prison that the Polish contractor pays wages in accordance with collective agreements which were applicable at the site. In this case the ECJ said that this could not be required as a condition of the contract because the collective agreement in question had not been declared universally applicable; nor was it generally applicable. Yet although these decisions have been as a direct attack on collective bargaining by European trade unions, despite the ferocity of the attack they nevertheless leave largely intact the legitimacy of the European model of industry wide agreements as a source of standards with which all employers must comply.

## V

The lesson from two continents thus appear to be that (i) the American and European ways are very different; (ii) that although we use the same words, collective bargaining may mean different things in different systems; (iii) that collective bargaining density levels vary greatly according to the level at which bargaining takes place; (iv) that the North American system of representational bargaining creates obstacles or barriers to entry; and (v) that the European system of regulatory bargaining creates incentives to employer engagement with trade unions at enterprise level – they help to take employer resistance out of the equation. We are thus

presented with a stark contrast, between high levels of coverage under European systems and low levels of coverage in the United States. Can the new Australian system bridge the gap between these extremes? The world is watching, for there are genuinely important regulatory innovations in the new Australian system which will help determine whether this enterprise bargaining model is fatally flawed or whether it can be made to work as a result of the important variations which have been introduced. These initiatives include the minority bargaining provisions, the wide discretion given to Fair Work Australia to determine whether there is majority support for collective bargaining, and the remarkable provision for multi-employer bargaining in the low pay stream.

All of these go some way beyond the situation in the US and the UK, but all are vulnerable to the same forces that operate to undermine the US and UK systems. Thus, the question of **resources** will be an issue for the minority bargaining initiative (which does not at first sight appear to have been a conspicuous success in New Zealand), the discretion vested in Fair Work Australia may be both a source of strength and weakness, and the impact of the multi-employer bargaining stream will be impaired by a mean minded legislature's lack of political confidence. The discretion in assessing majority support will be a weakness if the discretion as to what counts as a legitimate means to assess employee support induces caution on the part of the unions as to the means chosen in anticipation of what FWA might say, and if it induces caution on the part of FWA also as to the means chosen in anticipation of what the courts might say. These are questions for administrative lawyers rather than labour lawyers, and although the operation of administrative law principles may or may not be more relaxed in Australia (and I am reliably informed that they are not), the existence of such a wide discretion would give rise to concern by the courts unless

it is exercised with great circumspection. My own view is that despite the vast improvements on the US system in the Fair Work Act, it too will encounter similar problems in time. My prediction is that as the political mood in the country has changed, there will be an initial flurry of activity, a few big scalps will be taken in the short term, but that the number of cases will gradually decline, and the struggles will get tougher.

If this is true, the question will be one of trade union ambition and the extent to which trade unions are prepared to accept the contained role defined for them by governments. **Are we prepared to accept a model of collective bargaining that is guaranteed to ensure that only a minority of workers will be covered by a collective agreement? Are we prepared to accept a model of collective bargaining that guarantees we will be a minority movement, speaking for a minority of workers? And are we prepared to accept a model of collective bargaining that requires us to give up on the idea that every worker has the right to be protected by a collective agreement? If the answer to these questions is no, what new laws should we now be seeking to secure? The political strategy for better laws must continue with an industrial strategy to make the existing laws work, and it is this need for a political strategy for continuing improvement which explains why it is in the interests of the trade unions that the close ties that bind the industrial and political wings of the Movement should never be weakened.** So let me return to the question I was asked in Glasgow about why trade unions in the United Kingdom appeared to be so weak compared to their German counterparts. It may be of course that the question was based on a distorted vision of reality. But assuming it to be at least partially right, the answer lies not only in restrictive labour law or in economic organisation, but in the authority that trade

unions draw from the fact that they reach so many people. They do this by bargaining collectively on behalf of the great bulk of the working population and by setting standards on which the great bulk of the people rely, an activity which it is the duty of governments in all common law systems to make better efforts to promote.

K D Ewing

5 November 2009