

IEA Briefing Paper

# SUMMERTIME BLUES

Unions, strikes and  
the law in 2022

J R Shackleton  
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## Summertime Blues: Unions, strikes and the law in 2022

*J R Shackleton,*

*Editorial and Research Fellow, Institute of Economic Affairs*

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### Summary

- This summer is seeing an upsurge in strikes and threats of strikes, with the number and scale of disputes being markedly higher than in the pre-Covid period.
- However, these disputes are concentrated in the public sector, or those parts of the private sector that were once nationalised industries, where union membership remains high. Across the workforce as a whole, unionisation has fallen to less than half the rate in the 1970s.
- Trade unions' power depends on their special status in law, which provides immunity from damages if strikers follow appropriate procedures. The Thatcher and Major governments tightened the conditions under which strike action could take place.
- These are not the only reasons for declining union power and influence. Globalisation and structural change have also weakened unionism in many countries. Within the UK increasing workforce diversity has undermined unionism, while higher levels of employee qualifications and various forms of employment regulation to protect workers have reduced the appeal of collective bargaining.
- The current round of disputes is unlikely to lead to a continuing seventies-style wage–price spiral, but government concessions to union militancy will add to public spending and mean that tighter monetary discipline will need to be imposed, with negative consequences for the rest of the economy. They will also make necessary public sector reform more difficult.
- Should the government wish to challenge union militancy more aggressively, there is a range of options, from selective strike bans and compulsory arbitration to reshaping public services, which could be adopted without compromising the fundamental freedom to join a trade union. However, this would require a coherent strategy rather than ad hoc responses made in the course of a febrile 'summer of discontent'.

## Introduction

The summer of 2022 has seen an upsurge in industrial relations disputes. In addition to the very visible and widely-discussed strikes on the railways and London Underground, action of one kind or another has taken place or is threatened on buses in West Yorkshire, among airport workers, civil servants and local government employees, parts of the National Health Service, universities, the Royal Mail, British Telecom and even barristers.

Excitable commentators have suggested that this ‘summer of discontent’ heralds a return to the industrial militancy of the 1970s.

The number and scale of disputes certainly seem to be greater than in the immediate pre-Covid years.

The most recent Office for National Statistics figures available, for 2018, show there were just 81 stoppages recorded in that year (the second lowest figure since 1893) involving 39,000 workers (the second lowest figure since 1930). Only 273,000 working days were lost to strikes.<sup>1</sup> By contrast, at the height of 1970s militancy in 1979, 29,474,000 working days were lost – in a much smaller workforce than today.

To some extent a rebound from the low level of disputes was to be expected, as we came out of two years of on–off lockdown during which pay had fallen for many workers and industrial grievances had been suppressed. There are some special factors. The end of the rail passenger franchise system, and the planned creation of Great British Railways with a brief to cut spending sharply, has precipitated the first national disputes in decades.<sup>2</sup> The announcement that 91,000 civil service jobs are to be cut has similarly spurred unions to action.<sup>3</sup> And rising inflation coupled with a buoyant labour market has fuelled the demand for higher pay across the board.

But does this flurry of militancy really suggest a permanently more combative industrial relations environment and – particularly if in some quarters militancy is seen as a political movement to undermine the government<sup>4</sup> – what should the response be?

Union militancy and the disruptive impact on the economy of strikes and other industrial action have not been major issues in the UK for many years; most of today’s politicians have no personal memory of a time when they were. This Briefing explores these questions by reminding us of the context in which unions operate today and outlines some possible policy alternatives.

## Trade unionism today: a minority pursuit?

Despite the noise generated by some of the stronger and more militant unions, trade unionism in the UK is at a low ebb. In 2021 just 23.1 per cent of employees were union members, the lowest proportion since current measurement began in 1995. A comparable figure for 1979, when unions were arguably at the height of their power and influence, would be approximately 50 per cent.

Trade unionism is nowadays primarily a public sector activity. Around 60 per cent of all union members work in public sector jobs,<sup>5</sup> where the unionisation rate was 50.1 per cent last year. In the private sector it was just 12.8 per cent – meaning that more people are self-employed than are private sector trade unionists. Even that is rather misleading. Concentrations of private sector unionism are mainly found in

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<sup>1</sup> Annual figures are normally published in the following year, so 2019 figures should have appeared in 2020. However, reporting was suspended as a result of the Covid-19 lockdown.

<sup>2</sup> Under privatisation, the unions negotiated with different Train Operating Companies (TOCs) and Network Rail. Strikes were mainly confined to issues with particular franchises. Under the Williams-Shapps rail plan, which brings the railways under ‘one guiding mind’, the TOCs simply run contracts on behalf of the government and have little if any autonomy. The government should not be setting pay on the railways, but it is being inexorably dragged in this direction.

<sup>3</sup> ‘Prime minister announce plan to cut 91,000 civil service jobs’, Civil Service World, 13 May 2022 (<https://www.civilserviceworld.com/news/article/government-plans-to-cut-91000-civil-service-jobs>).

<sup>4</sup> ‘A general strike to bring down the Tories is the only programme for victory for the working class’, The News Line, 31 May 2022 (<https://wrp.org.uk/editorials/a-general-strike-to-bring-down-the-tories-is-the-only-programme-for-victory-for-the-working-class/>).

<sup>5</sup> It is difficult to be precise. Our main source on unionisation is the Labour Force Survey, where individuals report which sector they work in. However, more people (7.7 million in 2021) think that they work in the public sector than is actually the case (5.72 million). For example, university employees or workers contracted by private companies working for local authorities assume they are public employees but will not be counted in the public sector using international definitions.

legacy industries, previously in the public sector, such as parts of the railways, Royal Mail, water, gas and electricity. Union presence in newer sectors such as information and communications is often nugatory.

And unionism is low among poorly-paid members of the workforce. There are heavy concentrations of workers paid at or near the minimum wage in retailing, textiles, hair and beauty, and food services and accommodation. Yet union density in these industries is usually less than 10 per cent. The reasons for this are easy to discern. Jobs in these sectors are disproportionately part-time, and are often temporary expedients (for example, students working in bars and restaurants) rather than career commitments.

They are usually in small establishments in a wide variety of locations, which makes them costly for unions to organise.

Although there are certainly many poor union members, on average trade unionists are relatively well off. Highly-paid unionists such as doctors, train drivers and senior civil servants may be unrepresentative, but union members are typically paid more than non-union members, and (particularly in the public sector) tend to have better pensions, work shorter hours and have longer holidays. They are more highly educated, being more likely to have degrees or other higher education qualifications, are more experienced and have been in their current job longer than other workers.

Significantly, given growing concern about intergenerational inequality, they are on average much older than the workforce as a whole: 41 per cent of all union members in 2021 were aged 50 or over, although this age group covers only 33 per cent of all those in employment. Only 4 per cent are aged between 16 and 24, as against 11 per cent of all those in employment, and there are no signs that younger workers are joining unions in anything like the numbers in previous generations.<sup>6</sup>

### So how are unions still influential in the UK labour market?

Trade union power in this country ultimately derives from unions' special status in law, which allows them to organise strikes with comparative impunity.

In the nineteenth century this status was insecure and early unionists could be charged with conspiracy to break contracts, a criminal offence. The Trade Union Act 1871 and the Conspiracy and Protection of Property Act 1875 removed the threat of criminal prosecution, but unions were still liable for civil damages. In a famous 1901 case, the Taff Vale Railway Company won a judgment against the Amalgamated Society of Railway Servants,<sup>7</sup> the courts held that a union could be sued for damages caused by the action of its officials.<sup>8</sup>

This case sparked massive opposition, providing the impetus for the eventual formation of the Labour Party, and the Trade Disputes Act of 1906 established the principle that the funds of unions engaged in lawful strikes were exempt from liabilities for tort resulting from breach of contract.

The obvious question is 'what is a lawful strike?' By the 1960s this became a major concern as the number of 'unofficial' disputes – those unsanctioned by the union bureaucracy but arising from spontaneous shopfloor action – grew to unprecedented levels. There were also issues about 'sympathy strikes' (where workers would strike in support of other workers even though not engaged in a dispute with their own employers) and political strikes against the government of the day.

Moreover, as Nobel Prizewinner F. A. Hayek (1960: Chapter 18) wrote, trade union immunity from damages gave unions the power to coerce employers – and also, sometimes, unwilling employees. It enabled them to impose a pattern of wages and other conditions that were economically inefficient, stymied productivity and threatened individual liberty.

Hayek had some sympathy for unions as voluntary organisations offering 'friendly society' benefits – such as insurance – and helping to channel grievances. But, in a much-quoted letter to *The Times* in

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<sup>6</sup> The age composition of union membership has changed markedly over time. In 1995 only 22 per cent of union members were aged 50 or over.

<sup>7</sup> A name evocative of a period when 'Master and Servant' legislation was still in place. The Amalgamated Society of Railway Servants merged into the National Union of Railwaymen (another archaic title) in 1913. This union in turn was incorporated in 1990 into the National Union of Rail, Maritime and Transport Workers, more snappily known today as RMT.

<sup>8</sup> For an account, see Brodie (2003: Chapters 3 and 4).

1977,<sup>9</sup> he drew particular attention to the coercion involved in the 'closed shop' – which required union membership as a condition of employment – and asserted more generally that 'there is no salvation for Britain until the special privileges granted to the trade unions by the Trade Disputes Act of 1906 are revoked'.

In 18 years of office until 1997, the Conservatives under Margaret Thatcher and John Major did not repeal the Trade Disputes Act, but they did produce eight significant pieces of legislation<sup>10</sup> which fundamentally rebalanced UK industrial relations and reduced the power of unions. This was a strategy for the long term, and involved gradualism – avoiding the head-on legislation of Edward Heath's government<sup>11</sup> – and careful planning, for instance in the accumulation of coal stocks before the 1984 miners' strike.<sup>12</sup>

The scope of permissible union action in pursuit of a dispute was considerably narrowed over time. Secret ballots (with independent scrutiny) were now required before a strike, no 'secondary' or sympathetic action was allowed, and there was an end to the coercive mass picketing that had been employed in some strikes, notably those involving the National Union of Mineworkers. Unions were made financially liable for torts committed by their members, including 'wildcat' unofficial strikes. The scope of the closed shop was reduced in successive Acts, with a final outright ban in 1990. And unions themselves were reformed and democratised, with secret ballots to elect and re-elect officials, and to institute or continue political funds paid from member subscriptions.

To the disappointment of many unionists, when the Labour Party returned to power in 1997, it did not attempt to turn back the clock by repealing the Thatcher-Major legislation. However, it did introduce in 1999 for the first time a procedure by which unions can seek recognition for bargaining purposes,<sup>13</sup> and it banned businesses from recruiting agency workers to replace striking workers in the course of a dispute.<sup>14</sup> The government is currently in the process of repealing this restriction.

It is also the case that unions have over the years, under both Conservatives and Labour, acquired various rights as a by-product of other legislation, sometimes as a result of European Directives while the UK was still a member of the EU – for example, paid time off for union representatives for official business, protection against dismissal for union activities, and the right to consultation for collective redundancies. But it remains true that the reforms of the 1980s permanently reduced the power of trade unions.

### But is unionism's decline simply down to legal reforms?

For many, the Thatcher-Major reforms are seen as the main cause of the decline of union power and influence. There have been frequent left-wing demands that they should all be scrapped as a means of restoring organised labour's position.<sup>15</sup>

But this attributes rather too much power to politicians. While legislative changes clearly had an

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<sup>9</sup> <https://www.margaretthatcher.org/document/114631>

<sup>10</sup> For details see Shackleton (1998).

<sup>11</sup> Under the Heath government's 1971 legislation, union members could be jailed for breaching the rules on picketing. Several dockers were indeed arrested, but they were soon released as the government was forced to back down under union pressure. The Thatcher-Major government avoided this: Secretary of State for Employment Norman Tebbit (himself a former trade union official) famously declared 'Under no circumstances will I allow any trades union activist, however hard he tries, to get himself into prison under my legislation.' Quoted in C. Howell (2005) *Trade Unions and the State: The Construction of Industrial Relations*. Princeton: Princeton University Press, p. 147.

<sup>12</sup> 'How Thatcher broke the miners' strike but at what cost?' Sky History (<https://www.history.co.uk/article/how-thatcher-broke-the-miners-strike-but-at-what-cost>).

<sup>13</sup> Under the terms of the Employment Relations Act 1999, businesses with over 21 employees must recognise a union if a body called the Central Arbitration Committee deems a majority of the relevant group of workers to support it. See 'Employers: recognise a trade union', gov.uk (<https://www.gov.uk/trade-union-recognition-employers>).

<sup>14</sup> Section 7 of the 2003 Conduct of Employment Agencies and Employment Business Regulations prevented employment businesses from supplying or introducing an agency worker to an employer in order to perform the duties of a striking worker. It also prevented them from providing agency staff to perform the roles of a non-striking worker who has been reassigned to cover for a striking worker.

<sup>15</sup> For example, see 'TUC urges Labour to scrap "all anti-union" laws', Personnel Today, 21 September 2019 (<https://www.personneltoday.com/hr/tuc-urges-labour-to-scrap-all-anti-union-laws/>).

important impact in the UK, unionisation has declined across most major economies,<sup>16</sup> few of which have ever experienced Thatcher-style reforms.

One factor affecting developed countries is structural change associated with technological innovation and globalisation. This has seen a switch from economies heavily dependent on manufacturing and extractive industries, where workers were concentrated in large-scale plants, often living close to their work, to more dispersed service businesses with little tradition of union presence. One UK study suggests that a third of the decline in private sector union recognition between 1980 and 2004 was attributable to changes in workplace characteristics (Blanchflower and Bryson 2008).

Another factor is the growth in employment regulation, which in some ways substitutes for protections offered by trade unions. Since unionism's peak in the 1960s and 1970s the UK has seen unfair dismissal laws, enhanced equal pay provision, minimum wages, expanded paid holiday mandates,<sup>17</sup> parental leave, anti-discrimination legislation and a proliferation of health and safety rules. We have Acas conciliation and employment tribunals, which offer individual redress for workplace problems.

The workforce is much more diverse than in the heyday of UK trade unionism. There are now more female than male trade unionists, a far cry from the days when female unionists were rare and dominant groups such as miners, dockers and shipyard workers were almost 100 per cent male. Today three-quarters of employees in Education and Health and Social Care, two of the most strongly unionised groups, are female.

There is also greater ethnic diversity: 18 per cent of the 2021 workforce were born outside the UK, and they are less likely to be in unions than UK-born workers,<sup>18</sup> though different groups have different employment patterns and propensities to join unions. Black or Black British employees have a unionisation rate well above the average, while Asian, Asian British and Chinese heritage employees display lower-than-average unionisation.

This greater diversity suggests that different groups will have different priorities, and may join interest groups focusing on particular issues relevant to them rather than broad unions (which, through mergers,<sup>19</sup> may have become less responsive to their concerns).

A drift towards individualism and away from collective solidarity has been intensified by much improved access to higher and further education and skills training. Employees are far more likely to possess qualifications than was the case in the 1970s, and this gives them a wider range of potential employers. Rather than staying with one employer for long periods, as was the case when there were many unionised nationalised industries and longstanding private sector employers, people with transferable skills and qualifications can now change jobs more easily as a means of boosting their income rather than relying on union-achieved pay increases. As the Resolution Foundation has shown (Cominetti et al. 2022), moving to a new employer offers a greater salary increase than staying in existing employment, with workers who leave to take up work in booming sectors gaining even more.

The post-Covid shortage of labour, with record levels of vacancies, has enabled many private sector workers to stay ahead of inflation by changing jobs as employers bid up wages. But those in heavily unionised sectors, such as public administration, tend to change jobs less frequently – which means they still rely on collective bargaining or government pay reviews to boost their pay.<sup>20</sup>

However, one measure of the raw 'union premium' – the percentage difference between the average

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<sup>16</sup> See 'Trade unions, employer organisations, and collective bargaining in OECD countries', OECD (<https://www.oecd.org/els/emp/Flyer-Collective%20bargaining.pdf>).

<sup>17</sup> John Forth and Alex Bryson (2019) show how legislation has reduced the 'paid holiday premium' associated with union membership.

<sup>18</sup> 24.1 per cent of UK-born employees were union members in 2021, compared with only 18.6 per cent of non-UK-born.

<sup>19</sup> The number of TUC-affiliated unions has fallen from 112 in 1979 to 48 today. Three large unions (Unite, UNISON and GMB) now account for 55 per cent of all members of TUC-affiliated unions. There are over 90 non-affiliated unions and 56 per cent of their membership is accounted for by the British Medical Association, the Royal College of Nursing and the Police Federation.

<sup>20</sup> Pay awards for around 45 per cent of public sector workers (e.g., the police, teachers and the NHS) are set by the government on the basis of recommendations from eight pay review bodies. Civil service pay awards differ between departments but are based on guidance from the Cabinet Office. Local government pay is agreed after negotiations in the National Joint Council for Local Government Services.

gross hourly earnings of employees who are union members and those of non-union members has fallen over time – from 25.9 per cent in 1995 to just 4.8 per cent in 2021. The 2021 premium is driven by the public sector: the premium is now negative in the private sector.<sup>21</sup> When the union wage premium is adjusted for the characteristics of workers (union members are older and better-qualified than non-union members, for example),<sup>22</sup> some studies suggest that only women (and possibly some ethnic minorities) gain significantly from joining unions.<sup>23</sup>

## Strikes – how much do they matter?

Over the last twenty years, there have been far fewer strikes than in the past. Only twice have the numbers of stoppages in a year exceeded 150 and the numbers of working days lost have only twice exceeded a million – vastly overshadowed by days lost through illness, even pre-Covid. The bulk of strikes and days lost have typically occurred in education, public administration and the transport industry, all sectors which are heavily unionised.<sup>24</sup>

Putting a cost to the economy of strikes is difficult, perhaps impossible. Workers involved in a strike lose pay, which in principle (together with other factor returns) corresponds to lost output. However, in education and in public administration this is more theory than reality. To some extent, teachers and students catch up on lost lessons and there is no cost to their institutions; indeed, head teachers and principals may consequently find they have a little more left in their budget to play with. Time out by local authority workers or civil servants means that work gets delayed, but much of it probably gets done eventually.

There may be knock-on costs – for instance, parents having to take time off work to look after children when teachers are on strike, and inconvenience to people waiting for responses from officials which they need for work or travel. But as many of these stoppages are symbolic – one-day strikes, for instance – rather than serious attempts to disrupt education or the conduct of national or local government, the damage may sometimes be minimal.

Some of the current disputes can be more damaging. Although the wider effects of rail strikes may be mitigated by our new-found ability to work from home, there are real losses of revenue when services don't run, and there may be longer-term effects as customers come to rely less on the railway for work journeys and are turned off the idea of leisure trips. Moreover, these strikes can hit other businesses quite severely: for example, the hospitality industry estimated that this June's rail and Underground strikes would cost it £540 million in lost business.<sup>25</sup>

Strikes by airline workers may mean holiday cancellations; those by doctors could delay treatments, with damaging effects on health prospects and possibly have more serious effects.

Much talk has suggested that the confluence of several different disputes may mean that pay settlements at levels approaching the current rate of inflation – around 9 per cent – could set off a continuing wage–price spiral of the kind Britain experienced in the 1970s. This seems unlikely to happen, given that the real power of, say, education unions, is very limited. But over-generous settlements in the case of public sector employees could lead to more borrowing and would then mean

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<sup>21</sup> See Department for Business, Energy & Industrial Strategy (2022: 17) and accompanying tables (<https://www.gov.uk/government/statistics/trade-union-statistics-2021>). In 1995, the overall 25.9 per cent premium was the result of a 30.3 per cent premium in the public sector and 15.3 per cent in the private sector. By 2021, the overall 4.8 per cent premium was the net result of a 14.8 per cent premium in the public sector and a *negative* premium of 4.7 per cent in the private sector (i.e., private sector unionists earned less on average than non-unionists).

<sup>22</sup> It is not easy to estimate the 'true' effect of unions on wages. For one thing, negotiated settlements typically cover both unionised and non-unionised members in a bargaining unit, giving the latter a 'free ride'. And union members have characteristics which would give them higher pay than non-union members anyway, a tendency which is exacerbated over time as union pay settlements reduce job opportunities, allowing employers to be choosier and thus raising the average quality of employees. There is a useful discussion of these complexities in Bryson (2014).

<sup>23</sup> For example, using data from 2003–12, one study concludes that 'In Britain there is a wage premium of 6–7 per cent for women but no premium among men' (Bryson et al. 2016).

<sup>24</sup> For the last four years (2015–18) for which we have data, the proportions of total working days lost by these sectors were 63 per cent, 51 per cent, 78 per cent and 87 per cent, respectively.

<sup>25</sup> 'Train strikes: Disruption set to cost hospitality £540m and have "catastrophic" impact on night economy', City A.M., 20 June 2022 (<https://www.cityam.com/train-strikes-disruption-set-to-cost-hospitality-540m-and-have-catastrophic-impact-on-night-economy/>). However, we should probably be wary of estimates by interested parties. As Peter Urwin (2020: 11–12) shows, such estimates are often based on questionable methodology.

that squeezing inflation out of the economy would require higher interest rates and monetary contraction that could precipitate a recession.

Another danger is that associated with concessions on redundancies or working practices, which several unions are seeking. To acquiesce to these demands may seem to involve little cost in the short run, but on the railways or in the NHS or the civil service, it could make it very difficult to achieve useful reform, with long-term negative consequences for productivity.

Unions can in principle contribute to increasing productivity, as Richard Freeman and James Medoff claimed in the 1980s.<sup>26</sup> These authors are particularly associated with the argument that, by giving workers a 'voice' within a business, unions help management to better decision-making and reduce labour turnover. This may in turn encourage greater investment in training and increase productivity over time. But equally, unions may use their power to resist change and maintain outdated working practices.

Empirical work suggests that results differ from business to business and from setting to setting. It is difficult to control for other relevant factors, such as the scale of the enterprise, the sector in which it operates, the skill level of the employees and so forth. Generalisations are, as always, difficult – although one meta-analysis (Doucouliagos and Laroche 2003), summarising the findings of many different studies, suggested that, in the UK at least, there has been a negative association between unions and productivity.<sup>27</sup>

Certainly, when we look at the recent record of the rail unions, for example, it is difficult to make a strong case that they will prove a positive force in the near future for increasing productivity and adapting to rapid economic change.

## What could the government do to resist union militancy?

Some may argue that the current wave of industrial disputes will blow over, and that the government should encourage early settlements without using up its shrinking stock of political capital by taking on the unions. But, should the government decide to take a markedly tougher line against trade unionism as part of an attempt to resist demands for inflationary settlements, there are a number of measures which could be taken without compromising the fundamental right to join a trade union.

Some such measures would be largely symbolic. For instance, the government could tighten the rules on **trade union recognition**. At the moment, compulsory recognition procedures apply to bargaining units of 21 employees or more. This could be raised to, say, 50. Currently the Central Arbitration Committee can deem a union to be representative if the union produces its own evidence to support this; instead, a ballot could be deemed mandatory, with a higher hurdle (currently 50 per cent of eligible employees) before recognition is granted. The ballot could be at the union's expense (currently the cost is shared between the employer and the union).

Another area might be **union 'facility time'**. At present union employee representatives are allowed paid time off work to carry out approved union activity (such as negotiating meetings, training, accompanying members to disciplinary hearings and so forth). The Taxpayers Alliance (Friend 2022) has recently calculated that the cost of this facility time in the public sector alone was almost £100 million in 2020–21, and has been rising sharply. Across the public sector 23,545 union representatives spent some of their working time on union activity, with over 1,000 spending 100 per cent of their time in this way. The Taxpayers' Alliance points out that under the 2016 Trade Union Act the government has reserve powers to alter the terms on which facility time is allowed, for instance by capping the proportion of time that can be spent on union work.

The government has already made some minor gestures of this kind. One was the decision mentioned earlier to restore the possibility of **employers substituting agency workers** for striking employees. Another was the announcement by Business Secretary Kwasi Kwarteng that the government will not

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<sup>26</sup> See Freeman and Medoff (1984).

<sup>27</sup> There is also what Brändle and Goerke (2018) call "the one constant" in the economic effects of trade unions, namely that collective bargaining reduces employment growth by 2–4% points per year".



Such measures will annoy the unions and suggest to the public that the government is doing something to tackle union militancy, but they are unlikely to have any significant impact on current strike activity. For example, there is no pool of skilled agency workers who can take over most key jobs on the railways.

Some have argued that the 2016 Trade Union Act, carried under David Cameron's administration, was a collation of similar minor irritants for unionists. Its most significant feature – the tightening of rules on strike ballots, particularly in 'important public services' (specified as health, education, transport, border security and fire-fighting) – seems to have had little practical effect: many votes have still gone in favour of industrial action despite ostensibly higher hurdles being set.

Measures that might be expected to have more of an effect are **minimum service agreements** for the railways (and potentially for other services), which the government has said it intends to bring forward. These were first promised in the 2019 Conservative manifesto. The aim is to prevent a total walkout by rail union members. Similar laws exist in Spain, France and Italy, though there is little published evidence on the success of these provisions. It has been suggested that such agreements might specify a level of provision of approximately 20 per cent of normal working. However, that would be little different from the current situation, where non-striking employees manage to provide a basic service. Any legislation is likely to come too late to affect current disputes.<sup>29</sup>

A more serious intervention would be to **ban strikes outright** in certain industries. This would be very unusual in the UK context. The armed forces cannot strike, and it has been the case since 1919 that police officers cannot do so either. Nor can prison officers, a prohibition which was confirmed in the High Court as recently as 2017.<sup>30</sup> The Royal College of Nursing has also had a voluntary arrangement which effectively means nurses do not go on strike.

But some other European countries have wider provisions.<sup>31</sup> In Germany, for example, civil servants (which include university staff and some schoolteachers) are prohibited from strike action. So are some categories of Danish civil servants. In Czechia and Slovakia civil servants and people working in public utilities and essential services such as health and social care, fire and rescue workers, air traffic controllers and some telecommunications workers cannot strike. In Poland many civil servants and other government officials are banned from striking. The same applies in Estonia, where the ban extends to rescue workers.

There have been few proposals to extend strike bans in the UK. One has been the London Underground. When he was Mayor of London, Boris Johnson tried to get a no-strike agreement with the unions. Thwarted in this, he called for legislation to impose a ban on strikes and recourse to **compulsory arbitration**.<sup>32</sup> No such call has been repeated since he became prime minister, however.

Voluntary arbitration, usually through Acas,<sup>33</sup> resolves hundreds of minor industrial disputes every year without recourse to strikes or other industrial action. Compulsory arbitration has been used during wartime in the UK, and has been used for long periods in Australia and some Canadian provinces, but both employers and unions have always been wary of it. Nevertheless, some reserve power to impose

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<sup>28</sup> Postal votes are slow and expensive, and unions have been pressing for some years to be allowed to use electronic balloting. At the time of the 2016 Trade Union Act it was agreed that the government would conduct a review of the possibility. Mr Kwarteng has now announced that he will not allow this, citing fears about security and hacking. 'Kwasi Kwarteng to axe plans for unions to hold electronic strike ballots', *The Telegraph*, 25 June 2022 (<https://www.telegraph.co.uk/politics/2022/06/25/kwasi-kwarteng-axe-plans-unions-hold-electronic-strike-votes/>).

<sup>29</sup> There are some practical difficulties in requiring such provision in the complex UK railway industry. 'Rail strike: UK government's plan to limit industrial action is just a recipe for more discontent', *The Conversation*, 25 May 2022 (<https://theconversation.com/amp/rail-strike-uk-governments-plan-to-limit-industrial-action-is-just-a-recipe-for-more-discontent-183677>).

<sup>30</sup> 'Prison officers banned from taking strike action after government win High Court bid', *ITV News*, 19 July 2017 (<https://www.itv.com/news/2017-07-19/prison-officers-banned-from-taking-strike-action-after-government-win-high-court-bid>).

<sup>31</sup> 'Which workers are denied the right to strike?', in 'The right to strike in the public sector in Europe', European Public Service Union (EPSU). (<https://www.epsu.org/article/right-strike-public-sector-europe#denied>).

<sup>32</sup> 'Boris Johnson: I need Tory government to help deliver tube strike ban', *The Guardian*, 17 March 2010 (<https://amp.theguardian.com/politics/2010/mar/17/boris-johnson-broken-promises>).

<sup>33</sup> The Advisory, Conciliation and Arbitration Service has roots in the nineteenth century, when governments first became interested in mitigating industrial conflict. Apart from its role in collective disputes, Acas also screens all individual applications to Employment Tribunals with a view towards conciliation. See Acas (2021).

arbitration in particularly drawn-out disputes could in theory be a useful part of the government's arsenal.

A nuclear option might be some version of **'fire and rehire'**. Once, not so very long ago, there were few legal restrictions on the ability of firms to fire workers. It was only in 1971 that an Industrial Relations Act introduced the first employment protection legislation to this country, creating the concept of 'unfair dismissal'. The Conservative government introduced this, not because they regarded it as intrinsically a good thing but because trade unions, very strong at that time, tended to come out on disruptive strikes whenever people were sacked. By providing a legal remedy against over-hasty dismissal, it was hoped strikes would be minimised.

Unfair dismissal legislation has changed several times over the last 50 years. Nowadays, once someone has been employed for two years, they can only lose their job for certain reasons. These include such obvious categories as capability, misconduct, contravention of statutory duties and redundancy.<sup>34</sup> One vaguer category, however, is 'some other substantial reason'.

This provides a loophole for the controversial practice of 'fire and rehire'. If the alternative to sacking employees and rehiring them on less favourable terms – which might not involve a pay cut, but some other contractual change, such as a requirement to work at weekends – is closure of the business, this is a 'substantial reason' which enables the practice to be permitted. New guidance is intended to ensure that fire and rehire is used only 'when a company is in financial distress and needs to cut costs to stay in business' and this 'should only ever be considered as an absolute last resort if changes to employment contracts are critical and voluntary agreement is not possible'.<sup>35</sup>

A change to the law to allow fire and rehire under less extreme conditions than threatened business closure could in principle allow employers to do as Ronald Reagan famously did with US Federal Air Traffic Controllers<sup>36</sup> in 1981 – dismiss all those who refused to accept changed conditions of service. However, given the adverse public reaction – and indeed the reaction of some government ministers – to the recent P&O case makes this unlikely in the current context.<sup>37</sup>

Another possibility might be to **reduce the legal protection for striking workers**. Under the Trade Union and Labour Relations (Consolidation) Act 1992, employees striking following a properly-conducted ballot are protected against dismissal for up to 12 weeks. Few strikes are likely to reach this limit, but in principle this period of protection could be shortened.

Finally, given that union power is concentrated in public or quasi-public sector businesses or institutions, a radical administration could turn again to **privatising government functions** and breaking up concentrations of union power in the civil service, education, the railways and elsewhere.

## Conclusion

The current round of strikes and threats of strikes has taken many people – including the government – by surprise. Such widespread militancy has not been seen for many years. However, it should not lead us to think that we are facing a growing revival in union power and influence across the board. Unionisation has fallen far from its peak in the 1970s and there is no reason to suppose that there is a serious renaissance ahead.

The main strike threats at the moment come from public sector or quasi-public sector unions, which are usually the strongest and most combative. After two years of on–off lockdown, a long period of pay

<sup>34</sup> Organisations must also follow appropriate procedures, or else dismissal is automatically unfair. See 'Dismissing staff', gov.uk (<https://www.gov.uk/dismiss-staff>).

<sup>35</sup> 'New statutory code to prevent unscrupulous employers using fire and rehire tactics', BEIS, 29 March 2022 (<https://www.gov.uk/government/news/new-statutory-code-to-prevent-unscrupulous-employers-using-fire-and-rehire-tactics>).

<sup>36</sup> 'Ronald Reagan fires 11,359 air-traffic controllers', History.com (<https://www.history.com/this-day-in-history/reagan-fires-11359-air-traffic-controllers>).

<sup>37</sup> P&O Ferries sacked its crews and sought to hire new crew members on lower pay, which the company claimed was the only way its loss-making business could survive. This provoked outrage among unions, politicians and much of the general public. The government has promised to tighten rules on 'fire and rehire' though is not planning to ban the practice outright. 'Government vows to clamp down on "fire and rehire" after P&O sackings', Independent, 29 March 2022 (<https://www.independent.co.uk/news/uk/politics/p-o-ferries-fire-rehire-b2046586.html>).

restraint and rapid inflation generated by monetary expansion associated with quantitative easing and boosted by the energy crisis, it is not surprising that we are facing demands for substantial wage increases.

The government should not be panicked into over-generous pay awards, or into making commitments to maintain existing working practices and job guarantees. While the hope must be that the inflationary crisis is only temporary in nature, unions' influence on productivity, particularly in the public sector, is a longer-term problem and the government needs to focus on reforms in the civil service, the NHS and the railways, which unions should not be allowed to thwart.

If the government wishes permanently to reduce the influence of militant trade unions, this will require a long-term strategy, rather like that of the Thatcher-Major years, to bring it about – rather than jumping for immediate legal action. Although there is a range of policies that could assist with long-term reform, there is no instant solution.

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