IDS Brief – a personal viewpoint

By John Hendy QC

1972 – the first IDS Brief was published and I started pupillage. How different labour law then was. Many labour lawyers thought of the subject as a set of rules, wrought by compromise, for order and fairness at the workplace. It was a notion which could not withstand the scrutiny of history, of course. A glance at developments over the last 1,000 issues of IDS Brief makes that clear even to those looking through the most rose-tinted of spectacles.

The Royal Commission on Trade Unions and Employers' Associations had resulted in the 'Donovan Report' in 1968. That led to Barbara Castle's proposal for comprehensive legislation in the white paper *In Place of Strife: A Policy for Industrial Relations* in 1969, which, though seen off by the TUC, opened the door to the Conservatives' Industrial Relations Act 1971, which was both comprehensive and radical, reversing the uneasy legislative 'accommodation' of the role of trade unions beginning a hundred years earlier with the Trade Union Act 1871.

1972 sounded the death knell for that, however. The dockers' strike over the stuffing and stripping of containers by workers other than those registered under the National Dock Labour Scheme led to the imprisonment of the 'Pentonville Five' and their release by the Official Solicitor under threat of a general strike by the TUC. These events rendered the 1971 Act inoperable. The strike by the miners that year and again in 1974 led to the return of a Labour government and the Trade Union and Labour Relations Act of 1974, amended in 1976, restored the law on industrial action as it was in 1906. The scope of the industrial action legislation was explored in the trilogy of cases at the end of the 1970s, NWL v Woods, Express Newspapers v McShane and Duport Steels v Sirs (in the last two of which I was junior counsel).

But the one feature of the 1971 Act which was preserved and which remains today as a cornerstone of employment law was the right to claim unfair dismissal. The last 40-odd years have seen many twists and turns in that narrative, some contributed by statute (e.g. the shortening and lengthening of the qualifying period) and some contributed by the judges (e.g. the band of reasonable responses test; the Polkey line).

The jurisdiction of the employment tribunals – then called industrial tribunals – already dealing with redundancy payments and statements of terms and conditions has since been increased dramatically, not least by equality legislation, much of it derived from the UK's accession to the EU (e.g. discrimination law) but a little, like the initial equal pay law (see the film *Made in Dagenham*), homegrown.

Labour prices and incomes policy in the 1970s led to much industrial action in 1979, which contributed to Mrs Thatcher's election victory in the same year and a dramatic change in industrial relations policy despite (or perhaps because of) the fact that the 1970s were the UK's most equal decade in terms of wealth and earnings. As is well known, a series of Acts of Parliament coupled with associated government policies sought to emasculate trade unions, notably by limiting the necessary protection from common law liability through the imposition of onerous procedural preconditions for industrial action and (after a period of restriction) an absolute ban on secondary action. Picketing was likewise constrained. The miners' strike of 1984–5 demonstrated what the courts could do by way of sequestration, receivership and bail conditions even before the bulk of the trade union legislation had taken effect. The statutory trade union recognition procedure had already failed under the pressure of litigation and sector-wide collective bargaining was systematically dismantled. Collective bargaining coverage, which had reached a peak of some 86% of British workers covered in 1975, was reduced continuously to a low of 23% in 2011. The Fair Wages Resolution was abolished in 1983 and most Wages Councils were abolished in 1993 (the last, in agriculture, being abolished in 2013).

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This series of Acts also penetrated trade union autonomy in relation, in particular, to internal elections and political funds. The closed shop was outlawed. The Conservatives' panoply of labour laws were not reversed by the Labour governments of 1997–2010, which nonetheless introduced significant additions such as the minimum wage, and during the term of which, EU protections in relation to working time, part-time work, and equal rights in relation to retirement and pensions were implemented domestically. And, of course, it was Labour who introduced the Human Rights Act 1998. But its creation of a trade union recognition machinery had no measurable impact on the decline of collective bargaining coverage.

The Coalition government has, however, been far more proactive in terms of employment law. Though the Conservatives promise further restriction of trade union protection for industrial action if elected in 2015, it is in individual employment law that the Coalition has made its sweeping changes. Were it not for the fact that EU law is now the source (and hence the protector) of much individual employment law, the 'reforms' would otherwise have been that

much more extensive. The increase in the qualifying period for unfair dismissal protection (excluding some 3 million workers) has been paired with swingeing fees to bring a claim that individual rights have been breached. In consequence, tribunal applications are said to have decreased by some 79%, a dramatically higher proportion than the proportion of claims which failed in previous years. Clearly, a significant number of workers whose rights have been violated have been denied access to justice by the new fees regime.

And what of the judges? Their contribution has been far from uniformly benign. How is Autoclenz v Belcher to be reconciled with Edwards v Chesterfield? Why did it take the European Court of Human Rights to put Wilson v Palmer right? Can the Johnson v Unisys line of authority really be jurisprudentially justified? Why have senior judges recently been seeking to undermine the ECtHR?

The consequence of the changes in the legal regime since 1979 has been a massive growth in inequality in earnings and wealth, and widespread precarious and 'non-standard' forms of employment (such as over 1 million on zero-hours contracts, and some 4.6 million 'self-employed'). The most significant correlation is between the decline in collective bargaining coverage and the growth in income inequality. Strikingly, inequality of income has increased to such an extent that more people now receiving benefit are in work than are unemployed. So the state subsidises low pay. Though the number of jobs has grown, so has the number of low-paid jobs on short hours.

After 42 years the labour and employment law on which the IDS Brief reports is plainly regarded in Whitehall as little more than a tool for economic regulation. The image of this area of law as a civilised set of rules guaranteeing dignity and protection has faded almost to invisibility. It is not surprising that for many lawyers in the field much of the joy has gone out of the job.

John Hendy QC is a member of Old Square Chambers best known for his expertise in industrial relations, and has led on numerous high-profile cases in this area. He has appeared at a number of significant Public Inquiries and Inquests, usually for the bereaved and injured. In November 2011 he was given a Lifetime Achievement Award by Liberty, and was Employment Silk of the Year in 2013.