ILO Convention 87 on Freedom of Association and Protection of the Right to Organise Convention and the right to strike.

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Since 2016, I have had the privilege of being a member of the UK delegation to the International Labour Conference of the International Labour Organization (ILO), the United Nations agency which sets binding international labour law standards and monitors compliance with them.

The annual 2-week conference in Geneva is where these matters are hammered out by negotiation between governments, employers' organisations and workers' organisations. It is this tripartite structure that makes the ILO unique and is its lifeblood.

It was an honour to be in Geneva again this June representing UK employers with the support of ***Doyle Clayton*** *and flying the flag for* ***ELLINT****.*

Part of my role has been to participate in the Committee on the Application of Standards, which considers complaints that member states are acting in breach of ILO standards. This has included being UK employer spokesperson and, in 2016 and 2023, preparing submissions on behalf of UK employers in respect of complaints brought against the UK government regarding UK laws on trade unions and industrial action.

The crucial context in 2024 is that it was the first International Labour Conference since the Governing Body of the ILO, at the initiative of the International Trade Union Convention, requested ***a binding ruling from the International Court of Justice (ICJ) on whether ILO Convention 87 on Freedom of Association and Protection of the Right to Organise Convention does, or does not, include the right to strike****.*

The dispute is summarised by the ILO as follows:

"The interpretation dispute concerns whether the right to strike of strike of workers and their organizations is protected under the Convention No. 87. The dispute has persisted for several years and in 2012 gave rise to a major institutional crisis, with the Conference Committee on the Application of Standards being prevented for the first time from exercising its supervisory functions.

For the Employers' group, Convention No. 87 does not contain any provision whose ordinary or literal meaning would imply the existence of a right to strike while the preparatory work that led to its adoption confirms that the intention of the drafters was clearly not to include the right to strike within the scope of Convention No. 87. In addition, the Employers' group objects to the acceptance by the Committee of Experts on the Application of Conventions and Recommendations of a universal, explicit and detailed right to strike and the Committee's attempts to produce new "jurisprudence" despite lacking law-making power or the authority to issue binding rulings on the application of national laws and regulations.

In contrast, **the Workers' group** considers that the terms of Convention No. 87 guaranteeing the right to organize must be understood in the context of the relevant provisions of the Preamble to the ILO Constitution and of the Declaration of Philadelphia and taking into account any subsequent practice that establishes general agreement regarding their interpretation, such as the consistent case law of the bodies responsible for overseeing the application of the Convention. In addition, the Workers' group contends that all ILO bodies involved in supervision necessarily interpret the meaning of standards, and that therefore the Committee of Experts may occasionally perform interpretative functions."

This is a case which has received a remarkable level of interest and a high number of submissions from interested parties.

Initial submissions by governments, employers' organisation and workers' organisations have been made to the ICJ.

The next stage is responses to those submissions, to be provided by 16 September 2024. After the responses have been provided, it is likely that the Court will order a hearing to take place on this in the Hague, probably no earlier than the second quarter of 2025.

While the submissions and responses are confidential, some themes of workers' organisations and employers' respective positions are predictable.

The unions will take the view that the right to strike is part of customary international law.

Their argument can be expected to lean heavily on making analogies with the interpretation of The European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR). The relevant Article of the ECHR, Article 11, is short and does not refer to the right to strike.

Although in interpreting ECHR, the starting point is the ordinary meaning of the words used in it, ECtHR looks for ordinary meaning of the words in their context and in the light of the object and purpose of a provision while seeking to ensure that its interpretation is practical and effective. At the same time, it gives a dynamic interpretation to provisions, informed by the existence or absence of a consensus across contracting states. In addition, the ECtHR will have regard to the preparatory work that led to the adoption of the ECHR and other international instruments, judgments and rulings. The Court will generally follow its case law but there is no rigid adherence to precedent.

Turning to the employers' position, it is important to underline at the outset that the employers' do not call into question this interpretation of ECHR or the existence of the right to strike in national law, including as a constitutional right in numerous jurisdictions (albeit with different scopes and limits and sometimes with specific exceptions and enforcement).

Employers can also be anticipated to agree that the ICJ has jurisdiction and that the question of whether the right to strike is protected by ILO Convention No.87 is a matter on which the ICJ is able to make a ruling.

The employers' argument will include the importance of distinguishing interpretation of ILO conventions from interpretation of ECHR.

In essence, whereas the ECtHR applies dynamic interpretation to provisions of ECHR on the basis outlined above, with the ILO instruments the dynamism comes from the organisation itself. The ILO, via its tripartite structure at the International Labour Conference, in response to the ever-evolving context of the world of work, regularly negotiates the adoption of new legal instruments (and, by the same token, agrees the abrogation of instruments which are no longer relevant).

Regarding ILO Convention No.87 the employers can be expected to argue that they rely on Article 31 of the Vienna Convention on the Law of Treaties in particular:

"Article 31 General rule of interpretation

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context:*

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. *A special meaning shall be given to a term if it is established that the parties so intended."*

Employers will submit that the ICJ needs to give particular consideration needs to the tripartite structure of the ILO and its emphasis on preparatory work.

Employers will rely on the fact that the text of ILO Convention 87 does not contain any rules, nor any mention at all, of the right to strike and can be expected to submit that including language on the right to strike was quite clearly contemplated by the Convention's drafters, and also that those drafters made the unequivocal and considered decision to leave out any mention of the right to strike in the Convention.

As the applicable report from the 1948 ILC states: "the proposed Convention [87] relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association".

Employers can be expected to argue that there has been no consistent subsequent practice agreeing that the right to strike emanates from Convention 87 but that there are lots of examples of where governments, unions and employers have stated that this issue should be addressed by social dialogue and standard setting.

Employers will argue that interpreting Convention 87 to include the right to strike would undermine the legitimacy and authority of the International Labour Conference, setting a precedent for external bodies to introduce interpretations and rules contrary to the drafters' intentions. This would jeopardize confidence in the predictability of obligations under ratified Conventions.

Regardless of the decision of the ICJ, employers organisations are convinced that the only sustainable solution to this outstanding question is a social dialogue process at the International Labour Conference, with employer and government constituents working towards an agreed legal instrument on regulation of industrial action through the ILO's tripartite processes.

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Russell is an experienced Senior Associate and qualified as solicitor in 2013. He has a particular interest and depth of experience in advising on employee relations, including engagement mechanisms, pay negotiations, trade union recognition and industrial action. He has acted in interim strike injunction hearings, helping his clients to win the case and recover costs. He has achieved successful outcomes for employers in the Central Arbitration Committee. He has also acted successfully in defending claims alleging detriment for trade union membership and activities, both by achieving strike out at preliminary hearings and in matters which proceeded to full hearings. Russell is experienced in representing clients in the full range of employment litigation from the Employment Tribunal to the Supreme Court, from straightforward unfair dismissal to complex discrimination, equal pay and whistle blowing claims and appeals. This includes disciplinaries and grievances, incentives, negotiations before and during employment, restrictive covenants, settlement agreements, discrimination, flexible working, off-payroll working, restructures and TUPE, data protection, data subject access requests, working time and holiday pay.

Russell advises UK and international businesses on cross-jurisdiction employment and labour relations matters. From 2016 to 2021, he was a member of the UK delegation to the International Labour Organisation (ILO) as specialist employment counsel. This role included attending annual two-week sessions of the International Labour Conference, where international labour standards are hammered out by discussion and debate between governments, employers' organisations and workers' organisations. Russell was part of the team who drafted and negotiated the International Labour Standard on work-related violence and harassment. He was the UK employer spokesperson in the quasi-judicial committee of the ILO in relation to challenges to UK trade union law. He also represented UK employers in the developing field of transnational supply chain governance. This has given Russell a unique insight into global horizons and how they affect UK employers, as new international law is often translated into changes in domestic legislation.