HUNGARIAN LABOUR LAW
E - J O U R N A L

No more business as usual

The 2018 British public university faculty strikes and how this dispute might have played out under American federal law

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"A little rebellion now and then is a good thing."
*Thomas Jefferson***

From an American legal perspective, the recent strike activity by public university faculty and staff in the United Kingdom is an anomaly. First, strikes by public sector workers in the United States generally are legally prohibited in most states. Second, even private universities and colleges must comply with a comprehensive federal labour-management statute that would deter, or at least delay, such a strike because of the mandatory to bargain in labour disputes.

This article will explain the reasons for the British strike; the legal issues in the dispute; and the provisional settlement. A subsequent summary of U.S. law that would apply to such activity provides some juxtaposition of the two bodies of law. Following is a summary explanation of the settlement between the British universities union (University and College Union [UCU]) and the universities group (Universities United Kingdom [UUK]). Finally, some economic realities of the underlying dispute clarify why a resumption of the strikes remains a possibility.

The underlying questions address the ideal of the extent of and limitations upon the right to strike and whether a model akin to the American mandate of good faith bargaining would be helpful for the United Kingdom.

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** Third President of the United States of America (1743–1826).

1. Introduction

What would the gentlemanly Mr. Jefferson think of the recent strike activity by British university faculty and staff, the largest such strike in history? Founder of the University of Virginia and the third U.S. President, he was a scholar, politician, and statesman, not a labourer. Although also a lawyer, he was not one who delved in the area of labour law. Indeed, since he was a slave owner, it is dubious that he would view such disputes from the standpoint of workers. He may, however, have sided with strikers in their reaction to a management decision that was, arguable that it is patently unfair to faculty.

When the Universities United Kingdom (hereinafter UUK) unilaterally announced its decision to convert faculty and staff pensions from defined befits to defined contributions, the University and College Union (hereinafter UCU) voted overwhelmingly to take industrial action. As a consequence, classes were suspended at more than sixty universities for selected days during a four-week period.

In the U.S., such strike activity most probably would not have occurred. This article provides a comparative look at how British and American laws regarding academics' right to strike and the procedures and restrictions differ. In the latter, different laws apply to public and private universities.

This article is not intended to be a comparison between the quantity or quality of faculty pensions and salaries, but rather, to address the respective limits the law imposes on striking and the different procedures of resolving labour disputes. Should university faculty be legally permitted to strike? Would mandatory good faith bargaining improve United Kingdom labour-management laws and policies? Those are questions that not only universities, but also companies and labour unions in general, might address.

2. The labour dispute

Pensions come in two varieties with respect to funding and eventual benefits. Defined contribution plans provide a certain amount that will periodically be deposited for the beneficiary, with his ultimate amount of pension payments dependent upon the productivity of investments. Conversely, a defined benefit plan assures the employee of a specified amount of his periodic payment once he has retired. Additionally, a defined benefit plan pays the promised amount to the pensioner until he dies, the periodic payments being dependent upon contributions during his work life. To the contrary, a defined contribution plan provides the retiree with a lump sum from which he usually elects to withdraw a desired sum periodically. The amount of this sum is determined by the investment return, and the

fund might expire before he does. For this reason, Ewan McGaughey, lecturer in employment law and pension law expert at Kings College London, describes the latter as "die quickly" (DQ) pensions.[1]

The parties in contention are the University College Union (hereinafter "UCU")[2] and Universities UK (hereinafter "UUK"). The universities' pension funds are managed by Universities Superannuation Scheme (hereinafter USS"), one of the country's largest pension managers, which act as trustees for members. Traditionally, USS has been the pension manager for the U.K. University faculty and staff retirement plan,[3] a defined benefit scheme.

The third – and neutral – party is The Pensions Regulator (hereinafter TPR), a sub-agency of the Department of Work and Pensions, a ministerial body. TPR regulates workplace pensions. Its ten member-board is comprised of persons with backgrounds in finance, accounting, and the law and heads a staff of 500. TPR does not make policy, but rather oversees pensions throughout the UK.[4]

In November 2017, UUK made the unilateral announcement that the pensions plans would change to defined contribution because of a reported £5 billion deficit. UCU general secretary Sally Hunt termed this proposal "categorically the worst […] I have received from universities on any issue in 20 years of representing university staff."[5] Accordingly, UCU members rallied.

A vote by UCU members on January 22, 2018, resoundingly called for a strike. With a 58% turnout, 88% voted to strike, and 93% voted to take action short of a strike.[6] The majority vote specified 14 days of striking, staggered among institutions and commencing on February 22, 2018.[7] Strikes would continue for a four-week period, with two days of strikes during the first week; three during the second; four during the third; and five during the final week, ending Friday, March 16.[8] The initial strike involved 61 universities.

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1 Ewan McGaughey: *Pension strike: University staff are getting a 'Die Quickly' pension plan. It won't work*. March 6, 2018. Available at blogs.lse.ac.uk/politicsandpolicy/pension-strike-explainer/ accessed at https://www. printfriendly.com/p/g/5caAYc

2 This union was founded in 2006 by a merger of several then extant faculty unions, the first established in 1904. https://ww.ucu.org.uk/ As of September 3, 2015, UCU had in excess of 120,000 members representing 162 institutions of higher learning in the UK that have a total academic staff of 207,000. Non-academic staff at these institutions number about 213,000. Thus, about 35% all faculty and staff are members of UCU. See www.universitiesuk.ac.uk/facts-and-stats/Pages/higher-education-data.aspx

3 Douglas Logan: *The Birth of a Pension Scheme. A History of the Universities Superannuation Scheme.* Liverpool University Press, 1985.

4 See TPR website www.thepensionsregulator.gov.uk; last accessed March 26, 2018.

5 Susanna Rust: Universities propose closing DB scheme of largest UK pension fund. (Impact Investing) available at https://www.ipe/com/.../uk/universities...uk-pension-fund/.../uk/universities...uk-pensi...; last accessed on 22 May 2018.

6 UCU website available at https://www.ucu.org.uk/ussballotresult_jan18 (accessed 22 May 2018). Action short of a strike might include refusing to work overtime, to work outside the job description, to cover for absent colleagues, or to engage in voluntary activities, such as meeting with student groups.

7 Sally Weale: UK universities face disruption as staff back industrial action. *The Guardian*, 28., January 2018. https://www.theguardian.com/.../2018/jan/22/uk-universities-face-disruption-staff-bac (accessed 22 May 2018).

8 UCU announces 14 strike dates at 61 universities in pensions row, UCU website, 28 February 2018., accessible at https://www.ucu.org/uk/article/9242/UCU-announces-14-strike-dates-at-61-universities-in-

The union calculated the loss by a "typical lecturer" occasioned if this proposed change were implemented of as much as £200,000 in his retirement,[9] or £10,000 per year.[10] Anger among faculty mounted in summer, 2017, when the retirement fund manager for USS requested an additional £500 million per year from university employers and staff to fill a £5 billion deficit.[11] Once the strike had begun, strikers outside University College London during February, 2018, claimed that universities had not made payments to USS for a 10-year period,[12] an accusation that did not identify a source. No records to substantiate this alleged deficient were revealed by USS or UUK.

Somewhat ironically, many at the university managerial level sided with the union against UUK. Top administrators of eleven universities, for example, the Vice-Chancellor of Newcastle University, spoke publicly against the refusal of UUK representatives to discuss the situation with union representatives and implored the universities to "get back to the table and sort a deal."[13] Other backers of faculty's decision to strike public universities were agents of the British government, including Labour MP Jeremy Corbyn.[14]

Some perspective on UUK's position is informative. Regarding the UUK rationale that the fact that, on the average, people live longer in recent years[15] makes a defined benefit plan financially unsustainable, Ewan McGaughey took issue with this as the causative factor in the state of the pension fund. His response was that the system itself is the core problem, a system he opined as ranking "among the worst in the world."[16] McGaughey explains that USS deliberately chose a time (March 31, 2017), when asset prices were uncharacteristically low to show a substantia pension fund deficit.[17] He charges UUK with not having contributed to the fund when these values were high (*i.e.*, 1997-2009).

A poster on the office door of a striking UK law professor paraphrased "Green Eggs and Ham," a famous work by the incomparable Theodore Geisel (also known as Dr. Seuss), which follows. This version reflects the depth of university faculty ire over UUK's plans.

> We do not like this pension sh__,
> We do not like it just one bit!
> We do not like Universities UK,

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9 Weale op. cit.

10 Sally Hunt: Strike action on this scale has never been seen before on British university campuses. *The Telegraph*, 22 February 2018. https://www.telegraph.co.ukeducation/2018/02/22/strike-action-scale-has-never-seen-...

11 Ibid.

12 Striking UK lecturers speak on struggle against assault on pensions. *World Socialist Web Site,* 22 February 2018., accessed at https://wsws.org/e/articles/2018/02/23/ints-f23.html?view=print

13 Sally Hunt: Strike action on this scale has never been seen before on British university campuses. *The Telegraph,* 22 February, 2018., accessible at https://www.telegraph.co.uk/education/2018/02/22/strike-action-scale-has-never-seen-...

14 Ibid.

15 The British Office for National Statistics reported that in 1981, the average life expectancy for a male was 71, and for a female, 77. As of 2016, these figures increased to 79.5 (males) and 83.1 (females), respectively. https://www.ons.uk/.../birthsdeathsandmarriages/lifexpectancies

16 This point has been made by Dr. Ewan McGaughey, see McGaughey op. cit.

17 Ibid.

We do not like that they won't pay!
We do not like precarity,
Or casualisation in HE.
We do not like tuition fees,
Or that they're going to VCs.
Why, if there's money for the bosses,
Must we suffer cuts and losses?
We don't want education understood
As a business, but as a social good.
We don't like picketing in the cold,
So we can live when we get old.
But we hope that students and staff alike
Will come support us in our strike.

3. Issues, applicable law, and contrasts with U.S. law

3.1. Might an employer lawfully alter employees' pension plan structure unilaterally without bargaining?

To the American legal practitioner or academic, the duty to bargain on economic issues is sacrosanct. Although U.S. labour law is not addressed in the Constitution, federal statutory law since 1935 that recognized the right of workers to associate for mutual benefit has required of employers, this duty to bargain. The 1935 Wagner Act[18], applicable to private sector companies with the exception of railroads and airlines, specifically imposes this duty of management[19] to bargain with a union with respect to wages, hours, and conditions of employment.[20] Thus, no unilateral changes on these three areas would be lawful. Twelve years later, in the 1947 Taft-Hartley amendments to the 1935 statute,[21] that same duty was imposed on the union.[22]

If the allegations of union administration that UUK refused to discuss this announced change[23] were accurate, under U.S. law, an unfair labour practice charge would have been filed against the

18 29 U.S.C. secs 141-197 (1935) (hereinafter Taft-Hartley Act).

19 Taft-Hartley Act sec 8(a)(5).

20 Ibid. Sec 8(d).

21 29 U.S.C. secs 151–169.

22 Taft-Hartley Act sec. 8(b)(3).

23 Hunt op. cit.

universities-employers[24] and university management would have been ordered to negotiate with union representatives. Moreover, faculty representatives would be entitled to access to financial records of the universities' allegation of such a monumental deficit in the pension fund. Once management has made the contention of an inability to pay, rather than a simple unwillingness to pay, the duty to produce demonstrable evidence arises.[25] The United States Supreme Court has held that the employer is obligated to furnish to the union any information that is potentially relevant.[26] The universities group's initial refusal to submit to an audit would be in direct conflict with American law.

Parliamentary aversion to adopting a similar mandatory bargaining statute is inexplicable. This provision in the American Taft-Hartley Act might encourage the union to accept a no-strike clause (the European term is a "peace clause") so that production, or, in this case, university functioning continues during the process. There is no duty to reach an agreement, but a good faith effort to do so is required.

The NLRB and courts have construed the duty to bargain broadly. An employer might lawfully make a unilateral change such as UUK's change of structure of the pension plan only after the point of impasse.[27] The lawlessness of such a unilateral change regarding wages, hours or terms and conditions of employment without negotiating survives the expiration date of the collective bargaining agreement.[28]

UUK's failure to provide substantiating material with respect to its claim that it is financially unable to continue with the defined benefit plan would also violate American federal law. The NLRB and the courts have held it to be a mutual duty of both management and union to furnish requested documentation relevant to a disputed issue.[29] This is required particularly when an employer claims financial inability to meet a union's demands.[30]

UK law is to the contrary. There is no duty on the part of either party to a labour dispute to bargain. Although the Trade Union and Labour Relations Act[31] appears to some as indirectly encouraging such, the absence of such an obligation makes this encouragement a toothless tiger.

An extension of this issue is the strength of faculties' right in their pension plans. The fact that a strike was called rather than filing of a court action for unlawfully altering the pension plan infers that UUK could lawfully act in accordance with its announcement. That is, the strike was to pressure the

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24 Taft-Hartley Act sec 8(d).

25 See, e.g., Nielson Lithography Co., 305 NLRB 697 (1991).

26 NLRB v. Acme Industrial Co., 353 U.S> 432 (1967).

27 Litton Financial Printing Division v. NLRB, 501 U.S. 190, 198 (1991).

28 Hen House Market No. 3, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Moreover, the good faith requirement is strictly enforced. The Supreme Court has described this obligation as "more than a willingness to enter upon a sterile discussion of union management differences." NLRB. v. American National Insurance Co., 343 U.S. 395, 402 (1952).

29 See, e.g., NLRB v. Acme Industrial Co., 385 U.S. 432 (1962).

30 NLRB v. Truitt Manufacturing Co., 351 U.S. 149 (1956).

31 Trade Union and Labour Relations (Consolidation) Act 1992, in particular, Schedule A1 on procedure for employer recognition of a union. Nonetheless, this law does not address bargaining or negotiating.

collective universities to abandon that move. A comparative word about American statutory treatment of public sector pensions is instructive.

U.S. universities are either public (state) or private. Because the striking British universities are public institutions, the accurate comparison will be to state legislation. These laws vary somewhat among the 50 states, and Virginia will be used as an example.

A comprehensive Virginia statute governs state workers' pensions.[32] In sections that address university faculty and staff, the law expressly states that any legislation that will change the amount of a worker's retirement benefit might affect only benefits of those persons who qualify for retirement on or after the date that legislation becomes effective.[33] Additionally, faculty must choose one of two alternate plans, defined benefit or defined contribution, within 60 days after the date upon which his work for the state commences, a choice that is irrevocable.[34] Vesting is immediate, so a mid-career change by the employer of the basic type of plan and/or the amount to which he would eventually be entitled would violate statutory law. The faculty or staff member has both a statutory and a contractual right in his chosen pension plan and accrued funding.

If any substantial: alteration were made to the pension structure, the task would be that of the state legislature, the General Assembly of Virginia. According to Cynthia Wilkinson, Policy, Planning, and Compliance Director for the Virginia Retirement System (hereinafter VRS, the statutory agency charged with operating and managing state pensions), the legality of any such change by the law-making body has never been challenged in a court. Perhaps this is because its traditional use of pension reform powers has been prospective, affecting only new employees hired on or after the date of the effectiveness of such a statute.[35] Because it is a system to which both employer and employees regularly contribute and which was a part of the employment package of each faculty member upon hire, such mutual contributions constituting consideration from each party, any change such as UUK announced would be tantamount to a breach of contract. In the alternative, it would likely be barred by the doctrine of promissory estoppel because of the justifiable reliance on the existing scheme by faculty and staff.

Significantly, Virginia law requires that the Virginia Retirement Service's Board of Directors, also a creature of the statute, must maintain all records of proceedings and appoint an actuary to investigate VRS no less often than every four years and to make its evaluation public.[36] This "sunshine" provision is antithetical to USS' and UUK's secretive policy and lack of accountability. The unsubstantiated claim

32 Va. Code Ann. Sec 51.1-100-169.

33 Va. Code Ann. Sec 51.1-124.8.

34 Va. Code Ann. Sec 51.1-126 (A)(1)a), (b). Note that there is a newer hybrid plan that is a third option. Vested rights in that plan are on a graduated scale (50% vested after two years of service; 75% percent, after three years; and 100% after five years. Va. Code Ann. Sec 51.1-169(B)(3).

35 Electronic communication from Ms. Wilkinson, 23 May 2018.

36 Va. Code Ann. Sec 51.1-124.22.

that the fund was operating at an unacceptable deficit was made without proffering any substantiating evidence or divulging any records by either.

3.2. Might an employer lawfully deduct from earnings during a strike?

Under U.S. law, this is governed by a no-work-no-pay rule. Indeed, economic strikers (those who refuse to work because of a wage, hours, or condition of work issue, such as the British faculty and staff strikers) have no job security under American federal law. In 1938, the U.S. Supreme Court held in *NLRB v. Mackay Radio and Telegraph*[37] that such strikers might be permanently replaced, a powerful negative incentive to a union contemplating engaging in a strike. Not only is the employer entitled to refrain from paying wages to workers on strike, but it also might replace them permanently. Thus, American workers who strike for economic reasons do so their employment peril.

The answer to this question under UK law is not as simplistic. McGaughey of the Kings College London law faculty believes that the reduction of striking staffers' pay was unlawful.[38] He bases this conclusion on case law, pointing first to *Liverpool City Council v. Irwin*[39], in which the House of Lords made this response dependent upon which party first breaches the contract. The non-breaching party would have the implied right not to perform its contractual obligations without any reduced compensation or no compensation at all during such strike. Liverpool City Council did not involve a strike in the sense of a work stoppage, but rather a refusal of tenants to pay rent when due because the lessor had not performed its duty to maintain and clean common areas adequately, but the analogy is logical.

McGaughey then refers to UUK's own internal rules and bylaws, documents that he maintains this decision to change the defined benefits plans to defined contributions violated. Because a British university is a company limited by guarantee (in American jargon, a not-for-profit company), any member university who disagrees with the majority could challenge it under the Companies Act[40] as *ultra vires.*

He next cites *Hartley v. King Edward VI College*,[41] involving a collective bargaining agreement that expressly provided for pay reductions in the event of a strike. However, the court held that deductions nonetheless must be fair and proportionate. Accordingly, it reduced the degree of pay reductions from the employer's deductions of 1/260th of a striker's total salary (governed by working days), to 1/365th of

37 304 U.S. 333 (1938).

38 Ewan McGaughey: Can universities cut staff pay for the strike as they please? 'No way,' says the law. *LSE blog site,* blogs.lse.ac.uk/politics and policy/staff-pay-pensions-strike/ accessed at https:///.printfriendly.com/p/g/jp2fe4

39 UKHL 1 (31 March 1976).

40 Companies Act 2006 ss. 40–42.

41 UKSC 39 [2017].

salary (based upon yearly calendar days). McGaughey reminds that there was no collective bargaining agreement provision permitting pay reduction in *Hartley*, and even if such a reduction were held lawful, the degree of deductions was too great (that is, as determined by working days).

Initial announcements of planned decreased salaries for strikers were imprudent based on the *Hartley* standard. For example, University of Kent communicated to striking staff that monetary losses would be from 50-100% for each day for which missed lectures were not rescheduled, operating under the theory that the non-working faculty were breaching their contracts of employment.[42] Which party actually breached is the operative factor under *Liverpool City Council*.[43]

One might assume that it was the *Hartley* decision that induced some universities, such as Cambridge, to decide against withholding pay. The proviso was that faculty would re-schedule missed classes. Another tacit underlying logic would presume that these decisions not to withhold pay recognized the wrongness of UUK's action, applying *Liverpool City Council*.

3.3. Is failure of the institutions to refund fees during a strike a breach of contract to students?

At the University of Liverpool a student petition was circulated seeking reimbursement to each student of £1,079.16, a figure based upon the 14-day fractional equivalent of fourteen days of the total of 120 days in a semester. (Each day was assessed at a cost of £77.083). The university's refusal to refund was based upon its assurance that there would be a provision of "alternative learning materials and supervisory support."[44] The underlying logic fails under simple contract law. The student fee is a condition precedent to registration for classes. It constitutes one side's completed performance of its *quid pro quo* arrangement, whereby the student's money is in exchange for regularly scheduled lectures by the faculty member assigned to teach the particular course. If one has pre-paid for an ordered pizza, the seller has not performed its contractual duty if it delivers pasta, stating that "we're all out of pizza." The customer would, of course, demand a refund, since he did not order pasta. University administration blamed the strike on participating faculty and confirmed that it was reducing the pay of each striking staff member 1/365[45] for each day not worked. The university's contract with each faculty member is separate from its contract with students, so how it chose to deal with strikers is irrelevant to the issue of student refunds.

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42 Richard Adams: Universities threaten to punish striking staff over cancelled lectures. *The Guardian,* March 2, 2018., accessible at https://www.theguardian.com/2018/mar/02/uk-universities-threaten-punish-striking-staff-cancelled-lectures

43 Supra n. 39.

44 Thomas Hale: The strange economics of the university strikes. *Financial Times*, 22 February 2018., accessed at https://alphaville.ft.com/2018/02/22/2198956/the-strange-economics-of-the-universi...

45 See supra n. 41 and accompanying text on the House of Lords holding in Harvey v. King Edward VI College.

The general decision not to reimburse students for consideration not received was a bone of contention for Minister of Education, Sam Gyimah. He commended Kings College London (KCL) for its plan to reimburse, saying that universities must "step up to the plate."[46] Gyimah's idea, however, still would change the consideration the students had been promised. He suggested that there were several manners whereby students could be compensated, such as faculty's making up lectures after the strike, adding that the money saved from deductions from strikers' pay could be used to fund these reimbursements.[47] This would nonetheless alter what the students had bargained for – regularly scheduled lectures. Were the same lectures to be offered at a later time, some students' schedules might not accommodate their attending.

KCL had likely consulted its legal advisors, since its spokesperson explained that "once the nature and scale of disruption has become clearer, we will develop a mechanism for considering cases for […] compensation […] warranted,"[48] implying that there would be no effort to circumvent payment to students for cancelled classes.

A cursory look at the relative amount of student fees in Britain as compared with those in other European countries lends some perspective to the extent of students' financial losses. In general, costs are higher for students who are residents of non-EU or EEA countries. Some, however, make no distinction. For example, Austria[49] and Denmark do not currently assess student fees.[50] For those charging lower fees for EU/EEA students, the amount for students from EU or EEA countries in France ranges from €200-650/year; in Germany, €100-200/year, the latter covering also all public transportation costs in the *Land* (state) where the university is located. Residents of EU/EEA countries pay €850-1,000 per year in Italy, and €550/semester in Switzerland. These scaled amounts vary from university to university.[51] According to Eoin Quill of the law faculty at University of Limerick, that institution, typical for Irish public universities, charges no fee for the first year of study. Thereafter, the fee for EU resident students is €558 per year.[52]

In contrast, fees at UK universities appear draconian. Set by statute, the maximum (which is usual) annual fee is £9,250. Student fees began in 1998 at £1000 per year, gradually rising to £1,225 by 2005. From 2006-2007, statutory law permitted variable fees in England and Northern Ireland up to £3,000

46 Eleanor Busy: University strikes: Students set to receive 'direct compensation' over lectures missed due to action, minister says. *Independent*, 28 February 2018., accessed at https://www.independent.co.uk/education/education-news/university-stikes-co...

47 Ibid.

48 Ibid.

49 According to Professor of Law Reinhard Resch, Johannes-Kepler Universitaet in Linz, there is a fee of €363.36 per semester for students who remain longer than the general six-to-eight-semester period for graduation with a bachelor's degree, plus two semesters. *See* https://www.jku.at/studieren/studium-von-a-z/studienbeitrag/

50 See Tuition Fees at Universities in Europe in 2018 – Overview and Comparison. Accessed at https://www.masterportal.com/articles/405/tuition-fees-at-universities-in-europe-in-2...

51 Ibid.

52 Electronic message from Dr. Quill, 12 May 2018, referring to https://ulsites.ul.ie/finance/finance-document-0#fees

per year, in effect also in Wales in 2007-2008.[53] The maximum increased incrementally to £3225 in 2009-2010; to £8400 in 2012-2013; to £8900 in 2016-2017; and to its current £9,250 in 2001-2018.[54] Fees in Northern Ireland are currently capped at £4130 for students from the province, and £9,250 from the rest of the UK. (All have higher fees for international students.[55])

American universities' tuition varies considerably, but is higher overall at private institutions (which are also more selective regarding admission). Unlike European institutions of higher learning, tuition has been existent since the inception of Harvard University, the first in the country (founded in 1636). It has risen exponentially, with a CBS report showing the highest at Sarah Lawrence College in Bronxville, New York, at $61,236 annually.[56] Harvard University, for which tuition was $150 per year in 1870, now assesses tuition at $48,949 (£36,548.72).[57] These fees do not include costs of housing, books, or other incidentals.

These are private institutions, and, while lower overall, tuition at public universities can be as high, or higher, than is tuition at UK universities. Each state determines how tuition at these universities will be established. For example, Virginia statutory law provides for each public institution of higher learning to have a governing board authorized to set tuition.[58] Currently, the highest annual tuition among Virginia's 15 state institutions of higher learning is that of The College of William and Mary, at $15,674 (£10,718) for in-state residents.[59] The fees in public universities are considerably higher for out-of-state students.

In Britain, students' reaction to the strike was favourable, in general. A UCU poll taken on February 22, 2018, the first day of the strike, showed that 61% students who were asked responded that they supported the strikes. Inexplicably, this support was stronger in those institutions affected by the strike (66%) than in non-struck universities (58%). Fifty percent placed blame on the universities, with only 2% blaming faculty and staff. Twenty percent saw each side as equally to blame.[60] It should be emphasized that this poll was conducted by the union.

The Independent reported the remarks of one student, not identified as to institution. She expressed ambivalence, stating reports about widespread student support as showing a "swelling mass of solidarity pouring onto infinite picket lines" to be inaccurate. She had chosen to attend the few lectures still being held out of admitted self-interest, reminding that students were not receiving what they "shelled

53 Higher Education Act 2004.

54 House of Commons Library, Briefing Paper No. 917, 19 Feb. 2018. See also Paul Bolton: Tuition Fee Statistics. Accessible at https://researchbriefings.files.parliament.uk/documents/SN00917/SN00917.pdf

55 The World University Rankings, Dec. 1, 2017, accessed at https://www.timeshigheredcation.com/students/advice/cost-studying-university-uk

56 http://www.cbsnews.com/pictures/the/50 moist expensive-us-colleges/

57 https://www.scholarships.com/colleges/harvard-university

58 Va. Code Ann. Sec 23–45 *et seq.*

59 See www.collegealc.org/lists/virginia/most-expensive-in-state-tuition/

60 Poll shows students support pension strikes and blame universities for the disruption. Accessed at https://www.ucu.org.uk/article/9345/Poll-shows-students-support-pension-strikes-and...

out thousands of pounds for […]. We paid over £9,000 a year for the courses which now have zero contact hours." She bemoaned the pressure from other students who appeared to disdain her because she had not chosen to join the picket lines. Nonetheless, she understood the reason for faculties' action because she viewed the universities' decision as damaging to education. Her conclusion was that favouring the strike while simultaneously favouring one's education were not mutually exclusive, feeling "torn between supporting [… her] treasured lecturers and [… her] treasured education."[61]

A Newcastle University student staunchly stood with the strikers. He reported in *the Guardian* that he saw the dispute as addressing the demoralisation of faculty, whose salaries had decreased by 16% since 2009. Compounded with the prospect of the loss to pension benefits, he understood their anxiety. He stressed that strength in combatting the UUK decision would benefit other workers who otherwise would likely suffer similar attacks on their own pensions. He strongly solicited avoiding attending lectures and joining the picket lines during the strike.[62]

The Newcastle student body was not as enthusiastic. The Newcastle University Students Union council rejected a motion to express support for striking faculty, deciding instead to take a neutral stance. Simultaneously, some 2,500 Newcastle students were signatories to a petition demanding a partial refund of fees.[63]

3.4. Might a union legally penalize a union member for working during a majority approved strike?

There is a marked difference between American and British law in this regard.

British statutory law is strict. A union member has the right to decide whether or not he will participate in a majority-approved strike, and his procedural and substantive rights if he is disciplined for exercising that right against the will of the majority are explicit.[64] If he has been discriminated against for his refusal to strike, he has the right to file a complaint with an industrial tribunal.[65] If he is not satisfied with that body's decision, he might appeal to an Employment Appeal Tribunal (on questions of law only).[66] A remedy for unjustified discipline (the implication is that any discipline for this reason is unjustified) might be an award of compensation from the union to the subject member.[67] Among members of UCU, many chose not to participate in the strike under this statutory protection.

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61 Juliette Bretan, *The Independent*, 27 February, 2018., accessible at https://www.independent.co.uk/voices/university-strikes-lectureres-strike-students-tuiti...

62 Greg Rosenvinge: Why we students should back our lecturers on strike. *The Guardian*, 21 February 2018., accessed at https://www.theguardian.com/education/2018/feb/21/why-we-students-should-back-o...

63 Hannah Graham: Newcastle students refuse to support striking lecturers – but they won't condemn them either. https://www.chroniclelive.co.uk/news/north-eaxst-nedws/newscaxstle-students-refuse-suo...

64 Employment Act 1988 ss 3-5 (Part I).

65 Ibid. sec 3(3)(a).

66 Ibid. Sec 4(5).

67 Ibid. Sec 5.

One colleague who, as an UCU member, chose not to strike wrote to the author that he "might lose friends" over this decision.[68] Nonetheless, any concrete retaliation would be unlawful.

American federal law recognizes the contractual nature between a union member and the union. Twelve years after the Taft-Hartley amendments, in the aftermath of many charges of fraud against union leadership, Congress adopted the Labor Management Reporting and Disclosure Act, commonly referred by its common name, the Landrum Griffin Act of 1959.[69] Primarily vesting union members with rights against any maltreatment by a union, such as fraud and abuse or, union links to organized criminal organizations,[70] this law requires openness and reporting of collective bargaining agreements and other documents to the federal government. Additionally, it includes a labour union member's bill of rights.[71] The flip side of this rights and duties coin was member's duties to pay dues and to be loyal to the union, with due process rights included by unions' responsibility to adopt a constitution and/or bylaws approved by members. The Department of Labor published an exhaustive report compiled by the Bureau of Labor Statistics in 1963 analyzing lawful disciplinary measures taken by various unions for members' non-compliance with reasonable union rules contained in these constitutions or bylaws.[72] This report recognized the reasonable expectation of a union to "prevent or punish activity which might threaten its existence… [and] to proscribe behaviour which interferes with the carrying out of the collective bargaining obligations."[73] Expressly included among activities of a union member that might be penalized by the union is not participating in a strike after a majority has voted to strike.[74]

An example of such internal use of this power to discipline is in the Communication Workers of American (CWA) Constitution. A decision to strike must be approved by a majority vote.[75] In such case, the union might thereafter fine, suspend, or expel a member who disobeys or wilfully fails to comply with that that decision or who works during an approved strike.[76] Conversely, that constitution provides for discipline for one who engages in a wildcat strike, that is, who strikes without a majority vote to do so.[77]

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68 Electronic communication from this source, 2 May 2018.

69 29 U.S.C. secs 401-531 (1959).

70 The purpose clauses in the Act state the need for labour unions to "adhere to the highest standards of responsibility (sec 402(2)(a). This required Congress to address "breach[es] of trust, corruption [and] disregard ot the rights of individual employees." Sec 401(2)(b).

71 Landrum Griffin Act sec 411.

72 Bulletin No. 1350, May 1963, U.S. Department of Labor, Bureau of Labor Statistics, accessed at https://fraser.stlouisfed.org/files/docxs/publications/bls/bls_1350_1963.pdf

73 Ibid. at Chapter 1, Introduction.

74 Ibid. at 18.

75 CWA Constitution Article XVIII sec 6.

76 Ibid. at Article XIX sec 1(d)(e).

77 CWA Constitution Article XIX sec 1(f).

A second example is the International Association of Machinists and Aerospace Workers (IAM). According to William H. Haller, Associate General Counsel of IAM, its constitution also provides for the imposition of fines against those members who do not honour union-sanctioned strikes. This is regarded as being among those punishable offenses generally included in the constitutional "conduct unbecoming a member."[78]

3.5. Must an employer permit an employee to engage in union activities during work hours?

The British statute is clear on this point. An employer is required to allow employees to take a reasonable time during work hours for this purpose.[79] What constitutes a "reasonable" time is determined by the governmental agency Advisory, Conciliation, and Arbitration Services (ACAS) in its Code of Practices.[80] Additionally, this time spent at the work site engaging in union affairs rather than responsibilities of work must be paid. [81]

The American view is that an employer might enforce reasonable workplace rules, and it is surely reasonable for management to expect workers to be productive on behalf of the company (in this case, the university) during paid time. Generally speaking, the employer might make and enforce rules requiring regular attendance; obedience to reasonable work rules; a reasonable quality and quantity of production; and the avoidance of conduct that would interfere with the employer's ability effectively to carry on its business. [82] In general, a worker who is terminated for having violated a reasonable work rule is ineligible for receipt of state-administered unemployment benefits.[83]

The underlying presumption is that this would include engaging in personal activity on the employer's clock. In a right-to-work state where union membership is entirely voluntary,[84] personal affairs would include union activity. The NLRB construed this work-only-at-work rule as not permitting an employer to prohibit use of company computer equipment by an employee to communicate electronically to co-workers his criticisms of the company's plan to change vacation policy[85] because this would interfere with his statutory (sec 7) right to engage in concerted activities for mutual benefit. This view was substantially altered in 2007 in *General Publishing d/b/a The Register-Guard*[86], in which the NLRB

78 Electronic message from Mr. Haller, 21 May 2018.

79 Sec 168 TULRA.

80 Sec 168(3) TULRA.

81 Sec 169 TULRA.

82 Roger I. Abrams – Dennis R. Nolan: Toward a Theory of 'Just Cause' in Employee Discipline Cases. *Duke Law Journal,* 594., 1985. 611–612.

83 See, e.g.,Va. Code Ann. Sec 60.2-618(4) on chronic absenteeism.

84 For statutory explanation of states' authority to enact right-to-work legislation, see secs 7, 8(a((3), and 14(b) Taft-Hartley Act..

85 See Timekeeping Systems, Inc., 323 NLRB 244 (1997), holding that an employee's use of company e-mail to communicate to co-workers his criticism of

86 351 NLRB 1110 (2007, rev'd and remanded on other ground in Guard Pub. Co. V. NLRB,571 F.3d 53 (D.C. Cir. 2009)

construed sec 7 as not permitting employees to access employer e-mail system to communicate regular workplace concerns. *Register* upheld the basic property rights of the employer to control its equipment.

Regulatory directives are subject to interpretative mood swings with changes of administration, and in 2014, the NLRB decided *Purple Communication, Inc*.[87] This ruling allowed employees to use employer e-mail for union communication during work hours, but this time was restricted to break time, such as permitted coffee and/or lunch breaks. It is instructive that U.S. federal law does not require employers to provide break time or even days off work, although some state laws require specified breaks during a regular work day.[88] Whether these breaks are paid depends upon regulations under the federal wage and hour law, the Federal Labor Standards Act.[89] The general rule is that any break time of less than 20 minutes in duration must be paid.[90]

Purple Communications may have a short shelf-life. Now on appeal to the 9th Circuit Court of Appeals, the Trump NLRB has issued a notice to file briefs in support of its current position that it be overruled.[91] A cautious prediction is that this rule will in fact be changed and that an employer soon might prohibit any union activities during working hours. Even should *Purple Communications* survive, American workers are entitled to pay for any on-site union activity unless this work is more than 20 minutes in duration.

3.6. Government provided mediation services and procedures

Both countries have federal statutory mediation and arbitration services. The UK's Advisory, Conciliation, and Arbitration Services (hereinafter "ACAS") became a governmental agency upon passage of the Employment Protection Act 1975,[92] legislation that was replaced by the Trade Union and Labor Relations Act of 1992[93] and which continued the provisions with regard to ACAS. That body's 2016-2017 report revealed an 89% settlement (or partial settlement) rate during that one-year period.[94] The work of this body on the universities pension dispute is addressed in Part 5, below.

87 361 NLRB 1050 (2014).

88 Those states are California, Colorado, lllinois, Kentucky, Minnesota, Nevada, Oregon, Vermont, and Washington.

89 29 U.S.C. secs 201 *et seq*., first enacted in 1938.

90 29 C.F.R. sec 785.19(a).

91 The Case in which the NLRB applied Purple Communications as precedent and thus prompted this notice issued in May, 2018, is Caesars Entertainment Coorp. et. al, Case 28-CA-06-841.

92 Part I, Employment Protection Act 1975, effective 1976.

93 Trade Union and Labour Relations Act 1992 (TULRA) secs 300(1), 302, Sched. 1.

94 Acas Annual Report and Accounts 2016-2017. Accessed at www.acas.org.uk/media/pdf/e/s/Acas-annual-report-2016-2017.pdf

A provision of the United States' 1947 Taft-Hartley Act created the Federal Mediation and Conciliation Act.[95] Its services are available to any parties who request them, and notice to FMCS is required no less than 30 days prior to the expiration of a collective bargaining agreement.[96] The only time use of FMCS assistance is mandatory is in a case in which the President sees an actual or threatened strike or lockout as injurious to the health or safety of the country or of a significant region.[97] The Attorney General presents the case to a federal district court that, if it agrees on the potential effect of the work stoppage, orders a suspension of 80 days.[98] During that time, the parties must work with the FMCS in an effort to settle. It would not be realistic to conceive of a university faculty strike as a threat to national health or security. An example of the use of this provision was President George W. Bush's request to seek judicial postponement of an announced strike by the longshoremen's union at West Coast ports in 2002, just prior to Christmas. The government's position, which the court accepted, was that such a cessation of work would disrupt Christmas deliveries from overseas at a time when the economy was in need of stimulation and, more importantly, it would interfere with the transport of munitions and military supplies during the post-September 11, 2001, war on terrorism.[99]

Some state courts make more frequent use of mediation than do others, but use of alternate dispute resolution in labour strife is frequent in the United States.

3.7. The duty to bargain during a labour dispute

American labour law makes mandatory negotiation between the parties in a dispute concerning ages, hours, and/or other conditions of employment.[100] There is no obligation to reach an agreement, but they must discuss and bargain in a good faith effort to do so. When that duty terminates is not clearly delineated, but bargaining must continue until they have reached an impasse. The courts have held that whether an impasse exists is a question decided by objective evidence showing that further discussion would be futile.[101]

The contrary is the case under British law, which does not require bargaining by the parties. The invitation to further acrimony by this absence in British law was evidenced by University of Oxford administration's blocking attempts of university staff in March, 2018, to debate the proposed changes to USS. In what appeared to be a direct blow at academic freedom of speech, Vice Chancellor Louise

95 29 U.S.C. sec 172.

96 29 U.S.C. sec 158(d).

97 29 U.S.C. secs 176-180.

98 29 U.S.C. sec 178.

99 Notably, the dispute was settled before mediation with FMCS began. Chris Reese: Dock workers Report Back to Work. *CBS News,* www.cbsnews.com/news/dockworkers-report-back-work

100 Taft-Hartley Act secs 8(5), 8(b)(3), and 8(d).

101 *See, e.g.*, NLRB v. Tex-Tam, 318 F.2d 472, 482 (5th Cir. 1963).

Richardson criticized the "tenor of some of the debate" (a debate that had not commenced, since staff efforts had been thwarted administration heads' use of internal procedures), while simultaneously stating that the university "take[s] pride in our defence of freedom of[102] speech." Other heads of universities, including the Vice-Chancellors at Sheffield and Loughborough universities, were more conciliatory, even visiting picket lines. Sheffield Vice-Chancellor Keith Burnett called on the UUK as an entity to enter "genuine negotiations" with the union.[103] Were this duty required by law as is the case under U.S. federal law, Sir Keith would have had his way. Mandatory bargaining is an integral part of American labour law, and it is submitted that labour disputes in the UK would generate shorter, if not fewer, work stoppages if Parliament were to enact similar legislation.

3.8. Legality of the strike itself

Unlike some major European countries with a constitutional right to strike, for example, France,[104] Germany,[105] Italy,[106] and Spain,[107] the UK statute is more indirect. Britain has no written constitution, so any right to strike must be statutorily derivative. The Trade Union Labour Relations (Consolidation Act 1992, TULRA) specifies the necessary procedural steps for recognition of the union and provides immunity from liability for strikers,[108] but does not specifically mention the right to strike. In the United States, any right to strike also is statutory, there being no such right in the constitutional Bill of Rights.[109]

With regard to international law, the UK adopted International Labour Convention No. 87 on the right to associate and to engage in activities for mutual aid on June 27, 1949.[110] As it has refused to sign many ILO treaties, the United States is not a signatory to this agreement. The reason is a constitutional one. The Supremacy Clause states that the Constitution, laws of Congress, and any treaties entered into are the supreme law of the land. A treaty could not supplant or supersede that supremacy of the constitution.[111]

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102 Richard Adams: Oxford University blocks staff attempts to challenge pension cuts. *The Guardian*, 6 March 2018., accessed at https://www.theguardian.com/uk-news/2018/mar/06/oxford-university-blocks-challenge-to-staff-pension-cuts-proposals-universities-strike

103 Ibid.

104 French Constitution sec 828(1) (1956).

105 German *Grundgesetz* Article 9 (1949).

106 Italian Constitution Article 40 (1947).

107 Spanish Constitution Art. 18 (1978).

108 TULRA sec 219.

109 Generally, this is incorporated into the right of workers to associate and to "engage in concerted activities for mutual aid." Taft Hartley Act sec 7.

110 ILO Conv. No. 87 (articles 3, 8, and 10).

111 Const.of the United States Article IV sec 2 (1787).

Additionally, the UK is a party to the European Convention on Human Rights (article 11),[112] which recognizes this same right. The UK 1998 Human Rights Act incorporates the provisions of the ECHR,[113] so those rights might be enforced in domestic courts.

Contrary to what might be common belief, neither the United States nor Canada are parties to the American Convention on Human Rights, [114] in which Article 1 guarantees the right to strike. This treaty used the term "American" to refer to the two continents of North and South America, but the only member nations are countries in Central and South America.

The consequence is that the only right to strike in the United States is found in the Taft-Hartley Act, implied in the right of workers to organize, bargain collectively, and engage in further activities for mutual and benefit applicable to private employment. Engaging in strikes against the U.S. federal government is a statutory crime.[115]

American legal references to strikes herein have been made thus far under the assumption that the comparator would be a private university,[116] unlike the public status of the universities in the UK. A recent example of an American private university strike was the one-day strike at Loyola University of Chicago, a Jesuit Catholic university where tuition is over $43,000 per year, on April 4, 2018. The action was taken by non-tenure track full- and part-time faculty in two of the university's colleges, members of the local branch of Service Employees International Union (SEIU).[117] Issues involving pay increases were resolved on April 27, 2018.[118] Interestingly, in addition to demanding a 67% pay increase for part-time (adjunct) (the university had offered raises of 5.5% across the board to all faculty and 33-35% per credit hour taught for adjuncts, depending upon full-time or part-time status[119]), the strikers also sought specified benefits (such as health insurance),[120] uncommon in American part-time work, and some form of job security. The latter, too, was unusual, since adjunct work is generally a one-time contract, renewable at the discretion of the university. This teaching status category bespeaks the absence of job security. Notable is the short time of the work stoppage, a single day. According to

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112 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR 4 November 1950, ETS 5.

113 1998 Human Rights Act c. 42, Schedule 1.

114 American Convention on Human Rights, Organization of American States (OAS) Treaty Series No. 36: 1144 UNTS 123, 9 ILM 99 (1999).

115 5 U.S.C. sec 3333, 18 U.S.C. sec 1918, and 5 U.S.sec 118p-r.

116 See references to the general private sector labour relations statute, the Labor-Management Relations Act, commonly called the Taft-Hartley Act, 29 U.S.C. secs 1161 et seq.

117 Julie Whitehair: Loyola University faculty threatens to strike April 4; next talks Monday. *Chicago Sun-Times,* 30 March 2018., accessed at https://chicago.suntimes.com/workingloyola-university-faculty-union-threatens-str...

118 Adjunct faculty at Loyola University ratify first contract. *Washington Post*, 27 April 2018., accessed at https://www.wash ingtonpost.com/…/2018/…/adjunct-faculty-at-loyola-university…

119 Official published statement from the Colleges of Arts and Sciences bargaining group, March 20, 2018, SEIU Local 73 Negotiations–3/19 Bargaining Update, accessed at https://www.luc.edu/bargaining/cas-bargaining/pastmessages/march202018/

120 Non-Tenured Professors Strike After Negotiations Fail. *Loyola Phoenix* (student newspaper), April 2018., accessed at http://loyolaphoenix.com/2018/04/non-tenured-profexssors-strike-after-negotiations-fail/

a report from a collegiate collective bargaining centre, faculty strikes in U.S. universities tend to be short.[121]

This shorter tendency was not a characteristic of the longest faculty strike in American higher education. This University of Bridgeport (Connecticut) strike began September 1, 1990 and continued for two years. Bridgeport is also a private institution, so the Taft-Hartley Act applied. Tuition for 2017-2018 is a relatively high $15,353 per year.[122]

The then financially troubled university announced plans to implement a 30% reduction in faculty salaries and to propose a provision in the new collective bargaining agreement providing for termination of a tenured faculty member with 30 days' notice, without severance pay. One hundred twenty five of the 175 faculty members participated in the strike. The university replaced all strikers (as it might legally do under a 1935 U.S. Supreme Court decision, *NLRB v. Mackay Radio and Telegraph*[123]), another first in American college and university history. After two years, only 66 strikers remained[124] when a mediator achieved a settlement. These former faculty accepted 2/3 one year's salary each, agreed upon a cease and desist order stopping the strike, and accepted decertification of the union.[125]

It is significant that the Taft-Hartley Act excludes some classifications of workers as "employees" under the statute.[126] Since only statutory employees might be members of a union, this is a significant exclusion. Additionally, the U.S. Supreme created a judicial exclusion of management personnel from the Taft-Hartley concept of "employees."[127] In *NLRB v. Yeshiva University*,[128] the Court held some university faculties attempting to unionize as falling under that management exemption. In *Yeshiva*, faculty was vested with many managerial powers, including decisions, size of the student body, amount of tuition, and graduation requirements. They also determined what courses would be offered. This holding made it clear that determinations on whether faculty constitute managerial employees would be made on a case-to-case basis, and it is submitted that most faculty do not have this authority. Some other private sector universities' faculty have been held not to be "managerial," and, as such, permitted to unionize for collective bargaining purposes.[129]

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121 *See* Kaustuv Basu: Do Faulty strikes Work? *Inside Higher Education* online, 24 October 2011., accessed at https:///.insidehighered.com/news2011/10/24/are-faculty-strikes-effective; quoting Richard Boris of National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College, a state institution in New York City.

122 University of Bridgeport home page, https://www.bridgeport.edu/

123 See supra n. 35.

124 These remaining strikers likely kept hope that they might eventually be rehired. After *McKay*, the NLRB held that replaced economic strikers had the right to their former jobs if their replacements left that employment, and the strikers had not accepted regular and substantially similar work in the meantime, or, in the alternative, unless the employer can prove that it had a legitimate and substantial reason not to reinstate them. *Laidlaw Corp.*, 171 NLRB 1336 (1968).

125 D. Collins: The University of Bridgeport Faculty strikes. Introduction to the Special Issue. *Journal of Academic Ethics*, vol. 1, 2003. 233–237.

126 Taft-Hartley Act sec. 2(3).

127 NLRB v. Bell Aerospace Co., 416 U.S. 267, 281-282 (1974).

128 444 U.S. 687 (1980).

129 See, e.g., Pacific Lutheran University, 361 NLRB 1404 (2014).

The U.S.' Taft-Hartley Act that governs private sector industrial relations excludes state and federal governments from coverage.[130] Thus, public university faculties' right to strike, if any, is governed by state legislation. Only eleven states (Alaska, California, Colorado, Hawaii, Illinois, Louisiana, Minnesota, Montana, Ohio, Oregon, and Pennsylvania) permit state workers to strike,[131] and these are limited in nature (usually according to the type of work performed).[132] For example, Oregon prohibits strikes by hospital guards, firefighters, or police.[133]

A typical example of the remaining 39 states is Virginia. The applicable statute[134] results in immediate termination of the employment of any employee of the state or political subdivision (that is, city, town, or county) who engages in any strike or non-performance of any work duties (this would include those who take industrial action "short of a strike") together with two or more other workers. They are ineligible for employment by any state or local agency for the following twelve-month period.

Some commentary on the less-innocuous-to-employers right to bargain collectively for state workers in the United States is relevant. The first state to permit bargaining by public sector workers was Wisconsin in 1959,[135] and most states thereafter enacted similar legislation. Currently, Texas prohibits collective bargaining by public sector workers except for police and firefighters[136], and Georgia, for all workers with the exception of firefighters.[137] North Carolina,[138] South Carolina,[139] and Virginia prohibit all public employees from bargaining collectively.[140]

With regard to the Virginia statute, some history is explanatory in order to indicate the depth of conviction against public sector bargaining in those states that prohibit it. In 1946, the state law-making body, the General Assembly, adopted a Joint Resolution that collective bargaining by state workers violated public policy.[141] Because such a resolution does not have the force of legislation, the issue was litigated in 1977. In *Commonwealth of Virginia v. Arlington County Board*,[142] a unanimous Supreme Court of Virginia held that, absent express legislation granting this authority, any state or local agency lacked the authority to bargain collectively with employees. Shortly thereafter, the

130 Taft-Hartley sec 2(2).

131 *See* Kirsten Bass: Overview How Different States Respond to Public Sector Labor Unrest. 11 March 2014., accessed at https://onlabor.org/overview-how-different-states-respond-ro-public-sector-labor-unrest/

132 Mila Sames – John Schmitt: *Regulation of Public Sector Bargaining in the states.* Center for Economic and Policy Research, Washington, D.C., March 2014.

133 Oregon Revised Statutes 243.736.

134 Va. Code Ann. Sec 40.1-55.

135 WIS. STAT. ANN. Sec 111.70 (1974).

136 Tex Gov't Code Ann. Secs 617.002 and 174.002.

137 Ga. Code Ann. 925-5-4.

138 N.C. Code sec 95-98 (1959).

139 McNair Resolution, H. 1636, 1969 S.C. Sen. Jour.826 (April 5, 1969); 1969 House Jour. 942 (April 30, 1969).

140 VA. Code Ann. Sec 40.1-57.2.

141 S.J.Res. 12, 1946 Va. Act 1006.

142 217 Va. 558 (1977).

state Attorney General, issued official opinions declaring the same.[143] Statutory confirmation of this prohibition came in 1993.[144]

A perusal of some strikes in public sector universities in American states where they are permitted by law is illustrative of their frequency. A week-long Southern Illinois University faculty strike in November, 2011, did not address pay *per se* but rather the lack of transparency by administration about the institution's financial status and ongoing operations in light of faculty's feared future position terminations and/or furloughs. This altruistic faculty had actually declined an offer of an across-the-board salary raise of 4% because this would resulted in a student tuition increase. The desired openness was achieved by the walkout, and the differences were tentatively settled a week after the strike ended.[145] Final agreement came via a new collective bargaining agreement signed on February 6, 2012.[146]

In 2016, the California Faculty Association, representing faculty in the entire public university system, announced a planned five-day strike to begin April 13. The union had demanded a 5% pay increase over the administration's offer of 2%. The strike was averted when the parties reached a settlement on April 7, agreeing to an increase of 10.5% phased over a five-year period, a deal that universities' spokesperson said would cost $200 million over the following two years. Inexplicably, the administration claimed it was victorious.[147]

Another wide-spread strike in 2016 was that of fourteen institutions in the Pennsylvania state university system. This three-day work stoppage, the first in that group's history, drew the participation of 80% of the 5500 faculty and coaching staffs members and affected more than 100,000 students. Responding to cuts in state funding, the bedrock of a public university's financial status, administration had announced that it would hire more adjunct faculty and increase course loads of existing faculty. A rarity because the strike was not based on the usual bottom line (money), the union (Association of Pennsylvania State College and University Faculties) actually accepted some reductions in salaries and benefits in exchange for the administration's commitment to forego most of some 249 planned cost-cutting changes. Union spokesperson stated that the primary goal of the union was to "preserve quality education for our students, protect our adjuncts from exploitation, and make sure the varieties of faculty are respected."[148]

143 1974-75 ATT'Y. GEN. OO. 158 and 1974-75 VA. ATT'Y. GEN. OP. 77.

144 Va. Code. Ann. 40.1-57.2.

145 Weeklong Faculty Strike Ends at SIU, CBS. See https://chicago.cbslocal.com/2011/11/10/11/siuc-n10.html

146 This contract, Agreement Between the Board of Trustees of Southern Illinois University Faculty Association, IEA/NEA for Fiscal years 2011-2014, can be viewed at https://laborrelations.siu.edu/_common/documents/labor-contracts/2010-2014fa.pdf

147 Maura Walz – Kyle Stokes: SUI admin, faculty agree to 10.5 percent raise over three years. *KP radio,* 8 April, 2016.

148 Susan Svriuga: Faculty strike ends at 14 Pennsylvania state universities. *Washington Post*, 21 October 21 2016), accessed at https://www.washingtonpost.com/news/grade-point/wp/2016/10/21/faculty-strike-end...

The recurring similarity is the successful negotiations that addressed each of these labour disputes. Only in the Southern Illinois case was lack of candor and openness on the part of administration at issue, and this was resolved by earnest negotiations.

In the vast majority of states (39), such public sector strikes are unlawful. Thus, faculty strikes at public universities are rare.

4. Employer groups and union density

Some comment on employer groups and union density in the United States is instructive. With respect to pension plans specifically, they typically are undertaken at the multi-employer group level generally in industries with smaller groups of workers who frequently change jobs. Most are defined benefit plans.[149]

Moreover, union density in the United States is decidedly lower than in the UK. A 2017 U.S. Department of Labor Bureau of Labor Statistics reported an overall 10.7% membership among workers. A breakdown shows the much more highly unionized public sector rate at 34.4%, and the private sector, at only 6.5%.[150]

Contrasting those figures with their counterparts across the UK shows a private sector union membership in the USA of almost one-quarter of that in the UK. The latter reported a 2017 union membership rate of 23.2% overall, with 51.7% among public sector workers, and 13.5% among those in the private sector.[151] Whether this disparity of union membership rates is a factor in the greater frequency of strikes in the UK is conjecture.

5. The settlement

ACAS began six days of conciliatory talks with UUK and UCU, and the result was an offer from UUK. This first proposal agreed to leave the issue of evaluating pension deficits to independent assessors, to defer any implementation of the planned pension fund change until 2020, to work out temporary ways to approach the funding gap, and to increase both employer and employee contributions to the pension fund. This settlement also would have required strikers to reschedule teaching of classes missed.[152]

149 H. Weinstein – W. J. Wiatrowski: Multi-Employer Pension Plans. *Compensation and Working Conditions,* spring, 1999. 20.

150 Economic News Release, 19 January 2018, USDL 18-0080. https://www.bls.gov.news-release/union2.nr0htm

151 https://www.gov.uk/government/collective/trade-union-statitsitics

152 Deal offered in university pensions row. *BBC,* 13 March 2018., accessed at http://www.bbc.com/news/education-43380857

The bargaining representatives of UUK and executive employees of UUC accepted this proposal on March 12, but the following day, UCU members voted to reject.[153] Concerns among "no" voters apparently focused on the firm belief that there was no deficit. One law lecturer who had opted not to strike but who voted against this proposal, revealed that he, too, questioned the reality of a deficit. He explained that if there were in fact such a shortage, UUK would have not agreed to an "independent" evaluation. This led to doubt as to the genuine neutrality of the evaluators.[154] A law professor at another institution told the author that he had voted "no" simply because he "did not trust the executive members of UCU" who had found the proposal acceptable.[155]

One striking faculty member who voted to reject was Steven Parfitt of the Department of History at Longborough University. While not explaining why the proposal was unacceptable, he included a litany of other strikes that had been inspirational for the faculty, including the heavily immigrant-cleaners and support staff's strike at London's School of Oriental and Asian Studies, demanding better pay and pensions; cleaning staff at London School of Economics who rejected a weak offer of settlement; the 2016 junior doctors' strike who abandoned their strike and suffered from an agreement "rammed" by the government; and the spring, 2018, school teachers strike in the American state of West Virginia.[156] Praising support from students in the latter, he is guilty of two misconceptions. First, these were secondary school students. Any parent will confirm that children and adolescents relish every excuse to miss school time. These students were not paying fees and preparing for a career, as were the UK university students. Second, he failed to note that the strike in West Virginia was unlawful.[157]

A second proposal was sent to members on April 4, 2018, and voting polls closed at 2 pm on April 13, 2018. The timing was perfect for UCU, since, if not approved by members, the next scheduled strike activity would begin May 16, the first of a group of strike dates during summer term. This would interfere with scheduled examinations. This proposal actually withdrew the plan to change the pension scheme to a defined contribution one, guaranteed a defined benefit scheme, and retained UCU's right to strike if final negotiations on all issues were not productive. Approval was necessary not only by union members, but also by the USS Board and the governmental Pensions Regulator.[158]

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153 Katie Tarrant – Daniel Ruben: Strikes set to continue during exam season as UCU rejects deal. *The Boar* (student newspaper at University of Warwick), 15 March 2018. 3.

154 Electronic message from this UCU member to the author, 19 March 2018.

155 Discussion between this professor and the author on 16 May 2018.

156 Steven Parfitt: Why the UCU Strike Matters. https://www.jacobinmag.com/2018/03/ucu-university-staff-strike-deal-pensions-union; Jacobin Magazine is described on its website as a "leading voice of the American left, offering "socialist perspectives on politics, economics, and culture." It should be noted that the United States is a republic and a capitalist state, not a socialist or a social state.

157 The Supreme Court of West Virginia held in 1990 that public sector strikes, since unauthorized by the state legislature, were illegal. Jefferson County Board of Education v. Education Association, 393 S.E.2d 653 (W.Va. 1990).

158 UCU members vote in record numbers to accept proposals in pensions dispute. Accessed at https://www.ucu.org.uk/article/9439/UCU-members-vote-in=record-numbers-to-accep...

Voter turnout was a record high (63.5%) for UCU national voting, and the vote to accept was 64%, with a "no" vote of 36%.[159] Notably, lecturers insisted that they would not make up missed classes, although they would make some changes to exam papers in accordance with those lost teaching days. UUK now claimed a deficit in the amount of £6 billion.[160]

With a jointly chosen expert to evaluate the financial status of the pension fund and the assurance of their desired defined benefit scheme, faculty clearly appeared to be the victors. A final agreement will resolve minor faculty issues, but faculty had clearly won t he deal-breaker.

6. Some economic realities

Both students and faculty have voiced concerns about erosion of the quality in higher education, fearing that UK universities have become revenue-driven. One economist wrote in *Financial Times* that high-level university administrators earned substantially more than faculty, the latter whose pay was being decreased during the strike. At the same time, few institutions were refunding student fees, universities' highest source of revenue. His point was that a strange situation was created in which strikes actually were profitable for the struck institutions, epitomizing the marketization of higher education.[161]

The same concern exists about American universities. Noam Chomsky, Professor of Linguistics at Massachusetts Institute of Technology and self-professed libertarian socialist, agrees that universities now use the corporate business model, dividing workers into a "plutonomy" of top sectors earners (administrators) and "precariat" (adjunct faculty), the latter, who live a precarious existence with no job security. Added costs are imposed on students and on untenured faculty, with administrators' salaries increasing because "education is not their goal."[162]

With respect to the UCU tentative settlement, Des Freedman, Professor of Media and Communications at Goldsmiths, University of London, cautions that faculty realize that employers have not changed their position on pensions because they are "enlightened or […] newly benevolent."[163] He reminds that the provisional settlement is not the end of the campaign on pensions and that the strike has emboldened the union. Parroting Chomsky, he refers to the "bloated nature of a... system

159 Ibid.

160 Rosemary Bennett: Lecturers end strike in time for finals. *The Times*, 14 April, 2018., 2., col. 2–4.

161 Thomas Hale: The strange economics of the university strike. *Financial Times Alphaville*, 22 Feb.2018., accessed at http://ftalphaville.ft.com/2018/02/22/22/3298956/the-strange-economics-of-the-universi...

162 Noam Chomsky: The Death of American Universities. (Edited portions of his 2014 address to Adjunct Faculty Association, United Steelworkers, Pittsburgh, Pennsylvania.) Accessed at https://www.jacobinmag.com/2014/03/the-death-of-american-universities/

163 Des Freedman, *The Guardian* (commentary section), 16 April 2018., accessed at https://www.theguardian.com/commentisfree/2018/apr/16/university-pensions-strikes-...

that gobbles up tuition" to subsidize "infrastructure and inflated salaries for vice chancellors, while pleading poverty when it comes to adequately compensating staff."[164]

7. Conclusion

The UCU decision to accept the brokered offer of settlement did not dispense with the possibility of more strikes in the near future. Unlike most settlements, this right was retained but postponed, so the earlier strike might have been a Rasputin whose head might rear itself again. Union readiness for another strike has not met an untimely demise.

Could this have occurred at a public American university? Only eight states permit any public sector striking, so it would be highly unusual. In the private setting, where federal labour laws apply, there have been intermittent faculty strikes that, compared with the recent UK strike (which may be only dormant), have been relatively short.

An American union would insist that the pension would be one bargained for and contained in the collective bargaining agreement, a factor that solidifies contributors' obligations and clarifies questions of a breach. On the university's side, a bargaining offer might be conditioned on the union's acceptance of a peace obligation (referred to in American jargon as a no-strike clause). Legislatively required bargaining would likely expedite a settlement without a cessation of the essential function of a university – that is, teaching fee-paying students and engaging in productive research. Parliament would do well to consider adopting such a mandate for all labour disputes.

Finally, UCU should emphasize the issue of sustaining quality education. This fundamental purpose, at least in the perspective of university management, seems to have diverged into been in the foray of an institutional focus upon monetary gain, leading to faculty's resort to depriving students of the service for which they have paid. Because of the absence of statutory directives with regard to labour dispute resolution, the metaphorical jury is still out as to the likely result of a permanent agreement through current negotiations.

[164] Ibid.