Strikes (Minimum Service Levels) Bill

A. INTRODUCTION

On 10 January 2023, Grant Shapps (the then Secretary of State for Business, Energy, and Industrial Strategy), introduced the Strikes (Minimum Service Levels) Bill[1] in the House of Commons following a period of prolonged industrial action across a number of sectors, caused in part by the cost-of-living crisis. The Bill expands on a commitment made in the Conservative Party's 2019 manifesto[2] to require minimum service levels during transport strikes. The government had already introduced the Transport Strikes (Minimum Service Levels) Bill[3] in October 2022 but its progress through the legislative process had stalled. The prospect of strikes in a range of public services prompted the replacement of the Transport Strikes Bill by the Strikes (Minimum Service Levels) Bill, which enables the implementation of minimum service levels in a number of sectors – going beyond transport to include five other sectors – during periods of strike action. To that end, the Bill amends the current law regulating industrial action and limits the protections afforded to trade unions and workers taking lawful action. Unsurprisingly, the Bill has attracted a considerable amount of controversy. At time of writing in June 2023, the Bill had passed the third reading in the House of Lords and was going back and forth between the House of Commons and House of Lords with disagreement centring on a small number of amendments.

This note briefly summarises the current law on industrial action before outlining the provisions of the Bill. As the final text of the Bill has not been agreed at time of writing, this note will explain the Bill as currently agreed by both Houses of Parliament, and mention, where relevant, the proposed House of Lords' amendments over which there remains a dispute. A final section analyses the main concerns raised by the Bill.

B. THE CURRENT LAW

There is no positive right to strike in the UK. At common law, a worker taking industrial action is in breach of their contract of employment, while the trade union organising the industrial action is committing at least one of the "economic torts", including inducing breach of

[1] Bill 222 2022-2023.
[2] https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf.
[3] Bill 168 2022-2023.

contract.[4] Since the passage of the Trade Disputes Act 1906, trade unions and workers have had immunity against tortious liability if they are acting in furtherance of a trade dispute. The current law can be found in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Section 218 TULRCA sets out the meaning of a trade dispute as one between workers and their employer which relate wholly or mainly to one of the matters listed in the Act.[5] Action taken in contemplation or furtherance of such a dispute is not actionable in tort under section 219 TULRCA. Employees taking industrial action also receive some protection from unfair dismissal due to their participation in industrial action which has been lawfully called by their trade union. The legislation therefore "secures a freedom rather than conferring a right as such".[6] In order to call industrial action, trade unions must follow a complex statutory procedure[7] including ballots and stringent requirements on the type and timing of notice to be given to employers of the proposed action. Industrial action taken otherwise than in accordance with the information provided in the notice would result in the union losing its immunity against civil action by the employer.[8]

The Trade Union Act 2016[9] further constrained the freedom to take industrial action by making changes to existing balloting and notice requirements contained in TULRCA, including introducing special requirements for those working in "important public services", as well as placing restrictions on picketing.

Overall, therefore, the law relating to industrial action is complex and restrictive. A number of labour law academics have argued that it breaches international standards, particularly those determined by the International Labour Organisation, in a number of respects.[10] The Bill increases concerns in this regard.

C. THE STRIKES (MINIMUM SERVICE LEVELS) BILL

[4] See further Z Adams et al, *Deakin and Morris' Labour Law*, 7th ed (2021), paras 9.5 – 9.24.
[5] These are contained in section 218(1) TULRCA and include terms and conditions of employment; engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; allocation of work or the duties of employment as between workers or groups of workers; matters of discipline; the membership or non-membership of a trade union on the part of a worker; facilities for officials of trade unions; and machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters.
[6] *RMT v Serco Ltd and ASLEF v London & Birmingham Railway* [2011] EWCA Civ 226; [2011] 3 All ER 913 at para 2. Although arguments have been made that article 11 ECHR, as interpreted by the European Court of Human Rights, has introduced a right to strike in UK law: see KD Ewing & J Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010) Industrial Law Journal 2.
[7] Beginning at section 226 TULRCA.
[8] Section 219(4) TULRCA.
[9] See further M Ford & T Novitz, "Legislating for Control: The Trade Union Act 2016" (2016) Industrial Law Journal 277.
[10] See Z Adams et al (n 4), para 9.67.

The Bill is a short piece of legislation whose stated aim is to find a balance between the ability of unions and their members to strike, with the need for the wider public to be able to access key services during strikes. The government intends for the Bill to apply to England, Scotland and Wales (although a still disputed House of Lords amendment seeks to limit the territorial application to England only).

Clause 1 and the Schedule amend TULRCA to introduce a power for the Secretary of State to set, through regulations, minimum service levels in relation to strikes in six "relevant" service areas which broadly overlap with those defined as "important public services" in the Trade Union Act 2016, namely health services; fire and rescue services; education services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security. The scope of the minimum level within each of these sectors (e.g. within the NHS (health services), should it apply to professional services staff or medical staff and, if the latter, which medical staff?) and the numbers which are considered to represent a "minimum" will be set by the relevant minister following consultations. The proposed regulations would be subject to the affirmative procedure. This provision has been subject to some criticism and a disputed House of Lords amendment seeks to require the government to consult with the House of Commons and the House of Lords on minimum service levels before introducing regulations. So far, three consultations have been launched by the Home Office (fire and rescue services)[11], the Department for Health and Social Care (ambulance service levels)[12], and the Department for Transport (rail services)[13].

Where minimum service level regulations have been made, an employer may issue a "work notice" to trade unions taking planned strike action to require minimum service levels to be delivered in the specified sectors. The notice must be given seven days before strike action is to take place but can be varied up to four days before. The work notice would identify "reasonably necessary" workers who would be required to work during the strike to reach the set minimum level of service. Before giving a work notice, the employer must consult the union about the number of persons to be identified and the work to be specified in the notice and have regard to any views expressed by the union in response (although there is no requirement to negotiate or come to an agreement with the union). There is no requirement to serve a work

[11] https://www.gov.uk/government/consultations/minimum-service-levels-for-fire-and-rescue-services/minimum-service-levels-for-fire-and-rescue-services-accessible.
[12] https://www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-ambulance-services/minimum-service-levels-in-event-of-strike-action-ambulance-services-in-england-scotland-and-wales.
[13] https://www.gov.uk/government/consultations/minimum-service-levels-for-passenger-rail-during-strike-action/a-consultation-on-implementing-minimum-service-levels-for-passenger-rail.

notice on an employee, merely on the union (although if an employer wishes the notice to be effective then they would presumably serve a notice on both).[14] The House of Lords has proposed a disputed amendment to require employers to ensure individuals receive work notices.[15]

Once a work notice has been issued, trade unions calling the strike action are required to take "reasonable steps" to ensure that their members comply with the notice. Such compliance by union members would mean not participating in the strike on those strike days when members identified in the notice are required by the work notice to work.[16] If a trade union fails to do so, then its protection from tort proceedings is removed and employers can seek damages from the union for loss caused by the union's failure to take reasonable steps to ensure compliance with the notice. This is significant as the cap on damages relating to strike action was increased in July 2022 to between £40,000 and £1,000,000 depending on the size of the union.[17] Employees who fail to comply with the work notice lose the automatic protection from unfair dismissal.[18] The House of Lords has sought to amend these provisions to ensure that an employee's failure to comply with a work notice would not be regarded as a breach of their employment contract or constitute lawful grounds for dismissal or any other detriment, and to remove the requirement for trade unions to take reasonable steps to ensure that employees comply with a work notice.[19] That amendment remains disputed. At the time of writing, the final form of the Bill therefore remains uncertain.

D. CONCLUDING ANALYSIS

The Bill has been substantially criticised by several different groups from across the political spectrum, including trade unions[20], labour law academics[21], the Equality and Human Rights

[14] Schedule, Part I, para 2.
[15] Bill 322 2022-23 - Lords Non-Insistence, Amendments in Lieu and Consequential Amendments, see Lords Amendment 4B to the Schedule, Part I, para 2 (13 June 2023).
[16] See Explanatory Notes to the Bill, p. 6 available at: https://publications.parliament.uk/pa/bills/cbill/58-03/0222/en/220222en.pdf.
[17] Liability of Trade Unions in Proceedings in Tort (Increase of Limits on Damages) Order 2022.
[18] Schedule, Part II, para 8.
[19] Bill 322 2022-23 - Lords Non-Insistence, Amendments in Lieu and Consequential Amendments, see Lords Amendment 4B to the Schedule, Part I, para 2 (13 June 2023).
[20] See, for an overview: https://www.ier.org.uk/comments/interference-with-the-right-to-strike-the-strikes-minimum-service-levels-bill/.
[21] https://www.tuc.org.uk/news/anti-strikes-bill-will-give-ministers-unfettered-power-restrict-right-strike-top-lawyers-warn.

Commission[22], and the Joint Committee on Human Rights[23]. The Labour Party have pledged to repeal the law if it wins the next general election.[24] Apart from the way in which the Bill undermines the ability to take effective industrial action lawfully voted for by trade union members, the main concerns centre on the wide scope of the Bill both in terms of the vague definition of sectors included, obligations placed on trade unions, and the broad powers given to ministers with limited parliamentary oversight; and the question of whether the Bill conforms with the UK's international commitments under Convention No.87 of the International Labour Organisation on Freedom of Association and Protection of the Right to Organise and article 11 of the European Convention on Human Rights which guarantees freedom of association. The Scottish and Welsh governments have also criticised the way in which the Bill will affect devolution. Clause 3(2) of the Bill gives UK government ministers the power to make regulations which amend primary legislation, including, presumably, legislation passed by the Scottish and Welsh Parliaments thereby potentially interfering in the conduct of industrial disputes in the operation of services devolved to the Scottish and Welsh governments. Unsurprisingly, the Welsh Parliament has refused to give its legislative consent and will not participate in consultations on minimum service levels.[25] In a speech to the Scottish TUC Congress, Scotland's First Minister, Humza Yousaf, declared that the Scottish Government will not issue or enforce work notices during industrial action.[26]

If passed in its current form, the Bill will fundamentally alter the premises upon which British labour law is based in two respects: first, by singling out specific sectors for minimum staffing levels to be enshrined in law; and second, by compelling workers to work. The introduction of additional requirements for taking industrial action in "essential public services", even after a lawfully conducted vote has been won in favour of the action, marks a break from the traditional approach which has focussed on measures which lessen the impact of disruption rather than attempting to prevent it.[27] Although measures similar to those in the

[22] https://www.equalityhumanrights.com/sites/default/files/strike_minimum_service_levels_bill_statement_feb_23_002.docx#:~:text=The%20Bill%20provides%20for%20an,limited%20to%20such%20emergency%20situations.
[23] https://committees.parliament.uk/work/7232/legislative-scrutiny-strikes-minimum-service-levels-bill-20222023/publications/.
[24] https://www.theguardian.com/uk-news/2023/jan/16/foolish-anti-strike-bill-would-stop-some-workers-from-ever-striking-says-labour.
[25] https://www.gov.wales/written-statement-uk-governments-strikes-minimum-service-levels-bill.
[26] https://www.fbu.org.uk/news/2023/04/17/scottish-first-minister-pledges-not-issue-work-notices-under-new-anti-union-laws-0.
[27] G Morris, "Industrial Action in Essential Services: The New Law" (1991) Industrial Law Journal 89. A recent example is the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 which allowed employers to hire agency staff to replace striking workers.

Bill in relation to "essential services" have been discussed at various intervals, and particularly during the 1970s and 1980s, none have ever found their way into legislation. The Trade Union Act 2016 already marked a change from the traditional approach, but the Bill, although stopping short of an outright ban on industrial action, makes it prohibitively difficult in practice (and potentially very expensive!) to conduct an effective strike. The Bill therefore hollows out the freedom to strike in those sectors affected to such an extent that it becomes nugatory.

The second area where the Bill marks a change is that of the work notice which, in effect, amounts to a power granted to employers by the State to oblige workers to work. This contrasts with section 236 TULRCA which prohibits courts from compelling employees to work, a principle also recognised by the common law.[28] As Ewing and Hendy have pointed out, "it is necessary to go back to the Defence Regulations of 1940 to find State powers to require people to work, and then only in the exceptional circumstances of a war-time economy under siege".[29] Even this power was constrained by the establishment of a Joint Consultative Committee consisting of an equal number of employer and trade union representatives which advised on the use of labour. No such provision has been made in the Bill and its provisions requiring employers to involve unions in the identification of workers to be included in the work notice are weak. Even the now stalled Transport Strikes Bill required employers to negotiate an agreement on what the minimum service level should be and made provision for resolution of disputes over the minimum service level through the Central Arbitration Committee. The Strikes (Minimum Service Levels) Bill does not contain equivalent provisions. Thus, employees subject to a work notice are put in the difficult position where they must choose between working while their colleagues – and fellow union members – strike, and potentially losing their livelihood if they contravene the work notice (as refusal to work results in the loss of protection from unfair dismissal). The practicalities of how a work notice will be implemented are also unclear and will, in the absence of further detail, likely lead to costly and prolonged litigation.

Finally, it is not obvious that the Bill will have the desired effect of ensuring that the wider public can access key services during strikes. Trade unionists have pointed out the irony that:

[28] For an overview see *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482 and for a critique see D Brodie, "Specific Performance and Employment Contracts" (1998) 27 Industrial Law Journal 37.
[29] https://www.ier.org.uk/comments/interference-with-the-right-to-strike-the-strikes-minimum-service-levels-bill/.

> whilst the government proposes to impose [minimum service levels] on workers and their unions, [minimum service levels] for normal times in public services are usually lacking and where they do exist (on the railways and for the ambulance service), are constantly breached – without penalty. There is a real possibility that [minimum service levels] will be set in some sectors at a level higher than the service usually provided.[30]

At the same time, section 240 TULRCA already contains a prohibition on strikes which may endanger human life or cause serious bodily injury, and unions in relevant sectors such as fire and rescue services or the NHS have long had so-called "life and limb" policies in place which maintain minimum provision during strikes to comply with section 240 .[31] Rather than increasing service provision in the affected areas, the Bill will instead lead to a deterioration of industrial relations and may indeed result in a rise in the number of unofficial strikes over which unions have no control.[32]

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[30] https://www.ier.org.uk/comments/interference-with-the-right-to-strike-the-strikes-minimum-service-levels-bill/.
[31] See, for example, the Royal College of Nursing's Industrial Action Handbook available at https://www.rcn.org.uk/employment-and-pay/Industrial-Action-Handbook#participatinginindustrialaction.
[32] Similar observations have been made in the past when strikes have been curtailed by law: see LJB Hayes & T Novitz, "Applying the Laval Quartet in a UK context: chilling, ripple and disruptive effects on industrial relations" in A Bücher & W Warneck (eds), *Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert* (2011), 195-244.