Strikes (Minimum Service Levels) Bill

House of Lords – Committee Stage

Date: Thursday 9 March 2023

Introduction

1. In line with our statutory remit to advise Parliament on the equality and human rights implications of proposed laws, the Equality and Human Rights Commission has prepared this note on the Strikes (Minimum Service Levels) Bill to inform the Committee Stage debate in the House of Lords.
2. Having carefully considered the issues, we believe the Bill raises several human rights considerations, specifically in relation to Article 4 (Prohibition of Slavery and Forced Labour), Article 11 (Freedom of Assembly and Association) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR)[[1]](#footnote-1) that require careful scrutiny.

Our analysis

1. First, we note the wide range of sectors impacted by the Bill’s provisions.
2. In the human rights memorandum that accompanied the earlier Transport Strikes (Minimum Service Levels) Bill, now superseded by this Bill, the case for the lawfulness of similar provisions was made partly by distinguishing the Bill’s transport-focused clauses from measures affecting other sectors, including health and education. In that document, the Government recognised the importance of existing measures to mitigate the impacts of industrial action in health, education and fire and rescue services.[[2]](#footnote-2) For example, some healthcare sector trade unions already provide *‘life and limb’* cover during strikes[[3]](#footnote-3), and the Secretary of State has legal powers to give directions to fire and rescue authorities, which could be used in the event of industrial action.[[4]](#footnote-4)
3. It is not clear what consideration has been given to these existing measures in the current Bill. We advise that more detail may be needed to articulate a legitimate aim for imposing Minimum Service Levels (MSLs) on each sector impacted by the Bill.
4. Second, we recommend that particular attention be given to the proportionality analysis that has been provided as justification for interference with Article 11 ECHR under the Bill, in relation to the measures where that Article is engaged.
5. We note that the Bill allows the Government discretion to consult *‘such persons as they consider appropriate’* on MSLs, yet there is no requirement to engage nor to attempt to reach an agreement with worker and employer organisations. By contrast, the Transport Strikes Bill provided for MSLs to be set either through minimum service agreements agreed between employers and trade unions, or minimum service determinations made by the Central Arbitration Committee or, in their absence, minimum service regulations made by the Secretary of State. It is not clear why this more collaborative approach – as practised in some states in Europe[[5]](#footnote-5) - was not pursued in the current Bill.
6. We have not seen any Government analysis of the proportionality of provisions in the Bill that could remove legal protections for trade unions and employees participating in industrial action. We recommend that this analysis should be presented to enable appropriate scrutiny. There is also a lack of clarity around what *‘reasonable steps’* a trade union would need to take to ensure that workers comply with a work notice. This is particularly concerning given the serious financial, reputational and personal implications on individuals of the Bill’s provisions.[[6]](#footnote-6)
7. Third, we note further that the Government’s human rights memorandum makes no reference to Article 4 ECHR (prohibition of slavery and forced labour). The Bill provides for an employer to issue a notice setting out the names of *‘persons required to work during the strike’*. While Article 4 ECHR permits any *‘service exacted in case of an emergency or calamity threatening the life or well-being of the community’*, the Bill is not limited to such emergency situations. Accordingly, we consider that Article 4 is engaged, and the Government should provide further assessment to enable effective scrutiny of the measures within the Bill.
8. Fourth, we recommend that further consideration be given to Article 14 ECHR, which is also engaged because MSLs only apply to certain services. The Government’s human rights memorandum states that the case law of the European Court of Human Rights supports member states in imposing more stringent conditions on certain public sectors by referring only to the single case of *Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v Spain* (45892/09)[[7]](#footnote-7), in which a ban was upheld on members of a police force taking strike action. The Court found that the difference in treatment was objectively justified in light of the substantive difference between the nature of the duties of police officers and workers in other sectors. However, it is difficult to compare police officers, who have specific duties to protect the state, with workers in other sectors such as teachers, university lecturers or truck drivers - all of whom could be within the remit of this Bill. We would welcome further analysis of how such differential treatment can be objectively justified for workers across the broad range of services covered by this Bill.
9. Finally, we are concerned that an employee would lose automatic unfair dismissal protection not only if they fail to comply with a work notice, but also if their trade union has failed to take reasonable steps to ensure compliance: an employee will not know before participating in a strike whether that is the case or not. By contrast, in Italy, for example, where MSLs are permitted, legislation provides that an individual cannot be dismissed for failing to comply with a MSL agreement.[[8]](#footnote-8)
10. We advise careful consideration of these issues to mitigate against disproportionate or unjustified interference with Article 4, 11 and 14 ECHR rights. We further recommended that more detail on specific policy choices – in the human rights memorandum or elsewhere – is needed in order to facilitate effective parliamentary scrutiny of the Bill.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission’s work on our [website](http://www.equalityhumanrights.com)**.**

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1. [European Convention on Human Rights](https://www.echr.coe.int/documents/convention_eng.pdf). [↑](#footnote-ref-1)
2. UK Government, January 2023 [Strikes (Minimum Service Levels) Bill Memorandum on European Convention of Human Rights](https://publications.parliament.uk/pa/bills/cbill/58-03/0222/ECHRMemoStrikes(MinimumServiceLevels)Bill2023.pdf) [↑](#footnote-ref-2)
3. Unison, June 2019 [Industrial Action Handbook](https://www.unison.org.uk/content/uploads/2019/06/25528.pdf) [↑](#footnote-ref-3)
4. Sections 29 and 30 of the [Fire and Rescue Services Act 2004](https://www.legislation.gov.uk/ukpga/2004/21/contents), as referenced in paragraphs 50 and 51 of the [Transport Strikes (Minimum Services) Bill Memorandum on European Convention of Human Rights](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112462/transport-strikes-minimum-service-levels-bill-echr-memorandum.pdf) [↑](#footnote-ref-4)
5. UK Government, January 2023 [Strikes (Minimum Service Levels) Bill Memorandum on European Convention of Human Rights](https://publications.parliament.uk/pa/bills/cbill/58-03/0222/ECHRMemoStrikes(MinimumServiceLevels)Bill2023.pdf) notes at paragraph 27 that *‘other countries have introduced legislation in relation to MSLs, such as France which legislated in relation to public hospitals and public broadcasting amongst other public services in order to ensure the continuity of public services, a purpose followed in Italy as well.’* [↑](#footnote-ref-5)
6. Trade unions are protected from certain legal liabilities arising from strike action under section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992. Under the Bill’s proposals to introduce new section 234E to TULRCA, this protection would be lost if a trade union fails to take reasonable steps to ensure workers who are identified in a ‘work notice’ comply with it. [↑](#footnote-ref-6)
7. European Court of Human Rights, April 2015 [Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain - 45892/09](https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22002-10658%22]}) [↑](#footnote-ref-7)
8. Joint Committee on Human Rights, February 2023 [Oral Evidence: Legislative Scrutiny: Strikes (Minimum Service Levels) Bill](https://committees.parliament.uk/oralevidence/12681/html/) [↑](#footnote-ref-8)