IER & CTUF JOINT BRIEFING

Strikes (Minimum Service Levels) Act 2023

Professor KD Ewing and Lord Hendy KC

Published November 2023

The Institute of Employment Rights
4th floor
Jack Jones House
1 Islington
Liverpool
L3 8EG
0151 207 5265
www.ier.org.uk

The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade-union rights and labour law by providing information, critical analysis and policy ideas through our network of academics, researchers and lawyers.

This IER briefing does not necessarily reflect the collective view of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

The Campaign for Trade Union Freedom was established in 2013 following a merger of the Liaison Committee for the Defence of Trade Unions and the United Campaign to Repeal the Anti Trade Union Laws. The CTUF is a campaigning organisation fighting to defend and enhance trade unionism and oppose all anti-union laws, as well as promoting and defending collective bargaining across UK, Europe and the world.

Ben Sellers
Director, Institute of Employment Rights
September 2023
ben@ier.org.uk

Strikes (Minimum Service Levels) Act

I

The Strikes (Minimum Service Levels) Act 2023 became law in July, following a lengthy fight in the House of Lords. It continues the raft of anti-union legislation started by Mrs Thatcher in 1980, making UK law on trade unions 'the most restrictive in the western world' as Tony Blair famously described it in 1997. Labour governments did not reverse this regime when they had the chance between 1997 and 2010 and since then, of course, there have been yet further restrictions, including the Trade Union Act 2016.

In consequence, it is extremely difficult for trade unions to do their job of defending working-class living standards so that the proportion of our 34 million workers who have the benefit of a negotiated collective agreement has slid from more than eight out of ten in the 1970s to just over two out of ten today. The rest of the workforce are on terms set exclusively by the employer on a take-it-or-leave-it basis. The result has been a marked decline in living standards, half the population earning less than £29,600 pa, far less than the £50,000 a year minimum calculated by the Rowntree Foundation for a family of four to be warm, dry, clean and fed.

The Strikes (Minimum Service Levels) Act is not about preventing disruption to the public in a strike. It is about preventing workers through their unions pushing back, as they have been over the last year, against low wages and poor conditions.

The Act is objectionable not just in its underlying purpose but also in its form and content. The form of the Act is significant. It defies every legislative principle laid down by the relevant parliamentary committees which examined the Bill before it was passed by Parliament: Acts are supposed to set out the essentials of what they regulate and only leave technical details to ministers to specify in secondary legislation. Yet the Act fails either to set out the minimum service level (MSL) intended for each of the six sectors to which it applies, or even to specify the factors used to determine them. If the MSLs had been specified in the Bill they would have been subject to debate as the Bill passed through Parliament. Instead, the Act gives the minister complete discretion to set MSLs by regulations – which cannot be amended under our parliamentary system. Only now, nearly six months later, have the MSL regulations for rail transport, border services and ambulances been published.

The suspicion is that the reason why the MSLs were not specified in the Act is that the government wished to conceal the fact that it intended to use this legislation not just to weaken strikes by certain workers but to remove their right to strike altogether. Had that been disclosed in the Bill, opposition would have been galvanised, particularly in the House of Lords.

The six sectors covered by the Act are: health, fire and rescue, education, transport, nuclear decommissioning, and border security. Millions work in these sectors, including many of the applauded workers who kept the country running during the pandemic. The sectors involve most major unions. But in making regulations, though the Act requires ministers to consult whoever they believe to be appropriate, it does not require negotiation (or even consultation) with the unions – or even employers – directly affected by the Act.

The fact that the MSLs were unknown until this month is one reason why the government's Impact Assessment of the Bill was held by Parliament's Regulatory Policy Committee to be 'not

fit for purpose'. Nevertheless, that Impact Assessment contained the revealing analysis that, far from diminishing the disruption strikes inevitably cause, the Bill could lead to:

> 'a general increase in tension between unions and employers. This may result in more adverse impacts in the long term, such as an increased frequency of strikes for each dispute'.

Indeed, since in the current strikes the unions typically will have negotiated local minimum-service levels with the employers (as they always do in many of the sectors involved), the imposition of national levels set by government is likely to upset the delicate negotiated balance and intensify the dispute. This is why so many employers, like all the unions, told the government the Act was neither wanted nor helpful.

II

Draft regulations setting MSLs for categories of workers in three of the six sectors specified in the Act were criticised but approved by Parliament in December 2023. In the NHS, the MSL is published only for ambulance and patient-transport services. The MSL for them is that emergency calls are answered, 'triaged', and responded to in respect of conditions which are life-threatening or require clinical assistance at the scene or transport to a healthcare facility as they '*would be if the strike were not taking place on that day*'. It is not possible to read this as anything other than requiring normal service on strike days. Hence these ambulance and patient-transport workers are effectively banned from taking strike action. NHS employers have pointed out that the MSL 'will not replace the need for [voluntary agreed arrangements] but will make them harder to achieve'.

In border security (which includes passport services), the examination of people and goods coming in or going out of the UK, the patrol of ports and coastal waters, as well as the collection and dissemination of intelligence, are required, on a strike day, to be '*no less effective than they would be if the strike were not taking place on that day*'. Again, this can only be seen as a virtually total ban on these workers' right to strike. The government estimates that only 70-75% of Border Force would be required to provide this service, though more in smaller ports and airports where staffing levels are lower. Depriving 70% of the workforce of the right to strike appears to be serious enough to us.

The prohibition is slightly less for passport services since the requirement that the issuing of passports and certain other travel documents provided by the Passport Office is to be no less effective than on a non-strike day, only applies to '*such of those services as are necessary in the interests of national security*'. PCS will be able to give a clearer indication of the breadth of implications of this requirement.

The third category covered by the new Regulations are passenger railway services. It appears that the rail-freight employers refused the offer to be covered on the basis that they preferred to deal directly with their unions without this legislation complicating matters. Eurostar is also excluded. The MSLs for rail differ between three sectors: infrastructure (i.e. keeping the railway running); train operations, and light-rail services (e.g. metros, trams, London Underground, Dockland Light Railway, etc).

The MSL both for train-operating services and light-rail services is that which is '*necessary to operate the equivalent of 40% of the timetabled services during the strike*'. The effect will be that those required to work the 40% service will lose their right to strike. This is likely to be well in excess of 40% of normal staffing. There will need to be cover for sickness and emergencies;

additional staff to cope with the danger of overcrowding on platforms and trains consequent on a reduced service, and because it will often be the case that the complement of staff required for a 40% service may, in any event, not be much short of that required for a 100% service.

The regulations have nothing to say about the danger of overcrowding of platforms and trains consequent on a reduction of service (as opposed to no service).

For those covered by 'infrastructure services' (a very widely defined term including train-movement control, the maintenance of signals, communications, crossings, bridges, tunnels, and power, and the response to incidents on the line or to rolling stock), the MSL applies to priority routes (listed in the Schedule – ie most of the network, and including loops and sidings connecting priority routes and depots). The MSL is to provide '*those services between the hours of 0600 and 2200*'. In short, signallers and maintenance staff on the relevant routes can only strike after ten o'clock at night and before six the next day.

The extent to which these MSLs are operable and effective remains in doubt. Since railways are safety critical, there will inevitably be a conflict between the obligations of a work notice and the Employment Rights Act 1996, ss 44 and 100, which entitle workers to leave a dangerous place of work where there is a serious and imminent danger to themselves or to others which they cannot avert.

III

The Act enables an employer in a sector with a specified MSL, if faced with a strike, to serve a 'work notice' on the union seven days before the strike begins. The work notice identifies the workers required to work and the work they are to do during the strike.

Two points to note here. First, a strike-hit employer is not obliged to serve a work notice. Consequently, many unions are seeking agreement with employers that they will not do so (as the Scottish government has undertaken). The danger here, of course, is that any public body that refuses to comply with the MSL regime may find itself being pursued in the courts by service users, unless there is a voluntary agreement in place. Secondly, the whole legislative scheme only applies to strikes, not 'action short of a strike' – so unions may prefer to engage in disruptive 'action short of a strike' if litigation under the legislation prevents them organising a successful strike.

Where the employer decides to issue a work notice, it must consult the union about the workers and work specified in the work notice. This will place unions in a difficult position, and, since there is no obligation to agree, may be a waste of time. The government's own Impact Assessment pointed out that 'the issuing of work notices would be challenging and time-consuming' by reason of the consultation required with unions. This is in addition to the need to communicate with workers who 'may disagree with being named or query whether they are or are not named', and to the need for 'updating rosters which may not align with strike action and/or updating privacy notices'.

The selection of workers for inclusion in a work notice is addressed in Government Guidance on MSLs which was issued on 16 November 2023. This makes clear that:

> In selecting workers for the work notice, the employer must comply with all its contractual and other legal obligations, including employment law, data protection, equality and health and safety requirements. For example, the employer must comply with its obligations under the Equality Act 2010.

Unions should be alert to ensure that these obligations are fully met. The Guidance also makes clear that:

> The work notice cannot override an employment contract or other contract with a worker. For example, if an individual cannot be required under the contract to work on a Sunday, the work notice cannot override that agreement.

Again, unions must be alert to ensure that workers are not being required to perform duties which they are not contractually required to perform. But here it is important to examine the contract of employment carefully to determine the extent to which the employer has powers of deployment on a temporary basis where workers are being asked to do jobs or work at locations which are not normally expected.

One final point is that trade-union officials in the workplace (shop stewards, health and safety representatives, branch officials, etc) can also be the subject of a work notice. The Act says that they should not be selected because they are trade-union officials. But equally they should not be excluded from selection because of their trade-union role. Any official who is included in a work notice will clearly be placed in an invidious position, particularly as they will be required to cross a picket line.

The effect of service of a work notice impacts both the worker and the union. From the worker's perspective, an individual employee named in the work notice must (unless sick or on leave) work during the strike. And, if they do not work, the Act removes their automatic protection from unfair dismissal. It may be possible in such circumstances to bring a claim under the general law of unfair dismissal, though the chances of success for an employee identified in a work notice and dismissed for not working in accordance with it during a strike may not be great – depending on the particular circumstances of the case. Nevertheless, the Code of Practice referred to below ought to be amended to include a reference to this possibility.

IV

From the union's perspective, once served with a work notice the Act requires it '*to take reasonable steps to ensure that all members of the union who are identified in the work notice comply with the notice*.' This is a heavy administrative burden, which is potentially incapable of fulfilment. When a work notice is received (seven days – including weekends and public holidays – before the strike), and any variation of the notice received (up to three days before the strike), the union will be required to follow a number of steps set out in a *Code of Practice on Reasonable Steps to be Taken by a Trade Union*, which was approved by Parliament.

This means, first, that on receipt of the information from the employer, the union must identify its members in the notice '*as soon as practicable after receiving a work notice*'. The union will receive a list of names of the workers who are required to work, a list which will include both members and non-members, as well as workers who are members of other unions. n the case of a big strike the list may include thousands of workers. Sifting these lists for members will be a formidable administrative task to be performed in a very short time on the basis of what could be very limited information about the individuals in question provided by the employer or otherwise known to the union.

Having identified its members from the list provided by the employer, the union must, secondly, issue a detailed 'compliance notice' to each of its members on the list '*to advise them not to strike during the periods in which they are required by the work notice to work, as well as to encourage them to comply with the work notice*'. The Code of Practice also provides that:

> Unions may also wish to engage with the identified members on an individual or group basis to reinforce the messages within the compliance notice, as well as clarify any questions from members, especially in relation to their rights and protections.

Unlike industrial-action ballots which must still be conducted by post, compliance notices inviting members to break the strike are to be sent electronically where the union has an email address, and by post if not.

The union must also instruct the picket supervisors (who have been required on picket lines since the 2016 Act) '*to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line at times when they are required by the work notice to work*'. What is required by the undefined phrase '*reasonable endeavours*' is uncertain and unpredictable, and will no doubt be decided by the courts in the inevitable litigation which will follow the use of the new Act.

Picketing is not referred to in the Strikes (Minimum Service Levels) Act 2023 and the right to picket is enshrined in the Trade Union and Labour Relations (Consolidation) Act 1992, s 220, subject to many conditions. However, under that Act breach of those restrictions in practice had consequences for the individuals who breached them but not for the legality of the strike itself. But since the Strikes (Minimum Service Levels) Act 2023 requires unions to take 'reasonable steps' and since the Code sets out 'reasonable steps' in relation to picketing, the conclusion is likely to be that a failure to comply with 'reasonable steps' in relation to picketing will render the entire strike unlawful. Thus, as observed by the government, 'it would be difficult for a union to comply with the requirement to take reasonable steps without moderating its picketing activities in any way'.

So, in a national rail strike involving tens of thousands of workers and hundreds of picket lines, a single picket supervisor who can be shown to have failed *to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line* may cause the membership nationally to be deprived of the right to strike. This is because the consequence of failure to take the reasonable steps outlined in the Code of Practice to ensure that its members comply with a work notice is that the strike will become unlawful.

It is to be emphasised that *any* failure on the part of a union to take reasonable steps to ensure that its members comply with a work notice will render industrial action unlawful, even though it is in furtherance of a trade dispute and the statutory notice and ballot requirements have been met. The union may be sued for an injunction to stop the strike and damages (up to £1,000,000 for the biggest unions) for any ensuing loss sustained. Failure to comply with an injunction may result in proceedings by the employer for contempt of court with sanctions including fines (and theoretically, imprisonment) and, ultimately, sequestration (seizure) of the union's assets.

And if the strike becomes unlawful because the union fails to take these reasonable steps, all strikers (not just those specified in a work notice) will then cease to have automatic unfair-dismissal protection.

V

Though Mr Blair was right that we have the most restrictive law on trade unions in the western world, never before have our unions been obliged to act as enforcers on behalf of employers and the State, as is now required by the Strikes (Minimum Service Levels) Act 2023.

Self-evidently, the Act violates the right to strike, a right established by many international treaties which the UK has ratified. Parliament's Joint Committee on Human Rights made this clear at an early stage in the parliamentary life of the Bill. The government claims that international law permits minimum service levels to be set by law. But, though true, international law permits them only in exceptional circumstances and subject to tightly regulated conditions.

One of the circumstances is that the service must be 'essential' – and railways are not so considered. Other conditions include a requirement of trade union and employer dialogue in the setting of an MSL; an obligation on the employer to negotiate an agreement with the trade union about the service level to be operated in that firm or service, and an established independent adjudication process (by the courts or agreed independent arbitrators) in the event of a failure to agree. None of these conditions is met by the Act, with the result that it clearly breaches ILO Convention 87. In consequence, the Regulations under the Act are likely to breach Article 11 of the European Convention on Human Rights and Article 6(4) of the European Social Charter. In turn, these breaches appear to break the UK's obligations under the 'Brexit Deal' (the Trade and Cooperation Agreement of 2020).

The government prayed in aid that other European countries have MSLs but so far as is known these are always agreed by the unions after negotiation and conform to the ILO requirements.

VI

Repeal of this Act must be an early priority of a Labour government. It passed despite criticism from a host of parliamentary committees, and despite resistance from the House of Lords. The latter had proposed number of important amendments to the Bill, none of which the government was prepared to accept. But although, ironically, it was the unelected House of Lords which sought to defend trade-union freedoms, as Mick Whitley MP said in the Commons, 'no amendments could ever salvage this Bill'.

Pending repeal, unions will be considering whether the awaited minimum service level regulations can be challenged in the courts. In doing so they will have been encouraged by the recent High Court decision striking down regulations to enable agency workers to be used as strike-breakers. According to the court, the government's failure to consult was 'so unfair as to be unlawful and, indeed, irrational'. We can expect a wide range of legal objections to the regulations under this Act.

More immediately, however, unions will be seeking to work around the legislation, persuading employers to agree not to serve work notices, and instead to negotiate voluntary minimum-service agreements, as usual. They will also be considering other ways of exerting industrial pressure, for example by taking forms of industrial action other than strikes. Industrial action is unlikely to decline, but its form may radically change as a result of this Act.