

PASCALE LORBER

ASSOCIATE PROFESSOR, UNIVERSITY OF LEICESTER, LAW SCHOOL

RESTRICTIONS OF THE RIGHT TO STRIKE IN THE UNITED KINGDOM

In the last two years, following an increase in the number of strikes organised against the cost of living crisis and following attempts of reforms in the post office and the transport sectors, the government has sought to regulate further the ability of unions to take industrial action. The number of days lost to strike actions recently has been one of the highest since the 1980s and 1990s¹. The government reacted by wanting to limit the disruption to the public given that a majority of the strikes occurred in the public sector (health, education)² and transport (trains)³. The result has been legislative changes on a number of fronts, when the right to strike in the UK is already severely curtailed. This paper will focus on the latest Act: the Strikes (Minimum Service Levels) Act 2023 that became law in the summer of 2023. Keith Ewing describes the Act as continuing « 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” »⁴. A brief analysis of the existing structure on the protection available to take industrial action will be presented before examining the latest law on Minimum Service Levels.

I - THE RESTRICTIVE LEGAL FRAMEWORK ON STRIKE IN THE UK

In a nutshell, the United Kingdom does not have a constitutional right to strike. No laws state that workers and trade unions have a right to withdraw labour. Instead, the law provides protection on two levels if the strike is lawful. On an individual level, a withdrawal of labour is considered as a breach of contract but workers who take part in the strike are protected from unfair dismissal for 12 weeks⁵. For trade unions, organising a strike is considered a tort of inducing breach of contract but the law protects them from being sued for damages for the financial cost of the strike to the employer. Both protections are only available if the strike is lawful and this is dependent on a number of conditions spelt out in statutes and developed in case law. First, the

-
- 1 *The Guardian*, « Nearly 4m fewer working days in past year due to strike actions, study says », 14 August 2023.
 - 2 For example for the health sector, *House of Commons Library*, « NHS strike action in England », 21 December 2023 : <https://commonslibrary.parliament.uk/research-briefings/cbp-9775/>
 - 3 <https://inews.co.uk/news/consumer/train-strike-dates-2023-when-rail-strikes-planned-august-september-train-2560194>
 - 4 Professors K. D. Ewing and Lord K. C. Hendy, *Strikes (Minimum Service Levels) Act 2023*, Institute of Employment Rights, l.
 - 5 Trade Unions and Labour Relations (Consolidation) Act 1992, s 238A (TULRCA 1992).

strike must be in furtherance of a trade dispute⁶. This means that only certain topics listed in statutes (such as terms and conditions of employment; allocation of work, etc.) can be the reasons for a strike⁷. As a result, political strikes are forbidden⁸. Under section 244 TULRCA 1992, the strike is protected by law only if it takes place between the employees and their direct employer. Any sympathy or solidarity industrial action is banned under UK law⁹. Second, a union must follow a number of procedural requirements: organise a ballot for members to agree to take part in the strike and give warning to the employer that a ballot and a strike will be organised as well as a notification of the result of the ballot to the employer within certain timeframes¹⁰. This is subject to detailed regulations about the process (for example the ballot must be postal; details of actions and timeframe must be spelt out, etc). There are therefore no « surprise » strikes as the employer will know when a union is balloting its members as well as when the strike will take place¹¹. The Trade Union Act 2016 further increased the procedural requirements of the balloting and notification system: unions must ensure that 50 % of their members take part in the ballot, or the strike will be unlawful. Additionally, in some sectors, considered as essential (eg health or education), 40 % of the union membership must vote in favour of strike (imposing a qualified majority for those sectors). The increasing numbers of rules for a strike to be legal had led commentators to deem the right to strike to be close to impossible to be exercised¹². In that context, the UK has been found in breach of ILO and European Social Charter (ESC) standards. For example, in its latest conclusions in March 2023, the European Committee of Social Rights found that the UK was not in conformity with article 6.4 of the ESC (on collective action), noting that « the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive »¹³.

Nevertheless, except for the police, prison officers and the armed force, all other sectors have always been able to engage in strike actions, with no specific differences for the public sector, except the recent imposition of a higher threshold to meet for the ballot in some essential services in the Trade Union Act 2016. As industrial actions increased in the last 2 years, in particular in public and essential services, the government is now imposing a new requirement of having minimum services guaranteed during strikes in such sectors, through the Strikes (Minimum Service Levels) Act 2023.

6 TULRCA 1992, s 219.

7 TULRCA 1992, s 244.

8 *BBC v Hearn* [1977] ICR 685 (CA).

9 TULRCA 1992, s 224 and the case of *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] IRLR 467 (ECtHR) where it was argued that a ban on secondary action is in breach of article 11 European Convention on Human Rights without success.

10 TULRCA 1992, ss 226- 234.

11 The employer must be notified at least 14 days before the start of action - TULRCA 1992 s 234

12 R. Dukes and N. Countouris, « Pre-strikes ballot, Picketing and Protest: Banning Industrial Action by the Back Door », *ILJ*, vol. 45, no. 3, 2016, p. 337.

13 Conclusions XXII-3 (2022), p. 23.

II - THE STRIKE (MINIMUM SERVICE LEVELS) ACT 2023 (MSLS)

A - GENESIS AND AIMS

The introduction of the legislation in early 2023 was prompted by a wave of ongoing strikes. The minister who introduced the Bill stated: « we also need to maintain a reasonable balance between the ability of workers to strike and the rights of the public, who work hard and expect the essential services that they pay for to be there when they need them »¹⁴. The Bill went through a long legislative process with serious resistance found in the second chamber of the legislature (the House of Lords)¹⁵. It was finally adopted in July 2023 and amends the Trade Union Labour Relations Act 1992 by introducing new sections (234B- 234G).

B- MAIN PROVISIONS OF THE ACT

The Act is short and requires supplementing by secondary legislation, some of which were made in December 2023 but not yet published (see below). In essence, in the following six sectors, minimum service levels must be guaranteed during strike: health services, education services (including universities), fire and rescue services, transport services, border security and nuclear installations¹⁶. Novitz argues that the scope of the legislation is too wide and could contravene Article 11 ECHR as these sectors are not limited to essential services¹⁷.

The minimum service levels will be determined by secondary legislation following a period of consultation by the government, but the Secretary of State will propose a minimum level in each sector. This minimum service levels are therefore not negotiated with unions. This could potentially be in breach of what the ILO recommends when legislation requires minimum service levels¹⁸. At the time of writing (January 2024), minimum service levels have been proposed in three sectors: ambulance, border control and transport. For rail, the proposed threshold is 40 % of the normal service while in border control, it should be the same as a non strike day and for ambulance, this will be considered in the types of priority calls that should be answered¹⁹. For border control, this would therefore mean that the right to strike is potentially completely withdrawn and the same is argued for ambulance according to

14 Hansard, « Strike (Minimum Service Levels) Bill », vol. 726, debated on Monday 16 January 2023.

15 Institute of Employment Rights, « Government defeated in the Lords over Minimum Service Levels Bills amendments », 27 April 2023 : <https://www.ier.org.uk/news/government-defeated-in-the-lords-over-minimum-service-levels-bill-amendments/>

16 TULRCA 1992, s 234B(4).

17 T. Novitz, Minimum service levels legislation : in conflict with strikers and with Europe, *UK in a Changing Europe* : <https://ukandeu.ac.uk/minimum-service-levels-legislation-in-conflict-with-strikers-and-with-europe/>

18 *Ibid.*

19 Institute of Employment Rights, *Minimum service level legislation extended to ambulance, rail and border workers*: <https://www.ier.org.uk/news/minimum-service-level-legislation-extended-to-ambulance-rail-and-border-workers/>

academics²⁰. The government also launched a consultation on the minimum service levels for education²¹, fire services²² and hospitals²³.

The first interesting point to note is that the employer enforces the new law: they have a discretion to apply the minimum services or not. If they do, the employer will specify who work and what duties they have to carry out. The Act specifies that the employer cannot consider who is and is not a union member or whether they have taken part in union activities when selecting those who need to work²⁴.

Once a strike has been announced, the act requires the employer to issue work notice to the union²⁵. On receipt, the union will be able to cross reference if the employees identified are union members. However, because of data protection, apart from the union, only the employees concerned by the work notice will be made aware of their duty to work²⁶. The employees chosen will have to work or would lose the protection from unfair dismissals if they refused to come to work.

Before issuing work notices (on who should work), the employer must consult the trade unions and have regard to their views²⁷. There is no obligation to agree and the period to discuss will be short as the work notice must be issued 7 days before the action and could be amended up to 4 days before the action starts²⁸. This is because the union must notify the employer about a strike action 14 days before it starts.

The unions are subsequently under a duty to take reasonable steps to ensure that their members comply with the notice to work²⁹. It is therefore the responsibility of the union which will have organised the strike to certify that some of its members did not follow the strike mandate. If the union does not ensure that the work notice is respected, the industrial action could become unlawful, and unions and members could lose the protection of the law. The Act has also been supplemented by a Code of Practice on reasonable steps which was issued in December 2023³⁰.

20 Ewing and Hendy, *Strikes (Minimum Service Levels) Act 2023* Institute of Employment Rights, November 2023, p. 2.

21 In November 2023: <https://www.gov.uk/government/consultations/minimum-service-levels-msls-in-education>

22 In February 2023: https://data.parliament.uk/DepositedPapers/Files/DEP2023-0126/Consultation_Minimum_Service_Levels_for_Fire_and_Rescue_Services.pdf

23 In September 2023: <https://www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-hospital-services>

24 TULCA 1992, s 234C(6).

25 TULCA 1992, s 234C(1).

26 TULCA 1992, s 234D.

27 TULCA 1992, s 234C(8).

28 TULCA 1992, s 234C(3) and (9).

29 TULCA 1992, s 234E.

30 Department for Trade & Business: <https://www.gov.uk/government/publications/reasonable-steps-to-be-taken-by-a-trade-union-code-of-practice/code-of-practice-issued-by-the-secretary-of-state-under-section-203-of-the-trade-union-and-labour-relations-consolidation-act-1992-on-reasonable-ste>

C - REACTIONS TO THE ACT

The Trade Union Congress (TUC), that is the umbrella organisation of most trade unions, has launched a campaign to oppose what they consider to be draconian changes that will deprive up to 5 million workers of their right to defend their terms and conditions. This includes non compliance with the law³¹, but also mounting legal challenges on the basis of non compliance with UK or international standards. The trade union movement was victorious in summer 2023 when it challenged another law that the government had introduced in 2022³². It had removed the ban on agency workers replacing striking workers, in an attempt to limit the impact of strikes, notably in the transport sector, despite opposition by unions but also agencies and employers³³. Such reform of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 was deemed unlawful by the High Court as the government had not followed the correct procedure and had not consulted the social partners and others before changing the law³⁴. However, the government is now trying to re-introduce a law that would allow the use of agency workers to replace striking workers by launching a consultation³⁵, showing its political resolve to limit the ability of workers to take part in industrial action. The TUC has already criticised this exercise as the consultation period is shorter than customary³⁶.

At the time of writing, unions are considering whether to challenge the regulations implementing the Act in the relevant sectors³⁷. There have certainly been a number of questions asked as to whether the new MSLS Act is compliant with international standards as mentioned above. Further, in its report in March 2023, the Joint Committee on Human Rights expressed concerns about its compatibility with Article 11 ECHR³⁸.

Conclusion

This piece of legislation is a significant change to the current legal framework. It is controversial as it gives extensive power to the government and requires unions to police their members and go against their main function, to defend terms and

31 TUC, *Protect the Right to Strike*: <https://www.tuc.org.uk/protectrighttostrike>

32 *Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022*

33 <https://www.gov.uk/government/news/new-law-in-place-to-allow-businesses-to-hire-agency-workers-to-plug-staffing-gaps-caused-by-strike-action>

34 *R (on the application of ASLEF and others) v Secretary of State for Business and Trade* [2023] EWHC 1781 (Admin).

35 Department for Business and Trade, *Hiring Agency Staff to cover industrial action*, 16 November 2023.

36 TUC, *Hiring agency staff to cover industrial action – Trade Union Congress response to government consultation*: <https://www.tuc.org.uk/research-analysis/reports/hiring-agency-staff-cover-industrial-action>

37 TUC, *MSLs Act - what you need to know*: <https://www.tuc.org.uk/protectrighttostrike>

38 House of Commons, House of Lords *Legislative Scrutiny: Strikes (Minimum Service Levels) Bill 2022-2023*, 6 March 2023.

conditions of employment by instructing members to go to work instead of the strike that their members would have voted in favour of. It has also been argued that the new law breaches international law. Whether the law is applied will soon be seen as strikes in the rail sector should resume at the end of January. A general election is also anticipated by the end of 2024 and the Labour Party has already committed to repeal this law, should they be elected in government³⁹.

39 Reuters, *Britain's Labour party would repeal strike laws in first 100 days in power*, 12 September 2023: <https://www.reuters.com/world/uk/britains-labour-party-would-repeal-strike-laws-first-100-days-power-2023-09-12/>