

Minimum Service Levels During Strikes and the Misuse of Comparative Law

The
“Frankenstein”
method of
comparative
labour law

In January 2023, UK Prime Minister Rishi Sunak¹ said minimum service levels (MSL) are “present in France, in Italy, in Spain”, while then-business secretary Grant Shapps² claimed the legislation “simply brings us into line [...] with many other modern European nations, such as Spain, Italy, France”. On more than one occasion, UK government officials have made great use of comparative law arguments to justify the introduction of new, draconian, minimum service level obligations under the Strikes (Minimum Services Levels) Bill 2023, which at the time of writing is nearing its third and final reading in the House of Lords.

Almost exactly half a century ago, in June 1973, Sir Otto Kahn-Freund, arguably the founding father of modern UK labour law, delivered a special lecture, later published as an article by the *Modern Law Review*, entitled “On Uses and Misuses of Comparative Labour Law”. In that lecture he warned against the introduction in English law, by means of the 1971 Industrial Relations Act, of a number of “specimens of attempted transatlantic transplantation” (particularly in the domain of collective bargaining, but also some affecting cooling off pauses and compulsory ballots in emergencies) stressing the high risk of “rejection” of these transplants that, the very different British legal, industrial, and political tradition, would most likely identify as a “foreign body” to be expunged.

In the case of the key provisions being envisaged by the Strikes (Minimum Services Levels) Bill 2023, it would be perhaps more appropriate to recur to a different metaphor, borrowing not from the science of organ transplant but rather from the literary domain and Mary Shelley’s 19th Century three volume novel *Frankenstein*. In this instance, it is fair to say that the UK government is practicing comparative labour law more or less in the way Dr Frankenstein practices surgery. As the following sections will discuss, the Bill brings together, into a single text and within what is already a rather tormented creature – i.e. the existing British laws on strikes – a selection of restrictions more or less present in other legal systems but that once stitched up together will invariably form a legal abomination, a hideous creature, that will not stand the scrutiny of European and international labour law standards.

choice of comparators for the UK to emulate when introducing MSL legislation. At least since 2018, Spain has been facing complaints before the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) in respect of the “abusive” operation of minimum service levels, ostensibly in breach of Article 3 of Convention 87. More specifically, Spanish unions CCOO and UGT have sent direct requests to the Committee complaining that “in an important number of ... essential services, the Government authorities refuse to enter into dialogue with trade unions for the determination of minimum services and instead establish them in a unilateral and abusive manner” something that has “given rise to court judgments finding the determination of minimum services and the replacement of workers abusive”⁴.

In 2023, it was once again put to the CEACR that “the rules on the determination of minimum services continue to be repeatedly violated by the government authorities, and that the CCOO cites, in this regard, 13 recent court rulings that determine, in relation to minimum services, a violation of the right to strike”. The Committee has noted “with regret” the Spanish authorities’ failures to engage with these allegations in the pasts, reiterating its “requests the Government to provide its comments on the allegations ... on the frequent failure by the government authorities to comply with the rules on minimum services”. So, to the extent that s.234B of the Bill grants a unilateral and unrestricted power to the Secretary of State to specify minimum service levels, it is safe to suggest that it seeks to transplant within the UK a provision that is already tainted by unlawfulness and incompatibility with international and regional labour standards.

France is of course the most interesting choice of comparator for the UK to justify a change in its legislation on strikes, particularly at a time when some 3.5 million people, according to French union CGT, have taken to the streets to strike and protest against the government’s pension reform proposals⁵. France has a complex set of rules regulating MSL in essential services, that vary considerably depending on the sector. As far as the transport sector is concerned, the *Loi n°2007-1124 du 21 août 2007 sur le dialogue social et la continuité du service public dans les transports terrestres réguliers de voyageurs*, requires, in the first instance, the social partners at company level to agree what those MSL should be and, failing that, allows the relevant transport authority to set them, taking into account a number of criteria such as the significance of the expected

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Poor comparators: Spain and France

In a recent commentary³ published by the Institute of Employment Rights, Professor Ewing and Lord John Hendy KC already highlighted the poor

disruptions and particular areas and points of interest (e.g. hospitals, schools, airports) that may need to be serviced as a matter of priority.

However, in practice, when general strikes take place participation is such that an insufficient number of non-striking workers is typically available for redeployment, and since the law does not grant to companies the power to “requisition” staff - something that remains the exclusive competence of local prefects, and only on the very stringent condition of “*atteinte grave à l'ordre public*” (serious threat to public order) – it is typically not seen as a “best practice” for politicians eager to curb the freedom to strike. So much so that in recent years centre right French politicians have called for a change in the law, and for the introduction of enforceable MSL in the transport sector⁶. British politicians seeking to emulate the French model should perhaps familiarise themselves with its detail in advance.

The “Italian Job”

In effect this would seemingly only leave Italy as a suitable benchmark for the UK to compare itself with. What about Italy, then?

Italy’s legislation on strikes in essential services was introduced in 1990 with Law 146/1990, and then modified by Law 2000/83⁷. It has stood the test of time in terms of striking a balance between two equally fundamental (and constitutionally protected) sets of rights: the right to strike on the one hand (protected by Article 40 of the Italian Constitution) and a number of other fundamental rights such as the right to health, to safety, education, free movement, free press, etc., on the other. No less importantly, in striking this balance the Italian regulatory framework has commanded the respect of both sides of industries, the public, and has never been subject to an adverse scrutiny on the part of the International Labour Organisation.

But before rushing to suggest that this would be a suitable model for UK MSL, an important caveat must be introduced. Italian legislation on MSL operates, both in law and in practice, in a manner that is drastically different from, almost the polar opposite of, the proposals currently being rushed through Westminster by the UK government. It is a proverbial case of “apples and pears” being compared. Three important features distinguish the Italian MSL system from what is currently being pursued by the UK Government. The system is a) consensus based; b) independently supervised and enforced; c) proportionate. None of these features apply to the UK MSL Bill.

First and foremost, the Italian MSL law in effect presides over, and provides for the enforcement of, MSL commitments agreed by the social partners and enshrined in collective agreements, as expressly

provided by Article 2(2) of the Law. Article 2(5) introduces a minimum notice period of 10 days, with the possibility for collective agreements to go beyond that, and a general requirement that around 50% of the services normally provided ought to be guaranteed during strikes (Article 13(1)a) is also included. But it is important to stress that even these fairly minimalistic requirements (and the 1990 Law as a whole) were the result of a highly consensual preparatory and drafting process, in which the three major union confederations CGIL, CISL, and UIL, played a key role, including by commissioning a report to a committee of experts⁸ chosen by them, a report that fundamentally shaped the successive legal framework. There is clearly no trace of this consensual spirit in the current UK debate, and it is perhaps worth mentioning that ILO standards both demand⁹ this spirit and, perhaps more importantly, a role for collective agreements in shaping the detail of the law.

“Negotiations over the minimum service should be ideally held prior to a labour dispute¹⁰, so that all parties can examine the matter with the necessary objectivity and detachment”

Secondly, the Italian MSL rules are supervised and applied independently, by a commission of five independent experts called, appropriately, *Commissione di Garanzia*. Its independence and authoritativeness go hand in hand with the status and calibre of the members that compose it, usually respected academics and experts in the domains of labour law, constitutional law, and industrial relations, and nominated by presidential decree. Its very first President was Sabino Cassese, a respected Constitutional law professor, who was followed by the late Gino Giugni, also known as the father of the 1970 “Statute of Workers” legislation, and back then considered the doyen of the labour law academic confraternity. There is no role for the executive branch or government ministers. The Commission is independent, is perceived to be independent, and acts independently.

Thirdly, and quite aptly given the fundamental nature of the rights and freedoms at stake, the entire Italian MSL system is premised on the idea of proportionality, a concept that receives an explicit mention in Article 4(1) of the 1990 Law when it comes to disciplinary sanctions, that expressly “exclude measures that would terminate the relationship or those that would permanently vary it”. So, no dismissal for breach of MSL rule. Fines for trade unions found in breach of MSL are also contained between 2,500 and 50,000 Euros, and according to the latest, annual report¹¹ produced by the Guarantee Commission, in 2001 there was only one order for a disciplinary sanction to be administered and the two fines administered amounted to 2,500 and 20,000 Euros respectively.

The Bill brings together what is already a rather tormented creature (British laws on strikes) with selections from other legal systems, stitched together to form a legal abomination

Conclusions: The cumulative effect of MSL on UK strike legislation

So perhaps before rushing to embrace the Spanish, French, or Italian MSL models, the UK executive should be mindful of some of the detail of these countries' legislation. It should also consider that the specific restrictions applicable to strike action in those countries' essential services (that in many ways are less draconian than those applying in the UK to non-essential services) are embedded in a general framework for the regulation of industrial action in all other sectors and industries that is arguably way more liberal than the British one.

And this is perhaps a valuable comparative lesson to draw from in the current debate on MSL. The UK has never sought to regulate MSL in essential services specifically because successive British governments have sought, most markedly since the late 1970s, to curb industrial action as a whole, by introducing limitations, mainly in the form of notice and increasingly demanding balloting requirements, that applied to all sectors of the economy. In fact, until 2016, the concept of "essential services" as such was largely ignored by UK strike legislation, until of course s. 3 of the Trade Unions Act 2016 introduced the additional 40% threshold of workers "entitled to vote" for strikes in "important public services" (now in s. 226 (2A)-(2F) TULRCA 1992).

By contrast, in a large share of Continental European systems, balloting and notice requirements have exclusively applied to strikes and industrial action in essential and public services. So, what is a special and limited/narrowly applicable restrictive feature in the law on strikes of most European member states, has been very much the norm in UK legislation for the best part of the last forty years. There is hardly any doubt that this strategy, coupled with the comparatively greater creativity on the part of English courts in conceiving new torts linked to strike action (and a certain reluctance by Westminster to address them by generating new immunities), has been quite effective, comparatively speaking, in curbing the levels of industrial action in the UK.

This however raises an important question about the overall, cumulative effect, of any additional restrictions being imposed on particular sectors that are already subject to one of the most restrictive systems regulating strike action in Europe. It is arguable that even the introduction of otherwise proportionate and well-balanced limitations and MSLs, such as the ones applicable to Italian essential services, can – in the UK context – have a "final straw" effect, creating a disproportionately restrictive, and ultimately unlawful, regime. A system where, each and every restrictive device, on its own, is not unlawful or disproportionate as such. But as system that, once all the parts are stitched up together, becomes unlawful, precisely by virtue of being cumulatively disproportionately restrictive of the fundamental right to strike. This Frankenstein-like creature has no place in a modern European democracy.

- 1 <https://hansard.parliament.uk/commons/2023-01-11/debates/5C68A4D9-407C-4507-8B72-67DD6014B26E/Engagements>
- 2 [https://hansard.parliament.uk/commons/2023-01-16/debates/A08B1E2A-B712-4C30-9A71-57DAC922C4A5/Strikes\(MinimumServiceLevels\)Bill#contribution-89BF17D5-25AB-47B3-B3C2-FA1213A2EF37](https://hansard.parliament.uk/commons/2023-01-16/debates/A08B1E2A-B712-4C30-9A71-57DAC922C4A5/Strikes(MinimumServiceLevels)Bill#contribution-89BF17D5-25AB-47B3-B3C2-FA1213A2EF37)
- 3 <https://www.ier.org.uk/comments/the-tories-minimum-service-levels-legislation-could-face-legal-challenge/>
- 4 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3252723
- 5 <https://morningstaronline.co.uk/article/f/macron-pushes-through-hated-pension-reform-but-resistance-grows>
- 6 <https://www.senat.fr/dossier-legislatif/ppl19-166.html>
- 7 https://www.cgsse.it/sites/default/files/2020-04/L_146_1990_stes_25_sett_2013.pdf
- 8 <https://www.rivistaitalianaperlescienzeigiuridiche.it/sites/default/files/La Commissione di Garanzia.pdf>
- 9 <https://uklabourlawblog.com/2023/01/18/the-strikes-minimum-service-bill-a-blatant-violation-of-international-labour-standards-by-ioannis-katsaroumpas/>
- 10 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0:0::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3945998,2
- 11 https://www.cgsse.it/sites/default/files/2022-06/Relazione_2022_0.pdf

This hideous creature will not stand the scrutiny of European and international labour law standards