The Strikes (Minimum Service Levels) Bill

The British government has launched yet another attack on British trade unions. At the time of writing, the Strikes (Minimum Service Levels) Bill is currently making its way through Parliament. The Bill will impose, for the first time, minimum service levels ("MSLs"), to be observed in strikes in six sectors of the economy: health services, fire and rescue services, education services, transport services, nuclear decommissioning, and border security. Introduced in response to high levels of industrial action by public service workers in particular, the Bill has been widely condemned.

In this article we address three aspects of the Bill which attracted adverse criticism: its form, its content, and its incompatibility with human rights obligations of the British government. But before addressing these questions, it is to be emphasised that the Bill is not to be seen in isolation, but in the context of a wider attack on workers' rights and political freedoms. As put succinctly by a senior Labour MP: the Bill is

> *part of a longer term, anti-democratic trend, and part of a raft of anti-democratic legislation passed by the Government. It is a trend of transferring power away from workers and citizens, and eliminating their limited rights and freedoms in the workplace and across society*

Constitutional Objections

A remarkably short measure of a page and a half plus one appendix of four pages, the Strikes (Minimum Service Levels) Bill replaces the now redundant Transport (Minimum Service Levels) Bill (introduced only months ago) which in contrast ran to 19 pages, despite applying to a single sector. Yet the new Bill extends to five additional sectors. The reason why the current Bill is so short is because it proposes to delegate to ministers the power to set out all the relevant law in regulations. It is true that regulations have to be approved by Parliament in the normal way. But Parliament is not permitted to amend draft regulations, which receive only the most minimal scrutiny.

So it is government – not Parliament – which will make regulations "to determine the levels of service in relation to strikes as respects minimum services" in each of the various sectors. Furthermore, it is government, not Parliament, which sets by regulation the boundaries of what is included in each of the very broad sectors. There is no guidance in this skeleton Bill about how ministers are to use these extraordinary powers. The sectors are open-ended, as is the power to set the minimum level of service required. Is it 20 percent normal services? Or 50 percent? Or 90 percent? This is for ministers alone to determine.

It is obvious that by reserving the sole authority to ministers to set the MSLs, they can be set at such a high level that any strike will be rendered largely ineffectual. It is a point well made by many trade unionists that whilst the government proposes to impose MSLs on workers and their unions, MSLs 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 MSLs will be set in some sectors at a level higher than the service usually provided.

Extraordinarily, the Bill also proposes that ministers should have the power (by regulation) to "amend, repeal or revoke provision made by or under primary legislation". So primary legislation passed by Parliament can be amended by secondary legislation drafted by the minister without full Parliamentary scrutiny. This is what lawyers call a "Henry VIII" power, a power which usurps the function of Parliament. The use of skeleton Bills with Henry VIII clauses has been unsurprisingly the subject of excoriating criticism by two important committees of the House of Lords in recent reports, the titles of which speak for themselves: *Democracy Denied and Government by Diktat.*

But it gets worse. The primary legislation which ministers can amend or repeal is defined to include an Act of the Senedd in Wales or the Scottish Parliament. Pause there. What is being proposed is that ministers in the United Kingdom government in London should have the power by regulation to override legislation passed by the Scottish Parliament and the Welsh Senedd, and to do so with minimal scrutiny. And to do so to interfere in the conduct of industrial disputes in the operation of services which fall within the devolved authority of the Scottish and Welsh governments respectively.

Work Notices: Requisitioning Workers

The six services covered by the Bill are similar to those in the Trade Union Act 2016 which required strike mandates to have the support of at least 40 percent of those eligible to vote as well as a majority of those voting. Those working in these services were clapped for their heroism during COVID: are now rewarded by offers of sub-inflationary wage increases and the threat of denial of one of their human rights. As others have pointed out, BME workers are

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significantly overrepresented in two key sectors – health (24 percent) and transport (21 percent). The same is true of women in health and education.

Once the MSL for the sector is set, an employer in the sector will have the power to serve on the union a "work notice" identifying the workers and the work required to fulfill the MSL. This power will be activated by a strike notice from the union (which is required by law to give 14 days' notice before commencing industrial action). The employer (which may have provoked the strike, for example by "fire and rehire") is under no obligation to agree with but merely "to consult" the relevant trade union over the proposed work notice and its content. This is in effect a power to requisition workers with the authority of the State.

It will be for government – not Parliament – to make regulations. But what level will be set – is it 20 percent normal services? Or 50 percent? Or 90 percent?

Although such powers may be familiar in other countries, powers of requisition are largely unknown in the United Kingdom. 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. It has never been possible in peacetime for the State or employers to exercise such power. Even emergency powers legislation forbids the making of regulations which would have the effect of restricting the right of workers to strike: such as the Civil Contingencies Act 2004.

Not only that, but the power to issue work notices will give to the employer a power which not even a British court can exercise. Under the Trade Union and Labour Relations (Consolidation) Act 1992, no court can "compel an employee to do any work or attend at any place for the doing of any work" (s 236). Yet under the Strikes (Minimum Service Levels) Bill a worker who refuses to work after having been requisitioned in this way will lose unfair dismissal protection if dismissed despite having participated in lawful industrial action. Nor will there be any protection for a lesser penalty than dismissal.

Beyond the foregoing, a matter of particular concern is that there are no restrictions on which workers may be requisitioned by the employer under a work notice. It is thus open to the employer to requisition workplace representatives – shop stewards and branch secretaries – in the work notice. This means in effect that the employer has the power to take local strike leaders out of active service, by requiring them to cross picket lines, by placing them in an invidious and potentially humiliating position, and by exposing them to the obvious risk of victimisation if they refuse to comply.

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Reasonable Steps: Requisitioning Trade Unions

Apart from the power to requisition workers, an even greater matter of concern is the proposed power of employers effectively to requisition trade unions themselves. Where the employer notifies the union of the identity of the workers to be requisitioned, the Bill then requires the union to take "reasonable steps to ensure" that all members of the union identified in the work notice "comply" with it. In other words, the union is required by law to take steps to co-operate with the employer to undermine the effectiveness of its own industrial action.

The question is what would a trade union have to do to show it had taken "reasonable steps"? Notify the workers in question that they are included in the work notice? But they likely to know that anyway. Information from the union would thus be unnecessary, thereby suggesting that additional steps would have to be taken. Does it mean that the union must instruct its members included in a work notice that they *must cross union picket lines?* And does it mean that the union must issue a list of members included in a work notice to a picket supervisor with an instruction that these members are not to be approached by pickets?

It is easy to foresee employers arguing in court that the union failed to take "reasonable steps" because it did not discipline or expel a member who refused to comply with a work notice, particularly if the failure was persistent. Thus the paradoxical situation arises that since 1988 legislation has provided that a trade union is prohibited by law from disciplining or expelling a member who refuses to participate in a strike. Under the Bill, however, it is possible that the union could be placed under a duty to discipline or expel its members who does participate in a strike it has authorised.

What happens if the union fails to take "reasonable steps" to ensure that its members go to work during a strike? Here we find that the union's failure will have dramatic and wholly disproportionate consequences, in the sense that it will render the strike unlawful, despite the union's compliance with all other notice and balloting formalities (which in the British case are extensive and excessive). As a result, it will remove automatic unfair dismissal protection from ALL the strikers (including those who were not the subject of the work notice – who will be penalised for an oversight by the union wholly beyond their control.

For its part, the union will be exposed to the risk of injunctions and claims for damages, with the consequential risk of contempt of court proceedings, heavy fines, and the sequestration of the union's assets in the event of non-compliance. Perhaps coincidentally, the limit on damages recoverable from a union for organising industrial action subsequently found by a court to be unlawful was raised in 2022 for the first time since 1982. In the case of the largest unions, damages are now capped at £1 million – in addition to legal fees, costs, and other expenses.

International Legal Obligations

So the Bill requires trade unions, at the behest of the State and on behalf of employers, to act as instruments of coercion over their own members, a role which unions have never in the past been required to perform, and which they should not now be obliged to undertake. This and other aspects of the Bill raise obvious questions of compatibility with

international obligations, and it is a matter of some surprise that the Prime Minister should justify the Bill on the ground that MSLs are authorised by the ILO, and that legislation of this kind operates in France, Spain and Italy.

What Mr Sunak did not say, however, is that if a minimum service regime is to be introduced, the ILO Committee of Experts said in 2012 that the manner of its implementation is subject to the following conditions

(i) it must genuinely and exclusively be a minimum service, that is one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear; and
(ii) since this system restricts one of the essential means of pressure available to workers to defend their interests, their organisations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities.

Moreover, the minimum service levels must also be set by an independent body in the event of a dispute: "any disagreement on minimum services should be resolved, not by the government authorities, as is the case in certain countries, but by a joint or independent body which has the confidence of the parties, responsible for examining rapidly and without formalities the difficulties raised and empowered to issue enforceable decisions". None of these requirements has been met by the Strikes (Minimum Service Levels) Bill, which allows the minimum service level to be determined by government and employers, after consultation but without the need to secure an agreement.

Nor did Mr Sunak explain when mentioning the experience of other countries that the ILO Freedom of Association Committee has condemned French law following the requisitioning of workers during a dispute at an oil refinery during a national dispute about pensions. The Committee was very critical of the French government for giving public authorities the power to specify the MSL and the workers to be requisitioned without involving the relevant employers' and workers' organisations. Nor did he mention that in Spain that the unions have complained bitterly that "in an important number of such 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".

Nor again did Mr Sunak say that in Italy an independent body of five labour law professors, nominated by Parliament, called the "Commissione di Garanzia" (Guarantee Commission)) encourages the parties to reach agreement, failing which it sets the MSL. In Italy, moreover, if a worker violates the MSL requirements, the maximum penalty is a fine of up to four hours pay, or suspension from work for up to 10 days. Dismissal is expressly forbidden. Which is not to say that the Italian system is virtuous, with a Collective Complaint by a trade union to the European Committee of Social Rights testing its compatibility with the Social Charter, article 6(4).

Conclusion

In short, British government claims that (a) minimum service levels are authorised by the ILO, and (b) that legislation of this kind operates in France, Spain and Italy is on the face of it correct but deeper analysis reveals that what is being proposed by the British government is inconsistent with ILO obligations as determined by the ILO supervisory bodies – particularly in relation to French law and Spanish practice. Quite apart from the fact that MSLs under the Bill do not need to be agreed by the union or the subject of a third party decision, it is likely that other aspects of the Bill are inconsistent with ILO Convention 87. These include:

- the power of the employer to requisition trade union officials requiring them to work during a strike and to cross picket lines;
- the duty on the union to take "reasonable steps" to ensure that members requisitioned by work notices unilaterally issued by the employer do not take part in the strike;
- the penalties imposed on the union where it fails to take such steps, including, for example, a failure to instruct members to cross picket lines;
- the removal of unfair dismissal protection from trade union members who refuse to cross picket lines; and
- the removal of unfair dismissal protection from all strikers where the union has not taken "reasonable steps" to ensure those subject to a work notice do not participate in the strike.

The Bill proposes the power to amend primary legislation without full Parliamentary scrutiny; what lawyers call a "Henry VIII" power

These concerns have implications not only for compliance with ILO Conventions but also the European Convention on Human Rights, given the deference usually shown by the European Court of Human Rights[1] to ILO and European Social Charter jurisprudence when applying the Convention. The Convention also requires that any restriction must be "necessary in a democratic society". Given that MSL restrictions have not been considered necessary in United Kingdom law at least since the legalisation of industrial action by the Trades Disputes Act 1906, this is a difficult argument for the government. To say the least, the ministerial statement of compatibility with the Human Rights Act 1998 on the face of the Strikes (Minimum Service Levels) Bill seems wildly optimistic, particularly in view of the already heavy weight of restrictions on the right to strike in the United Kingdom.

1 K.D. Ewing, John Hendy, QC, The Dramatic Implications of Demir and Baykara, Industrial Law Journal, Volume 39, Issue 1, March 2010, Pages 2–51, https://doi.org/10.1093/indlaw/dwp031