
**TUC Briefing on the draft Trade Union
Freedom Bill**
Equality and Employment Rights
Department
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Trade Union Freedom Bill – Explanatory notes

Since 1997, the Government has made a number of important changes to UK industrial action law. Nevertheless, UK trade unions members have fewer rights to take industrial action than in 1906 when the current system of industrial action law was introduced. Those participating in lawful industrial action remain vulnerable to dismissal and victimisation. UK law on industrial action also places heavy financial and bureaucratic responsibilities on trade unions and fails to reflect economic changes and the restructuring of the labour market.

In April 2006, the TUC General Council published proposals for a Trade Union Freedom Bill. A draft legislative text of the Trade Union Freedom Bill, which reflects the General Council's proposals has been published on the TUC website at www.tuc.org.uk/tufb. The text of the Bill was prepared with the advice of John Hendy QC. This document provides a short summary of the proposals contained in the Bill.

Content of the Bill

The draft Bill seeks to modify the existing UK legislative model rather than implementing the wholesale changes that would be required to bring the UK into full adherence with international standards. The Bill amends five aspects of industrial action law:

1. Improved protection for those participating in lawful industrial action

In recent years, the Government has improved the protection for striking workers, including by extending the period during which employees participating in official industrial or strike action are protected from dismissal from 8 to 12 weeks. Nevertheless, those participating in lawful industrial action can remain vulnerable to dismissal or victimisation, even following a democratic ballot. The inadequacy of the existing protection can create an opportunity for employers to prolong industrial

action, by hiring replacement labour, rather than entering into early and genuine negotiations in order to reach a sensible resolution to a dispute.

Although an increasing proportion of the working population are in non-standard employment relationships, existing protections for those taking part in lawful industrial action only apply to those who legally qualify as 'employees'. As a result, agency workers, 'casuals' and freelancers are all excluded from protection when taking industrial action. In 2004, the Government took the very welcome step of extending to all 'workers' rights relating to dismissal and action short of dismissal for trade union membership and activities. The Bill would extend this policy by creating rights for all workers not to suffer detriment for taking part in lawful industrial action.

Clause 1 (1) of the Bill would introduce measures which ensure that all workers have the right to take official strike or industrial action free from the fear of dismissal or victimisation. It proposes that any dismissal of a worker would be void and ineffective unless the employer can show that the reason for the dismissal was not connected to the industrial action. Workers would be able to enforce these rights through the courts.

Clause 1(2) strengthens unfair dismissal protection for employees who have participated, are participating, or are proposing to participate in official strike or industrial action. The protection from unfair dismissal applies regardless of the length of the industrial or strike action.

The Bill would also enable employees to enforce these rights easily and effectively. Employment tribunals would be able to award interim relief in unfair dismissal cases relating to industrial action and where the employer breaks the law, employees would have the right to automatic reinstatement where they request it.

The TUC also believes that employers should not be able to penalise or victimise staff for taking lawful industrial action before, during or after a dispute. **Clause 1(2)** therefore creates a right for all workers not to be subjected to any detriment because they have participated, are participating or are proposing to participate in official strike or industrial action.

This new right to protection from detriment would, in particular, prohibit employers from taking unfair deductions from workers' pay packets for taking part in official industrial action. There is a growing practice amongst employers to threaten to or actually to deduct more pay than that to which the employee would have been entitled if they had not participated in industrial action, for example withholding a full day's pay when industrial action was taken for half a day. Workers should be entitled to be paid for the work which they do.

2. Use of agency workers

The Bill seeks to improve the existing law prohibiting the use agency workers to replace workers participating in lawful strike or industrial action. In 1999, the Government introduced new laws on the deployment of agency workers to replace workers participating in official industrial action. They recognised that permitting the supply of agency workers can create an opportunity for employers to prolong industrial action, rather than entering into early and genuine negotiations in order to reach a sensible resolution to a dispute.

The existing law only places a duty on agencies not to supply agency workers to replace striking workers. **Clause 2** would amend the Conduct of Employment and the Employment Businesses Regulations 2003 to place equivalent duties on employers not to use agency workers to replace striking workers. It would also require employers to notify agencies that they use on a regular basis when industrial action is taking place or is planned.

3. Revising the law on injunctions

Currently, the law permits employers to gain an injunction against industrial action where they can demonstrate that there is a serious issue to be tried. As a result High Court judges often do not give serious consideration to the merits of the case before granting an injunction.

Clause 3 would amend the law to provide that employers would only be able to gain an injunction where they have demonstrated that they are more likely to succeed than the union once the legal action is considered by a court.

4. Modernising the law to accommodate labour market changes

The Bill would also modernise the law on industrial action to accommodate changes in the economy and the structure of the labour market. In recent years, business restructuring and contracting out have become more prevalent but the law on industrial action has not evolved to respond to these changes.

The case of *University College Hospital NHS Trust v UNISON* [1999] ICR 204 highlighted some of the problems unions face. A new hospital was to be built and run by a consortium to which some Trust employees would be transferred. UNISON sought an agreement from the Trust that the staff transferred to the consortium (and all future staff) would be employed under terms and conditions that were equivalent to those employees who were not transferred. When negotiations failed to yield an agreement, industrial action was organised and a ballot was held. However the action was restrained by an injunction on the ground that there was no trade dispute.

To address the problems highlighted by this case, **clause 5(2)** would amend the definition of a trade dispute to permit lawful industrial action in the primary

workplace over future terms and conditions of staff with future employers, for example in cases where a TUPE is to take place. (These provisions would not permit any new forms of supportive action.)

Unions are also prevented from organising lawful industrial action where groups of workers are employed by associated employers, i.e. employers with common management or decision-making structures. This makes it impossible for unions to take effective action in situations where the 'real' employer with whom they were in dispute was able to take refuge behind one or more subsidiary companies who are technically the 'employer' of the workers concerned, but who often lack the capacity to take decisions necessary to resolve the dispute. **Clause 5 (2)** would also permit Industrial action between workers and their employer and any associated employer.

Clause 5(1) would also modernise the law to permit supportive action in two limited and specific circumstances, where a second employer has directly intervened and therefore contributed to the circumstances surrounding a dispute. Firstly, unions would be permitted to organise industrial action against a company to which work or production had been transferred during industrial action, with a view to breaking a strike. This proposal is similar to laws in the USA where an exception is made to the general prohibition on supportive action where work has been transferred to another employer and action can be taken against the second employer on the basis that he or she has become enmeshed in the dispute.

Secondly, **clause 5(1)** would permit supportive action in cases where the union is taking defensive action to protect their members' interests and the union has a reason to believe that at least part of the fault for the dispute is due to the intervention of a principal supplier or customer. For example, a supplier or customer may have aggressively cut costs under a contracting out arrangement and as a result the primary employer has threatened dismissals or substantial pay cuts. In such limited cases, it is fair that unions should be able to take supportive action to try to dissuade the second employer from placing excessive financial pressure on the original employer.

Clause 5(1) also provides that in all cases of supportive action unions would be required to comply with statutory notice and balloting requirements.

Clause 5(3) would remove the remaining bar on prison officers taking industrial action.

5. Cutting 'Red Tape' for trade unions

Before conducting lawful industrial action or strike action trade unions must comply with extensive rules on notices and ballots which place heavy financial and bureaucratic burdens on unions. They impose a significant burden on unions to keep meticulous records of their members' addresses, jobs, and workplaces and

often expose unions to applications for injunctions by employers to prevent industrial action taking place, even where a clear majority have voted in a ballot to support of the action.

The Employment Relations Act 2004 repealed the requirement on unions to supply notices to enable to the employer 'to make plans', thereby removing the statutory rationale for the notices. The 2004 Act also modified the nature of information which must be provided to employers; nevertheless the obligations on trade unions remain onerous, expensive and highly complex.

The Bill would simplify notice and balloting rules, thereby reducing the overly bureaucratic restrictions on unions, while retaining the need for a ballot.

The current requirement on trade unions to give an employer notice that a ballot is to take place **and** notice of the action is unnecessarily duplicates the bureaucratic duties on trade unions without serving any clear policy objective. If the Bill were to become law trade unions would still be required to give seven days' notice of the proposed start of industrial action. However **clause 7(1)** would remove the requirement on unions to give employers notice of a ballot.

Clause 7(2) would also substantially simplify the nature of the information which unions are required to provide in the notice to the employer. Trade unions would only be required to provide information relating to the category of workers being called to take action; the nature of the industrial action, i.e. whether it will be a strike or action short of a strike; and when action will commence and whether it will be continuous or discontinuous.

Clause 4 would create a new duty for employers, when requested, to supply trade unions with information which they need to comply with notice and balloting requirements. This duty is similar to current duties in the statutory recognition scheme, where the employer is obliged to supply the CAC or a QIP with the names and home addresses of workers. Where the employers refuse to supply the necessary information, a subsequent application for an interim injunction to prevent industrial action should fail.

Section 24 of the Employment Relations Act 2004 provided that a union will not lose its protection from taking industrial action where it accidentally fails to ballot an insignificant number of those it intends to induce to take industrial action.

Clause 6(2) extends this provision to notices with the effect that a trade union would not lose its immunity for taking industrial action where it accidentally includes an insignificant amount of inaccurate information in a notice to the employer.

Finally, **clause 6(3)** would remove the current bar on industrial action where there has been a prior call. As the *Midlands Mainline* case highlighted, a union cannot rectify a prior unofficial call to take industrial action by repudiating the call and then seeking to conduct a proper ballot. This can limit the ability of unions to seek to

resolve an on-going trade dispute and to ensure that their members' democratic wishes are given effect.