TUC
Changing the world of work for good

TUC submission to the CEACR

Response to the CAS conclusions on Convention 87. September 2023

Introduction

1. The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions. We support unions to grow and thrive, and we stand up for everyone who works for a living.

2. We welcome the conclusions of the Committee on the Application of Standards (CAS) on UK compliance with Convention 87.[1] We also welcome the opportunity in this submission to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to comment on the UK government's progress on the matters raised by CAS.

3. We also welcome this opportunity to raise fresh concerns with the CEACR. When twelve months ago the TUC made its initial report on UK compliance with Convention 87, ministers had merely proposed minimum service levels for transport and other 'critical' sectors. Since then the Strikes (Minimum Service Levels) Act 2023, has completed its parliamentary passage and become law, representing a hardening of the government's position.

4. The Act gives ministers the power to impose minimum service levels (MSLs) in services in six broad sectors, and the government plans to introduce regulations to introduce MSLs in specific services starting with the ambulance service, the fire service, passenger rail and border security. We strongly believe that this will take the UK even further from compliance with Convention 87.

5. In the first part of our submission we address our concerns relating to the Strikes (Minimum Service Levels) Act 2023. We then follow up on the CAS report by considering the failure of the government to make progress on electronic balloting in trade union ballots and elections. We also consider the role of the Certification Officer, as well as the dearth of structures to allow effective engagement between government and the social partners.

Minimum Service Levels

6. British law on the right to strike has been the subject of numerous observations by the ILO Committee of Experts since 1989. Most recently the committee made several observations in relation to what is now the Trade Union Act 2016 which inter alia increased the procedural obligations that must be met before industrial action may lawfully take place. These observations have been ignored by the British government, which has introduced new legislation which will give ministers the

[1] Committee on the Application of Standards (10 June 2023). *Conclusions by the committee* www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_885449.pdf

power to make regulations requiring minimum service levels to be observed in six sectors in the event of strikes.

7. The government had originally proposed to introduce minimum service levels in the transport sector only. To this end, the Transport Strikes (Minimum Service Levels) Bill was introduced on 22 October 2022. However, the Strikes (Minimum Service Levels) Bill 2023, which was published on 10 January 2023 and received Royal Assent to become an Act on 20 July 2023, now applies to a wider range of services and activities: namely health services, fire and rescue services, education services, nuclear decommissioning, and border security, as well as transport.

8. The TUC believes minimum service levels are unacceptable in the UK given the highly restrictive anti-strike laws already in place. Minimum service levels should not be imposed in any sectors.

9. It should be noted that shortly prior to the Strikes (Minimum Service Levels) Act 2023, the government introduced regulations that further undermined the right to strike, and imposed potential additional liabilities on trade unions in the event of industrial action. Thus, the law was changed to remove the prohibition on the recruitment of agency workers to carry out the tasks of strikers, while at the same time the cap on damages recoverable from a trade union for organising what is deemed to be an unlawful strike has been raised to £1 million. Both of these matters have been referred already by the TUC to the ILO's Committee of Experts. After a legal challenge by trade unions, the regulations relating to agency workers were quashed by the High Court with effect from 10 August 2023. This was due to the government's failure to conduct a consultation consistent with the Employment Agencies Act 1973. The government has yet to confirm whether it will seek to introduce replacement legislation.

Existing Law and Practice

10. It is widely understood that the right to strike is tightly controlled in the United Kingdom. As a general principle, strikes are permitted in Great Britain only where they are in contemplation or furtherance of a trade dispute, and only after very detailed notice and ballot requirements are met. As pointed out above, the latter requirements were tightened still further by the Trade Union Act 2016, several of the provisions of which were the subject of critical observations by the Committee of Experts in 2015, 2016 and 2018, following concerns raised by the TUC. Among the changes introduced by the Trade Union Act 2016 were:

    - a minimum participation threshold in a strike ballot of 50% of those entitled to vote
    - a requirement to give 14 rather than seven days' strike notice to the employer
    - a requirement to refresh a ballot mandate after six months.

11. The Trade Union Act 2016 was notable also for introducing special rules applying specifically to 'important public services'. These were categorised as:

a) health services

b) education of those aged under 17

c) fire services

d) transport services

e) decommissioning of nuclear installations and management of radioactive waste and spent fuel

f) border security.

In these services there is an 'additional requirement' in the form of a ballot support super-threshold: at least 40 per cent of those entitled to vote must do so in favour of industrial action. This means that in order to satisfy the requirements of the legislation, strikes in important public services must already be supported by a ballot in which a) at least 50 per cent of those entitled to vote did so; b) at least 40 per cent of those entitled to vote did so in favour of industrial action; and c) that those voting in favour of the action constituted a majority of those voting.

12. Where the union fails to comply with its extensive statutory obligations, it is liable to be restrained by an injunction, despite the fact that (i) the union will have incurred considerable cost in conducting a postal ballot, and (ii) any oversight on its part may be relatively minor and largely inconsequential.[2] The union is also liable to be sued in damages, although in practice at the moment this is uncommon.

13. Otherwise, where a union fails to comply fully with its procedural obligations (whether by oversight or design), the action ceases to be lawful and its members lose their unfair dismissal protection.[3] The delay which the process creates and the high levels of support required before a strike can take place are obviously a great benefit to the employer in a dispute. The delay before a strike can begin means that the employer has adequate time to make contingency arrangements. It can also provide an opportunity for a responsible employer to enter into meaningful negotiations to address the discontent which the high levels of ballot support reveal.

14. In addition to the foregoing, it should not be overlooked that the Trade Union and Labour Relations (Consolidation) Act 1992, section 240 'covers 'life and limb' arrangements, by retaining a provision first introduced in 1875 whereby it is an

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[2] For a good example, see BT v CWU [2003] IRLR 58.

[3] Note that British workers have no protection – even in the event of a lawful strike – from disciplinary sanctions short of dismissal for participating in or organising a strike: Mercer v Alternative Future Group Ltd [2022] EWCA Civ 379. The case is currently before the UK Supreme Court.

offence for a person wilfully and maliciously to break a contract of service 'knowing or having reasonable cause to believe that the probable consequences of his so doing will…endanger human life or cause serious bodily injury'. Anyone convicted of an offence under TULRCA 1992, s 240 can be fined up to £500 or imprisoned for up to three months. That said, it has never been necessary ever to use this power since it was introduced 150 years ago, which speaks volumes about the responsible way in which industrial action is conducted in Great Britain.

15. Finally, the importance of both the Emergency Powers Act 1964, s 2 and the Civil Contingencies Act 2004 should also be acknowledged. The former makes provision for military aid for the civil authorities, which means that troops can be used for civilian purposes. A Ministry of Defence document on *Military Aid to Civil Authorities* specifically refers to the 'highly trained members of the military', who can help with: "Public service-related industrial disputes that affect our safety or security, or disruption to transport or communications links: the UK Armed Forces have trained logisticians who can lend expert advice at a time of need".[4] Troops have in fact been used as 'substitute labour' on many occasions since the end of the Second World War, in the course of strikes in a number of different sectors.[5]

16. For its part, the Civil Contingencies Act 2004 allows emergency powers to be invoked to deal with "emergencies", a term defined to mean:

    (a) an event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region,

    (b) an event or situation which threatens serious damage to the environment of the United Kingdom or of a Part or region, or

    (c) war, or terrorism, which threatens serious damage to the security of the United Kingdom.

    An event or situation is defined to threaten damage to human welfare for the purposes of (a) if it involves, causes or may cause (a) loss of human life, (b) human illness or injury, (c) homelessness, (d) damage to property, (e) disruption of a supply of money, food, water, energy or fuel, (f) disruption of a system of communication, (g) disruption of facilities for transport, or (h) disruption of services relating to health. Where an emergency has occurred, is occurring, or is about to occur a government minister may issue regulations "for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency".

17. Unlike the Emergency Powers Act 1920 which it replaced, it has never been necessary to use the Civil Contingencies Act 2004 to deal with an emergency caused by a strike, even though a strike could well cause consequences to which

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[4] Ministry of Defence (2021). *Military Aid to Civil Authorities* https://medium.com/voices-of-the-armed-forces/military-aid-to-civil-authorities-maca-5-things-you-should-know-9fbd2a2f64cb.

[5] Morris, G. S. (1986). Strikes in Essential Services. Mansell Chapter 4

the Act applies. It is also notable that should an emergency ever arise requiring intervention under the Civil Contingencies Act 2004, it is expressly provided that emergency regulations may not "prohibit or enable the prohibition of participation in, or any activity in connection with, a strike or other industrial action".

18. All in all, industrial action in important public services is already heavily regulated: there are restrictions imposed by the civil law; there are criminal liabilities which underpin voluntary agreements to provide cover; there is legal authority for the use of the troops as strike-breakers; and there is power to make regulations to prevent, control or mitigate the effects of the industrial action. It is neither necessary nor proportionate to add to the burden of trade union regulation or the risk of trade union liability. It is important to emphasise that the Strikes (Minimum Service Levels) Act 2023 adds a new layer of regulation without removing any of the restrictions currently in place, restrictions which in some cases already breach international labour standards.

The content of new legislation

19. The Strikes (Minimum Service Levels) Act is a short measure. It does three things.

- First, it authorises a Secretary of State to make minimum service regulations in six named sectors.
- Second, it authorises employers to issue work notices to a trade union in relation to a strike where minimum service regulations apply to the service in question.
- Third, it imposes a duty on trade unions to take reasonable steps to ensure that its members who are identified in a work notice comply with its terms.

We address each of these aspects as follows:

Minimum Service Regulations

20. So far as the power of government ministers is concerned, the only limitation on a Secretary of State's powers is that the regulations may specify only services that fall within one of the following categories:

i) health services

ii) fire and rescue services

iii) education services

iv) transport services

v) decommissioning of nuclear installations and management of radioactive waste and spent fuel

vi) border security.

These categories are largely the same as those created for the first time for the law relating to strikes by the Trade Union Act 2016, aside from a broader education category which is wider under the Strikes Act 2023 than in the 2016 Act.[6]

21. Apart from listing in these broad terms the services to which the Act applies, a wide power has been given to be the Secretary of State to determine the scope of these services without any guidance from Parliament. The Secretary of State also has a wide power to determine what the minimum level of service should be in the services in question, and consequently the circumstances in which and the extent to which workers in these sectors can lawfully exercise their freedom to strike. In expressing concern about the scope of ministerial powers, one member of Parliament did so by giving the following example: "In the case of transport, for instance, the government could stipulate a service requirement that would effectively mean that the majority of the workforce needed to be deployed on a given strike day. Railway signalmen are an obvious example. If minimum services are to run throughout Great Britain, which seems to be the demand from some Tory Benchers, that means that the majority of signalmen would be forced to work on strike days."[7] The powers were strongly criticised, including by a former senior minister in recent Conservative governments. Sir Jacob Rees-Mogg MP expressed surprise these powers "managed to get through the intergovernmental procedures that take place before legislation is presented to the House", describing them as being "not properly constitutional" and as "a particularly extreme example of bad practice with the least possible excuse for it". Nevertheless, Secretaries of State are also empowered to "amend, repeal or revoke" Acts of the Scottish Parliament, or the Senedd Cymru. It is notable, too, that minimum service regulations passed by the Westminster Parliament can apply to services devolved to the Scottish and Welsh Parliaments. The current administrations in those countries have indicated that they will resist implementing these as far as their powers allow.[8]

22. When making regulations under these powers, the relevant Secretary of State is under a duty to consult "such persons" as the Secretary of State "considers appropriate". There is no express obligation to consult the social partners about the content of the regulations, and no obligation to do so with a view to reaching an

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[6] The 2023 Act applies to fire and rescue not fire alone, and to education generally (including FE colleges and universities), not education for under 17s only.

[7] HC Debs, 30 January 2023, col 95 (Alan Brown MP). https://hansard.parliament.uk/commons/2023-01-30/debates/AA4BBFD1-EBE3-4346-8968-7CB474F3F85E/Strikes(MinimumServiceLevels)Bill

[8] Mick Antoniw MS, Counsel General and Minister for the Constitution (22 May 2023). *Written Statement: UK Government's Strikes (Minimum Service Levels) Bill*, Welsh Government www.gov.wales/written-statement-uk-governments-strikes-minimum-service-levels-bill; Neil Gray, Cabinet Secretary for Wellbeing Economy, Fair Work and Energy (2 July 2023) *Strikes (Minimum Service Levels) Bill: further letter to UK Government - 30 June 2023* www.gov.scot/publications/strikes-minimum-service-levels-bill-further-letter-to-uk-government-30-june-2023/

agreement. Although a draft of the regulations must be approved by Parliament, Parliament has no opportunity to amend the regulations or to consider them in detail. At the time of writing the government has already conducted consultations on the introduction of minimum service levels in the ambulance service[9], fire service[10] and passenger rail[11]. It had also launched a consultation on minimum services in border security.[12] The consultation papers were extremely light on detail, giving no suggestion of how the intended minimum service level would be structured or applied and the likely level of staffing required.

23. Notably, there is no requirement in the Act that any regulations made by ministers are consistent with ILO Conventions, or other international obligations. Although the government claims that the Act is consistent with ILO obligations (as well as the European Social Charter, which by Article 6(4) expressly protects the right to strike), it has failed to explain why it believes that this is the case, despite widespread scepticism about such claims.

Requisition and work notices

24. The Strikes Act states that where a strike is announced in a service where minimum service level regulations are in force, an employer may give a work notice to the trade union or trade unions involved in the strike in question. A work notice is defined to mean a notice in writing that levels of service provided for under the minimum service regulations are to apply in relation to the strike. The work notice must be given at least one week before the strike is due to start, identify the persons required to work, and specify the work required to be carried out by them. There is no obligation to specify the wages to be paid or the working conditions to operate during the period of the work notice.

25. The requisitioning of workers in this way is unprecedented in British law in peace-time. The last time powers of requisition were in operation was for the purposes of war-time production, with the Defence Regulations 1940 authorising the Minister of Labour and National Service to 'direct any person' to 'perform such services' as may

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[9] Department of Health and Social Care (2023). *Minimum service levels in event of strike action: ambulance services in England, Scotland and Wales* www.gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-ambulance-services

[10] Home Office (2023). *Minimum service levels for fire and rescue services* www.gov.uk/government/consultations/minimum-service-levels-for-fire-and-rescue-services

[11] Department for Transport (2023). *Minimum service levels for passenger rail during strike action* www.gov.uk/government/consultations/minimum-service-levels-for-passenger-rail-during-strike-action

[12] Border Force and Home Office (2023). *Border security: minimum service levels during strike* action www.gov.uk/government/consultations/border-security-minimum-service-levels-during-strike-action/border-security-minimum-service-levels-during-strike-action

be 'specified in the direction' (Regulation 58A). Indeed, the Act gives employers a power which not even the courts enjoy. Thus, existing legislation provides:

> **No compulsion to work**
>
> No court shall, whether by way of—
>
> > (a) an order for specific performance or specific implement of a contract of employment, or
> >
> > (b) an injunction or interdict restraining a breach or threatened breach of such a contract,
>
> compel an employee to do any work or attend at any place for the doing of any work.
>
> (Trade Union and Labour Relations (Consolidation) Act 1992, section 236)

26. Beyond the foregoing, there are a number of specific concerns about these new provisions:

27. Before the work notice is issued to the trade union, there is a duty to consult the trade union about the number of people to be identified and the work to be specified in the work notice. But although for these purposes (in contrast to the power of the Secretary of State to make regulations) there is a power to "have regard to any views expressed by the union in response", there is no obligation to seek an agreement with the trade union on minimum service levels, or to introduce a work notice only after an agreement has been secured. Consequently, there is no procedure for the independent resolution of differences or disagreements. A draft non-statutory guide for employers, trade unions and workers was issued by the government on 24 August 2023, with a deadline of responses just a month later on 29 September 2023. This states that the consultation on the work notices "should be carried out with sufficient time for the union to consider the proposed number of workers to be identified and work to be specified, express their views in responses and for the employer to consider the response and amend the work notice as necessary". This makes it clear that the process is in the hands of the employer. It also confirms: "The employer does not need to agree the number of workers and the work within the work notice with the union as part of this consultation."

28. There is no exception from inclusion in a work notice for any worker who is also a workplace representative of the trade union. This means that shop stewards and trade union branch officials - who have a leadership role and are likely to be heavily involved in organising the strike - could nevertheless be requisitioned by the employer. Union officials may not be requisitioned to provide work during a strike because they are union officials. But equally they are not exempt by virtue of being union officials. In turn, this would mean that these officials could be expected by the employer to cross picket lines, which would place the trade union officials in

question in an intolerable position. It would also seriously affect the leadership of a dispute at local level if union officials were required to work during a strike.

29. Where a worker fails to comply with a work notice, he or she is liable to discipline and dismissal. The Act expressly withdraws legal protection for unfair dismissal for participation in a strike from those who breach a work notice, provided the employer has notified the worker that they are required to work no later than the day before the work is required to be carried out. For an employee dismissed for refusing to comply with a work notice, it will be necessary to bring a claim under the general law of unfair dismissal. It is uncertain whether any such case would succeed, except in the most unusual circumstances. The removal of unfair dismissal protection could lead to the victimisation by employers of trade union activists with impunity.

Duty of the trade union

30. Most controversially, the Act provides that after the employer has given the work notice to the trade union, the latter will then be required to take "reasonable steps to ensure that all members of the union who are identified in the work notice comply with the notice". This means that a trade union is required by an employer acting with the authority of the state to take steps actively to undermine its own strike, which its members will have voted in a ballot with high thresholds to support. Such an obligation is unprecedented in British law, and possibly unparalleled in any liberal democracy.

31. During the latter stages of the Act's parliamentary passage, ministers belatedly promised to publish and consult on a statutory code of practice aimed at clarifying a union's duties.[13] On August 25 the government published its consultation paper on a draft statutory code on the "reasonable steps" expected of a union allowing just six weeks for unions and others to respond.[14] This is half the standard 12-week consultation period.[15] A separate consultation on draft guidance relating to the compiling of work notices is even shorter running from August 24 until September. This shows that the government is blithely ignoring the CAS's request that it "improve consultation of the social partners on legislation of relevance to them".

32. We are strongly of the view that rather than provide clarification of the law, the code over-reaches the underlying legislation to seek to place a swathe of additional requirements on trade unions.

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[13] Strikes (Minimum Service Levels) Bill Volume 831: debated on Thursday 20 July 2023 https://hansard.parliament.uk/lords/2023-07-20/debates/5E7DC2DE-77DF-4459-A062-4270E3FCB48B/Strikes(MinimumServiceLevels)Bill

[14] Department for Business and Trade (August 2023). *Minimum service levels: Code of Practice on reasonable steps* www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps

[15] HM Government (July 2008). *Code of Practice on Consultation*

33. The code requires unions to:

- identify their members on the work notice
- issue a "compliance notice" to those members "encouraging" them to comply
- send an "information notice" to the wider membership stating that a work notice has been issued and how that will affect the strike
- instruct picket supervisors to take "reasonable endeavours" to ensure members named in the work notice are not encouraged to take strike action
- take steps not to undermine any of those steps and to correct actions by union officials and members that do.

34. The code itself does not impose legal obligations. However, its provisions can be taken into account in any subsequent legal proceedings. The consequences of breaching the law are wholly disproportionate:

- An injunction may be granted by a court requiring the strike action to be stopped, despite the fact that all other notice and ballot procedural obligations have been complied with.
- Significant damages may be awarded against a union for losses relating to the work notice not being fulfilled.
- The strike may be deemed to be unlawful, with the result that all the workers taking part in the strike will lose their protection for unfair dismissal. In other words, the protection will be lost because of an oversight by the trade union over which employees individually have no control. It is an obligation with which in any event the trade union should not be burdened.

35. The requirements also raise questions of legal liability

    a. Could the trade union be sued by any member who was dismissed for taking part in the strike and who lost unfair dismissal protection because the union was deemed to have failed to have taken reasonable steps?

    b. Could the trade union be sued by a member of the public whose use of a particular service has been impaired because the union was deemed to have failed to have taken reasonable steps?[16]

36. Under the draft code, unions are expected, first of all, to identify all of its members named in a work notice and contact them either via email or post. This must be undertaken at short notice because employers need only provide the work notice seven days before the strike takes place and can amend it up to four days before. This time can include weekends and public holidays. This is an unreasonable

[16] See Falconer v NUR [1986] IRLR 331 (Sheffield County Court).

timescale and would be a huge drain on trade union resources. There is a significant risk that mistakes could be made, leading to an employer challenge in the courts.

37. The requirements in the code are incredibly detailed. For example, it contains eight pieces of information the union's communications with those named in the work notice must include "clearly and conspicuously". This includes telling a worker who is named in a work notice that they "must carry out the work during the strike or lose the protection against dismissal" and also "that the union encourages the member to carry out the work as required by the work notice and not to strike except to any extent that would not contravene the notice from the employer". The code even includes sample text for communications with those on work notices and all workplace members.

38. There are similar levels of detail for communications with all trade union members involved in the dispute. It is striking that the underlying Strikes Act itself does not require unions to communicate with the wider workforce. Doing so by the required electronic means or post would be a significant drain on trade union resources.

39. The code also fails to explain legal issues with necessary clarity and accuracy. It states that unions are advised to tell members that they should receive from the employer a statement that the member is "an identified worker" who "must comply with the notice given to the union". But there is no obligation under the Act for an employer to communicate with workers named on a work notice. They need only do so if they want to keep open the option of dismissing them for not attending work.

40. In addition, it is not the case that workers "must comply" with a work notice. This Act gives neither the employer nor the government the power to compel people to work. Rather, a worker who has been notified by the employer that they are named in the work notice may be dismissed, and be denied the automatic right not to be unfairly dismissed for taking part in the strike. The draft code does not highlight that a worker might still be able to bring an unfair dismissal complaint under the general law.

41. This requirement for "encouragement" for a worker to attend work during strike action is a significant imposition on a trade union, which should not be required to undermine its own industrial action.

42. There are no statutory obligations on employers as to the text that they should use when communicating with staff.

43. Of course, the more detail required of unions the more opportunities there are for an employer to challenge the strike action in the courts.

44. A particularly outrageous aspect of the draft code is that even though picketing does not feature in the Strikes Act, the code contains considerable requirements in this area. The code of practice states that, as part of the reasonable steps, the union should instruct the picketing supervisor (if present) or another union official or

member to use "reasonable endeavours" to ensure that picketers avoid trying to persuade those on work notices to stay away from work. The picket supervisor is expected to explain to those on the picket line that some members have been named in a work notice. Those named in work notices can show their letters from the union or employer or "may simply wish to state orally that they are required by a work notice to work at that time". This would make it hard for unions to use pickets to encourage compliance with a strike. It goes significantly beyond preventing hindrance of anyone named in a work notice, the code says that the picket supervisor should encourage any such worker to attend work and not to take strike action which would be inconsistent with the work notice. These requirements place picket supervisors in an extremely difficult position. The aim of a picket is to encourage compliance with a strike, yet the picket supervisor is expected to not only ensure that a worker named in a work notice isn't hindered in going to work but to even encourage them to attend work.

45. The TUC is deeply concerned that the requirements could undermine the protection of trade union membership data, which is special category data under data protection rules. The government provides some guidance to employers on handling such data in its non-statutory guidance on work notices. However, this amounts to telling employers they cannot use that data when determining those named on work notices. There is no recognition the opportunities that implementation of work notices provides for inference of someone's trade union membership status. Nor is it clear how an employer can seek to show that a union has not met its duties under the legislation to take "reasonable steps" to contact members in the way set out in the code, without seeking to establish individuals' trade union membership status? Given the history of trade union members suffering detriment, such as being blacklisted, this issue should have been treated more seriously.

International Labour Standards

46. ILO Convention 87 deals with Freedom of Association and the Right to Organise. It was ratified by the United Kingdom on 27 June 1949 and came into force in the following year. The United Kingdom re-affirmed its commitment to ILO Convention 87 (and to other ratified ILO Conventions) in the EU-UK Trade and Co-operation Agreement, which was approved by the current British Parliament in primary legislation passed in 2020.[17]

47. The TUC notes that while the Committee of Experts recognises the importance of the right to strike, it also recognises that restrictions can be imposed in the case of essential services in the strict sense of the term, *provided that* compensatory measures such as binding arbitration are put in its place. The TUC also notes that in

[17] European Union (Future Relationship) Act 2020. The relevant provision of the treaty is Article 399.

some circumstances the Committee accepts that it may be possible to have what are referred to as negotiated minimum services.

Negotiated minimum services

48. In the most recent compilation of its jurisprudence, the ILO Committee of Experts wrote in 2012:

"136. In situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, consideration might be given to ensuring that users basic needs are met or that facilities operate safely or without interruption, the introduction of a negotiated minimum service, as a possible alternative to a total prohibition of strikes, could be appropriate. In the view of the Committee, the maintenance of minimum services in the event of strikes should only be possible in certain situations, namely: (i) in services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (or essential services "in the strict sense of the term"); (ii) in services which are not essential in the strict sense of the term, but in which strikes of a certain magnitude and duration could cause an acute crisis threatening the normal conditions of existence of the population; and (iii) in **public services of fundamental importance**.

"137. However, such a service should meet at least two requirements: (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 organizations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities. Moreover, a minimum service may always be required, whether or not it is in an essential service in the strict sense of the term, to ensure the security of facilities and the maintenance of equipment.

"138. The Committee emphasizes the importance of adopting explicit legislative provisions on the participation of the organizations concerned in the definition of minimum services. **Moreover, 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."**[18]

[18] ILO Committee of Experts (2012). *Globalisation with a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008. Emphasis added.

49. Having regard to the foregoing, it is clear that ministerial power under the Strikes Act to make minimum service regulations greatly exceeds the prescribed safeguards set out by the Committee of Experts. Thus, the Act fails to ensure that:

- the regulations will apply only to essential services or public services of fundamental importance
- the level of service required will be genuinely and exclusively a minimum service only, no more than strictly necessary to meet the basic needs of the population or the minimum requirements of the service
- steps are taken to safeguard the right to strike by maintaining the effectiveness of the pressure being brought to bear by the workers engaged in the dispute
- 'explicit' provision is made for 'participation of the organizations concerned in the definition of minimum services'
- provision is made for a joint or independent body which has the confidence of the parties to resolve any disagreement about minimum services.

50. It is true that – as pointed out above - the minister will be required to 'consult' before regulations are made, and that the employer will be required to 'consult' before work notices are issued. Under British law, however, an obligation to 'consult' does not mean an obligation to 'negotiate', nor does it imply a duty to reach an agreement. Still less does it mean an obligation to refer any differences or disagreements for resolution by a third party. Where there is a duty to consult, this means no more than a duty to invite and then to consider representations received before making a decision. The decision will be a unilateral decision of the minister (in the case of the regulations) and the employer (in the case of a work notice).

Protection of workers and trade unions

Work notices and the worker's duty to work during a strike

51. The TUC is also concerned about the lack of protection for workers under the Act and the unprecedented duties on trade unions. Attention is drawn here to two other passages from the ILO Committee of Experts' report referred to above.[19] The first deals with the requisitioning of workers during a strike, and the second with the need to protect trade union officials:

> **Requisitioning of strikers and hiring of external workers.**
>
> 151 Although certain systems continue to retain fairly broad powers to requisition workers in the case of a strike, the Committee considers that it is desirable to limit powers of requisitioning to cases in which the right to strike may be limited, or even prohibited, namely: (i) in the public service for public

[19] ILO Committee of Experts, *Globalisation with a Human Face*, ibid.

servants exercising authority in the name of the State; (ii) in essential services in the strict sense of the term; and (iii) in the case of an acute national or local crisis.

Trade union officers and members

186 While the Convention requires protection against acts of anti-union discrimination in relation to all workers, the protection provided for in the Convention is particularly important in the case of trade union representatives and officers. One of the ways of ensuring this protection is to provide that trade union representatives may not be dismissed or otherwise prejudiced either during their term of office, or for a specified period following its expiry. Moreover, the importance and nature of the duties performed by a trade union representative and the demands made by this kind of office should be taken into account when deciding whether an offence was actually committed and assessing its seriousness.

52. The Strikes Act clearly violates these provisions, for the following reasons:

- The employer's power to requisition workers is to be activated by a work notice the contents of which may lawfully be issued without the agreement of the trade union.
- The employer's power to requisition workers by issuing work notices is not confined to cases which fall within the narrow scope of the three categories referred to in para 151 of the ILO Committee of Experts' report referred to above.
- Before workers are requisitioned by means of a work notice, there is no obligation on the part of the employer to find less intrusive means than requisition to meet the need to provide minimum services.
- The removal of unfair dismissal protection for employees who refuse to comply with a work notice is disproportionate, as is the sanction of dismissal for workers in such circumstances.
- The employer's power to requisition workers' representatives by including them in a work notice is a particularly serious violation of the right to freedom of association, as recognised inter alia by the Workers' Representatives Convention, 1971.

53. The latter Convention (Convention 135) provides that: 'Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, *in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements'*.[20] Although it is true that the words in parenthesis qualify the general principle, it is clearly implied that any existing laws must be compatible with

[20] Emphasis added.

the right to freedom of association. The qualification would otherwise wholly negate the general principle.

The trade union duty to take reasonable steps

54. So far as the trade union is concerned, reference has been made to the obligation to take 'reasonable steps to ensure that its members comply with a work notice'. Reference has also been made to the uncertain scope of this obligation and the far-reaching consequences of a failure on the part of the union to comply. In assessing the compatibility of this obligation with ILO Convention 87, it is difficult to find guidance in the jurisprudence of either the Committee of Experts or the ILO Freedom of Association Committee. This is unsurprising, as it is difficult to find a comparable example of any such legal obligation on a trade union operating in any other country in the world.

55. Notwithstanding the absence of any ILO jurisprudence addressing this specific question, it is hard to avoid the conclusion that this is a most far-reaching violation of Convention 87. Despite having secured the support of a majority voting in a postal ballot, and despite having the support in the ballot of at least 40 per cent of those eligible to vote, the legislation places the trade union under an obligation by the state to take steps to undermine its own strike. If the union fails to take these steps, the effect will be to render the strike unlawful, notwithstanding the high levels of support by which it was endorsed. The fact that the strike will be unlawful will have adverse legal consequences both for the union and its members.

56. It is difficult to contemplate a more far-reaching violation of the right to strike. Trade unions should never be placed in a position by the state where they are:

- required by law to undermine their own interests and the interests of their members, by
- compelled by law to act as the coercive instrument of the employer or otherwise face legal sanctions, in order to ensure that the employer's interests are met.
- The extent to which the position of the trade union is compromised is compounded by the potential scope of the regulations (which have yet to be made) to which the union's duty will apply.

57. That apart, there are a number of features of this duty which reinforce concerns about its content:

i) The scope of the duty, particularly as set out in the draft statutory code of conduct, seeks to oblige the union to do more to undermine its strike than would otherwise be warranted.

ii) If the union is deemed to have failed to take reasonable steps thereby rendering the strike unlawful, the consequences are wholly disproportionate:

- It exposes the union to the risk of legal action; and
- It withdraws unfair dismissal protection from ALL non-requisitioned workers taking part in the strike.

iii) The duty to take reasonable steps to ensure workers comply with a work notice applies not only to members of the union but also to workplace representatives.

The effect of the last point is that if a shop steward or branch official is requisitioned by an employer in a work notice, the union will be required to take steps to ensure that its own representatives in the workplace in question comply with the requirement to work.

As sets out above there are also extensive obligations placed on picket supervisors to "encourage" compliance with the legislation.

Unnecessary, excessive and coercive

58. Apart from the foregoing concerns about the substance of the Strikes Act, there are a number of additional concerns that ought to be addressed.

59. First, the Act is **unnecessary**, and the government has produced no evidence to the contrary. Thus, it has been accepted that in some sectors voluntary agreements are in place during strikes and that they work well. In the case of nursing, for example, it was pointed out while the legislation was being considered in Parliament that:

"In relation to safety—others have mentioned this—the nurses that I have spoken to and been on the picket line with have told me that they want better pay and conditions and more staff, but they have also made sure that at no stage was emergency cover not available. The ambulance service staff who went on strike always made sure emergency cover was available. It is really a matter of staffing and wages. Does the Minister, who I respect greatly, understand that nurses have already ensured cover, and all they are looking for is fair pay?"[21]

The Minister agreed: "We are happy with the agreement we have with the Royal College of Nursing, and that is why we are not consulting on minimum service levels for nurses".[22] This begs the question why it was necessary to include nurses in the Act. But the same would be true in relation to ambulance staff and other occupational groups who will be covered by the Act. The government has failed to provide any evidence that the voluntary procedures which are in place to deal with industrial action are ineffective, nor any evidence to suggest that a statutorily based national protocol set out in minimum service regulations would be a better option.

60. Secondly, the Act is **excessive**: there is extensive legislation regulating the right to strike generally, and important public services in particular. Indeed, one of the

[21] HC Debs, 30 January 2023, col 80 (Jim Shannon MP).
[22] Ibid (Kevin Hollinrake MP).

declared purposes of the Trade Union Act 2016 was to regulate important public services. As pointed out above, these are broadly the same important public services as the six contained in the Strikes (Minimum Service Levels) Act. The 2016 Act imposed a super-threshold in strike ballots before industrial action could lawfully be taken in these sectors, the Conservative Party explaining in its 2015 General Election Manifesto: "Strikes should only ever be the result of a clear, positive decision based on a ballot in which at least half the workforce has voted. This turnout threshold will be an important and fair step to rebalance the interests of employers, employees, the public and the rights of trade unions. We will, in addition, tackle the disproportionate impact of strikes in essential public services by introducing a tougher threshold in health, education, fire and transport. Industrial action in these essential services would require the support of at least 40 per cent of all those entitled to take part in strike ballots – as well as a majority of those who actually turn out to vote."[23]

The point was reinforced during the Trade Union Bill's parliamentary proceedings in 2015 where it was said by the government minister in charge of the Bill that one of its purposes was 'to redress the balance between the rights of trade unions and the rights of the general public, whose lives are often disrupted by strikes',[24] and to address 'the massive disproportionate disruption that stoppages in those areas can cause'.[25]

61. The Committee of Experts has made three observations on these provisions of the Trade Union Act 2016:

"The Committee notes that the following categories have been identified as important public services: health services, education of those aged under 17, fire services, transport services, decommissioning of nuclear installations and management of radioactive waste and spent fuel, and border security. While the Committee generally considers that a requirement of the support of 40 per cent of all workers to carry out a strike would constitute an obstacle to the right of workers' organizations to carry out their activities without interference, it further observes that a number of the services set out in section 3 fall within the Committee's understanding of essential services in the strict sense of the term or of public servants exercising authority in the name of the State, in which restrictions on industrial action are permissible. The Committee does however express ***concern*** that this restriction would also touch upon the entire primary and secondary education sector, as well as all transport services, and considers that such a restriction is likely to severely impede the right of these workers and their organizations to organize their activities in furtherance and defence of their occupational interests without interference. The Committee recalls in this regard that recourse might be had to negotiated minimum services for these sectors, as

[23] Conservative Party Manifesto (2015), p 18.
[24] HC Debs, 10 November 2015, col 340 (Nick Boles MP)
[25] HC Debs, 14 September 2015, col 764 (Sajid Javid MP).

appropriate. ***The Committee requests the Government to review this matter with the social partners concerned with a view to modifying the Bill so as to ensure that the heightened requirement of support of 40 per cent of all workers does not apply to education and transport services."*** (2015)

"On the 40 per cent requirement, the Committee notes the Government's statement to the Conference Committee that, in view of the widespread adverse consequences of industrial action in public services, this requirement was important to ensuring necessary democratic legitimacy and clear majority support in services extremely significant to the public. The Committee recalls from its previous comments, however, that a requirement of support of 40 per cent of all workers effectively means a requirement of 80 per cent voting support where only the 50 per cent participation quorum has been met. ***In light of the concerns expressed above in relation to the challenges attached to the current balloting method and with a view to ensuring the rights of workers' organizations to organize their activities in full freedom, the Committee once again requests the Government to review section 3 of the Trade Union Act with the social partners concerned and take the necessary measures so that the heightened requirement of support of 40 per cent of all workers for a strike ballot does not apply to education and transport services."*** (2016)

"The Committee had previously requested the Government to review section 3 of the Trade Union Act with the social partners concerned and to take the necessary measures so that the requirement of support of 40 per cent of all workers for a strike ballot in important public services does not apply to education and transport services. The Committee notes that the TUC is concerned about the 40 per cent support threshold in the other four sectors to which it applies. The Committee recalls that it had previously observed that a number of the services set out in section 3 fall within the Committee's understanding of essential services in the strict sense of the term or provided by public servants exercising authority in the name of the State, in which restrictions on industrial action are permissible. The Committee had noted, however, that a restriction on education services in particular would touch upon the entire primary and secondary education sector, and a restriction on all transport services would have a similarly sweeping and overbroad effect, and the Committee considers that such restriction is likely to severely impede the right of these workers and their organizations to organize their activities in furtherance and defence of their occupational interests without interference. The Committee further notes the TUC's indication that the Government have made no serious attempt to amend section 3 of the Act. The Committee notes with ***regret*** that the Government reiterates its previous position on the need to maintain the 40 per cent threshold in education and transport services." (2018).

There has been no evidence that the government has acted on any of these requests to review the legislation with the social partners.

62. The foregoing makes clear that these thresholds were exceptional measures which 'constitute an obstacle to the right of workers' organisations to carry out their activities without interference', and which were not justified in the cases of transport and education. To the extent that they were tolerated by the Committee of Experts in the other four sectors, there is no suggestion that they would be permitted in **addition to** minimum service levels. There can be no justification for either super-thresholds in strike ballots in important public services as well as minimum service levels where these thresholds are met, let alone for both sets of requirements to apply. Such an arrangement would be wholly disproportionate.

63. Thirdly, the Act is **coercive** in the sense that it will compel people to work, in what is a major departure for British industrial relations, where the requisitioning of workers has been tolerated only in the extreme circumstances of war. Nevertheless, workers who refuse to comply with work notices will lose their right not to be unfairly dismissed for taking part in the strike. They also risk disciplinary steps short of dismissal being taken by the employer. A union which fails to take reasonable steps to ensure its requisitioned members comply with a work notice risks having the entire industrial action being deemed to be unlawful as a result. This means that the union will be subject to legal action, and that its members who have not been requisitioned will lose their right not to be unfairly dismissed for taking part in the strike.

64. Needless to say, such coercion will swing the balance of power still further in the employer's direction. As the government itself pointed out (and as is no doubt intended), the proposed powers to requisition workers will have implications well beyond the current disputes. According to the Impact Assessment on the Transport Strikes (Minimum Service Levels) Bill:

    "If the effect on worker power derived from the ability to take impactful strike action is substantially reduced then potentially there could be a wider impact of generally reduced terms and conditions for workers than would otherwise be the case if collective worker power was stronger. According to the Annual Survey of Hours and Earnings around 40% of workers had their pay determined through collective bargaining in 2021. If terms and conditions are reduced over time relative to the strength of the economy in one sector then there is a potential for employers in other related sectors to be able to offer similarly reduced terms and conditions to attract and retain the workers they need."[26]

    On any objective assessment, the effects identified by the Transport Strikes (Minimum Service Levels) Bill will be compounded by the greatly increased scope of the Strikes Act.

[26] Transport Strikes (Minimum Service Levels) Bill, Impact Assessment, 17 October 2022, para 87.

Conclusion

65. The Strikes (Minimum Service Levels) Act is thus **unnecessary** (minimum life and limb provision is generally agreed in some sectors); **excessive** (the right to strike is already subject to multiple restrictions which are to be retained, despite in some cases the critical Observations of the Committee of Experts); and **coercive** (the Act was introduced to weaken still further the bargaining power – and consequently reduce the wages and diminish the working conditions - of workers in a country where social and economic inequality continues to rise).

66. The Act is also self-evidently **irrational** – as was again made clear by the government itself in its Impact Assessment on the Transport Strikes (Minimum Service Levels) Bill:

    "In addition to the potential increase in strike action prior to MSLs being introduced, a further significant unintended consequence of this policy could be the increase in staff taking action short of striking. Where services are reliant on staff working additional hours, this could have a significant negative impact on the level of services provided and it is important to note that such action could continue even when MSLs are in place, (so it could be that instead of taking strike action, action short of strike becomes a more prevalent form of lawful protest). This could further disrupt the interests of the workers and businesses the legislation seeks to protect."[27]

67. The same Impact Assessment also warns of the risk of "an increased frequency of strikes following a Minimum Service Level being agreed. This would reduce the overall impact of the policy as although service levels would likely be higher than the baseline, it could mean that an increased number of strikes could ultimately result in more adverse impacts in the long term".[28] These concerns will also be compounded by the greatly increased scope of the Strikes (Minimum Service Levels) Act.

68. Turning to the content of the Strikes (Minimum Service Levels) Act itself, the TUC believes that it is clearly in breach of ILO Convention 87, on multiple grounds. These relate to

    i) the wide powers of the government (not Parliament) to define the scope of the sectors to be covered by MSLs, as well as the MSL to be guaranteed

[27] Ibid, para 100.

[28] Ibid, para 101. The concerns in the Impact Assessment would appear to be supported by evidence from war-time prohibitions on the right to strike. As restrictions tighten to make strike action impossible, difficult or ineffective, workers will inevitably be driven to other forms of protest.

ii) the power of the employer to requisition workers under arrangements unilaterally imposed, and in particular the power to requisition trade union officials

iii) the duties imposed on the trade union to ensure that requisitioned workers serve the interests of the employer rather than its members.

69. Pursuing this legislation is in direct contravention of the CAS's request that the UK government "ensure that existing and prospective legislation is in conformity with the Convention".

Electronic balloting

70. The TUC is extremely disappointed that the government continues to make no progress despite the ILO's request that the government "facilitate electronic balloting (e-balloting)".

71. It remains forbidden for unions to use electronic balloting in statutory ballots such as for union leadership roles or for industrial action.

72. This is despite further evidence earlier this year of the problems caused by reliance on this method of balloting alone. The NAHT, which represents school leaders, reported that it had narrowly missed the 50 per cent turnout threshold required in a ballot for industrial action when the vote coincided with disruption to postal services.[29]

73. Unions increasingly use electronic balloting for non-statutory ballots such as indicative votes on pay claims. Other organisations such as the National Trust, use eballoting for key votes.

74. Indeed, members of the Conservative Party were invited to vote electronically when deciding on the party's new leader and therefore new Prime Minister.

75. A review of eballoting, which was required by the Trade Union Act 2016, which was published in December 2017, recommended pilots of eballoting in non-statutory areas as a first step. But nearly five years on, ministers have yet to formally respond to this review. The only notable development has been a media report that the former Secretary of State for Business, Energy and Industrial Strategy planned to reject the recommendation of pilots on the grounds that eballoting could be "manipulated by 'ill-intentioned' states such as Russia".[30]

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[29] NAHT (January 2023). *School leaders' union to consider re-running industrial action ballot due to postal disruption, as leaders in England and Wales vote to take action* www.naht.org.uk/News/Latest-comments/Press-room/ArtMID/558/ArticleID/1930/School-leaders%e2%80%99-union-to-consider-re-running-industrial-action-ballot-due-to-postal-disruption-as-leaders-in-England-and-Wales-vote-to-take-action

[30] Malnick, E. (25 June 2022). "Kwasi Kwarteng to axe plans for unions to hold electronic strike votes," *The Telegraph Online*

76. Unions strongly believe eballoting would better meet the expectations of members and would encourage greater participation in unions' democratic structures. It is inappropriate for modern unions that postal-only ballots are the only option for statutory ballots.

Certification Officer

77. The CAS requested that the UK government "limit and define the investigatory powers of the Certification Officer to ensure that these powers do not interfere with the autonomy and functioning of workers' and employer's organizations".

78. The TUC has not been engaged by the government on this issue.

79. The powers of the Certification Officer remain unchanged.

80. Trade Union Act 2016 contained measures to overhaul the role of the Certification Officer (CO) which is responsible for statutory functions relating to trade unions and employers' associations. These included:

    - a levy paid by trade unions and employer organisations to fund the CO
    - financial penalties on unions for breaches of statute
    - for the CO to be given greater investigatory powers.

81. For six years these provisions remained dormant.

82. However, without warning, in June 2021 the government announced it intended to activate those powers. After passing the short Parliamentary process required, they became active in April last year.

83. Before these rules were brought into force Britain's trade unions were already highly regulated.

84. These changes tip the balance of power further towards the state and, we believe, put the government at odds with Convention 87 Article 4.

85. There is no evidence that the Certification Officer requires these powers. Her latest annual report shows that just 27 complaints were subject to formal decisions over the 12 months. Of these just three were upheld and one enforcement order made.[31]

86. The Certification Officer said she had not found any reason to use these new powers over the last year.

87. However, they remain a threat to trade union rights.

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[31] Certification Officer for Trade Unions and Employers' Associations (2023). *Annual report 2022-2023*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1166838/27_6_23_AR_final.pdf

88. The new investigatory powers will allow the Certification Officer to demand documents with sensitive information on the slimmest of bases.

89. The sensitivity of information about trade union activities is recognised in data protection laws which give them special protection. There is a long history of hostile employers or extremist groups seeking to victimise trade unionists.

90. The Certification Officer has stated that she will demand documents "where she has good reason to do so, and where she has reason to believe that the specific documentation exists".[32]

91. This is too low a threshold and leads to lots of scope for a Certification Officer to act against trade unions in future.

[32] Certification Officer (2022*). Implementing the Remaining Provisions of the Trade Union Act 2016 - April 2022*, Department for Business, Energy and Industrial Strategy

Consultation with social partners

92. The CAS requested that the UK government "improve consultation of the social partners on legislation of relevance to them".

93. At the time of writing there have been no attempts by government to improve consultation with trade unions.

94. It is notable that in July the High Court quashed regulations that allowed agencies to supply workers to replace people taking strike action.[33] It found that the government had failed to consult in line with the Employment Agencies Act 1973.

95. As stated above, the government provided just six weeks to respond to the Code of Practice on the "reasonable steps" to be taken by trade unions in relation to minimum service levels. This is half the standard consultation time and no particular provision was made for engagement with the social partners. We believe this shows that the UK government has responded inadequately to this request.

[33] Associated Society of Locomotive Engineers and Firemen v Secretary of State for Business and Trade [2023] EWHC 1781 www.judiciary.uk/wp-content/uploads/2023/07/ASLEF-v-Secretary-of-State-for-Business-and-Trade-judgment-130723.pdf