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PROTECTING THE RIGHTS OF TRADE UNIONS AND PROTESTORS



Wednesday 25th January 2023

WiFi: DSC-Guests

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Nick Toms

A NEW ROUND OF ANTI-UNION LAWS

- Britain is experiencing a growing tidal wave of industrial action. Days lost through strikes are at their highest levels since the 1980s when those taking action included steelworkers, printers, dockers, train drivers, nurses and, of course, the miners
- The response of the government to date has not been to recognize the genuine issues that the cost of living crisis and decade of austerity has created for many workers. They have not sought to negotiate or compromise any of the disputes so far.
- Instead, they are proposing a further very significant assault on the rights of trade unions and their members through the introduction of this Bill
- This Bill coupled with the proposals in the Public Order Bill will further seriously damage the right to protest effectively in the UK

DAYS LOST THROUGH INDUSTRIAL ACTION

- Days lost due to industrial action

1980 – 12 million

1981 – 4.3 million

1982 – 5.3 million

1983 – 3.8 million

1984 – 12.1 million

1985 – 6.4 million

1986 – 1.9 million

1987 – 3.5 million

1988 – 3.8 million

2014 – 0.8 million

2015 – 0.2 million

2016 – 0.3 million

2017 – 0.3 million

2018 – 0.3 million

2019 – 0.2 million

2020 – 0.02 million

2021 - 0

2022 – 1.6 million (excl Dec)

- Source: ONS

- From 1990 to 2014 there were only five years in which the number of lost working days exceeded a million, the last being 2011.

NO RIGHT TO STRIKE UNDER UK LAW

- The 'right to strike' or take other forms of industrial action is fundamental to the ability of trade unions to represent their members. The stronger the 'right to strike' the more effective trade unions will be in securing better terms and conditions etc. The weaker the right, the easier it will be for employers to impose their will.
- There is no positive right to strike under UK law
- Under the common law, the judge created industrial torts effectively make strike action unlawful. Any strike will break one or more of the industrial torts e.g. inducement to breach of contract. The employer can seek an injunction to restrain the strike and/or damages
- UK statute law has not provided a right to strike. Instead, it has enabled industrial action by providing immunity from the economic torts where a trade union is acting 'in contemplation or furtherance of a trade dispute' ("the golden formula")

THE INTRODUCTION OF ANTI-UNION LAWS

- This presentation cannot possibly cover the development of the anti-union legislation since the 1980s. A brief overview is all that is possible
- Up to the late 60s there were no significant statutory provisions relating to strikes and trade unions. Both sides in industry were largely left to get on with things themselves
- The post WW2 period saw significant advances in social reforms and redistribution of wealth. These included the NHS, state education, public ownership of significant areas of the economy, social housing, legal aid
- The taxation system was used to redistribute wealth. In 1979, the top rate of income tax was 83% with the base rate being 33%. The top rate of tax on investment income was 98%.

THE NEO-LIBERAL COUNTER OFFENSIVE

- The world economy moved into ever greater difficulties in the 1970s with high inflation, particularly, due to oil price increases. The welfare state was increasingly considered by big business and the establishment as unaffordable. They also saw the trade unions as too powerful.
- There were attempts to rein in the trade unions in the late 1960s (In Place of Strife) and early 1970s (Heath's Industrial Relations Act 1970). They were unsuccessful.
- The election of the Thatcher government in 1979 saw a more calculated and, ultimately, brutal counter-offensive against the trade unions, welfare state etc.

THE ANTI-UNION LAWS

- Unemployment was allowed to increase to previously un-heard of levels to weaken support for industrial action
- A careful plan was followed to break the unions culminating in the miners' strike 1984-85
- Alongside all this, came the introduction of ever more wide-reaching statutory controls on trade unions. The anti-union laws operated by:
 - narrowing the meaning/scope of the 'golden formula'; and
 - introducing different areas where the statutory immunity from the economic torts is lost

THE ANTI-UNION LAWS (2)

- The areas where statutory immunity is lost include:
 - secondary action (except lawful picketing)
 - action to enforce union membership;
 - action to impose union recognition in third party contracts;
 - action in support of dismissed unofficial strikers;
 - action without proper notice to an employer;
 - action without a valid strike ballot
- In relation to the latter, a strike ballot will be deemed invalid in the event of a breach of any of the myriad of complex requirements for a ballot to be valid

TRADE UNION ACT 2016

- The action against trade unions did not end with laws introduced by the governments of Thatcher and/or Major (which were largely left intact under Blair/Brown)
- 2016 saw the imposition of new restrictions on strikes. These included,
 - a requirement for a turnout of at least 50% in strike ballots; Section 2
 - a requirement for at least 40% of those entitled to vote to support a strike for the ballot to be valid in relation to ‘important public services’; Section 3Regulations defines what is meant by ‘important public service’. They can only apply to certain categories as set out in Section 3(2E)
- In many ways the proposed new anti-union legislation follows on from the measure contained in the Section 3 of the Trade Union Act 2016 as the categories covered in Section 3 are identical categories to those in the Strikes (Minimum Service Levels) Bill
- The 2016 Act also introduced further requirements on the voting paper, information to be given to members and the Certification Officer

TRADE UNION ACT 2016 (2)

- The 2016 Act also,
 - increased the notice required to be given to an employer of industrial action from one to two weeks
 - required re-ballots to renew a strike mandate after 6 months
 - introduced a duty on unions to supervise picketing
- One of the lessons of history is that, ultimately, trade unions and industrial action cannot be suppressed by simply passing laws
- Undoubtedly, the anti-union laws did prevent/deter industrial action from 1990
- However, the huge array of anti-strike laws has failed to prevent the current wave of strikes. People have had enough. Undeterred, the government has decided to try and press ahead with new legislation

THE STRIKES (MINIMUM SERVICE LEVELS) BILL

- The Bill was introduced into the House of Commons on the 10th January 2023. It provides for so-called minimum service levels in the event of certain strikes
- If passed, it will work by amending the current anti-union legislation contained in the TULR to remove the statutory immunity from a trade union taking industrial action where a union fails to take reasonable steps to comply with minimum service levels set by the Secretary of State
- It will also remove unfair dismissal protection from workers who take part in a strike in defiance of their requirement to work to provide the minimum service level required by the Secretary of State as identified by the employer.

PURPOSE OF THE BILL (1)

- The Government said that the Bill “will ensure crucial public services such as rail, ambulances, and fire services maintain a minimum service during industrial action, reducing risk to life and ensuring the public can still get to work.”
- Grant Shapps referred to safety considerations when presenting the Bill,
“I am introducing a Bill that will give the Government the power to ensure that vital public services will have to maintain a basic function, by delivering minimum safety levels to ensure that lives and livelihoods are not lost.” (Hansard 10.1.23 at 1.08 pm)
- However, it is difficult to see how this applies, for instance, to education and transport at all. In other areas such as health and fire, trade unions come to local agreements already on minimum ‘life and limb’ cover.
- In reality, this Bill is designed primarily to reduce the effectiveness of industrial action. In transport this was readily apparent from the Impact Assessment from the now withdrawn Transport Strikes (Minimum Services) Bill from 2022.

PURPOSE OF THE BILL (2)

- The Impact Assessment from the Transport Strikes Bill stated government intervention was needed as,
“Strike action on the transport network can lead to widespread service disruption, as well as causing financial and wider negative impacts on the UK economy. Negotiations between unions and employers do not consider wider externalities such as the impact on the wider economy, the environment or categories of users who experience significant disbenefits from not being able to travel when they most need it. Government intervention is needed in the sector to protect the rights of the public to access the transport network to go about their daily lives, and this will be achieved through statutory requirements for minimum services levels to be provided in the event of a strike.”
- It is to be noted there is no reference to safety at all. It is all about reducing the impact on strikes. The Impact Assessment stated this sole objective in terms.

THE PROVISIONS OF THE BILL – WHICH SERVICES ARE COVERED

- The teeth of the proposed Bill are found in Schedule 1. Under Sch 1 Part 1, a new Clause 234C is inserted into TULR to allow the Secretary of State to make provision by way of regulations for the minimum levels of services in relevant services
- ‘Relevant services’ is not defined in the Schedule. Instead, it is to have the meaning given in the regulations by the Secretary of State; Sch 1 Part 3.
- The regulations can specify services falling into the following categories:
 - health services
 - fire and rescue services
 - education services
 - transport services
 - decommissioning of nuclear installations and management of nuclear waste and spent fuel
 - border security

NUMBER OF EMPLOYEES POTENTIALLY AFFECTED

- The proposed Bill will impact on the right to strike of a very significant number of employees (Source: ONS)
 - health 2.5 million
 - fire and rescue services 50,000
 - education 2.6 million
 - transport 650,000
 - nuclear installations etc. 9,000
 - border security 9,100

WIDTH OF 'RELEVANT SERVICES' (1)

- The 2019 Tory manifesto contained a pledge to introduce legislation to “require that a minimum service operates during transport strikes.” A Bill to this effect was listed in the December 2019 Queen’s Speech, but not introduced in the 2019-21 session or repeated in the 2021 or 2022 Queen’s Speeches.
- It is immediately apparent that the proposed Bill goes well beyond this, covering the services listed in Section 3(2E) of the 2016 Act. Consequently, the government has no mandate for much of this new legislation.
- It is further apparent that the ‘services’ categories covered by the Bill are drafted in very wide terms.
- Education, for instance, potentially covers a huge area. It is not just schools, but universities, further education colleges, nurseries, and it matters not, seemingly, whether they are publicly or privately run. The same applies to all the other widely drawn areas.

WIDTH OF 'RELEVANT SERVICES' (2)

- What is a 'relevant service' in each category of service covered is to be determined by the Secretary of State when drafting the regulations; see Sch 1 Part 3.
- There is no definition of what is meant by a 'relevant service' in Sch 1. Nor are there any indications or considerations set out anywhere in the Bill or its schedule. The level of discretion this Bill gives to the Secretary of State is extraordinary
- In the Trade Union Act 2016, Section 3(2D) provided that the meaning of 'important public services' would be set out in regulations by the Secretary of State. However, none have been made.

MINIMUM SERVICE LEVELS (1)

- The Bill provides that the Secretary of State will define 'minimum service levels' which will be set out in the regulations; proposed Section 234B(1) TULR
- Sch 1 provides in proposed Section 234F(1) TULR that before making regulations under Section 234B the Secretary of State must consult with such persons as he/she considers appropriate. Consultation can take place before or after the Bill becomes law; proposed Section 234F(5)
- The requirement to consult is mandatory but the Secretary of State is given a complete discretion as to who to consult. Nothing in the Bill, as it currently stands, covers who this might include e.g. the relevant trade unions
- It could, of course, be arguably irrational under public law not to consult the relevant trade unions

MINIMUM SERVICE LEVELS (2)

- There is a major difference between the new Bill and the previous Transport Strikes Bill other than the wider categories covered
- The Transport Strikes Bill provided that minimum service levels were to be determined,
 - if possible, by agreement between the employer and trade union(s). The Bill specified who should be consulted and what matters should be taken into account
 - in default of agreement, by the Central Arbitration Committee (CAC)
 - in default of agreement or determination by the CAC, by regulations made by the Secretary of State.
- The new Bill has the proposed previous last resort as the only resort
- The government relied on the process of negotiation/CAC determination in its memorandum explaining how the Bill complied with the ECHR/International Law; see e.g. paras 41-42

HOW THE BILL IS PROPOSED TO OPERATE – WORK NOTICE (1)

- Where minimum service regulations have been made, an employer may give a work notice to a trade union in the event of a proposed strike. This sets out that minimum service levels are to apply in relation to the strike; proposed Section 234C(1) TULR
- A work notice must identify the persons required to work during the strike in order to secure that the levels of service under the minimum service regulations are provided, and specify the work required to be carried out by them during the strike in order to secure that those levels of service are provided; proposed Section 234C(4)
- The work notice must not identify more persons than are deemed reasonably necessary for the purpose of providing the minimum level of service under the regulations; proposed Section 234(5)

HOW THE BILL IS PROPOSED TO OPERATE – WORK NOTICE (2)

- Before giving a work notice, the employer must— (a) consult the union about the number of persons to be identified and the work to be specified in the notice, and (b) have regard to any views expressed by the union in response
- Note: there is no requirement for an agreement of any kind with the union. Just to have regard to their views. This is different from the Transport Strikes Bill where the minimum service level was to be determined first and foremost by agreement as above
- The Work Notice can be varied by the employer following the same consultation; see proposed Section 234(8)(9) TULR

ENFORCEMENT

- The Work Notice is to be enforced in two ways.
- First, the trade union must take reasonable steps to ensure that all its members in the notice comply with its provisions. If they fail to do this, they lose their statutory immunity under the golden formula and can be sued in tort – damages and injunctions
- Injunctions may be more difficult re a Work Notice; see Section 236 TULR preventing injunctions compelling an employee to work
- Second, individual members who are required to work but do not work will lose their right to claim unfair dismissal based on taking part in official industrial action if dismissed; see proposed amendment to Section 238A TULR

THE IMPACT OF THE BILL

- This Bill is really an outrage. The government is seeking to suppress any form of effective industrial action, especially, in the public sector
- It won't work. Strikes are happening not due to people being greedy or bloody minded but, instead, because workers in many industries have simply had enough. They have been pummeled by the neoliberal agenda for almost a generation and, in particular, since 2010 with austerity. They are at breaking point
- If the Bill is implemented it will inhibit effective trade unions to the point where their existence is called into question. That, of course, is what the government and the people they represent want

COMPATIBILITY WITH ECHR AND INTERNATIONAL LAW

- The front of the Bill contains a statement from the Secretary of State that its provisions are compatible with the ECHR rights. However, it must be seriously doubted as to whether this is right
- Interestingly, the Department for Transport produced a Memorandum on ECHR to accompany the Transport Strikes Bill, to address issues that were said to arise relating to the Bill. Paragraph 46 of the Memorandum stated that,

“The Government also considers that it is compatible with Article 14 to extend the MSS requirements only to the transport sector in this Bill and not, for instance, to other important public service sectors”

COMPATIBILITY WITH ECHR AND INTERNATIONAL LAW (2)

- The Memorandum went on to explain in some detail why transport should be treated differently to other areas. It stated that in other areas, unlike transport, there were already important mitigating factors in the event of industrial action. These included
 - Section 240 TULR (emergency provision re life and limb)
 - Sections 29/30 Fire and Rescue Services Act 2004 (Secretary of State can direct service levels for fire and rescue)
 - various statutory duties on schools
- The Memorandum also referred to the difficulty in determining minimum service levels in education given the numbers involved. This must also apply to health
- It is difficult to see what has changed since 2022 to make these measures now necessary in a democratic society

THE RELEVANT PROVISIONS OF THE ECHR

- Article 4(2) provides that no one shall be required to perform forced or compulsory labour. The exceptions include:
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations
- Article 11 covers freedom of association. The ECtHR has held the right to strike falls under the protection of Article 11 as an important aspect of the freedom of association and the right to form a trade union and for that trade union to be heard and to bargain collectively. The government accepts that Art 11 is engaged.

THE RELEVANT PROVISIONS OF THE ECHR (2)

- The ECtHR and other international organisations only accept interference with the right to strike/freedom of association in limited circumstances.
- The EHRC on its webpage on Article 11 explains when this right can be lawfully restricted, saying: There are some situations where a public authority can restrict your rights to freedom of assembly and association. This is only the case where the authority can show that its action is lawful, necessary and proportionate in order to:
 - protect national security or public safety
 - prevent disorder or crime
 - protect health or morals, or
 - protect the rights and freedoms of other people.Action is 'proportionate' when it is appropriate and no more than necessary to address the issue concerned.
- Article 14 covers discrimination in relation to the exercise of the other rights under the ECHR. Protected status include trade union membership. The government accepts Art 14 is engaged

INTERNATIONAL LABOUR ORGANISATION

The ILO states that,

“The Committee has stated on many occasions that strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population.”

ILO Digest of decisions and principles (fifth (revised) edition, 2006) the ILO Committee of Freedom of Association at para 541

OGNEVENKO V RUSSIA (2018) ECHR 950

- The government cite this case in both the memorandum on the ECHR for the Transport Strikes Bill and that for the new Bill as part of their justification for saying the minimum service level requirements are a proportionate interference with Art 11 freedom of association rights
- A closer study of the case suggests that, far from supporting the government position, it does the opposite with the government citing passages out of context and/or incorrectly.
- The case involved a challenge to Russian treatment of rail transport as an essential service so justifying banning strikes. The claimant had been dismissed partly for taking part in a rail strike
- The ECtHR held that Article 11(2) of the Convention requires that restrictions on the freedom of association, such as a prohibition of the right to strike, must be “prescribed by law”, pursue one or more legitimate aims and be “necessary in a democratic society” for the achievement of those aims; see para 63

OGNEVENKO V RUSSIA (2018) ECHR 950 (2)

- The ECtHR stated that the right to strike, which falls under the protection of Article 11 of the Convention, is an important aspect of the freedom of association and the right to form a trade union and for that trade union to be heard and to bargain collectively; see para 70.
- The ECtHR accepted that strikes could be prohibited in essential services; see para 70. However, they went on to hold that neither the ILO nor the ECSR considered transport in general, and railway transport in particular to constitute an essential service, an interruption of which could endanger the life or health of (a part of) the population and that there was no reason for the Court to reject the existing international approach to the definition of an essential service and to consider the railway transport as such; see para 72.
- The ECtHR further said that, even if railway transport was an essential service, serious restrictions would require solid evidence to justify their necessity.

OGNEVENKO V RUSSIA (2018) ECHR 950 (3)

- The ECtHR did accept that railway transport was a public service of primary importance where a minimum service requirement could be justified; see ILO Digest of decisions and principles (fifth (revised) edition, 2006) the ILO Committee of Freedom of Association at para 621
- However, the ECtHR referred also to the safeguards the ILO requires where there is an interference with the right to strike including:
 - The minimum service levels are truly minimum
 - That Minimum service levels are negotiated and/or ultimately subject to independent arbitration
 - The provision of an alternative safeguard where strikes are restricted such as adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which awards, once made, are fully and promptly implemented.

OTHER COUNTRIES

- The government have tried to justify the Bill by saying other countries have minimum service levels in the event of strikes. That is true but not in the way proposed by the government
- Spain has minimum service levels is services 'essential' for the community. The level of service must not be out of proportion to the breach of fundamental rights threatened by the strike. Further, judicial and negotiations determine what the level of service should be
- France and Italy also have minimum service levels in certain areas but again these are subject to negotiation and agreement

POSSIBLE WAYS THE BILL COULD BE CHALLENGED LEGALLY

- Legal action should only ever be seen as an auxiliary to more effective forms of trade union action including industrial action. Courts/judges are not generally sympathetic to trade unions and industrial action.
- However, there may be the following possibilities depending on what finally emerges from Westminster:
- A declaration of incompatibility under the HRA. Primary legislation cannot be struck down by the courts but this might be possible
- Challenges to regulations made under the Bill based on the ECHR and/or under normal judicial review principles if the regulations define relevant services in ways well beyond what might be considered an essential service

POSSIBLE WAYS THE BILL COULD BE CHALLENGED LEGALLY

- Challenges to regulations made under the Bill based on the ECHR and/or under normal judicial review principles in relation to the proposed level of minimum service
- Challenge to a work notice issued by an employer on the basis that it names more people than are necessary to provide a minimum service