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Industrial Action and Minimum Service Levels

11 January 2023 Sarah Hooton

The Government has issued the first draft of the **Strikes (Minimum Service Levels) Bill** (Strikes Bill) which appears to be intended to replace last year's **Transport Strikes (Minimum Service Levels) Bill** (Transport Strikes Bill), but with a considerably wider mandate.

Under the Transport Strikes Bill, it was intended that the obligation would be placed on relevant employers to take steps to consult over and agree minimum service levels, with the ability for the Central Arbitration Committee to step in where agreement could not be reached. This is not the approach taken under the wider Strikes Bill; instead, power is reserved to the Secretary of State to specify the relevant minimum service levels, after consultation with such persons as the Secretary of State considers appropriate.

The scope of the Strikes Bill as it is currently drafted is very wide. It would apply across England, Scotland and Wales. Minimum service levels can be issued for any services falling within: health services; fire and rescue services; education services; transport services; decommissioning of nuclear instalments and management of radioactive waste and spent fuel; and border security. None of these services are defined further, and whilst the Government press release makes reference to "access to public services", the Strikes Bill is not in fact drafted as being limited only to public sector organisations or service providers.

The Government's press release makes a number of references to the need to ensure the safety of the public; however, there is no limitation within the Strikes Bill to requiring minimum service levels linked to safety (as opposed to operational convenience or to minimise disruption within society), nor in fact any guidance or thresholds as to what "minimum" means. In theory, therefore, the minimum required could be at or near full-service provision at particular times – for example, during 'usual' commuting times, or during exam periods within schools – or for longer periods, such as during winter months where health services are already stretched. The current draft therefore has the potential to entirely undermine the right to strike.

The Government has indicated that it intends to consult on minimum service levels for fire, ambulance and rail services first. Whilst fire and ambulance service levels may fall within a public safety argument (albeit that unions within those sectors would argue that safety considerations are already taken into account with any industrial action), the rail focus appears to be prompted simply by the disruption caused by the recent rail strikes. The Strikes Bill is also drafted specifically to cover strikes taking place after the regulations come into force, even if the strike notice or relevant ballot pre-dated those regulations.

The press release indicates that the Government hopes that it will not need to issue any minimum service levels for employers outside of fire, ambulance and rail and that it expects those employers to work together to reach voluntary agreements to enable them to deliver a reasonable level of service. The power of the government to step in has been reserved "should that become necessary". This is not, however, mirrored in the Strikes Bill – the "works notice" provisions (see below) only apply where the Secretary of State has issued minimum service level regulations and there is no reference to voluntary minimum service levels being agreed.

Where minimum service levels regulations have been made and a trade union gives notice of industrial action, relevant employers will need to consult with unions about the numbers of staff required to meet those minimum service levels. A "works notice" must then be issued identifying those employees who are required to work to secure the minimum service levels, together with the work that they are required to do. The notice must not specify more persons than are reasonably necessary to provide the services, and no regard must be taken of union membership when identifying who is required to work. An employee who is identified in the works notice but who nevertheless takes part in the industrial action will not fall within the deemed unfair dismissal provisions under the Trade Union and

Labour Relations (Consolidation) Act 1992. Unions may also be liable to pay damages if they fail to take reasonable steps to ensure all those who are named in the works notice comply with that notice. No further information as to what “reasonable steps” would be is given.

As would be expected, there has been considerable union opposition to these proposals. The TUC, referring to the Strikes Bill as “the latest attack on the right to strike”, has called for the Bill to be rejected, pointing to the Government’s own Impact Assessment on the Transport Strikes Bill to support the argument that minimum service levels prolong disputes and lead to more frequent strikes.

Although the Government has indicated that it doesn’t want to legislate unless it has to, it is at the same time seeking to reserve considerable power to impose service levels on a huge number of employers, employees and unions across widely drawn sectors, without any fetters on the service levels set, nor the circumstances in which service levels can be imposed. It is perhaps unsurprising that the Government’s attempts to restrict industrial action are being described as “draconian”.

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