

Industrial action and minimum service levels within education

13 January 2023  Sarah Hooton

With headlines hitting the press of industrial action and ballot results within the education sector, the government has issued the first draft of the Strikes (Minimum Service Levels) Bill ('Strikes Bill') which is its second attempt at imposing minimum service levels, following last year's draft Transport Strikes (Minimum Service Levels) Bill.

The scope of the Strikes Bill as it is currently drafted is very wide. It would apply across England, Scotland and Wales and 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.

Minimum service levels can be issued for any education services, as well as services falling within: health services; fire and rescue 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.

On the face of it, therefore, all schools could be in scope, regardless of their governance structure or funding arrangements (as well as pre-schools and further and higher education providers). 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.

Public safety

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.

On the current wording, minimum service levels could be set for schools for any reason – whether to avoid disruption to education or to minimise the impact of industrial action on working parents. Further, whilst minimum service levels could be set at a level to enable continued provision for the most vulnerable children (or, for example, to oblige a similar "key-worker" provision as was in place during the pandemic) in theory, the minimum required could be at or near full-service provision, such as for particular year groups during exam periods.

“...potential to entirely undermine the right to strike”

There would in fact be nothing to prevent the minimum service level being set to require full education provision for all year groups at all times during the academic year. The current draft therefore has the potential to entirely undermine the right to strike.

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".

Putting the onus on employers

It is not in any way clear how such voluntary arrangements are meant to operate within the education sector and in particular what degree of cooperation is expected of employers to both agree and then meet general minimum service levels. This sort of voluntary arrangement puts the onus onto employers and, whilst the degree of control may be welcomed by some, others may view this as an attempt to shift the focus of the unions onto local employers and away from national pay disputes.

Furthermore, voluntary arrangements are not referenced in the Strikes Bill at all – the “works notice” provisions (see below) apply where the Secretary of State has issued minimum service level regulations and would not apply where there are only voluntary arrangements in place.

Work notice provisions

Where minimum service levels regulations have been made and a trade union gives notice of industrial action, then the “works notice” provisions apply, although there is a mix of “may” and “must” wording included in the draft.

Relevant employers will need to consult with unions about the numbers of staff required to meet those minimum service levels (although the drafting is silent on the consequences of employers not maintaining the minimum service levels). A “works notice” must identify 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.

Union opposition

As would be expected, there has been considerable union opposition to these proposals. 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.

“draconian”

It is perhaps unsurprising that the government's attempts to restrict industrial action are being described as “draconian” and it remains to be seen firstly whether the proposed legislation will survive in its current form and, if so, how the reserved powers will actually be exercised by the government.

The impact on schools and other educational providers, particularly in respect of employee morale and union relations (already strained as a result of the impact of the cost of living and national pay disputes), is not, at this stage, clear – but it is certainly a potential area of reform to keep an eye on.

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