AN IER BRIEFING

The Strikes (Minimum Service Levels) Act

Published September 2023

The Institute of Employment Rights
4th floor
Jack Jones House
1 Islington
Liverpool
L3 8EG
0151 207 5265
www.ier.org.uk

The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade-union rights and labour law by providing information, critical analysis and policy ideas through our network of academics, researchers and lawyers.

This IER briefing does not necessarily reflect the collective view of the Institute. The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

Ben Sellers
Director, Institute of Employment Rights
September 2023
ben@ier.org.uk

The Strikes (Minimum Service Levels) Act

The Strikes (Minimum Service Levels) Act 2023 became law in July, following a lengthy fight in the House of Lords. It defies every legislative principle laid down by the relevant Parliamentary Committees which examined the Bill before it finally received Royal Assent. The legislation, which originated as a Transport Strikes Bill in 2022, has been hugely controversial and subject to national and international criticism.

A brief history

The Conservative manifesto in 2019 general pledged to introduce legislation to "require that a minimum service operates during transport strikes." This was mentioned in the Queen's Speech in December 2019, but not introduced in the 2019-21 Parliamentary session or repeated in the 2021 or 2022 Queen's Speeches.

However, in the summer of 2022, then Transport Secretary **Grant Shapps** pledged to introduce this measure as part of a 16-point plan to deal with growing industrial action, as laid out in the Daily Mail.

In October 2022, the **Transport Strikes (Minimum Service Levels) Bill** was introduced to the House of Commons. This Bill would allow minimum service levels to be introduced during strikes in certain transport services to be specified by the Secretary of State.

This Bill, specific to transport, was then superseded by a more general one targeting of public sector strikes, in the **Strikes (Minimum Service Levels) Bill** introduced into Parliament by the government in January 2023.

Objections

A whole series of objections were raised throughout its passage in the House of Commons and in the Lords, as well as the trade-union movement and international human-rights organisations.

- To begin with, it is a 'skeleton Act', so the Minister has the unilateral power to fix the minimum service levels in each of the six sectors covered. In addition, there is no specific obligation to negotiate with or even consult the unions and employers who are directly affected by the Act. And it is likely only to exacerbate tensions between employers and unions, overriding negotiated local agreements with imposed, national levels set by government, intensifying disputes.
- If a union fails to take 'reasonable steps' to ensure that the legislation is complied with, it will lose its protection against claims for damages and injunctions. The Act imposes new and unprecedented restrictions on the right to strike, these restrictions extending potentially to six sectors: health services; fire and rescue services; education services; transport services; nuclear decommissioning; and border security.

As the IER's **Professor Keith Ewing** explains in a recent article:

"The Act authorises ministers to make regulations for minimum service levels to be provided during a strike in each of these sectors. Where the regulations are made, an employer will be authorised to issue a work notice to a union to ensure that the service levels are met. The effect of the work notice is that employees will be required to attend for work during the strike and to perform duties demanded by the employer.

“The only constraints in the Act are that a work notice must not identify more persons than are reasonably necessary for the purpose of providing the levels of service under the minimum service regulations, and that the work notice must be given to the union at least seven days before the first day of the strike. Note that the work notice is to be issued to the union not the employees affected directly. The union is then required to take ‘reasonable steps to ensure that all members of the union who are identified in the work notice comply with it’.

“If the union fails to take reasonable steps, it loses all legal protection for the industrial action, and its members lose their automatic unfair dismissal protection for taking part in a strike. This means the union must take active steps to break its own strike or risk an injunction by an employer requiring the action to be called off. The question which arises is precisely what it means to ‘take reasonable steps’ to ensure that its members go to work and break the strike. There is nothing in the Act to provide any guidance. Instead, the government has issued a draft code of practice on which it is currently ‘consulting’.

“As the IER predicted when the Bill was first introduced, the duty to take reasonable steps will impose intolerable obligations on trade unions. This is vindicated by the different steps with which the Code of Practice will expect affected unions to comply. The first – on receipt of a notice – is a requirement to identify which of the workers in the work notice are members of the union. The work notice communicated to the union will include both members and non-members alike. Having identified which of the workers in the work notice are members, the union will be required to issue each member personally with a compliance notice.

“In a big dispute (such as the recent teachers dispute) this means that the union may be required to sift the names of thousands of workers to identify its members and then communicate with them. Equally troubling is the information the compliance notice must contain. Thus, the union will be expected to advise members ‘not to strike during the periods in which they are required by the work notice to work’, and also ‘encourage them to comply with the work notice’. This is to be done electronically or by first class post and is to be addressed to the member individually.”

Violation of the right to strike.

The Strikes (Minimum Services Levels) Act violates the right to strike, a right established by many international treaties which the UK has ratified.

British government claims that (a) minimum service levels are authorised by the ILO, and (b) that legislation of this kind operates in France, Spain and Italy are, on the face of it, correct but deeper analysis reveals that what is being proposed by the British government is inconsistent with ILO obligations as determined by the ILO supervisory bodies – particularly in relation to French law and Spanish practice. Quite apart from the fact that MSLs under the Bill do not need to be agreed by the union or the subject of a third-party decision, it is likely that other aspects of the Bill are inconsistent with ILO Convention 87. These include:

- the power of the employer to requisition trade-union officials requiring them to work during a strike and to cross picket lines;
- the duty on the union to take “reasonable steps” to ensure that members requisitioned by work notices unilaterally issued by the employer do not take part in the strike;
- the penalties imposed on the union where it fails to take such steps, including, for example, a failure to instruct members to cross picket lines;

- the removal of unfair-dismissal protection from trade-union members who refuse to cross picket lines, and
- the removal of unfair-dismissal protection from all strikers where the union has not taken "reasonable steps" to ensure those subject to a work notice do not participate in the strike.

Spotlight on the Labour Party

With a General Election on the horizon, attention has also been focused on what a new government might do in relation to this pernicious legislation and what, in the meantime, the trade-union response will be. In a recent summary of the Minimum Services legislation, **Lord John Hendy** (Chair of the IER) and **Professor Keith Ewing** (President of the IER) looked ahead to the political and industrial response:

"Repeal of this Act must be an early priority of a Labour government. It passed despite criticism from a host of parliamentary committees, and despite resistance from the House of Lords. The latter had proposed number of important amendments to the Bill, none of which the government was prepared to accept. But although, ironically, it was the unelected House of Lords which sought to defend trade-union freedoms, as Mick Whitley MP said in the Commons, 'no amendments could ever salvage this Bill'.

"Pending repeal, unions will be considering whether the awaited minimum service level regulations can be challenged in the courts. In doing so they will have been encouraged by the recent High Court decision striking down regulations to enable agency workers to be used as strike-breakers. According to the court, the government's failure to consult was 'so unfair as to be unlawful and, indeed, irrational'. We can expect a wide range of legal objections to the regulations under this Act.

More immediately, however, unions will be seeking to work around the legislation, persuading employers to agree not to serve work notices and, instead to negotiate voluntary minimum service agreements, as usual. They will also be considering other ways of exerting industrial pressure, for example by taking other forms of industrial action than strikes since the Act only applies to strike action. Industrial action is unlikely to decline, but its form may radically change as a result of this Act."