IER & CTUF JOINT BRIEFING

The Strikes (Minimum Service Levels) Act 2023 and Regulations

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The Strikes (Minimum Service Levels) Act 2023

I Introduction

The Strikes (Minimum Service Levels) Act 2023 became law following a lengthy fight in the House of Lords. It continues the raft of anti-union legislation started by Margaret Thatcher in 1980, making UK law on trade unions 'the most restrictive in the western world' as Tony Blair famously described it in 1997. Labour governments did not change this regime when they had the chance to do so between 1997 and 2010. Since then, of course, there have been yet further restrictions, including the Trade Union Act 2016.

In consequence of these restrictive laws, it is extremely difficult for trade unions to do their job of defending working-class living standards. This is well demonstrated by the fact that the proportion of our 34 million workers who have the benefit of a negotiated collective agreement has slid from more than eight out of ten in the 1970s to just over two out of ten today. This is one of the lowest levels of collective bargaining coverage in Europe. The result has been a marked decline in living standards. The value of wages has not risen in real terms since May 2007, so that half of British workers now earn less than £30,000 pa, far less than the £50,000 a year minimum calculated by the Rowntree Foundation to be needed for a family of four to be warm, dry, clean and fed.

It is this stagnation in the value of wages which has been a major contributor to the fact that 14.4 million of the UK's 67 million inhabitants live in *poverty* and 3.8 million in *destitution*. Two-thirds of working-age adults in poverty live in a household where someone is in work. More people in work are reliant on benefits than those not in work. The Strikes (Minimum Service Levels) Act 2023 is yet another measure to prevent workers, through their unions, pushing back, as they have been over the last 18 months, against low wages and poor conditions. The Act is not about preventing disruption to the public in a strike, as the government claims.

In the pages that follow we provide a critical account of the Act, which quite simply:

- Empowers ministers to make Regulations to impose minimum service levels in six different public services;
- Empowers an employer to issue a work notice to a trade union in the public services where MSL Regulations have been made:
    - Where a work notice has been issued, the workers who are subject to the notice in question can be required to work during the strike, failing which they may be dismissed;
    - Where a work notice has been issued, the union is required to take 'reasonable steps' to ensure that all members of the union who are identified in the work notice comply with the notice.

II Extensive ministerial power

The Act is objectionable not just in its underlying purpose but also in its form and content. The format of the Act is significant. It defies every legislative principle for good legislation. The parliamentary committees which examine draft legislation have many times reiterated that Acts of Parliament are supposed to set out on the face of the Act the essential elements of what the legislation will do. Only technical details should be left to ministers to specify in secondary legislation in the form of Regulations (statutory instruments).

These parliamentary committees examined what is now the 2023 Act before it was passed by Parliament and criticised its failure either to set out the minimum service level (MSL) intended for each of the six sectors to which it applies, or even to specify the factors which would be used to determine them. If the MSLs had been specified in the Bill they would have been subject to debate as the Bill passed through Parliament. Instead, the Act gives the minister complete discretion to set MSLs by Regulations – which, in the process of parliamentary scrutiny, cannot be amended.

The Regulations confirm the suspicion that the reason why the MSLs were not specified in the Act is that the government wished to conceal its intention to use this legislation not just to weaken strikes by certain workers but to remove the right to strike from many of them altogether. Had that fact been disclosed in the Bill, scrutiny would have been even more intense, particularly in the House of Lords.

The six sectors covered by the Act are: health, fire and rescue, education, transport, nuclear decommissioning, and border security. Millions work in these sectors, including many of the applauded workers who kept the country running during the Covid-19 pandemic. The sectors involve most major unions. But in making Regulations, though the Act requires ministers to consult whoever they believe to be appropriate, it does not require negotiation (or even consultation) with the unions – or even the employers – directly affected by the Act.

The fact that the MSLs were unknown until each set of draft Regulations was published is one reason why the government's Impact Assessment of the Bill was held by Parliament's Regulatory Policy Committee to be 'not fit for purpose'. Nevertheless, that Impact Assessment contained the revealing analysis that, far from diminishing the disruption strikes inevitably cause, the Bill could lead to:

> 'a general increase in tension between unions and employers. This may result in more adverse impacts in the long term, such as an increased frequency of strikes for each dispute'.

Indeed, since unions typically negotiate local minimum-service levels with employers (as they always do in many of the sectors involved), the imposition of national levels set by government is likely to upset the delicate negotiated balance and intensify the dispute. This is why so many employers, like all the unions, told the government the Act was neither wanted nor helpful. It is also the reason why many employers have, since the passing of the Act, undertaken not to deploy 'work notices' (see below) to compel workers to provide a MSL.

III Minimum Service Levels Regulations

It was only in December 2023, nearly six months after the Act had come into force, that the first MSL Regulations were published for passenger rail transport, border services and NHS ambulances. It was not until March 2024 that the MSL Regulations for fire and rescue services were published. The MSL Regulations for education and nuclear decommissioning are still awaited. The four sets of regulations published so far are as follows:

- ***The Strikes (Minimum Service Levels: NHS Ambulance Services and the NHS Patient Transport Service) Regulations 2023***

The MSL here is only for NHS ambulance and patient-transport services. The MSL is that emergency calls must be answered, 'triaged', and responded to in respect of conditions which are life-threatening or require clinical assistance at the scene or transport to a healthcare facility as they '*would be if the strike were not taking place on that day*'.

These are the normal and principal day-to-day duties of the staff involved. So it is not possible to read the Regulations as anything other than requiring normal service on strike days. Hence these ambulance and patient-transport workers are effectively banned from taking strike action. NHS employers have pointed out that the MSL 'will not replace the need for [voluntary agreed arrangements] but will make them harder to achieve'.

- ***The Strikes (Minimum Service Levels: Border Security) Regulations 2023***

In border security the relevant services to which the Regulations apply are (i) examination of people and goods coming in or going out of the UK, (ii) the patrol of ports and coastal waters, as well as (iii) the collection and dissemination of intelligence. Here the MSL is that on each day of a strike the services must be '*no less effective than they would be if the strike were not taking place on that day*'. Again, this can only be seen as a virtually total ban on these workers' right to strike. The government estimates that only 70-75% of Border Force would be required to provide this service, though more in smaller ports and airports where staffing levels are lower. Depriving 70% of the workforce of the right to strike appears to us to be serious enough.

The Regulations also apply to passport services, that is to say, 'any services for, or in connection with, the issuing of passports and other travel documents' provided by the Passport Office. Here, however, the MSL requirement that the service should be no less effective than on a non-strike day, only applies to '*such of those services as are necessary in the interests of national security*'. PCS will be able to give a clearer indication of the breadth of implications of this requirement, though the government will doubtless tend to exaggerate the number of workers required to perform what is an extremely opaque service level.

- ***The Strikes (Minimum Service Levels: Passenger Railway Services) Regulations 2023***

The third category covered by MSL Regulations is passenger railway services. It appears that the rail-freight employers refused the government's offer to be covered on the basis that they preferred to deal directly with their unions without this legislation complicating matters. Eurostar is also excluded. The MSLs for rail differ between three sectors: infrastructure (i.e.

keeping the railway running); train operations, and light-rail services (e.g. metros, trams, London Underground, Dockland Light Railway, etc).

The MSL both for train-operating services and light-rail services is that which is '*necessary to operate the equivalent of 40% of the timetabled services during the strike*'. The effect will be that those required to work the 40% service will lose their right to strike. RMT and ASLEF estimate that this is likely to be well in excess of 40% of normal staffing. This is because there will need to be cover for sickness and emergencies and additional staff to cope with the danger of overcrowding on platforms and trains consequent on a reduced service, a danger about which the regulations notably have nothing expressly to say.

In any event, it will often be the case that the complement of staff required for a 40% service will, in any event, not be much short of that required for a 100% service in order that each train (and each rostered member of staff) ends up, after providing a scheduled service, in the right place. The complexities of computing a 40% timetable are said to be virtually prohibitive to the extent that many senior managers regard it as hopeless.

For those covered by 'infrastructure services' (a very widely defined term which includes train-movement control, the maintenance of signals, communications, crossings, bridges, tunnels, and power, and the response to incidents on the line or to rolling stock), the MSL applies to priority routes listed in the Schedule to the Regulations (in fact, most of the network, and including loops and sidings connecting priority routes and depots). The MSL is to provide '*those services between the hours of 0600 and 2200*'. In short, signallers and maintenance staff on the relevant routes can only strike after ten o'clock at night and before six the next day. So, in reality, they are denied an effective right to strike.

The extent to which these MSLs are operable and effective remains in doubt. Since railways are safety critical, there will inevitably be a conflict between the obligations of a work notice and the Employment Rights Act 1996, ss 44 and 100, which entitle workers to leave a dangerous place of work where there is a serious and imminent danger to themselves or to others which they cannot avert.

- ***The Strikes (Minimum Service Levels: Fire and Rescue Services) (England) Regulations 2024***

The regulations for the fire and rescue services in England require that:

> calls for help are answered and assessed as they would be if the strike were not taking place on that day, personnel are summoned to provide an emergency incident response to each call for help which … requires such a response …. as if the strike were not taking place on that day, and management, control and direction of these services … is provided as it would be if the strike were not taking place on that day.

However, an 'emergency incident response' (essentially: extinguishing fires; protecting life or property in fires; and rescuing people in road traffic accidents) curiously requires only 73% of fire appliances and vehicles and their crews (though *all* 'national resilience assets'- specialised equipment - and their crews are required to be provided).

How the 73% was computed is a mystery. Its effect is that in a modest-sized fire station of three or fewer fire appliances, all will need to be operational and crewed in a strike. As to

control-room staff, the government 'factsheet' says that 'The minimum service level Regulations provide for the normal functions of a control room to be carried out during industrial action, as if it were a non-strike day.' Thus the right to strike in the fire service will be largely obliterated.

IV Work notices: a Duty to strike-break

As explained above, the Act enables an employer in a sector with a specified MSL, if faced with a strike, to serve a 'work notice' on the union seven days before the strike begins. The work notice identifies the workers required to work and the work they are to do during the strike.

Two points to note here.

- First, a strike-hit employer is not obliged to serve a work notice. Consequently, many unions are seeking agreement with employers that they will not do so. Many have acceded to such requests, including the Scottish and Welsh governments and Bolton, Sheffield, Islington, South Lanarkshire, Leeds, Liverpool, Glasgow, Dumfries and Galloway Councils.
- Secondly, the whole legislative scheme only applies to strikes, not 'action short of a strike' – so unions may prefer to engage in disruptive 'action short of a strike' if the threat of litigation under the legislation makes it difficult to run a successful strike. It is likely that unions will use more overtime bans, work-to-rules, and other techniques in consequence of the threat of work notices.

It should be pointed out, however, that any public body that refuses to utilise the MSL regime may find itself being pursued in the courts by service users and other interested third parties, unless there is a voluntary agreement in place, which is at least equivalent in scope to the MSL. The courts are unlikely to view favourably a policy decision by a public body never to issue a work notice, and a public authority undertaking not to serve a work notice in any particular case may have to show a good reason for not doing so.

Such a reason might be a well-founded fear that the anticipated strike would be prolonged by use of the legislation, that settlement of the underlying dispute might become more difficult and demands might harden, that workers might go off sick with stress and their absence for this reason might last longer than the strike, that relations with the unions and the workforce are likely to deteriorate in consequence of service of work notices thus diminishing productivity after the strike, and so on. It will be recalled that when train-operating companies threatened to use work notices in relation to ASLEF, the union responded by increasing the number of days of proposed strike action and the result was withdrawal of the threat of the work notices.

Where, however, the employer decides to issue a work notice, the Act requires that it must consult the union about the workers and the work to be specified in the work notice. This will place unions in a difficult position, and, since there is no obligation to agree, may be a waste of time. The government's own Impact Assessment pointed out that 'the issuing of work notices would be challenging and time-consuming' by reason of the consultation required with unions. This is in addition to the need to communicate with workers who 'may disagree

with being named or query whether they are or are not named', and to the need for 'updating rosters which may not align with strike action and/or updating privacy notices'.

The selection of workers for inclusion in a work notice is addressed in Government Guidance on MSLs which was issued on 16 November 2023. This makes clear that:

> In selecting workers for the work notice, the employer must comply with all its contractual and other legal obligations, including employment law, data protection, equality and health and safety requirements. For example, the employer must comply with its obligations under the Equality Act 2010.

Unions will be keen to ensure that these obligations are fully met. The Guidance also makes clear that:

> The work notice cannot override an employment contract or other contract with a worker. For example, if an individual cannot be required under the contract to work on a Sunday, the work notice cannot override that agreement.

Again, unions will look to ensure that workers are not being required to perform duties which they are not contractually obliged to perform. But here it is important to examine the contract of employment carefully to determine the extent to which the employer has contractual powers of deployment on a temporary basis where workers are being asked to do jobs or work at locations which are not normally expected.

One final point is that trade-union officials in the workplace (shop stewards, health and safety representatives, branch officials, etc) can also be the subject of a work notice. The Act says that they should not be selected because they are trade-union officials. But equally they should not be excluded from selection because of their trade-union roles. Any official who is included in a work notice will clearly be placed in an invidious position, particularly as they will be required to cross a picket line.

The effect of service of a work notice impacts both the worker and the union. From the worker's perspective, an individual employee named in the work notice must (unless sick or on leave) work during the strike. And, if they refuse to work, the Act removes their automatic protection from unfair dismissal. It may be possible in such circumstances to bring a claim under the general law of unfair dismissal, though the chances of success for an employee identified in a work notice and dismissed for not working in accordance with it during a strike may not be great – depending on the particular circumstances of the case. Nevertheless, the Code of Practice referred to below did not but ought to have included a reference to this possibility.

V 'Reasonable steps': the union's duty to encourage strike-breaking

From the union's perspective, once served with a work notice, the Act requires it '*to take reasonable steps to ensure that all members of the union who are identified in the work notice comply with the notice*.' This is a heavy administrative burden, which is potentially incapable of fulfilment. When a work notice is received (seven days – including weekends and public holidays – before the strike), and any variation of the notice has been received (up to three

days before the strike), the union will be required to follow a number of steps set out in a *Code of Practice on Reasonable Steps to be Taken by a Trade Union*. As shown below, failure to take those 'reasonable steps' can result in truly draconian consequences.

Th first step is that on receipt of the information from the employer, the union must identify its members in the notice '*as soon as practicable after receiving a work notice*'. The union will receive a list of names of the workers who are required to work, a list which will include both members and non-members, as well as workers who are members of other unions. In the case of a big strike the list may include thousands of names. Sifting these lists for members will be a formidable administrative task to be performed in a very short time on the basis of what could be very limited information about the individuals in question provided by the employer or otherwise known to the union.

Having identified its members from the list provided by the employer, the union must, secondly, issue a detailed 'compliance notice' to each of its members on the list '*to advise them not to strike during the periods in which they are required by the work notice to work, as well as to encourage them to comply with the work notice*'. The Code of Practice also provides that:

> Unions may also wish to engage with the identified members on an individual or group basis to reinforce the messages within the compliance notice, as well as clarify any questions from members, especially in relation to their rights and protections.

As if to underline the unfairness of the anti-union legislation, unlike industrial action ballots which must still be conducted by post, compliance notices inviting members to break the strike are to be sent electronically where the union has an email address, and by post if not.

The union must also instruct the picket supervisors (who have been required on picket lines since the 2016 Act):

> to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line at times when they are required by the work notice to work.

What is required by the undefined phrase '*reasonable endeavours*' is uncertain and unpredictable, and will no doubt be defined by the courts in the inevitable litigation which will follow use of the new Act.

Picketing is not referred to in the Strikes (Minimum Service Levels) Act 2023 though the right to picket is enshrined in the Trade Union and Labour Relations (Consolidation) Act 1992, s 220 (although subject to many conditions). However, under that Act breach of those restrictions in practice had consequences for the individuals who breached them but not for the legality of the strike itself. But because the Strikes (Minimum Service Levels) Act 2023 requires unions to take 'reasonable steps' and since the Code sets out 'reasonable steps' in relation to picketing, the conclusion is that a failure to comply with 'reasonable steps' in relation to picketing is likely to render the entire strike unlawful. Thus, as observed by the government, 'it would be difficult for a union to comply with the requirement to take reasonable steps without moderating its picketing activities in any way'.

So, in a national rail strike involving tens of thousands of workers and hundreds of picket lines, a single picket supervisor who can be shown to have failed *to use reasonable endeavours to ensure that picketers avoid, so far as reasonably practicable, trying to persuade members who are identified on the work notice not to cross the picket line* may cause the membership nationally to be deprived of the right to strike. This is because the consequence of failure to take the reasonable steps outlined in the Code of Practice to ensure that its members comply with a work notice is that the strike will become unlawful.

It is to be emphasised that *any* failure on the part of a union to take reasonable steps to ensure that its members comply with a work notice will render industrial action unlawful, even though it is in furtherance of a trade dispute and even though the statutory notice and ballot requirements have been met. The union may be sued for an injunction to stop the strike and damages (up to £1,000,000 for the biggest unions) for any ensuing loss sustained. Failure to comply with an injunction may result in proceedings by the employer for contempt of court with sanctions including fines (and theoretically, imprisonment) and, ultimately, sequestration (seizure) of the union's assets.

And, if the strike becomes unlawful because the union fails to take these reasonable steps, all strikers (not just those specified in a work notice) will then cease to have automatic unfair-dismissal protection.

VI Minimum Services and International Law

Though Mr Blair was right that we have the most restrictive law on trade unions in the western world, never before have our unions been obliged to act as enforcers on behalf of employers and the State, as is now required by the Strikes (Minimum Service Levels) Act 2023. Self-evidently, the Act violates the right to strike, a right established by many international treaties which the UK has ratified. Parliament's Joint Committee on Human Rights made this clear at an early stage in the parliamentary life of the Bill.

The government claims that international law permits a state to set minimum service levels by law. But, though that is true, international law permits this only in exceptional circumstances and subject to tightly regulated conditions. These we outline below.

Firstly, as to the exceptional circumstances that justify legislating for minimum services, the International Labour Organisation (the arm of the UN which establishes minimum labour standards applicable throughout the world) holds that:

> The establishment of minimum services in the case of strike action should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance.

In order to rank as 'essential services in the strict sense of the term' the ILO holds that 'the criterion which has to be established is the existence of a clear and imminent threat to the life,

personal safety or health of the whole or part of the population'. The ILO has thus held that railways and the education sector (other than 'strikes of long duration') are not 'essential services', though fire and rescue services and hospital (and hence probably ambulance services) are considered essential. Passenger rail transport may, however, rank as 'a public service of primary importance'. It seems unlikely that Border Services qualify as essential though they might conceivably qualify as 'public services of fundamental importance'. Given the risks inherent in nuclear decommissioning such work might perhaps rank as essential.

The second condition is that where the right to strike is restricted in essential services, 'compensatory guarantees' must be provided to those workers. Amongst these are that:

> the parties to the dispute should be given every opportunity to bargain collectively, for a sufficient period of time, with the help of independent facilitators and machinery and procedures designed with the foremost objective of promoting collective bargaining.

The 'compensatory guarantees' must also include:

> adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.

But joint arbitration is only permissible 'where, and only where, conciliation fails'. The ILO holds that in such conciliation and arbitration proceedings:

> it is essential that all the members of the bodies entrusted with such functions should not only be strictly impartial but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned.

Thirdly, the ILO requires trade union, employer and public authority dialogue in the setting of an MSL: 'workers organisations should be able to participate in defining such a service in the same way as employers and the public authorities.'

Fourthly, the ILO imposes an obligation that the employer negotiates an agreement with the trade union about the service level to be operated in that firm or service, and it is desirable that these negotiations do not take place during a dispute 'so that all parties can examine the matter with the necessary objectivity and detachment.'

Fifthly, it is necessary for there to be recourse to an established independent adjudication process (either by the courts or by agreed independent arbitrators) in the event that the parties fail to agree the MSL or its implementation at enterprise level. Disagreements should not be left to settlement 'by the ministry concerned' and '[u]nilateral determination by the employer of minimum service, if negotiation has failed, is not in conformity with the principles of freedom of association.' The ILO has specified that:

> The workers and employers organisations concerned must be able to participate in determining the minimum services which should be ensured, and in the event of

> disagreement, legislation should provide that the matter be resolved by an independent body and not by the administrative authority.

Sixthly, the ILO requires that 'the scope of the minimum service does not render the strike ineffective' since it is necessary to preserve 'respect for the principles of the right to strike and the voluntary nature of collective bargaining.' Involvement of unions and employers:

> contributes to guaranteeing that the scope of the minimum service does not result in the strike becoming ineffective in practice because of its limited impact, and to dissipating possible impressions in the trade union organisations that a strike has come to nothing because of overgenerous and unilaterally fixed minimum services.

Finally, where a minimum service level is permitted, 'Measures should be taken to guarantee that the minimum services avoid danger to public health and safety.' Thus, where the MSL for passenger rail transport specifies a 40% service, measures will have to be taken to avoid dangerous overcrowding.

Even assuming that the six sectors to which MSLs are to be applied fall within the permissible categories for such legislation, it is apparent that none of the other conditions established by the international law set by the ILO is met by the Act. These international law requirements are indisputably binding on the UK which has ratified ILO Convention 87 from which they derive. In consequence, the Regulations under the Act not only violate Convention 87 (one of the fundamental Conventions of the ILO binding on Member States even if they have not ratified it), they are likely to breach Article 11 of the European Convention on Human Rights (which implicitly protects the right to strike) and Article 6(4) of the European Social Charter of 1961 (which expressly protects the right to strike).

In turn, these breaches appear to violate the UK's obligations under the 'Brexit Deal' (the Trade and Cooperation Agreement of 2020), which requires the United Kingdom to promote, respect and implement the ILO Conventions and the European Social Charter. The government has argued that other European countries have MSLs in some of the sectors prescribed by the Act. However, so far as is known, these are always the result of agreement by the unions after negotiation (or the result of judicial adjudication) and hence conform to the ILO requirements.

VII The 2023 Act and the ILO

In light of the foregoing, the ILO Committee of Experts not unexpectedly expressed 'serious concern' about the 2023 Act following a very detailed report to the Committee by the TUC. The TUC report was made in September 2023, and the Committee of Experts responded early in 2024. In its report to the Committee the TUC had argued that the legislation was unacceptable, particularly in view of the existing restraints on trade-union freedom, highlighting in particular the fact that the Act, incompatibly with Convention 87:

i) grants wide power to the Secretary of State to determine the scope of these services without any guidance from Parliament;
ii) authorises employers to issue work notices to a trade union in relation to a strike where MSL Regulations apply and;

iii) imposes a duty on trade unions to take reasonable steps to ensure that union members who are identified in a work notice comply with its terms.

The Committee also made reference to other TUC concerns, relating specifically to the implementation of the 2023 Act. First, there were concerns about the peremptory nature of the consultation on the making of the Regulations under the Act, which were said to be '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'. Secondly, concern was expressed about the work notices, the TUC pointing out that 'while 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, 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', a point highlighted by government guidance issued on 24 August 2023 which 'stated clearly that the employer does not need to agree with the union on the number of workers and the work within the work notice as part of this consultation'. Finally, concern was expressed that the government was seeking to use the Code of Practice as a way of imposing additional requirements on trade unions in terms of the 'reasonable steps' they must take once work notices have been issued.

The Committee of Experts was particularly concerned in its report with the inclusion of 'education services' and 'transport services' in the Act, and with the need for close monitoring of the statutory powers in these sectors. The Committee had previously condemned the Trade Union Act 2016 and the introduction of additional strike ballot thresholds in strikes involving important public services (support from 50% + 1 of those voting which must constitute at least 40% of those eligible to vote). The sectors affected by MSLs are broadly similar to the services covered by the 2016 Act. In holding that the higher strike-ballot threshold should not apply in education or transport, the Committee had indicated that such services were not 'essential services in the strict sense of the term' and that the restriction could not therefore be justified, adding that 'recourse might be had to negotiated minimum services for these sectors, as appropriate'. It is clear, however, that in suggesting 'negotiated minimum services' the Committee had this in mind as an alternative to the ballot thresholds applying in education and transport, not as an addition to the ballot thresholds.

The Committee has since made clear, that its concept of 'negotiated minimum services' is very different from the imposed minimum services in the 2023 Act. In responding to the TUC report about the 2023 Act, the Committee said that a minimum 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 organisations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities. Moreover, any disagreement on minimum services should be resolved, not by the government authorities, but by a joint or independent body which has the confidence of the parties.

As the Committee observed, 'in its current state the Strikes Act does not assure any of these elements', adding its expectation that:

> in preparing its regulations and other guidance, including codes of practice, the government will ensure that any minimum services imposed on industrial action in the transport and education sectors are indeed minimum, ensure the participation of the social partners in their determination, and where no agreement is reached, ensure that they are determined by an independent body which has the confidence of the parties.

The government has, as we have seen, failed to heed this clear message. The consequence is clear: the government in flouting those expectations is now operating beyond the boundaries of international law. The Regulations so far have been introduced in breach of these requirements, and the government has given no indication of any intention to comply with them when making the education MSL Regulations.

VIII Conclusion

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 a 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 MSL Regulations can be challenged in the courts. In doing so they will have been encouraged by the High Court decision in 2023 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 forms of industrial action other than strikes. Industrial action is unlikely to decline, but its form may radically change as a result of this Act.

19 April 2024