

THE GOVERNMENT WANTS TO REMOVE YOUR RIGHT TO STRIKE

Introduction

The Conservative UK Government at Westminster has introduced some highly controversial legislation that if passed will severely restrict, if not in practice ban, your right to strike.

The publication of the new draft law has come at a time when thousands of TSSA and other rail union members, as well as workers from across the private and public sector, including nurses and paramedics, have been taking industrial action since the latter half of 2022.

Unlike dispute settlements that have been reached with a number of private sector firms, the Government has refused to adequately engage in finding resolutions to many strikes but has instead chosen to restrict your future right to strike.

In this Bulletin we will be providing a briefing to TSSA reps and members on what is contained within the proposed legislation and how it will affect you and your union. The legislation may be subject to change, but this Bulletin is based on what we know so far.

What is the new law called?

The name of the proposed legislation is the Strikes (Minimum Service Levels) Bill¹ and the intention is that it amends the Trade Union and Labour Relations (Consolidation) Act 1992 (known as TULCRA).

The new Bill was introduced by Grant Shapps MP, Secretary of State for Business, Energy and Industrial Strategy.

Shapps, when Secretary of State for Transport, had previously proposed a 16 point plan in August 2022 that was designed to add a series of restrictions to industrial action and he later went on to produce the Transport Strikes (Minimum Services Level) Bill in October 2022 following a commitment in the Conservative Party's 2019 General Election manifesto.

¹ We have referred to the legislation as MSL in this Bulletin. The Bill as at 20th January 2023 can be found at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0222/220222.pdf>

The latest proposed piece of legislation, however, replaces the version published in October but goes far beyond the manifesto commitment by covering additional sectors and through removing employment protections.

Can you give me a summary of what the Bill is saying?

The legislation proposes to ultimately give the Business Secretary (Shapps) the power to set minimum service levels during strikes in key sectors, with employers instructing unions via 'work notices' how many workers will be required on strikes days to meet that level. Under the law, unions would be required to take "reasonable steps" to ensure members comply with the notice and could be sued if they fail to do so, while striking workers would lose their protection from unfair dismissal if the work notice says they should be working, provided that their employer has given them notice ahead of the strike day.

What is the effect of the draft Bill?

Given the Conservative Party's anti trade union record, could this mean that in a train service context, for instance, the Secretary of State may arbitrarily decide that there is a requirement that 80% of all services have to be run? If that were the case, the staff involved would be virtually banned from taking strike action.

For some staff the ban could last for one set of industrial action whilst for others it may be a permanent ban.

The overall effect of the draft legislation nevertheless means that potentially large numbers of workers are banned from taking strike action, a direct assault on their Human Rights and a matter that is already the subject of TUC Rights to Strike Rallies on 1st February 2023 and a likely reference to the UN's International Labour Organisation. It will also no doubt become the subject of legal action.

What sectors will the Bill apply to?

The new Bill permits the Secretary of State to produce regulations, to impose minimum service levels (MSLs) on services within six sectors:

- Transport
- Health
- Fire and Rescue
- Education
- Border Security
- Decommissioning of nuclear installations and management of radioactive waste and spent fuel

What are minimum service levels?

The Government does not like the fact that after a democratic vote in accordance with current legislation workers can go on strike and virtually, if not completely, close down a sector of the economy as is happening with the current round of rail strikes.

To overcome that situation, the Government are legislating to give themselves powers to be able to impose a minimum level of service meaning that an unknown number of workers who may have supported an industrial action ballot will in future have to go to work instead of taking strike action.

It should also be noted that unions that have members operating in a workplace are bound by a minimum service specification, regardless of whether their union is recognised by the employer.

Will the MSLs be imposed or be voluntary?

According to the Government's website² the requirement will be that employers and trade unions "in these sectors will be expected to negotiate sensible and voluntary agreements between each other on delivering a reasonable level of service when there is strike action. This will, however, be kept under review and the Bill gives the government the power to step in and set minimum service levels should that become necessary."

The Government may say there will be a chance for voluntary agreement, but the MSL Bill does not place that duty or requirement on employers or trade unions, and neither does it propose a mechanism for a voluntary arrangement, unlike the Transport Strikes (Minimum Services Level) Bill that was replaced by this latest draft law.

Even if a voluntary arrangement is possible, the implication is that any agreement between the employer and trade union would have to achieve the minister's approval before being put in place. And because approval would be needed, there is also the chance that the minister would change what had been agreed.

It is also a fact that the National Rail Contracts that nearly all of the DfT train operating companies have signed over the last year contain substantial and detailed clauses that requires them to obtain a mandate from the Secretary of State which controls how they engage with trade unions over virtually all employment related matters. MSLs in the TOCs will, therefore, be dictated by the Minister in accordance with the so far unpublished regulations and not by any genuinely voluntary approach.

What criteria will the Secretary of State use to determine a MSL?

The Bill does not list any criteria so the answer is currently unknown.

At what point can a MSL be introduced?

Section 234B(2) of the Bill gives the Secretary of State the power to introduce a MSL not only after the regulations come into force but also on industrial action that at that point is at the stage of the ballot or the strike notice. This clearly gives the minister the power to intervene in an existing dispute situation but whether in the event that a MSL is already in place he is able to alter it is not clear.

What is a work notice, and can it be changed?

Once an MSL is in place, the employer would be able to issue a 'work notice' in response to a trade union notifying them of the successful outcome of an industrial action ballot – or when the union gave notice of the start of industrial action which includes a list of jobs by location of who will be participating. The work notice would:

- identify those required to work

² <https://www.gov.uk/government/news/government-introduces-laws-to-mitigate-the-disruption-of-strikes-on-the-public>

- specify the work required to be carried out by them.

The employer issuing the work notice must:

- not identify more persons “than are reasonably necessary” to provide the service set out by the minimum service regulations
- have no regard to whether the person is or is not a member of a trade union (or a particular trade union).

The work notice has to be:

- issued at the latest on the seventh day before the earliest “strike date”
- but it can be varied by the employer up to the end of the fourth day before the “strike date”.

The employer has to consult with the union about:

- the number of persons identified
- the work to be specified and
- varying the notice.

It also has to “have regard” to any views expressed by the union.

This whole system is designed to cause difficulties for trade unions by introducing ways that employers could attempt to frustrate or hold up industrial action. For instance:

- a union is required to give a minimum of two weeks’ notice to an employer before the commencement of industrial action. Usually that would also mean notifying members of the date of the action and making preparations for the strike to take place.

Under the MSL Bill, the employer can delay issuing the work notice until seven days before the strike is due to begin. They can then vary that notice again as many times as they like up to the fourth day before the strike.

Not only does this leave open the question about whether the union has to resubmit an amended industrial action notice, delaying the strike, it also means that members may not be clear if and when they will be going on strike until the event is almost upon them. This could especially happen if the employer chose to vary elements like the person identified to work or the nature of work to be carried out.

- The legislation also requires that each day of a continuous or discontinuous strike is treated as a separate “strike date” with the implication that the process of a work notice would need to be carried out for every day.
- The work notice is required to “identify the persons required to work” but they should not have regard to whether they are union members or not. Despite the latter consideration, for some employers it may be too easy to ensure

union activists are identified as having to work, potentially setting them up to refuse to cross picket lines and lose employment protections.

As if that were not enough, the Government are also expecting the trade union to take “reasonable steps” to ensure that identified workers adhere to the work notice.

What are the reasonable steps that the union has to take?³

Strike action would cease to be protected under TULRCA⁴ if a union which is given a work notice then fails to take “reasonable steps” to ensure that all its members who are identified in the work notice do not take part in the strike.

Despite putting this requirement on trade unions, the Bill gives no guidance about what constitutes “reasonable steps”, leading to questions about whether a written communication to members would be sufficient?

If insufficient, the employer would potentially be able to secure an interim injunction against the union, preventing it from calling its members out on strike.

The union that has breached the new requirements could also find itself facing civil liabilities of up to £1,000,000 for calling unlawful industrial action although the legislation specifically states at Section 234(E)(2) that damages could only be claimed for losses linked to not complying with the work notice, not losses the employer would have suffered anyway.

One of the effects of declaring a strike unlawful is that it removes the unfair dismissal protection from ALL those on strike. This is despite the fact that they can be in no way culpable for the alleged failure of the union to take reasonable steps to ensure that the requisitioned workers comply with the employer’s instructions.⁵

In the absence of guidance, the effect of this lack of information is undoubtedly that unions will face expensive litigation that will eventually set down the approach to taking reasonable steps. The period of litigation is no doubt a factor the Government is aware of and willing to allow to happen in order to prevent unions and members taking strike action.

How will workers who ignore the MSL be penalised?

If a person specified in their employer's work notice continues to take strike action despite being required to work during the strike, they will lose their protection from automatic unfair dismissal that currently applies for the first 12 weeks of the strike. This will put them at risk of dismissal.

What other powers are the Government giving themselves?

The Government, and in particular the Secretary of State behind the Bill, is giving itself huge powers, not only to define services subject to MSLs and the nature of the

³ Information based on an analysis by Lewis Silkin at: <https://www.lewissilkin.com/en/insights/new-bill-to-mandate-minimum-service-levels-during-public-service-strikes>

⁴ Trade Union and Labour Relations (Consolidation) Act 1992

⁵ Institute of Employment Rights article by Professor Keith Ewing and Lord John Hendy KC “Strikes (Minimum Service Levels) Bill: More Government by Diktat” at: <https://www.ier.org.uk/comments/strikes-minimum-service-levels-bill-more-government-by-diktat/>

service, but also to make further consequential regulations, even where those regulations amend primary legislation. Whether those consequential regulations could see some or all of Shapps' 16 point plan introduced is uncertain but if it was, it would mean yet more attempts to frustrate trade unions and their members in being able to take industrial action.⁶

Controversially, the new Bill also enables the UK Government to change laws made by the Devolved Governments in Wales and Scotland. This would seem to be in response to the Welsh (Labour) Government's legislation in 2017 that repealed the application in Wales of some of the measures in the Trade Union Act 2016. The new Bill does not apply in Northern Ireland where employment law is a devolved matter.

What are regulations?

A lot of the detail of how MSLs will work in practice should be contained in the regulations that the Secretary of State is giving himself the right to create through the Bill. Regulations, which include Statutory Instruments (SI)⁷, are what is known as "Secondary Legislation" with powers to create these laws usually given or enabled by Primary Legislation (Act of Parliament). Regulations often go into a lot of detail whilst the Bill (that becomes an Act following Royal Assent) makes general statements of intention or places duties and responsibilities on individuals.

The problem with regulations is that they are often not published when a bill is going through its Parliamentary stages. In the case of the minimum service legislation, this means that the Government has so far withheld the detail of the plans that they may have and neither have they published a detailed guide on their thinking.

In addition, usually legislation like the Strikes (Minimum Services Level) Bill will have been the subject of a pre-legislation consultation but on this occasion that has not taken place.

Instead, the Government has said they will consult in parallel with the Parliamentary process over the minimum service levels in rail, ambulance, fire and rescue services. This could indicate that there will be no voluntary negotiations in any of those sectors which is the opposite approach being taken by the Government in other sectors (that are beginning with voluntary negotiations between unions and employers).

The question, though, is at what stage in that process will the consultation take place and will the Secretary of State delay until after the Bill becomes an Act as is allowed for in the Bill's proposed Section 234F? The same Section also gives him the choice of who to consult with – will it include the appropriate trade unions?

Where is the Bill's Impact Assessment?

It is also important to note that before legislation is presented for debate by Parliament, there is an obligation on Government departments to produce an Impact Assessment for all new laws that enables the independent Regulatory Policy Committee (RPC) to issue an opinion on the proposal's effects. The Committee has

⁶ By such things as increasing ballot thresholds for industrial action or longer notice periods to employers.

⁷ An example of a Statutory Instrument (SI) is the Safety Representatives and Safety Committee Regulations 1977, SI number 500

put out a statement⁸ that confirms the Government has failed to produce an Impact Assessment.

As noted earlier, the new Bill replaces the Transport Strikes Bill which did have an Impact Assessment that clearly stated that minimum service levels could lead to an “increased frequency of strikes” and “reduced terms and conditions” for workers.

What has been the reaction to the MSL legislation?

There has been widespread condemnation of the Bill from the trade unions and UK political parties (apart from its instigators, the Conservative Party) who have highlighted a number of outstanding questions and the effect on human rights of potentially banning people from taking industrial action.

Grant Shapps has sought to justify his Bill by reference to the United Nation’s International Labour Organisation’s principles and MSL legislation in some European Countries.

The ILO Secretary General, Gilbert Houngo has, however, disputed the Government’s claims, telling the BBC⁹ that the ILO believes in social dialogue and that he is “very worried about workers having to accept situations due to being faced with the threat of losing their jobs.” He is also in dialogue with UK trade unions about the matter becoming a complaint because it amounts to a breach of international worker rights.

In terms of the comparisons with the situation in some European countries, Dr Ewan McGaughey, an expert on labour law at King's College London, has published a blog¹⁰ on the new Bill and says the Government’s claims do not stand up to scrutiny and are untrue. He also describes the Shapps’ Bill as “a “Pay Cut and Forced Labour Bill”. It is not the law of a free country.” McGaughey goes further by saying:

“The right to strike is the vanguard of democracy and freedom, and whether they have the self-awareness or not, Sunak and Shapps are treading blindly down the road to tyranny, like Viktor Orbán’s Hungary, or Vladimir Putin’s Russia.”

When will the Bill become law?

The Bill began its progress through the Parliamentary law making process on 10th January 2023 and is expected to become law in June or July.

Prior to that, it will continue to progress through the House Commons where the Government’s large majority of Conservative MPs ensured it received its Second Reading on 16th January. This was despite a vigorous debate led by Labour that exposed a number of inconsistencies and unanswered questions caused by the proposed legislation, causing some opposition MPs to accuse the Government of fabricating their evidence.

⁸ See: <https://www.gov.uk/government/news/strikes-minimum-service-levels-bill-ia-statement-from-the-rpc>

⁹ See: <https://www.bbc.co.uk/news/64313013>

¹⁰ See: <https://blogs.lse.ac.uk/politicsandpolicy/the-governments-anti-strike-bill-violates-international-law/>

The Government is rushing the legislation through and intends to complete the Committee and Third Reading Stages on 30th January 2023. Once it has finished its stages¹¹ in the Commons, the Bill will then follow similar law making stages in the House of Lords before potentially receiving Royal Assent in April or May 2023.

It is possible that the Bill will never become law according to law firm, Lewis Silkin.¹² They cite the 2019 Conservative manifesto which only committed to introduce minimum service levels in the transport sector but the current Bill exceeds that, so there would be no constitutional obligation on the House of Lords to pass the Bill (in which the government does not have a majority and which blocked numerous additional reforms to the Trade Union Act 2016).

Is there a theme in the Government's actions?

The MSL Bill comes at a time when the Conservative Government has already given itself increased powers to ban protest actions and is looking to strengthen legislation in that area. It is also forcing another Bill through Parliament¹³ that is likely to withdraw large swathes of EU law, including many of the workers' rights that we all enjoy. The theme that can be detected is that the current UK Government is intent on moving to become ever more authoritarian with the MSL Bill being another expression of that change.

Reps' Action

Reps are asked to publicise this Bulletin to all members because it represents a serious assault on our members' human rights.

Reps and members should look out for campaigning activities that they can engage in, and make sure they sign the TUC Petition against the MSL Bill which can be found at: <https://www.tuc.org.uk/news/petition-protect-right-strike>

Acknowledgements and further reading

This Bulletin has been constructed from the publications credited in the footnotes.

¹¹ The law making stages are: First Reading (with no debate), Second Reading (debate), Committee Stage, Report Stage, Third Reading.

¹² <https://www.lewissilkin.com/en/insights/new-bill-to-mandate-minimum-service-levels-during-public-service-strikes>

¹³ The Retained EU Law Bill