



# Pointmaker

## STRIKES IN ESSENTIAL SERVICES

### TIME FOR FURTHER PROTECTION FOR THE PUBLIC?

NICHOLAS FINNEY OBE

#### SUMMARY

- Strikes in the “essential services” are banned in most major Western economies, apart for in the UK.
- The definition of “essential services” varies from country to country and is much debated. Broadly, however, they include transport, health, education, public sector broadcasting, utilities and prison services. In all countries, strikes are banned in the military and police forces.
- The Trade Union Act 2016 did contain provisions which mean that 50% of those eligible to vote must do so in order for a vote in favour of strike action to be effective. In addition, in respect of those activities described as “important public services”, there is an additional requirement for 40% of those eligible to vote to have voted in favour.
- This threshold does not apply in the following sectors: Public broadcasting, Water, Sewage, Electricity and Gas supplies, and prison administration.
- Recent UK strikes, in particular on the railways and by Junior Doctors, have illustrated that it is the most vulnerable who are badly affected by strike action: mothers with young children, the sick, the elderly and those on low wages (who are less likely to be able to afford, for example, private transport in the case of a rail strike).
- As government agencies (such as the NHS) are responsible for ensuring the continuation of minimum services in the case of a strike, Government should allow agency workers to be used as a last resort.
- Other recommendations include, *inter alia*:
  - open discussions with the TUC to seek to incorporate stronger voluntary restraint by Trade Unions taking strike action,
  - expand the definition of “important public services” to mirror that of “essential public services” in most EU countries.
  - index link the level of financial penalties applied to Trade Unions who have lost their immunity through unlawful action.



## 1. INTRODUCTION

The question of state intervention to prevent a workforce from withdrawing from work is a complex and contentious matter. This is because the rights to organise labour, to join a trade union and to bargain collectively are enshrined in International Treaties particularly those determined by the International Labour Organisation (ILO). No Government takes away these rights lightly. However, many countries, other than the UK, have taken steps over the past 100 years to either ban strikes or in some other manner restrict them, in what the state regards as essential services.

Various UK Governments have sought to constrain strike action and in 1982, limitations were placed on the ability of a Trade Union to claim immunity from breaches of tort and large limited value fines introduced for Trade Unions where the Courts had found action to strike unlawful. In both the 1990s and the early 2000s, Governments flirted with the idea of restricting, perhaps banning strikes in essential services but no legislation was passed.

However, the Trade Union Act 2016 contains provisions which mean that 50% of those eligible to vote must do so in order for a vote in favour of strike action to be effective. In addition, in respect of those activities described as important public services, there is an additional requirement for 40% of those eligible to vote to have voted in favour.<sup>1</sup>

This represents a significant change to the law on strike balloting, and for the first time

introduces into employment legislation the concept of essential services, called in the Act “important public services”. Note that these do not conform to the ILO definitions of essential services but are defined as:

- **Health:** Medical services such as ambulance services, accident and emergency services in hospitals, high-dependency units and intensive care in hospitals, emergency psychiatric and obstetric and midwifery services.
- **Transport:** London bus and passenger rail services (including maintenance and some station services, but not international rail services), air traffic control services, and airport and port security services.
- **Education:** Teaching services (provided by teachers) at non-fee-paying schools, academies for students aged 16-19, and limited further education institutions.
- **Border security:** Border control services, such as customs, patrol, inspection and intelligence services.
- **Fire:** Firefighting services and those handling calls to request services.

According to a report by the University of Salford,<sup>2</sup> the Trade Union Act 2016 reforms would have outlawed about 40% of the strikes in these sectors since 1997 (out of 90 strike ballots in the ‘essential public services’ covered by the research, 35 failed to meet the two

---

<sup>1</sup> In other words, should a Union have 800 members, the 50% turnout threshold will need to be met by at least 400 members voting. Should the dispute be within an “important public service”, it is also subject to the 40% threshold. In that case, at least

320 (40%) of the 800 members would need to vote in favour of industrial action.

<sup>2</sup> Professor Ralph Darlington and Dr John Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: the challenge to the Trade Unions*, University of Salford, August 2015.



thresholds). The research also revealed significant sectoral differences:

- **Fire Service:** No effect: all 11 strike ballots cleared the 40% threshold with an average of 54% of balloted workers supporting strike action.
- **Health:** Partial effect. Only two of the five national strikes would have cleared the 40% threshold.
- **Education:** Partial effect. 19 of the 29 strike ballots would have been able to go ahead.
- **Transport:** Partial effect. 23 of the 44 strikes cleared the 40% threshold. Interestingly, while most strike ballots in the railway sector would have met the thresholds, most of those on London Underground would not have cleared the thresholds.

The question now is whether the 2016 reforms go far enough in this area. The long-running Southern Rail dispute has clearly caused great public anger (and is said to have cost the Conservative Party a number of seats in the 2017 General Election)<sup>3</sup>. In addition, the Conservative Party Manifesto pledged reform in this area, including:

“We will work with train companies and their employees to agree minimum service levels during periods of industrial dispute – and if we cannot find a voluntary agreement, we will legislate to make this mandatory.”

However, following the result of the General Election in June 2017, there is the realistic prospect of a left-wing opposition party coming to power at some time in the future. The Labour

Party has recently pledged to repeal the 2016 Trade Union Act; worse still, it intends to sweep away the protections which have been in place for over 35 years for employers and the general public against abuse of Trade Union power. Such practices as flying pickets, intimidation of non-strikers and abuse of balloting provisions would become a reality again. This could well, uniquely among developed countries, lead to a repeat of the 1970s Industrial Relations environment.

## 2. A SHORT HISTORY OF STRIKES IN THE ESSENTIAL SERVICES

The past 70 years have seen massive changes to employment activity. The coal stack industries declined, robotics has replaced factory labour and cheap labour (particularly in the Far East) has shifted manufacturing away from the Western economies. Those parts of industry which traditionally employed thousands, such as the docks, road haulage, coal and steel industry and textile and food processing, have given way to smaller service businesses and hi-tech design companies. The public service sector took over as the main employers, with large workforces, engaged in the National Health Service, local authority administration, education and Non-Governmental Organisations (NGOs). In the UK, most utilities (water, power generation and postal services) are now operated and owned by the private sector. Transport is also now in the private sector (with some very limited exceptions); the Government has included transport (but not utilities) in their definition of important public services. In many other countries such services (transport and utilities) are provided by state or local authority-owned organisations.

---

<sup>3</sup> *Daily Telegraph*, “Southern Rail dispute ‘cost the Tories seats’”, 10 June 2017.



In the UK a serious escalation of strikes in the 1970s, culminated in 1,273 days work lost per 1,000 employees (only Italy in the industrialised world was worse – 1,373 per 1,000 employees). The industrial relations reforms of the 1980s<sup>4</sup> had a major impact on the number of strike days lost, so that by 1987 the figure had dropped to 142 days lost per 1000 employees. It took the major coal-miners dispute, with all its associated secondary action by railway unions and dock workers, to persuade the Government to act to bring about the cessation of widespread strike action, which had been primarily used to apply political pressure on the Government. This steady reform of the employment legislation to try to curb the official unions' support for industrial action was not without its dangers since, to an extent it led to greater unofficial action from militant shop steward committees.

In the US, the one dispute recalled by commentators for its draconian resolution was the illegal strike of the Federal Air Traffic controllers through its Union PATCO in 1981. Then, President Reagan described the strike as 'a peril to National Safety', and ordered the Air Traffic controllers back to work under the provisions of the Taft Hartley Act. They refused. To much surprise, President Reagan refused to accept that this essential service could be withdrawn by Federal employees and sacked all 11,345 strikers. Few of these workers ever got their jobs back. The Union was decertified, and strike leaders were threatened with civil and criminal contempt and prosecution, as well as criminal prosecution. Labour relations

commentators have subsequently concluded that President Reagan's fast and savage response profoundly changed the power of organised labour for good in the US.

In Australia, the 1989 Airline Pilots dispute had a major impact on industrial relations. The strike was defeated with the support of the Government, and within a year the deregulation of the labour market began. This was eventually consolidated through the Industrial Relations Reform Act 1993 and seven years later, the Workplace Reform Act.<sup>5</sup> It demonstrated that there were limits to the willingness of Government to be coerced into acceptance of the power of trade unions in certain situations

The 2016 strike called by the British Medical Association covering Junior Doctors, marked another landmark. During the dispute the Junior Doctors first provided cover in settings that provide life or death care, such as A&E, intensive care, maternity services, acute medicine, and emergency surgery. But in two strikes in April 2016, the doctors walked out from emergency departments for the first time in NHS history. The Health Secretary, Rt Hon Jeremy Hunt MP, claimed that up to 100,000 operations and up to a million appointments would have to be cancelled.

At first the strikers had the support of the public, but as the dispute dragged on that sympathy dwindled, and the BMA eventually decided to accept that a modified contract, embracing weekend working, would be imposed by the Government. The dispute brought into focus

---

<sup>4</sup> The Callaghan Government's inability to control widespread strikes in public services such as rubbish collection and grave digging in 1979 was so disliked by the public at large that the Conservative Government then had the task of

clearing up the poor industrial relations inheritance of the previous Labour Government.

<sup>5</sup> Peter Schulte and Ying Zhu, *Globalization and Labour relations in Australian Airlines Industry. A case study of pilot experience*. University of Melbourne, 2005.



again the damage to the lives of the ordinary citizen which could be created by trade unions representing workers in the field of essential services.

The Junior Doctors dispute also threw into sharp relief the inability in law to allow individual strikers or Trade Unions to be sued for any damages which might be caused to the general public by the breach of their employment contracts.

Whilst Junior Doctors clearly have a duty of care to their patients, there is no case law which demonstrates that either individual strikers or their Trade Union has any responsibility for subsequent "negligence" resulting from their strike action.

In the case of the Junior Doctors dispute, the obligation in law was on the National Health Service management to provide adequate staff and equipment to meet the requirements for say, a properly functioning Accident and Emergency service. And the BMA made sure that, technically, by issuing guidance to remind them of their GMC responsibilities, they could claim to have absolved themselves of any liability (if they ever had one).

This raises a concerning anomaly. An employer in the essential services has a duty to make sure that the service it provides is properly and safely continued. Yet the Government has not yet enacted the draft affirmative statutory instrument on Employment Agencies, an instrument which was clearly designed to make

it easier to employ agency staff to cover duties not fulfilled by striking staff.<sup>6</sup>

The Government should move forward to allow agency workers to be used at least in what are now described as "important public services" under the 2016 Trade Union Act.

### **3. ESSENTIAL SERVICES OUTSIDE EUROPE**

Many countries have restricted or banned strikes in essential services.

#### ***The Canadian Approach***

In Canada, the Public Service Labour Relations Act of 1995 (as amended in 2005) lays down conditions for determining what service should be regarded as essential. It defines an essential public service as: 'A service, facility or activity of the Government of Canada that is or will be, at any time, necessary for the safety or security of the public or a segment of the public'. The employer has the exclusive right to designate essential positions in order to maintain the safety and security of the public. An Essential Services Committee determines any disputes. Several states have applied different models to seek a solution.

Some states have a no-strike model, notably Alberta, Ontario and Nova Scotia. These three states demonstrate the practical difficulties. In Alberta, the Nurses Union has always rejected compulsory restraints on striking and have always defied the legislation. However, in Ontario, (where compulsory arbitration prevails),

---

<sup>6</sup> The right to use agency staff was originally taken away by in Regulation 7 of the Employment Businesses Regulations 2003. In the recent guidance note provided by the then Department for Business, Innovation and Skills in July 2015, one of the reasons put forward for the proposed amendment – which has yet to be enacted – was:

"There are sectors in which industrial action has a wider impact on members of the public that is disproportionate and unfair. Strikes can prevent people from getting to work and earning a living and prevent businesses from managing their workforce effectively."



the leading scholar in the field, Professor Bernard Adel, found that:<sup>7</sup>

“As well as avoiding the need for long and arduous designation procedures or other devices for working out essential service levels, the no-strike model had led to the highest level of essential service provision, at least when the law was respected (which it always almost was, except by Alberta nurses).”

### ***The US Approach***

In the US, strikes in the private sector are largely permissible, with reference back to mediation and arbitration. The 1935 National Labour Relations Act still governs private sector Trade Union Employer collective bargaining.<sup>8</sup> However most public sector workers are explicitly banned from strike action. Of interest is the fact that through the Railway Labor Act (RLA) both private and public railroad services are subject to severe restrictions on strike action. There is an absolute ban on strikes deemed to be of a minor nature, and once the National Mediation Board (NMB) has intervened, neither party may change any conditions and strikes are prohibited. The RLA covers rail and air transportation sectors and freight and passenger transport. The National Labour Relations Act covers virtually every issue and dispute procedure in the private sector. Most public sector workers either at state level or at local state or county level are prohibited from striking but as ever there are some exceptions.

## **4. THE INTERNATIONAL LABOUR ORGANISATION**

The International Labour Organization is an agency of the United Nations and its constitution dates back to the Treaty of Versailles in 1919 when it was formed by nine founding members (including the US and the UK). It is a tripartite organisation, the only one of its kind, bringing together representatives of Governments, employers and workers in its executive bodies.

In 1998, the ILO approved a declaration on Fundamental Principles and Rights at Work to which the UK is a key signatory. Its categories are: Freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

The UK has agreed to follow the Declaration.

### ***ILO Attitudes to Strikes in Essential Services***

The ILO stops short of constraining strikes in transport services, which it claims could not be said to do other than inconvenience the community. It does however accept that activities which are essential to preserving the lives, health or safety of all or part of the population can be prevented in law from strike action. The ILO does set out conditions in which a minimum service requirement may be imposed.

Firstly, in services whose suspension might endanger life, safety or health and which are

---

<sup>7</sup> Professor Emeritus Bernard Adel in the Labour and Employment Law Journal, *Regulating Strikes in Essential (and Other) Services after the “New Trilogy*.

<sup>8</sup> Marley S. Weiss, *The right to strike in essential services under US Labor law*, Maryland Law School



essential services in the strict sense of the word, a ban on strikes might be appropriate.

Secondly, a minimum service requirement might be introduced in services which are not essential in the strict sense of the word, but where strikes of a certain nature or duration might cause a national emergency threatening normal living conditions. The ILO believes that workers' organisations should be involved in decisions about what constitutes minimum services and the staff needed to service such services.

In its most recent Labour Legislation guidelines published by the ILO's Industrial and Employment relations department, there is further advice on 'essential services and emergency situations' (chapter V):

"The determination of which services are to be considered essential in each case is a delicate matter. For example, the interruption of a specific activity in many countries might not be considered such as to endanger the life, personal safety or health of the whole or part of the population, while such a service may be essential in other countries in view of their particular conditions. By way of illustration port or maritime transport services might be considered essential on an island that is heavily dependent on them for basic supplies, whereas they would not be considered essential in most countries. Moreover, the impact of a strike may depend on its length. A stoppage of a few days may pose few problems, while one of weeks and months may cause serious prejudice to the population concerned (for

example household refuse collection services). In view of the above, in some countries a specific authority has the power to declare a service to be essential or to prohibit a strike in a service or activity where its length has created a situation that is akin to an emergency for the whole or part of the population.'

There are a few specific cases where the ILO believes that circumstances warrant a minimum service obligation, ferries, port authorities, the metro, passenger and goods transport, railways and the post. The ILO makes it clear that where restrictions on the freedom to strike are in place: "The workers concerned should be offered compensatory guarantees, such as conciliation and mediation procedures leading, in the event of deadlock, to arbitration machinery seen to be reliable by the parties concerned. In such cases, it is essential that the parties are able to participate in determining and implementing the procedure which should provide sufficient guarantees of impartiality and rapidity. Moreover, arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely."

The TUC complained on several occasions to the ILO about the provisions set out in the Trade Union Bill (now the 2016 ACT). However, the following extract from the ILO Committee goes some way towards defending the Government's proposals:<sup>9</sup>

"As regarding the ballot requirements raised by the TUC, the Committee observes that two sets of additional requirements related to strike ballots are being proposed. Section 2 of the Bill introduces a new

<sup>9</sup> Comments adopted by the CEACR: United Kingdom C087. Observation adopted 2015, published 105<sup>th</sup> session (2016). The full text of the ILO response can be found at

[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0:::P13100\\_COMMENT\\_ID:3255351](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0:::P13100_COMMENT_ID:3255351)



requirement of a 50% participation quorum to be reached in strike ballots. In this regard the Committee recalls in its 2012 General survey on the fundamental Conventions, para 47, that while it has always stated that a quorum should always be fixed at a reasonable level, it has consistently considered that a quorum of 50% is indeed within such limits of reasonableness. The second requirement referred to by the TUC concerns the heightened conditions in important public services of support by 40% of all workers (section 3 of the Bill), which effectively means a requirement of 80% support where only the 50% participation quorum has been met. The Committee notes that the following categories have been identified as important public services. Health services, education of those aged under 17, fire services, transport services, decommissioning of nuclear installations and management of radioactive waste and spent fuel, and border security. While the Committee generally considers that a requirement of the support of 40% of all workers to carry out a strike would constitute an obstacle to the right of workers' representatives to carry out their activities without interference, it further observes that a number of the services set out in section 3 fall within the Committee's understanding of essential services in the strict sense of the term or of public servants exercising authority in the name of the state, in which restrictions on industrial action are permissible.

The Committee does however express concern that this restriction would also touch upon the entire primary and secondary education sector, as well as all transport services and considers that such

a restriction is likely to severely restrict the right of these workers and their organisations to organise their activities in furtherance and defence of their occupational interests without interference. The Committee recalls in this regard that recourse might be had to negotiated minimum services for these sectors as appropriate."

## **5. DEFINING AND RESTRICTING ESSENTIAL SERVICES INSIDE EUROPE**

### ***The Council of Europe***

The UK is a member of the Council of Europe, not to be confused with the European Union.

The Council of Europe was formed in 1949 and has 47 member states. It is focused on promoting human rights, democracy and the rule of law, but unlike the European Union it cannot make its own laws. It does however have the power to enforce select international agreements reached by European States on various topics. Probably the best known is the European Convention on Human Rights and the European Court of Human Rights which is the enforcement body

The European Social Charter is the creation of the Council of Europe and the UK is currently bound by its provisions. It would be fair to say that the European Union is seeking to align the social partnership philosophy underlying closer union ambitions supported by the ILO.

This distinction, however fragile, between the Council of Europe and the EU is important: the UK is not resiling from the Council of Europe but from the EU. Given that the European Social Charter contains significant commitments on such matters as the organisation of labour and





the right to strike, any proposals to deal further with this matter in the UK must by necessity also take account of our obligations under the European Social Charter.

In Europe, the issue of strikes in essential services has been subjected to several enquiries and investigations. A discussion paper presented by the Rapporteur from the Socialist Group (Mr Giovanni Crema from Italy), to the Council of Europe's Committee on Economic Affairs and Development in May 2005 (which is still apposite to circumstances in 2017) came down strongly in favour of greater public protection from strike action:<sup>10</sup>

"The Report's central message is that, while strikes continue to form an essential ultimate tool for employees to improve their conditions, greater attention needs to be paid to the rights of ordinary citizens to pursue their daily lives unhindered and to the right of society to protect their well-being and its own essential functioning." of attitudes to strikes in essential services in a number of EU countries."

Further extracts from the draft resolution, subsequently approved by the Council of Europe, can be found in Appendix A.

### ***The definition of lawful strikes***

There then comes the issue of defining lawful strikes. Three European Countries prohibit political strikes: Germany, Spain and the UK. Others such as France and Italy may through the courts, find certain strikes illegal on the grounds that do not relate in any way to the circumstances at the workplace. Germany and the UK are also tougher about secondary strikes. In Germany public servants (who make

up 30% of the workforce) are not allowed to strike and unions must also represent 75% of employees in order to be able to call a strike. They must also see that the strike remains proportionate to its aims.

Many European countries restrict strike action in all public services. The armed forces and law enforcement authorities are not allowed to strike anywhere, and the refusal to allow public servants to strike is accepted even by the ILO as a consequence of being given security of employment.

Apart from certain compulsory arbitration provisions, some countries (like Italy) lay down strict rules on the frequency and duration of strikes in certain industries and circumstances. For example, there must be at least 10 days between strikes. Once this period has expired, a strike cannot exceed four hours and subsequently 24 hours, once a further ten days' notice has been given. There must be at least ten days between two strikes in the same sector or affecting the same group of users. It is strictly forbidden to take industrial action in the transport sector during school holidays or election periods.

There is little doubt that countries across the wider European community recognise the concept of essential services. Importantly, these extend to economic services, not just in respect of safety and human life, including transport, public broadcasting, water, gas and electricity supply and prison administration.

---

<sup>10</sup> Council of Europe, *The right to strike in essential services: economic implications*, 11 May 2005.



### ***The Trade Union Act 2016***

With the exception of the UK, most Council of Europe countries have brought in regulations on minimum service levels in the event of a strike in essential services. The Trade Union Act 2016 takes the UK one step closer to trying to find a solution to this problem but there is more that can be done.

The Government has now published five regulations defining important public services, for the purposes of section 226 of the Trade Union and Labour Relations Act 1992, and these came into force on 1 March 2017. The employment services covered are Health, Fire, Transport, Education and Border security.

Unions holding strike ballots in work covering employment classified in the orders will be required to meet the additional 40% threshold for all members employed in that section. What is perhaps surprising is that some other highly sensitive services have so far not been defined. These include: Public broadcasting, Water, Sewage, Electricity and Gas supplies, and prison administration.

### ***European countries treatment of essential service strikes – case studies<sup>11</sup>***

In Spain, the Constitutional Court has always taken into account the overriding need to protect users' interests in the particular circumstances of each dispute. It has ruled that 'the community's right to vital services takes precedence over the right to strike'. It has further ruled that 'a service is essential not by virtue of its nature but by the virtue of the results expected of it taking into account the nature of the interests it is intended to satisfy'. In Spanish case law, the main essential sectors include

transport, hospital health services, energy supply, water purification and the collection and the treatment of solid waste, assistance services, energy supply, postal services and education. The minimum service provisions are compulsory.

However, recent changes to the law, Basic Act 4/2015 protecting public safety and the new section 557 amending the penal code, have brought about strong resistance from the main trade unions in Spain.

In France, on-going attempts have been made to reach some agreement with the main Trade Unions on providing minimum services in the event of strikes in essential services, but action to protect the rights of the citizen are patchy. Minimum service provisions are provided by collective agreement between the parties in dispute or by Ministerial decree. In 2008 an Act was passed which required minimum services to be supplied in strike situations covering terrestrial transport services. Air and maritime transport and goods and tourism were excluded. It is difficult to see much merit in adopting any provisions which arise through French law.

In the Netherlands the right to strike is not embedded in national law, but relies upon Section 6(4) of the European Social Charter. There are no rights embedded in Dutch law to protect third parties from the damage to their interests from strike action. However, the Supreme Court has on occasions specifically limited strike action so that a minimum service can be provided. For example, in 1997 it was ruled that striking was prohibited during rush hours in the transport industry. Another ruling

---

<sup>11</sup> ILO Freedom of Association and Protection of the right to organize, Convention 1948 (no. 87). Observation of CEACR in 2015.



excluded the right of collective action in the railway sector, since the strike would lead to disproportionate damages for travellers and even the railway company, as it was argued that the company had guaranteed that travellers would be transported. In relation to medical personnel, the Supreme Court ruled that in the case of a collective action a minimum level of sufficient medical treatment must be available.

In Italy, the minimum service is governed by Act 146 of 1990 which regulates the right to strike in essential public services and protects the constitutional rights of the individual. This law was further amended in 2000 by a clause which 'provided that the purpose of the Act was not to deprive anyone of the right to strike but to guarantee the operation of a minimum service in essential public services'. A Guarantee Committee assesses the appropriateness of the minimum services set out in collective agreements and, if necessary, orders further measures. In transport, users have to be given notice of minimum service timetables. A full service usually has to be guaranteed by the railways and bus services between 0600 and 0900 and again from 1800 to 2100.

In Belgium there are differences between the legal framework for the private and public sector. The private sector is governed by the Essential Services Act of 1948 concerning services of public interest. The responsibility for providing services lies with the collective bargaining partners. A joint committee draws up lists of vital needs and services. The whole system is out of date and needs to be modernised but it is relevant that in 2010, plans were being drawn up to modernise the 1948 Public services Act to introduce the provision of guaranteed services for example in the transport sector.

### ***The European Social Charter***

The European Social Charter secures certain rights to employees and trade unions in the event of conflict of interests, essentially on conflicts over the negotiation of collective agreements. All national laws and actions are reviewed by the European Committee of Social Rights to assess whether it conforms with the provisions of the Social Charter. The introduction of a minimum service provision complies in principle with Article 6 paragraph 4 of the European Social Charter. However, the Committee has warned against the complete banning of strikes in essential services, advising that:

"A minimum service may be established in sectors that are essential in the strict sense of the term, for example – those which are essential for guaranteeing respect for the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

Public authorities and trade unions must enter into negotiations to define and determine the minimum service to be provided in essential public services

These matters should be determined under the supervision of an independent commission or a court.

A study by the Institute of Employment Rights ,2008, entitled *The Right to Strike – A Comparative Perspective* produced a study of national law in six EU states which illustrates how troublesome the achievement of a balanced and agreed consensus on trade union immunity can be."



### ***Trade Union attitudes to restricting strikes in essential services***

International guidance is provided by the ILO. However, in the UK, trade unions are reluctant to accept any limitations on the right to strike and are resistant to arguments about banning strikes in essential services.

The TUC has been at the forefront of criticisms of the UK Government for bringing in laws which impose stricter ballot provisions for important public services. For example, a TUC delegate claimed that:<sup>12</sup>

“This law places a much broader restriction to freedom of association than is provided for in ILO jurisprudence, a restriction that is clearly unnecessary, unjustified and disproportionate, and provides no compensatory guarantees.”

There is no sign that the UK trade union movement wishes to recognise the need to restrict strike action in essential services. Neither the TUC, nor leading trade unions such as UNISON, UNITE or the GMB, have published considered research on the matter. Much political effort has been expended on fighting the Trade Union Act 2016 and in particular resisting the new 40% ballot requirement.

The representations made to the BEIS consultation document by trade unions in 2015 all pointed to existing minimum service agreements for the protection of public health and safety, but there is no publically available evidence of any meaningful agreements on such matters. No trade union has accepted that breaches by the union concerned should result in the loss of immunity from damaged parties in cases of essential services. The Junior Doctors

dispute in April 2016 demonstrated a complete disregard for these so-called minimum service agreements.

The TUC appealed in September 2015 to the ILO's Committee of Experts in regard to an early draft of the Trade Union Act 2016. The TUC claimed that the Bill contained a wide range of restrictions on trade union freedom, which the TUC believed contravened a number of ILO conventions ratified by the UK, notably ILO conventions 8, 98, 135 and 151. They also suggested that the proposed legislation might be in breach of other treaties such as the European Social Charter.

The TUC were particularly concerned by the new restrictions on the ability of trade unions to hold lawful strikes. However, there are also worries that extensive restrictions on trade union freedoms may lead to an increase in unlawful unofficial action which is sometimes much more difficult to deal with than action controlled by the official trade union. As ever, it is a question of balance.

The extensive use of industrial action by the rail unions in respect of the Southern Rail dispute is now extending to northern England. This has brought the issue of the damage that strikes in essential services can cause back into the political arena. It is now recognised, as it was with the dispute by the Junior Doctors that the damage that can be inflicted on an innocent public is considerable. The following section considers what can be done.

---

<sup>12</sup> “TUC speaks out against the Trade Union Act at the ILO”, 7 June 2016. [www.tuc.org.uk/CAS-TUC](http://www.tuc.org.uk/CAS-TUC).



## 6. BACKGROUND TO RECOMMENDATIONS

It is sometimes forgotten that current trade union legislation does provide severe penalties on trade unions who lose their immunity through unlawful action. Injunctions are often sought by employers suffering from strike action. Although there are relatively few major cases with extreme penalties, the threat is always there.<sup>13</sup>

Penalties range between £25,000 for unions with less than 5,000 members to £250,000 for unions with over 100,000 members. It is surprising that these limits have not been updated to take account of their falling value - £250,000 in 1982 has an approximate value of £616,000 in 2017.

It is also the case that Industrial disputes have fallen to historic lows with only 322,000 days being lost to strikes in 2015, compared to an annual average of 9.8 million days being lost in the 1970s and 1980s.<sup>14</sup>

However, as can be seen in Table 1 below, the proportion of strikes currently being held in what may be defined as essential services, such as Health, Education and Transport is striking. Over 90% of working days lost were in what may

be broadly considered as important or essential services. So looking at the total number of days lost does not provide a reliable guide to the damage capable of being inflicted on the general public. Certain sectors of the economy are vulnerable to extreme and rapid public damage.

It is also true that certain sectors of the population are more vulnerable to strike action than others: in particular, the people most affected by strikes are very often the poorest or the weakest in society, such as mothers with young children, the sick, the elderly and those on low ages (who are less likely to be able to afford, for example, private transport in the case of a rail strike). Given the overriding social responsibility to protect such vulnerable groups it is perhaps surprising that reaching a fair solution to restricting strikes in essential services has been so difficult to achieve.

So what further measures might be effective to reduce the impact of strikes in essential services?

<sup>13</sup> For a complete review of UK industrial labour relations law 1997 to 2010, see House of Commons Library report, 26 January 2017.

<sup>14</sup> ONS, "Labour disputes in the UK: 2016": Table 1: labour disputes annual estimates, May 2017.

**Table 1: Number of working days lost by industry, UK 2016**

Industry group	Working days lost (thousands)	Proportion of total working days lost
Transport and storage	49.1	15.3%
Public admin and defence; compulsory social security	10.8	3.4%
Education	105.4	32.7%
Human health and social work	131.5	40.8%
All other	25.5	7.9%
<b>Total</b>	<b>322.3</b>	<b>100%</b>

Source: ONS, "Labour disputes in the UK: 2016": Table 3, May 2017.



### ***Tighter Definition of essential services***

One issue dominates international and domestic consideration – defining what is an essential service.

The difficulties surrounding this matter have so often led to it being put into the 'too hard basket'. The modern world is so interlinked and interdependent that taking out one small section of a supply chain can lead to much unforeseen damage. The chances of legislation failing to adequately cover all circumstances are high. Indeed, the new definitions of five important public service areas by the Government (following the enactment of the Trade Union Act 2016) will be a test of such definitions and whether they are sufficiently complete.

However, the new legislation has already effectively prevented one public sector strike. In June 2017, Unison Scotland called a strike ballot in support of a pay claim to COSLA, the Scottish Local Authorities. Although 62.7% of those voting were in support of strike action, only 22.8% of those eligible to vote chose to do so. Put another way, this meant only 14.3% of the pay bargaining group voted to strike. The strike was not implemented.

This points up the threat posed to the general public by the Labour Party's proposals to do away with long-standing ballot restrictions. If they enact their manifesto proposals, small sectors of union membership voting for strike action will succeed in paralysing large public service sectors with no redress in law to prevent it.

Assuming that essential services/important public services can be defined and agreed, there then comes the question of what to do when a trade union decides to continue with a strike, even though the 40% ballot threshold has not been reached. This would open up a trade

union to challenge in the courts, presumably by anyone damaged by the strike which would be deemed to be unlawful. It would also render the strikers liable to dismissal, since they would have broken their employment contract. The problem with this whole scenario is that it creates uncertainty and confusion. It also places the courts in the uncomfortable position of having to interpret many industrial disputes across a wide range of industries. This is dealt with in more detail below.

There is increasing evidence that the ILO is no longer able to justify its refusal to accept transport services as non-essential services. Effort should therefore be put into persuading the ILO to modernise its approach towards this matter, whilst understanding the importance to organised labour of maintaining its freedoms to bring pressure to bear upon employers. The Education sector, which is now defined as an important public service, has slightly less support in other parts of the world as needing protection from strikes. However it must be remembered that for countries like the US where most teachers are public servants, they are prohibited from striking anyway.

### ***No Strike provisions to be imposed through Legislation***

There are some examples of countries/ devolved regions applying this remedy – notably some Canadian States

This is the most extreme action to be considered and would probably not be supported by the public unless it was handled in a manner which gave the trade unions some alternative protection. Compulsory independent arbitration is the obvious compensation measure. This could be a possibility but the risks for public sector pay policy are obvious. If an independent inflationary pay award was granted, the consequences could be grave for industrial



relations and the economy. The other contentious issue will be the determination of what constitutes an essential service/important public service. Nevertheless, when all else fails this is still an option to be considered especially if the public perception of social and economic damage is strong.

At a time when public support for strike action has been reduced by the effect of the rail and Junior Doctor disputes, the Trade Union movement should be sensitive to the risk that a failure to cooperate on adequately protecting the general public from the social and economic damage of strike action could lead to binding prohibition.

#### ***Voluntary agreements, backed by statutory enforcement***

The common approach taken by many countries (and one which is not in breach of European Social Charter rights or even ILO considerations) is to consider applying a restriction to strikes in essential services.

The Government has brought forward a set of regulations designed to require higher ballot approval to justify strikes in what it terms "Important public services". The purpose behind avoiding the words "essential services" appears to have been to avoid becoming embroiled with the ILO in regard to the definition laid down by that organisation regarding essential services. This has to be allowed to be tested but it can be said to introduce another complication in regard to the desired restriction of action by Trade Unions which hurts the general public.

Chris Philp, MP for Croydon South introduced a 10 minute Rule Bill in January 2017 which allowed referral of strike action which was alleged to harm the general public, to a judge. It was called the Industrial Action (Protection of critical National Services) Bill. However, the new

task for the judge was to decide whether the action was reasonable or proportionate thereby establishing a new test to determine the legality of strike action. The proposals in the Bill were widely supported on the Conservative side by over 100 MPs but the Opposition whipped objections and the Bill was lost.

The difficulty with this proposal is that it requires every such strike action challenged as taking place in an important public service to be subject to different legal interpretation. The consequences could be controversial and worse still give the judiciary powers which should rightly be determined by Parliament.

## **7. RECOMMENDATIONS**

1. The Government should approach other countries concerned about the damage that strikes in essential services are causing to the general public and agree a submission to the ILO for discussion. The objective of this initiative would be to modernise and update advice and guidance to mitigate the impact of strikes in essential services.
2. Perhaps simultaneously, the Government should open up discussions with the TUC to seek to incorporate stronger voluntary restraint by Trade Unions taking action in areas designated as an essential public service. It may be that the Government wishes to incorporate other matters such as progress on the Taylor report. Both parties could consider the drafting of a code of conduct designed to cover the provision of minimum services during strike action where necessary. It will be appropriate to avoid further references to the court although the proposals formulated by Chris Philp MP for a percentage of the workforce to remain on



duty on a strike day could usefully be discussed. (This was not incorporated in the Chris Philp 10 min rule Bill).

3. If the Government were to choose to accede to increased public sector pay demands (of, at best, questionable affordability), it should demand as a *quid pro quo*, restrictions on the right to strike in the important public services.
4. There are still serious black holes which will emerge as the Trade Unions test the new "important public service" definitions. Given the immunity of strikers from claims against them or the Trade Union for negligent action leading to injury whether physical or economic, it seems reasonable for the Government to seek support for enacting the repeal of Regulation 7 from the Employment Businesses Regulations 2003.
5. The Government should move forward to allow agency workers to be used at least in what are now described as "important public services" under the 2016 Trade Union Act.
6. Furthermore, the level of financial penalties applied to Trade Unions who have lost their immunity through unlawful action should be updated to reflect the impact of inflation. The original maximum penalties under the 1982 Employment Act were £25,000 for unions with less than 5000 members to £250,000 for unions having over 100,000 members. That maximum figure should be increased to around £620,000 with commensurate increases for lower penalties.
7. If the TUC shows no interest in finding a solution to the difficulties presented by strikes in essential services, work should

begin on the creation of an Independent Tripartite Committee or Commission to define and adjudicate on the service standards needing to be maintained during a strike in an important or essential service. Such a body should be fully representative of the different interests involved including the consumer. Whether the Advisory, Conciliation and Arbitration Service (ACAS), the Central Arbitration Committee, (CAC) or the Certification Officer, ( responsible for statutory functions relating to Trade Unions and Employer's Associations have any role to play is doubtful.

If such a body were to be constituted, it would need to be well-defined and given quite narrow objectives such that, if its non-binding recommendations were not accepted, the legal and social pressures on the striking workforce would be considerable.

What all parties – unions, employers and public sector managers – should recognise is that industrial conflict hardly ever serves a good community purpose. Strikes are surely a matter of last resort when all other avenues have failed. If strikes in essential services are used by trade unions to pursue political objectives under the auspices of a trade dispute, the public will tire of the damage to the fabric of their lives and legislation will inevitably be brought forward to restrict such strike action further. We are not yet at that point, but we could be reaching that point soon if there are further "political" strikes. There is a clear responsibility on Government, public service negotiators, private sector employers in essential services and the trade unions to improve consultation and communications to try to avoid strikes which clearly damage the public without progressing the case of the workforce.





## APPENDIX A

### *Extracts from the Council of Europe Parliamentary Assembly draft resolution, subsequently approved, “The Right to Strike in Essential Services”, 11 May 2005*

“As Europe undergoes rapid political, economic, social and cultural integration, within the EU and the wider Council of Europe area, the vulnerability of each country to disruptions to others is becoming increasingly pronounced. This holds also for strike actions in essential services – whether in public or private ownership – such as the transport sector, especially air transport or in public health, at a time of intensified international contacts and labour mobility...

Of further concern is the lack of balance in many countries between on the one hand, the right to strike, including in essential services as enshrined in various treaties from the Council of Europe’s European Social Charter to the European Union’s Charter of Fundamental rights and on the other hand, the fundamental right of citizens to pursue their lives unhindered, preserve their health and well-being and the right of society to function and to maintain its overall ability to function as well as protect the health and welfare of its citizens. In certain European countries this balance is seriously tilted against citizens and society...

Strike actions in essential services – whether in the public or private sector – are having an increasingly profound effect not only on the countries where they occur but also internationally and especially within a rapidly integrating Europe. The Report’s central message is that, while strikes continue to form an essential ultimate tool for employees to improve their conditions, greater attention needs to be paid to the rights of ordinary citizens to pursue their daily lives unhindered and to the right of society to protect their well-being and its own essential functioning...

Whilst the cost of a strike can be quantified, its consequences among users are difficult to evaluate, though user reaction to recurrent disputes is observable in terms of fatigue, arriving late, absenteeism and sometimes violence towards strikers. There were examples of this in Milan in December 2003 during a lightning strike in public transport. Strikes can lead to a substantial reduction in the number of hours worked or local productivity. For instance, during the 1995 strikes, of 3,337,000 Paris region commuters, some 360,000 or about 11% said that they had not gone to work at least once because of transport problems. A large number, 87% said their work schedules had been disturbed. As we have already seen, to this should be added a fall in consumption and confidence about the future. The problem is all the more worrying in that it accentuates social differences. Especially in public transport it is often the least privileged workers who suffer the effects of a strike most, since they cannot always afford alternatives, such as cars.

The right to strike therefore has to be reconciled with the protection of users and the community. It should be used to penalize the direct interlocutor of the strikers, not users.





## THE CENTRE FOR POLICY STUDIES

The Centre for Policy Studies is one of Britain's best-known and most respected think tanks. It is independent from all political parties and pressure groups, and relies on the support of all those who share its aims and ambitions.

Through our Associate Membership scheme, we welcome supporters who take an interest in our work. Associate Membership is available for £100 a year. Becoming an Associate will entitle you to all major CPS publications produced in a 12-month period; invitations to lectures and conferences; and advance notice by e-mail of our publications, briefing papers and invitations to special events.

Please contact Jenny Nicholson for more details at:

Centre for Policy Studies  
57 Tufton Street  
London SW1P 3QL  
020 7222 4488  
[jenny@cps.org.uk](mailto:jenny@cps.org.uk)

*The aim of the Centre for Policy Studies is to develop and promote policies that provide freedom and encouragement for individuals to pursue the aspirations they have for themselves and their families, within the security and obligations of a stable and law-abiding nation. The views expressed in our publications are, however, the sole responsibility of the authors. Contributions are chosen for their value in informing public debate and should not be taken as representing a corporate view of the CPS or of its Directors. The CPS values its independence and does not carry on activities with the intention of affecting public support for any registered political party or for candidates at election, or to influence voters in a referendum.*

## THE AUTHOR

Nicholas Finney has spent much of a distinguished career as an industrial relations expert. He has acted as the employers' collective negotiator in both the Dairy Industry and the Docks Industry where he saw out the ending of the National Dock Labour Scheme. He has contributed to policy on Waterfront Labour reforms in Australia and is known for his extensive Maritime expertise. He was awarded the OBE in 1989 for his contribution to the Port Transport Industry.

Latterly he looks after the research programmes on freight and the supply chain for the Independent Transport Commission.

### *Acknowledgements*

The author would like to single out for special thanks Joe Robertson who has patiently, with his legal expertise, helped me to understand the range and limitations of employment law in the difficult area of strikes in essential services. Support towards the publication of this study was given by the Institute for Policy Research.

ISBN: 978-1-910627-49-5

© Centre for Policy Studies, September 2017