CLYDE&CO

Strikes (Minimum Service Levels) Bill – the story so far

Authors: Stephen Miller, Ruth Bonino, and Abarna Harindra - Clyde & Co

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BSA member Clyde & Co have produced the following article on the Strikes (Minimum Service Levels) Bill. For further information, or to find out more about the BSA, please contact bsa@bsa-org.com

Overview

The Strikes (Minimum Service Levels) Bill is intended to provide powers to introduce minimum levels of service during strikes across certain key sectors. The government's intention is to mitigate the disruption of strike action to the public and ensure their safety. If the Bill is passed, employers covered by the new rules will be able to issue a work notice to unions setting out who is required to work during a strike. The Bill was introduced into Parliament in January 2023 by Grant Shapps and was swiftly voted through the House of Commons. The Bill is currently progressing through the House of Lords.

Sectors covered by the Bill

The six sectors which are covered by the Bill are health, education, fire and rescue, transport, border security, and nuclear decommissioning and radioactive waste management services. The Secretary of State can also specify in future regulations which services within these broad categories listed in the Bill could be subject to the proposed rules on retaining minimum service levels during strikes.

Minimum service levels

Importantly the Bill does not set out the minimum service levels (MSLs) as these will be set out in future "minimum service regulations". The government has promised to consult on what the MSLs in each sector should be, but it will be able to decide unilaterally what the MSLs should be if the relevant parties do not negotiate and reach an agreement. The MSLs will then be outlined in further regulations which will require approval of both Houses of Parliament. In February this year, consultations on MSLs were launched in relation to ambulance, fire and rescue, and passenger rail services. The government hopes to not to have to use its powers in other sectors, expecting them to reach "sensible and voluntary agreement" on delivering a reasonable level of service, but will "step in and set minimum service levels should that become necessary".

The Bill permits the regulations to be framed so they apply to any strike which takes place the day after they come into force.

Work Notices

Under the proposals, where a trade union has given notice of a strike to an employer, the employer would be able to serve a 'work notice' on the relevant trade union at least one week before a planned strike (or later if agreed with the union). The work notice will identify the people required to work during the strike to ensure the MSLs, regardless of whether they are a member of a trade union, as well as specifying the type of work they need to carry out during the strike period. A work notice cannot identify more people than is reasonably necessary to provide the MSLs. An employer may vary a work notice by giving notice to the trade union at least 4 days before the strike date (or later if agreed with the union).

Before serving a work notice (or amending a work notice), the employer must consult the union and have regard to their views on how many people are identified in the work notice and the work they are required to undertake in order to meet the MSLs. In practice this will mean that there will need to be an attempt to achieve collaboration between the employer and the recognised unions as regards work arrangements and workers.

Loss of union immunity in tort

There is no legal right to strike in the UK but the current law provides immunity for unions from civil legal action in relation to lawful strikes. However, under the proposed Bill, this immunity will be lost if a union fails to take reasonable steps to ensure that all members identified in the work notice comply with it. This means that the employer could discipline the non-complying employees and sue the trade union for any resulting losses. There is no further information in the Bill or its explanatory notes as to what "reasonable steps" means. However, in practice the employer would be wise to seek to collaborate with the union, to mitigate any future arguments by the union that it was prevented from taking all reasonable steps through the employer's lack of collaboration.

Loss of automatic unfair dismissal protection

Currently, if an employee is dismissed for taking part in protected industrial action during (and in some cases after) a 12-week "protected period", their dismissal is automatically unfair. Under the Bill, if someone identified in the work notice chose to strike in breach of the work notice, they would lose their protection from automatic unfair dismissal, provided their employer has notified them before the strike day that they are named in and must comply with the work notice and the work which they'll need to carry out. Despite this, they will still retain their ordinary unfair dismissal protection, so the question will be whether their particular dismissal for striking in breach of the work notice was fair.

Impact

If the Bill becomes law in its current form, it will be important for employers and recognised trade unions to attempt to collaborate to scope out work notices so that they meet MSLs for their particular sector. Under the proposed rules, the employer is required to "have regard to the views expressed by the union" but there is no obligation to reach agreement. Nevertheless, employers who are seeking a deal and wanting to keep the union at the negotiating table and end the industrial action, might be wise to strive for an agreement. In any event, collaboration will be desirable since it is in both sides' interests to ensure that those workers identified in the notice comply with it.

Whether the Bill does become law, and for how long is another question. The Bill has faced extreme opposition, particularly from trade unions who have called it undemocratic and potentially illegal. Recently, a group of employment law academics have criticised the Bill, saying it will place an "unacceptable restriction" on a worker's right to strike, stating that it would give the government a "largely unfettered power" to determine what constitutes a minimum level of service, as well as imposing an "unprecedented" obligation on trade unions to take reasonable steps to ensure that workers comply with a notice that they must work during a strike, which the academics say will effectively require them to undermine their own strikes. The Labour Party has pledged to repeal the Bill if enacted into law, and it is likely that it would be challenged in the courts. Furthermore, Scotland's First Minister has recently declared that the Scottish Government has no plans to use the legislation and will not issue or enforce work notices during industrial action.

Examples from other jurisdictions show that such laws may not always be enforced. For example, France has a less restrictive minimum service law in certain public services, yet the minimum service requirements are often not implemented because they are thought to be an unreasonable infringement on workers' right to strike.

The Bill is currently at the Report Stage in the House of Lords where a number of key amendments which significantly weaken the Bill's provisions have been agreed. After the Report Stage, the Bill will return to the Commons where the amendments will be debated. As the Commons are unlikely to agree, the Bill will be delayed while the government tries to find a way forward.

About the authors

Stephen Miller

Stephen is accredited as a specialist in employment law and in discrimination law by The Law Society of Scotland. He advises on and represents clients in all areas of employment law from discrimination and disciplinary issues and executive exits to reorganisations, redundancies and equal pay issues. Stephen has represented both private and public sector organisations in a number of high profile tribunals throughout the UK, and he is regularly involved in providing strategic advice and training to clients in the local authority, transport, charity, sports and further and higher education sectors.

Ruth Bonino

Ruth is a solicitor with extensive experience in employment law. She manages the professional support function of the Employment, Pensions and Immigration team where she is responsible for keeping the team's knowledge and skills up to date. Ruth writes client alerts and legal articles for external publication and is a contributor to a number of legal text books. An important aspect of her current role is to consider the impact of changes to employment law. A part of this process is to organise think-tank sessions on new developments in employment law and draft client alerts and associated template documents.

Abarna Harindra

Abi is a Trainee Solicitor at Clyde & Co. During her seat with the Employment team, she worked on a variety of Employment Tribunal claims including discrimination and redundancy claims. She also assisted with advising clients on contractual issues, trade union matters and data subject access requests. Abi has co-written an article on the Clyde & Co website on the Miscarriage Leave Bill, as well as upcoming articles on the Neonatal Care (Leave and Pay) Bill and the Carer's Leave Bill. She is currently undertaking the second seat of her Training Contract in the Insurance, Financial and Professional Disputes team, focusing on financial lines and directors' and officers' liability insurance.