

Minimum Service Level Act 2023: *Issues & Reforms*

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Executive Summary

The Strikes (Minimum Service Levels) Act 2023 (MSL) allows an employer to give a “work notice” to a trade union concerning any strike affecting a service subject to minimum service regulations. Despite the evident need to ensure essential public services continue operating, this has come at the cost of compromising the right to strike as it is compulsory for designated workers to provide such minimum services.

This brief identifies key gaps with the MSL that have exacerbated the asymmetry of power in the relationship between employers and employees. As well as the potential incompatibility with Conventions of the International Labor Organisation (ILO), which intensifies the legal and political uncertainties for employees and trade unions alike.

Amendments to the Act must be made in a way that allows minimum basic services to operate alongside an effective right to strike. The recommendations proposed in this policy brief will provide greater guidance on how the minimum service level for industries should be set and clarify the status of the MSL in relation to complying with international conventions.

996 Words Total



ISSUES

"WHEN WORKERS DEMOCRATICALLY VOTE TO STRIKE, THEY CAN BE FORCED TO WORK AND SACKED IF THEY DON'T COMPLY"³²

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ISSUE 1: ENTRENCHING POWER ASYMMETRY

With Trade Unions

Primarily, they afford asymmetric substantive rights between Trade Union (TU) and employers. The Act¹ clarified through the COP², reduces TUs to a merely consultative role. It worsens this gap through the imposition of onerous administrative burdens on them through s.234E³. As it disqualifies them from s.219⁴ protections upon fairly to meet these burdens.

Their only means in challenging MSL regulations is through judicial review which Katsaroumpas⁵ argues is costly and lengthy. Finally, there is a material risk that work notices would be weaponised against TUs. Through s.234C(6)⁶, employers could disproportionately target key TU/strike/picket organisers to undermine their cause – and through s.234C(5)⁷, serve them to a damaging number of workers to achieve the same effect.

With Striking Employees

The act⁸ imposes a penalty onto workers who strike contrary to their work notices; it disqualifies them from protections against unfair dismissals. The COP⁹ clarifies that, if they were induced to do so by a TU, the entire strike loses s.219¹⁰ protections. Disqualifying every striking employee irrespective of whether they have been served work notices.¹¹

ISSUE 2 – (UN)TRANSPARENCY IN SETTING MSL

Crucially, the MSL setting process is untransparent. It relies on secondary legislation as its source of power. Paragraph 2¹² grants the Secretary of State expansive powers to set MSL. The process in setting these MSLs is undisclosed. Ministries disclose neither the evidence nor factors they consider in setting them. Hence, there is a noticeable, yet unexplained difference in MSL between different industries. Compare for instance, the 40% MSL for rail workers¹³ as opposed to a direct obligation for all ambulance¹⁴ and fire service workers¹⁵ to respond to calls.

ISSUE 3 – INCOMPATIBILITY WITH ILO

Current UK Position	The ILO's Position
Government consultation documents state <i>"The International Labour Organisation...has stated that minimum service levels are justifiable"</i> . ¹⁶	MSLs are not mentioned in ILO Conventions No 87 or No 98 Decisions of the ILO Committee on Freedom of Association present a more nuanced picture. ¹⁷
Potential tortious liability for unions ¹⁸ and a loss of unfair dismissal protection for union members if a work notice is not complied with. ¹⁹	<i>"The public authorities shall refrain from any interference which would restrict" the right of workers' organisations to organise their activities and formulate their programmes under Convention 87 Art 3.</i> ²⁰
Although the Act forbids employers from using union membership or activity as selection criteria for work notices, there is a lack of oversight to enforce this. ²¹	Convention 98 Art 1 protects against anti-union discrimination. ²²
UK has taken a top-down approach, with MSLs for some sectors specified in secondary legislation. ²³	ILO CFA: <i>"Trade union organisations should be able to participate, along with employers and the public authorities, in defining the minimum service."</i> ²⁴ <i>"Any disagreement should be settled by an independent body."</i> ²⁵
Secondary legislation sets the MSL for border services so high as to seemingly render a strike meaningless: services should be <i>"no less effective"</i> than if there were no strike. ²⁶	ILO CFA: <i>"Minimum service should be restricted to...ensuring that the scope of the minimum service does not render the strike ineffective"</i> . ²⁷
Employers must merely <i>"consult... and have regard to any views expressed by the union"</i> before issuing a work notice. ²⁸	ILO CFA: <i>"Unilateral determination by the employer of minimum service, if negotiation has failed, is not in conformity with the principles of freedom of association."</i> ²⁹
Employers must issue the work notice at least 7 days before each day of strike action, but can vary it up to 4 days before. There is also no legal obligation for employers to notify workers identified in the notice. ³⁰	ILO CFA: <i>"it is important that the provisions regarding the minimum service...are established clearly, applied strictly and made known to those concerned in due time."</i> ³¹

Footnotes:

1. Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s234C(8) (as inserted by Strikes (Minimum Service Levels) Act 2023)

2. Code of Practice issued by the Secretary of State under section 205 of the Trade Union and Labour Relations (Consolidation) Act 1992 on reasonable steps to be taken by a trade union (minimum service levels) (6 December 2023). <<https://www.gov.uk/government/publications/reasonable-steps-to-be-taken-by-a-trade-union-code-of-practice/code-of-practice-issued-by-the-secretary-of-state-under-section-205-of-the-trade-union-and-labour-relations-consolidation-act-1992-on-reasonable-steps>> accessed 4 March 2023

3. TULRCA 1992, s234E (as inserted by Strikes (Minimum Service Levels) Act 2023)

4. TULRCA 1992, s219 (as amended by Strikes (Minimum Service Levels) Act 2023)

5. Ioanna Katsaroumpas, 'Crossing the Rubicon: The Strikes (Minimum Service Levels) Act 2023 as an Authoritarian Crucible' [2023] Ind Law J 515 <<https://doi.org/10.1093/indlaw/dwad023>> accessed 1 March 2024.

6. TULRCA 1992, s234C(6) (as inserted by Strikes (Minimum Service Levels) Act 2023)

7. TULRCA 1992, s234C(5) (as inserted by Strikes (Minimum Service Levels) Act 2023)

8. TULRCA 1992, s238A (as amended by Strikes (Minimum Service Levels) Act 2023)

9. COP (n 2)

10. TULRCA (n 4)

11. COP (n 2)

12. Strikes (Minimum Service Levels) Act 2023, Para 2

13. Strikes (Minimum Service Levels) (Passenger Railway Services) Regulations 2023, SI 2023/1355

14. Strikes (Minimum Service Levels) (NHS Ambulance Services and the NHS Patient Transport Service) Regulations 2023, SI 2023/1545

15. Strikes (Minimum Service Levels) (Fire and Rescue Services) (England) Regulations 2024 [Draft]

<<https://www.legislation.gov.uk/ukdsi/2024/9780348257597>>

16. Minimum Service Levels for Education, Department for Education, Consultation Document [2023]

17. International Labour Organization, *Compilation of Decisions of the Committee on Freedom of Association*, 6th edn (International Labour Office 2018), 864-906

18. TULRCA (n 5)

19. TULRCA (n 8)

20. International Labour Organization, *Convention concerning Freedom of Association and Protection of the Right to Organise*, 1948, art 5

21. TULRCA (n 6)

22. International Labour Organization, *Right to Organise and Collective Bargaining Convention*, 1949, art 1.

23. Strike Regulations (n 15)

24. ILO (n 17) [871]

25. ILO (n 17) [876]

26. The Strikes (Minimum Service Levels: Border Security) Regulations 2023, SI 2023/1555

27. ILO (n 17) [874]

28. TULRCA (n 1)

29. ILO (n 17) [883]

30. Minimum Service Levels: Issuing Work Notices, a Guide for Employers, Trade Unions and Workers, Department of Business and Trade, (November 2023)

31. ILO (n 17) [880]

32. Trade Unions Congress, 'TUC welcomes civil liberties' groups condemnation of ministers' attack on the right to strike' (tuc.org.uk, 30 January 2023) <<https://www.tuc.org.uk/news/tuc-welcomes-civil-liberties-groups-condemnation-ministers-attack-right-strike>> accessed 10 March 2024

REFORMS

RECOMMENDATION 1: INDEPENDENT BODY

An independent body should be established. This body would have responsibility for facilitating dialogue between employers, government and unions to set MSLs. Ideally, tripartite discussion will result in MSLs which do not overly restrict the right to strike, while ensuring acceptable access to essential public services. In this case, the new organisation's role will be limited to approving the MSL agreement. If, however, negotiations break down, the organisation will step in to set MSLs.

To allow the new body to fulfil this task, its remit will also include gathering data on the impacts of strike action in essential public services. This will enable MSLs to be set at a level which can be objectively justified.

RECOMMENDATION 2: ILO REPORT

The government historically has a track record of underestimating the importance of the ILO in the global context, where Conservative MP's have described ILO's supervisory bodies as a mere 'informal advisory role'.³³ Ironically courts tend to place heavy emphasis on ILO jurisprudence,³⁴ therefore we recommend the government to assign more weight to the supervisory bodies and realise their obligations to international conventions.

Currently the government has still yet to respond to the ILO with regards to its compliance of Convention 87³⁵, with the TUC highlighting incompatibility of UK legislation with its international standards and the CEACR asking the government to respond to complaints raised.³⁶ We speculate the government's avoidance in these matters is due to the issues of current political importance. In light of the aforementioned incompatibility mentioned in issue 3, we recommend the government issue a report to the ILO clarifying its position on Convention 87 in the context of the MSL and whether it is compatible with the Convention.

We also recommend that the government amends its legislation in accordance with such international standards to rebalance the asymmetry of power mentioned earlier, and when doing so, ensures that it meets the level of consultations outlined by the ILO.³⁷

**"IMPROVE CONSULTATION OF THE
SOCIAL PARTNERS ON LEGISLATION
OF RELEVANCE TO THEM"**³⁷



**"[THE] UK GOVERNMENT
RESPONSE TO ILO REBUKE
[WAS] DISAPPOINTING"**³⁸

NAUTILUS
INTERNATIONAL



**"[THIS] CONSTITUTES A FURTHER
DEPARTURE FROM ESTABLISHED
NORMS AND TREATY OBLIGATIONS.
IT WOULD MAKE GREAT BRITAIN AN
OUTLIER AMONG COMPARABLE
COUNTRIES"**³⁹



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Footnotes:

33. Sajid Javid Letter to the Chair of JCHR, https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Letter_from_Sajid_Javid_050116.pdf accessed 4 March 2023

34. Katsaroumpas (n 5) [541]

35. ILO (n 20)

36. ILO, 'Direct Request (CEACR) - adopted 2023, published 112nd ILC session (2024)', <https://www.ilo.org/dyn/normlex/en/f/?es=1000:13100:0:NO:13100:PI3100_COMMENT_ID:PI3100_COUNTRY_ID:4378458:ID2651:NO>, accessed 08 March 2024

37. ILO (n 17)

38. Nautilus International, 'UK government response to ILO rebuke on labour laws 'disappointing'', says Nautilus' (Nautilus International, 12 December 2023) <<https://www.nautilusint.org/en/news-insight/news/uk-government-response-to-ilo-rebuke-on-labour-laws-disappointing-says-nautilus/>> accessed 8 March 2024

39. Mason Rowena, 'Sunak's anti-union laws would make UK 'international outlier', lawyers say' (Guardian, 31 March 2023) <<https://www.theguardian.com/politics/2023/mar/31/rishi-sunaks-anti-union-laws-would-make-uk-international-outlier-lawyers-say>> accessed 8 March 2024

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