TUC
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Minimum service levels: issuing work notices

TUC response to draft work notice guidance.

September 2023

Introduction

The Trades Union Congress (TUC) exists to make the working world a better place for everyone. We bring together more than 5.5 million working people who make up our 48 member unions. We support unions to grow and thrive, and we stand up for everyone who works for a living.

The right to strike is a fundamental British liberty that is a vital part of ensuring a fair balance of power in the workplace. It is protected by the Human Rights Act, Article 11 of the European Convention on Human Rights, the International Labour Organisation's Convention 87 and Article 6(4) of the European Social Charter and is therefore a core part of the UK's international commitments.

While taking industrial action is a last resort for workers seeking to bring an employer to the table for meaningful negotiation, workers' ability to withdraw their labour underpins the successful resolution of many disputes before strike action has taken place.

Therefore, the TUC strongly opposes the introduction of minimum service levels. We believe that the regime initiated by the Strikes (Minimum Service Levels) Act 2023 is draconian, unnecessary and unworkable. As we have consistently set out, ministers should reconsider plans to introduce minimum service regulations which would serve only to undermine constructive industrial relations.

Ministers already know that the introduction of minimum service levels could lead to prolonged and more frequent disputes: a government impact assessment warned of this risk.[1]

Unfortunately, the provisions in the draft guide for employers, trade unions and workers would amplify some of the most toxic elements of the legislation and make it even harder to resolve industrial disputes. They would give the green light to bad employers to use the legislation primarily as a weapon against trade unions and their members.

The guidance should help employers comply with the underlying legislation. But it fails in this task. The Strikes (Minimum Service Levels) Act 2023 requires that: "A work notice must not identify more persons than are reasonably necessary for the purpose of providing the levels of service under the minimum service regulations". Yet the guidance is insufficiently robust in warning employers of their statutory duties in this regard and that they should be making every effort to minimise the numbers of those named on a work notice. Indeed, it suggests that employers could issue work notices

[1] Department for Transport (22 October 2022). *Transport Strikes (Minimum Service Levels) Bill Impact Assessment* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1112717/transport-strikes-minimum-service-levels-bill-impact-assessment.pdf

even where they are able to provide a minimum service without them. This failure is serious: every worker who is unnecessarily added to a work notice is being denied their right to strike, a right that is underpinned by the UK's international commitments.

In many sectors it has long been custom and practice for voluntary agreements to be put in place to ensure life-and-limb cover during industrial action. During the parliamentary passage of the legislation, ministers said that they preferred voluntary agreements to be sought during industrial disputes. Yet, the guidelines make only cursory reference to voluntary agreements and fail to prioritise them. Such arrangements, whether longstanding or ad hoc, should be the first option for providing services during industrial action.

Likewise, the guidelines give little weight to the perspective of a trade union, even though consultation with unions is a statutory duty under the legislation. They contain no defined timescale for employer consultation with unions and little encouragement, let alone obligation, on employers to take proper account of the views of unions when devising work notices. The result is a consultation process that is perfunctory and essentially meaningless.

The guidelines fail to engage adequately with the legal protection given to trade union data. This is important because there is a long history of trade union members suffering detriment and even being blacklisted.

It is also notable that these guidelines, which generally apply to employers, do not carry the statutory weight of the proposed code of practice on "reasonable steps" that it is proposed would apply to trade unions.[2] So, if an employer ignores its provisions, for example by deliberately targeting for work notices those workers they believe will take strike action, workers cannot seek restitution.

Overall, the guidance demonstrates just how unworkable this legislation is. It is clear from this guidance that employers will find it incredibly difficult to produce accurate work notices while complying with their statutory duties.

If the government remains intent on continuing along the damaging path this legislation makes, as a minimum the TUC believes further action is needed to ensure the guidelines do not further exacerbate the harm this legislation could cause. This would involve government acting to ensure the guidance:

- states that work notices should not be issued where an employer can meet a minimum service level without one
- emphasises the need for employers to seek voluntary agreements ahead of imposing work notices
- provides trade unions with sufficient time to respond to consultation and place greater obligation on employers to take account of their views

[2] Department for Business and Trade (August 2023). *Minimum service levels consultation – draft Code of Practice* www.gov.uk/government/consultations/minimum-service-levels-code-of-practice-on-reasonable-steps

- places greater duties on employers to ensure that staffing levels are not beyond those necessary to provide a minimum service, in line with their statutory duties
- provides greater protection for highly sensitive trade union data.

Unnecessary levels of staffing

The TUC has warned repeatedly that the making of minimum service levels by ministers and the issuing of work notices will damage workplace relations in any situation.

But by suggesting to employers that work notices can be issued to workers where this is not necessary to meet a minimum service level, the guidelines risk exacerbating the damage to industrial relations.

Also, if the guidance leads employers to breach their statutory duties and cause workers to lose their right to strike, the work notices are likely to be challenged in court.

Therefore, the guidance needs to be clearer to employers that they have a statutory duty stemming from the new Section 234C (5) of the Trade Union and Labour Relations Consolidation Act 1992 that they do not name more workers in a work notice than needed: "A work notice must not identify more persons than are reasonably necessary for the purpose of providing the levels of service under the minimum service regulations." The guidance should make it clear that any unnecessary worker added to the list is having their right to strike denied them, a right underpinned by the UK's international commitments.

On page 8 of the draft guide it is stated that employers "may" want to consider whether they can provide a minimum service level without a work notice.

It is remarkable that an employer might be able to meet minimum service levels without issuing a work notice but would be encouraged by this guidance to issue one anyway, potentially putting them in breach of the legislation.

Likewise, on page 8, the guidelines state that "employers can account for potential sickness or other absence". This suggests to employers that they have scope to name more members of staff on the work notice than is necessary for the delivery of minimum service levels. This is inconsistent with Section 234C (5) which makes no allowance for contingency planning.

Telling employers that they can take into account varying demand based on the time of day, week or year is, again, inconsistent with the legislation. Varying demand is not a factor an employer should take into consideration. The law is clear that employers can (if they wish) issue a work notice to meet a minimum level of service set out in regulations. If varying demand could lead to health and safety issues, for example, then the employer should not issue a work notice.

Page 15 of the guide notes that those not named on a work notice may attend work resulting in a service higher than the minimum service level being delivered. The guide states: "The employer may then *decide* to refine or adjust its approach to identifying

workers to ensure that future work notices identify no more workers than are reasonably necessary to achieve the minimum service level." This is too weak and again allows for an employer to continue to name excessive numbers of workers in a work notice. In doing so they could breach Section 234C (5) and deny workers their right to strike.

There is also little guidance as to what level of detail is required in the work notice to explain the work that someone named would have to carry out. This information is crucial if employers are to be discouraged from naming more people than is necessary.

Indeed, on page 11 the guide states that a work notice could specify that workers may be "re-tasked or re-deployed". This guidance undermines the purpose of having specific duties outlined in the work notice in the first place as required by the new Section 234C (4)(b) of the 1992 Act. It contradicts page 15 where the guide states "… a worker identified on a work notice is only required to do the work set out in the work notice", and raises the potential that employers could be encouraged to name workers and then redeploy them, in contravention of the stated intention of the Act.

It is alarming, too, that the government suggests on page 11 that an employer in a sector where there are security or safeguarding issues might want to limit the information on a work notice "to reduce the risk of sensitive information being shared with the trade union". Unions frequently deal with confidential issues in many workplaces including in their work representing people in sensitive roles such as those in the Ministry of Defence, Border Force and the security services. Such guidance would simply embolden bad employers to exclude unions from proper consultation on the scope of work notices.

Voluntary agreements

In many sectors it has been commonplace for voluntary agreements to be agreed to ensure life-and-limb cover during industrial action.

Throughout the Parliamentary passage of this legislation, Ministers repeatedly said that despite their intention to put minimum service levels in place, they would prefer voluntary arrangements.

For instance, Lord Callanan told peers: "If voluntary negotiations are in place in certain sectors, that is preferable to the heavy hand of legislation."[3]

Yet, while there is limited mention of voluntary agreements in the guidelines, their potential role is significantly underplayed. Agreements that have buy-in from both sides are more likely to be adhered to and cause less resentment than work notices imposed by an employer.

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[3] Strikes (Minimum Service Levels) Bill Volume 828: debated on Thursday 9 March 2023 https://hansard.parliament.uk/lords/2023-03-09/debates/85022032-3FE5-4ABB-96DF-88AE691386E8/Strikes(MinimumServiceLevels)Bill

Page 8 of the code states that employers should consider legal obligations but only "may also want to consider" factors such as whether they can achieve a minimum service level without issuing a work notice and voluntary agreements with trade unions.

This is an extremely short-sighted provision that is likely to further increase antagonism between the employer and its workers and potentially cause an employer to breach their statutory duties.

We strongly encourage the government to state in the guidelines that employers should turn to voluntary agreements with unions before issuing work notices. This should be reflected in the "Steps for Producing a Work Notice".

This would not prevent the damage to workplace relations that legislation enabling compulsory work notices will bring, but would encourage sensible employers to take a less adversarial approach.

Union consultation

The guidance on consultation is deficient and suggests to employers that it would be acceptable to completely disregard the views of a trade union.

This is despite the duty to consult and have regard to the views of the union being a statutory requirement set out in the new 234C (8) of the 1992 Act. It also gives insufficient regard to the importance of workers retaining their right to strike and overlooks the damage that inadequate consultation could do to workplace relations.

The current wording provides no guidance as to the duration and quality of consultation with a trade union concerning a work notice, providing further scope for extending the damage the legislation will cause. As drafted, it shows how meaningless any provisions in the Act for consultation with trade unions are.

The guide merely states there should be "sufficient time" for the union to consider the proposed number of workers (page 9) without indicating if this is one hour or one week or what criteria should be considered. This leaves it open for employers to give unions insufficient time to respond meaningfully to any consultation.

Likewise, merely "recommending" that consultation takes place "as soon as reasonably practicable" is the weakest possible formulation to attempt to meet the terms of the new Section 234C (8) of the 1992 Act on consultation with trade unions.

It is disappointing that the guidelines merely echo the underlying legislation that employers must "have regard" to views expressed (page 9) and must "consider all feedback appropriately". There is no attempt in the guide to spell out what would constitute appropriate consideration in these circumstances. There is therefore a high risk that the views of the union would be ignored. We believe that there should be a requirement on an employer to demonstrate where and how changes have been made in response to consultation with trade unions, in line with case law concerning other aspects of collective consultation in employment law.

Likewise, while the guide states that "the employer does not need to agree the number of workers and the work within the work notice with the union" (page 9), it would be positive for workplace relations if the guide encouraged employers to agree these with a union.

Proper consultation with trade unions is crucial to employers meeting the additional statutory duty in the new Section 234C (5) of the 1992 Act that (5) "A work notice must not identify more persons than are reasonably necessary for the purpose of providing the levels of service under the minimum service regulations". Failing to adhere to this would mean workers having their right to strike removed.

The guidelines, including the "Steps for Producing a Work Notice" should encourage employers to issue work notices as soon as possible and no later than seven days before action is due to begin. Unions only have a short window to undertake their processing of a work notice that could include hundreds of thousands of names, and convey that information to members.

Withdrawal of a work notice

It is absurd that the Act makes no provision for withdrawal of a work notice. Suggesting that in these circumstances an employer "may want to contact the trade union to discuss the position" gives no indication as to the possible solutions available. The guidance does little more than reveal how ill-thought through the legislation is and is likely to undermine workplace relations.

Right of appeal

This section of the guidance is both inaccurate and is likely to exacerbate conflict in the workplace.

Saying "we expect employers to have constructive conversations with workers if they feel there is a genuine reason why they should not be named in the work notice" (page 14) is extremely weak, and again illustrates the malicious potential this legislation has.

There is no definition of a "genuine reason". If there is any intention of preventing workers being named when their work is not necessary for achieving the stated minimum service level, the guide should recommend that employers put in place an appeals process.

The guidance should make it clear that employees retain their right to raise a grievance or take legal action if a work notice breaches their legal or statutory rights.

Inaccurate information

The guidance illustrates that work notices are likely to regularly contain insufficient or inaccurate information. It is insufficient to say that if a work notice contains information of this sort that a union should engage with the employer to clarify the

position. This is asking a trade union to correct an employer's homework. It also assumes those named are union members and that a union is in a position to identify these inaccuracies. And that an employer is willing to act on such information.

While it states an employer may wish to vary a work notice in these circumstances, the guide doesn't explain how this could be done if the issue arises less than four days before the work notice takes effect. It illustrates how meaningless provisions attempting to guard against inaccuracies are.

The guidance should be clear that a union can challenge a work notice in the courts where an employer fails to comply with their duties under the Strikes Act.

Duties on a trade union

This section on page 14 should be deleted. There is no reason for it to contain a link to the code of practice on picketing when picketing is not mentioned in the Strikes Act.

Duties on a worker

The wording of this section on page 14 is inappropriate. It is not clear who "we" is in the sentence "We encourage all workers who have been identified on a work notice to attend work and carry out the work specified within the work notice." If it is intended to be an instruction from the government then it is improper for it to issue guidance to workers as to what to do during an industrial dispute.

This section should make it clear that an individual is not subject to a work notice where it is breach of their contract of employment, parental rights or health and safety law.

Substitute

On page 16 the guidance says that a worker cannot send a substitute in their place. It should state that this must be consistent with a worker's contractual terms.

Disciplinary action

On page 15 of the guide, it is stated that an employee can be notified that they are "required to comply" with a work notice. This is inaccurate. This Act gives neither the employer nor the government the power to compel people to work.

Rather, a worker who has been notified by the employer that they are named in the work notice may be dismissed, and be denied the automatic right not to be unfairly dismissed for taking part in the strike. A worker might still be able to bring an unfair dismissal complaint under the general law.

The guide states: "We encourage employers to be fair and reasonable" when considering disciplinary action. This is a very low bar. An employer is obliged by law to follow a full and fair procedure during disciplinary action.

Ministers made it clear in Parliament that no worker should be sacked for failing to adhere to a work notice. Minister Kevin Hollinrake told the House of Commons in May: "The reality is that nobody will be sacked as a result of the legislation. There are other disciplinary measures that can take place."[4] The guidelines should reflect this.

Data protection

We are deeply concerned that so little consideration has been given to protection of trade union data.

This matters enormously because there is a long history of trade union members and activists being targeted unfairly or even blacklisted by employers.

Ultimately, the problems in the guidance on data protection are problems of the minimum service regime. It is implicit in the policy that the personal data of individuals will need to be shared and held by unions and employers during the creation and monitoring of work notices, which creates subsequent risk to individuals. There is no way to ameliorate the data protection risk. This should have been acknowledged when the policy was devised.

Nevertheless, the guidance also creates some problems. The justification for the processing and holding of data is sometimes unclear, some guidelines are contradictory and the proposed approach is insufficiently robust in safeguarding trade union data which enjoys particular protection under data protection law.

The guidance states that: "Workers are likely to be interested in how their personal data is being processed, who has access to it, and understanding the selection process for work notices. Employers and trade unions should therefore be as transparent as possible about their policies and processes, ensuring privacy information is readily accessible and intelligible for the audience; and be prepared to respond to data subject rights requests, and/or Freedom of Information (FOI) requests if they fall within scope of the Freedom of Information Act." The guidelines should recognise that workers will be interested in the selection policy for a work notice not only in terms of how it is decided who is to be included but also how the number of employees of any category is to be identified as needed to meet the minimum service levels. As a minimum, the guidance should make clear that this should be reflected in employers' data protection policies to ensure consistency with data protection rules.

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[4] Strikes (Minimum Service Levels) Bill Volume 733: debated on Monday 22 May 2023 https://hansard.parliament.uk/commons/2023-05-22/debates/DE7D768F-2624-49B7-A053-2A644CD0B2CE/Strikes(MinimumServiceLevels)Bill

The department appears to guide employers that the lawful basis for processing personal data is "legal obligation". Yet there is no obligation on any employer to issue a work notice under the Trade Union and Labour Relations Consolidation Act 1992. The new Section 234C states that "an employer **may** give a work notice" where minimum service regulations have been made regarding a service. As currently drafted, the guidance could mislead employers into interpreting that the Act requires them to issue a work notice where it does not. If the government thinks there is another legal obligation not derived from this Act, then it should state what it is.

The guidance states that "any processing activity which identifies the union membership status of a worker will be likely to constitute the processing of special category data and so [an employer] should be able to identify an additional UK GDPR Article 9 lawful basis in such circumstances". This is only partial because not only should an employer need to identify a lawful basis for processing information as to trade union membership, but it would also need to identify lawful basis for holding such data. As a minimum, the guidance should require employers to determine that basis.

As regards trade unions, the guidance maintains that: "When processing personal data containing details of an individual's trade union membership this will constitute special category data and will require an additional lawful basis at Article 9 of UK GDPR." It is an omission that the guidance does not state which lawful basis under Article 9 might apply.

The guidance is contradictory when it comes to how trade unions can use work notice data. On the one hand, the guidance states "the data [in the work notice] can also be used by the trade union to monitor the operation of the work notices and to assess whether the employer has complied with the Act when issuing it". But it also instructs unions that "as soon as members have been identified, the personal data of non-union members should be disposed of safely and securely, as quickly as possible.

In addition, the disposal of the non-member data is itself processing of their data as will be its collection once received. There is a risk that this personal data identifies trade union membership in that the persons concerned will be identified as not being members of the union, though they could be members of other unions. The guidance should clarify whether this requires an Article 9 condition to be complied with.

The guidance recognises that employers might want to retain work notices to check that they are not naming more workers than reasonably necessary or that someone is not repeatedly named in work notices. But the guidance fails to recognise that the union may also have legitimate interest in checking these matters too using previous work notices. It would hamper their ability to participate meaningfully in any consultation if they did not have access to previous work notices. The guidance must make it clear that unions should be able to retain work notices and the basis for this under data protection law. Otherwise, the process is skewed considerably towards employers.

The guidance needs to be less ambiguous in places. It states: "If the employer inadvertently obtains data about trade union membership, for example, from the trade union while discussing the work notice, the employer cannot store or use that information in finalising the work notice as the Act does not provide a lawful basis for processing that data and specifically prohibits the employer from taking trade union membership or activities into account in selecting individuals to include on a work notice." The guidance should be clearer that if the employer inadvertently obtains data about trade union membership, they should destroy that data and not store it. It is not enough to say that the employer "cannot store … that information in finalising the work notice," which suggests it can nevertheless be stored for other reasons.

On automated decision making, the guidance fails to address the requirement in Section 14 of the Data Protection Act 2018 for the employer to notify those who are included in the work notice as result of an automated decision-making process, that the decision was based on automated decision making. It is not at all clear how the person named can have a meaningful right to request reconsideration within one month given the short timescales for provision of a work notice.