Department for Business Innovation & Skills

TRADE UNION BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

DECEMBER 2015

Contents

Introduction

This memorandum addresses issues arising under the European Convention on Human Rights ("ECHR" or "the Convention") in relation to the Trade Union Bill ("Bill"). The memorandum has been prepared by the Department for Business, Innovation and Skills with input from the Cabinet Office.

The Secretary of State will make a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Bill are compatible with the Convention rights.

This memorandum deals only with those provisions of the Bill which raise ECHR issues. The memorandum is structured so as to follow the structure of the Bill.

Overview of the Bill

The Bill amends or inserts a number of provisions in the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

The Trade Union Bill delivers a number of Government priorities.

The Bill covers the following areas -

- Ballot thresholds and mandates for industrial action - makes provision in respect of all ballots for a 50% turnout requirement, for an additional 40% support requirement in important public services in six key sectors; and the expiry of a mandate for industrial action four months from the date of the ballot.

- Picketing and Intimidation – a number of provisions in the Code of Practice on Picketing are to become legal obligations in the Bill.

- Other provisions about industrial action - makes changes to the information requirements on the ballot paper by requiring detail on the nature of the dispute and the type of industrial action to be taken, alongside a general indication of the time period for action; makes changes to the notice of ballot results provided to members and employers; and imposes new annual reporting requirements to the Certification Officer.

- Application of funds for political objects - will require a union member to actively decide to contribute a proportion of their membership subscription being used for the union's political fund. A union member will then be required to renew the

decision to contribute (to the political fund) every 5 years. Unions will also have to provide information in their annual return in relation to political expenditure.

- Facility Time - will introduce two new regulation making powers. The first allows a Minister of the Crown to make regulations which require some or all public sector employers with one or more trade union representatives to publish information relating to time off taken by those representatives for trade union duties and activities. The second allows a Minister of the Crown to make regulations exercising reserve powers for the purpose of applying a statutory cap applying to relevant public sector employers, where the Minister considers it appropriate to do so having regard to information published in accordance with publication requirements

- Prohibition on deduction of union subscriptions from wages in public sector (known as "check off") - will prohibit relevant public sector employers from making deductions for trade union subscriptions from workers' wages. The prohibition will apply to relevant public sector employers which will be specified in regulations.

- Certification Officer (CO) - will make provisions to expand the role of the CO to allow him to investigate and enforce breaches of statutory requirements without having to act upon a complaint from union members and where there has been a breach the CO will have the power to impose financial penalties (or warn of their use if certain action is not taken).

- Levy –will make provisions for a regulation making power which will enable the Secretary of State to make affirmative regulations to provide for trade unions and employer associations to pay for the full recovery of the costs of running the Certification Office.

ECHR issues in the Bill

Ballots thresholds on Industrial Action

50% Minimum Turnout Threshold

Clause 2 introduces a 50% minimum turnout threshold that must be satisfied in any ballot for industrial action for the members to benefit from statutory immunity from tort. This clause engages Article 11 of the ECHR.

The Government considers that any such interference with Article 11 will be justified. Such interference will be in accordance with the law as the ballot requirements will be set out in primary legislation. The 50% turnout will pursue the legitimate aim of ensuring that industrial action has democratic support and legitimacy within the relevant workforce.

The proposed amendments are proportionate to that aim. The European Court of Human Rights ("ECtHR") judgment in RMT v United Kingdom (31045/10) recognised that the area of industrial relations involved sensitive social and political issues and there was a high degree of divergence between member states and therefore a wide margin of appreciation was to be accorded to each member state. The Government considers that it is within the state's margin of appreciation to determine that strike action should not proceed in circumstances where a majority of the relevant workforce has not voted on the issue. The introduction of a minimum turnout threshold will ensure that industrial action has democratic support. The Government is satisfied that this provision is compatible with Article 11.

40% Minimum Support in "important public services"

Clause 3 sets out a 40% threshold of support that must be satisfied in a ballot for industrial action where a majority of the persons entitled to vote in the ballot are engaged in the provision of important public services or activities that are ancillary to the provision of important public services. This threshold will only come into effect once the Secretary of State exercises the power to make provisions by regulations (subject to the affirmative procedure) to list roles or occupations within the following sectors:

Health services;

Education of those aged under 17;

Fire services;

Transport services;

Decommissioning of nuclear installations and management of

Radioactive waste and spent fuel;

Border security.

This provision engages Articles 11 and 14 of the Convention.

The Government considers that any such interference is justified under Article 11(2) because it is necessary to protect the rights and freedoms of others. Article 11 acknowledges that there may be more stringent conditions imposed on certain public sectors. The provision does not prohibit a right to strike in the six key sectors. The proportionality of this additional threshold is justified because industrial action in important public services in the affected sectors causes significant inconvenience (including financial loss) to the general public and causes economic harm to the economy.

In Matelly v France (10609/10) the ECtHR acknowledged that whilst a complete prohibition on trade union membership could not be justified, the context and nature of the sector could mean that even significant restrictions could be imposed on the forms of action and

expression provided that such restrictions did not deprive them of the general right of association.

The clause recognises the impact that strikes in important public sectors can have on the general public and the economy as a whole and as such is a proportionate response. In addition, the regulations (which are subject to the affirmative procedure) will set out exactly which functions/roles will be captured by this provision. As such the regulations are capable of being exercised in a way which is compatible with Article 11. The evidence base for the regulations will be obtained through a public consultation this summer.

As this measure imposes a higher threshold before industrial action can take place in only important public services in four sectors it is arguable that Article 14 of the convention is engaged in conjunction with Article 11. This interference is justified for the reasons explained above in relation to Article 11.

Furthermore case law supports member states imposing more stringent conditions on certain public sectors. The ECtHR in Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v Spain (45892/09) upheld a ban on members of a police force taking strike action. They rejected the argument that the police officers had been discriminated against in comparison with other sectors e.g. doctors and firefighters, which retained the right to strike. The Court found that the difference in treatment was objectively justified in light of the substantive difference between the nature of the duties of police officers and workers in other sectors. Accordingly, the Court held that there had been no violation of Article 11, taken alone and in conjunction with Article 14 of the Convention.

Conclusion

The Government are satisfied that this provision is capable of being exercised in a way which is compatible with Article 11 and Article 14.

Timing and duration of ballot mandates

Notice of industrial action

Clause 7 increases the period of prior notification of strike action a trade union is required to provide employer from seven to fourteen days.

This provision engages Article 11 of the Convention.

The Government considers that the increased notice period is a procedural requirement which does not affect the union's ability to engage in strike action. The Government recognises that an increased notice period will require increased forward planning and efficient administration on the part of the trade union. However, as the measure only adds a requirement of advance notice, we do not consider there to be an unlawful restriction of Article 11 rights.

Expiry of mandate

Clause 8 (expiry of mandate for industrial action four months after date of ballot) provides that the mandate for industrial action (which has the support of a ballot) shall cease to be

effective four months from the date of ballot. A union is not prevented from arranging a fresh ballot if the trade dispute is not resolved. Currently there is no time limit on a mandate for industrial action. This Clause also removes the requirement that industrial action must take place in the first four weeks after a ballot (which could be extended by agreement between the parties to eight weeks). This provision engages Article 11 of the Convention.

This clause provides clarity to both trade unions and employers on the length and validity of the mandate for industrial action. Currently courts are asked to consider the validity of ballot mandates as in the recent case of *Westminster Kingsway College v University and College Union* 2014 EWHC 4409 QB where the High Court held that the proposed strike was not protected by ballot in accordance with section 226 of the 1992 Act.

The Government acknowledges that the four month time limit (as opposed to a longer time limit) engages issues regarding the compatibility with Article 11. However, the measure does not place an immediate restriction on a trade union's ability to hold a strike. The measures will be set out in primary legislation and the provision minimises the risk of ambiguity for both employers and trade unions so it is clear when the mandate for industrial action expires. The primary aim of the measure is to eliminate a "stale" ballot which may no longer represents the workers' up to date views on taking industrial action. Under this provision trade unions will have their members' up-to-date views on taking industrial action.

The Government therefore considers that any interference with Article 11 is justified and proportionate and therefore compatible with Article 11.

Picketing

Clause 9 (Union supervision of picketing) this clause proposes that some parts of Section F of the Code of Practice on Picketing will become legal obligations on trade unions when organising a picket line. . A new section 220A in the 1992 Act will extend the current protection to trade unions from certain tort liabilities as set out in section 219 of the 1992 Act.

The tort liabilities are essentially those which induce another to breach a contract. Trade unions will be protected from tortious liability if they comply with existing requirements taken from Section F of the Code including: appoint a person to supervise the picketing; that person must be a union official or another member of the union who is familiar with any provisions of the Code of Practice on Picketing; the picket supervisor must have a letter from the union stating that they are authorised to act; The letter must be shown to a constable or any person who reasonably asks to see it; The supervisor must be present at a picket or be readily contactable by the union or the police at short notice and the supervisor must wear a badge or armband so as to be readily identifiable.

Article 11 is engaged in relation to this provision. The requirements that we are proposing are wholly proportionate and already reflect current practice in terms of the way unions carry out pickets. They are designed to make it clear to third parties where a trade union sanctioned picket is taking place and to make it clear for the police and other parties who they should contact in the event of any matters which they need be concerned about. We are therefore of the view that these provisions are compatible with Article 11.

Facility Time

Clause 13 is a reserve power which will enable a Minister of the Crown to make regulations for the purpose of imposing a statutory cap in relation to categories of public sector employers for the purpose of constraining:

The percentage of the working time that any of its trade union officials can spend on paid facility time and/or

The overall proportion of that employer's pay bill that can be spent on facility time.

The power to impose a cap is a reserve power which will only be exercisable in relation to those employers that have been made subject to the facility time publication requirements (also being introduced in the Bill). The Government would be able to monitor progress through the publication requirements as a primary step and only choose to exercise the reserve power to introduce cap regulations as a secondary step. This 'last resort' measure would therefore only be introduced if the obligation to publish data in accordance with the publication requirements fails to achieve the efficiency savings anticipated and if the data returned in response to the publication requirements reveals concerns about value of money to the taxpayer sufficient to justify the imposition of a cap.

It is proposed that the clause will enable the regulations to have effect in relation to existing contractual arrangements and could therefore have retrospective effect. Any potential retrospective effect of the regulations will be very narrowly focused.

The Cabinet Office does not consider that many organisations or individuals will be affected by the retrospective nature of any provisions and it is anticipated that any effect on current contractual arrangements in the employment sphere can be successfully managed in the same way as employers are accustomed to doing when making workforce changes. The provisions specifically cater for transitional arrangements to be made to ensure any effect on current contractual arrangements can be dealt with by employers taking appropriate time to engage all the usual workforce processes and procedures that might be necessary to facilitate change.

This clause engages Article 11 and Article 14 of the ECHR - the Spanish case *Sanchez Navajas v Spain* (2001) ECHR VI-507 recognises that reasonable facility time is an aspect of Article 11, and *Wilson v United Kingdom* [2002] IRLR 568 emphasises the right for trade union representatives to be able to make effective representations to their employer (paragraph 46).

The Department considers that the imposition of a cap does not unjustifiably interfere with Article 11 rights – *Sanchez* recognises the right to facility time is one that exists '*within certain limits'*. Any limitation placed upon facility time would be done in a way that does not substantially undermine the rights guaranteed by Article 11.

The current framework in the 1992 Act[1] will remain in place so that trade union representatives remain entitled to a reasonable amount of time off work to carry out their duties, and to unpaid time off to carry out any activities. The cap is a reserve power which would only be exercised if the Minister of the Crown considers it appropriate to do so, having had regard to information published in accordance with the publication requirements

The main legitimate aim of the policy is to deliver value for money for the public/tax payer and to promote efficiency.

In addition to the greater transparency and accountability for the tax payer there are concerns about the potential loss of skills for union representatives spending all their work on facility time. The view taken during the review into Civil Service facility time arrangements[2] was that union representatives spending all or most of their time engaged on union business became dislocated from the work of the employer, risked de-skilling themselves by focusing solely on one narrow role to the exclusion of anything else; and fundamentally compromised the efficiency with which they could carry out their union duties if this came at the expense of understanding and engaging in the broader work of the employer at a practical, day to day, level.

Article 14 is also engaged since an organisation being funded by a tax payer would arguably fall within the concept of "other status", although this is not a class that gets much attention compared to others under Article 14. .

The success of any reliance on Article 14 would, in the Government's view, be influenced by the success of its justification under Article 11. As such the Government is satisfied that a decision to impose a cap is capable of withstanding scrutiny under Article 14 for the same reasons as those set out in relation to Article 11.

The Government's view, therefore, is that including a regulation making provision does not create any inherent risk. The criteria which will apply to the making of the cap will be drafted so as to ensure it is exercised in such a way that ensures compliance with Article 11 and Article 14 ECHR rights.

Prohibition on deduction of union subscriptions from wages in public sector

Clause 14 inserts a new section 116B into the 1992 Act. The new section prohibits relevant public sector employers from making trade union subscription deductions from the wages of their workers (a practice known as 'check-off'). The prohibition will apply to relevant public sector employers as specified in regulations. The regulations will allow consequential provision to be made to amend or otherwise modify existing legal entitlements to check off. It allows for transitional provisions in connection with the coming into force of any provision of the regulations.

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[1] ss.168-173 deal with time off for trade union duties and activities

[2] Consultation on reform to trade union facility time and facilities in the Civil Service: https://www.gov.uk/government/consultations/reform-to-trade-union-facility-time-and-facilities-in-the-civil-service

It is the Government's view that Article 11 ECHR is not engaged. Check-off is simply an administrative mechanism for deducting union subscriptions and employers are under no obligation to offer the service, or to continue to offer the service, subject to any individual contractual rights which may have been granted. As such, the prohibition does not impact upon core Article 11 rights.

Other methods of paying trade union subscriptions are readily available, principally direct debit. Many Civil Service employers have already ceased to operate check-off arrangements and trade unions affected by the decision have been successful in making alternative arrangements for their members to pay subscriptions by other means.

The clause anticipates there will be a reasonable transitional period during which time trade unions and their members will be in a position to put in place alternative payment methods and which should be sufficient to ensure no undue disruption is caused to trade unions or their members. As such, any interference with pre-existing contractual entitlements should be insubstantial.

Certification Officer

Clauses 15 to 18 will provide the Certification Officer (CO) with additional enforcement powers including financial penalties which can be imposed on trade unions. In relation to financial penalties the CO will impose financial penalties (in addition to the current enforcement orders) on trade unions where he has found a breach. The Clause and Schedule in the Bill will ensure that the CO is given a power to:

impose a financial penalty where the CO makes an enforcement order, or

has the power to make an enforcement order but does not do so.

In addition the CO may impose a requirement "a conditional penalty order" that the union take a particular action within a certain timescale and give notice that a financial penalty will be imposed if they do not comply.

The Bill will allow for regulations to prescribe the maximum level of the penalty that can be imposed upon a Trade Union. The maximum amount that can be set in regulations will be £20,000 and the minimum penalty of £200.00. The Bill also contains powers to prescribe further details about the civil penalties regime.

These provisions engage Article 6 and Article 1 of Protocol 1.

Article 6(1) is relevant because the procedure for imposing financial penalties involves the determination of a trade union's civil obligations. The decision to impose a penalty will be made following a quasi-judicial procedure which builds on well-established functions of the CO. The CO already considers potential breaches of statutory requirements and trade union rules and can make declarations and enforcement orders where he is satisfied there has been such a breach.

The provisions allow for representations to be made to the Certification Officer and subsequently an appeal against the imposition of any penalty; therefore providing for a fair

and public hearing to an appropriate court. This means that the Government considers that the requirements of Article 6(1) are satisfied.

The Government has considered whether Article 6(2) and (3), which require additional safeguards for those "charged with a criminal offence", might be engaged. In *Engel v Netherlands (No 1) 1976 1 EHRR 647* the ECtHR has provided a three stage test to determine if a matter is a criminal offence for the purposes of Article 6. That test requires consideration of:

the classification of the offence;

the nature of the offence;

the possible punishment.

The burden and standard required for the decision to apply the penalty is the same as it is when the CO is considering whether to impose such an order. Although there are a number of breaches of statutory requirements on trade unions which do constitute criminal offences (see section 45 of the 1992 Act), these penalties are not being extended to those breaches.

Where a penalty is intended as a deterrent and/or punitive in its purpose an argument can be made that this points towards it being criminal in nature, unless there are other factors to the contrary. Although there is a deterrent and punitive element to the penalty scheme proposed, there are other relevant factors to consider:

a) The penalty is only applicable to a specific group in the form of trade unions (and persons frustrating the CO in his investigative duties) so the penalty has no general binding character as would often be expected from a criminal penalty.

b) The imposition of a penalty under this scheme does not depend on establishing culpability in the sense of there being a wilful or deliberate failure to comply with the requirements.

The Government believes that these factors point towards a penalty that is more civil than criminal in nature. The Government must further consider the possible punishment. The prime consideration here is the severity of the penalty.

The primary policy reason for making financial penalties available to the CO here is to support his new expanded role in ensuring compliance with various requirements by trade unions, which are clearly civil in nature. Although there are a number of duties which the CO oversees where a breach is a criminal offence (and appropriate sanctions can be imposed by the courts) there are also a number of areas where the CO currently only has recourse to declarations and enforcement orders. With no way to impose any direct sanction for a breach or non-compliance with the requirements of one of his orders. The introduction of financial penalties is intended to complement his existing power to make civil enforcement orders.

The Government believes that the penalties can and will be set at a level which is proportionate to this aim. The Certification Officer is to be given the discretion to set the

penalty imposed, but only up to a maximum amount set out in regulations. Penalty amounts set out in regulations cannot exceed the figure of £20,000 set out on the face of the Bill (unless that figure is specifically amended in future). A maximum penalty at a level of £20,000 is broadly consistent with that imposable in other areas; for example, on employers for non-payment of the National Minimum Wage (up to £20,000 per worker) or by the Electoral Commission for various breaches of electoral requirements (up to £20,000).

The Schedule providing for the penalty scheme contains the power to use regulations to set other lower maximum penalty amounts depending on the size of the trade union or the nature of the requirement that was breached (subject to it not exceeding the £20,000 figure set out in the primary legislation). This would, for example, allow the Government to set a lower penalty for smaller trade unions or to specify that certain breaches carried more substantial potential penalties than others.

The regulation making powers can therefore be exercised in a way which sets financial penalties which are appropriate and proportionate to a civil penalty regime.

As noted above, the target of the financial penalties are to be primarily trade union organisations rather than individuals, so the impact of the level of penalty has to be seen in the context of the resources available to the recipient of the penalty and the specific nature of its application to a closed group.

The Government therefore considers that the provisions are compliant with Article 6.

Article 1 Protocol 1 is relevant because the financial penalties will amount to a deprivation of the possessions of natural or legal persons. However, for the reasons given above this deprivation will be in the public interest by seeking support more effective oversight and compliance with a range of important requirements in relation to the conduct of Trade Unions by the CO. It will also be subject to safeguards including a right of appeal against any penalty imposed. The Article itself is expressly clear that there is no prohibition on penalties being applied. Therefore, the Government considers that there will be no breach of the right contained in Article 1 Protocol 1.

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