AN IER COMMENTARY

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Institute of Employment Rights

IER Commentary on certain aspects of the 43rd National Report on the implementation of the European Social Charter submitted by the Government of the United Kingdom to the Council of Europe's European Committee on Social Rights

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certain aspects of the 43rd National Report on the implementation of the European Social Charter submitted by the Government of the United Kingdom to the Council of Europe's European Committee on Social Rights

1. This commentary is prepared by Professor KD Ewing and Lord John Hendy KC commissioned by the Institute of Employment Rights (IER) which is an NGO, a 'think tank' largely funded by the trade unions in the UK. The views of the authors do not necessarily reflect those of the IER. The commentary is restricted to the Government's 43rd National Report on the implementation of the European Social Charter (ESC) registered by the Secretariat on 3 January 2025. This commentary is restricted to Articles 5 and 6.

2. It is to be noted that the UK continues to decline to ratify the 1996 ESC but remains bound by the Articles it has ratified in the 1961 ESC (which include Articles 5 and 6). The government's rationale for signing but not so far ratifying the 1996 ESC was explained by the Minister in the House of Lords on 3 September 2024:[1]

> My Lords, in signing a charter, the UK is indicating that it agrees with the contents as negotiated, but we can ratify it only when we know that we will be compliant with it, because to ratify a charter is to agree to be bound by its provisions. As I have indicated before, that would mean that the UK would need to make an assessment to be sure that it would in fact be compliant with the terms of the treaty before doing it.

3. Since the European Committee on Social Rights (ECSR) has itself found that the UK is not compliant with Articles 5 and 6 of the 1961 ESC (see below) which are in identical terms to those of the 1996 ESC, and since the government is not proposing to ameliorate the principal non-conformities found by the ECSR, it follows that the UK is and will not be compliant with the 1996 ESC and therefore will not ratify it. This is gravely disappointing and a snub to the High-Level Conference in Vilnius on 4 July 2024 and its aspiration to reinvigorate the ESC process.

4. More than that, the rationale is flawed since the government is apparently prepared to remain in non-conformity with ratified Articles of the 1961 Treaty by which it has 'agree[d] to be bound by its provisions'. That contradiction does not

[1] Hansard, 3 September 2024 at https://hansard.parliament.uk/Lords/2024-09-03/debates/B2719AD5-6C5C-4D78-8DAD-8D8B7831D36A/EuropeanSocialCharter#contribution-130E55D9-82AB-4CF0-B221-45AEDAD853D2.

appear to be logically capable of constituting a ground for refusing to ratify the identical provision of the updated Treaty.

5. Further complexity is added by the UK's public denials that it is not in conformity with the 1961 ESC.[2]

Article 5 Right to Organise

a) Please indicate what measures have been taken to encourage or strengthen the positive freedom of association of workers, particularly in sectors which traditionally have a low rate of unionisation or in new sectors (e.g., the gig economy).

6. In its answer to this question the government expresses its commitment to empowering workers to organise collectively through trade unions. It cites its Employment Rights Bill which will:
    - repeal the Strikes (Minimum Service Levels) Act 2023;
    - much of the Trade Union Act 2016; and
    - improve the rules governing statutory trade union recognition;

    It also cites the consultation it proposes on moving to a simpler two-part framework differentiating between workers and the genuinely self-employed.

7. There is no doubt that these measures will assist in strengthening freedom of association. However, even cumulatively they do not begin to address the inadequacies of the current UK legal architecture to protect and promote freedom of association.

8. Prior to 1980 the UK had a flourishing trade union movement legally capable of defending the professional interests of workers. In 1979 13.5 million workers were in a trade union; last year's figures show only 6.25 million.[3] As a proportion of the workforce however, the decline is yet more stark in the form of a falling percentage from over 46% to less than 19%. See figure 1 below.[4]

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[2] E.g. *Conclusions XXIII-3* (2023): 'In its report, the UK Government firstly states, in general, that it still believes that the situation is in conformity with Article 6§4 …'; Lord Leong (on behalf of the government), Official Report, House of Lords, 23 July 2025, col.297: 'On Amendment 150 [seeking to repeal the restrictions on secondary action], we are clear that industrial action should take place only where there is a dispute between a group of workers and their direct employer and we will not change this position. … The Government are clear that we are compliant with our international obligations under ILO Convention 87, Article 11 of the ECHR and Article 6 of the European Social Charter, all of which protect the right to strike but also permit restrictions on industrial action necessary in a democratic society.' at https://hansard.parliament.uk/Lords/2025-07-23/debates/FEBD0DCC-C0E1-463F-86B1-470BD887D722/EmploymentRightsBill#contribution-9189D8F2-19CD-45C6-85E9-01D8DCB06C36.

[3] Annual Report of the Certification Officer 1980, 2024.

[4] © Institute of Employment Rights 2025.

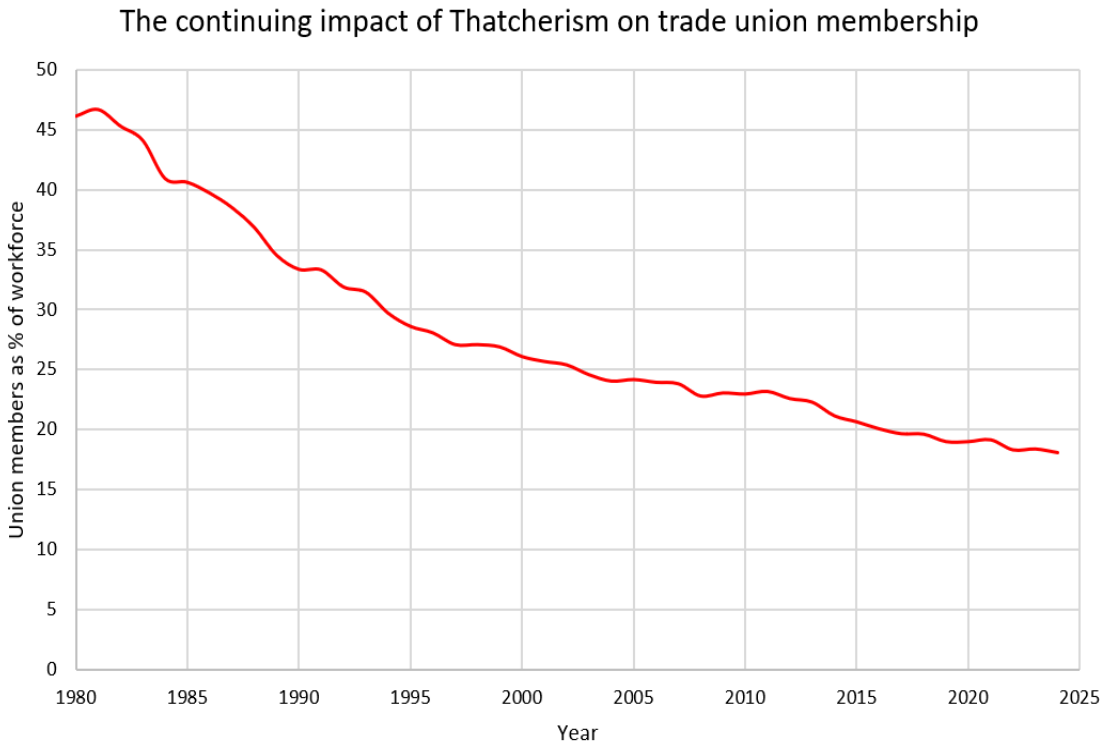

Figure 1 union membership as a proportion of the UK workforce.

9. As the ECSR questionnaire recognises, a decline in union density rates is found elsewhere in Europe and for a variety of reasons including deindustrialisation and globalisation. However, few European countries have suffered such a steep decline in union density as the UK and this is, without question, a reflection of an array of laws which hamper the trade union ability to bargain effectively with employers.[5] Whilst workers join and remain members of trade unions for a variety of reasons, it cannot be doubted that the principal motivation is a belief that the union can, or within the foreseeable future, can be in a position to bargain collectively so as to protect, if not advance, workers' terms and conditions of employment.

10. Of yet greater relevance is the fact that the coverage of collective bargaining in the UK has declined even more dramatically than the collapse in trade union membership. From an average of over 80% of the workforce covered in the period from the end of the Second World War until 1980, coverage has now collapsed to less than 25%.[6] Particularly striking has been the destruction of sectoral collective agreements (including the almost complete abolition of the

[5] See e.g. J Waddington, 'United Kingdom: a long-term assault on collective bargaining', Chapter 29 in Müller, T; K Vandaele, J Waddington (eds), *Collective bargaining in Europe: towards an endgame; volume 3*; ETUI, 2019, at 605-624 at https://www.etui.org/sites/default/files/CB%20Vol%20III%20Chapter%2029.pdf .

[6] There is some controversy over the latest figures since the ONS has sought to redefine the parameters for collective bargaining coverage. Unfortunately, the ONS is in some disarray at present and its figures are debatable. As an indicator it is to be noted that the Labour Force Survey in 2017 estimated that coverage was then overall 26%, with 15% in the private sector and 58% in the public sector.

Wages Councils) which single employer agreements have largely failed to replace.

11. To achieve effective rather than merely theoretical freedom of association requires a fundamental change to the legal architecture of industrial relations in the UK, in particular reversal of much of the 9 Acts passed between 1982 and 1993 which undermined trade union capacity to bargain collectively. The Employment Rights Bill does not do this and, in particular, it does not reverse the legal restrictions identified over many years by the ECSR which have so undermined freedom of association in the UK. Yet (as Waddington points out[7]) 'without a substantive change in the legislative framework it is difficult to imagine how trade union action alone can reverse the decline in collective bargaining coverage.'

12. It will be noted that the government points to its proposed consultation on the legal status of workers. It is a matter of concern that the Employment Rights Bill was not used as the vehicle for remedying the multiple ways in which employers have utilised legal devices to undermine the rights, both individual and collective, of workers by disguising the classification of the latter as other than employees entitled to the full range of employment rights. One particular and relevant example is found in the Supreme Court judgment in *R (Independent Workers Union of Great Britain) v Central Arbitration Committee, Roo Foods Ltd (t/a Deliveroo), SoS Business and Trade (intervening)* [2023] UKSC 43, [2024] 2 All E.R. 1, [2024] I.C.R. 189, [2024] IRLR 148.

13. In that case, gig workers using a phone app and paid by Deliveroo to collect and deliver restaurant orders were held not to be within the definition of 'workers' whose union, under domestic law, or pursuant to Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), was entitled to bring a claim to be recognised by the employer for collective bargaining. This is because the sole legal mechanism by which a union is entitled to lodge a claim for recognition for collective bargaining is under Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act). Union eligibility depends (in the first place) on the workers on behalf of whom the claim is made falling within the definition in s.296(1) of that Act which reads as follows:

> (1) In this Act worker means an individual who works, or normally works or seeks to work—
>
> (a) under a contract of employment, or
>
> (b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or

[7] Op cit at 612.

> (c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

14. There was no dispute that the Deliveroo riders were not employed under a contract of employment (s.296(1)(a)) and the Central Arbitration Committee, the High Court and the Court of Appeal held that they did not fall within the definition in s.296(1)(b) since they did not undertake to do or perform personally any work or services for another party, because they had the right (inserted into their contracts unilaterally by the employer) to engage a substitute to perform work they had contracted to undertake. Permission to appeal against that decision was refused and the Supreme Court rejected the claim pursuant to Article 11 of the ECHR that their union was entitled to exercise the right to bargain collectively via the statutory recognition machinery. The rationale for that decision was essentially because the riders were not in an 'employment relationship' because they were self-employed with a right to engage a substitute to undertake their work. They were therefore not entitled to the trade union rights guaranteed by Article 11.

15. A consequence of this judgment is also that such workers are not entitled to form a trade union of their fellow workers or become the majority membership of an existing trade union. That is because domestic law defines a trade union in s.1 of the 1992 Act as set out in the government's response at p13. The definition makes it necessary that a trade union 'consists wholly or mainly of workers …' and the definition of 'workers' for the purposes of s.1 is likewise s.296(1).[8] Consequently, gig workers, such as the Deliveroo riders are barred from forming their own (or becoming a majority in another trade union) both under domestic law and under Article 11. This appears to be a fundamental violation of Article 5 of the ESC which reads:

> With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the States Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. …

16. The judgment is a very significant weakening of Article 5 freedom of association so far as the gig economy is concerned since the mechanism used by the employer to achieve its result of denying the right to bargain collectively to its workers and their union (by unilaterally inserting a right to use a substitute in the contract) has since been deployed widely across the gig economy employers, in particular those engaged in providing delivery services. It is not known how many workers are engaged in the delivery sector and subject to substitution

[8] See the discussion in the case of foster carers in *National Union of Professional Foster Carers v Certification Officer, IWGB and ors intervening* [2021] EWCA Civ 548, [2021] IRLR 588.

clauses but in the gig economy as a whole a government survey in 2018 found 4.4% of the workforce, roughly 2.8 million workers.[9] Since then estimates have suggested that the number has grown to 4.7 million workers in the UK.[10]

17. The Employment Rights Bill was an opportunity to rectify this breach of Article 5 of the ESC but was not taken by the government. It remains to be seen whether it will, after its consultation, introduce a new Bill to remedy this abuse.

b) Please describe the legal criteria used to determine the recognition of employers' organisations for the purposes of engaging in social dialogue and collective bargaining.

18. The government in their response have cited the domestic law definition of an employers' association without further comment.

19. However, as noted above, the decline in sectoral collective bargaining in the UK and its replacement with enterprise level bargaining has meant that employers' associations have, except in a very few sectors, largely ceased to engage in collective bargaining. In addition, as Waddington has observed:[11]

> during the 1960s and 1970s the TUC coordinated trade union engagement in the burgeoning range of tripartite institutions established by both Conservative and Labour governments. The Thatcher-led governments of the 1980s dismantled these tripartite institutions as part of the sea change in economic management, with the result that the trade union movement was effectively excluded from involvement in macroeconomic policy formulation.

20. With the exclusion of the trade union movement from social dialogue, the role of employers' associations has likewise diminished save to the extent of whatever bilateral discussions may occur with government.

21. The Confederation of British Industry (CBI) is the principal employers' organisation. Similar to the TUC, the CBI does not have, and has never had, a collective bargaining function, although it participated in tripartite institutions during the 1960s and 1970s.

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[9] Department for Business, Energy and Industrial Strategy, *The Characteristics of those in the Gig Economy, Final Report*, February 2018 at https://assets.publishing.service.gov.uk/media/5aa69800e5274a3e391e38fa/The_characteristics_of_those_in_the_gig_economy.pdf.

[10] https://www.london.gov.uk/programmes-strategies/business-and-economy/support-your-business/challenge-ldn/past-challenges/gig-economy?ac-66699=66698.

[11] Op cit at 609.

c) Please describe the legal criteria used to determine the recognition and representativeness of trade unions for the purposes of engaging in social dialogue and collective bargaining. Please provide information:

- *on the status and prerogatives of minority trade unions;*
- *on the existence of alternative representation structures at enterprise-level, such as elected worker representatives.*

22. The authors of this commentary take no issue with the government's analysis of domestic law here. However, the government leaves out some key features of collective bargaining machinery in the UK.

23. In the first place it is important to note that the statutory recognition machinery (Schedule A1 of the 1992 Act) to which the government refers, only permits a claim to be made against a single employer. There is therefore no legal mechanism by which a union or unions can seek recognition for the purposes of establishing collective bargaining with multiple employers or on a sectoral basis.

24. The prohibition on using public procurement as a mechanism for encouraging adherence to and extension of recognition and collective agreements (such as by the now revoked *Fair Wages Resolutions* of the House of Commons) persists and the Employment Rights Bill does not change this.

25. Previous governments abolished the Wages Councils (and repealed the Wages Councils Act 1979) which provided a statutory mechanism for sectoral collective bargaining. In the 1970s wages councils provided collective bargaining coverage to about 25% of the workforce. It focussed on the least well organised sectors of the economy, which necessarily, included many of the lowest paid workers (e.g. hair dressing, hospitality, retail, clothing manufacturing).

26. Amendments to the Employment Rights Bill to enable the Secretary of State to choose to establish sectoral collective bargaining in any sector of the economy were rejected by the government[12] and the Bill therefore provides no mechanism by which sectoral bargaining can be established in the future. It is true that the Bill provides for the establishment of 'negotiating bodies' in the adult social care and school support staff sub-sectors but these do not constitute collective

[12] See the amendments moved by Lord Hendy in the House of Lords and the Minister's rejection of the need for such machinery: Hansard: 5 June 2025 at https://hansard.parliament.uk/Lords/2025-06-05/debates/F2C736EA-8C19-428A-903A-6554BAE5526E/EmploymentRightsBill#contribution-B767B1DC-6A1D-4972-A1AD-B8561F69DC71, Official Report cols 893-6, 900-902; 5 June 2025 at https://hansard.parliament.uk/Lords/2025-06-05/debates/F2C736EA-8C19-428A-903A-6554BAE5526E/EmploymentRightsBill#contribution-CFBC3AC3-F94F-432A-BA94-085DE85C391F, Official Report cols 903-906, 915-918; 5 June 2025 at https://hansard.parliament.uk/Lords/2025-06-05/debates/F2C736EA-8C19-428A-903A-6554BAE5526E/EmploymentRightsBill#contribution-93B1B5BD-950F-423D-9ABB-2B797D8A5FCE, Official Report cols 936-938, 942-944; and 21 July 2025 at https://hansard.parliament.uk/Lords/2025-07-21/debates/1055A295-3A18-43D3-9340-DE1D09BEB41C/EmploymentRightsBill#main-content.

bargaining bodies as understood in domestic law, international law or by industrial relations experts.[13]

The **negotiating bodies for Adult Social Care and School Support Staff do not constitute collective bargaining bodies** and contain no mechanism for their extension to other workers in those or any other sectors. The reasons are these:
Firstly, the Bill expressly states that nothing in the SSSNB is to be regarded as collective bargaining as defined by s.178 of 1992 Act, and that any agreements reached are not to be regarded as collective agreements. The ASCNB is slightly different, in that the relevant Minister is given power to exclude the application of s.178. S.178 provides the statutory definition of 'collective bargaining' and 'collective agreement'.
Secondly, the Bill defines a negotiating body, but its functions do not include negotiation. The parties have no power to decide for themselves the matters they wish to discuss and are confined to the four subjects permitted to each by the Bill, plus any additions conferred by the Minister. The very limited subjects so far permitted exclude, for example, work organisation, diversity and inclusion, eradication of pay gaps, health and safety, deployment of new technology, formulation of a dispute resolution procedure and the legal status of workers in the sector.
Thirdly, the Bill gives the Minister power to make regulations as to the nature of the consideration the negotiating body must give to the authorised subjects, with power to direct specific factors the body must take into consideration and any conditions that must be met in reaching agreement. Matters can be discussed by the SSSNB only with the permission, or on the direction, of the Minister, who can also specify matters that may not be discussed.
Fourthly, if the body reaches an agreement, the Minister can override it and require reconsideration, specifying factors that must be taken into account and conditions that must be met to reach a reconsidered agreement acceptable to Minister. Ultimately, the Minister can override agreements of the negotiating body.
Fifthly, if the negotiating body fails to agree, the Minister has the power to assume its functions and impose a settlement, regardless of the wishes of the parties, who may, of course, prefer their own dispute resolution procedure, or conciliation, mediation and arbitration by a third party in whom they have confidence.
[The **sixth** reason was cured by a governent amendment.]
Seventhly, the employers and the unions are unable to decide for themselves the size and composition of the body; that is in the exclusive power of the relevant Minister, who will determine how members may be appointed to each body, including the chairperson and third parties, who must not represent employers or unions in the sector. They will have voting rights, if the Minister chooses, in the case of the ASCNB, but not in the case of the SSSNB. Employers and unions may not choose their own chair and, in the case of the SSSNB, must not select one of their representatives as chair, thus precluding the usual arrangement of alternating the chair between the two sides.
Eighthly and finally, the Bill defines a social care worker as those 'employed …', thus excluding the many self-employed in that sector.

[13] For seven of the eight reasons spelled out by Lord Hendy in debate (Hansard, 5 June 2025 at https://hansard.parliament.uk/Lords/2025-06-05/debates/F2C736EA-8C19-428A-903A-6554BAE5526E/EmploymentRightsBill#contribution-B767B1DC-6A1D-4972-A1AD-B8561F69DC71, Official Report, cols 895-6),

27. Because of the limitations on the right to strike, in particular the prohibition on a strike against other than a worker's own employer, it is almost impossible to imagine that, without a legislative scheme, unions could achieve a sectoral agreement across a sector not currently covered.

28. It must also be recalled that previous governments abolished legal mechanisms for extending the scope of existing employer specific collective agreements to other employers and the Bill does not seek to reintroduce them.

29. In relation to the statutory recognition procedure the government mentions that it only applies to firms employing at least 21 workers. This is an important restriction because it places workers in some sectors of the economy completely outside the reach of the statutory machinery. Many industries previously subject to a sectoral agreement under the Wages Councils are now excluded from access even to the single employer recognition machinery by this rule. Examples such as hospitality and hairdressing come to mind.

30. Most notable is the agriculture sector in which the Agricultural Wages Council was abolished for England and Wales in 2013 (though remaining in Scotland and Northern Ireland and reintroduced for Wales). The unchallenged evidence was and is that few if any agricultural enterprises employed more than 21 employees so that the effect of abolition has been to exclude collective bargaining from virtually the entire agricultural sector in England.

31. The government also points out that the statutory recognition machinery excludes self-employed workers. This is so and the effect is profound. It was the very basis of the denial of collective bargaining to the Independent Workers of Great Britain in the *Deliveroo* case referred to above. Since so many other gig employers have adopted the same device to deny collective bargaining to their workers, gig workers have effectively no legal mechanism to achieve collective bargaining in the UK.

32. As to minority trade unions, unless there is an agreement between unions jointly seeking recognition, there is no scope for unions representing a minority of workers to be recognised by the employer for collective bargaining where a majority union has been recognised. Indeed, if one union gains recognition it cannot be dislodged by another union (save by a onerous and lengthy derecognition process which it cannot initiate itself) - even if that other union represents the majority or even the overwhelming majority of the workforce in the bargaining unit: Schedule A1, paragraph 34 (even after proposed amendment in the Employment Rights Bill), *R(National Union of Journalists) v CAC, Sec. of State, MGN Ltd, BAJ* [2006] ICR 1; IRLR 53; *R (Boots) v Central Arbitration Committee, PDAU* [2017] EWCA Civ 66, [2017] IRLR 355.

d) Please indicate whether and to what extent the right to organise Is guaranteed for members of the police and armed forces.

33. The authors of this commentary agree with the legal position outlined by the government. However, the ECSR may wish to note that the Police Federation of England and Wales are not permitted to bargain collectively and have their pay set by a Pay Review Board which is neither independent of government or binding on it and in which the Federation do not have confidence.

34. Furthermore, the Police Federations do not have the right to organise or support industrial action nor do police officers have the right to take such action.

Article 6§1 Joint consultation

a) Please state what measures are taken by the Government to promote joint consultation.

b) Please describe what issues of mutual interest have been the subject of joint consultation during the past five years, what agreements have been adopted as a result of such discussions and how these agreements have been implemented.

c) Please state if there has been any joint consultation on matters related to (i) the digital transition, or (ii) the green transition.

35. The authors of this commentary are not in a position to challenge the governments response to the above questions. However, it is to be noted that the government's assertion that the 'UK government regularly consults on important matters of policy and follows proper legal and procedural principles' conveys no more than that the consultations it conducts are *ad hoc* and informal.

36. The government does not claim to have discharged the obligation to *promote* joint consultation between workers and employers. So far as the authors are aware, apart from the ICE regulations cited by the government, it has not adopted any measures to *promote* consultation between the social partners. There are now almost no formal mechanisms by which government consults the social partners, such as those referred to in paragraph 19 above.

37. This failure to promote joint consultation is particularly striking given that in 2023 the Committee on Freedom of Association of the ILO specifically requested 'the government to engage with the social partners to overcome challenges regarding the legislative prohibition on sympathy strikes, in

conformity with freedom of association.'[14] Neither the then government nor the current government have taken any steps whatever to further the requested consultation and though the recommendations of the Committee were drawn to the attention of the government during the passage of the Employment Rights Bill, no such steps were enabled by the Bill.

38. In the view of the present authors this exemplifies the violation of Article 6(1) of the ESC.

Article 6§2 Collective bargaining

a) Please provide information on how collective bargaining is coordinated between and across different bargaining levels including information on:

• the operation of factors such as erga omnes clauses and other mechanisms for the extension of collective agreements;

• the operation of the favourability principle and the extent to which local/workplace agreements may derogate from legislation or collective agreements agreed at a higher level.

39. The government response that the UK has a highly de-centralised collective bargaining structure fails to do justice to the demolition of the extensive and effective collective bargaining structures supported by all governments in the period from the end of the 19th century until the 1980s. The post-war level of collective bargaining coverage of more than 80% referred to earlier, ensured that worker voice was heard and unions were enabled to influence the regulation of the terms and conditions of workers (not just their members), as required by Article 6(2) of the ESC. Few sectors (electrical contracting, packing case manufacture, civil engineering) in the private sector still have sectoral bargaining coverage and though sectoral agreements are more extensive in the public sector, successive governments have limited their effectiveness by, e.g., precluding collective bargaining over pay and substituting in its place of, pay review bodies, the members of whom are appointed by government, and whose decisions are no more than recommendations which government can and does reject.[15]

40. As the government says, such collective bargaining as now takes place is 'at firm level'. This is almost invariably achieved by agreement, sometimes after strikes to bring the employer to the negotiating table. The twenty-year history of the statutory recognition procedure (Schedule A1 of the 1992 Act) has not brought about significant gains in collective bargaining coverage – indeed, the slump in

[14] ILO, *404th Report of the Committee on Freedom of Association*, 2023, case 3432, (UK) at [647] and [651(b)].

[15] As, e.g., for school teachers, doctors and dentists, NHS staff, prison officers, police, armed services.

coverage has continued regardless of the statutory machinery which appeared only in its first year to pause the decline.

41. The *Digest of Decisions of the Case Law of the European Committee of Social Rights*, updated in June 2022, records the Committee's decision that:

> If the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Where only 30% of the total number of employees are covered by collective agreements, voluntary negotiations are not sufficiently promoted in practice.[16]

42. The UK now has less than 30% of its total number of employees covered by collective agreement and it is indisputable that 'the spontaneous development of collective bargaining is not sufficient.' Accordingly, it is incumbent on the government to take steps to increase collective bargaining coverage but it has signally failed to do so by the Employment Rights Bill or otherwise. The duty is to *promote* not merely to *permit*.

43. Previous governments removed the legal mechanisms to extend existing collective agreements and to support *erga omnes* arrangements. The Employment Rights Bill was an opportunity to restore and modernise these mechanisms but it contains no such measures. More significantly still, as explained above, the Bill contains no mechanism for reintroducing sectoral collective bargaining.

44. The government's references to Fair Pay Agreements in the adult social care sector (and for school support staff) will not, for the reasons set out above, constitute collective bargaining or collective agreements.

45. In the view of the authors the UK government has failed in its Article 6(2) obligation:

> to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

[1616] P87. The quotation is from *Conclusions 2018*, Slovak Republic.

b) Please provide information on the obstacles hindering collective bargaining at all levels and in all sectors of the economy (e. g. decentralisation of collective bargaining).

46. The present authors acknowledge the factors to which the decline in union membership and collective bargaining coverage is said to be attributed. However, the legislative restrictions on trade union action (see below) and the removal of machinery to extend the scope of existing collective agreements, implement sectoral agreements and promote collective agreements by the use of public procurement are not mentioned by the government but are by far the most significant factors.

47. A further factor is the exclusion of self-employed workers from access to the only statutory mechanism for gaining collective bargaining rights, as exemplified in the *Deliveroo* judgment discussed earlier. The government refer to this in their third bullet point on page 14 of their National Report. Yet this too is in violation of Article 6(2) since, as the *Digest* records (at 88):

> In establishing the type of collective bargaining that is protected by the Charter, it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining.[17]

c) Please provide specific details on:
- *the measures taken or planned in order address those obstacles;*
- *the timelines adopted in relation to those measures;*
- *the outcomes achieved/expected in terms of those measures.*

48. Needless to say the reforms to which the government point in the Employment Rights Bill are welcome. But they are not sufficient to remove or reverse the obstacles to collective bargaining at all levels and in all sectors of the economy. That requires at the least:
    - A mechanism for the implementation of sectoral collective bargaining in each sector of the economy;
    - An action plan for the achievement, within 5 years, of at least 80% collective bargaining coverage as in the European Union pursuant to the Directive on Adequate Minimum Wages (Directive (EU) 2022/2041);
    - A mechanism for the extension of existing collective agreements to non-signatory employers;

[17] These sentences are from *ICTU v Ireland*, Complaint 123/2016, 12 September 2018 at [38].

- A requirement that all tenderers for public sector contracts and the beneficiaries of grants, licences and other benefits conferred by the public sector both observe and adhere to collective agreements, negotiate collective agreements where there are none, and recognise any union representing a significant proportion of its workforce for collective bargaining;
- Removing those restrictions on the exercise of the right to strike which have been the subject of adverse comment by the ECSR or by organs of the ILO.

d) Please provide information on the measures taken or planned to guarantee the right to collective bargaining of

(i) economically dependent (self-employed) persons showing some similar features to workers and

(ii) self-employed workers.

49. The government response under this head is notable for its failure to point to any measure taken or planned to guarantee the right to bargain collectively of the workers identified in the question.

50. There is no doubt that some self-employed and dependent workers do in fact exercise the right to bargain collectively in some sectors of the UK economy. Criminal barristers may not be the best example but some freelance journalists, musicians, actors and film and television crew are amongst them. However, industrial strength apart, they do not have any legal means of insisting on exercising that right.

51. The problem arises, therefore, where self-employed and dependent workers are refused collective bargaining by their employer and do not have the organisation or the collective strength to strike to achieve such bargaining. As referred to above, such workers are denied access to the only mechanism provided by the law to achieve collective bargaining, Schedule A1 of the 1992 Act. This was exemplified in the *Deliveroo* case discussed earlier. Furthermore, even were they able to access that right, in industries where each employer engages only small numbers of workers (as in hairdressing, hospitality and agriculture), any application would fail the 'minimum 21 workers' threshold. Yet further, Schedule A1 does not permit multi-employer bargaining applications so that sectoral agreements cannot be achieved.

52. The measures suggested in paragraph 48 above would go some way to guarantee the right to bargain collectively for these workers. In particular, the right to call on solidarity industrial action (discussed below) would enable other workers in the sector to press for the right of such workers to achieve collective bargaining.

Article 6§4 Collective action

a) Please indicate:

• the sectors in which the right to strike is prohibited;

• those sectors for which there are restrictions on the right to strike;

• sectors for which there is a requirement of a minimum service to be maintained.

Please give details about the relevant rules concerning the above and their application in practice, including relevant case law.

53. The authors of this commentary agree with the government that police and prison officers in England and Wales (and members of the UK armed services) are prohibited from taking strike action. It is to be noted that prison officers in Scotland do have the right to strike in contrast to those in England and Wales. This does not seem to have caused a problem in Scotland, and the justification for discriminating against those serving in England and Wales in this respect seems untenable and incompatible with Article 6(4) of the ESC.

54. The authors also agree that in consequence of the Trade Union Act 2016 there are particular thresholds for strike ballots in certain sectors, which restrictions are proposed to be removed by the Employment Rights Bill. The Strikes (Minimum Service Levels) Act 2023 will also be repealed.

55. However, the heavy burdens of providing complex strike ballot notices to employers specifying the number, categories and workplaces of the workers the union intends to ballot; providing the full results of strike ballots (number of ballot papers issued, number voting in favour, number voting against, number of spoilt papers); providing complex strike notices of not less than 10 days (reduced from 14) to employers specifying the number, categories and workplaces of the workers the union reasonably expects to call on strike, all will remain after the Employment Rights Bill is enacted and implemented. Ballots must be carried out by first class post but the Employment Rights Bill proposes to permit electronic balloting (but no workplace balloting).

56. The changes are welcome but they do not go far enough to guarantee the right to strike pursuant to Article 6(4) of the ESC. The ECSR have held that multiple specific aspects of the UK legislation are incompatible with the ESC and the Employment Bill will not change them. Thus, e.g., the following incompatibilities identifed by the ECSR remain: [18]

[18] *Conclusions XI-1,* (1989) UK; *Conclusions XII-1* (1991), UK; *Conclusions XIII-1* (1993), UK; *Conclusions XIII-3* (1993), UK; *Conclusions XIV-1*,UK; *Conclusions XV-1*, (2000); *Conclusions XVI-1*, (2003); *conclusions XVII-1* (2005), UK; *Conclusions XVIII-1* {2006), UK; *Conclusions XIX-3* (2010), UK; *Conclusions XX-3* (2014), UK; *Conclusions XXI-3 (*2018), UK; *Conclusions XXII-3* (2023), UK.

- The limited scope of lawful action, confined to "trade disputes" between workers and their own employer;
- The consequential restriction on workers taking action against a *de facto* employer which is not the immediate employer;
- The bar on collective action concerning a future employer and future terms and conditions of employment in the context of a transfer of part of a business;
- The requirement that strikes are lawful only if they have been approved by a majority of workers, through a secret ballot, the legal and regulatory provisions regarding which are highly complex and limiting;
- The 'excessive' requirement to give notice of an industrial action ballot;
- The bar on trade union industrial action in support of unofficial strikers;
- The absolute prohibition on secondary action;
- The prohibition on all forms of picketing (other than at the worker's own place of work) and other secondary action;
- The possibility of dismissing all those who take strike action which falls outside the scope of the limited scope of protected action;
- The absence of any guaranteed right to reinstatement for those unfairly dismissed for taking part in a lawful strike;
- The lack of unfair dismissal protection for trade union members taking part in unofficial disputes, regardless of the reason for the unofficial action.

57. In short, the ECSR have held on numerous occasions that:

> The Committee concludes that the situation in the United Kingdom is not in conformity with Article 6§4 of the Charter because:
>
> – the scope for workers to defend their interests through lawful collective action is excessively circumscribed;
>
> – the requirement to give notice to an employer of a ballot on industrial action is excessive;
>
> – the protection of workers against dismissal when taking industrial action is insufficient.

58. Furthermore, the Committee of Ministers have made Recommendations to the UK to change its law on industrial action in some respects but the UK declined to comply.[19]

[19] See Recommendations R ChS (93)3 and RChS(97)3 still ignored by the government.

59. In relation to the ECSR's longstanding finding that the absence of legal protection for secondary action is incompatible with Article 6(4), it is to be noted that this wholly consistent with the view of the ILO which has many times repeated its criticism that the lack of protection is inconsistent with ILO Convention 87. Recently this was drawn to the previous government's attention in the 2023 ILO Committee on Freedom of Association's Report on the P&O Ferry scandal.[20] There it will be recalled that 786 seafarers working on cross channel ferries were summarily dismissed in order to be replaced by cheaper agency labour recruited outside Europe. Existing collective agreements were disregarded, as was the domestic law requirement to consult before collective dismissals. The employer unequivocally broke domestic law while it was not feasible for the union, because of the circumstances, to organise strike action by its dismissed members. More significantly, it was unable to call on other unions and workers in the ports and elsewhere to take industrial action to pressure the employer by reason of the absolute nature of the lack of legal protection in the UK for organising or taking secondary industrial action. The facts are clearly set out in the Report of the Committee on Freedom of Association.

60. That Report specifically requested:

> the government to engage with the social partners to overcome challenges regarding the legislative prohibition on sympathy strikes, in conformity with freedom of association.

Neither the then government nor the current government have taken any steps whatever to further the requested consultation and though the recommendations of the Committee were drawn to the attention of the government during the passage of the Employment Rights Bill, no such steps were enabled by the Bill.

b) Please indicate whether it is possible to prohibit a strike by seeking injunctive or other relief from the courts or other competent body (administrative body or arbitration body). If affirmative, please provide information on the scope and number of decisions in the last 12 months.

61. The authors of this commentary agree that a failure to observe the complex and restrictive requirements of the UK law on industrial action entitle an employer (or a third party) to seek an interlocutory injunction against a union to restrain the industrial action. This is likely to be granted if there is 'a serious issue to be

[20] ILO, *404th Report of the Committee on Freedom of Association*, 2023, case 3432, (UK) at [647] and [651(b)].

tried' at full trial and if the balance of inconvenience favours its grant (as it usually does). Failure to abide by the injunction is likely to result in contempt of court proceedings leading to heavy fines or sequestration of the union's assets.

62. It is not known why figures are not kept in relation to applications for such injunctions or their outcomes.

Conclusion

63. The authors of this commentary respectfully conclude that the UK continues to be in violation of its obligation under Articles 5 and 6 of the ESC in multiple respects.