



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: Human rights at work, [HC 1161](#)

Wednesday 14 June 2023

3 pm

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Members present: Joanna Cherry (Chair); Lord Dholakia; Lord Henley; Dr Caroline Johnson; Baroness Kennedy of The Shaws; Baroness Meyer; David Simmonds; Lord Alton of Liverpool

Questions 10 - 17

Witnesses

[I](#): Sarah Fraser Butlin, Barrister, Cloisters, and Fellow, Selwyn College Cambridge; Professor Alan Bogg, Professor of Labour Law, University of Bristol and Barrister at Old Square Chambers; Andrew Burns KC, Barrister, Devereux Chambers.

Examination of witnesses

Sarah Fraser Butlin, Professor Alan Bogg and Andrew Burns.

Q10 Chair: Good afternoon, and welcome to today's meeting of the Joint Committee on Human Rights. We are a cross-party Joint Committee, which means that our members are from both the House of Commons and the House of Lords. This oral evidence session is the second in our human rights at work inquiry. We will be focusing on Article 11 of the European Convention on Human Rights, which protects freedom of association, including industrial or strike action.

We are delighted to be joined by the three witnesses to our first panel, who I will now introduce. I will introduce the witnesses to our second panel when we get to it. Our first panel consists of Sarah Fraser Butlin, who is a barrister at Cloisters and an affiliated lecturer in labour law at the University of Cambridge. Sarah has a wealth of experience as an employment specialist and has been instructed in numerous high-profile cases for both employers and employees. Good afternoon, Sarah, you are very welcome.

Secondly, we have Professor Alan Bogg, who is an academic specialising in the general fields of labour and employment law and a barrister at Old Square Chambers. Alan is currently professor of labour law at the University of Bristol, and his academic work has been widely cited with approval in the Employment Appeal Tribunal, the Court of Appeal and, indeed, the Supreme Court of the United Kingdom. Professor Bogg, you are very welcome.

Last, but most certainly not least, we have Andrew Burns KC, who is a barrister and head of Devereux Chambers. Andrew specialises in complex commercial employment and industrial disputes. He has particular expertise in injunction applications and has featured in some of the leading cases of employment law and trade disputes.

We are very grateful to all of you for being with us this afternoon. I will kick off with the first question, which is very much a general question to start with. Professor Bogg, can you take us through the main provisions of international and domestic human rights law that protect strike action and tell us, in particular, how striker industrial action is protected under the European Convention on Human Rights? I may then ask the others to come in after you have answered. Thank you.

Professor Alan Bogg: The basic starting point would be the International Labour Organization, which is the UN body responsible for international labour standards. There is no right to strike instrument as such, but there is no question that the right to strike is clearly protected as a fundamental right under the auspices of the ILO, principally ILO Convention 87 on freedom of association and the right to organise. The ILO committees over many decades have regarded that as the basis for the right to strike under the ILO.

There is specific textual reference to the right to strike under the European Social Charter, which is an instrument under the Council of

Europe. Article 6 makes a specific reference to the right of workers to take collective action. That includes the right to strike and is linked to the right to collective bargaining. Under the International Labour Organization framework and the European Social Charter, there can be no question that the right to strike has been identified as a human right of some importance.

Under the European Convention on Human Rights, the main provision is Article 11. That accords general protections of freedom of association, and there is a special freedom: “the right to form and to join trade unions for the protection of his interests”. It does not make a textual reference to the right to strike, but in a case called—sorry, I just need to remind myself of it; I am of a certain age now where case names go into the background—*Enerji Yapi-Yol Sen v Turkey*, the European Court of Human Rights treated the right to strike as protected under Article 11.

There were three main reasons for that. The first is the reference to the ILO material. This is often described as the integrated approach to human rights adjudication where the European Court of Human Rights takes other instruments as a reference point. Obviously the European Social Charter was referred to by the court, but there is also the basic textual point that Article 11 refers to trade union freedoms “for the protection of his interests”. That is not redundant. People do not join trade unions to make friends—well, they might do; I could not possibly comment. They usually join trade unions to secure material improvements to their interests. The history of labour law tells us that the most effective way unions and workers can do that is through strike action, and that has been recognised by the European Court of Human Rights, so it is clearly protected under Article 11.

Chair: Thank you for explaining that so clearly. Would our other witnesses like to add anything?

Andrew Burns: No, just that it has been accepted in UK case law for over a decade that the Article 11 right to freedom of association does incorporate a right to strike and that, therefore, UK laws should be looked at and interpreted in that way. *RMT v Serco Ltd* in the Court of Appeal was the case that perhaps turned the tide by making the courts look at the UK strike laws as being a balance between the rights of the workers and the unions to take industrial action and the rights of those affected by the industrial action—the employers and the customers of the employers—rather than hurdles for unions to overcome.

Chair: Thank you very much.

Q11 **Lord Henley:** Could we move on to our domestic law? Professor Bogg, could you explain, equally succinctly and clearly, just how that protects individuals who participate in strikes and the unions who organise them? What limitation, if any, does the law place on industrial action?

Professor Alan Bogg: First, I will try to set out the basic framework. If I were to get on to the limitations, we would probably be here all

afternoon, and I do not want to hog the space, but I will start with an overview of the structure of protection and distinguish between the collective level and the individual level.

Let us take the collective level first. The starting point for UK labour law is that organisers of strike action commit a civil wrong, an economic tort, because inevitably in most cases the union organiser will be inducing a breach of contract, and inducing a breach of contract is a civil wrong. The only way trade unions could lawfully organise strike action is through a specific right protection or an immunity from suit in tort. Historically, in the Trade Disputes Act 1906, the legislature opted for an immunity. A trade dispute defence was given to the trade union, the organiser of industrial action, so that where there was a trade dispute and it was in contemplation or furtherance of that dispute, the union would be protected from liability in tort. Historically, it was an immunity-based protection.

It is important to emphasise that, historically, trade unions favoured that, because they did not want courts to become embroiled in industrial relations, because the memories of 19th century cases and master and servant law were still very vivid in the memories of workers and trade unions. That is at the collective level, and that is still the basic structure today.

How has that changed? The trade dispute defence is still the vehicle, but the immunity can now be lost in all sorts of ways where there have been various failings by the trade union—for example, getting the ballot procedures wrong or making mistakes about the notice procedures. It must be said that it is possible to try to navigate this with good faith and with good legal representation and still get the law wrong because the statute is of labyrinthine complexity. I confess that when I teach industrial action, which I have been doing for 20 years, I still come out in a cold sweat when I know that I have to lecture on the ballot procedures. That is the collective level.

At the individual level, the first question is: what is the position of the individual striker? At common law—this is a surprise to many people who are not au fait with industrial action law—the individual striker commits a repudiatory breach of contract, even in a perfectly lawful strike. The default position at common law is that the striker is in breach of contract and can be sued for damages for breach of contract. That is still the position today, even where the strike is completely lawful.

There is limited protection for employees from unfair dismissal where the industrial action is protected for the first 12 weeks of the dispute, capable of extension in certain circumstances. So there is protection from unfair dismissal, but that is restricted to employees, which is a narrow category of employment status. Remarkably, and people may be surprised to learn this, there is currently no protection from detriment short of dismissal for participating in lawful strike action. Even though you are protected from dismissal, at the current time you do not appear to be protected from victimisation short of dismissal—we can talk about that more generally—

which is an egregious departure from Article 11 standards. That is a precis. I hope it is clear, and I will shut up.

Lord Henley: Again, do the rest of the panel want to comment further?

Sarah Fraser Butlin: The protection in relation to unfair dismissal obviously applies only to employees. If you are dealing with someone who is a worker, particularly in the platform or the gig economy, there is simply no protection for them at all.

Andrew Burns: The only thing I would add about unions is that we absolutely have this position whereby a union is effectively given immunity, so once the action is declared lawful, there is nothing the employer can do about it.

However, the union has to go through the procedures that Alan mentioned, which are broadly in two categories. The first is the balloting procedure to ensure that industrial action cannot be called other than with a clear democratic mandate. Secondly, there are notice procedures so the employer is not surprised by the industrial action. As Alan said, those procedures require accuracy of notices—a ballot notice before the ballot, a properly conducted ballot, and accuracy in the strike notice. Those strict requirements, which existed until the implication of the Article 11 rights, have been tempered by the courts over the last decade to say that as long as unions comply, and substantially comply, with the detail in the 1992 Act by substantially getting their balloting notice and balloting procedures right, and substantially getting their strike notice details right, the employer is not entitled to say that the action is unlawful and to seek an injunction to stop the strike.

Although it is complex to go through those procedures, the law has found a balance between ensuring that unions have to go through procedures so that no union member is called out on a strike that is not a democratic strike, and no employer is given less than 14 days' notice of a strike. Small failures in what the union had done used to be used by employers to stop strikes. I used to do that: I used to go to court and say, "There's a small error here. It's not excluded by the statute. This action cannot proceed". That, generally, has fallen away with the advent of Article 11, so that has made a change in the way in which the courts interpret UK strike legislation.

Chair: Is that only since the Human Rights Act?

Andrew Burns: Yes, effectively, in *Metrobus*. Before that, the whole procedure was looked at by the Court of Appeal, which said, "This isn't an undue infringement on rights". As European case law has developed, particularly in the Turkish cases that Alan mentioned in which really quite harsh action has been taken by the Government or employers against people protesting or taking industrial action, that has been imported into the courts of England and Wales in particular and used to temper the strictness. Where the courts used to insist on strict compliance—either you have complied or you have not complied, and if you have not

complied the strike is not valid—that has been directly tempered by the influence of Article 11.

Lord Henley: Was the Metrobus case before the Human Rights Act 1998, but after the 1992 Act?

Andrew Burns: No. We have effectively seen the courts take a journey in looking at compliance. Article 11, and of course the Human Rights Act 1998, brought about a change whereby the courts were required to have regard to the European Convention on Human Rights in interpreting UK statute.

Baroness Kennedy of The Shaws: Just to be clear, even before the passing of the Human Rights Act, guidance was taken from the European Court of Human Rights. Although it was not absorbed by our courts in quite the way that the Human Rights Act was, it would look to see what was happening in other places so that our workers were as protected as workers across Europe.

Sarah Fraser Butlin: What is interesting is that when Article 11 was first addressed by the higher courts in Metrobus, there was perhaps not as much scrutiny of the process overall, and there was still the maintenance of a strict approach. The logic in Metrobus was, “We don’t have a right to strike. We have an immunity from suit”. Then we get to Serco and it became much less strict and about substantial compliance.

Lord Henley: Sorry, just to be clear, what is the date of Metrobus?

Andrew Burns: Serco is 2011, and Metrobus was about two years before that.

Q12 **Lord Henley:** The basic statute before that is the 1992 Act, which was a consolidation Act to bring together all the changes of the 1980s. You have set out the protections for the union and for an individual, particularly if they are an employee but not so much if they are a worker. Last week, we heard about that distinction, and others might want to ask about that later. Is there any distinction in the protections they get, whether they work in the public or private sector?

Sarah Fraser Butlin: No, we do not have any of that particular distinction.

Andrew Burns: There is no intrinsic difference in collective label or terms between the private sector and the public sector, and in comparative terms that is rather unusual. There are lots of European countries—Germany, for example—where the civil service is subject to a very different regime. Historically, that has not been the case here, so I do not think it would be useful to talk in terms of private and public sector strike law.

However, even though it is not an intrinsic distinction, the ballot thresholds in important public services are very severe. Of course, in practice, they will impact more heavily on workers in the public sector.

That will also be true of the minimum service levels Bill. One has to keep in mind the importance of how general rules can have disproportionate impacts in the public sector, even though there might not be a formal legal distinction between private and public employment. I hope that is clear.

Chair: That is very clear. Thank you.

Q13 **David Simmonds:** Sarah Fraser Butlin answered this question in brief, but given the growth of the gig economy it would be helpful perhaps to hear a slightly broader answer. Does UK domestic law protecting strike action afford any protection to those who have worker status rather than employees? Is there any context in the form of cases or others that you might refer us to?

Sarah Fraser Butlin: In practice, the simple answer is no. The protection is provided to employees if they are dismissed, so you have two gaps. The first is the status gap, the employee/worker difference. The second is the dismissal and detriment gap. The protection is limited to employees who are dismissed. We have to remember that the framework internationally is that protection should be given to those in an employment relationship, which is at least as wide as our worker status. In fact, it is almost certainly wider, because it does not require a contract of employment.

So we have one gap that we can very easily identify because our worker status is not included, but in fact the gap is broader than that because of the additional people who would fall into an employment relationship who would not be a worker, alongside the dismissal detriment issue. In a gig economy context, that is particularly challenging, because, in my case experience, you would not see a platform worker being dismissed, exactly; they would simply not be provided with work. So even if you said, "Well, let's expand the dismissal protection to workers in some way", that probably would not bite anyway, because you are dealing with a different type of action that employers might take.

Professor Alan Bogg: A very important point in the gig economy, particularly because of casualised work, is that you have strong protection from dismissal under Section 238A. What happens if there is no further offer of employment? This is often the case where you have intermittent employment with gaps: you are not asked back, you are not given any more assignments. The key provision is Section 137 of the 1992 Act, which deals with access to employment. If you are not made an offer of employment for certain reasons, that is unlawful trade union discrimination under that provision.

That does not help here, for two reasons. First, it is focused on employee rather than worker. Secondly, the ground of discrimination is defined narrowly to trade union membership or non-membership, so it does not extend to the use of trade union services or trade union activities. In any event, at the current time, "trade union activities at an appropriate time"

does not include strike action within its scope. That is just an addendum to Sarah's point.

Andrew Burns: I suppose the context might be that, traditionally, a strike is taken by an employee, because an employee is somebody who is obliged to work at a particular time in a particular way under the control of an employer. The definition of worker has been looked at a lot in case law in recent times, but at one stage it was regarded as somebody who did not have the same obligations to turn up, so you cannot strike if you do not have to turn up.

As Sarah and Alan both say, as the pictures, opportunities and styles of work have changed in the globalised economy, a lot of people do not fit into that. We have a lot of employees, of course, but we have a good lot of people who are not. They may not be strictly legally obliged to turn up on a particular day, but are they still taking part in industrial action? The employer perhaps expects them to come, even if they cannot be compelled to turn up for work.

The gig economy, of course, is the paradigm example. A worker who can choose whether to switch on an app and work on a particular day could choose not to switch on the app because they wanted to take a day's holiday or because they were on strike, and the employer is not to know whether they are on holiday or on strike.

Whether you are on strike becomes much less well defined when it has traditionally been defined by this contract, because, as we have said from the start, a strike in English law is all about whether you have breached your contract which obliges you to turn up and you are in breach of contract by not being there. Then, you are protected, as has been said.

The incidents of people being dismissed for engaging in a strike have been exceedingly rare. It happens very rarely, because there is pretty strong unfair dismissal protection for somebody who takes part in an official strike—in other words, one that is organised by a union, and the union has gone through the proper democratic balloting and notice provisions. There is no protection for somebody who takes part in what used to be called a wildcat strike, one that is either not official or is not subject to a ballot or notice. There are other categories too, but there is effectively good in-law protection for dismissal.

As Alan said, there is no corresponding statutory provision saying that a striker cannot be caused a detriment less than dismissal. That is potentially because an employer will always cause a detriment to a striker by not paying them for the day. That is a detriment, but that has been accepted as being part of the work/pay bargain. Then the questions are: are they entitled to commission for that day? Are they entitled to the bonus or an element of the bonus? Are they entitled to discretionary perks and other things? Can they be warned or a disciplinary sanction imposed?

At the moment, Parliament has not legislated to provide a balance for what detriments are appropriate. Deduction of pay is an obvious one. What detriments are inappropriate, and disproportionate to the action that the employee has taken? You may want to look at whether Parliament should be legislating, because it might not be something the judges can solve.

Chair: As the law currently stands, then, you are saying that our protections are deficient under Article 11 because they do not protect employees against the detriment short of unfair dismissal, such as victimisation because they went on strike.

Sarah Fraser Butlin: The case law is clear. In the case of *Sadrettin Güler v Turkey* in 2018, it was treated as a serious violation of Article 11 rights where penalties—fines or disciplinary warnings—were imposed for participating in strikes. Article 1 of ILO Convention 98 says very clearly that workers “shall enjoy adequate protection against acts of anti-union discrimination”. The ILO committee has developed principles, including that discriminatory actions against strikers present a serious risk of abuse of freedom of association. It is clear that there is a significant problem here in relation to both detriment and the scope of protection and who is captured within it.

Professor Alan Bogg: I want to follow on from the discussion about the impact of rules in the gig economy. We have talked a lot, quite rightly, about employment status, but I would like to make another point about the disproportionate burden that general rules can impose on particular sectors.

An example might be the ballot thresholds as they apply in a gig economy strike. We have very restrictive ballot rules. I probably take a dimmer view of them than Andrew does. In an ordinary strike situation, there is a 50% turnout requirement. You might take the view that that is not onerous and that it is a reasonable specification to ensure that the ballot has democratic legitimacy. If we are thinking about a strike in a single factory where people come together and there can be communication with them, that is absolutely right; I think it is defensible.

However, take a gig worker in a sector where the workers are geographically dispersed, suffer from very high levels of personal debt, might not have a stable home address. Let us remember that the statute requires it to be a postal ballot; it cannot be a workplace ballot, it cannot be an electronic ballot. There might also be a high turnover of union members, because they find it difficult to pay the subscriptions. In that situation, what looks on the face of it to be a perfectly defensible rule—in general, it may be—when you apply it in the context of work in a labour market that is highly precarious, its impact can be very severe in chilling strike action. That is another dimension of the gig economy.

Chair: Could we go so far as to say that potentially, insofar as workers in the gig economy are concerned, our current statute law in the United Kingdom is not complicit with Article 11? Maybe we can take the opinion

of each of you. Let us start with Andrew.

Andrew Burns: I am not sure, on the basis that a union will not be inducing a gig economy worker to breach their contract. There is no obligation at all on the union to ballot or serve notice, because in UK law at the moment it is not inducing a strike. What happens in the gig economy now is that unions call informal action at no notice. Gig economy workers switch off their apps, and there is nothing an employer can do about it because no breach of contract has occurred. So the union has not done anything unlawful by encouraging its members to switch off the apps, because it is their choice to switch the app on or not.

In relation to the general scope of 1992, I disagree with Alan that that would push it into disproportionate interference. The difficulty with gig economy workers is the individual. The individual should still be protected. If that gig economy worker takes part in a strike, which is an articulation of their freedom to associate and take part in industrial action, that person not having any individual protection is problematic.

Chair: Thank you. Sarah, I think you wanted to come in too.

Sarah Fraser Butlin: It depends on the type of gig economy worker you are talking about. I disagree with Andrew that for every gig economy worker there is no contract. There may not be a contract of employment, but there may still be a contract. Very often, the debate in tribunal is, "We have a contract of sorts", but exactly what kind of contract is it, and where do we put them in the box of status? Are they a worker or are they an employee? I am much less optimistic that there is not a problem of compliance regarding gig economy workers in relation to contract and to the chilling effect of all this regulation and the cumulative effect of the requirements in a context where workers are incredibly vulnerable and precarious.

Professor Alan Bogg: I agree with Sarah, and I agree with Andrew absolutely on the question of individual detriment protections. If there is one point I would like to hammer home today, it is the absence of individual detriment protections for workers.

I disagree with Andrew that there might not be any unlawfulness at the collective level. That depends very much on the context. It depends upon the type of contract. Anybody familiar with the history of British labour law would never underestimate the creativity of the judiciary in discovering new economic torts when there are industrial disputes that are vexing to the public good, or the perceived public good. In that context, trade dispute immunity and the disproportionate effect of the ballot thresholds in the gig economy is absolutely a live issue, because the economic torts have continued to evolve. Things have gone quiet for now, but my prediction—and I am usually not bad at this—is that whenever you get spikes in industrial action, employers are interested in pushing the boundaries of economic torts. If you have people interested in pushing the boundaries of economic torts, you need a robust trade

dispute immunity to head that off precisely because of the uncertainty that it would otherwise generate and the chilling effects of that.

Baroness Kennedy of The Shaws: It is always helpful for this committee and for those watching—wherever they are watching from; it always puzzles me—to have examples. The obvious example that comes to mind is, of course, Uber. We know of the actions there have been around the Uber driver who can switch off his app. Sarah, you mentioned that there would be a distinction between kinds of gig economy jobs and where the detriments might be very distinct. Where are the other areas? It is helpful to colour in the picture for people.

Sarah Fraser Butlin: The majority of the gig economy cases that have been running have been dealing with things like working time and holiday pay, but within those cases there have been discussions about status. We see that each company does something slightly different, usually with the hope that they will put their gig economy workers firmly outside of the worker status. So you see a variety of agreements rather than contracts, working practices, and the use of things like substitution clauses, so that you take people outside of the specific protections.

As to what we would think of as types of industrial action, probably your next panel will be even more helpful, particularly the IWGB witness, who I know has been doing some very interesting action on gig economies to try to break through the challenges that are faced. I am not avoiding the question. I just think they will be much more helpful to you.

Chair: We are looking forward to hearing from trade unionists working with workers in the gig economy in our next panel.

Q14 **Baroness Meyer:** In your view, is there a balance between the rights of the workers and the rights of the employers. You have more or less answered this question, but maybe we can look at the right of the employer.

Andrew Burns: There is a balance, because Article 11 is not an unrestricted right, and it expressly permits a restriction on the rights in Article 11, including the right to strike in appropriate circumstances, which generally is informed by the notion of proportionality in European human rights law. The expression of proportionality does not really feature in UK legislation. At the moment, if the courts are asked to determine whether a strike is lawful or not, often people might think that that is a balance between the rights of the workers and the unions to bring their action and how important it is, and how fundamental, and the rights of the employers to conduct their business and the rights of the customers—the travelling public, the students who are not getting their degrees, whoever is affected by the strike.

For historical reasons, the UK courts steer absolutely clear of that zone. We do not judge the proportionality of the action and balance the rights and wrongs of the strike. The UK courts have said, “We mustn’t get into the industrial arena and see whether this is a proportionate strike or not”.

It means that, in theory, an industrial dispute can be any industrial dispute. It could be a dispute about lack of provision of biscuits in the canteen and, in theory, you could have an all-out strike over that topic.

You could have the strike in the UK, as long as it is a tidy strike—as long as the ballot provisions and the notice provisions are all nice and tidy. We have this idea that if it is procedurally all tidy and clear cut, you can strike as much as you like. No balancing is done by the courts, which means that effectively the courts perhaps have to steer clear of it, but it is always in the background facts; they always have to say, “We’re not allowed to decide that”.

In other jurisdictions, the labour courts are allowed to decide and they say, “We have to expressly balance the impact of the strike. Is it proportionate to the issue? Is it about biscuits in the canteen, or is it about people actually losing their livelihoods?” Is a strike about people losing their livelihoods a proportionate or disproportionate strike? That would need a fundamental change.

Baroness Meyer: Is that something we should be doing in the UK?

Andrew Burns: I cannot see it happening. It seems to me that it is much more useful to propose incremental change to what we have than to envisage a root and branch change to a much more continental system. It must be said that it has happened by the importation of things like the substantial compliance idea that I talked about earlier, the tempering of the procedure. We have ended up in this odd situation where you just have to get your process right and then you can take as much industrial action as you want for the period of the ballot, and then you have to go through it again; the ballot expires after exactly six months, and you have to re-ballot and start again.

Sarah Fraser Butlin: I have three concerns. First, when you look at the cumulative impact of the restrictions, the notification requirements, the balloting, and add in important public services and possible minimum service levels, you end up with a very burdensome system where there is no way out for either employer or trade union. There is no requirement to mediate or have some form of alternative dispute resolution, so both sides can get very stuck and there is no required way through. That is my first concern.

My second concern is that although employers can go to the courts for an interim injunction to stop the action, the reality is that a union cannot practically go to the courts and say, “Please, can you declare that our action is lawful?” That has an impact on the individual rights and whether they are protected from dismissal. Theoretically, they can go to the court for a declaration, but we know from a case called *British Airways v BALPA* that the process is just too slow and all the wind of the union sails is taken out, whereas you have the rapid interim injunction process for the employer.

Thirdly, if there are subsequent detriments by the employer, it is the individuals who have to bring those claims. The trade union cannot bring a representative action to say, "You've effectively de-unionised this workforce. We, as the union, no longer have a majority here", and there is nothing it can do. Those would be my three concerns.

Andrew Burns: Can I endorse what Sarah just said about mediation? Obviously I do not speak on behalf of any of the employers I have represented, but on a more general scale I can really see the advantage of putting a mandatory mediation requirement in between the ballot and the strike notice, where the union can serve the strike notice only after mediation. For the employer, when it seeks its injunction, the refusal to mediate or unreasonable action in mediation would be taken into account in the discretion whether to get an injunction or not. That would be a serious obligation on the union to mediate, because it cannot serve a strike notice unless it can, and a serious obligation on the employer to mediate, because it knows that if it does not, even if the action is unlawful it cannot do anything about it.

Baroness Meyer: Like in the German system, where they mediate and then agree for a specific period of time and cannot re-strike or renegotiate.

Sarah Fraser Butlin: One has to be very careful when one is using comparative examples—I am sure Alan can speak much more effectively about this—because each country is so different that taking parts of a process from another country does not quite work. We have an immunity-based system, so in trying to take a part from here and a part from there where they perhaps have a right to strike it becomes more complex. I will look to Alan, because he is very much better at this.

Professor Alan Bogg: Thank you. To respond to that interesting suggestion about proportionality, in the correct context how could one be against proportionate strike action? Are we in favour of disproportionate strike action? It seems that there can only be one answer, which is that of course we should favour proportionate strike action. The problem lies in the difficulty that Sarah has just identified. Systems that have a proportionality standard, like the German system, are institutionally very different to the British system. There are specialist labour courts in Germany that understand how to apply the proportionality requirement sensitively in the industrial relations context. The idea that you would hand a proportionality tool to a member of the English High Court who has spent time at the commercial Bar and is then asked to scrutinise the proportionality of strike action would be deeply problematic. It would simply be yet another obstruction in an already obstructive system.

I would reinforce Sarah's point about the cumulative effect of the restrictions. I have been a student of labour law for 24 years. I am interested in the history and I could count on one hand the number of statutes since 1979 that have introduced protections for unions and strikers. I could not possibly count, without getting lost, how many

statutes have been introduced every year, across a 50-year period, to progressively restrict the right to strike.

I am afraid that is the reality when we talk about balance. We are in a context where the labour market is structurally imbalanced against unions and workers. That is partly a result of a very hostile legislative framework, which is relevant under Article 11 because the European Court of Human Rights emphasises that it will look at the totality of the measures adopted by the member states in implementing the right to strike and freedom of association. It is very important to keep this cumulative restrictive context in mind, because that is what the balance means in reality for the most vulnerable workers.

Chair: Thank you. That is very interesting.

Q15 **Baroness Kennedy of The Shaws:** Do you think that the Strikes (Minimum Service Levels) Bill, if enacted, would be compatible with Article 11?

Andrew Burns: My concern with the Bill is actually less of an Article 11 concern and more that it is fundamentally unworkable. It restricts minimum service levels in vital services. That, of itself, is not an Article 11 problem as long as the service is vital and as long as the restriction is not disproportionate. At the moment, the Bill, as we have seen it, is a framework. It does not tell you where the proportionality threshold lies. That will lie in regulations that have not yet been made and we have no idea what they would say, so we cannot tell yet whether there is an Article 11 compliance or whether Article 11 will be hugely disproportionate because it will allow you to restrict something that is genuinely fundamental and necessary.

In the past, unions and employers have consensually engaged to ensure that when a strike or industrial action takes place it does not affect life or limb. Until very recently, that has been an absolutely ubiquitous feature of industrial action. Regrettably, in the last year, things seem to have become polarised, and employers and unions have failed to agree on life and limb. We have had situations where there has been industrial action, and it is inevitable that people have lost their life because of industrial actions being taken. That is something that I never thought I would see happen, but it has happened consensually, so I would query the extent to which the present law, which makes it a criminal offence for a person to engage in industrial action that they know could lead to loss of life or serious injury, helps.

My fundamental concern with the Bill is that it requires employers and unions to engage in the very narrow 14-day period between a strike notice and a strike, and for the employer to serve a work notice, which has to hit a Goldilocks point. It must specify no more than is necessary to supply the minimum service level. If it specifies a higher number of employees or workers than needed, it is invalid. If the employer undercooks it and does not have enough workers in a vital service, and

there are losses, people lose their lives or suffer injury, the employer will be liable for choosing not to have a proper workforce on that day.

I would not advise any employer to serve a work notice under the present regime, because you cannot hit the Goldilocks point; you would always have too many or too few employees or workers. For the union to have to engage in consultation with the employer during that time—when the employer is trying to make contingency plans because the strike is coming up—puts a huge resource problem on the employer, and the trade unions then have to do things as well. It is really challenging to see the way through the Bill, and I cannot say that I would advise any employer to engage with it as it is written at the moment.

Professor Alan Bogg: We talked about this over lunch, so we kind of staked out where we are, but I disagree with Andrew for three reasons. First, to go back to the totality of measures point, many of the public services within the scope of the minimum service levels Bill will also be subject to the high thresholds under the ballot procedures. You have a double whammy for unions in this situation, because they have to navigate the elevated thresholds for important public services under the Trade Union Act 2016 framework. If they get through that obstacle, they then face the minimum service levels framework. Given that overlap, there is a cumulative effect of restrictions that are impacting on particular sectors.

Secondly, the minimum service levels Bill framework clearly deviates from ILO standards. You, I think, have identified that in your report on the minimum service levels Bill. Why is that relevant to Article 11? In *RMT v United Kingdom*, the European Court of Human Rights said that although the standards are not identical across different legal orders, the standards of Article 11 should not be much narrower than standards in other instruments.

Baroness Kennedy of The Shaws: So you are saying that you do not agree with Andrew Burns about whether Article 11 applies or not, but would you agree with him that it is unworkable?

Professor Alan Bogg: I completely agree that it is unworkable. The real problem with the Bill from an Article 11 perspective is the provision for dismissal for refusal of a work notice. This is clearly covered in a case called *Ognevenko v Russia* where a dismissal had been implemented in a situation where there had been a prohibition of a strike in what Russia had defined as an essential service. The collective definition of an essential service breached international labour law and, on that basis, the European Court of Human Rights took the view that the dismissal in *Ognevenko* was a clear violation of Article 11. That would be true here as well.

Baroness Kennedy of The Shaws: I am sure we would hate to be in the company of Russia in its oppression of workers.

Professor Alan Bogg: Indeed.

Sarah Fraser Butlin: I would simply agree that it is unworkable and that there is a breach of Article 11. Let me add one more issue in relation to Article 11, and that is the scope of the Bill. It covers transport and education, and in my view it would be difficult to establish that they were truly essential services in the meaning of international labour standards. Ognevenko is a transport case, and the court held that it was a violation, so there is a very obvious link there.

Q16 **Chair:** Throughout the session all three of you have covered some suggestions about changes that could be made to improve the United Kingdom's compliance with human rights regarding strikes. In very overarching terms, could you summarise what those changes are just so that we have a quick summary at the end of this panel?

Professor Alan Bogg: If we take Article 11 as a reference point, the key distinction in a narrow and broad margin of appreciation relates to the position of the individual striker. The margin of appreciation is very narrow in circumstances where individual strikers are being victimised for participating in strike action. It seems to me that that is a rational distinction to draw. On that basis, I would say that the urgent priorities for reform relate to the protection of individual strikers, particularly from detriment, and it should extend not simply to workers as defined under domestic law, but to the wider category of employment relationship as defined under Article 11.

The collective rules need to be scrutinised carefully to evaluate whether they have disproportionate burdens and impacts on precarious and vulnerable workers. I gave an example earlier of the way in which the ballot thresholds might be open to scrutiny in that way. The one surprising thing has been the quality of democratic consideration of changes to strike law that have often been rushed through without proper evidential basis.

That is also an issue under Article 11. Under the margin of appreciation doctrine, the European Court of Human Rights endorses the importance of subsidiarity but emphasises that that is based upon member states taking their democratic obligations seriously and legislating in an appropriate and consultative way, which is not how I would characterise recent events.

Sarah Fraser Butlin: If I was only allowed one thing, I would say exactly what Alan has said: detriment protection for those in an employment relationship—in other words, broader than just workers. That is the big gap that is glaringly obvious, particularly in the context of the changes in the economy.

If I am allowed a second thing, we really need a way for a trade union to establish that the action is lawful before it takes it. As I said, *British Airways v BALPA* is a prime example of a new economic tort being raised about EU freedom of establishment. There was no real way of testing that before the courts before they took action, which meant the strike did not happen. That is even more important because the lawfulness of the strike

impacts the protection of the individuals. As soon as it is unlawful, the individual also loses protection. Some form of urgent interim declaration from a trade union that mirrors the interim injunction process before the courts would provide—

Baroness Kennedy of The Shaws: At the moment, it is much too slow and you are saying it needs to be standardised.

Sarah Fraser Butlin: Exactly.

Q17 **Baroness Kennedy of The Shaws:** What has come out of Andrew Burns' suggestion is that the business of mediation should be seized and that there is a very short window in which that can happen. I want you to think about whether anything could be recommended that would insist on others who have power in this relationship, particularly when it is public servants, being required to come to the table too. I am thinking here of the failure of Government Ministers to take part in the discussions on vital services like the National Health Service.

Andrew Burns: A trade dispute can be between a worker or an employer, but it can involve the ultimate paymaster—government—in the public sector. The innovation I would put forward would be some sort of mandatory mediation involving the parties to the trade dispute, including wider parties if they were the decision-makers. That would bring a bit of proportionality into the current very procedural way in which we define whether a strike is lawful or unlawful.

The only other thing I would note is that we have a provision for interim relief for the individual who is dismissed for an automatically unfair reason, but I do not think interim relief at the moment extends to somebody who is automatically dismissed within the 12-week period for taking part in industrial action. That appears to be a potential anomaly that would mean that an individual had a personal interim plan ready. It may be helpful for me to stop. As I say, people being dismissed for being on strike does not happen very often. Luckily, it is not common.

Sarah Fraser Butlin: In relation to the paymaster being at the table, in the gig economy context it can be even more complex. If there is effectively an agency relationship in between, for example, you might get the agency to the table, but they will say, "We can't raise your pay, because we are being paid this much by the principal, so we can't do anything about it". If there is to be a compulsory mediation provision, there would need to be some consideration about piercing the corporate veil to find the person who really holds the purse strings. How that is done is not altogether straightforward.

Chair: Alan, did you want to come in there?

Professor Alan Bogg: I think I have said quite enough. Thank you.

Chair: You have all been extremely helpful. It has been quite a rich session for an hour, and we are very grateful to you. You have our huge thanks for being here today. Thank you.

