

Written Evidence by the Equality and Human Rights Commission (HRW0036)

Introduction

1. The Equality and Human Rights Commission (the Commission) is a statutory body established under the Equality Act 2006. We operate independently to encourage equality and diversity, eliminate unlawful discrimination and protect and promote human rights. The Commission is the equality body for Great Britain and National Human Rights Institution for England and Wales, with a statutory mandate to advise Government and Parliament on matters relating to equality and human rights.

Freedom of association and the right to strike

Legal framework

2. Article 11 of the European Convention on Human Rights protects the right to strike as a part of the right of free association. Article 11 is a qualified right, which means that any interference must comply with the requirements set out in Article 11(2).¹ Freedom of association, including the right to join and form trade unions, is enshrined in Article 22 of the International Covenant on Civil and Political Rights (ICCPR)² and Article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).³
3. Both Covenants state no restrictions should be placed on the exercise of this right other than those which are required by law and considered necessary in a democratic society in the interests of national security, public safety, public order, or for the protections of public health or the rights and freedoms of others. Article 8(1)(c) and (d) ICESCR requires the UK to ensure ‘the right of trade unions to function freely’ and the right to strike provided it is exercised in conformity with the laws of the particular country.⁴
4. A general principle of ICESCR is that State parties must take steps ‘to the maximum of its resources’ to ‘progressively achieve the full realization’ of this right.⁵ In principle, this means that the UK cannot, without careful consideration and justification,⁶ enact laws which reduce the free functioning of trade unions and remain in line with its ICESCR obligations,⁷ although Article 8(2) does enable the UK to impose ‘lawful restrictions on the exercise of this right’ on the army, the police and the administration of the State.
5. Article 8 ICESCR also requires the UK to ensure that any legislative measures taken do

¹ Council of Europe, 2019 Guide on Article 11 - Freedom of assembly and association.

² International Covenant on Civil and Political Rights *Note that the Human Rights Committee which oversees the implementation and monitoring of the ICCPR released a joint statement on freedom of association alongside the CESCR Committee on the 100 year anniversary of the ILO, reaffirming the importance that both freedom of association and peaceful assembly play in the ability for individuals to participate in and make decisions about their workplaces.*

³ International Covenant on Economic, Social and Cultural Rights

⁴ Ibid

⁵ International Covenant on Economic, Social and Cultural Rights

⁶ See the CESCR General Comment No.3, The nature of State party’s obligations (Art 2, Para. 1), 14 December 1990, para. 9.

⁷ ICESCR, Article 2(1)(a).

not prejudice the guarantees provided for in the International Labour Organisation (ILO) Convention 1948 concerning freedom of association and Protection of the Right to Organise.⁸ Although ILO Conventions are not incorporated in UK law and so these rights are not directly enforceable in the UK, the European Court of Human Rights (ECtHR) has said it would be inconsistent for the Court to adopt an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law.⁹

Domestic developments

6. Over recent years the UK Government has implemented a number of changes with implications for the right to strike. These changes, designed to limit the disruptive impact of industrial action, include increasing the threshold required for a strike ballot to be lawful,¹⁰ legislating to enable the use of agency staff to cover striking workers,¹¹ and increasing the financial liability for trade unions should they fail to comply with the legal framework.¹²
7. The ICESCR Committee in its 2016 review of the UK criticised the Trade Union Act 2016, noting that it ‘introduced procedural requirements that limit the right of workers to undertake industrial action’.¹³ Some of the changes made by the Act are not compliant with recommendations made by the ILO Committee on Freedom of Association, which has stated: ‘Strikers should be replaced only: (a) in the case of a strike in an essential service in the strict sense of the term in which the legislation prohibits strikes; and (b) where the strike would cause an acute national crisis.’ No such limitations apply to the use of agency workers in Great Britain.¹⁴
8. The Strikes (Minimum Service Levels) Bill raises further questions around the enjoyment of Article 11 rights in Britain and compliance with Article 8 ICESCR and Article 22 ICCPR. The EHRC has set out concerns around Article 4 (Prohibition of Slavery and Forced Labour), Article 11 (Freedom of Assembly and Association) and Article 14 (Prohibition of Discrimination) of the European Convention on Human Rights (ECHR).¹⁵ Careful scrutiny is required to mitigate against disproportionate or unjustified interference with those rights.

⁸ ICESCR, Article 8 (3). See also the International Labour Organisation Convention 1948 concerning freedom of association and Protection of the Right to Organise.

⁹ See European Court of Human Rights, 2014 *National Union of Rail, Maritime and Train Workers v The United Kingdom*

¹⁰ Section 2 Trade Union Act 2016

¹¹ The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022 Note: In December 2022, the High Court granted permission for a judicial review which is scheduled for March 2023.

¹² *Liability of Trade Unions in Proceedings in Tort (Increase of Limits on Damages) Order 2022 (SI 2022/699)*

¹³ ICESCR, June 2016 Concluding Observations on the sixth periodic report of the UK, U.N Doc E/C.12/GBR/CO.6

¹⁴ ILO, 2018 CFA Compilation of decisions of the CFA Sixth Edition para 917 Note that the Welsh Government has sought to legislate against some of the changes in the Trade Union (Wales) Act 2017 but the status of that legislation is unclear because industrial relations is subject matter reserved for UK Parliament.

¹⁵ EHRC, March 2023 Briefing: Strikes (Minimum Service Levels) Bill

The right to privacy and surveillance at work

Legal framework

9. Article 8 ECHR (the right to respect for private and family life) places limits on most forms of surveillance. Within the workplace, surveillance most commonly involves monitoring of emails, internet or telephone use, but it could also involve CCTV/video surveillance or vehicle tracking. While Article 8 is a qualified right, any interference must be both necessary and proportionate. Article 16 of the ICCPR also ensures that no one should be subjected to arbitrary or unlawful interference with their privacy and establishes the right to legal protection against any such interference.¹⁶
10. There is some domestic case law considering the extent to which employees are protected from surveillance at work, in the context of unfair dismissal cases.¹⁷ This case law indicates that an employee will only be able to rely on Article 8 if they have a reasonable expectation of privacy in respect of the relevant matter. This depends on matters such as whether an employer has a relevant policy, what that policy says, what has been communicated to the employee and the nature of the alleged misconduct leading to dismissal.
11. The ECtHR notes that employers' interests need to be balanced with an individuals' right to privacy. In *Bărbulescu v. Romania* [GC] 2017, on the storage of private data on a work computer, it concluded that 'an employer's instructions cannot reduce private social life in the workplace to zero.'¹⁸
12. The employment tribunal's competence to consider Article 8 in a claim against a private employer is limited to how it interacts with relevant employment rights in the tribunal's jurisdiction and so it is only when a breach of Article 8 is relevant to, for example, the fairness of a dismissal, that it is likely to be held unjustified.¹⁹ This means there could be gaps in protection for employees who are subjected to surveillance, outside the jurisdiction of the Tribunal.
13. We are not aware of any dedicated guidance for employers or workers explaining how Article 8 protects workers, and when interference with Article 8 rights may be justified and proportionate.²⁰

Domestic developments

¹⁶ International Covenant on Civil and Political Rights

¹⁷ See for example: *Halford v UK* [1997] 24 ECHR 32; *Copland v United Kingdom* [2007] ECHR 253; *Atkinson v Community Gateway Association* 2015 ICR 1, *EAT and Garamukanwa v Solent NHS Trust* 2016 IRLR 476, *EAT*,

¹⁸ See also *Lopez v Spain* (1874/13) and comments at para 116 in particular, applying principles from *Barbulescu* - "*These criteria must be applied taking into account the specificity of the employment relations and the development of new technologies, which may enable measures to be taken that are increasingly intrusive in the private life of employees*".

¹⁹ See, for example *X v Y* [2004] EWCA Civ 662,

²⁰ Article 8(2) European Convention on Human Rights states: 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

14. The UK Government will soon be publishing an AI White Paper, setting principles for the regulation of AI within the existing legal framework and regulatory landscape. Surveillance in the workplace is also regulated by the UK GDPR and the Data Protection Act 2018, and the ICO has recently consulted on draft guidance dealing with monitoring at work. EHRC is keen to work with Government and regulators with a remit over workplace issues to ensure that human rights and equality is at the core of the oversight of AI. EHRC and ICO have recently signed a Memorandum of Understanding to support joint working in relation to our respective work on AI.

Freedom of thought, conscience and religion and freedom of expression in the workplace

Legal framework

15. The EHRC considers that the Equality Act 2010 and the Human Rights Act 1998 provide sufficient protection for both those with and without a religion or belief.²¹ The indirect discrimination provisions within the Equality Act, and the concept of balancing rights in human rights law where there is an apparent conflict of interest between individuals, or between an individual and the public interest, generally ensure adequate protection from disproportionate interference with Article 9 and 10 rights in the workplace.
16. The Equality Act permits employers with an ethos based on religion or belief to restrict recruitment opportunities based upon discriminatory criteria related to religion.²² We consider that these exceptions are necessary to allow employers to operate in accordance with their religion or belief. We are also of the view that the law should not permit individuals to opt out of work duties, to accord with their religion or belief views, where this has an actual or potential detrimental or discriminatory impact on others. Opting out of work duties may be permissible where there is no actual or potential detrimental impact to other staff or to service users. In some instances, this will not only be good practice, but essential to ensure that the employer is not indirectly discriminating against the person requesting the arrangement. The EHRC has detailed guidance on religion or belief in the workplace to provide clarity for employers and workers on their duties and obligations.²³
17. Article 10 ECHR on freedom of expression is a fundamental right, which is also protected under the common law, and in Article 19 ICCPR, which imposes an obligation on the UK to secure the right to freedom of expression. Protection under Article 10 extends to the expression of views that may shock, disturb or offend the deeply-held beliefs of others. Any restrictions on freedom of expression must always be clearly set out in law, necessary in a democratic society for a legitimate aim, and proportionate. Subject to these conditions, freedom of expression may be limited in some circumstances. Article 10 does not protect statements that unlawfully discriminate against or harass, or incite violence or

²¹ EHRC, 2016 Religion or belief: is the law working?

²² Paragraph 3, Schedule 9 Equality Act 2010

²³ EHRC, 2016 Religion or belief in the workplace: an employer's guide

hatred against, other persons and groups, particularly by reference to their race, religious belief, gender or sexual orientation. Recent domestic case law suggests that where beliefs are expressed by employees outside of the workplace they will have to be objectively offensive and unreasonable to justify detrimental action by an employer.²⁴

18. Expression of religious views can also be considered a manifestation of religion or belief protected under Article 9 ECHR. Similarly an interference with that freedom is permitted only insofar as it can be justified. Domestic case law establishes that employers are not generally allowed to restrict employees' manifestation of their beliefs outside a work-related context, and that legitimate expression of beliefs cannot be prohibited simply because many might disagree with them.²⁵
19. Article 7 read with Article 2 of the ICESCR imposes an obligation on the UK to take steps to achieve the full realization of 'the right to the enjoyment of just and favourable conditions of work' for all, 'without discrimination of any kind'. In practice, this means that workers must be able to enjoy 'freedom from harassment, including sexual harassment' at work, and that 'legislation, such as anti-discrimination laws... should define harassment broadly, with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status'.²⁶

Domestic developments

20. The UK Government is supporting – along with the EHRC – a Private Members Bill that will introduce further protections against workplace harassment, in particular sexual harassment.²⁷ We note that some parties have raised concerns that this may have unintended consequences on the right to freedom of expression because employers may implement measures to prevent harassment in an overzealous manner to the detriment of free speech.
21. To address this, the Bill was amended to ensure that employers will not be liable for workplace harassment (other than sexual harassment) in circumstances where that harassment arises as a result of a 'protected conversation' which, in effect, intends to capture 'overheard' conversations where a personal view is expressed.²⁸
22. The Equality Act already makes clear that not all behaviour which an employee finds offensive will constitute harassment; all the circumstances and whether it is reasonable for the behaviour to have that effect also must be taken into account. At tribunal matters such as the context of a discussion, how it is initiated and the roles of the participants are

²⁴ See for example *Forstater v CGD Europe and others* ET/22200909/2019

²⁵ See for example *Smith v Trafford Housing Trust* [2012] EWHC 3221 and *R(Ngole) v. University of Sheffield* [2019] EWCA Civ 1127

²⁶ ICESCR general comment no. 18 on Article 7, U.N. DOC E/C.12/GC/23, paras 6 and 48

²⁷ Worker Protection (Amendment of Equality Act 2010) Bill

²⁸ Worker Protection (Amendment of Equality Act 2010) Bill Report Stage amendments The Government states that a protected conversation is one that takes place in the course of work; relates to a protected characteristic (but is not of a sexual nature); involves the expression of an opinion on a political, moral, social or religious matter; is not indecent or grossly offensive, and is not aimed specifically at the individual who is offended and is not intended to cause offence.

all relevant to determining whether behaviour qualifies as harassment. Our view is therefore that a more targeted way of addressing the legitimate concerns around free expression would be to restrict the ‘protected conversation’ exemption to harassment by third parties.²⁹

Labour market exploitation

Legal framework

23. The UK Government has binding international legal obligations to prohibit labour market exploitation. Article 6 ICESCR imposes an obligation on the UK to ‘take appropriate steps to safeguard...the right of everyone to gain his living by work which he freely chooses or accepts’,³⁰ and guarantee that this right is exercised ‘without discrimination of any kind as to race’ and a range of other protected characteristics which is broader than those listed in the Equality Act 2010.³¹
24. Article 8 ICCPR also prohibits slavery, servitude and forced or compulsory labour,³² and Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women also specifies that ‘all forms of traffic in women and exploitation of prostitution of women’ must be suppressed.³³
25. Article 7 read with article 2(2) of the ICESCR imposes an obligation on the UK to guarantee that ‘the right to the enjoyment of just and favourable conditions of work’ is enjoyed ‘without discrimination of any kind’³⁴ to ‘the maximum of its available resources’.³⁵ For workers with precarious employment status ‘...supplements to the wage, as well as other measures to guard against arbitrariness, may be necessary in the interest of fairness to mitigate the lack of job security’.³⁶

Domestic developments

26. The number of live police investigations into modern slavery increased by 65% in 2021/22,³⁷ and referrals to the National Referral Mechanism (NRM) for potential victims of slavery have increased in recent years, with 12,727 referrals in 2021.³⁸ Estimates from

²⁹ EHRC, February 2023 Worker Protection (Amendment of Equality Act 2010) Bill Report Stage briefing

³⁰ ICESCR, Article 6

³¹ ICESCR, Article 2(2) read with Article 6.

³² International Covenant on Civil and Political Rights

³³ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979
Furthermore, the UN’s Committee on the Elimination of Discrimination against Women published a general recommendation on “trafficking in women and girls in the context of global migration” in November 2020. Recommendations cover a wide range of topics, including addressing the root causes of trafficking; upholding victims’ rights; gender-sensitive court proceedings and data collection.

³⁴ Article 7 read with Article 2(2) International Covenant on Economic, Social and Cultural Rights

³⁵ Article 2(1) International Covenant on Economic, Social and Cultural Rights

³⁶ ICESCR general comment no. 18 on Article 7, U.N. DOC E/C.12/GC/23, para 2.

³⁷ Modern Slavery and Organised Immigration Crime Annual Report 2021-22 There were also increases in referrals to the Crown Prosecution Service for a charging decision and increases in convictions, although numbers remain low overall.

³⁸ UK Government, March 2022 Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary, 2021. There has been a 20% increase in referrals between 2020 and 2021.

police data in 2020 indicate there could be at least 100,000 victims each year.³⁹

27. Despite a rise in referrals to the NRM, decision-making processes remain very slow, and there has been limited progress on the NRM Transformation Programme.⁴⁰ Further, while there is a statutory requirement to have an Independent Anti-Slavery Commissioner in post, the position has been vacant since the end of April 2022
28. The Nationality and Borders Act 2022 includes changes to the identification and protection of, and support for, victims of trafficking and modern slavery. This includes provisions to disqualify an individual from protection on the grounds that the individual is a threat to public order or has claimed to be a victim in bad faith. While many of the protections within the Act are welcome, we note concerns have been raised that these changes will make it harder to identify and support victims of human trafficking and modern slavery, and bring offenders to justice.⁴¹
29. We are also concerned that the Government rejected a recommendation to amend the Modern Slavery Act 2015 to clarify that children cannot consent to their exploitation.⁴² This raises concerns about the UK's compliance with its obligations to protect children 'from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development' under the Convention on the Rights of the Child.⁴³
30. The UK Government's Illegal Migration Bill contains provisions that reduce protections for victims of trafficking, alongside those preventing asylum claims, enabling the detention of children and limiting human rights claims, and so may breach international and human rights law. We will provide further analysis of these provisions as the Bill progresses.
31. Our inquiry into the treatment of lower-paid ethnic minority workers in health and social care found that these types of workers generally have a lower awareness of employment rights, and are afraid to raise concerns, or have a lack of mechanisms to do so.⁴⁴ These findings support the conclusion that the UK should take additional steps to ensure non-discriminatory enjoyment of Article 7 on the grounds of race and national origin, including by increasing access to statutory sick pay and establishing a single enforcement body for employment rights.⁴⁵
32. The UK Government had committed to introduce an Employment Bill that would see the introduction of such a body, but to date has not brought that legislation forward.

³⁹ Justice and Care, July 2020 It still happens here: fighting UK slavery in the 2020s

⁴⁰ Independent Anti-slavery Commissioner Annual Report 2021-2022 and Home Office, July 2018 Letter to Meg Hillier MP, Chair of the Public Accounts Committee

⁴¹ Independent Anti-slavery Commissioner Annual Report 2021-2022. The NRM Transformation Programme was due to be completed by March 2020, but was still ongoing at the end of 2022.

⁴² UK Government, 2019 UK Government response to the Independent Review of the Modern Slavery Act 2015

⁴³ Article 32 Convention on the Rights of the Child

⁴⁴ EHRC, 2022 Inquiry into racial inequality in health and social care workplaces

⁴⁵ Ibid.

Retained EU Law and workers' rights

Legal framework

33. Article 7 ICESCR sets out the right to just and favourable conditions of work. This includes fair wages and equal remuneration for work of equal value; safe and healthy working conditions, and the right to rest, leisure and reasonable limitation of working hours.⁴⁶
34. Article 11 of the Convention on the Elimination of Discrimination Against Women (CEDAW) requires the UK to eliminate discrimination against women in the field of employment. It also identifies the right to equal remuneration, including benefits, and equal treatment in respect of work of equal value. Article 11 also entails the obligation to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances. It also prohibits dismissal on the grounds of pregnancy or of maternity leave.⁴⁷

Domestic developments

35. The Retained European Union Law (Revocation and Reform) Bill⁴⁸ allows for the revocation of certain retained EU law and gives ministers the power to replace, restate or update such laws. There is uncertainty over the Government's policy intentions and therefore the human rights implications of the Bill.
36. Overall, the breadth of law within the scope of the Bill has the potential to considerably impact human rights protections for workers. Rights that could be affected include, but are not limited to, parental leave, paid annual leave, equal pay, rights for part-time and agency workers, and maximum hours for Heavy Goods Vehicles drivers.⁴⁹ The potential for regression or loss of existing rights raises doubts on the UK's ability to meet its obligations under Article 7 ICESCR.
37. While the Equality Act 2010 incorporates the right to equal pay in domestic law, retained EU law, which may be lost under the Bill provides additional rights. A recent example is the ability of equal pay claimants to compare themselves against comparators who may not work within the same establishment but whose employment terms and conditions are set by a single source.⁵⁰ If the Bill proceeds, and Government takes no action to retain the relevant protections, many women will face significant obstacles in challenging discriminatory pay arrangements.
38. The right to maternity leave and pay, and the prohibition of dismissal on the grounds of pregnancy or maternity are currently set out in the Maternity and Parental Leave

⁴⁶ International Covenant on Economic, Social and Cultural Rights

⁴⁷ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979

⁴⁸ Retained EU Law (Revocation and Reform) Bill

⁴⁹ In scope legislation includes the Working Time Regulations 1998 and the Management of Health and Safety at Work Regulations 1999

⁵⁰ For example, Article 157 of the Treaty on the Functioning of the European Union, which covers equal pay for equal work as applied in *K and Others v Tesco Stores Ltd*, C-624/19

regulations 1999 (MAPLE) which implement EU Directives on parental leave and pay and protection from redundancy.⁵¹ Loss of these rights may undermine the UK Government's ability to comply with Article 11 CEDAW.

39. We are actively briefing on the REUL Bill as it progresses through Parliament and are engaging with the Department for Business and Trade to ensure that valuable worker protections are retained. However, there is a risk that the limited time available before the proposed sunset date in the Bill may limit the ability of the Government to preserve existing rights.

International human rights treaties

40. As noted throughout, there are a number of areas that engage the UK's obligations under ICCPR, ICESCR and other international and regional human rights instruments.
41. We believe there is a need for a stronger accountability mechanism for overseeing the implementation of the UK's international human rights obligations and recommendations from UN treaty bodies and the Universal Periodic Review process. A national mechanism for implementation, reporting and follow-up would ensure a more coordinated and effective approach to engaging with UN human rights reviews and implementing recommendations to create the best possible standard of compliance. This recommendation is also supported by the Women and Equalities Committee and others,⁵² but has so far been rejected by the UK Government.⁵³

30/03/2023

⁵¹ The Maternity and Parental Leave etc. Regulations 1999 We note that the Government is currently supporting the Protection from Redundancy (Pregnancy and Family Leave) Bill which will introduce greater protection against redundancy for pregnant women and new parents by amending the MAPLE regulations.

⁵² UK House of Commons Women and Equalities Committee (2021), Levelling up and equality: a new framework for change

⁵³ Ibid.