ASLEF Response – Business and Trade Committee – Employment Rights Bill Call for Evidence

1. The Associated Society of Locomotive Engineers and Firemen (ASLEF) is the UK's largest train driver's union representing over 22,000 members in train operating companies, freight companies as well as London Underground and light rail systems.

2. We have long campaigned for a 'New Deal for Workers' and welcomed the publication of the Labour Party's New Deal for Working People and Labour's Plan to Make Work Pay, which outlined how if in government, they would deliver a new deal. There have been many meetings and lots of work from the Labour affiliated trade unions ahead of the general election to ensure that Labour would be able to implement the necessary changes to employment rights to begin to undo the damage of the last 14 years of Conservative led governments, whilst also updating legislation to ensure it is fit for the modern world of work and able to provide a fair deal for working people, the Labour Party also engaged with businesses in the lead up to the election and once elected worked with all stakeholders to ensure that the Employment Rights Bill would deliver on manifesto commitments and be deliverable. We see the Employment Rights Bill as the first step in the journey to balancing the world of work and delivering a new deal for workers.

3. We welcome the opportunity from the committee to provide written evidence on the Bill's ability to protect workers, the impact it will have on business and the impact it will have on economic growth and wealth creation.

4. It is important that the Committee also looks beyond the Employment Rights Bill and at the Plan to Make Work Pay. We welcome the government's announcement on the next steps and await progress on the government's review into TUPE, health and safety guidance and regulations, surveillance technologies, single worker status, collective grievances and extending the Freedom of Information Act to private companies that hold public contracts and publicly funded employers.

5. Our response will cover some of the committee's questions under each heading to highlight positives and potential areas of concern with a focus on the impact it will have on our members specifically.

Protecting workers

Does the Employment Rights Bill adequately safeguard the workers it seeks to protect?

<u>Protection from harassment</u>

6. Clauses 15,16 & 17 take important steps to address the harassment that workers can receive whilst carrying out their duties. Clauses 15 and 17 ensure that employers have a duty to take **all** reasonable steps to prevent

sexual harassment, this should create a greater balance for workers to be able to address sexual harassment in the workplace, this coupled with the extension of whistleblower protections under Clause 18 and the Workers Protection (amendment of Equality Act 2010) Act 2023 will enable workers and unions to address and challenge sexual harassment in the workplace and ensure that employers are meeting their legal obligations.

7. Clause 16 outlines that an employer must not permit a third party to harass an employee, this clause could have a real impact on addressing the harassment that railway workers and other workers in public facing roles can face. Whilst our members are not technically in passenger facing roles, they do interact with passengers and can experience third party harassment whilst carrying out their duties. Recently we have seen increases in harassment on areas of the railway with particular news attention being given to the incidents on Scotrail services between Balloch and Glasgow.

8. A recent survey of our membership has revealed incidences where these new clauses and the new Act will enable action to be taken and should encourage employers to have policies and procedures in place which should reduce the chance of such harassment happening in the future. We would be happy to share some of this survey with the committee but have already shared some of these findings with the Employment Rights Bill Committee.

Are there weaknesses or loopholes in the Bill that could be exploited or have unintended consequences?

Day one rights / unfair dismissal

9. We strongly welcome the introduction of day one rights to sick pay, to request flexible working as well as to paternity leave and parental leave, we also welcome the reduction of the 2-year period before an employee can claim unfair dismissal at a tribunal. We are however concerned with the provision for regulations to set out an 'initial period' of employment where a modified version of the right to unfair dismissal will apply. This will essentially be a statutory probationary period. Presently employers tend to have 3–6 month probationary periods and we are already seeing business lobby groups pushing for the statutory period to be 12 months with the government's stated preference of 9. This in our view, is not compatible with the manifesto commitment of a day one right from unfair dismissal and could potentially jeopardise the empowerment of an employee to utilise their day one rights through fear that it could contribute to an employer opting to utilise the 'lighter touch' process and dismiss them during their probationary period.

10. The regulations must be robust and not allow any loopholes which enable employers to freely dismiss employees that don't 'fit' the role despite being capable. As noted above under point 6 the regulations must be robust enough that they do not enable an employer to essentially penalise an employee for utilising their right to sick pay or parental leave during their statutory probationary period.

11. An employee can be fairly dismissed on conduct or performance grounds, and we are concerned that the proposed 'lighter touch' process during a statutory probationary period could eventually creep beyond a probationary period and become a 'fair' dismissal ground, particularly if there is a change of government intent on re-balancing the scales in favour of unscrupulous employers. The precedent would have been set with employers fairly dismissing workers on a ground deemed fair during a probationary period, making it easier for such grounds of 'fair' dismissals to be extended beyond a probationary period.

Fire and re-hire

12. Whilst positive steps are being taken to end fire and re-hire it is not being banned, which for us is a disappointment. The Bill does however make it less likely for fire and re-hire to be used as a negotiating tactic by employers as the ability to threaten the use of fire and rehire has been weakened due to the changes to unfair dismissal under Clause 22.

13. We are however concerned that as fire and re-hire will still be an option, employers can rely on the exception of 'likely' scenarios as afforded by Clause 22, under Section 104I (4) of the Employment Rights Act 1996, which states:

> *"the reason for the variation was to eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties which at the time of the dismissal were affecting, or were likely in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business"*

Whilst this appears robust, it would be pertinent for the definition of 'likely' to be outlined by the Minister and clarified. An argument could be made for the interpretation of 'likely' to be taken from Section B12 of the Equality Act 2010 Guidance which outlines that it can be interpreted as something that "could well happen"[1]. Without clarification on the interpretation of likely in guidance, unscrupulous employers may be able to exploit a loophole which enables them to outline scenarios that "could well happen" to ensure the legal use of fire and re-hire.

Independent trade unions

14. Under Clause 46 is the inclusion of 'listed' trade unions creates a loophole which could enable a dependent union to access a workplace and be used to thwart an independent union from gaining access with the dependent union gaining access via the statutory regime, an amendment to the Bill's wording

[1] Disability Unit, 'Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability (HTML)' *(2011)* https://www.gov.uk/government/publications/equality-act-guidance/disability-equality-act-2010-guidance-on-matters-to-be-taken-into-account-in-determining-questions-relating-to-the-definition-of-disability-html

could change 70ZA (2) to clarify that it applies to independent trade unions as defined by those with a certificate of independence from the Certification Officer.

Can the measures in the Bill be adequately enforced? What are the barriers to setting up a Single Enforcement Body (Fair Work Agency) and how can these challenges be overcome?

15. We welcome the intention to create a single enforcement body called the Fair Work Agency (FWA) but to truly be effective the FWA will need adequate funding and resourcing for the measures in the Bill to be adequately enforced, we know that there also needs to be strong independent trade unions which can access workplaces and organise workers. When collective bargaining is present, with wide coverage and is well co-ordinated, good labour market performance is the outcome[2].

16. Clauses 45,46 and 47 take steps to improve the process of accessing and organising workers and ultimately achieving collective bargaining agreements with employers. If the Central Arbitration Committee (CAC) is adequately resourced and the penalties for employers which seek to frustrate union access and recognition are sufficient, then an increase in union density coupled with an adequately resourced FWA should ensure that the measures in the Bill can be enforced. With regards to penalties, we see value in the mirroring Article 83 UKGDPR and the DPA, where section 157 provides for a maximum penalty of £17.5 million or 4 percent of the undertaking's total annual worldwide turnover in the preceding financial year, whichever is higher. This should apply to employers not following their consultative obligations when carrying out collective redundancy / fire & re-hire and when an employer breeches its obligations on access.

Will the proposed trade union reforms improve working relationships between workers and businesses, and hence, productivity and enable voice at work?

17. We see real value in the repeal of the Trade Union Act 2016 and the Strikes Act 2023 as these go some way in rebalancing the relationship between employer, worker and their trade union. Clauses 54, 55, 56 remove areas of trade union legislation which were used by employers to challenge industrial action on technical grounds, looking to utilise the courts to weaken the resolve of an organised membership and in some cases de-facto resolve disputes in their favour as happened with GTR V ASLEF [2016] EWHC 1320, where a court essentially blocked ASLEF from taking protected industrial action. GTR subsequently went on to challenge similar industrial action later that year in 2016,EWCA 1309, which ultimately failed but highlighted how employers will try to challenge a dispute on technicalities rather than enter negotiations under the current framework.

[2] OECD (2019), *Negotiating Our Way Up: Collective Bargaining in a Changing World of Work*, OECD Publishing, Paris, https://doi.org/10.1787/1fd2da34-en.

18. The desire to have a principles-based approach as the base of a modern industrial framework should assist in setting the ground to encourage better working relationships between workers and businesses. We would note though, that in our view, principle 2 'proportionality' is missing the importance of negotiation when it states *"…unions will have the ability to undertake their core role of engagement and dispute resolution uninhibited"*[3].

19. We would also see value in a 5th principle being added, the 'Plan to Make Work Pay' document is clear when it states that *"Labour believes strong collective bargaining rights and institutions are key to tackling problems of insecurity, inequality, discrimination, enforcement and low pay. When workers are empowered to act as a collective, they can secure better pay and conditions."*[4] And it seems remiss to not have the promotion of collective bargaining through good faith covered in the principles.

20. The repeal of the antagonistic anti-trade union legislations combined with a modern framework for industrial relations should encourage disputes to be resolved rather than prolonged as we saw with the previous government in the our national pay dispute which started in June 2022 and was only resolved in September this year after a change of government, with a new administration in place that understood the importance of speaking with the workers and their trade union and working collaboratively. The previous Rail Minister stated in January 2023[5] that the strikes would have been cheaper to settle yet continued to support the prolonged dispute. Highlighting that the government itself saw no value in negotiating and instead tried to force through changes to terms and conditions even introducing The Strikes Act 2023 to try and further force through changes, so we widely welcome the new government re-setting the framework for industrial relations and changing the tone.

Impact on businesses

21. Whilst we will not comment exhaustively on this section it is worth noting that good employers support the Employment Rights Bill, this has come out in the evidence sessions of the Bill Committee with the Chartered Management Institute noting that good businesses know that when their staff feel safe, secure and valued their business works better. The government is taking the right approach in that it wants to encourage good jobs and good employers.

Economic growth and wealth creation

22. The government's own impact assessment highlights how the Employment Rights Bill and the Plan to Make Work Pay could impact economic growth with the outlook being positive. It is important that the committee views the Bill in

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3 https://assets.publishing.service.gov.uk/media/672899a1fbd69e1861921a9a/Consultation_creating_modern_framework_industrial_relations.pdf P11

4 https://labour.org.uk/wp-content/uploads/2024/05/LABOURS-PLAN-TO-MAKE-WORK-PAY.pdf P14

5 https://www.bbc.co.uk/news/business-64317725

the round of the other work that the government is undertaking such as the reforms to planning and the creation of an industrial strategy and an infrastructure strategy. The industrial and infrastructure strategy will be able to create greater certainty for businesses with a clear path of direction and pipelines of work which should further encourage investment.

23. From a railway perspective the creation of Great British Railways will enable the government to ensure that the rail network is serving the public to the best of its ability and we know that for every £1 invested into rail, £2.50[6] is generated elsewhere in the economy, the sector provides £43 billion in gross value added, is essential to hit net zero targets and rail freight currently contributes £2.45 billion to the British economy with 90% of the benefits are accrued outside of London and the South-East. By taking a whole system view under GBR the government will be best placed to ensure that the railways are able to further deliver wider economic and social benefits. Further to this the move to actually want to resolve disputes should avoid prolonged industrial action which ultimately harms the economy.

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[6] https://www.oxfordeconomics.com/resource/The-economic-contribution-of-UK-rail/