

TUB 05

Bil yr Undebau Llafur (Cymru)

Trade Union (Wales) Bill

Ymateb gan: Gwasanaethau Tân ac Achub Cymru

Response from: Wales Fire and Rescue Services

JOINT RESPONSE TO THE INVITATION TO CONTRIBUTE TO THE TRADE UNION (WALES) BILL

Wales Fire and Rescue Services

1 Background

1.1 The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) sets out the requirements that a union must meet to benefit from statutory immunity from liability for inducing workers to take industrial action. TULRCA sets out the circumstances in which an employee taking industrial action loses their protection from unfair dismissal.

1.2 In brief, for a union to establish that it is not liable it will need to show that:

1.2.1 The action is in contemplation or furtherance of a trade dispute;

1.2.2 The union has the support of a simple majority following a valid ballot and has sent the appropriate notifications to union members and the employer;

1.2.3 The action does not amount to secondary action or unlawful picketing; and

1.2.4 It is not for a prohibited purpose, for example to support employees dismissed during unofficial industrial action.

1.3 The Trade Union Bill 2015-16 was introduced in the House of Commons on 15 July 2015. In summary, the Bill proposed:

1.3.1 A requirement for a minimum threshold of a 50% turnout in all industrial action ballots, and an additional requirement in specified important public services of at least 40% of those entitled to vote having voted in favour of industrial action.

1.3.2 Information requirements relating to industrial action: the information that must be included in the ballot paper, the information that must be given to union members and the information that must be given to the Certification Officer.

1.3.3 Arrangements for the timing and duration of industrial action, requiring notice of any action to be given to an employer, and providing that a ballot mandate for industrial action expires after a specified time; and

1.3.4 Requirements on unions for the supervision of picketing.

1.4 On 4 May 2016, the Bill received Royal Assent and became the Trade Union Act 2016. Only the provisions relating to electronic balloting are currently in force, with the rest of the Trade Union Act 2016 likely to come into force in 2017.

2 Impact in Wales

2.1 The UK government takes the view that the matters dealt with by the legislation are not within the legislative competence of the National Assembly for Wales and that therefore legislative consent motions are not required.

2.2 The Joint Council for Wales, which provides a forum for Welsh public sector employers and trade unions, issued a statement condemning the measures in the Bill as being counter-productive to industrial relations and called on the Welsh government to urge the UK government to reconsider the Bill.

- 2.3 On 28 June 2016, Carwyn Jones, First Minister of Wales, announced that legislation would be brought forward to repeal sections of the Act in devolved areas as part of the Legislative Programme of the Welsh Assembly.
- 2.4 A Bill to repeal parts of the Trade Union Act 2016 and a call to evidence is scheduled to be published in January 2017.
- 2.5 The National Assembly has the right to pass laws (known as Assembly Acts), but only in areas where those powers have been expressly conferred. These powers include the following relevant areas:
- 2.5.1 Fire and Rescue Services and Fire Safety;
 - 2.5.2 Local Government; and
 - 2.5.3 Public Administration.
- 2.6 If a policy area is not specified within the Government of Wales Act 2006, the National Assembly cannot legislate in relation to it. Neither employment law nor industrial relations are specified within the Government of Wales Act 2006 and therefore the National Assembly of Wales does not have the power to legislate in those areas.
- 2.7 In light of this, it is not currently clear whether the National Assembly has the power, under the Government of Wales Act 2006, to repeal aspects of the Trade Union Act 2016. The National Assembly's position may be that, whilst employment legislation is not a devolved power, public services are. The defined "important public services" are in the public sector and therefore it could be argued within the National Assembly's legislative authority.
- 2.8 The UK government may take a contrary position and be of the view that the Trade Union Act 2016 regulates the relationship between employer and employee and that simply because it has an impact on Public Authorities, it does not follow that the Welsh Government has devolved power to repeal that legislation.
- 2.9 Ultimately, it may be that the question of whether the National Assembly could repeal aspects of the Trade Union Act 2016 is something that the Courts would need to determine.

3 **Ballots: 50% turnout requirement (section 2)**

- 3.1 Currently, section 226 of TULRCA provides that a strike or other industrial action will be unlawful unless at least 50% of trade union members who responded to the ballot voted in favour of the action. When it is brought into force, section 2(1) of the Trade Union Act 2016 will amend section 226 so that, in addition to a majority being in favour of the action, at least 50% of all eligible members must have voted.
- 3.2 The changes will make it more difficult for a union to call its members out to take part in industrial action and give rise to more challenges of proposed strike actions in the courts. This may delay the resolution of industrial disputes and may lead to costly court disputes or damage the unions' ability to call for industrial action.
- 3.3 Industrial action includes the following consequences:
- 3.3.1 A reduction in the Fire Service's capacity to provide emergency and non-emergency services to members of the public;
 - 3.3.2 Increased risks to public safety and or security;
 - 3.3.3 Risks to local and national resilience due to reduced service levels,
 - 3.3.4 Diversion of capacity from other public services to provide cover for industrial action in the region;
 - 3.3.5 Limited availability to help in other emergencies such as road accidents or medical emergencies; and

3.3.6 Limited ability to undertake preventative and community safety work.

3.4 As a result of the introduction of this requirement, unions may be forced to approach industrial action in a different way and issue more focussed ballots to specific locations or key job categories, where these would be more likely to meet the thresholds. In addition, unions may be forced to spend more time and resources to improve turnout and support rather than seeking settlement of disputes with the employer.

4 Ballots: important public services: 40% support requirement (section 3)

4.1 In ballots of workers engaged in "important public services", in addition to the requirement that at least 50% of all eligible members must have voted, at least 40% of those entitled to vote must have voted in favour of the action. This will be achieved by section 3 of the Trade Union Act 2016 adding new subsections (2A) to (2F) into section 226 of TULRCA.

4.2 "Fire Services" have been defined as falling within the definition of "important public services".

4.3 The Important Public Services (Fire) Regulations 2017 specify that important public services are:

4.3.1 Services provided by firefighters in extinguishing fires and protecting life and property in the event of fires; and

4.3.2 Services provided by fire and rescue authority personnel in dealing with, and organising a response to, a call made from a telephone or other device to request the services provided by firefighters as mentioned above.

4.4 Therefore these regulations cover firefighters and control personnel.

4.5 We acknowledge that the threshold could be considered high. The prime issue for the Service will always be that it is able to respond quickly and efficiently to an emergency.

4.6 The requirement that at least 40% of all those entitled to vote must also vote for action, means that non-voters (i.e. those eligible to vote but who abstain for whatever reason) are treated as "no" voters, which could be seen to be unfair.

4.7 As a result of the introduction of this requirement, unions may be forced to approach industrial action in a different way and issue more focussed ballots to specific locations or key job categories, where these would be more likely to meet the thresholds. In addition, unions may be forced to spend more time and resources to bolster turnout and support rather than seeking settlement of disputes with the employer.

5 Electronic balloting (section 4)

5.1 Section 4 of the Trade Union Act 2016 required the Secretary of State to commission an independent review on the delivery of secure methods of electronic balloting.

5.2 No further comments are therefore necessary at this time.

6 Information requirements (sections 5, 6 and 7)

6.1 The Trade Union Act 2016 will introduce new requirements regarding:

6.1.1 Information that must be included in the ballot paper.

6.1.2 Information that must be given to union members about the result of the ballot.

6.1.3 Information that must be given to the Certification Officer.

6.2 The voting paper issued by the union must:

- 6.2.1 Include a summary of the matters in issue in the trade dispute to which the proposed industrial action relates. It is likely that it will require sufficient information to enable the union member who is voting to understand what issues remain in dispute/unresolved.
 - 6.2.2 If a strike is not proposed, specify the types of industrial action proposed (either in the question itself or elsewhere on the voting paper).
 - 6.2.3 Indicate the periods within which the industrial action (or, as the case may be, each type of industrial action) is expected to take place.
- 6.3 All those entitled to vote will also be told:
- 6.3.1 The number of individuals who were entitled to vote in the ballot.
 - 6.3.2 Whether or not the number of votes cast in the ballot was at least 50% of the number of individuals who were entitled to vote in the ballot.
 - 6.3.3 Whether the number voting "yes" was at least 40% of the number of individuals who were entitled to vote in the ballot.
- 6.4 It would appear that the information requirements are significant in terms of the level of administration during a period of time when the union is required to undertake a number of activities in a very short space of time. This creates a significant burden on the union and creates an additional risk of litigation - which could arise as a result of a minor procedural irregularity or failing.

7 Timing and duration of industrial action (sections 8 and 9)

- 7.1 When the Trade Union Act 2016 comes into force, two weeks' notice of the intended action should be given (seven days if agreed).
- 7.2 A trade union must provide an employer with notice of industrial action after it has secured a ballot mandate and before any such action is taken. For industrial action to be protected, the union must give the employer a notice covering the action within the appropriate period - which it is proposed will be extended to 14 days.
- 7.3 The increased notice period appears reasonable as it will allow the Service to take appropriate legal advice and to make contingency arrangements. The extended period of time will allow the Service to put in place the necessary steps to protect the public and those of its employees who are not taking part in the proposed industrial action.
- 7.4 Under the Trade Union Act 2016 a ballot in favour of industrial action will remain valid for six months from the date of the ballot (rather than the current unlimited period), or such longer period of time, not exceeding nine months, if the union and employer agree.
- 7.5 The requirement that unions are forced to re-ballot after six months may give rise to unintended consequences as it could cause unions to prioritise action over negotiation as the deadline approaches, while employers may be reticent to engage if they know time is running out. Tactical behaviour of this nature may not improve industrial relations between unions and employers in the long term.

8 Union supervision of picketing and facility time (sections 10 and 13)

- 8.1 Section 10 of the Trade Union Act 2016 will impose extra requirements where either the picketing has been organised by a trade union, or the union has encouraged its members to take part in the picketing. It will do so by incorporating into law provisions currently in the Picketing Code. The legal requirements will include:
 - 8.1.1 The union must appoint a person to supervise the picketing (the picket supervisor).
 - 8.1.2 The picket supervisor must be an official or other member of the union who is familiar with the Picketing Code.

- 8.1.3 The union or picket supervisor must take reasonable steps to tell the police:
- (a) the picket supervisor's name,
 - (b) where the picketing will be taking place, and
 - (c) how to contact the picket supervisor.
- 8.1.4 The union must provide the picket supervisor with a letter stating that the picketing is approved by the union.
- 8.1.5 The picket supervisor must show the letter of authorisation to any person who is acting on behalf of the employer as soon as reasonably practicable after they have been asked for sight of the letter.
- 8.1.6 While the picketing is taking place, the picket supervisor must be either:
- (a) present where it is taking place, or
 - (b) is easily contactable by the union and the police, and able to attend at short notice.

8.2 While present where the picketing is taking place, the picket supervisor must wear "something" to identify themselves.

8.3 Picketing will be defined to mean attendance at or near a place of work, in contemplation or furtherance of a trade dispute, for the purpose of either:

8.3.1 Obtaining or communicating information, or

8.3.2 Persuading any person to work or abstain from working.

8.4 A failure to comply with the new requirements will mean that a trade union and its members will not be protected from legal proceedings which claim that they have induced someone to break their contract or interfered with a person's performance of a contract.

8.5 These requirements add an additional and unreasonable level of administration to industrial action which is likely to increase litigation. The Picketing Code was well understood and was sufficient to regulate the arrangements in place during industrial action and to ensure that both parties act in a consistent and fair manner.

9 Financial implications arising from the Bill

9.1 We recognise that while it is not feasible to quantify the direct financial impact of the Bill's provisions it is desirable to outline the areas of concern.

9.2 We consider that those financial implications may include:

9.2.1 The financial implications associated with removing the 40% threshold are significant. Industrial action impacting Wales Fire and Rescue Services in the preceding three years has given rise to the following additional costs:

- a. Working days lost (although this does result in salary costs savings)
- b. Additional training costs to ensure cover;
- c. Contingency planning costs;
- d. Loss of work that would have been undertaken by officers;
- e. Additional appliance costs incurred in strategic placement of appliances across the region;

9.2.2 The cost of facility time in the public sector is paid for out of public funds. Further transparency and monitoring is therefore necessary. Costs of repealing this part of the Trade Union Act include:

- a. It is not anticipated that the Services' pay bills spent on facility time will not be reduced and will stay at existing levels. However, there may be a reduction in facility time as a result of increased transparency resulting from reporting time spent.

9.2.3 Costs of repealing the restrictions on deduction of union subscriptions from wages by employers include:

- a. The additional administrative and payroll costs associated with making "check-off" deductions from union member's pay;
- b. The additional administrative and payroll costs associated with making the "check-off" payments to the union.
- c. Each of these will vary in terms of the number of staff in direct employment.