



## Employment Rights Bill

Written evidence to the Public Bill Committee submitted by the National Education Union

November 2024

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### **Introduction**

1. The National Education Union (NEU) welcomes the opportunity to submit evidence on the Employment Rights Bill to the Public Bill Committee.
2. The NEU is an independent trade union and is the largest education union in the United Kingdom (UK) and Europe. We represent half a million serving teachers, headteachers and support staff in maintained schools, academies, independent schools, maintained nurseries, sixth form, tertiary and further education colleges in the UK.

### **Executive Summary**

3. The NEU supports the Employment Rights Bill as a positive step toward strengthening workers' rights. For too long, our members have faced poor treatment at work and the means of enforcing those rights has become increasingly protracted. Key provisions include "day one" protections, enhanced rights to statutory sick pay, and extensions for parental and paternity leave, all of which will ensure greater security and fairness for working educators.
4. We welcome proposals to stop employers from exploiting and then dismissing new recruits, particularly young and early careers educators with less than two years' service. However, we also want to see greater protection from discriminatory dismissal for older teachers, in particular older women teachers who are working through the menopause. In parallel we want to see the government investing in training, coaching and mentoring for all education workers - classroom teachers, support staff and school and college leaders.
5. While we support new measures for flexible working, the NEU believes it should be a default right, as many educators - especially women - face unreasonable refusals under the current statutory grounds. Similarly, we seek enhanced protections for pregnant educators and new mothers.

### **Part 1 - Employment Rights**

#### **Zero hours workers, etc (Clauses 1 to 6)**

6. The Bill mandates that employers offer a contract to workers on zero or low-hours contracts which guarantees them a minimum number of hours reflecting the amount of work they have carried out in a prescribed reference period.
7. The NEU supports this as it would benefit supply teachers, part-time staff, and others in casual roles, providing more job security. However, the definition of worker must be widely drawn to make sure that those in the most insecure work are able to access the new rights.
8. the proposals are also exceptionally convoluted and include a number of exceptions. The NEU urges the Government to ensure that the operation of provisions and the exceptions do not

undermine the objective which is to improve job security and income security, and we look forward to scrutinising the draft regulations.

9. The clauses include individual remedies, but we recommend that the provisions are strengthened so that employers can be ordered to make an offer of guaranteed hours or for such contractual terms to be imposed.

#### **Right to request flexible working (Clause 7)**

10. The Clause introduces a new reasonableness test into the right to request flexible working. An employer may only refuse a request for flexible working on specified grounds and only if it is reasonable to refuse on those grounds.
11. The NEU is disappointed that the clause retains the list of eight statutory reasons that employers may rely on to refuse a request for flexible working. In our experience, the existence of the list has given employers free rein to refuse reasonable applications for flexible working. We do not anticipate that the proposed changes will ease the pressure on our members seeking flexible working to balance their work with their childcare or other caring responsibilities. Most of these members are women, and they are forced to claim indirect sex discrimination to challenge employers who refuse flexible working requests unreasonably
12. Real progress requires making flexible working a default right and imposing penalties on employers who unreasonably reject requests. We are concerned that retaining the statutory refusal reasons and not introducing an adequate penalty for failing to meet the reasonable test will increase workplace disputes and increase rather than reduce workload for education staff and leaders.

#### **Statutory sick pay (Clauses 8 to 9)**

13. Statutory sick pay (SSP) is currently payable from day four of sickness, and employees need to be earning above the lower earnings limit of £123 per week to qualify. The Bill makes SSP payable from day one of illness and removes the current lower earnings threshold. However, the Bill allows for lower earners to be paid less than the statutory rate.
14. We hope the term 'employee' will include those who are currently designated 'workers', otherwise many of our agency worker members and daily contract workers such as home tutors and music tutors, may be excluded from the benefits of reform. Furthermore, we would like the exceptions to SSP to be reconsidered, particularly where individuals are excluded from SSP because they have regular periods of sickness that are more than eight weeks apart. Our members with long Covid symptoms may be adversely affected by this exclusion, which seems rather arbitrary in any event.
15. The removal of the condition to earn at least the lower earnings limit is welcome. Agency workers including supply teachers and supply support staff, and other educators on low hours, zero-hours or day-to-day contracts such as home tutors, music tutors often do not earn enough to meet the lower earnings limit. We would prefer that the Bill did not allow lower earners to be paid less than the statutory rate, but we are yet to see what the prescribed percentage of the employee's normal weekly wage the rate of SSP will be.

### **Parental and Paternity Leave (Clauses 11 to 13)**

16. Clause 11 proposes to remove the qualifying period of employment to qualify for unpaid parental leave, making the entitlement a day-one right. The NEU welcomes this proposal but wishes to see the introduction of paid parental leave. Clause 12, likewise, introduces a day-one right to take paternity leave. This is a welcome extension.
17. Clause 13 expands the rights to fathers and partners to take paternity leave in addition to and following shared parental leave. This change is welcome as some NEU members have lost out on the opportunity to take their full leave entitlements by not scheduling them in line with the existing stringent statutory provisions.

### **Bereavement leave: removal of qualifying period of employment (Clause 14)**

18. The Clause extends the current right to bereavement leave from bereaved parents of children under the age of 18 to teachers and support staff who are grieving the loss of an adult child or other close family member, this will include parents of disabled children who have reached adulthood. The NEU welcomes this proposal and recommends that the regulations are broadly worded and that the definition is extended to cover parents grieving the loss of a pregnancy before 24 weeks.

### **Protection from harassment (Clauses 15 to 18)**

19. Clause 15 adds a wider duty on employers to take 'all' reasonable steps to prevent sexual harassment of employees and Clause 17 anticipates the regulations that will specify what those steps are. The NEU reported on the prevalence of sexual harassment in schools in 2017 <https://neu.org.uk/latest/library/its-just-everywhere>. Regrettably the experience of women working in the education sector has worsened since our report. Our members are often impeded in reporting sexual harassment by the lack of clear workplace procedures and subsequent failure of employers to give sufficient weight to their concerns. We will welcome provisions that place a clear duty on employers to facilitate reporting, investigating and responding to allegations of sexual harassment, we are particularly keen to see the inclusion of sexual harassment in workplace risk assessments.
20. What is missing from the Bill is a recognition of the impact of sexual harassment and enforcement on potential claimants. A time limit of 3 months in which to lodge a claim for sexual harassment is wholly inadequate. Experiencing sexual harassment at work can be traumatic, our members take time to regain their dignity after being subjected to sexual harassment at work, sadly, many do not recover from the experience. We wish to see a time limit of at least 6 months in which to lodge a claim.
21. Clause 18 introduces a new category of protected disclosure in relation to sexual harassment. Given that the protected disclosure provisions encompass a wider range of workers, the NEU supports this provision. However, we also want protection to be extended to union reps, since they (e.g. lay officers) do not always enjoy the status of 'worker' and may not therefore enjoy protection from detriment.

22. Clause 16 prohibits an employer from permitting a third party to harass an employee during the course of their employment. NEU members report that they are subjected to discriminatory harassment on the part of third parties – this can encompass pupils, students, the parents or carers of pupils and students, school governors who are not employees of the school, OFSTED inspectors and other visitors to education sites. Black educators, in particular, have reported an increase in racial harassment by pupils, parents and other staff. Our casework shows a disturbing pattern of false allegations of abuse against Black teachers which appear to be motivated by racism and the desire to see Black educators dismissed without challenge or pushback from school/college leaders.
23. The NEU welcomes the reintroduction of the provision, but we do need to see more support for schools and colleges in terms of comprehensive training for all staff, as well as additional powers for schools/colleges to take swift action against parents who harass members of staff but fall short of what may be deemed criminal harassment.

#### **Right not to be unfairly dismissed: removal of qualifying period (Clause 19)**

24. The NEU is pleased to see that the new Labour Government has largely fulfilled its manifesto pledge to make protection from unfair dismissal a day one right. There is however a caveat which stops the provision from being full protection from day one, in that the Government will legislate to bring in the new concept of the "initial period of employment." This, we believe, will operate in practice as a probationary period during which a less rigorous process for 'fairly' dismissing an employee will apply (save in the case of redundancy).
25. We believe this initial period should be no longer than six months, which is in keeping with the probationary periods many employers operate at present. Six months is more than sufficient time for an employer to ascertain whether or not an employee is suitable for the post to which they have been recruited. The Bill outlines the permissible grounds for a fair dismissal, maintaining that dismissals based on conduct, capability, or a statutory ban (such as lack of legal right to work in the UK) remain valid. There will also remain scope for a potentially fair dismissal due to some other substantial reason related to the employee during the proposed initial period of employment.

#### **Dismissal during pregnancy (Clause 20)**

26. Clause 20 makes way for regulations to increase protection for pregnant women, new mothers and women who have experienced baby loss. NEU members want stronger protections against dismissal during or after pregnancy. Our 2022 Maternity Rights Survey revealed that women are dismissed on grounds of pregnancy and maternity in spite of the current recruitment and retention crisis in education.
27. We want to see a prohibition against dismissal during and for a period after pregnancy unless there are exceptional circumstances which we would like to see prescribed in regulations. Again, the current time limits for taking a claim are a barrier to justice for pregnant women and new mothers. This short time period is especially problematic for women who are dismissed late in pregnancy or shortly after giving birth. They will be recovering from giving birth and adjusting to having a new baby. It is essential that the employment tribunal time limit is extended to at least six months.

### **Dismissal for failing to agree to variation of contract, etc (Clause 22)**

28. The NEU has been involved in several disputes against independent schools who have been removing members' contractual right to the Teachers' Pension Scheme and replacing it with inferior pension provision. As the law stands, there is insufficient protection for employees. This is unjust and could lead to worsening industrial relations and strike action. This is what the NEU was forced to do.
29. The Government's proposal to make it automatically unfair to dismiss an employee who refuses to accept a variation of their contract or to replace them with someone with different terms but doing substantially the same job, is welcomed. However, there is an exception allowing the employer to fire and rehire if:
- a. *(a) the reason for the variation was to eliminate, prevent or 15 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, and*
  - b. *in all the circumstances the employer could not reasonably 20 have avoided the need to make the variation.*
30. The NEU is concerned that this provision allows the employer too much leeway to get around the relevant provisions and risks undermining the aims of the legislation. The NEU would urge the Government to be more specific as to what 'financial difficulties' means and recommend that only fire and hire should be allowed only if there is an imminent risk of closure/administration and only on a temporary basis. Further, the employer should be completely transparent with regards to its finances when consulting with employees/trade unions. The NEU's own experience shows that although employers cite financial difficulties, they refuse to provide any further details.

### **Part 2 - Other Matters Relating to Employment**

#### **Collective redundancy: extended application of requirements (Clause 23)**

31. The duty of employers to consult employees and trade unions on collective redundancies under Section 188 of the Trade Union & Labour Relations (Consolidated) Act 1992 is to be amended so that that the duty to consult is not restricted 'to one establishment'. The NEU welcomes this development but would urge the Government to give real teeth to this legislation by increasing the amount for the Protected Award (currently 90 days pay for each employee) under Section 189 of the 1992 Act, in the event the employer is breach of its duties to collectively consult.

#### **Public sector outsourcing: protection of workers (Clause 25)**

32. The NEU welcomes the provision of a Code of Practice (Section 5) and the duties imposed on the Outsourcing Authority (Section 6). With regards to a Code of Practice, the NEU would like to see a provision that requires a Minister of the Crown to consult with the recognised trade unions representing outsourced workers before producing and publishing or reviewing a Code of Practice.
33. Although the NEU welcomes the above provisions, unfortunately a large proportion of the exploitation of outsourced workers occurs in the private sector. For example, the high-profile case

of a cleaner sacked for allegedly 'stealing' a left-over sandwich at a top City law firm. This is an area the Government should consider further.

### **Equality Action Plans (Clause 26)**

34. NEU welcomes the revision of the Equality Act 2010 to allow for the government to introduce (via regulations) a process for requiring larger employers to demonstrate how they will tackle the Gender Pay Gap across their workforce, as well as supporting employees going through the menopause. Currently, whilst employers with more than 250 employees are required to publish a Gender Pay Gap report annually there is no requirement to publish any plan to address any issues arising from that report.

35. The NEU notes however that there is nothing in the current Bill to bring forward formalising Ethnicity or Disability Pay Gap reporting, which we understand will be considered as part of changes under the (yet to be published) Equality (Race and Disability) Bill. The NEU also supports the proposal by Maternity Action for employers to evaluate the retention rates for mothers, covering the period from pregnancy to eighteen months after the birth.

36. We would also want the duty to publish equality action plans, including gender pay gap action plans, to apply to public authority employers of every size, not just to employers with 250+ employees in order to ensure that all publicly funded institutions are held to the highest standards regardless of size.

### **Provision of information relating to outsourced workers (Clause 27)**

37. The Bill enables regulations to require private and voluntary sector employers with at least 250 employees to publish information about the service providers that they contract with for outsourced services. They also enable ministers to require public authorities in England to publish information about the service providers they contract with for outsourced services. This will be helpful information for trade unions to have in redundancy and restructuring consultations. It will also be useful information for members of the public and third party/voluntary organisations who wish to ensure ethical procurement practices.

## **Part 3 – Pay and Conditions in Particular Sectors**

### **School Support Staff Negotiating Body (Clause 28)**

38. The re-establishment of a discrete negotiating body for support staff is welcome and long overdue. Support staff, predominantly female and already the lowest paid members of the school workforce, have experienced the same real-terms cuts in pay as their teacher colleagues, and similar workload pressures. The government is right to foreground how collective bargaining via the new negotiating body can help to resolve the severe recruitment and retention crisis in support roles. Thousands of NEU support staff will be keen to contribute to its success.

## **Part 4 – Trade Unions and Industrial Action**

### **Right to statement of trade union rights (Cause 45)**

39. A new provision is included in the Trade Union & Labour Relations (Consolidated) Act 1992, which places a duty on the employer to provide a statement to workers of their trade union rights, similar

to the duty to provide a statement of particulars of employment. This is an important development. Many workers are unaware of their rights with regards to joining a trade union and/or fear victimisation by their employer.

#### **Right of trade unions to access workplaces (Clause 46)**

40. This provision allows trade union officials access to the workplace to organise and recruit workers. This is a welcome development. This Government recognises that trade unions play a crucial role in delivering workers' rights required for a modern economy and driving economic growth.
41. The various subsections under this provision also deal with Access Agreements, adjudication in case of a dispute by the Central Arbitration Committee and enforcement by the Employment Appeal Tribunal. At this stage the above arrangements appear to be sufficient in ensuring that workers can enjoy these rights. The NEU would recommend a statutory Code of Practice to assist the parties and Courts gain a greater understanding of this provision.

#### **Conditions for trade union recognition (Clause 47)**

42. A thorough review of the impenetrable statutory recognition procedure is long overdue. This clause will be welcome by workers and trade unions. The current legislative framework regarding trade union recognition is not fit for purpose. The current procedure is that a trade union will ask an employer for voluntarily agreement for recognition. If the employer does not agree, which most employers do not, then the trade union must follow a statutory procedure for recognition which is adversarial and costly.
43. Currently, trade unions require a 40% threshold of employees to vote and over 50% majority for recognition. Under this clause, the 40% threshold will be removed, and simple majority is required to trigger recognition. These provisions make the process more democratic and more constructive in maintaining good industrial relations.

#### **Requirement to contribute to political fund (Clause 48)**

44. This provision rightly removes the undemocratic provisions of the Trade Union Act 2016, which was introduced by the government at the time to undermine the ability of trade unions to participate in the political process. Requiring trade union members to opt out of the political fund is fairer and less burdensome to trade unions.

#### **Facility time: provided to trade union officials and learning representatives (Clause 50)**

45. Clause 50 inserts additional duties on employers to provide accommodation and other facilities to enable workplace representatives to undertake their trade union duties. These are welcome additions.
46. We recommend that the Bill goes further and provides greater protection for trade union facility time, so that elected representatives have adequate time during working hours to represent their members in an increasingly complex work environment. The NEU recommends stronger remedies for a breach of section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992, such as a protective award for the respective trade union members who have been disadvantaged by the breach.

### **Facilities for equality reps (Clause 51)**

47. Equality reps will finally have parity of esteem with other workplace reps under this new provision. However, the NEU is disappointed by the absence of rights to equality information from the employer. The equality rep's job will be made untenable without such rights. It is no answer to say that trade unions have access to equality information relating to the workforce, because such rights are frequently ignored, or denied on grounds of data protection legislation. A very specific right to such information by the equality rep would therefore be welcome. Furthermore, explicit reference to 'paid' time off would be helpful.

### **Facility time: publication requirements and reserve powers (Clause 52)**

48. Clause 52 removes section 172A and 172B of the Trade Union and Labour Relations (Consolidation) Act 1992 and consequently the Trade Union (Facility Time Publication Requirements) Regulations 2017. The revocation of these provisions is welcome. NEU workplace representatives and officers will now be freed from the bureaucracy of having to report on the time that they are spending exercising their statutory rights to represent, advocate and negotiate on behalf of their members.

### **Blacklists: additional powers (Clause 53)**

49. The additional powers for the Secretary of State to make the regulations set out in this clause is a positive development. However, the NEU would urge the Government to put in statute these protections against blacklisting as soon as possible. It is appreciated that in the Next Steps to Make Work Pay document; the Government will examine trade union members' rights further. The NEU believes that would be a good opportunity for the Government to broaden the protection of blacklisting to include trade union victimisation for employees outside of employment (pre and post-employment victimisation).

### **Industrial action ballots: turnout and support thresholds (Clause 54)**

50. Removing the anti-trade union arbitrary ballot thresholds in the Trade Union Act 2016 are welcome. These thresholds were introduced to make it difficult for workers to take industrial action. Although it failed to have this effect with regards to the NEU's pay campaign in 2022/2023, the removal of the ballot thresholds will go a long way to boosting workers' rights and balancing the industrial relations landscape.

51. However, it is noted that the Bill retains the Trade Union Act's 6-month expiry date for ballot mandates. This means that strike action needs to be taken within that period, rather than allow more time for negotiations. We would urge the Government to remove this requirement to encourage good industrial relations and avoid strikes.

### **Industrial action ballots: provision of information to members (Clause 55)**

52. This provision reduces the information required on the ballot paper, which was introduced in the Trade Union Act 2016. This opened trade unions to challenges by employers who could stop strike action by way of an injunction from the High Court on a mere technicality. This provision reverts to a sensible approach, where only relevant information needs to be shared such as the type of strike action workers would like to take (strike action or action short of strike action) and a simple yes or no is required on the ballot paper.



### **Electronic Balloting (Clause 56)**

53. Labour's 'New Deal for Working People' in September 2022 referred to Labour allowing trade unions to ballot members via secure electronic ballots. The Bill retains provision for this to happen, by removing the requirement to commission an independent review into e-balloting as set out in the TU Act 2016.
54. However, it seems that the next step will be to launch a 'stakeholder' working group with a view to bringing in secondary legislation in future. Given that a review into electronic balloting was first touted by the previous government in 2016, the NEU hopes that this does not get dragged out yet further.

### **Union supervision of picketing (Clause 58)**

55. Under the Trade Union Act 2016 a trade union would need to appoint a picket supervisor whose name and contact information would be given to the police. Further, they would need to wear something that would identify them as the picket supervisor. This an extra layer of bureaucracy undermined the fundamental right of workers to protest and left the picket supervisor vulnerable to victimisation/blacklisting by the employer. This provision removes this requirement and is therefore welcomed.

### **Protection against detriment for taking industrial action (Clause 59)**

56. Whilst the current legislative framework provides employees protection from dismissal in the first 12 weeks of a dispute, it does not cover action short of dismissal such as disciplinary action. In the NEU's experience some employers deploy this discourage strike action. This issue was determined in the Supreme Court case of Secretary of State for Business and Trade (Respondent) v Mercer (Appellant) [2024] UKSC 12. The provision in this Bill protects workers (not just employees) from specific detriments aimed at preventing and deterring workers from taking lawful industrial action. The NEU urges the Government not to create an exhaustive list of detriments as this would enable employers to find ways to punish/deter workers who take strike action.

### **Protection against dismissal for taking industrial action (Clause 60)**

57. Currently employees are only protected from dismissal in the first 12 weeks of the dispute. This cap was seen as arbitrary and against international standards on workers' rights, it was criticised by the UN's International Labour Organisation. The removal of the 12-week cap in this Bill is a sensible development.

### **Minimum service levels (Clause 61)**

58. The NEU applauds the revocation of the Strikes (Minimum Service Levels) Act 2023 and related provisions. The NEU and our sister unions were united in our wholesale opposition to the former Education Secretary's minimum service level (MSL) proposals for schools. Our steadfast opposition to the proposals prevented their introduction in the education sector. We would welcome significant measures to actively promote collective bargaining.

### **Certification Officer (Clauses 62-69)**

59. The Trade Union Act 2016 significantly increased the powers of the Certification Officer (CO) and made trade unions pay for its increased costs. This put a significant regulatory burden on trade

unions not seen elsewhere in the economy. The CO was given powers to impose financial fines on trade unions for a breach of statute, it could investigate complaints from a third party (including those organisations/groups hostile to trade unions) and required more detailed reporting on trade union political activities and strike action. These provisions rightly remove these unnecessary extra powers of the CO and reduces the regulatory burdens on trade unions.

## **Part 5 – Enforcement of Labour Market Legislation**

### **Enforcement of labour market legislation by Secretary of State (Clauses 72-112)**

60. We would welcome a single enforcement body which if properly funded and empowered could make a profound difference to vulnerable workers, including agency workers. The current arrangements around enforcing the national minimum wage, have been poor due to a lack of inspectors and funds.
  
61. The Fair Work Agency is a welcome development, including the fact that new Agency will enforce Employment Tribunal awards. Provided that the Fair Work Agency has sufficient resources and enforcement powers this will have a huge impact on protecting the rights of workers. The NEU would also urge the Government to give the Fair Work Agency the power to produce and publish Codes of Practice, produce Statutory Guidance and the resources to promote enforcement by working with employers.