Written evidence submitted by Professor Alan Bogg and Michael Ford KC to The Employment Rights Public Bill Committee (ERB69).

I Introduction

1. This submission to the Public Bill Committee is provided by Professor Alan Bogg and Michael Ford KC. Professor Bogg is a Professor of Labour Law at the University of Bristol, Visiting Professor of Law at the University of Oxford, and a Barrister at Old Square Chambers. Michael Ford KC is a Barrister at Old Square Chambers and an Emeritus Professor of Law at the University of Bristol. We are writing in a personal capacity. We published a blog post on the Employment Rights Bill (ERB) when it first appeared which outlines some of the core provisions.[1]

2. In this submission we focus on some selected legal problems with specific provisions of the Bill, focusing on guaranteed hours, "day 1" dismissal rights, "fire and rehire", detriment for participating in industrial action, and sectoral wage-setting.

II Guaranteed Hours, Reasonable Notice of Shift Changes and Payments for Cancelled Shifts

3. The provisions in the new Chapter 2 to Part 2A of ERA are daunting in their detail, length and complexity, with the attendant risks that employers will fail to follow them and low paid workers without access to legal advice do not know when the duties have been breached or lack the resources to bring a claim. A further concern is that much of the heavy lifting is left to future regulations. If recent examples are anything to go by, such as the recent regulations (SI 2023/1426) introduced to "simplify" the Working Time Regulations 1998 ("WTR"), there is a high risk of laudable objectives being subverted by poor drafting.

4. The provisions face the enormous regulatory challenge of imposing a single set of rules across all sectors and the ERB optimistically defers the solution to this problem to future regulations (see, e.g., s.27BD(5), s.27BQ(1)(b)). We doubt, however, that it is feasible for regulations to produce rules suitable for diverse form of working arrangements across all sectors – on-call workers, term-time working, seasonal working, week on/week off working and so on. A better model would be to adopt the approach in WTR. As well as excluding some sectors (regulation 18), the application of some regulations in some circumstances (regulation 21) and some types of workers (regulation 22), WTR also permit collective agreements to modify or exclude the duties in relation to particular groups of workers (regulation 23). Such a mechanism has the virtue of permitting flexibility in how the rules operate based on knowledge of working practices specific to the particular workplace or sector, while also ensuring a sufficient level of protection for vulnerable workers and promoting workers' voice.

5. All the in duties in new Chapter 2 currently exclude "agency workers" from their scope (see new s.27BA(3)(e), s.27BK(1) and s.27BQ(1)). The legislative challenges in applying duties such as guaranteed hours in a triangular agency relationship are formidable, though it is

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[1] From 'Fairness at Work' to 'Making Work Pay': A Preliminary Assessment of the Employment Rights Bill – by Alan Bogg and Michael Ford KC – UK Labour Law

essential that regulations under 27BV block a rush to use agency labour – a group already disadvantaged on the labour market.[2] But there is a fundamental problem in the definition of "agency worker" in clause 27BU of the ERB itself. It adopts the definition of an "agency worker" in regulation 3 of the Agency Workers Regulations 2010 ("AWR), which requires that a worker is supplied to work "temporarily" for the hirer.

6. A growing body of case law has examined the hazy boundary between permanent and temporary agency workers for the purpose of AWR: see, e.g., ***Moran v Ideal Cleaning Services*** [2014] ICR 442, ***Brooknight Guarding v Matei***, UKEAT/0309/17/LA, ***Angard Staffing Solutions v Kocur*** [2020] ICR 1541, ***Ryanair v Lutz*** [2014] IRLR 299 (due to be heard by the Court of Appeal in 2025). The contractual documents are not necessarily determinative and a tribunal may need to examine matters such as the nature of the work. On the ERB as drafted, presumably permanent agency workers will be subject to the normal rules in new Part 2A (so long as they are "workers"), whereas temporary agency workers will be subject to the rules in bespoke regulations to be made under clause 27BV. It is highly undesirable to have two different sets of rules applying to agency workers when the distinction between these two groups is often so unclear. The best option would be to modify the definition of "agency worker" in s.27B so as to make clear that the definition in regulation 3 AWR should be read as if the term "temporarily" were omitted, so that one set of rules applied to *all* agency workers.

7. Enforcement will be critical to the new provisions. It is no surprise that some provisions of WTR, such as the right to rest breaks, are barely enforced because a claim must be made within three months of each refusal to exercise the right, without any provision linking repeated breaches of the duties. Where an employer fails to provide the contractual hours following the worker's acceptance of a guaranteed hours offer (see s.27BE(4)), no doubt the worker could bring a claim for unlawful deduction from wages under Part 2 of ERA, in which case a single claim can be brought for the past "series" of deductions: see s.23(3) of ERA. But no such series or continuing act provision enables linking repeated failures to give reasonable notice of shifts (s.27BM) or to pay for cancelled or curtailed shifts (s.27BS). The introduction of such a provision would assist the aim of the legislation achieving its goals in practice and would reduce the number of claims which ETs would need to process.

III Day One Rights and Unfair Dismissal

8. In *Plan to Make Work Pay,* the Government committed itself to making unfair dismissal a "day one" right while permitting "probationary periods with fair and transparent rules and processes". There is no doubt that reform of dismissal protection is justified. Among OECD countries, the Resolution Foundation has found that the UK is the fifth least-regulated out of 38 OECD countries.[3] The initial qualifying period in the Industrial Relations Act 1971 was six months; two years is longer than the period which the ILO views as acceptable under Article 2 of ILO Convention No. 158, on termination of employment (not ratified by the

[2] See the Resolution Foundation, "The good, the bad and the ugly: the experience of agency workers and the policy response" (November 2018).

[3] N Cominetti and H Slaughter, "Job done? Assessing the labour market since 2010 and the challenges for the next government" (June 2024) 30.

UK);[4] and the common law of contract provides very limited protection against wrongful dismissal.

9. The lower level of protection in the initial period envisages a trade-off between the goals of fairness and economic efficiency, ensuring some protection from arbitrary treatment for employees from day one while giving employers more flexibility than they would otherwise have in respect of standard unfair dismissal protection. It is still unclear how this core trade-off between efficiency and fairness will be implemented, because the regulation of dismissal during the probationary period is left to regulations by the new s.98ZZA. We draw attention to three points.

10. First, by s.98ZZA(2) for the modified procedure to be engaged, the reason itself, or the principal reason, must relate to the employee's capability, conduct, inability to work without contravening a statue or some other substantial reason relating to the employee. The obvious intention is that the reason must be related to the individual employee and not be, e.g., a global decision to make redundancies. It might be better for the legislation to state this expressly: compare s.195 of TULRCA, on collective redundancies, defining a redundancy within that legislation as a reason "which is not related to the individual concerned".

11. Second, the legislation will need to address the position of the many employees, such as those on zero hours arrangements, who are engaged on repeated very short-term engagements under a series of micro, "spot" contracts. In the absence of an overarching umbrella contract, at the end of each engagement the contract is terminated, followed by another short-term contract, and another, and so on. The consequence is that there is a dismissal for the purpose of the Employment Rights Act 1996 s.95 at the end of each micro-engagement (probably on the basis that it is a termination on a "limiting event")

12. The legislation is silent on how the modified fairness rules will operate in relation to such workers. The Bill refers to regulations treating two or more periods of continuous employment as a single period (new s.98ZZA(5)(a) of ERA), so perhaps the aim is to deem there not to be a dismissal at the end of each short-term engagement. But it is still unclear how this might work.

13. This could prove to be a formidable regulatory problem in platform economy work contexts where there are high volumes of spot contracts for relatively short periods. Bringing such contracts within the scope of unfair dismissal protection risks creating bureaucratic challenges for companies and resource problems for tribunals. The simplest regulatory response is to opt for a short qualifying period of employment for these workers, although this is inconsistent with the stated commitment to day 1 rights. For platform workers in longer term engagements comprised of successive spot contracts, the problem will often not be regulating a dismissal (which necessitates a contractual termination) but a decision not to offer further work. This is because there is no contract to terminate between discrete

[4] See the ILO "Note on Convention No. 158 and Recommendation No. 166 concerning termination of employment", pp 6-7 (referring to the conclusion of a Tripartite Committee that two years was too long in the case of small enterprises in France); available at https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@normes/documents/meetingdocument/wcms_100768.pdf

contractual engagements.[5] In these contexts, it would be better to detach the right from the unfair dismissal regime altogether and to formulate the protection around an unjustified ending of the supply of work. A potential model which could be adapted is that in s. 68A of ERA, which provides protection to agency workers where their supply to a hirer is "ended" on maternity grounds. A similar model could apply where the engagement of a worker on repeated contracts is "ended" because of, e.g., their conduct or capability.

14. The third issue relates to the standards applying in the modified test of fairness during probation. The suggestion in *Next Steps* is that the employer would be required to hold a meeting with the employee, at which the employee had the right to be accompanied, and to explain to the employee their concerns about the individual's performance (para. 30). There is a distant echo here of the unlamented mandatory statutory dismissal and disciplinary procedure once found in Schedule 2 of the Employment Act 2002. These provisions were repealed because there was empirical evidence that they had the opposite effect of escalating and formalising workplace disputes, rather than resolving them. Given that historical precedent, the Government should think very carefully before adopting a similar regulatory model during the initial period of employment.

15. If the approach in the EA 2002 is avoided, the challenge of articulating the lower threshold of protection with sufficient clarity and certainty will be significant. The "reason" for dismissal is the set of facts or beliefs that caused the employer to dismiss, and the burden of proof is on the employer: s.98(1). Without some sort of adequate investigation, a tribunal may not be satisfied that the employer has shown it genuinely believed on sufficient grounds that the employee was, for example, incapable or committed misconduct. Giving meaningful effect to "day one" rights to unfair dismissal requires some form of sufficient procedural safeguards to employees, not simply jumping over hoops. Once it is acknowledged that there will need to be a reasonable investigation or reasonable performance management as a reasonable ground for the employer's belief, the case law may eventually gravitate towards the existing norms for standard unfair dismissal protection as set out in familiar authorities such as ***British Home Stores v Burchell*** [1980] ICR 303. This could generate wasteful litigation on the differentiation of procedural norms in the initial and non-initial periods of employment, and this is of no benefit either to employees or employers.

16. The need for proper protection to employees in the "initial period" is especially important where the dismissal has serious consequences for the employee or involves charges of serious misconduct. The existing case law on s.98 already recognises that the more serious the allegations, the more thorough must be the employer's investigation: see ***A v B*** [2003] IRLR 405, ***Turner v East Midlands Trains*** [2013] ICR 525. Dismissals which have very serious consequences for the employee's reputation, future income or ability to practise his or her occupation (such as a career-ending allegation of misconduct) are also liable to engage Article 8 of the ECHR and so require close scrutiny of their fairness, regardless of the

[5] This is a problem with "casual" work more generally rather than a modern phenomenon created by platform work. In ***O' Kelly v Trusthouse Forte plc*** [1984] QB 90, for example, casual waiters had their employment discontinued, allegedly because of trade union reasons. Given the absence of an overarching umbrella contract, it was never clear if the discontinuation of employment amounted to a dismissal. This would depend upon the timing of the decision and whether there was a contract to terminate.

employee's length of service.[6] It is important that any modified fairness procedure or changed Code of Practice allows for heightened standards of fairness to operate in these sorts of circumstances, perhaps by excluding the modified rules (compare s.108(4) of ERA, excluding the existing qualifying period where a dismissal relates to political opinions in order to comply with the judgment of the Strasbourg Court in ***Redfearn v United Kingdom*** [2013] IRLR 51).

17. In terms of international comparisons, it is not uncommon for unfair dismissal protections to limit the scope of application in different ways. In Germany, Austria, and Turkey, the relevant period of employment to qualify for legal protection is 6 months.[7] Other countries regulate probationary periods. Slovenia, Italy, and the Netherlands require a written agreement for a probationary period to be recognised, and many countries specify a maximum limit on the probationary period. Within the probationary period group, countries such as Italy and Japan require the employer to justify dismissals but subject to less strict standards than those applying to employees with longer service. Even where there are qualifying periods, such as in the UK, there are "day 1" protections where the reason is automatically unfair or if the dismissal is related to political opinions or affiliation. In Australia, the distinctive position of small firms is recognised in the legal framework. In small firms, employing fewer than 15 employees, the qualifying employment period is 12 months. In other firms, the qualifying period is six months.[8] This distinction reflects the challenges that smaller firms may face in terms of access to good HR and legal advice, and resources.

IV The "fire and rehire" clause: cl. 22

18. "Fire and rehire" encompasses a complex range of practices. The classic case of "fire and rehire" is where an employer effectively forces through unnecessary pay cuts through terminating existing contracts and reissuing new contracts with lower pay. In "fire and hire", the employer dismisses the workforce and hires a *new* workforce on contracts with revised terms. The new workforce may be hired directly by the employer or the employer may hire workers engaged through agencies and other third-party intermediaries. The use of intermediary agencies occurred in the notorious case of P&O Ferries, where a unionised workforce was replaced overnight with seafarers employed through an agency based in Malta. While "fire and rehire" is often focused on pay, there may be other terms that the employer is seeking to vary. For example, it may be necessary for the employer to vary the timing, organisation, or use of technologies at work. In his criticism of cl. 22 as currently drafted, Darren Newman gives the following examples:

- an employer is a contractor providing after-school activities to a local authority. When the contract comes up for renewal the contractor is told that under the new contract those activities will be required at other times of the day including mornings and lunchtimes.

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[6] See, for example, ***Denisov v Ukraine*** App No 76639/11, 25 September 2018. See too A. Bogg and others, *Human Rights at Work* (Hart, 2024) 42.

[7] Takashi Araki, "Dismissal", in G. Davidov et al, *The Oxford Handbook of the Law of Work* (OUP, 2024) 385.

[8] Ending employment fact sheet

- an employer is providing support services running Monday-Friday and the client informs them that this needs to change so that the services are also available at weekends
- an employer undertakes a new contract handling personal data which for security reasons cannot be accessed by employees working at home so that those working remotely will have to come into the office to work
- a manufacturing firm invests in new machinery that will increase productivity but only if shift patterns are changed so that the plant runs seven days a week rather than five. [9]

The current legal framework

19. Under the current law, it is relatively easy for the well-advised employer to avoid liability. At common law, terminating the employment contracts with the requisite notice will usually amount to a lawful dismissal.[10] Unfair dismissal law also gives employers a wide latitude for implementing a fair dismissal. In a classic "fire and rehire", such a dismissal will be for "some other substantial reason" (or SOSR). The tribunal will not challenge the underlying rationale for achieving savings, and nor will it subject the means chosen (e.g. wage cuts) to any significant scrutiny: see e.g. ***Catamaran Cruisers Ltd v Williams*** [1994] IRLR 384, ***Masiero v Barchester Healthcare Limited*** [2024] EAT 112. In larger-scale fire and rehire, there may also be duty on the employer to engage in collective redundancies consultation. Under the current law, the remedies may not be sufficiently dissuasive to deter an employer from bypassing collective consultation altogether, as in P&O Ferries.

The proposed cl. 22

20. Broadly speaking, there are three reform options. The first is to do nothing. The second is complete prohibition of "fire and rehire" dismissals. The third is to provide a narrow justification for employers where it is necessary to implement contractual changes. The first option is not acceptable because it allows "fire and rehire" without robust external scrutiny. The second option may go too far because in circumstances of genuine economic distress it could lead to redundancies and insolvencies.[11] Overall, we think that cl. 22 strikes an acceptable balance in allowing a narrow justification for employers.

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[9] Fire and Rehire – Unintended Consequences of the Employment Rights Bill | A Range of Reasonable Responses

[10] In a narrow set of circumstances, where an employer is using "fire and rehire" to avoid a "permanent" or "for life" benefit in the contract, the court may find a term implied in fact and issue an injunction restraining the dismissal: ***Tesco Ltd v USDAW*** [2024] UKSC 28. However, this is unlikely to be of wider relevance to "fire and rehire" beyond the specific facts in the case. A Bogg and D Brodie, "Every Little Helps: Permanent Benefits, Contract Interpretation, and 'Fire and Rehire'" (2023) 52 *Industrial Law Journal* 246.

[11] For a defence of this narrow approach to justification, see Alan Bogg, Firing and Rehiring: An agenda for reform - IER

21. Under cl. 22, there will be an "automatically unfair" reason for dismissal in two situations: (i) where the employer "sought to vary" the contract and the employee did not agree to the variation; (ii) where the employer was seeking to employ another person or re-engage the employee under a varied contract of employment to carry out "substantially the same duties as the employee carried out before being dismissed": see s.104I(2)(3). This is broader than the classic "fire and rehire" situation because it includes *any* dismissal in response to a refusal to agree a variation to any terms of the contract (whether express or implied, written or oral: see Explanatory Notes §342). The second limb includes both dismissals pursuant to "rehiring" the same employees *and* "hiring" new employees. The requirement that the duties be "substantially the same" allows the tribunal some latitude to scrutinise the underlying substance of the new contracts, though many such cases would be covered by the first limb as well.

22. This definition of an automatically unfair reason must be read alongside s.104l(4). This provides a justification defence for the employer. In this respect, it is like discrimination law where it is possible to justify some forms of discrimination if it is a proportionate means of achieving a legitimate aim. Under limb (a) of s.104I(4), the "reason" for dismissal ordinarily means the set of facts or beliefs which caused the employer subjectively to dismiss, and the focus of limb (a) is on the "reason for the variation". The purpose of the provision and the stringency of the statutory wording suggests that tribunals will require, at least, sufficient evidence to demonstrate that it was reasonable to believe that the conditions did in fact exist.

23. The reason for the variation must be to "eliminate", "prevent", "significantly reduce" or "significantly mitigate" financial difficulties. It is not sufficient that there is a belief the measure would simply "reduce" or "mitigate". The financial pressures must be presently affecting or "very likely in the immediate future" to be affecting the firm or its activities.

24. The second condition in s.104I(4) envisages that the employer had no reasonable alternative open to it in all the circumstances. The context and wording suggest the question here is not subject to the deferential standard of dismissal law, the "range of reasonable responses", but is instead an objective question for the tribunal. Tribunals are likely to approach this as they would questions of objective justification under discrimination law.

25. If the employer demonstrates it meets these strict conditions, the tribunal must then consider if the dismissal was fair or unfair in the circumstances. New s.104I(5) sets out a non-exhaustive list of relevant procedural factors which tribunals must consider in addressing general fairness under s.98(4).

26. The overall approach under cl. 22 is strict. Is it too strict? Darren Newman has suggested (see above, [18]) some scenarios where cl. 22 could block "fire and rehire". We do not agree that cl. 22 is too strict. In many of the scenarios involving meritorious technical or organisational reasons, these could be implemented without "fire and rehire". In ***Cresswell v Board of Inland Revenue*** [1984] ICR 508, employees refused to cooperate with the introduction of new technologies because of concerns about job losses. The court concluded that the employer could instruct the employees to learn and adapt to new technologies. The employee "is expected to adapt himself to new methods and techniques introduced in the course of his employment": p 518. In turn, employers must provide support and training.

The existing law giving employers ample flexibility to run the business is likely to address many situations without the need for "fire and rehire". The employee is also under a duty to obey lawful and reasonable instructions, and this will include instructions related to the timing and organisation of work. Employment contracts are incomplete by design, leaving employers with the necessary residual authority to change organisational practices through managerial prerogative without affecting contractual terms.

27. In circumstances where only *some* activities of the business are seriously affected, s.104I(4)(a) envisages that it is sufficient that the financial difficulties were affecting the employer's ability ***either*** "to carry on the business as a going concern" ***or*** "otherwise to carry on the activities constituting the business". This suggests that different activities of the business can be disaggregated and considered separately. If an employer is forced to change the working practices in *part* of its activities to retain a commercial contract to provide that service to a third party, as in Darren Newman's first example above, that action might be justified as preventing or mitigating financial difficulties in the immediate future *for that specific business activity*.

28. There may be circumstances where an employer needs to vary contracts to secure compliance with a statutory requirement, such as compliance with equal pay or working time legislation. There could be a narrow extension of the existing defence to cover a situation where the reason for the variation is "necessary to comply with a statutory duty". Otherwise, we think that cl. 22 strikes the right balance.

P&O Ferries and Cl. 22

29. The widespread condemnation of the corporate behaviour of P&O Ferries led to public attention on "fire and rehire".[12] P&O Ferries does not appear to be covered by cl. 22. This is because the employer had not "sought to vary" the employment contracts of the seafarers and nor had it sought to employ other workers to carry out substantially the same duties (the agency workers would not be employed by P & O): see new s.104I(2)(3). The weak remedies in the collective redundancies framework facilitated this corporate planning. The protective award for a breach of consultation procedure is capped. The current cap on the "protected period" used to calculate the protective award is 90 days: see s.189(4). This allowed the company to predict with precision its maximum financial liabilities to the seafarers. It decided to dismiss immediately rather than consult, and to pay the financial price to the seafarers.

30. Should the exclusion of P&O Ferries from cl. 22 concern us? This must be considered within the context of wider proposed reforms to the collective redundancies consultation framework in the Bill.[13] The Government is consulting on interim relief and the removal of the cap on the "protective award" in respect of the collective redundancies consultation framework. Interim relief would preserve the contracts for a period, either until trial or for the duration of the consultation period. The removal of the cap would disrupt corporate

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[12] For a recent examination from a comparative perspective, see K D Ewing and M Pittard, "'Fire and Rehire': Four Lessons from Australia' (2024) 53 *Industrial Law Journal* 331.
[13] A Bogg, 'Taking the rule of law seriously: the P&O Ferries scandal and the need for a Labour Enforcement Act', in TUC, *Building Worker Power* (2022) Building worker power | TUC

planning by making it more difficult for the purposive wrongdoer like P&O Ferries to predict financial liabilities. The implementation of these changes would mean that a company like P&O Ferries would find it more difficult to assess likely profits against likely costs of wrongdoing in its corporate planning. Given the current scope of cl. 22, it is imperative that these wider reforms to remedies are implemented to avoid another P&O Ferries.[14]

Other changes needed to support cl. 22?

31. The enactment of cl. 22 may lead to a growth in the insertion of very wide unilateral variation clauses into employment contracts, as exemplified in ***Bateman v Asda*** [2010] IRLR 370. These clauses reserve a power to the employer to vary the terms of the contract without employee consent. The pre-emptive inclusion of a provision to ban such wide flexibility clauses would be a prudent step for the legislator.

32. Under the proposed s. 104l(5), this currently refers to "consultation" with trade unions as a relevant factor in assessing the fairness of the dismissal. We propose that this should be "consultation with a view to reaching an agreement" so that it is aligned with collective redundancies consultation. Alternatively, it could be replaced with "negotiation".

V Individual detriment and dismissal protections for participating in "protected" industrial action.

33. In ***Secretary of State for Business and Trade v Mercer*** [2024] ICR 814 the Supreme Court considered whether a worker who (on agreed facts) had been suspended in order to sanction or penalise her for participation in a "protected" (i.e. lawful and official) strike was protected from "detriment" for her participation in trade union activities under s. 146 TULRCA. The Supreme Court concluded that this protection was excluded from s. 146, principally because it did not take place "at an appropriate time". This meant there was no statutory protection for the claimant on ordinary principles of statutory interpretation. Lady Simler considered that it was appropriate to issue a declaration of incompatibility under s.4 of the Human Rights Act 1998. This was because the absence of *any* protection for individual strikers exposed to detriments for engaging in a lawful and official strike meant s. 146 was incompatible with Article 11 ECHR.

34. The legislative response to the ***Mercer*** declaration is set out in cl. 59. The basic formula substantially mirrors that provided for in the s. 146 TULRCA trade union detriment provision covering union membership, activities, and use of union services. Cl. 59 provides that a worker has the right not to be subjected to "detriment" where the act or failure to act "takes place for the sole or main purpose of preventing or deterring the worker from taking protected industrial action or penalising the worker for doing so." Furthermore, it is for the employer to show what was the sole or main purpose for which it acted under the proposed s. 236C.

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[14] Unusually, the seafarers in P&O Ferries were likely to be entitled to a redundancy payment because alternative labour was engaged through an external agency. In standard "fire and rehire/hire" cases, there will be no individual redundancy payment because the same work will continue with directly employed employees. It is important that any reforms do not downgrade entitlements to redundancy payments, and this may provide a further reason for addressing P&O Ferries outside the scope of cl. 22.

35. The potential difficulty with cl. 59 is s.236A(4) which provides "Regulations under subsection (1) may prescribe detriment of any description". This implies that some detriments may be excluded from s. 236A altogether by Regulation.

36. This reservation about detriments may have been triggered by the following paragraph in the ***Mercer*** judgment:

> "In my judgment the state's positive obligations under article 11 do not require it to confer universal protection in all circumstances to all workers against any detriment (however slight) intended to dissuade or penalise them from participating in a lawful strike. If that were the case, the conditions that must be fulfilled to attract the protection from dismissal afforded under Part V of TULRCA would be incompatible with the UK's obligations under article 11, and *RMT* would have been decided differently. Equally, it would be surprising if sanctions could not be imposed in circumstances where an employer could permissibly dismiss an employee for participation in a lawful strike. There may be circumstances where it is permissible to impose a detriment for participating in lawful strike action where employees have necessarily acted in breach of contract, particularly where the manner of the breach is harmful or disruptive." (83).

37. Where the manner of breach is "harmful or disruptive", for example an assault on a picket line, it is unlikely that any detriment will be imposed to penalise strike action. The worker is being disciplined for the assault, not the industrial action. Such cases can be dealt with through the "sole or main purpose" enquiry. It would confuse the issue to address it through "detriment".

38. There is one area where a statutory limitation on the meaning of "detriment" is justified. The expert bodies of the International Labour Organisation and European Social Charter have held that proportionate salary deductions for the duration of a strike are permissible. We suggest that "detriment" bear its ordinary meaning in s. 236A, aligned with s. 146. We would then recommend the inclusion of a provision to the effect that "proportionate deductions of pay do not constitute a detriment for the purpose of s.236A (1)".

39. Another area that may need further specific attention is the position at common law that industrial action will almost always be a repudiatory breach of contract: see ***Simmons v Hoover Ltd*** [1977] ICR 61. Lady Simler recognised that suing individual strikers for a breach of contract was very likely to amount to an Article 11 violation: see [87] in the judgment. A detriment provision would not amount to a suspension of the employment contract during industrial action, although in many countries the doctrine of contractual suspension is treated as a corollary of treating the right to strike as a protected human right. It would not be straightforward to introduce a doctrine of suspension into the UK system of strike law because UK law permits a wide range of industrial action short of a full strike.[15]

[15] On the history of the doctrines of suspension and breach in English law on strikes, see A Bogg, "The Hero's Journey: Lord Wedderburn and the 'Political Constitution' of Labour Law" (2015) 44 *Industrial Law Journal* 299, 337-346.

It isn't clear, for example, how a contract could be suspended if an employee is still providing extensive performance under the contract (as in a withdrawal of certain duties such as marking examinations in industrial action at a university). The simplest solution would be to stipulate that workers enjoy an immunity from damages claims for breach of contract where that claim relates to protected industrial action.

VI Sectoral wage-setting in adult social care and school support staff

40. We agree with the proposals to support sectoral negotiating bodies in adult social care (clauses 28-44) for school support staff (Schedule 3). We see value in an incremental "trial and error" approach so that experience can be derived from the experience in these sectors before introducing new sectoral institutions. Ongoing review can inform the development of new sectoral institutions where there is a case for their introduction. This will also allow time to build capacity and expertise for sectoral bargaining, such as providing logistical and material support to trade unions and employers' associations.

41. We think there is a drafting error in the provisions about the Adult Social Care Negotiating Body: see clause 29ff. The effect of the order of the Secretary of State ratifying an agreement from the Negotiating Body is that the worker's remuneration is to be determined and paid *in accordance with* the agreement (clause 36(2)). The same applies to other terms fixed by the Negotiating Body (clause 36(3)). Inconsistent terms in the contract are of no effect (clause 36(4)). The same applies where the Negotiating Body is unable to reach agreement and the Secretary of State regulates to determine pay and other terms and conditions: see clause 37(5)-(7). The regulations fix pay and other terms, and inconsistent terms again have no effect (clause 37(7)).

42. If our reading of these clauses is correct, they would prevent an employer agreeing to pay a worker more or give them better terms, than the agreed terms ratified by the Secretary of State or fixed by him or her in regulations. It would also have the paradoxical result that legislation aimed at replicating collective bargaining (often absent in this sector) would preclude collective agreement on better terms. Although clause 41 prevents regulations reducing pay or altering terms to a worker's detriment, it only applies in respect of periods before the regulations came into effect. While it might be possible, we suppose, for the agreement reached by the Negotiating Body or the regulations made under clause 36 or 37 *themselves* to state expressly that they are only laying down minimum standards, it would be much better if this was spelt out in the primary legislation. Amended clauses 36 and 37 should make clear that the Negotiating Body order and the regulations operate as a floor, not a ceiling on pay and other matters. That is exactly how the old provisions on Wage Councils worked - they set minimum terms which could be improved through voluntary negotiation. It is also how the National Minimum Wage Act works. If a model is needed, it can be found in s.15 of the Wage Councils Act 1979, by which the statutory terms were only triggered where the employer paid less than the statutory minimum or applied less favourable terms.

43. There appears to be a similar error concerning the provisions on School Support Staff Negotiating Body - see clause 28 and Sch 3, inserting new s.148M (person's pay "is to be determined and paid in accordance with the agreement") and s.148N in Education Act 2002

VII Conclusion

44. The reforms in the Employment Rights Bill are ambitious, but they are neither radical nor revolutionary in comparative and international terms. They only appear to be so because the current baseline is so low. In terms of job security and the use of flexible contracts, the UK is extremely lightly regulated compared with other OECD countries.[16] Even if the reforms of strike law are implemented, the UK will continue to have one of the most restrictive frameworks in Europe and many of its retained provisions (such as the ban on secondary strike action or the duty to give notice of the strike ballot) violate international standards.[17] It is important to retain a sense of perspective on this Bill and where it sits on the spectrum of international and comparative law and practice.

45. There is a missed opportunity in articulating linkages between the collective and individual elements of the Bill, particularly in the sphere of guaranteed hours. We proposed adopting the regulatory approach in the Working Time Directive and WTR, which allows for sectoral and firm-level flexibility in the implementation of standards through collective and workforce agreements.

46. It is a welcome feature of this Bill that enforcement is being considered in an integrated way alongside the enactment of substantive rights and duties. Effective enforcement is critical if the ambitions of this Bill are to be realised. When Parliament makes provision for remedies in enacting statutory rights, it is not providing a price list to employers so that they can calculate the costs of legal violations and make business decisions accordingly. Remedies should be effective, dissuasive, and accessible.[18] They should not be formulated to facilitate avoidance or evasion by employers, as in P&O Ferries.

47. It is important that there is a follow-up process once the Bill is enacted, to review its operation and to measure its economic, social, and legal effects. There is historical precedent for this kind of process. Following the Employment Relations Act 1999, there was a DTI Review of the Employment Relations Act 1999 launched in 2002. The report led to adjustments to the Employment Relations Act 1999 in the Employment Relations Act 2004. There is real value in an evidence-based step-by-step approach to legislative reform, involving full consultation of trade unions and employer groups.

December 2024.

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[16] N Cominetti and H Slaughter, "Job done? Assessing the labour market since 2010 and the challenges for the next government" (June 2024) 30.

[17] The Right to Strike, Minimum Service Levels, and European Values by Alan L. Bogg :: SSRN

[18] A Bogg, "Labor Constitutionalism: Effective Judicial Protection as a Constitutional Principle in UK Labor Law" (2023) 43 *Comparative Labor Law and Policy Journal* 45.