Employment Rights Bill: Committee stage

Submission by Prospect trade union on the Employment Rights Bill to the House of Commons Public Bill Committee (ERB71)

18 December 2024

www.prospect.org.uk

Introduction and summary

1. Prospect is an independent trade union representing over 150,000 members. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

2. Prospect welcomes the introduction of the Employment Rights Bill as the biggest single change to workers' rights in the last fifty years and a long overdue modernisation of employment law. As well as improving the quality of working life for millions of working people, we believe it has the potential to significantly boost our economy's productivity and growth prospects. If you treat your workforce with respect and give them a stake in your success then they will be fully engaged and deliver above and beyond your expectation.

3. There are however many vital issues still to resolve in this legislation and we welcome this opportunity to contribute our evidence to the Committee's deliberations.

4. Most important among the areas highlighted for improvement is for the provisions on trade union access to workplaces to be extended to enable reasonable and responsible *digital* communication and engagement with workers where appropriate. In keeping with the spirit of the provisions on physical access, we believe this can be achieved in a proportionate and suitably regulated way, drawing on existing precedent and consistent with the requirements of data protection and GDPR.

5. We do not seek here to address every element of the Bill, much of which is welcome, though with scope for improvement in many areas. Among the areas where we believe the Bill could be helpfully amended or clarified we highlight:

    - The scope for provisions on trade union access to be rendered nugatory by ministerial fiat or catch-all "security" considerations need to be reduced, and the availability of these rights to trade unions that are already recognised needs to be ensured

    - To be practicable and effective, the removal of the qualifying period for the right not to be unfairly dismissed needs to be combined with an overall reform of protections against unfair dismissal

    - To be effective, provisions intended to prevent "fire and rehire" and extend collective redundancy protections should be combined with more effective consultation rights

    - The right to a statement of trade union rights should be strengthened by adding a requirement that it be provided at least annually using the employer's "typical methods of communicating with its workforce".

    - Reforms to the rules governing trade union recognition should be enhanced by rebalancing the considerations the CAC is required to take into account when adjudicating disputes over prospect bargaining units.

    - Complimentary to the intention of measures provided for in Part 4 of the Bill, ACAS should be given a statutory duty to promote collective bargaining, as was originally set out in the 1992 Trade Union and Labour Relations (Consolidation) Act:

About Prospect

6. Prospect is an independent trade union representing over 150,000 members. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

7. As a union whose members are mostly in the private sector, Prospect is determinedly focused on the challenge of reaching out and demonstrating our relevance to new generations of workers in enterprises and industries where trade union membership is not the norm. In recent years we have achieved sustained increases in our private sector membership, with significant advances in new and growing areas of the economy such as the tech sector, renewable energy, the creative industries, and among the self-employed.

8. We are a trade union that is strongly committed to constructive dialogue and partnership working, and can point to a strong track record of building positive and productive working relationships with employers and employer bodies that benefit both our members and the enterprises and industries they work in. We have reaffirmed our commitment to this approach in recent joint publications with bodies such as the Involvement and Participation Association and the CIPD which can be accessed here

   https://www.ipa-involve.com/news/lets-start-talking-rebooting-the-partnership-agenda-between-government-unions-and-employers

   https://www.cipd.org/uk/about/news/government-must-make-good-work-the-norm-cipd-prospect/

9. Prospect is not affiliated to any political party. But we campaign and engage across the political spectrum for policies at a national level that will benefit our members: from those affecting all members such as rights at work, to sector-specific policies to benefit the industries they work in.

The Employment Bill

10. Prospect welcomes the introduction of the Employment Rights Bill as the biggest single change to workers' rights in the last fifty years and a long overdue modernisation of employment law. We note that the previous Government repeatedly promised an Employment Bill but failed to bring one forward. It did, however, bring forward new legislation that furthered a long-running trend of removing protections for working people and any checks or balances on arbitrary and unaccountable employer power.

11. Although the current outdated and unbalanced legislative environment makes it far too easy for abuses to go unchallenged or unredressed, our experience is that good employers already seek to apply the principles embodied in this Bill as a matter of good practice. It is to support these efforts and prevent undercutting by irresponsible and short-sighted actors in the economy that this Bill is needed.

12. As well as improving the quality of working life for millions of working people, we believe this Bill has the potential to significantly boost our economy's productivity and growth prospects. If you treat your workforce with respect and give them a stake in your success then they will be fully engaged and deliver above and beyond your expectation.

13. In recent joint work with the CIPD,[1] we highlighted the critical importance of improving the quality of working life and employment relations to advancing cross-party social and economic goals:

    - where it exists, precarious and exploitative work has a deeply damaging impact on places, communities, individual life chances, overall social cohesion and the strength of the wider economy
    - more broadly across the labour market, flexibility and autonomy are often constrained, levels of engagement and quality of management are mediocre, and non-inclusive or toxic working cultures and behaviours that marginalise, deter, disadvantage or abuse women, minorities and workers with disabilities are all too common, with consequent effects on productivity and participation
    - meanwhile government policies aimed at boosting low levels of private sector investment in new ideas and technologies, or managerial and workforce skills have repeatedly disappointed – suggesting that a key missing ingredient may be the working practices and cultures that stimulate and empower individuals and organisations to innovate and improve.

14. Moreover, the challenges we face over the next decade can only be met if we break out of this pattern of poor or increasingly indifferent working experiences and relationships that hold back individuals, places, businesses and industries. These pressing challenges include:

    - Raising productivity, by improving take-up, diffusion and utilisation of interventions focussed on areas such as R&D new technologies and skills
    - Resetting employment relations and repairing trust in the wake of the cost-of-living crisis and associated increase in industrial disputes
    - Improving the quality of work as a key element in individual and community wellbeing, and key to reversing recent declines in labour market participation
    - Navigating technological change, so that the power of new forms of automation and artificial intelligence can be fully harnessed and the benefits fairly shared

15. This Employment Bill has the potential to address many of these challenges. There are however many vital issues still to resolve in this legislation and we welcome this opportunity to contribute our evidence to the Committee's deliberations. The rest of our submission addresses the most important of these from Prospect's point of view.

Clause 46: The need for digital access

16. We warmly welcome the Bill's provision to extend, under appropriate and regulated circumstances, a right of access to trade unions. We accept that this right needs to be exercised in a proportionate and responsible way, and that the CAC may have a role to play in applying fair rules and adjudicating complaints and disputes that may arise. However the current draft suffers from a crucial weakness in restricting the meaning of "access" to "physical entry into the workplace".

17. This restriction would effectively result in the exclusion of a large and increasing proportion of the working population from the rights and benefits intended by the provision. This is because

[1] https://www.cipd.org/uk/about/news/government-must-make-good-work-the-norm-cipd-prospect/

- A large and growing proportion of the working population spend much or all of their working time away from any workplace and so could not be reached or communicated with by trade unions allowed only physical entry to physical workplaces. This has always been true of a significant segment of the workforce, from domiciliary care workers to field engineers to technicians on location; but with the rapid development and take-up of online communication and collaboration technologies, accelerated by the disruptions to working patterns resulting from the Covid pandemic, it is increasingly true of wider sections of the workforce. Recent ONS data suggests that 13% of workers work entirely from home and 28% work according to a hybrid pattern, with less than half of workers travelling to a physical workplace on a regular basis.[2]

- Even among those workers who are predominantly based in physical workplaces, a great many work in comparatively small establishments (even if, as is often the case, for large employers operating across multiple locations), that it would be impractical or prohibitively costly for trade unions to try to reach through physical visits alone.

- Finally, it has to be recognised that whatever their physical working arrangements, most workers receive information or engage with their work via digital, rather than physical means. Even in large workplaces, "all staff" meetings or assemblies in a single room are typically a less prevalent means of disseminating information or gathering views than electronic or online systems and platforms.

Restricting the right of access to "physical entry" to physical workplaces would therefore in our view go against the spirit and purpose of the Bill's provisions in this area, and risk nullifying its relevance and value to a large and, in today's fast changing economy, increasingly important segment of the workforce.

18. A further damaging result of the restriction of "access" to "physical entry" is that in some cases workers may feel intimidated about being seen to seek information from or engage with a trade union in a physical space where this may be visible to colleagues or managers, if they are not fully confident that this will not be seen negatively by their employer. Sadly this is not always the case.

19. This serious shortcoming of the Bill could be rectified by extending the definition of "access" to include "digital access", meaning communication and engagement through digital or electronic technologies. Depending on industry this may include for example:

    - Emails

    - Intranet pages

    - Online inductions, whether "live" or pre-recorded

    - Messaging systems (like Slack, Yammer or Teams) which are widely used

20. As with physical access, trade unions' digital communication and engagement with workers should be proportionate and responsible, which could be ensured through appropriate regulation and adjudication by the CAC.

21. Though this naturally raises questions of detailed implementation, it is important to recognise that this is not uncharted or untested territory for employment and trade union law. The possibility of digital access is already provided for, and regulated by,

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2 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/articles/whoarethehybridworkers/2024-11-11

the current law and regime for "access" during statutory recognition ballots. Specifically:

- ERA 1999 places a duty on employers

  "to give to the union (or unions) such access to the workers constituting the bargaining unit as is reasonable to enable the union (or unions) to inform the workers of the object of the ballot and to seek their support and their opinions on the issues involved".[3]

  There is no restriction of the meaning of this to "physical" access.

- The statutory Code of Practice on "access and unfair practices during recognition and derecognition ballots" further states that

  "Where they are suitable for the purpose, the employer's typical methods of communicating with his workforce should be used as a benchmark for determining how the union should communicate with members of the same workforce during the access period".

- It also states that as well as meetings, *"Campaigning can also be undertaken by circulating information by e-mails, videos or other mediums"* and explicitly envisages "*use* [in this circumstance by an employee nominated by the union] *of internal electronic communication, such as electronic mail or intranets, for campaigning purposes"*, particularly if the employer is using such channels to provide its own view on the issue.[4] If the union feels the employer is not fulfilling its duties, it can appeal to the CAC which can order the employer to rectify this and extend the access "period" if appropriate.

We believe that a broadly similar set of principles and regime of regulation could be applied to situations envisaged by the Bill in which a union is seeking "access" to a group of workers "to meet, represent, recruit or organise workers (whether or not they are members of a trade union)" or "to facilitate collective bargaining".

22. Employers often use concerns about data protection (GDPR) to restrict the ability of trade unions to communication electronically with workers. Trade unions well understand their data protection obligations given trade union membership is considered special category data. This means these concerns can be addressed in a number of ways, all of which should be available for unions to pursue:

    - Direct access to personal data like email addresses. This can be addressed through a data sharing agreement between employer and union. Workers would be given the chance to opt-out (as the lawful basis of legitimate interest would be used, an opt-out rather than opt-in process would be most appropriate). The data sharing agreement would naturally place restrictions on issues such as the purposes for which personal data could be used, the time period for which it could be retained, how it would be secured; breach of which would leave the trade union subject to complaint and investigation by the ICO. This framework should be seen as a help, not a hindrance, to carefully defined arrangements such as these. As the ICO itself stresses, "Data protection law is an enabler for fair and proportionate data sharing, rather than a blocker".[5]

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[3] https://www.legislation.gov.uk/ukpga/1999/26/schedule/1

[4] https://www.gov.uk/government/publications/code-of-practice-access-and-unfair-practices-during-recognition-and-derecognition-ballots

[5] https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-sharing/data-sharing-a-code-of-practice/

- The process described in the Guidance on Part I of Schedule A1 Trade Union and Labour Relations (Consolidation) Act 1992[6] using a suitable independent person could be replicated for these communications, particularly where a data sharing agreement could not be reached;

- Digital access that does not require direct access to personal for example being able to present at digital inductions for new staff and placing information from the union prominently on intranets etc.

For these reasons we would strongly resist and rebut attempts to cite GDPR or data privacy as an excuse for dismissing the idea of digital access without serious consideration. In fact, providing for digital access in appropriate circumstances, subject to reasonable regulation and oversight, in a way that is compliant with the spirit of data privacy and the letter of the GDPR, is eminently feasible.

Clause 46: further improvements to the access provisions

23. In addition to the critical need for provisions to cover "digital" access, further amendments to the access provisions should be considered, specifically:

    - Specific provisions need to be included to ensure a minimum level of access (physical and digital) in cases where a trade union is already recognised for collective bargaining purposes, so that it can effectively inform, consult and engage all workers whom it is recognised to represent (whether or not they are members).

    - the scope for a Secretary of State to render this provision nugatory without significant scrutiny or debate by "prescribing" highly restrictive circumstances of application (as allowed for by 70ZF, 3-5) should be reduced. This might be achieved by strengthening the "access principles" (70ZF, 2) to include (for example) a prima facie presumption that access should be granted where members of a workforce have (anonymously) registered interest or support for access to be granted

    - the scope for "national security" to be (arbitrarily and without significant scrutiny or debate) used to nullify this right should be reduced, by specifying instead a process for proposed access agreements to be referred by the CAC to a suitable body (for example UK Security Vetting or the MoD police) for review. With extensive membership in sectors such as defence, nuclear, and aviation, Prospect has extensive experience of responding responsibility and constructively to reasonable security considerations, as well as experience of their misuse for other purposes (at GCHQ).

Clauses 19-22: Right not to be unfairly dismissed

24. To make the extension of a modified version of this right to an "initial" period of employment practical and effective, the unfair dismissal regime needs to be looked at in the round.

25. The truth is that, as things stand, protections against unfair dismissal after the current qualifying period are already minimal. These are insufficient to protect working people, or deter employers, from behaviour that most people would regard as unfair. It also makes any attempt to design a regime to be applied to an "initial" period of employment that is somehow "lighter" virtually impossible.

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[6] https://www.gov.uk/guidance/statutory-recognition-guidance-on-part-i-of-schedule-a1#union-communications-with-workers-after-acceptance-of-application

26. For this reason amendments are required to existing statute on unfair dismissal that:

- removes the cap on the weekly pay used to calculate compensation, and the upper limit on total compensatory award, to provide a more effective deterrent and remedy
- removes or refines the "some other substantial reason" justification that can currently be used by employers an all-purpose loophole[7]
- supplants current case law that enshrines a "Range of Reasonable Responses" test that prevents an Employment Tribunal from making its own judgment of fairness
- extends the time allowed for claims to be submitted from the current three months minus one day to six months minus one day
- ensures unfair dismissal cases are heard by three-person panels including employer and employee-side members alongside the judge

27. Addressing these weaknesses in protections against unfair dismissal is just as important as bringing forward their point of application, and should be the background against which any modified version to be applied to an "initial" period of employment is designed.

Clauses 22-23: Consultation about dismissal or redundancy

28. We strongly support the intention of the Government to "boost worker voice in response to economic challenges" and enable business restructuring on the basis of "a proper process based on dialogue and common understanding between employers and workers".[8]

29. However extending the effect and scope of consultation rights to variations of contract, and cases of collective redundancy across establishments, will only have the desired impact if employers take the requirement to consult seriously.

30. Existing law requires employers to engage in "meaningful consultation" – in good faith and within appropriate timescales – if they wish to proceed with dismissal and reengagement, dismissal and replacement, or collective redundancy.

31. However the deterrent for employers to ignore this requirement is extremely weak, in two key areas:

- the very low protective award of 13 weeks' pay per employee for failures to consult, combined in some instances with the weakness of the unfair dismissal regime, means that often employers can easily budget for and absorb the costs of breaking the law
- this penalty can be sought and applied only after the fact, through an Employment Tribunal, typically after several months, when the damage has been done

32. This means not only that the law has been calculatedly flouted, for example in notorious recent cases like P&O or Twitter, but that workers can be unfairly bullied into accepting detrimental changes to their employment contracts because the implicit or explicit threat to do so is credible.

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[7] https://www.jstor.org/stable/2523668

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

33. The current law thus allows a viable option, and credible threat, to employers who view meaningful consultation as an impediment. By the same token it fails to support good employers who want to follow a proper process, both for the sake of individual workers who may lose their jobs, and for maintaining good employment relations in the business going forward.

34. The most powerful way of closing this loophole would be to apply injunctive relief to failures to observe consultation law. This would mean that employees (through their union or other designated employee grouping) could apply for an injunction where an apprehended or actual breach of consultation law has happened. The High Court could then order a halt to the dismissal proceedings, forcing an employer to engage in a proper process as required by existing law. We believe the effect of this reform in incentivising good industrial relations would be transformative.

35. It is possible that the currently proposed provision for employees and their representatives to seek interim relief could usefully alter the balance of financial and legal risk facing employers who might currently be tempted to flout any requirement to consult. However it would be important to ensure that the bar is not set too high to make this a realistic option for employees or deterrent for employers. As currently proposed an application for interim relief will only succeed if the tribunal is satisfied that it is likely, at the final hearing of the claim, that the tribunal will find in favour of the claimant. 'Likely' in this context does not mean simply 'more likely than not' (i.e. 51% or more) but connotes a significantly higher degree of likelihood. This test is too stringent and should be reviewed if interim relief is to properly incentivise employers to comply with the collective consultation obligations.

36. The time limit of 7 days for an application for interim relief is also too stringent and should be reviewed. This will be particularly relevant if there are applications for interim relief for large numbers of employees arising from a fire and rehire situation. The practicalities of both lodging these applications and managing expeditious summary assessment by a tribunal need to be considered.

37. Furthermore, consideration needs to be given to the feasibility of granting interim relief to large numbers of employees. If the employer Is not willing to reinstate or re-engage the employees, an order will made continuing the contracts of employment. These orders could be place for a year or more, given the current delays in the Employment Tribunals.

38. A number of further reforms to strengthen existing law and statutory codes would help to ensure consultation rights are effective and enforceable. Key among these would be:

- Higher penalties for employers found by a court to be in breach of the law – specifically a higher level of compensation for workers, a fine and the risk of criminal proceedings. This would still be at the discretion of the judge, taking into account the seriousness of the failure to consult, employers' reasons for wanting to make changes, and (provided this was not applied too loosely) "special circumstances" that may have made consultation difficult or impracticable

- Requiring employers to undertake an Equality Impact Assessment of any proposed changes early in the process, and to share it with trade unions and the workforce, with an opportunity for consultation on the process and outcome of the EIA.

- a fast-track process for tribunals to hear and determine cases of failures to follow proper consultation processes so these can be implemented before jobs are lost

- automatic re-instatement orders where a Tribunal finds a worker has ben dismissed in breach of consultation law

- extending the minimum period of consultation from 30 days to three months, or from 45 days to six months for larger scale dismissal

- reducing the threshold for the statutory obligation to consult from 20 redundancies to all cases of collective redundancies or dismissals (ie 2 or more)
- extending consultation rights to all workers, not just employees, from day one

We have detailed these recommendations in our submission to the Government's consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire.

Clause 46: Right to statement of trade union rights

39. This measure should be strengthened by adding, following the requirement that it be included in a written statement of particulars, a requirement that it be provided at least annually using the employer's "typical methods of communicating with its workforce".[9] (The provision for it being provided "at other prescribed times" should stand, for possible further specification by the Secretary of State)

40. This measure should be strengthened by placing a duty on ACAS, and/or any future "Single Enforcement Body", to develop and report on a proactive strategy to raise awareness of these basic rights. [10]

Clause 47: Conditions for trade union recognition

41. These provisions should be strengthened by rebalancing the considerations the CAC is required to take into account when adjudicating disputes over prospect bargaining units (currently vulnerable to gaming by employers seeking to resist recognition applications) by:

    - Removing the clause relating to fragmentation, given that the consideration of "effective management" should be sufficient
    - Requiring the CAC to consider "the desirability of promoting collective bargaining" as one of the matters it must take into account

ACAS and the promotion of collective bargaining

42. Complimentary to the intention of measures provided for in Part 4 of the Bill, ACAS should be given a statutory duty to promote collective bargaining, as was originally set out in the 1992 Trade Union and Labour Relations (Consolidation) Act:

    It is the general duty of ACAS to promote the improvement of industrial relations, and in particular to encourage the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery.

43. To underpin accountability, ACAS should be required to outline the activities it has undertaken in relation to this duty in its annual report.[11]

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[9] An "employer's typical methods of communicating with [its] workforce" is an established principle in the existing Code of Practice on access and unfair practices during recognition and derecognition ballots https://www.gov.uk/government/publications/code-of-practice-access-and-unfair-practices-during-recognition-and-derecognition-ballots

[10] A comparable objective might be that currently set for the British Business Bank to monitor and improve awareness of available finance options among small businesses.

[11] Statutory reporting requirements are not uncommon in public bodies. The previous government consulted on introducing new reporting duties for regulators in relation to promoting economic growth

https://assets.publishing.service.gov.uk/media/655e18cd5395a900124635f2/growth-duty-statutory-guidance-refresh.pdf