Making Work Pay Consultation: creating a modern framework for industrial relations

Submission by Prospect to the Department for Business and Trade

2 December 2024

www.prospect.org.uk

Introduction and Summary

Prospect is an independent trade union representing almost 160,000 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.

Prospect welcomes the opportunity to respond to the consultation on creating a modern framework for industrial relations.

Before addressing the specific questions in the consultation document, we would like to make a number of general points in this introductory section of our response.

The Role of Trade Unions

We welcome the steps taken by the Government to give unions better rights of access to workplaces. This is essential to ensure we are to build a high-investment, high-productivity, high-growth economy that can deliver good jobs and rising living standards for all.

Trade unions must step up to deliver this ambition. As a union whose members are mostly in the private sector, Prospect is determinedly focused on this challenge. In recent years we have reached out to new groups of workers and achieved sustained membership growth in the private sector, with significant advances in growing areas of the economy such as the tech sector, renewables, creative industries, and among the self-employed.

We are concerned however that the Employment Rights Bill does not explicitly include fair and reasonable digital access for trade unions. Unions need to be able to use both physical and digital access in tandem to make sure all workers have access to the option of joining a union.

Trade Union Law Reform

Attacks on trade unions over the previous 14 years, have been seriously detrimental to working people. We welcome the repeal of much of the Trade Union Act 2016, however, the key legislation which sets out rights for union members and obligations placed on trade unions, Trade Union and Labour Relations (Consolidation) Act 1992, has been in place for over 30 years and is very outdated in parts. In an age of social media, with increasing concerns around data privacy, the current legislation requires urgent updating.

CONSULTATION QUESTIONS

Specific questions:

Section 1: A Principles Based Approach

1) **Do you agree or disagree that these principles should underpin a modern industrial relations framework? Is there anything else that needs consideration in the design of this framework?**

Tripartite engagement between business, government and trade unions is essential in ensuring that the views of all stakeholders are represented. Working in partnership will lead to a high-investment, high-productivity, high-growth economy that can deliver good jobs and rising living standards for all.

We agree therefore that the principles of collaboration, proportionality, accountability and balancing the interests of workers, business and the wider public should underpin this framework.

However, we consider that it is important to explicitly recognise the role of collective bargaining in ensuring that the views and interests of workers and business are balanced.

2) **How can we ensure that the new framework balances interests of workers, business and public?**

Employment relations have been put under particular strain in recent years as a result of the cost-of-living crisis and cost-of-doing business crisis. In several sectors this strain on relations has been manifested by a sharp spike in employment disputes and industrial action. This is not a good starting point for meeting the challenges that face the UK economy: challenges that will entail more tough choices, flexibility and openness to change, and high levels of engagement and mutual trust.

The lack of engagement with trade unions and workers over the last 14 years means that the employment relations landscape does need to be reset. We urgently need to rebuild a mission of productive dialogue and shared understanding between workers and employers to enable effective change management and a renewed focus on mutual gains.

Together with the CIPD, Prospect has produced a discussion paper on strong partnerships, good jobs and productive workplaces: https://library.prospect.org.uk/download/2024/00506.

Section 2: Unfair Practices during the Trade Union Recognition Process

3) **Do you agree or disagree with the proposal to extend the Code of Practice on access and unfair practices during recognition and derecognition ballots to cover the entire recognition process from the point when the Central Arbitration Committee (CAC) accepts the union's application for statutory recognition? Please explain your reasoning and provide any evidence on cases that support your view.**

We agree with the proposal to extend the Code of Practice so that it applies from the point that the CAC accepts a union's application for statutory recognition. However, we think that it should apply from the very beginning of the process, when a union writes to an employer asking them to enter into voluntary recognition.

We can see no valid reason for an employer to instigate any unfair practice at any point during the recognition process, whether this be when voluntary or statutory recognition is being considered.

Unions do not always have access to workplaces before the statutory process has been started and therefore hostile employers may well act in a way to deter their workers from supporting recognition at this initial stage.

There should be proper access rights for trade unions from early on in the process to enable unions to properly explain to workers about the benefits of collective bargaining, so that workers can make an informed decision about recognition and the outcome of the ballot is truly reflective of the views of workers.

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4) **Do you agree or disagree with the proposal to introduce a requirement that, at the point the union submits its formal application for recognition to the Central Arbitration Committee (CAC), the union must provide the employer with a copy of its application? Please explain your reasoning.**

We agree with this proposal. We consider that this aligns with the principles of collaboration and balancing the interests of workers, business and the wider public.

The requirement should be a proportionate and straightforward one. Simply forwarding or copying the application for recognition to an appropriate employer contact, should be sufficient to comply.

5) **Do you agree or disagree that the employer should then have 10 working days from that date to submit the number of workers in the proposed bargaining unit to the Central Arbitration Committee (CAC) which could not then be increased for the purpose of the recognition process? Please explain your reasoning.**

We agree that 10 days is a reasonable amount of time for an employer to submit the numbers in the proposed bargaining unit and that this number should not be increased during the recognition process. It should be clear that the number submitted to the CAC should be the number of workers in the bargaining unit at the date that the recognition application was submitted to the CAC by the union, not at the '10 day' mark.

It should also be expressly prohibited for employers to recruit people into the bargaining unit for the purposes of thwarting recognition applications.

6) **Can you provide any examples where there has been mass recruitment into a bargaining unit to thwart a trade union recognition claim? Please provide as much detail as you can.**

N/A

7) **Are there any alternative mechanisms that you consider would prevent mass recruitment into a bargaining unit for the purpose of thwarting union recognition applications? Please provide as much detail as you can.**

We agree that once an employer has confirmed the number in the bargaining unit, they should not be able to increase this for the purposes of the recognition process.

We do not think that placing a new obligation on employers not to recruit into a proposed bargaining unit, where the purpose is to prevent the union from being recognised, will work very well in practice. In trade union detriment cases, it is very difficult to prove that the reason an individual has been detrimentally treated is because of their trade union activities. We think that there would be similar evidential issues if unions had to prove that the reason that individuals were recruited into the bargaining unit was to prevent recognition.

8) **Do you have any views on a possible alternative to place a new obligation on employers not to recruit into a proposed bargaining unit for the purpose of seeking to prevent a union from being recognised? How would this alternative work in practice?**

No, we consider that the proposal set out is the most workable.

9) **Do you agree or disagree with the proposal to introduce a 20-working day window to reach a voluntary access agreement from the point when The Central Arbitration Committee (CAC) has notified the parties of its decision to hold a trade union recognition ballot?**

We agree with this proposal. However, where both parties wish to do so, they should have the ability to engage with ACAS, with a view to reaching a voluntary access agreement.

10) **If no agreement has been reached after 20 working days, should the Central Arbitration Committee (CAC) be required to adjudicate and set out access terms by Order? If yes, how long should CAC be given to adjudicate?**

We think that the CAC should be required to adjudicate where no agreement has been reached but we consider that this requirement should arise after 10 days with no agreement, not 20 so as to avoid unfair practices, unless the parties agree to extend this.

11) **Once 20 working days have expired, should the Central Arbitration Committee (CAC) be allowed to delay its adjudication in instances where both parties agree to the delay? Should this delay be capped to a maximum of 10 working days?**

Where both parties agree to delay adjudication by the CAC, this should be permitted.

12) Which (if any) of the options provided do you agree with in terms of the tests set for making an unfair practice claim? Please explain your reasoning?

We consider that the option 1 is preferable i.e. removing the requirement to show that the use of the unfair practice changed or was likely to change the intent to vote in a particular way. There should be some consequence for an employer who uses unfair practices, even if it cannot be proven that this influenced how an individual voted.

13) Should the Government extend the time a complaint can be made in relation to an unfair practice to within 3 months of the date the alleged unfair practice occurred?

We support an extension of the deadline but consider that 3 months is too long. We would suggest that 2 weeks is sufficient time following the closure of a ballot to lodge a claim in respect of unfair practice.

Section 3: Political Funds

14) Do you agree or disagree with the proposal to remove the 10-year requirement for unions to ballot their members on the maintenance of a political fund? Please provide your reasoning.

We agree with this proposal. It is not for Government to determine how a union's finances should be allocated. That is a matter for the trade union and its members.

More generally, we understand that the Government also intends to make transitional provisions by way of Regulations so that at the time the Employment Rights Bill commences, existing union members who did not opt in to the political fund when they joined the union under the 2016 Act regime will remain opted-out, unless they then choose to opt in. This will create several different categories of members, with different administration provisions, dependent on the legislation/rules that applied at the relevant time.

From an individual member's perspective, opting into the political fund does not cost them any more money – they still pay one subscription rate. The political fund rules however are complex and challenging for members to understand. Putting all those who have opted into the fund in the same category would be a more straightforward and administratively simpler approach.

The most straightforward way to achieve this is for members who joined from 2016 up until the date the relevant provisions of the Employment Rights Bill commence, to be automatically opted in to the political fund. Unions should give affected members notice of their right to opt out by their normal method of communication (most likely email) This would then create one category of members in the political fund.

15) **Should trade union members continue to be reminded on a 10-year basis that they can opt out of the political fund? Please provide your reasoning.**

We consider that sending a reminder to members on a 10-year basis is reasonable and proportionate. However, rather than having to send to a member's preferred method of communication, if they have provided an email address contact, it should be permissible for the reminder to be sent by email. If no email address is provided, then post is a reasonable alternative.

16) Regulations on political fund ballot requirements are applicable across Great Britain and offices in Northern Ireland belonging to trade unions with a head or main office in Great Britain. Do you foresee any implications of removing the 10-year requirement for unions to ballot their members on the maintenance of a political fund across this territorial extent?

We do not foresee any particular implications.

Section 4: Simplifying Industrial Action Ballots

17) How should Government ensure that our modern framework for industrial relations successfully delivers trade unions a meaningful mandate to support negotiation and dispute resolution?

We welcome the steps taken in the Bill to reset the balance between workers and employers and recognising the right to strike. In particular, we welcome the abolition of the Minimum Service Levels legislation and the repeal of much of the Trade Union Act 2016.

We are pleased that the Government has committed to introducing electronic balloting for industrial action. Enabling unions to ballot their members electronically is crucial to ensure that members have increased opportunity to vote, so that trade unions have a meaningful mandate, representative of members' views, when negotiating on the issue under consideration.

There should be a reset on the approach to industrial action notification requirements. The requirements placed on trade unions in respect of industrial action should not be so onerous as to amount to a 'trap' such that employers can seek an injunction, even where the failure to comply is clearly so trivial that to render the whole ballot invalid would be wholly disproportionate.

18) Do you agree or disagree with the proposed changes to section 226A of the 1992 Act to simplify the information that unions are required to provide employers in the notice of ballot? Please explain your reasoning.

We do not consider that there should be any requirement to provide a notice of ballot. Unions have to notify employers of the result of any ballot and provide notice of any action taken. The employer therefore has plenty of notice before action is taken.

That being said, we support the simplification of the information required in the ballot notice. Disputes about the specificity of the categories of worker and/or workplaces, where

the action is otherwise valid, undermines the purpose of having a right to strike and can lead to disputes becoming more entrenched where procedural points are taken rather than seeking to resolve the actual dispute in good faith.

Furthermore, having to specify numbers of workers in the various categories can lead to identification of members if they are in singleton posts or in individual workplaces. Where workers work from home, such that their home address is their workplace, they become immediately identifiable as a union member if this has to be set out in the notice.

19) Do you have any views on the level of specificity section 226A of the 1992 Act should contain on the categories of worker to be balloted?

Unions should be permitted to categorise workers as per the categories they hold. The requirement should be a general one, to provide occupation; grade or pay band. It should not need to be so specific that individuals can be identified or nor should categories have to reflect the level of specificity that a union possesses.

20) What are your views on the proposal to amend the requirement that unions should provide information on the results of the ballot to those entitled to vote and their employers 'as soon as reasonably practicable'?

21) What do you consider is a reasonable time requirement for unions to inform members and their employers of the outcome of the ballot?

We consider that three working days from the close of the ballot is a reasonable time frame. There can sometimes be a delay in receiving the result from the independent scrutineer, particularly where there is a large ballot. Also, where concurrent ballots are run, across different workplaces or employers, say 40 or 50 at a time, administratively it can be difficult to inform employers and members about the outcome of each ballot on the day that the ballot closes.

22) What do you consider are suitable methods to inform employers and members of the ballot outcome? Should a specific mechanism be specified?

We consider that publishing the result on the union's website should be sufficient to notify both members and employers of the result of the ballot. If a union takes further steps, such as sending the result to the employer or members by email for example, that is a matter for the union.

If the employer is not notified within the timeframe this should not invalidate the ballot.

23) Do you agree or disagree with the proposal to simplify the amount of information that unions must provide employers in the industrial action notice? Please explain your reasoning.

Agree – see response to question 18 and 19.

24) What are your views on the degree of specificity section 234A of the 1992 Act should contain on the categories of worker?

Agree – see response to question 18 and 19.

25) Do you agree or disagree with the proposal to extend the expiration date of a trade union's legal mandate for industrial action from 6 to 12 months? Please explain your reasoning and provide any information to support your position.

We agree that mandate should be extended from 6 months to 12 months.

26) What time period for notice of industrial action is appropriate? Please explain your reasoning.

We consider that a 7-day notice period for industrial action is reasonable and appropriate. This follows the requirement for 7 days' notice of ballot and the ballot period itself. This in all provides employers with considerable notice of any action.

Section 5: Updating the Law on Repudiation of Industrial Action

27) Which (if any) of the options provided do you agree with in terms of modifying the law on repudiation? Please explain your reasoning.

We do not consider that there should be additional requirements on a union to repudiate action and consider that these should be removed.

28) Currently the notice by the union is prescribed by legislation. Do you think that prescription of the notice should remain unchanged? If not, what changes do you propose?

We consider that it should be sufficient for the union to simply make a statement that the industrial action is not authorised by the union and therefore that members should work as normal. We would therefore support option 2.

29) Do you agree or disagree that the current legislation on repudiation should be left unchanged? Please explain your reasoning

We agree that it should be changed. See responses to 27 and 28 above.

Section 6: Clarifying the Law on Prior Call

30) Do you agree or disagree with the Government's proposal to amend the law on 'prior call' to allow unions to ballot for official protected action where a 'prior call' has taken place in an emergency situation? Please explain your reasoning.

We agree with the proposal, however we consider that a 'prior call' should not invalidate a subsequent ballot.

31) What are your views on what should be meant by an "emergency situation"?

We consider that the definition as set out in section 44(1)(c) Employment Rights Act 1996 should apply: 'circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety'.

32) Are there any risks to the proposed approach? For example, increased incidences of unofficial action or of official action which does not have the support of a ballot and is taken without the usual notice to employers? Please explain your reasoning and provide any information to support your position.

We cannot see any potential risks.

Section 7: Right of Access

33) Do you agree or disagree with the proposed approach for the CAC to enforce access agreements? Please explain your reasoning.

We agree it is reasonable for the CAC to play the primary role in enforcing access agreements, as a natural extension of its role in recognition proceedings. It is of course essential that it is resourced sufficiently to carry out this role effectively.

Key principles for enforcement should include:

- Sanctions against employers for breach of access agreements which are sufficient to deter such breaches and are not something that can simply be budgeted for.
- Routes to enforcement and redress should be swift and timely so that delays cannot be used by employers to "play for time" or gain unfair advantage.

34) Do you have any initial views on how the penalty fine system should work in practice? For example, do you have any views on how different levels of penalty fines could be set?

We know from other areas of employment law that inadequate fines can simply be budgeted for and absorbed by employers who see advantage in breaking the letter or spirit of the law.

In order for penalties to act as an effective deterrent they should be imposed at a rate likely to make employers of different sizes think twice before risking them, for example by setting them as a proportion of turnover.

35) Do you think the proposal for a penalty fine system is proportionate or not, and would it be effective? Please explain why.

A penalty fine system could be effective provided that fines are set at a level sufficient to act as an effective deterrent to employers.

36) Do you consider there to be any alternative enforcement approaches the government should consider? For example, should a Central Arbitration Committee (CAC) order requiring specific steps to be taken (Step 2 above) be able to be relied upon as if it were a court order? What other approaches would be suitable?

Given the need for effective enforcement of obligations to be timely, we think that treating Step 2 orders from the CAC as if they were a court order should be considered as a means of reducing scope for non-compliant employers to take advantage of delays to enforcement.

Section 8: Going Further and Next Steps

37) Are there any wider modernising reforms relating to trade union legislation that you would like to see brought forward by the government? If yes, please state these and why.

Attacks on trade unions over several years, have been seriously detrimental to working people. We welcome the repeal of the Trade Union Act 2016, however, the key legislation which sets out rights for union members and obligations placed on trade unions, the Trade Union and Labour Relations (Consolidation) Act 1992, has been in place for over 30 years and is now very outdated in parts.

In an age of social media, with increasing concerns around data privacy, the current legislation requires urgent updating. In particular, our concerns relate to: the lack of clarity about what amounts to an accounting record under the Act; data protection for individuals whose data may be included in accounting records and enforcement routes for alleged breaches.

We feel that a broader review of the legislation governing trade unions is overdue. This is important so that trade unions can focus on representing the best interests of their members in the modern world and do not find themselves caught up in protracted and costly litigation.

Digital Access

Unions need to be able to use both physical and digital access in tandem to make sure all workers have access to the option of joining a union. Following the existing Code of Practice on access and unfair practices during recognition and derecognition ballots, the benchmark should be that unions are able to communicate with workers in line with “the employer’s typical methods of communicating with [its] workforce”.[1]

Depending on industry this may include for example:

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

- Access to work email addresses of non-members to send union communications (with safeguards on libellous or defamatory content and frequency);
- Intranet pages;
- Digital inductions, whether 'live' or pre-recorded;
- Messaging systems (like Slack, Yammer or Teams) which are widely used.

As with physical access, the parameters of proportionate and responsible applications of these rights could be determined by a combination of regulation, guidance and independent arbitration.

Access and communication can also be an issue in workplaces where a union is already recognised. Although some employers have reached agreements on digital access to non-members, many refuse, often citing data protection issues. This can make it harder for recognised unions to play their part in the bargaining process in an effective manner.

Prospect suggest ACAS or the Secretary of State should produce a statutory Code of Practice on access to workers for collective bargaining purposes. This would apply to *all employers that currently recognise a trade union* and any that reach recognition agreements going forward.[2] It would provide a reasonable and responsible route for recognised trade unions to access *all workers in a bargaining unit (not just their members)*, in order to:

- Inform all workers they are recognised to represent about negotiations affecting them
- Seek the opinions of all workers they are recognised to represent
- Provide workers with information about how to join the trade union(s) recognised to represent them and the benefits of doing so

As above, access should include digital communication in line with "the employer's typical methods of communicating with [its] workforce".[3] This reform simply extends these existing provisions to the circumstances of an established recognition arrangement for the purposes of enabling unions to better represent the workers they are recognised as representing.

The proposed Code of Practice would have broadly similar status to the existing Code of Practice on disclosure of information to trade unions for collective bargaining purposes.[4] A trade union or an employer would be able to present a case to the CAC that the other party had failed to comply with its duties under this provision. The CAC would be able to refer the complaint to ACAS for conciliation or choose to hear and determine the case. In making a judgement about whether the complaint was well-founded, the CAC would have regard to the statutory Code of Practice.[5]

[2] In this sense it would have broadly the same status as the existing Code of Practice on disclosure of information to trade unions for collective bargaining purposes, for example.
[3] As in the Code of Practice on access during recognition ballots https://www.gov.uk/government/publications/code-of-practice-access-and-unfair-practices-during-recognition-and-derecognition-ballots
[4] https://www.acas.org.uk/acas-code-of-practice-on-disclosure-of-information-to-trade-unions-for-collective-bargaining/html
[5] This follows the same principles and process as employers' duty to disclose information set out in the 1992 TULR Act. https://www.legislation.gov.uk/ukpga/1992/52/pdfs/ukpga_19920052_en.pdf