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Threats to collective bargaining in the Fire and Rescue Service: An analysis by Daniel Blackburn

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The analysis contained in this report is presented as a contribution to the discussion on proposed changes to the bargaining arrangements within the fire service.

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by Frances O'Grady, General Secretary, TUC

The Fire Brigades Union is a fighting union with a proud history of defending members against attacks. The Westminster government is orchestrating yet another assault on firefighters, by threatening to abolish their collective bargaining body, the NJC, where the FBU has secured many good deals for members over the years. The TUC stands with the FBU as it fights back against this unnecessary, unfair and unjust proposal.

As this excellent publication makes clear, workers have a right to be represented by a collective bargaining body. The experts at the IER demonstrate how the government is clearly in breach of its own legal obligations, making this a fascinating - but shocking - read.

Collective bargaining is how firefighters and millions of other workers secure a fair deal at work. And evidence abounds that there is a strong correlation between more union membership and collective bargaining coverage on one hand, and less income inequality on the other. After a decade of cruel austerity and rising insecurity at work, the UK is more unequal than at any time in modern history. More than ever, workers need union representation and voice to maintain basic rights and secure decent pay. Standing together in unity is the only way workers can win fairness and justice from employers and government.

The TUC is right behind the FBU in its fight to protect collective bargaining arrangements that benefit members. The FBU never sits back when working people are threatened - and neither do we.

Workers have a right to be represented by a collective bargaining body. The experts at the IER demonstrate how the government is clearly in breach of its own legal obligations, making this a fascinating - but shocking - read



by Matt Wrack, General Secretary, FBU

This latest threat from the Westminster government, to merge the governance of fire with policing, to introduce so called ‘operational independence’ for Chief Fire Officers and to “consider the need for an independent pay review body and the future of the ‘Grey Book’” is merely the most recent in a long line of attacks on trade unions in the UK. It is also an obvious threat to the functioning and democratic accountability of the Fire and Rescue service in England.

Collective bargaining is a means for an organised workers’ voice to have a seat at the table when terms, conditions and pay are discussed with employers i.e. to bargain over the terms on which work is undertaken. As explained in this report, it is proven to be an effective means of protecting workers’ rights. Consequently, a succession of governments have sought to undermine or abolish collective bargaining structures in different sectors. In 1997, 37% of all employees, in the public and private sector, were covered by collective bargaining. By 2019, when the latest ONS figures on this were published, only 27% of all UK workers were covered by it. This is no accident.

Within the fire and rescue service collective bargaining takes place on a UK-wide basis through the National Joint Council for Local Authority Fire and Rescue Services (NJC). The FBU is seeking to defend the NJC because it has worked well for decades, earning it praise from the employers’ side too. It therefore makes no sense for the chief fire inspector for England, Tom Winsor, to have questioned in his March 2021 report “whether the current pay negotiation machinery requires fundamental reform” but although I was disappointed, I was not surprised. The FBU has queried the independence of Winsor from government. We have also questioned the autonomy of the “independent pay review bodies” he promotes, because of the experience of other sectors when one has been imposed. Pay review bodies increase the powers of central government and reduce those of workers.

We ask that our allies in the labour movement stand alongside firefighters as they face this threat. The IER has produced in this report unequivocal evidence that what is being considered by the government is problematic for a number of legal and political reasons, and I thank Daniel Blackburn for putting together this powerful document, which sets out clearly the evidence on the issue and the case against these proposals.

Collective bargaining is a means for an organised workers’ voice to have a seat at the table when terms, conditions and pay are discussed with employers i.e. to bargain over the terms on which work is undertaken.... it is proven to be an effective means of protecting workers’ rights.

Introduction

Proposals for reform of the Fire and Rescue Service, emanating from Her Majesty's Chief Inspector of Fire and Rescue Services (HMCIFRS), with the apparent support of the British Government, unfairly take aim at Fire and Rescue Service collective bargaining machinery that has functioned effectively for the past 70 years, and which retains the support of both the union and Fire and Rescue Service employers. The proposals strike at the heart of the British voluntary tradition of workplace relations and ignore the wishes of the union and employers, both of whom have expressed support for the existing machinery. The intervention into bargaining that is proposed is also thoroughly incompatible with the UK's commitments under the ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and contrary to both the European Convention on Human Rights and the Social Charter.

The changes recommended to the Fire and Rescue Service are set out in *State of Fire and Rescue – The Annual Assessment of Fire and Rescue Services in England 2020*, published in January 2021 by Her Majesty's Chief Inspector of Fire and Rescue Services (HMCIFRS)². The Recommendations are:

- Recommendation 1: As soon as is practicable the Home Office, National Fire Chiefs Council and Local Government Association, in consultation with the Fire Standards Board and Association of Police and Crime Commissioners, should establish a programme of work that will result in consistency in the four priority areas³.
- Recommendation 2: As part of the next Spending Review, the Home Office in consultation with the Fire and Rescue Sector should address the deficit in the fire sector's national capacity and capability to support change.
- Recommendation 3: The Home Office, in consultation with the fire and rescue sector, should review and with precision determine the roles of: (a) fire and rescue services; and (b) those who work in them.
- Recommendation 4: The Home Office, the Local Government Association, the National Fire Chiefs Council and trade unions should consider whether the current pay negotiation machinery requires fundamental reform. If so, this should include the need for an independent pay review body and the future of the 'Grey Book'.
- Recommendation 5: The Home Office should consider the case for legislating to give chief fire officers operational independence. In the meantime, it should issue clear guidance, possibly through an amendment to the Fire and Rescue National Framework for England, on the demarcation between those responsible for governance and operational decision making by the chief fire officer.
- Recommendation 6: The National Fire Chiefs Council, with the Local Government Association, should produce a code of ethics for fire and rescue services. The code should be adopted by every service in England and considered as part of each employee's progression and annual performance appraisal.

This paper is concerned primarily with the implications of Recommendation 4, which proposes reform to the National Joint Council for Local Authority Fire and Rescue Services (NJC), the body responsible for conditions of service of fire and rescue services.

The Government, Employers, Chief Fire Officers and the Union are advised to 'consider whether' to change the bargaining system if it 'requires fundamental reform'; to consider the supposed 'need' for a pay review body; and to consider also 'the future of the 'Grey Book''. The innocuous tone belies an underlying objective, which is made clear in the body of the main report, to dismantle the NJC, and therefore degrade or remove firefighter bargaining rights; to change or abandon the extant collective agreements collated in the Grey Book; and to replace this well-respected and long-established machinery, either with the mechanism of a pay review body or no mechanism. Such proposals are rejected outright by the firefighters' union. Employer

representatives have confirmed also that they would prefer to maintain the existing machinery. The proposed intervention thus manages at once to ignore: the wishes of the parties; the success of the NJC framework over more than half a century; the essential voluntarism that is fundamental to the British industrial relations system, and the requirements of international treaties on labour and human rights which have been ratified by the UK and are binding on it.

There are, further, and quite apart from the factors set out above, domestic law procedural obstacles that mean that the only way to implement the significant re-structuring of Fire and Rescue Service industrial relations, such as are proposed, will be through primary legislation. Specifically legislation will be required to repeal a discretionary obligation arising under the Fire and Rescue Services Act 2004, while the recently adopted UK-EU Trade and Cooperation Agreement, ratified 30 April 2021, provides a new emphasis for the international law obligations of the ILO and the European Social Charter. The commitment, under Article 399(7) to ‘protect and promote social dialogue on labour matters among workers and employers’ appears to contradict the proposal to abolish the machinery of social dialogue which the NJC comprises.

The following analysis presents an overview of the existing bargaining structures and their development, and examines the recent position statements issued by the Fire Brigades Union and by the Chair of the Employers negotiating body. It proceeds to look at how each of the major areas of concern are dealt with under international labour and human rights law by examining decisions of the supervisory bodies of the ILO and the Social Charter, and by referencing case law of the European Court of Human Rights. There is consistently strong support in international law for three basic principles, which affirm that:

- workers’ and, in particular, firefighters’ bargaining rights are protected under international law
- the State is legally required to refrain from unwanted interference with established voluntary bargaining arrangements

The report from Her Majesty’s Chief Inspector of Fire and Rescue Services (HMCIFRS) *State of Fire and Rescue – The Annual Assessment of Fire and Rescue Services in England 2020*, sets out its stall from the outset, stating bluntly that ‘the National Joint Council (NJC) (the mechanism for agreeing pay and workforce terms and conditions) is failing firefighters and the public, and is in urgent need of reform’⁴. No evidence is offered for these dramatic claims, which do not correspond with the position statements put forward by either the Fire Brigades Union, or by the Fire and Rescue Service Employers, nor is any statistical information presented, and nor are survey reports of public opinion provided. The claims seem to be no more than the opinions of the Report’s author, offered as a compounding conclusion to the various more specific opinions he presents in the Report, in which he expresses the following concerns:

- ‘Consideration also needs to be given as to whether it is right that these arrangements cover the whole of the UK. Fire is a devolved matter. I am unconvinced that a UK-wide body can provide the flexibility needed to protect the best interests of staff and services across the UK’⁵.
- ‘The ‘Grey Book’ (the document that lists firefighters’ terms and conditions) has not been updated since 2009. Terms and conditions are rigid, leaving little room for services to adapt quickly and provide firefighters with necessary flexibility. They also inhibit firefighters from providing additional support to their communities in ways they think necessary’⁶.
- ‘Role maps were originally created to list general areas of competence. They are now being used as an exclusive list of what firefighters and control room staff can do’⁷. And that ‘the activities associated with each firefighter role are listed in the role maps. Their prescriptive nature isn’t helpful. Chief fire officers face resistance to varying degrees when asking their firefighters to undertake other tasks’⁸.
- ‘During the pandemic, chiefs couldn’t require firefighters to do something to protect their communities if it wasn’t listed in the role maps. This necessitated the tripartite agreement, which I

discuss later. This was a source of frustration for the many public-spirited firefighters who wanted to provide support to the communities they serve at a time of great need⁹.

- 'The basic pay structure, in which firefighters can only move between 'trainee' and 'competent' in most roles, leaves no room to recognise performance. It offers limited opportunities to link pay to progression. The rationale of NJC decisions on roles, especially those about pay, are opaque and should be open for all to see and understand'¹⁰.
- 'In these ways and others, the Grey Book, and the way it is interpreted and applied, is a barrier to change and improvement. A national approach is needed to find a model that provides appropriate terms and conditions. It must also allow for local variation and flexibility'¹¹.

These conclusions express the author's opinions as to what he considers beneficial and, as noted, are offered without supporting evidence or explanation. The author does not descend to consider the merits of evidence to support any views contrary to his own.

Yet in his Report, the author goes on to say 'I know there are some who believe that the current arrangements are effective. But these views are in the minority'¹². No explanation is offered as to whom he is referring here, but presumably he means the Fire Brigades Union and the Fire and Rescue Service Employers, as both have expressed this view. Neither is any explanation offered as to why the two sides of the Service might be said only to constitute a 'minority' of opinion. The suggestion is particularly puzzling as the FBU clearly represents the majority of people involved in the provision of the Fire and Rescue Service.

As noted, the author does not trouble to record the evidence or basis on which both employers and union 'believe that the current arrangements are effective' and should be retained. The inference is that he never inquired.

Discussing the pandemic, the Report seems conflicted between acknowledging that much worked well and a contrary narrative implying failure, through the comments bulleted above, and vague remarks such as 'the sector's response to the pandemic has been affected by structural problems already addressed by our national recommendations'¹³. And yet the Report also acknowledges that 'we saw services rise to the challenge, adapting to respond to emergency calls and providing additional support to their communities', and that 'in general, the continuity measures put in place worked'¹⁴. The praise continues, 'throughout the pandemic, fire staff worked exceptionally hard to help their communities in different ways'; and further that 'every staff group – whether whole-time firefighters, on-call firefighters, prevention and protection teams or non-operational staff – did valuable extra work. I pay particular tribute to all fire staff who did this'¹⁵; and the existing bargaining machinery is actually praised by the author as having worked efficiently at a time of crisis, 'for firefighters, the tripartite agreement – signed by the NFCC, National Employers and the Fire Brigades Union – helped achieve this in part. This national agreement allowed firefighters to undertake additional roles outside their normal responsibilities'¹⁶.

Despite this, the Report's author seems preoccupied with finding fault, and finally seizes upon one, noting that 'in December 2020, a further agreement was reached, but this time without the NFCC. The agreement was solely between National Employers and the Fire Brigades Union under the NJC'¹⁷. This action, according to the Report's author 'strengthened the Fire Brigades Union's hold on the sector, and made it more difficult for the NFCC to ensure that operational factors were fully considered in relation to additional pandemic activities'¹⁸. 'In some services, deployment decisions were influenced by other factors, including the Fire Brigades Union holding them back'¹⁹. But concerning the original tripartite agreement for the pandemic response, the Report seems either cautiously positive or ambivalent:

The tripartite agreement was a pragmatic way to get additional work agreed during the pandemic, considering the significant impediments that the current industrial relations apparatus suffers from. In some services, it got more work done. But in others, it became a hindrance²⁰.

The author then reveals his ideological standpoint:

I question why, in a public health emergency, a contract of this kind was even necessary. The sector had capacity to help, and strong systems in place to protect staff and enable them to take action. This should have been enough.²¹

The argument seems to be that it ought to have been possible simply to order firefighters to undertake any work considered appropriate by the employers, regardless of the contractual restraints they had agreed, as if firefighters were conscripts operating under a forced labour regime.

The author seems to be affronted by the very idea that firefighters should have any say either in the work they are to perform under their contracts of employment or in the terms and conditions under which they do it. The fact that the contracts agreed between firefighters and employers identify the scope of the work, the terms and conditions under which it is to be done, and the mechanism by which either may be varied appears to be irrelevant.

At the heart of this Report is the denigration of the National Joint Council for Local Authority Fire and Rescue Services (NJC) with a view to its abolition, notwithstanding that those views are unsupported by facts, or evidence, or by those responsible for implementing the Fire and Rescue Service, or who work within it. The Report gives the impression of an ideologically-driven project, based on the largely unsubstantiated musings of an individual but backed, it seems, by the government and its advisors. The author gives an appearance of being a devotee of Hayek and the neo-liberal school of economists which considers that trade union insistence on collective bargaining distorts the working of a free market in labour which should be left exclusively to the laws of supply and demand free from any such distorting interference. It is true that the author offers no view on the survival of collective bargaining at Brigade or more local level but if national level collective bargaining is not to be permitted, he does not give any indication of support for its continuation at regional or lower levels.

The abolition of the NJC is not supported either by the union, nor the employers. As noted, any imposition of the author's objectives set out above would be contrary to the fundamental principles of British industrial relations traditions, and to international legal obligations, including under the European Convention on Human Rights and the Conventions of the International Labour Organisation. These are considerations which the author has ignored.

The level, scope and implementation of collective bargaining is a matter that, according to international treaty obligations, should be exclusively within the competence of the workers and the employers. State regulation of this process is unusual in the British context (even in the private sector, where the limited model of 'statutory recognition' introduced in 1999 remains the vehicle only for a small minority of the UK's trade union recognition and bargaining arrangements)²². It is even more unusual in the public sector, where large-scale voluntary bargaining councils (NJC's) remain common (see chapter II of this report). Indeed 'voluntarism' in industrial relations has always been at the centre of the British tradition since at least 1918, with direct Government intervention in bargaining running contrary to this principle. And it is a clear and settled matter of international law that State policy should support and promote the principle of free, voluntary collective bargaining, not override it. The expansion of the State's regulatory power such as to override the interests of both sides of the service, therefore manifestly conflicts with both settled British tradition and the UK's international obligations.

It should be noted that Her Majesty's Chief Inspector of Fire and Rescue Services, Sir Thomas Winsor, was a partner in a major firm of solicitors in the City of London specialising in commercial law. Between 1999 and 2004, without any background in the railway industry, he served as the Rail Regulator in the Office of Rail Regulation. Between 2010 and 2012 he carried out a controversial review of the pay and conditions of service of police officers and staff in England and Wales that led to the abolition of collective bargaining in the police service and the introduction of a Pay Review Body for the police. In October 2012 he was appointed as HM Chief Inspector of Constabulary, the first to come from a non-policing background. In July 2017, he was appointed as the first ever HM Chief Inspector of Fire & Rescue Services, having no background in the Fire and Rescue Service either.

In summary his proposals:

- ignore the wishes of the parties – both the FBU and the Employers have refuted the need for abolition of the existing arrangements.
- represent a dramatic intervention in the long-established practices within the Fire and Rescue Service (the NJC has been the focus for national collective bargaining between the Fire Brigades Union and the Employers since 1947.
- strike at the very heart of the British industrial relations system by disregarding the principles of voluntarism that have long been its hall-mark.
- appear to be based upon ideological objectives and are proposed apparently without supporting evidence as to why they would be beneficial
- violate the UK's obligations under the European Convention on Human Rights
- violate the UK's obligations under the European Social Charter
- violate the UK's obligations under ILO Convention No. 98, and potentially also ILO Convention No. 87²³

In order to support the FBU's response to the proposed attacks on their bargaining structures, this paper will examine:

- The National Joint Council for Local Authority Fire and Rescue Services (NJC)

The paper will then examine relevant features of international, European, and domestic law, considering specifically:

- The ILO framework
- The European Convention on Human Rights
- The European Social Charter of 1961
- Domestic law

The paper concludes with a summary of findings, which indicate that the FBU will have strong grounds to resist the proposals.

National Joint Council for Local Authority Fire and Rescue Services (NJC)

The National Joint Council for the Fire Service is a forum for the conduct of collective bargaining for the Fire and Rescue Service. It was established in 1947, and negotiates over a range of matters, primarily pay and conditions in the service. Since its foundation, the NJC covered firefighters throughout England and Wales, with Scotland joining in 1952, and Northern Ireland from 1967, since when it has been a single negotiating body setting terms and conditions throughout the service on a UK-wide basis. With a modern and capable secretariat provided by the Local Government Association²⁴, the negotiating machinery comprises two bodies, the NJC proper, covering ‘all uniformed employees of Fire and Rescue Services in the United Kingdom in the roles of Firefighter to Area Manager’, and a Middle Managers Negotiating Body (MMNB), with ‘plenary powers to deal with the pay and conditions of middle managers (who are defined as employees in the roles of Station Manager, Group Manager and Area Manager)’. The MMNB performs this function ‘within the framework of the NJC’. While neither body is required to seek endorsement from the other for matters exclusively within their competence, both are required to refer to the other for any matter ‘that also affects employees within the scope of the other body’²⁵.

The function of the NJC and MMNB, as defined by its Constitution, is to make arrangements ‘to secure the largest measure of joint co-operation and agreement on conditions of service of those persons within its scope, and the settlement of differences between fire and rescue services and employees within their scope’²⁶. The bodies are empowered ‘to take any appropriate action that falls within the foregoing definition’. A non-exclusive list of the matters within the competence of the negotiating bodies is expressed as ‘(i) roles, pay and allowances; (ii) hours of duty and leave; (iii) discipline arrangements; (iv) procedure for appeals against dismissal or disciplinary action (including dismissal on disciplinary grounds) other than questions of discipline affecting individuals; (v) welfare arrangements’. Both bodies appoint an independent, non-voting Chair, and comprise 28 members with equal representation from the National Organisation of Employers of Local Authority Fire and Rescue Services and the Fire Brigades Union. The MMNB comprises representatives from the same Employer and Union bodies, and includes also the Fire Officers Association.

The NJC reaches national service-wide applicable terms that are agreed upon by both sides of the service, based on the outcome of complex and rigorous negotiations between those who most fully understand the processes involved, the needs of those involved, and the demands placed on the service and on workers. The agreements reached by this body are set out in the ‘Grey Book’, constituting the key positions agreed upon by the parties and setting a crucial framework for agreed working arrangements throughout the service. The terms and conditions in the Grey Book, and indeed the NJC itself, have legal force because they are incorporated into the contracts of employment between each firefighter in England and Wales and his or her employer²⁷. Thus the output of voluntary collective bargaining is crystallised into enforceable law.

Should bargaining reach an impasse within the NJC there is an established dispute resolution process²⁸. This procedure provides that where the parties ‘fail to reach agreement on any matter for which it has responsibility, that matter will be referred to ACAS for conciliation. Both sides will participate in the process of conciliation and act in good faith. Where conciliation fails to produce a settlement either side of the NJC may request arbitration through the services of ACAS. Following such a request, both sides shall fully participate. In such circumstances it follows that both sides have voluntarily agreed to take part in the arbitration process whenever it is invoked and have agreed in advance to be bound by the decision of the arbitrator’²⁹.

While the NJC at its creation was established with State support (at the same time as the far-reaching Fire Services Act of 1947 re-framed the service for a post-war world), the NJC itself has not been a statutory body since 1959. Thus the modern NJC in the Fire and Rescue Service exists independently as a voluntary

body established and supported by agreement the parties to it. Indeed, the NJC is in fact constituted as:

a collective agreement between representatives of fire and rescue authorities in the United Kingdom and representatives of the trade unions [...] as such it is intended to form a collective agreement as defined in Section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992³⁰.

In relation to the current proposals it is important to recognise that any action by the State aimed at dismantling the NJC would therefore amount to an act of State intrusion into a lawful, private, and long-standing voluntary agreement between the parties. Quite apart from any international law concerns, or the requirement to vary the contract of employment of every firefighter in the country, such an action would be a quite extraordinary act of State interference in the voluntary tradition that lies at the heart of the British industrial relations system. And as one eminent industrial relations academic memorably wrote: ‘Nothing seems able to produce such a united front of resistance in a trade union movement [...] than an affront to its tradition of voluntarism’³¹.

The tradition of voluntarism in British industrial relations has been fundamental throughout its history, and the UK retains a predominantly ‘voluntarist’ industrial relations culture to this day. One of the characteristics of the British voluntary system (though by no means unique to it) are large collective agreements that lack supporting legal frameworks and are entirely voluntary arrangements.

NJC agreements are between employers or groups of employers and one or more union partners. Several of these large NJC negotiating forums continue their work with the support of unions and employers alike, and they set terms and conditions for millions of workers. Despite a tendency to over emphasise³² the decentralised and deregulated nature of employment in the UK, the Fire and Rescue Service is in no way unique in maintaining its national bargaining structure. In fact, large-scale collective bargaining and national-level agreements remain overwhelmingly the dominant model in some large sectors, notably the National Health Service, local government and construction. The NJCs originated with State support but today operate without any specific legal framework underpinning their operation. The nature of voluntarism meant that the negotiating frameworks themselves – and the private contractual relations that they had established – could not be dissolved without radical intervention.

Across various industries and in the public sector, NJCs continue to set terms and conditions for millions of workers throughout the UK and in various sectors and trades. Examples of existing agreements include:

- The pay and terms of conditions of employment for local government services’ workers is determined by the National Joint Council for Local Government Services³³. The Single Status Agreement sets conditions for more than 1.4 million workers.
- The Construction Industry Joint Council (CIJC) Working Rule Agreement³⁴ is the largest industrial agreement within the construction industry, covering approximately 500,000 workers and setting minimum pay rates as well as standards on travel and fare rates.
- The National Joint Council for the Engineering Construction Industry (NJC)³⁵ reviews and administers the National Agreement for the Engineering Construction Industry - sometimes referred to as the ‘Blue Book’, or the NAEI, an agreement that dates back nearly 40 years. The agreement covers approximately 15,000 workers.
- The Thermal Insulation Contracting Industry National Agreement³⁶ covers working rules and conditions for several categories of workers employed by members of the Association in the thermal insulation contracting industry. The agreement dates back to 1947 and continues to be revised and amended in the course of negotiation between the parties.
- The Electrotechnical JIB sets employment standards in the electrical contracting industry, and refers to ‘over 144,000 cardholders’³⁷.

- The UNITE- BESA agreement for the heating and ventilation contracting industry³⁸.
- The Joint Negotiating Committee (JNC) for Youth and Community Workers³⁹ sets the national framework used to grade and pay youth work jobs. The function of the JNC is to agree the salary scales, yearly pay increases and other terms and conditions of service.
- The Joint Negotiating Committee for Local Authority Craft & Associated Employees negotiates the 'Red Book' collective agreement bringing together the coverage of two predecessor NJCs and sees member bodies set minimum thresholds on pay and terms and conditions of service for all craft and associated workers employed by local authorities⁴⁰.

NJC: the view of the union

'Firefighters' pay and conditions are negotiated through the National Joint Council for Local Authority Fire and Rescue Services (NJC). The NJC is a long-established collective bargaining body, established by agreement and enabling robust negotiation between employees and employers. The arrangement gives firefighters a democratic input through their chosen union, the FBU, into the terms and conditions which govern their working lives (and the resources and time available for life outside work). The abolition of the NJC would mark the end of industrial democracy in the Fire and Rescue Service. The NJC functions smoothly to ensure industrial relations are stable and efficiently managed.

The NJC is responsible for producing the Scheme of Conditions of Service, (Sixth Edition 2009), known as the Grey Book. This sets out the agreed national framework of terms and conditions, such as hours, pay, duty system, annual leave, maternity and paternity leave, health and safety, discipline and grievance. These outputs from the NJC are, as is normal, incorporated into the contracts of employment of firefighters. A degree of flexibility is possible because aspects of the NJC terms and conditions can be, and are, varied from time to time by agreement between the union and the employer at brigade level in order to accommodate local circumstances.

The full NJC meet three times a year, as does the Middle Managers' Negotiating Body (MMNB). The NJC's joint secretariat meets every four to six weeks to exchange information, progress negotiations and highlight potential conflicts on the horizon. The secretariat also assists with dispute resolution locally, providing a conciliation process to help both parties identify a mutually agreeable outcome. Last year it assisted three brigades in this way. Without the NJC, there will be more disputes, protracted over longer periods. Differential terms and conditions between brigades would lead to transfers of firefighters (particularly at the edges of brigade boundaries) to those with perceived better pay and conditions. This might be damaging to staffing levels. Local bargaining would replicate locally matters which could be dealt with nationally, wasting valuable time and resources. Without any mechanism for collective bargaining, were that to be the outcome of the Report under discussion, there is a clear danger that industrial relations would descend into anarchy.

The NJC's Technical Advisory Panel is one of the additional processes for dispute resolution, involving an independent chair.

The NJC also monitors legal developments and tribunals. For example in 2020 it oversaw the resolution to the part-time workers (prevention of less favourable treatment) employment tribunal ruling and ensured settlements were paid. Independent chair of the NJC, Lynette Harris, said: "this long-running legal case has evidenced the ability of the NJC to secure agreement and effectively administer the outcome including in a legal context." She also states that in addition to its obvious work, members "undertake a great deal of work that is not visible, much of which underpins those matters formally reported at NJC".

During the Covid pandemic the NJC swiftly agreed a national approach to risk assessments, which enabled thousands of firefighters to safely assist through new activities. Many such activities were outside existing job descriptions and contractual requirements but willingly and flexibly varied by agreement to ensure that, on the one hand, core work was not adversely affected and, on the other, that firefighters could make a major contribution to the alleviation of a national emergency.

In recent years the NJC has formed the Inclusive Fire Service Group, which seeks to tackle inequalities, in response to frequent criticisms of the culture across the service. The NJC has affirmed its commitment to improving equality, diversity and cultural issues and has devised practical strategies.

Finally, the NJC is flexible, and has evolved over time - and will continue to - to reflect changes in the service. Conditions of service are regularly subject to review and discussion, with each side free to bring proposals.

The overwhelming majority of firefighters are members of the FBU. They join, in particular because through the FBU they have a say over the conditions of their working lives. Their voice is heard through the NJC.

It is for these reasons that the NJC remains the FBU's preferred bargaining model⁹⁴¹.

NJC: the view of the employers

Significantly, the Employers also remain fundamentally supportive of the NJC as a negotiating body and are opposed to attempts to undermine or abolish the forum. Nick Chard, a (Conservative) local government Councillor, holds numerous public appointments on fire safety and fire regulatory bodies. Foremost among these is his position as the long-standing and experienced Chairman of the Employer's side on the National Joint Council for Local Authority Fire and Rescue Services (NJC). Councillor Chard has publicly spoken out against the plans to undermine the NJC, including a recently published piece for the Local Government Association, in which he set out a robust defence of the NJC:

The NJC has come under increasing levels of scrutiny and criticism in recent years. As with any institution, the NJC is not perfect and has never pretended to be, nonetheless I firmly believe it currently delivers value for money for fire authorities and their local communities, whilst also maintaining excellent employee and employer representation. One of the most recent criticisms is from Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) in England. Their 'State of Fire 2019' report asked if the 'NJC is no longer fit for purpose' and suggests that moving to a pay review body might be best for the sector; would this be an improvement? Aside from the fact that the NJC's remit goes well beyond pay, the benefits of this current model of negotiating machinery have many advantages, some well-known and others that are less well-known.

[...]

Another, often unfair, criticism of the NJC is that it can be slow to react and slow to achieve change, however in March at the start of the pandemic both sides of the NJC, employers' and employees' (FBU), entered into a Tripartite Agreement with the National Fire Chiefs Council (NFCC). We were able to quickly secure the necessary temporary changes to firefighters' terms and conditions to support the NHS, Ambulance Service and other partners to help our communities. Throughout the course of this national emergency, firefighters across the country have assisted the emergency service response with a range of important additional activities such as driving ambulances, delivering PPE and medical supplies, taking samples for antigen testing, providing infection control training to NHS staff and care home workers and sadly, even assisting with the movement of bodies. All of these vital activities have helped to

relieve pressure and free up important resource elsewhere in the healthcare system and continue to be available.

Reflecting on some of these criticisms of the NJC it is clear that more can and will be done to communicate the breadth and wider value of the NJC's work and make it even more effective and relevant. All members of the NJC are committed to ensuring the importance of the body, its functions and its benefits are promoted more widely. Far from being an obstacle to change, there are many instances where the NJC has actually facilitated the change that is required at local level through its dispute resolution work. Across the UK, the NJC ensures stability, a consistency of approach and removes the need to unnecessarily duplicate effort at a much-increased cost⁴².

The question of whether 20th Century bargaining machinery could function effectively in a crisis situation was put to the test recently during the recent global health pandemic, when the NJC was the forum relied upon for firefighters and the employers to reach agreement about crucial ground rules for the emergency response by the Fire and Rescue Service. The FBU and the employers are unanimous in their view that the machinery did work and allowed them to make necessary arrangements. The HMCIFRS report at various times expresses a view that contradicts the other parties, yet even it acknowledges, to a certain extent, that the machinery functioned effectively.

- The FBU says that, 'During the Covid pandemic the NJC swiftly agreed a national approach to risk assessments, which enabled thousands of firefighters to safely assist through new activities'⁴³.
- The Chair of the employers presents a similarly positive view, 'At the start of the pandemic both sides of the NJC, employers' and employees' (FBU), entered into a Tripartite Agreement with the National Fire Chiefs Council (NFCC). We were able to quickly secure the necessary temporary changes to firefighters' terms and conditions to support the NHS, Ambulance Service and other partners to help our communities'⁴⁴.
- The HMCIFRS report, although preoccupied with attacking the NJC and objecting to the way that role maps function, acknowledges that the main bargaining machinery worked, observing that 'The national agreement allowed firefighters to undertake additional roles outside their normal responsibilities'⁴⁵.

While statements such as those listed above show a degree of convergence - everyone seems to agree that certain aspects of the NJC machinery functioned effectively during the pandemic - there is nonetheless a clear disjuncture between the overall views of those that are party to the NJC (and are most directly affected by its operations), and the views expressed in the HMCIFRS report (written by an individual who is neither party to the NJC, nor who is directly affected by the NJC). This is perhaps unsurprising, and seems to gel with comments from a member of the NJC who advised the author of this paper that HMCIFRS 'has no understanding of the NJC'⁴⁶. This context may explain why the *State of Fire and Rescue* demonstrates little interest in how the NJC functions in practice, of the diverse range of issues that are discussed by the parties, of its role in facilitating the sharing of information and perspectives, or of the benefits generally of this forum for bringing the parties together to generated shared understanding. The HMCIFRS might have been better placed to make policy recommendations had more attention been given over to an attempt to understand the NJC, its composition, and its activities, rather than simply proposing its abolition.

The International Labour Organisation

Article 4 of International Labour Organisation (ILO) Convention No. 98 of 1950, the second most ratified of the ILO's Conventions (and of which the UK was the first signatory) states that

measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

The ILO's Declaration of Philadelphia annexed to the ILO Constitution:

...recognises the solemn obligations of the International Labour Organisation to further among the nations of the world programmes which will achieve –
(a) the effective recognition of the right of collective bargaining...

The ILO's *General Survey on the fundamental Conventions concerning rights at work in the light of the ILO Declaration on Social Justice for a Fair Globalization*, 2012 sets out the obligations of member States (all emphasis is in the original):

165. One of the ILO's principal missions is to promote collective bargaining the world over. This mission was set out in 1944 in the Declaration of Philadelphia, which forms part of the ILO Constitution and recognizes the solemn obligation of the International Labour Organization "to further among the nations of the world programmes which will achieve [...] the effective recognition of the right of collective bargaining". This principle was enshrined in Convention (No. 98), adopted five years later, which has since achieved almost universal endorsement in terms of ratification, bearing witness to the force of its principles in the majority of countries. In June 1998, the ILO took a further step with the adoption of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Declaration indicates that "all Members, even if they have not ratified the [fundamental] Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights". These principles include the effective recognition of the right to collective bargaining.

167. ... Collective bargaining is one of the principal and most useful institutions developed since the end of the nineteenth century. As a powerful instrument of dialogue between workers' and employers' organizations, collective bargaining contributes to the establishment of just and equitable working conditions and other benefits, thereby contributing to social peace. It also provides a basis for preventing labour disputes and determining procedures for the settlement of certain specific problems, particularly in the context of adjustment processes in the event of economic crisis or cases of force majeure, as well as worker mobility programmes. Collective bargaining is therefore an effective instrument which facilitates adaptation to economic, socio-political and technological change. The principal elements of Convention No. 98, with which most national law and practice is now aligned, are the following: (i) the principle of the independence and autonomy of the parties and of free and voluntary bargaining; (ii) the effort made, in the context of the various bargaining systems, to reduce to a minimum any possible interference by the public authorities in bipartite negotiations; and (iii) the primacy accorded to employers and their organizations and to trade unions as the parties to negotiations.

...

Promotion of collective bargaining – National legislation

198. Under the terms of the ILO Declaration on Fundamental Principles and Rights at Work, 1998,

collective bargaining is a fundamental right accepted by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realize in good faith. In this respect, Article 4 of Convention No. 98 sets out two essential elements: action by the public authorities to promote collective bargaining; and the voluntary nature of negotiation, which implies the autonomy of the parties.

In summary, the ILO requires of States: that they take active steps to promote collective bargaining; that a union should be able to bargain collectively with the relevant employers on behalf of its members where there is no other more representative union; and that though collective bargaining is voluntary that principle is not conflicted by a legal requirement on an employer to recognise a representative union for collective bargaining and not to obstruct collective bargaining. These rights apply under the terms of Convention No. 98 but also arising from State's membership of the ILO.

Application to firefighters: Convention 98

The broad principle outlined in Article 4 (above) applies without restriction to all workers in all sectors of employment, with the exception of two categories in respect of whom States may limit the application of the Convention; these being 'the armed forces and the police' (see Article 5). One further group is entirely outside of the ambit of the Convention, further to Article 6, which adds, 'This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way'. The ILO's Committee on Freedom of Association has considered the effect of Articles 5 and 6, affirming that 'only armed forces, the police and public servants engaged in the administration of the State may be excluded from collective bargaining' (*Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, ILO, 6th Edition, 2018⁴⁷, para 1239).

Unfortunately, Article 6 has generated some confusion, as governments and employers have sought to rely on the concept of 'public servants engaged in the administration of the State' to seek to exclude any number of categories of public sector workers from the ambit of the Convention. These attempts, while numerous, have been remarkably unsuccessful, and the ILO Committees have been at pains to emphasise the narrow interpretation to be applied to the phrase 'administration of the State', noting that 'a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98' (*Freedom of Association*, para. 1242).

In 2003 the UK Joint Committee on Human Rights incorrectly asserted that "it is proper to regard the Fire and Rescue Services as falling within the 'administration of the State'"⁴⁸. This conclusion contradicted what was a clear and well-established position within the ILO, and was therefore a perverse analysis, even at the time. It ought not to be possible for the same mistake to be made again now, however, since the European Court of Human Rights, in a 2009 Grand Chamber judgement, affirmed that it will follow ILO principles on questions such as the interpretation of 'administration of the State' with respect to collective bargaining rights (see below). Besieged by misinterpretations throughout the life of the Convention, the ILO's Committees have repeatedly addressed the question of what categories of workers can rightly be regarded as belonging within the 'administration of the State', and they have considered specifically the situation of firefighters on a number of occasions, in each case maintaining that firefighters are covered by Convention 98 and are therefore entitled to enjoy full protection of their collective bargaining rights.

The clear and emphatic position - that firefighters should enjoy full collective bargaining rights under Convention No. 98 and that they cannot be exempted from these rights - is one that both of the ILO's principal interpretative committees have maintained consistently.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) stated the position clearly in the late 1990s, ‘the Committee requests the Government to take measures to guarantee, both in law and in practice, that firefighters enjoy the right to organize and bargain collectively’ (Direct Request (CEACR) - adopted 1999, published 88th ILC session (2000), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Venezuela (Bolivarian Republic of) (Ratification: 1982)). It is a position the CEACR has maintained since, observing repeatedly in its analysis of Kazakhstan that,

while the armed forces and the police can be excluded from the application of the Convention, the same cannot be said for fire service personnel and prison staff. The Committee therefore requests the Government to take the necessary measures to ensure that these categories of workers are guaranteed the right to organize and to bargain collectively and requests the Government to indicate the measures taken to that end’ (Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Kazakhstan (Ratification: 2001), Observation (CEACR) - adopted 2014, published 104th ILC session (2015)).

In the most recent observations and requests from 2021 the CEACR has continued to assert this position, ‘the Committee recalls that the Convention applies to workers in the fire services and prison officers and accordingly requests the Government to take the necessary measures to amend the legislation to accord with the existing practice in relation to fire service workers and prison officers so as to ensure that they are able to enjoy formal rights to collective bargaining as guaranteed by the Convention’ (Direct Request (CEACR) - adopted 2020, published 109th ILC session (2021) Collective Bargaining Convention, 1981 (No. 154) - Saint Lucia (Ratification: 2000)).

The Committee on Freedom of Association (CFA) reached the same conclusions, which it has repeated on many occasions, for example, in the case of Japan where ‘the Committee once again urges the Government to [...] fully grant the right to organize and collective bargaining to firefighters’ (Committee on Freedom of Association, Interim Report - Report No 386, June 2018, Case No 2177 (Japan), para. 423).

The obligation to ‘encourage and promote’ bargaining

Decisions of the ILO’s expert committees have, over many years, affirmed that the voluntarism at the heart of Article 4 is of utmost significance. The ILO committees have concluded that the phrase ‘voluntary negotiation’ carries significant weight, while clarifying that the ratifying State’s duty is – as is plainly written in the text – to ‘encourage and promote’, rather than to ‘impose’. Much of the analysis has concerned governments’ attempts to re-draw bargaining mechanisms against the wishes of the parties.

A fundamental principle underlying the ILO position on collective bargaining is support for free and voluntary negotiation; as the CFA has said, ‘the voluntary negotiation of collective agreements, and therefore the autonomy of the bargaining partners, is a fundamental aspect of the principles of freedom of association’ (*Freedom of Association*, para. 1313). The CFA has also spoken of ‘the importance of respecting the autonomy of the parties in the collective bargaining process so that the free and voluntary character thereof, established in Article 4 of Convention No. 98, is ensured’ (*Freedom of Association*, para. 1314). And that if bargaining is to be effective, it ‘must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining’ (*Freedom of Association*, para. 1315).

Bargaining level: purely a matter for the parties

Concerning efforts to re-draw established bargaining frameworks, the CFA has found that ‘according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the

determination of the bargaining level is essentially a matter to be left to the discretion of the parties' and that 'consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority' (*Freedom of Association*, para. 1404-6). Clarifying that it would not seek to prioritise any particular bargaining model, the Committee affirmed that 'the fundamental principle concerns the need for the level of collective bargaining to be freely determined by the parties concerned' (*Freedom of Association*, para. 1407).

Echoing the position of the CFA, the CEACR has consistently ruled along the same lines, finding that 'the determination of the bargaining level is essentially a matter to be left to the discretion of the parties' (Direct Request (CEACR) - adopted 2018, published 108th ILC session (2019), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Spain). The CEACR has held this position consistently, and has urged governments to amend laws that threaten this position: the Committee 'requested the Government to: (i) revise [the Act] to ensure that the determination of the bargaining level is left to the discretion of the parties and is not imposed by law or the decision of the administrative authority' (Observation (CEACR) - adopted 2009, published 99th ILC session (2010), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Australia).

While neither Committee expresses a priority for any one bargaining model over another, both have expressed concerns that attempts to decentralise bargaining can threaten freedom of association. According to the CFA:

procedures systematically favouring decentralized bargaining of exclusionary provisions that are less favourable than the provisions at a higher level can lead to a global destabilization of the collective bargaining machinery and of workers' and employers' organizations and constitutes in this regard a weakening of freedom of association and collective bargaining contrary to the principles of Conventions Nos. 87 and 98 (*Freedom of Association*, para. 1408).

The same idea was expressed by the CEACR in very similar terms:

the adoption of procedures which systematically favour decentralized bargaining of less favourable clauses which replace clauses agreed at a higher level may result in the overall destabilization of collective bargaining machinery (Direct Request (CEACR) - adopted 2018, published 108th ILC session (2019), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Spain).

Dispute resolution in essential services

Under certain conditions the ILO does recognise the potentially beneficial role of third party involvement. The Committee on Freedom of Association outlines the following principles, 'if the negotiations are not successful because of disagreement, the Government should consider with the parties ways of overcoming such an obstacle through a conciliation or mediation mechanism, or, if the disagreements persist, through arbitration by an independent body trusted by the parties' (*Freedom of Association*, para. 1322), and that 'the intervention of a neutral, independent third party, in which the parties have confidence, may be enough to break a stalemate resulting from a collective dispute, which the parties cannot resolve by themselves' (*Freedom of Association*, para. 1323).

While accepting that a wide variety of mechanisms might usefully be involved in dispute resolution 'various arrangements can facilitate negotiations and help promote collective Bargaining' (*Freedom of Association*, para. 1324) the critical point is not the form of such a mechanism but the principle that any such 'machinery or procedures for arbitration or conciliation designed to facilitate bargaining between both sides of an industry should guarantee the autonomy of parties to collective bargaining' (*Freedom of Association*, para. 1324), and further that 'bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these bodies should be on a voluntary basis'

(*Freedom of Association*, para. 1325). The ILO Committees have been unimpressed with imposed and compulsory systems, the CFA stating that ‘the imposition of a compulsory arbitration procedure if the parties do not reach agreement on a draft collective agreement raises problems in relation to the application of Convention No. 98 (*Freedom of Association*, para. 1415) and that ‘provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98’ (*Freedom of Association*, para. 1416).

However, there is recognition by the ILO that firefighters as a specific occupational group may be considered ‘essential services’ (*Freedom of Association*, para. 840). This is a finding with implications for the forms of dispute resolution system that may be used, as the CFA has also said that:

recourse to compulsory arbitration in cases where the parties do not reach agreement through collective bargaining is permissible only in the context of essential services in the strict sense of the term (i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (*Freedom of Association*, para. 1417).

As per the finding above (*Freedom of Association*, para. 840), the CFA recognises that firefighters may be considered to fall within the group. There are two critical factors to highlight: firstly, such arbitration is ‘permissible only’ in a situation ‘where the parties do not reach agreement’ (ordinary collective bargaining processes must always be allowed to run their course before arbitration can be initiated); secondly, that where arbitration is imposed a framework of ‘compensatory guarantees’ must be provided and respected.

Having noted that intervention may be permissible where bargaining has reached a severe impasse, it is instructive to have regard to the CFA’s observations concerning the stage of bargaining at which disagreement may be considered sufficiently deadlocked to permit intervention: ‘there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified in stepping in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part’ (*Freedom of Association*, para. 1429), but this cannot be due to ‘the mere existence of a deadlock in a collective bargaining process’. This, the Committee has ruled ‘is not in itself a sufficient ground to justify an intervention from the public authorities to impose arbitration on the parties to the labour dispute. Any intervention by the public authorities in collective disputes must be consistent with the principle of free and voluntary negotiations; this implies that the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent and recourse to these bodies should be on a voluntary basis, except where there is an acute national crisis’ (*Freedom of Association*, para. 1430).

The European Convention on Human Rights

Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, states:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Article 11 does not explicitly refer to ‘collective bargaining’ but ‘the right to form and to join trade unions for the protection of his interests’ in Article 11 has been held to include the right to bargain collectively as an essential element of freedom of association, arising from the notion that freedom of association must be meaningful. The current view of the Court is expressed in the *Demir* case, at [154], where it was held that:

the right to bargain collectively with the employer has, in principle, become one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’ set forth in Article 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.

Application to firefighters

The Convention in principle extends freedom of association rights to all, with only narrow and clearly delineated exceptions. Article 11(2) of the Convention states that:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state’.

The Court has found that lawful restrictions imposed on members of the armed forces, of the police or of the administration of the State must also meet a pressing social need and be ‘necessary in a democratic society’ (*Tüm Haber Sen and Çınar v. Turkey*, 2006, paras. 35-35; *Adefdromil v. France*, 2014, paras. 42-45; and *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*, 2012, para. 62 et seq).

There have been attempts in parts of Europe to portray various public sector workers as falling within the category of ‘administration of the State’, but the European Court of Human Rights has followed ILO jurisprudence, understanding the concept to refer only to a small category of officials who are genuinely engaged in affairs of State. In the leading case of *Demir and Baykara v Turkey* (2009) 48 EHRR 54, [2009] IRLR 766 the Court explicitly based its reasoning on the ILO principles, observing that

in international law, the right to bargain collectively is protected by ILO Convention No. 98 [...] It states in Article 6 that it does not deal with the position of “public servants engaged in the administration of the State”. However, the ILO Committee of Experts interpreted this provision as excluding only those officials whose activities were specific to the administration of the State. With that exception, all other persons employed by government, by public enterprises or by autonomous public institutions should benefit, according to the Committee, from the guarantees provided for in Convention No. 98 in the same manner as other employees, and consequently should be able to engage in collective bargaining in respect of their conditions of employment, including wages’ (*Demir and Baykara*, at [147]).

The analysis of this point in the *Demir* case explicitly took its lead from the ILO position but did not represent a change of the Court’s position: it had already taken the view that the ‘administration of the State’ should be

interpreted narrowly (*Grande Oriente d'Italia di Palazzo Giustiniani v. Italy*, 2001, para. 31). Within this narrow band of exceptions it is clear that firefighters do not fall within the potentially excluded groups (which are strictly limited to the police, military and administration of the State). It is difficult to understand how the 'necessary in a democratic society' restriction could be applied. It is clear that industrial unrest or strikes in the Fire and Rescue Service could potentially engage such concerns, but it is difficult to see how an attempt to re-structure long-established and effective collective bargaining machinery could be viewed as 'necessary in a democratic society' to meet a 'pressing social need', however desirable it may be from the perspective of the Government.

Furthermore, the rights and interests which might be weighed against the Article 11 right to bargain collectively (i.e. the right not to bargain collectively or to derecognise, or to allow terms and conditions of employment to be settled by supply and demand) are not rights and interests protected by the Convention. This requires a yet higher standard to be deployed in order to justify restriction of the Convention right. In *Chassagnou v France* (1999) 29 EHRR 615, 7 BHRC 151, [1999] ECHR 25088/94 at [113] the ECtHR held:

In the present case the only aim invoked by the Government to justify the interference complained of was "protection of the rights and freedoms of others". Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society". The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a "pressing social need" capable of justifying interference with one of the rights guaranteed by the Convention. It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect "rights and freedoms" not, as such, enunciated therein. In such a case *only indisputable imperatives* can justify interference with enjoyment of a Convention right. (Emphasis supplied)

Obligation to promote collective bargaining

The State has a duty to 'promote' bargaining machinery, but this is a duty that is ideally passive and allows the parties to develop their own 'voluntary' arrangements. Hence, while Government action to dissolve a wage setting body established by the State was permitted by the ECHR in the *Unite* case⁴⁹, this was because that body was not seen as constituting the kind of voluntary negotiating machinery, supported by both parties, that the Court, the ILO and the European Committee of Social Rights have prioritised⁵⁰. The wages board was seen rather as an artificial structure imposed by the State, which it had no obligation to continue to impose. The polar opposite of the *Unite* case was the emblematic collective bargaining case of *Demir and Baykara* in which the Court refused to allow a State body (a court) to annul a collective agreement reached between the parties on a voluntary basis. The ruling on this point in the *Demir* case seems directly relevant in the context of the proposed reforms to the UK Fire and Rescue Service – for a State body to interfere with an agreement between the union and the employer constituted a breach of Article 11.

It is of significance that the *Demir and Baykara* judgment of the ECtHR was mirrored by a decision of the Supreme Court of Canada which reached a similar conclusion by a process of near parallel reasoning in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* [2007] 2 SCR 391. There the Supreme Court likewise expressly rejected its earlier case law in order to find (paras 23–31) that collective bargaining was thenceforth protected under Art 2(d) of the Canadian Charter of Rights which protects freedom of association. The court reviewed the historical importance of collective bargaining in Canada (at [43]–[67]); recognised that collective bargaining reflected the values of human dignity, equality, respect for personal autonomy and enhancement of democracy (at [80]–[86]); and relied on the relevant international treaty material and, in particular, the ILO (at [70]–[79]). The identical conclusions separately reached by these two courts shows an international convergence in relation to the rights inherent in freedom of association.

European Social Charter

The other relevant instrument at regional level is the **European Social Charter** of 1961, which under Article 6 says that

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

- 1 to promote joint consultation between workers and employers;
- 2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements ...⁷

The 'right to bargain collectively' is thus explicit in Article 6 of the Social Charter. The text of the *Digest of the Case Law of the European Committee of Social Rights*, (Published by the Council of Europe, latest edn., 1 September 2008) which summarises the judgments of the European Committee of Social Rights found in its Annual 'Conclusions', contains the following amplification of this paragraph:

According to Article 6§2, domestic law must recognise that employers' and workers' organisations may regulate their relations by collective agreement. If necessary and useful, i.e. in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements. Whatever the procedures put in place are, collective bargaining should remain free and voluntary. ...

It is open to States parties to require trade unions to meet an obligation of representativeness subject to certain general conditions. With respect to Article 6§2 such a requirement must not excessively limit the possibility of trade unions to participate effectively in collective bargaining. In order to be in conformity with Article 6§2, the criteria of representativeness should be prescribed by law, should be objective and reasonable and subject to judicial review which offers appropriate protection against arbitrary refusals.

Application to firefighters

While Article 5 of the Social Charter allows a State to place certain restrictions on the groups entitled to organise, this extends only to the police and military⁵¹. All workers falling outside these limitations (and this includes firefighters) should thus enjoy the right to organise, and all groups of workers who are permitted to organise ought fully to benefit from the rights established under Article 6. There are no restrictions established by Article 6 for example for workers in the 'administration of the State', and therefore it is clear that the right to collective bargaining for firefighters must be respected. There are the general grounds established by Article 31 under which Charter rights might be restricted⁵², but though it is possible to envisage arguments about a ban on the right to strike in respect of essential services, it is inconceivable that a restriction on the right to bargain collectively could fulfil the high threshold of the Article 31 requirement of being 'necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals'. Thus, in cases involving the police and the military (categories of workers whose rights may legitimately be restricted), whilst the right to strike has been held by the European Committee on Social Rights to be legitimately limited by a state (see, for example, *Junta Rectora del Ertzainen Nazional Elkartasuna v Spain* Appn No 45892/09, 21 April 2015), the right to bargain collectively cannot be so restricted: *Conseil Européen des Syndicats de Police (CESP) v. Portugal*, complaint no. 11/2001, 21 May 2002 at [58]; *Conseil Européen des Syndicats de Police (CESP) v. France*, complaint no. 101/2013, at [141]; *CGIL v Italy* complaint no 140/2016, 19 December 2016 at [4], *European Organisation of Military Associations (EUROMIL) v. Ireland*, Complaint No. 112/2014. Thus, in *European Confederation of Police (EuroCop) v. Ireland*, collective complaint No. 83/2012, the 'union' for

Irish Gardaí complained (amongst other issues) of being precluded by statute from joining other trade unions in the collective bargaining process. The Committee held:

73. ... police personnel must benefit from most trade union prerogatives. In practice, basic guarantees must be given to the police with regard to i) the constitution of their professional associations, ii) the trade union prerogatives that may be used by these associations; and iii) the protection of their representatives (CESP v. Portugal, ...).

...
109. Taking into consideration the special position of the police under the international instruments referred to above (see paragraphs 22, 28-29, 31-32), all of which provide for the possibility of restricting the freedom of association of police personnel, the Committee considers that states may choose to regulate the right to organise of the police through a mechanism applicable only to the police force. However, this may not deprive police representative associations from expressing their demands on working conditions and pay in an appropriate and effective manner.

...
120. In general, evaluated against the framework of trade union rights applicable to the Gardaí, the Committee considers that the contested restriction is not proportionate as it exploits in an undue manner the difference between police associations and trade unions established under national legislation.

121. Moreover, as the restriction has the factual effect of depriving the representative associations of the most effective means of negotiating the conditions of employment on behalf of their members, it cannot be considered as a proportionate measure for achieving its purposes.

In consequence of this decision, the Committee of Ministers of the Council of Europe adopted (8 October 2014) a Resolution (CM/ResChS(2014)12) adverse to Ireland. This is a serious diplomatic measure. The Committee of Ministers passed a similar resolution in relation to the ban on collective bargaining on the part of the Irish military: Resolution CM/ResChS(2018)2.

Obligation to promote bargaining

Ratifying States such as the UK are obliged by the terms of the treaty to ‘promote’ essentially the same kind of bargaining ‘machinery’ envisaged under ILO Convention No. 98, that is to say machinery for ‘voluntary negotiations’ and with the underlying aim that these should contribute to the overall regulation of terms and conditions of employment ‘by means of collective agreement’. The nature of the obligations arising under Article 6(2) have, of course, been tested, with ‘necessary and useful’ being one point of contention that the European Committee of Social Rights has been at pains to explain, ‘if necessary and useful, i.e. in particular if the spontaneous development of collective bargaining is not sufficient, positive measures should be taken to facilitate and encourage the conclusion of collective agreements’ (Digest of the Case Law of the European Committee of Social Rights, December 2018, Article 6.2, p99).

The Committee’s explanation is instructive as to core principles: if the parties develop sufficiently robust voluntary arrangements then the intervention of the State is neither ‘necessary’ nor ‘useful’. Ideally, bargaining should develop and proceed between the parties and the State should remain passive, allowing the parties to continue with their own arrangements. It is only if such mechanisms do not develop ‘spontaneously’ then the State is under an obligation to act or ‘to promote’ conditions under which the necessary machinery may develop. States that do take action to promote bargaining are free to adopt measures appropriate to local circumstances, but ‘whatever the procedures put in place’ the Committee has emphasised, ‘collective bargaining should remain free and voluntary’ (*Digest of the Case Law of the European Committee of Social Rights*, December 2018, Article 6.2, p99). Further emphasising this

commitment to voluntarism and the primacy of the wishes of the parties, the Committee adds that States ‘should not interfere in the freedom of trade unions to decide themselves which industrial relationships they wish to regulate in collective agreements and which legitimate methods should be used in their effort to promote and defend the interest of the workers concerned’ (*Digest of the Case Law of the European Committee of Social Rights*, December 2018, Article 6.2, p99). Giving a sense of how embedded this understanding is the Committee recently cited one of its decisions from 1991 as the basis for this 2019 finding, ‘direct state intervention in the collective bargaining process is a very serious measure’, European Committee of Social Rights, Conclusions XXI-3 - Croatia - Article 6-2 (2019)⁵³.

Dispute resolution

Article 6(3) of the European Social Charter obliges ratifying States ‘to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes’. The European Committee of Social Rights has expanded on what is meant here, stating that ‘any form of compulsory recourse to arbitration is a violation of this provision, whether domestic law allows one of the parties to defer the dispute to arbitration without the consent of the other party or allows the Government or any other authority to defer the dispute to arbitration without the consent of one party or both. Such a restriction is only allowed within the limits prescribed by Article G’ (Conclusions 2006, Moldova, Article 6§3). The restrictions permitted are set out under Article 31 of the Social Charter of 1961 (see footnote 52, identical to Article G of the Revised Charter) affirm that Charter rights ‘shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals’. The European Committee of Social Rights’ firm position against the blunt imposition of an all-out strike ban even in essential services⁵⁴ indicates that a high threshold would apply for such an argument to be successful. As with the ILO position, compliance with the Social Charter also requires strict independence for arbitration bodies, stating that ‘all arbitration systems must be independent, and the outcome of arbitration may not be predetermined by pre-established criteria’ (Conclusions XIV-1 (1998), Iceland).

Implications under UK law

The relevant provisions of the Fire Services Act 1947 dealing with the representation of Fire and Rescue Service employers and employees were repealed in 1959, by which time the NJC was firmly established as a body meeting by agreement between the parties. The NJC is now in fact constituted as:

a collective agreement between representatives of fire and rescue authorities in the United Kingdom and representatives of the trade unions [...] as such it is intended to form a collective agreement as defined in Section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992.⁵⁵

Public law

The form of any future Fire and Rescue Service industrial relations body is somewhat complicated by the provisions of the Fire and Rescue Service Act 2004, under which a power was established (though apparently never used) to make regulations to establish a bargaining system:

s. 32 Negotiating bodies

- (1) The Secretary of State may by regulations make provision for the establishment of one or more bodies of persons (negotiating bodies) for the purpose of negotiating the conditions of service of employees of fire and rescue authorities.
- (2) Regulations under this section must provide for a negotiating body established by the regulations to be composed of—
 - (a) persons representing the interests of some or all fire and rescue authorities;
 - (b) persons representing the interests of some or all employees of fire and rescue authorities;
 - (c) an independent chairman.

As long as the present NJC continues to function (the 2004 Act contains no provision that would authorise the winding up of the NJC), the s. 32 power remains in abeyance. However, were the proposals set out in the HMCIFRS report to be implemented such that the NJC were to be dismantled (other than via the mechanism of primary legislation - which could repeal s. 32), then the statutory powers would take on a new significance. This is because the discretion established under s. 32 would remain in existence, and ordinary principles of administrative law would bar the Secretary of State from any attempt to evade or to fetter that discretion (for example, by establishing a body that would conflict with the form and purpose envisaged by the statute).

The case of *R v Secretary of State for the Home Department ex parte Fire Brigades Union*⁵⁶ is instructive as to the applicable principles of law. In that case, strongly analogous to the present situation, the Secretary of State sought to establish a compensation scheme under prerogative powers, disregarding an unused but pre-existing discretionary power conferred by statute⁵⁷. The House of Lords affirmed that the Secretary of State could not - by purported exercise of prerogative powers - evade the continuing responsibility to exercise discretion conferred by the statute. Although the statute creates only a discretion rather than a specific or time-bound duty, the discretion persists nonetheless and is not one that the Secretary of State has power to evade or abrogate. As per the speech of Lord Nicholls:

... although he is not under a legal duty to appoint a commencement day, the Secretary of State is under a legal duty to consider whether or not to exercise the power and appoint a day. That is inherent in the power Parliament has entrusted to him. He is under a duty to consider, in good faith, whether he should exercise the power. Further, and this is the next step, if the Secretary of State considers the matter and decides not to exercise the power, that does not end his duty. The statutory commencement day power continues to exist. The minister cannot abrogate it. The power, and the concomitant duty to consider whether to exercise it, will continue to exist despite

any change in the holders of the office of Secretary of State. The power is exercisable, and the duty is to be performed, by the holder for the time being of the office of one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978, sections 5 and 12(2) and Schedule 1. So although he has decided not to appoint a commencement day for sections 108 to 117, the Secretary of State remains under an obligation to keep the matter under review. This obligation will cease only when the power is exercised or Parliament repeals the legislation. Until then the duty to keep under review will continue.

The implications of this for the present situation are clear: were the NJC to be dissolved by a mechanism other than primary legislation (which also repealed s. 32), then s. 32 would be an obstacle to any initiative that might thwart or frustrate the statutory discretion. This would be the case most clearly were the Secretary of State to authorise the establishment of a Pay Review Body (PRB). This is because the PRB (lacking the fundamental character of being a 'negotiating body') would intrude clearly into the realm of Fire and Rescue Service industrial relations, but in a manner incompatible with the outstanding statutory obligation, which concerns the establishment, specifically, of a 'negotiating body'. Obligated to retain and not to frustrate or fetter the s. 32 discretion, the Secretary of State would be prevented from implementing – under prerogative powers – any policies that would create incompatibility with system envisaged by s. 32, again from speech of Lord Nicholls:

This statutory duty is not devoid of practical consequence. By definition, the continuing existence of this duty has an impact on the Secretary of State's freedom of action. Since the legislature has imposed this duty on him, it necessarily follows that the executive cannot exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty. The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review.

In the FBU case, their Lordships also considered the question of whether a scheme introduced under prerogative powers but incompatible with the continued free operation of a pre-existing statutory discretion might be argued to constitute merely an 'interim' measure, and therefore might not frustrate the statutory obligation. The notion was dismissed by Lord Nicholls:

The new ex gratia scheme is intended to mark out the way ahead for the foreseeable future. It is intended to be the long-term replacement of the existing ex gratia scheme and its statutory embodiment. It is an alternative, not a stopgap. It is being brought into operation on the footing that sections 108 to 117 will never come into operation. The Home Secretary will, of course, monitor the operation of the tariff scheme. He will consider recommending to Parliament that the tariff scheme itself should be put on to a statutory basis once it has had time to settle down and any teething troubles have been resolved. But there is no expectation of ever bringing the statutory scheme into operation.

This is not just a matter of words, or of presentation. The matter goes beyond ministerial statements of intention. The steps being taken would in practice make it very difficult, if not impossible, for the Home Secretary at any time in the future to exercise the commencement day power. The Criminal Injuries Compensation Board will be dismantled, and a new authority will replace it. There will be other major procedural changes. The inescapable conclusion is that the Home Secretary has effectually "written off" the statutory scheme and that once the tariff scheme has been introduced, there would be no realistic prospect of him being able to keep the exercise of the commencement day power under review. By setting up the tariff scheme the minister has set his face in a different direction. He has struck out down a different route and thereby disabled himself from properly discharging his statutory duty in the way Parliament intended.

The implication of the s. 32 discretion, and the well-established House of Lords authority confirming the relevant public law principles that would apply, is that the only way forward for the Government, should they wish to proceed with the suggestion to collapse the NJC and establish in its place a PRB, will be through primary legislation that would include the repeal of s. 32. This requirement for primary legislation would require a significant commitment to parliamentary time in an overcrowded schedule. Furthermore, to pursue this ambition through the parliamentary process seems certain to generate a very public row with firefighters. Given the complex domestic law obstacles to what may have been assumed would be a simple administrative reform, it may be that the Government will be less enthusiastic to pursue reform of the 70-year old Fire and Rescue Service NJC.

Trade Union and Labour Relations (Consolidation) Act, 1992

Another relevant factor of UK domestic law that may frustrate implementation of any attempt to reduce the range of issues dealt with under collective bargaining in the Fire and Rescue Service is the prohibition on employer ‘inducement’ to surrender, in whole or in part, the terms of employment that are covered by collective bargaining. Depending on the mechanisms employed in any effort to implement the revision of Fire and Rescue Service collective bargaining, s. 145B may present a further effective barrier, essentially requiring that the range of matters determined by collective bargaining must be an outcome of collective bargaining, and cannot merely be by unilateral offer on the part of the employer.

s. 154B Inducements relating to collective bargaining

- (1) A worker who is a member of an independent trade union which is recognised, or seeking to be recognised, by his employer has the right not to have an offer made to him by his employer if—
 - (a) acceptance of the offer, together with other workers’ acceptance of offers which the employer also makes to them, would have the prohibited result, and
 - (b) the employer’s sole or main purpose in making the offers is to achieve that result.
- (2) The prohibited result is that the workers’ terms of employment, or any of those terms, will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.

The section makes it unlawful to make an offer to a worker or workers with the sole or main purpose being that some or all of the terms of employment will no longer be determined by collective agreement (this is the ‘prohibited result’). If, in the context of any attempt to re-organise firefighter bargaining machinery, a situation is brought about in which Fire and Rescue Service employers seek to establish bargaining relationships with firefighters that have the long-term and intentional effect of reducing the issues covered by collective bargaining – other than by agreement during the course of collective bargaining – then s. 145B will render such efforts unlawful. Provisions 145A-E, introduced as a legislative response to the European Court of Human Rights decision in *Wilson v United Kingdom* [2002], are also relevant. Section 145D(2) places the burden of proof on the employer to demonstrate the main or sole purpose in respect of which any offer might have been made, and s. 145D(4) states that factors that ‘must be taken into account’ include recent changes or attempts to change bargaining arrangements.

s. 145D Consideration of complaint

- (2) On a complaint under section 145B it shall be for the employer to show what was his sole or main purpose in making the offers.
- (4) In determining whether an employer’s sole or main purpose in making offers was the purpose mentioned in section 145B(1), the matters taken into account must include any evidence—
 - (a) that when the offers were made the employer had recently changed or sought to change, or did not wish to use, arrangements agreed with the union for collective bargaining,
 - (b) that when the offers were made the employer did not wish to enter into arrangements proposed by the union for collective bargaining, or
 - (c) that the offers were made only to particular workers, and were made with the sole or main purpose of rewarding those particular workers for their high level of performance or of retaining them because of their special value to the employer.

The effect of these provisions is that it will not be possible for employers lawfully to unilaterally downgrade the range of issues covered by collective bargaining.

Fire as a matter within the competence of the devolved Governments

Another area where firefighters have raised concerns with the author of this paper is in relation to the realities of devolved government. The HMCIFRS report, on the one hand, argues that devolution is a factor in support of its proposals:

Consideration also needs to be given as to whether it is right that these arrangements cover the whole of the UK. Fire is a devolved matter. I am unconvinced that a UK-wide body can provide the flexibility needed to protect the best interests of staff and services across the UK⁵⁸.

Yet, at the same time, the report does not acknowledge that the changes proposed would have a UK-wide impact in respect of devolved matters, and this has real and practical implications. Devolution has fundamentally changed the constitutional arrangements of the UK. This impacts sweeping areas of legislation and policy implementation concerning public services, and requires multi-government consultation before changes can be introduced impacting on devolved matters. Any steps taken by the UK Government to implement the proposals outlined in the HMCIFRS report will thus require the discussion and participation also of the devolved administrations of Northern Ireland, Scotland and Wales, further to the position expressed in the Memorandum of Understanding:

The UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature⁵⁹.

It was unclear to the author of this paper whether the devolved administrations have any appetite for a proposal to abolish firefighter bargaining structures, or whether any inter-governmental discussions concerning such proposals have taken place, but in addition to the potential hurdles of securing political support from the devolved administrations it will be necessary also for the UK Government to recognise that changes in respect of devolved matters will need a significant commitment of governmental and parliamentary time and resources. As UK Government guidance notes, this can be a complex and lengthy process:

UK departments preparing Bills need to be alive to the possibility of a Legislative Consent Motion being necessary in one or more of the devolved legislatures. They should be aware that this can be a complex process and they must ensure that they allow adequate time for the devolved administrations to consider the issues full⁶⁰.

The requirement for consent to be sought from the devolved governments in respect of changes impacting devolved matters is not necessarily a barrier to the implementation of policies outlined in the HMCIFRS report, but the practicalities and timescales involved may be rather more onerous than appear to have been anticipated (at least, so far as the HMCIFRS report acknowledges). What may, however, prove to be a more fundamental hurdle, is the practical political reality that the required consent may not be forthcoming.

The UK / EU Trade and Cooperation Agreement

Though the UK has now left the European Union so that EU law no longer applies, the UK's Brexit deal, the Trade and Cooperation Agreement, ratified 30 April 2021, is another source for the international law obligations of the ILO and the European Social Charter, which provides for its own mechanism for enforcement by the other party.

Article 399(2) provides:

In accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at Geneva on 18 June 1998 by the International Labour Conference at its 86th Session, each Party commits to respecting, promoting and effectively implementing the internationally recognised core labour standards, as defined in the fundamental ILO Conventions, which are:

(a) freedom of association and the effective recognition of the right to collective bargaining;

...

Article 399(5) provides that:

Each Party commits to implementing all the ILO Conventions that the United Kingdom and the Member States have respectively ratified and the different provisions of the European Social Charter that, as members of the Council of Europe, the Member States and the United Kingdom have respectively accepted ...

And, in relation to the UK a footnote makes clear that this is the 1961 version. Article 399(6) provides: Each Party shall continue to promote, through its laws and practices, the ILO Decent Work Agenda as set out in the 2008 ILO Declaration on Social Justice for a Fair Globalization (the “ILO Decent Work Agenda”) and in accordance with relevant ILO Conventions, and other international commitments, in particular with regard to:

(a) decent working conditions for all, with regard to, inter alia, wages and earnings, working hours, maternity leave and other conditions of work;

(b) health and safety at work, including the prevention of occupational injury or illness and compensation in cases of such injury or illness; and

(c) non-discrimination in respect of working conditions, including for migrant workers.

These are some of the matters currently regulated by the NJC the process of which is guaranteed by the instruments cited in 399(6). Article 399(7) provides that:

Each Party shall protect and promote social dialogue on labour matters among workers and employers, and their respective organisations, and with relevant government authorities.

The phrase ‘protect and promote’ appears to contradict the proposal to abolish the machinery of social dialogue which the NJC comprises.

Summary and Conclusions

The National Joint Council for Local Authority Fire and Rescue Services (NJC) is a robust and long-established vehicle for discussion, negotiation, and agreement. The NJC has stood the test of time, retains the support of employers and unions, and proved its worth and efficacy during the pandemic (a point that is made assertively by both union and employers, and which is acknowledged by the HMCIFRS, despite its simultaneous attempts to portray the NJC as an obstacle). The NJC exists on the basis of a voluntary agreement, and is not dependant on government or legislative support. It cannot be ‘repealed’, and the Government has limited options to interfere with such a private agreement, short of radical action that would be an affront to both fundamental legal concepts about the freedom of contract, and to the voluntary traditions of the British industrial relations system. While ultimately the Government might seek to proceed with such a radical intrusion, it would be required to justify this action under international law, as the union would almost certainly mount a challenge. Several international treaties place powerful negative obligations on the State to refrain from interference in existing bargaining arrangements, particularly where these demonstrate the effectiveness, continuity, stability and support of the Fire and Rescue Service NJC.

The core trade union rights of firefighters, including the rights to organise and collective bargaining, are protected by the ILO instruments. The ILO Committees have been absolutely clear on this point, in numerous cases, and over many years: they have consistently rejected the mistaken view that firefighters are members of the ‘administration of the State’. Any attempt to interfere with firefighter bargaining rights will therefore almost certainly engage ILO Convention 98. The European Convention on Human Rights has also considered the ‘administration of the State’ exclusion, and has taken both a narrow view of this exclusion and has increasingly expressed its intention to take a clear lead from the interpretations provided by the ILO Committees. It thus seems likely that any interference with firefighter bargaining rights would engage the rights protected under Article 11 of the European Convention on Human Rights. Article 6 of the European Social Charter of 1961 is framed as a broad right of general applicability to all workers and any interference with firefighter bargaining rights will therefore very likely engage Article 6 rights under the Social Charter.

There are strong principles common to ILO Convention 98 and Article 11 of the European Convention on Human Rights, which require that a State must not interfere with existing bargaining arrangements that are supported by the parties. To do so in the face of international law and the opposition of the parties would amount to a significant violation of rights. The European Committee of Social Rights says that a State is permitted to interfere in bargaining arrangements only when doing so is ‘necessary and useful’, and that ‘direct state intervention in the collective bargaining process is a very serious measure’. If the UK Government interferes with existing bargaining arrangements against the will of the parties there are strong reasons to believe this would be contrary to all three instruments discussed, and furthermore that the action would be regarded as a particularly serious violation.

There are also matters of domestic law that will present procedural barriers to any attempt at significant restructuring of Fire and Rescue Service industrial relations, such as are proposed. Primary legislation will be required to repeal a power arising under the Fire and Rescue Service Act 2004, that obligates the Secretary of State to keep under consideration the establishment of ‘negotiating bodies’ (PRBs will not meet this standard). The demands on the parliamentary schedule and the likelihood that this process would involve a very public row with firefighters may persuade the Government that the HMCIFRS proposals will require more work, energy, money and political difficulty than may have been given consideration. This is compounded of course by the requirement for consultation and consent from the devolved governments. And the incompatibility of the proposed approach with ILO principles is also completely at odds with the commitments re-emphasised and accepted so recently under the UK-EU Trade and Cooperation Agreement ratified of 10 December 2020, which re-assert the international law obligations of the ILO and the European Social Charter.

Recommendations

The Fire and Rescue Service collective bargaining machinery has functioned effectively for the past 70 years, and retains the support of both employer and employee representatives.

Our recommendations are as follows:

For the UK Government

- To recognise that the Fire and Rescue Service collective bargaining machinery has functioned effectively for the past 70 years, and that this existing machinery retains the support of both employer and employee representatives.
- To recognise that an uninvited intervention into established bargaining, such as is proposed by the HMICFRS report, would be incompatible with the UK's commitments under the ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and likely also to contravene both the European Convention on Human Rights and the Social Charter.
- To acknowledge that further to the Fire and Rescue Services Act 2004 s.32, the Secretary of State remains under a discretionary obligation concerning the establishment of a 'negotiating body' and that without primary repealing legislation this obligation cannot lawfully be fettered or frustrated (which would be the case were the Government to establish an incompatible non-negotiating body).
- To acknowledge that the recent commitment under Article 399(7) of the UK-EU Trade and Cooperation Agreement to 'protect and promote social dialogue on labour matters among workers and employers' is incompatible with the proposal to abolish social dialogue machinery in the Fire and Rescue Service.
- To solicit the advice of the parties to the NJC concerning their priorities for Fire and Rescue Service bargaining.

For HMICFRS

- To recognise that the Fire and Rescue Service collective bargaining machinery has functioned effectively for the past 70 years, and that this existing machinery retains the support of both employer and employee representatives.
- To recognise that the proposals set out in State of Fire and Rescue – The Annual Assessment of Fire and Rescue Services in England 2020 do not correspond with the position as stated by the representatives of either employers or employees within the bargaining group.
- To recognise that the intervention into bargaining proposed by the HMICFRS report would be incompatible with the UK's commitments under the ILO's Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and likely also to contravene both the European Convention on Human Rights and the Social Charter.
- To solicit the advice of the parties to the NJC concerning their priorities for Fire and Rescue Service bargaining.

For Firefighter employers

- To continue to support the existing NJC arrangements and to continue to publish their support for the institution.
- To cooperate with and seek agreement with the FBU and other NJC parties in common defence of the existing NJC arrangements
- To advise Government of their views concerning the existing bargaining arrangements

For the FBU

- To cooperate with and seek agreement with employers in common defence of the existing NJC arrangements
- To advise Government of their views concerning the existing bargaining arrangements
- To anticipate the engagement of UK legal services for the purposes of judicial review in the event that any significant changes are implemented contrary to the requirements of s.32 of the Fire and Rescue Service Act 2004 without primary legislation to repeal the obligations arising under that Section.
- To initiate discussions with the EPSU firefighters network and the Public Services International to prepare for the possibility of swift and effective engagement with the international supervisory mechanisms of the Council of Europe and of the ILO
- To liaise further with the IER/ICTUR to plan for the strategic use of international complaints mechanisms, including specifically which mechanisms to engage and how to formulate approaches to the supervisory bodies to avoid creating problems with the rules on parallel litigation of substantially similar issues with multiple bodies.

- 1 With thanks to Professor Keith Ewing, Lord John Hendy QC, and Carolyn Jones of the Institute of Employment Rights for their comments on a draft of this paper.
- 2 From <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/state-of-fire-and-rescue-2020-single-page-format.pdf>
- 3 These are described as: '1. identifying and determining risk as part of the IRMP process; 2. identifying and measuring emergency response standards and approaches; 3. defining what are high-risk premises for the purposes of fire protection; and 4. setting an expectation for how frequently high-risk premises, and parts of those premises, should be audited for compliance with fire safety legislation). There should be completion or significant progress in the four priority areas specified above, towards a common set of definitions and standards for fire and rescue services to adopt and apply as soon as reasonably practicable, for each of the four priority areas'.
- 4 *State of Fire and Rescue – The Annual Assessment of Fire and Rescue Services in England 2020*, Her Majesty's Chief Inspector of Fire and Rescue Services (Jan. 2021), p20
- 5 *State of Fire and Rescue*, p21
- 6 *State of Fire and Rescue*, p21
- 7 *State of Fire and Rescue*, p21
- 8 *State of Fire and Rescue*, p21
- 9 *State of Fire and Rescue*, p21
- 10 *State of Fire and Rescue*, p21
- 11 *State of Fire and Rescue*, p22
- 12 *State of Fire and Rescue*, p22
- 13 *State of Fire and Rescue*, p25
- 14 *State of Fire and Rescue*, p26
- 15 *State of Fire and Rescue*, p28
- 16 *State of Fire and Rescue*, p28
- 17 *State of Fire and Rescue*, p28
- 18 *State of Fire and Rescue*, p28
- 19 *State of Fire and Rescue*, p31
- 20 *State of Fire and Rescue*, p29
- 21 *State of Fire and Rescue*, p29
- 22 Now, Schedule A1, Trade Union and Labour Relations Act 1992.
- 23 ILO Convention No. 151 is also ratified by the UK but is of no relevance to the present case. This is because the terms of Convention No. 151 cannot be applied to undermine the situation of workers who are protected by the more robust framework of Convention No. 98 (see Article 1 of Convention 151, and also the decision of the CFA, '...Article 4 of Convention No. 98 should be applicable in preference to Article 7 of Convention No. 151', *Freedom of Association: Compilation of decisions of the Committee on Freedom of Association*, ILO, 6th Edition, 2018, para.1500). This is clearly the case for firefighters (see chapter III of this report).
- 24 National Joint Council for Local Authority Fire and Rescue Services ('NJC for Fire'), at: <https://www.local.gov.uk/national-joint-council-local-authority-fire-and-rescue-services>
- 25 NJC for Fire, Constitution, Article 1(3)
- 26 NJC for Fire, Constitution, Article 6
- 27 This is the ordinary process under which the terms of collective agreements attain force of law in the British system and is typically set out in the employment contract or terms of services, see for example Article 25 of the Terms of Employment for Grey Book Staff issued by Warwickshire Council, online at: <https://api.warwickshire.gov.uk/documents/WCCC-575-3040>
- 28 NJC for Fire, Constitution, Article 30
- 29 further procedural matters are dealt with under Article 31
- 30 NJC for Fire, Constitution, Article 34
- 31 A D Flanders, 'The Tradition Of Voluntarism', *British Journal of Industrial Relations* (Vol. 12, Iss. 3) 1974, pp352-370
- 32 Some of the UK's leading modern employment law reference books don't even mention the existence of the vast National Joint Councils, or their associated agreements
- 33 Details available from Local Government Association, at: <https://www.local.gov.uk/our-support/workforce-and-hr-support/local-government-services>
- 34 Copies of the 'Working Rule Agreement, 2018' are available from Construction Industry Publications at: <https://www.cip-books.com/2018-cijc-working-rule-agreement-and-updated-guide-now-available/#>
- 35 <https://www.njceci.org.uk/>
- 36 <https://tica-acad.co.uk/wp-content/uploads/2019/03/TICI-National-Agreement-2019-2021.pdf>
- 37 <https://www.jib.org.uk/>
- 38 <https://www.thebesa.com/employment-affairs/national-agreements/>
- 39 [https://www.nya.org.uk/youth-work/jnc/#:~:text=The%20Joint%20Negotiating%20Committee%20\(JNC,professional%20youth%20worker](https://www.nya.org.uk/youth-work/jnc/#:~:text=The%20Joint%20Negotiating%20Committee%20(JNC,professional%20youth%20worker)
- 40 <https://www.local.gov.uk/our-support/workforce-and-hr-support/local-government-services/green-book-payscales-and-other-2>
- 41 FBU Statement provided to author, May 2021
- 42 'Are recent criticisms of the Fire Service negotiating machinery fair?'
- 43 FBU statement provided to author of this paper.
- 44 Are recent criticisms of the Fire Service negotiating machinery fair?'
- 45 *State of Fire and Rescue*, p28.
- 46 Employee-side NJC member comment to author of this report
- 47 Hereinafter '*Freedom of Association*'
- 48 Joint Committee on Human Rights, Eight Report (2003), para. 9 (re: Fire Services Bill), at: <https://publications.parliament.uk/pa/jt200203/jtselect/jtrights/90/9003.htm>.
- 49 *Unite the Union v. the United Kingdom*, 2016
- 50 The Unite case followed a similar vein mined by the Court for many years, seen in the following cases: no right to a collective agreement (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 2014, para. 85); no right for a union to maintain a collective agreement on a particular matter for an indefinite period (*Swedish Transport Workers Union v. Sweden*, 2004); no requirement under the Convention that an employer enters into, or remains in, any particular collective bargaining arrangement or accede to the requests of a union on behalf of its members (*UNISON v. the United Kingdom*, 2002). 257; no obligation to provide a mandatory statutory mechanism for collective bargaining (*Unite the Union v. the United Kingdom*, 2016, para. 65 and *Wilson, National Union of Journalists and Others v. the United Kingdom*, 2002, para. 44). Essentially this line of reasoning shows that the State is under only a limited obligation to take any positive action. Conversely, as in the *Demir* case, there is a strong negative obligation preventing the State from taking unwanted or intrusive action, such as dismantling voluntary machinery or imposing any form of structure against the wishes of freely contracting parties.
- 51 restrictions to organising are only possible for the police and armed forces under Article 5.
- 52 Article 31 provides: (1) The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals. (2) The restrictions permitted under this Charter to the rights and obligations set forth herein shall not

- be applied for any purpose other than that for which they have been prescribed.
- 53 The Committee's Conclusion in respect of Croatia continues '...which could only be justified according to the relevant conditions laid down in Article 31 of the 1961 Charter'. It is not necessary here to expand at length on a detailed rebuttal of the limited grounds set out in Article 31 (under which restrictions may be applied to certain Charter rights). These exceptions are – in the view of the author of this report – unlikely to be of relevance to the structure of bargaining machinery in the Fire and Rescue Service. While it is certainly arguable that restrictions of the right to strike, for example, might be permitted on Article 31 grounds relating to 'protection of the rights and freedoms of others or for the protection of public interest, national security, public health', such considerations are unlikely to be accepted as met with regard merely to the form taken by bargaining machinery.
- 54 Digest of the Case Law of the European Committee of Social Rights, paras. 583
- 55 NJC for Fire, Constitution, Article 34
- 56 [1995] 2 AC 513
- 57 In that case, the statutory discretion concerned ss. 108-117 of the Criminal Justice Act 1988
- 58 *State of Fire and Rescue*, p21
- 59 Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee (Paragraph 14), at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf
- 60 Guidance on Devolution: Advice for civil servants and policymakers on taking account of devolution when working on policies and managing services, at: <https://www.gov.uk/guidance/guidance-on-devolution#how-devolution-affects-the-way-governments-work>

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Institute of Employment Rights

About the Institute

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

We provide the research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of our unique network of academics, lawyers and trade unionists.

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

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The National Joint Council for Local Authority Fire and Rescue Services (NJC) is a robust and long-established vehicle for discussion, negotiation, and agreement. The NJC has stood the test of time, retains the support of employers and unions, and proved its worth and efficacy during the pandemic. The NJC exists on the basis of a voluntary agreement, and is not dependant on government or legislative support. It cannot be 'repealed', and the Government has limited options to interfere with such a private agreement, short of radical action that would be an affront to both fundamental legal concepts about the freedom of contract, and to the voluntary traditions of the British industrial relations system.

While ultimately the Government might seek to proceed with such a radical intrusion, it would be required to justify this action under international law, as the union would almost certainly mount a challenge. Several international treaties place powerful negative obligations on the State to refrain from interference in existing bargaining arrangements, particularly where these demonstrate the effectiveness, continuity, stability and support of the Fire and Rescue Service NJC.

There are also matters of domestic law that will present procedural barriers to any attempt at significant re-structuring of Fire and Rescue Service industrial relations, such as are proposed. Primary legislation will be required to repeal a power arising under the Fire and Rescue Service Act 2004, that obligates the Secretary of State to keep under consideration the establishment of 'negotiating bodies' (PRBs will not meet this standard).

£5 trade union and students
£10 others