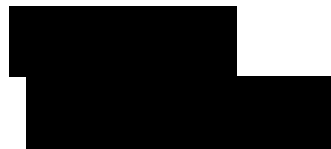


Independent Review of Administrative Law
Panel

contact:
email:



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19 October 2020

Dear Sir/Madam

Letter in response to call for evidence from the Independent Review of Administrative Law panel

We are writing in response to the Independent Review of Administrative Law panel's call for evidence, to state our support for the existing process of judicial review, and to highlight the importance of the judicial review process to trade unions and working people.

The Trades Union Congress (TUC) is the voice of Britain at work. We represent more than 5.5. million working people in 48 unions across the economy. We campaign for more and better jobs and a better working life for everyone, and we support trade unions to grow and thrive.

Trade unions play a vital role in ensuring that the rights and interests of working people are represented and recognised. For example, we advocate the importance of strong collective bargaining rights, appropriate regulation and enforcement to ensure the protection of employment rights, as well as equality of treatment for all, regardless of factors such as race, religion, age, gender, disability, sexuality and access to financial resources.

Judicial Review is a vital part of the way in which the UK protects its reputation for governance in accordance with the rule of law, respect for constitutional principles, and access to justice. These are important principles for the trade union movement.

Therefore, we believe strongly in the value of the judicial review process and the existing right of workers, and trade unions on their behalf, to make full use of this.

Frances O'Grady *General Secretary* Paul Nowak *Deputy General Secretary*

The IRAL panel has stated it is interested in understanding whether the current system strikes the correct balance between the rights of individuals to challenge executive action and that of the executive to carry on the business of government.

We are of the view that at present the correct balance is being struck. We are strongly opposed to any procedural or substantive changes to the existing process of judicial review which would in any way weaken the ability of individuals (or organisations representing them) to pursue judicial review.

Suitable parameters already exist so that judicial review is limited to where there is illegality, procedural unfairness or irrationality in a decision. We believe that respect for lawfulness, procedural fairness and rationality are principles essential to good government.

As judicial review reinforces these principles in government decision-making, we are not of the view that the current process hinders good governance. To the contrary, the judicial review process is a vital check on public body decision-making which serves to clarify legal requirements, standards and expectations.

In relation to potential reforms to the existing judicial review process, we would only support measures to enhance and strengthen the ability of individuals, trade unions and other organisations (such as the Equality and Human Rights Commission), to pursue judicial review proceedings. For example, by extending the existing limitation period (which is very short at three months and sometimes less), or by ensuring that potential costs are not a barrier to pursuing judicial review.

We wish to take this opportunity to highlight the vital importance of the process of judicial review to the Equality and Human Rights Commission, and our strong support for their existing ability to make use of this as an enforcement tool.

The EHRC can challenge a decision of a public authority where a public authority has acted in a manner incompatible with human rights as set out in the Human Rights Act 1998. These rights are of value to all trade unions and workers we represent. Therefore, we support the role of the EHRC in using judicial review to enforce these rights.

In the context of employment rights, we highlight in particular the importance of Article 11 right to freedom of assembly and association, Article 8 right to freedom of expression, Article 9 right to freedom of thought, conscience and religion, and Article 8 right to respect for private and family life.

We also wish to highlight the crucial role that judicial review has played in the context of the current public health crisis, with regard to transparency of information and the

protection of the health and safety of workers. Without judicial review action pursued by TUC affiliates, we are in no doubt workers would have received a lower level of transparency of information from government in relation to the re-opening of workplaces (case studies outlined below).

The ability to challenge government decisions which may impact on public health also goes to the heart of the public's trust in government. Without transparency and proper scrutiny of decisions through judicial review, we are of the view it will be far harder for the government to secure and maintain public trust, and compliance with restrictive public health measures.

As an appendix to this letter, we attach some examples of where trade unions have either sent a letter before action, or issued judicial review proceedings, and in doing so have successfully maintained the values and principles we have outlined in this letter.

We hope this letter and our case study examples are helpful to the panel, and serve to contribute to a body of evidence demonstrating the importance and value of the existing judicial review process.

Yours faithfully,

A handwritten signature in black ink that reads "Frances O'Grady". The signature is written in a cursive, flowing style with a small flourish at the end.

Frances O'Grady
General Secretary

Appendix - case studies

- **Access to justice**

In 2017, UNISON trade union successfully challenged the imposition of Employment (and Employment Appeal) Tribunal fees by the Lord Chancellor on the basis that the fees were unlawful because of their negative effects on access to justice. Once the fees order had been brought into effect in July 2013, there was a dramatic fall in tribunal claims as many people were priced out of the tribunal system. There was a long -term reduction in claims of around 70%.

UNISON successfully challenged the imposition of the fees regime by way of an application for judicial review which was supported by the EHRC as an intervenor. Without this process, many workers will have continued to be deprived of their ability to enforce their employment rights through the Tribunal system.

<https://www.bailii.org/uk/cases/UKSC/2017/51.html>

- **Transparency and public health**

On 20 March 2020 the government closed all schools, colleges and nurseries due to the COVID 19 crises. On the 11 May 2020 the government produced guidelines known as the Recovery Strategy to get workers back into the workplace. The guidelines stated that social distancing should be maintained at 2m apart, and in confined spaces where social distancing was not possible face masks should be worn. However, government guidance for the re-opening of schools on 1 June 2020 stated that PPE was not generally required for teachers and education staff and that social distancing was unrealistic for young children.

Education unions, teachers and parents were all concerned about the safety of a return to school. Education unions made significant efforts to communicate with government in order to understand why government guidance for the opening of schools differed from the terms of the general Recovery Strategy.

In letters and meetings with the Secretary of State for Education, senior officials at the Department for Education, education unions asked for the scientific advice, data and modelling with regards to the government's reasoning for its guidance, along with full risk assessments. This information was not provided.

On 21 May 2020 the NEU forwarded a letter before action to the Secretary of State for Education under the Civil Practice Rules for judicial review proceedings.

The potential judicial review was on the basis of the NEU's legitimate expectation (under established public law principles) that the government would provide access to the scientific

advice, evidence, data and modelling, give a reasonable period of time and opportunity to consider the information and respond in meaningful consultation before a final decision was taken.

Following the NEU's letter before action, the government then began to publish more information on the scientific advice behind the school re-openings, increasing public and professional confidence in the proposals. The need to issue judicial review proceedings was averted.

It is very important to note that this case was not about stopping the Government from re-opening schools. It was to ensure that the government's decision making was transparent and that teachers, education workers and parents were properly consulted on a decision that had implications for their safety.

This case also highlights the importance of the government's duty of disclosure and candour under judicial review proceedings.

- **Equality**

In May 2019, Ofsted reported that it would be introducing a new inspection framework for schools, due to be introduced a few months later. A final report produced by Ofsted overlooked information from a consultation process in which education unions and disability rights groups had raised concerns about the new framework and a potentially negative impact on pupils with special educational needs.

In accordance with the Civil Practice Rules, a letter before action was sent to Ofsted, on the basis that failing to take into account consultation response was a breach of public law principles, and that failing to consult on teaching for SEND pupils Ofsted was in potential breach of its public sector duties under the Equalities Act 2010.

This matter was resolved when Ofsted agreed to take into account the consultation responses and consult on teaching for SEND pupils. The need for judicial review was again averted.

- **Community, education and good governance**

A local authority's decision to take redundancy costs from a school budget was also successfully challenged by way of a pre-action judicial review letter, without the need for issue of proceedings.

In deciding to take redundancy costs from a school budget, rather than from local authority central funds, a London school's budget deficit was becoming unsustainable for the school community. This resulted in pressure on staff, resources and therefore, pupils.

In accordance with the Civil Practice Rules, the NEU served a letter before action for judicial review proceedings.

Under the Education Act 2002 Local Authorities cannot charge redundancy costs to the school's delegated budget unless there is a good reason for doing so. In this case the Local Authority was making a blanket policy without considering the school's circumstances, the reasons for the budget deficit, the impact on teachers, staff and pupils or consulting teachers/staff and parents. The NEU argued that the Local Authority's decision was unlawful and it was acting outside its powers.

On receiving the letter before action, the Local Authority agreed to review its decision.

This case shows how important judicial review proceedings are in making a practical difference to ordinary people in the community, in this case teachers, staff, pupils and parents.