Industrial Action - frequently asked questions

Industrial action has been back in the news. Earlier in the year there was extensive reporting of the unofficial (often referred to as "wildcat") strikes at the Lindsey Oil Refinery in Lincolnshire and the rash of sympathy strikes that followed up and down the country when over 600 striking workers were sacked. With the recent strikes by university lecturers, ongoing action by postal workers, the news that BA called on the services of ACAS over the summer in a bid to avert action over job cuts and a pay freeze and last week’s report that printing staff at Trinity Mirror have voted for industrial action short of striking in response to a pay freeze, it seems likely that employers in many industries may face industrial disputes over the coming year. This briefing provides a reminder of the key issues employers need to be aware of when faced with the threat of industrial action.

Despite the apparent increase in industrial action, a recent report by Incomes Data Services found that industrial conflict has been so far been at a lower level during the current recession than during previous ones. IDS believe that this is down to greater levels of collaboration and consultation being undertaken than before, resulting in innovative agreements to protect jobs.

What amounts to industrial action?
There are three main types of industrial action:

- strike;
- action short of a strike, e.g., an overtime ban, work to rule or go slow; or
- lockout, where the employer prevents employees working.

Do employees and unions have a right to strike?
There is no positive right to strike or to participate in other forms of industrial action under UK law.

Consequently, employees participating in most forms of industrial action will usually be in breach of their contract of employment and could be sued by their employer or face dismissal. Further, trade unions or other individuals who call for industrial action are inducing a breach of or interfering with the performance of the employees’ contracts and potentially interfering with the employer’s ability to fulfil its contractual obligations to customers and suppliers. At common law, trade unions or other organisers therefore face the prospect of legal action against them every time they call for or organise industrial action.

However this general common law position is altered by the “statutory immunities”. Where the statutory immunities apply, the industrial action is “protected”, with the result that the organiser of the action cannot be sued for losses flowing from the industrial action. Employees taking part also have some protection against dismissal, although they could still face action by their employer for breaching their employment contracts.

When do the statutory immunities apply so that the action is protected?
Industrial action will be protected provided that:

- there is a trade dispute between the workers and their own employer and the action is called in contemplation or furtherance of that dispute (the so called “golden formula”) The courts have interpreted “trade dispute” very widely and it will cover almost every type of dispute that might arise in relation to working conditions, terms and conditions of employment, trade union membership and consultation;
- the purpose of the industrial action is not to impose, or achieve the effect of, “union labour only” clauses or closed-shop practices;
- it is not taken in response to the dismissal of “unofficial” strikers;
- it is not secondary action;
- it does not involve unlawful picketing;
- the trade union has held a properly conducted secret ballot before calling for or organising the action and the majority of the workers voting have supported the action. Statute lays down precise requirements to be satisfied in relation to the ballot; and
- following the ballot, the trade union has given a detailed notice of the proposed action to the employer at least 7 days before it starts and the action starts within 4 weeks of the ballot.
Even where the action itself is protected, participating employees and organisers of industrial action do not have immunity against other civil wrongs or criminal offences committed during the course of any action, such as intentional damage to property or unlawful trespass.

**When is action official or unofficial?**

Industrial action is official if it is authorised or endorsed by the trade union whose members are taking part. Action will be authorised or endorsed by the union if it was done, authorised or endorsed by:

- the president or general secretary;
- its principal executive committee;
- any person empowered by its rules to do so;
- any other committee of the union; or
- any other official of the union, whether or not employed by the union, e.g. a shop steward.

A union can repudiate action taken by officials and committees in the last two categories, by written notice to the official or committee in question, every member they believe to be participating in the action and their employers. A union will often repudiate unofficial or “wildcat” action or subsequent sympathy strikes, whilst acknowledging an understanding of the participating employees’ reasons, in order to avoid liability for any losses suffered by the employer.

In relation to employees, action will not be unofficial if:

- they are members of a union and their union has authorised or endorsed the action;
- they are not union members, but the action has been authorised or endorsed by at least one of the unions involved; or
- none of the participants is a member of a union.

If none of the participating employees is a union member, the action is thus neither official nor unofficial. However it is treated in the same way as official action for the purposes of unfair dismissal claims.

**What are the consequences if the action is unofficial?**

Provided it has not endorsed or authorised unofficial action, or has repudiated the action as necessary, a union will not be liable to the employer or any third parties for losses caused by unofficial action. The employer could, however, seek to recover losses from the participants or organisers.

An employer is free to dismiss employees participating in unofficial action. The employers at the Lindsey Oil Refinery dismissed over 600 workers participating in the unofficial strikes (although they were later reinstated). Employers can also selectively re-engage dismissed workers. Dismissed employees have no right at all to claim unfair dismissal if, at the time of their dismissal, they were participating in unofficial industrial action. Employees will only be able to bring a claim if they can show their dismissal was for one of the automatically unfair reasons, such as health and safety or whistleblowing.

It is likely that participation in many forms of industrial action will amount to a repudiatory breach of contract by the employees and, if so, they also will not be able to claim notice pay or other contractual damages if they are dismissed.

**What are the consequences if the action is official?**

In reality, a union will almost always take steps to ensure that official action is also protected (see below). However, if the purpose of any official action is unlawful or if the union has failed to comply with one of the stringent legal requirements in relation to balloting or notice, then it may not be protected by the statutory immunities. If official action is not protected, the trade union is potentially liable for losses suffered by the employer, suppliers and customers as a result of the action. There are upper limits to the amount of damages that can be awarded against a union and the maximum is £250,000 where the union has 100,000 or more members.

If the action is official, the employer or other affected parties can also apply for an interim injunction (in Scotland, interdict) requiring the action not to go ahead or to cease. If the organisers or individuals concerned do not obey the injunction or interdict, they will be in contempt of court.
The employer is free to dismiss all employees that participate in official industrial action if it is not also protected. Employees can claim unfair dismissal only if the employer either dismisses some but not all of the employees that participated in the action or dismisses them all but selectively re-engages some employees within three months of the dismissal. If the action in which they are participating is also protected, employees have some protection from unfair dismissal (see below).

**What are the consequences if the action is protected?**
Where industrial action is protected, the employer (and other parties) cannot bring claims against the union for any losses they have suffered. An injunction or interdict will not be granted if the action is protected in accordance with the statutory immunities.

In addition, employees have greater protection from unfair dismissal and a dismissal for participating in protected industrial action will be automatically unfair if the employer dismisses the employee:

- during the first 12 weeks (the “protected period”);
- after the protected period but the employee had stopped taking part before the end of the protected period; or
- after the protected period at a time when the employee was still participating in the action, but the employer had failed to take reasonable steps to resolve the dispute.

Employees participating in protected action are not, however, protected from potential breach of contract claims and have no right to be paid. The employer could sue participating employees for losses caused by the industrial action. However this is very unusual, due largely to the industrial relations impact and potential negative publicity. It can also be difficult to establish the exact loss flowing from the actions of each individual employee, making it difficult to succeed with a claim.

**Employers’ options**
If industrial action is threatened or notified, there are a number of options for the employer to consider using, either individually or as part of a wider strategy for dealing with the dispute in question:

- peaceful settlement of the dispute – industrial action should always be seen as a last resort and consideration should be given to entering into discussions or negotiations with employees’ representatives or through an outside agency, such as ACAS, to seek to resolve the underlying dispute;
- withholding pay for the period of any strike – the employer does not have to accept partial performance of a contract and it is open to it to require that employees comply with their contracts in full or to stay away from work and receive no pay until they are prepared to comply in full (also known as a “lock out”).
- locking out or reducing the pay of any employees who refuse to perform all of their contractual duties;
- commencing proceedings against the employees for breach of contract – however, in practice this will usually not be worthwhile and will not usually be conducive to improving workplace relations;
- applying for an injunction or interdict to stop any unlawful strike going ahead;
- dismissing or locking out any employees engaging in unofficial or unprotected action (and potentially using alternative labour), although again this is likely to inflame rather than resolve matters;
- if the action is unprotected, commence proceedings against those organising the industrial action or against the relevant union.

Note that the law surrounding industrial action is complex. This briefing is only a summary of the issues and should not be relied upon as a substitute for specific legal advice, which should always be sought in relation to the application of any of the subject matter.

**Key contacts**

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Or your usual Shepherd and Wedderburn contact.