



Industrial action – your questions answered

EMPLOYMENT, PENSIONS AND BENEFITS: DOWNTURN UPDATES

The 'wildcat' strikes seen earlier this year throughout energy facilities in the UK, such as oil refineries and power stations, have the potential to cause major disruption to the operators of those facilities and to other businesses in the UK energy industry if the striking spreads. A resurgence in industrial action in the UK economy would have important implications for many businesses. But is there a right to strike and what can organisations do if they are affected by industrial action?

Earlier this year, a number of 'wildcat' strikes occurred at energy and natural resources facilities throughout the United Kingdom, including oil refineries and nuclear power plants. In addition, industrial action has been threatened in a number of other industries throughout the UK, including the postal and food production industries.

Industrial action can have dramatic adverse effects on the ability of companies and industries to provide essential products to both customers and to the wider community and has the potential to cause significant damage to the economy. It often has knock-on effects throughout the value chains if it continues.

But what rights do employers and employees have in relation to industrial action? What can an employer do when a strike occurs or is planned? What must it not do? This briefing answers a number of basic questions about industrial action in the UK.

What is 'industrial action'?

There are two basic types of industrial action:

- a strike – that is, a complete stoppage or cessation of work at the workplace; or
- other action that affects the proper or ordinary performance of work, eg overtime bans, a work-to-rule, a go-slow or picketing.

'Industrial action' is not defined in legislation, but the actions described above will generally be industrial action where they are engaged in with a view to placing pressure on the employer to gain some advantage (eg

in wage or industrial negotiations, or to achieve some change in the employer's policy or decisions).

Is there a right to strike in the UK?

There is no right to strike under English common law – a strike (and almost every other type of industrial action) will generally involve an employee breaching his or her contract of employment. An employer is able, therefore, to take legal action against the employee to seek to recover any loss it has suffered as a result of the strike (although this may be unappealing for the reasons highlighted below).

Employees and unions might also be liable if the strike has interfered with the employer's ability to perform other contracts (such as for the supply of goods or the performance of services), unless they have the benefit of legislative 'protection' (see further below).

The right to strike has been recognised by the European Court of Justice as a 'fundamental right forming part of the general principles of EU law'. While that position does not affect UK law directly, it effectively requires the English Courts to recognise the right to strike when interpreting questions of EU law.

When will industrial action be 'protected'?

Industrial action is 'protected' if it has been organised under the statutory rules. There are a range of steps that unions will need to go through to gain the relevant protection:

- the industrial action needs to be taken ‘in contemplation or furtherance of a trade dispute’ (the so-called ‘golden formula’). Importantly, this means that industrial action cannot be protected if it is taken to force workers to join a union or to pressure another employer to use union-only labour. However, if the action is taken for a prohibited purpose (eg to protest at the dismissal of workers taking unofficial industrial action), the union will not be entitled to protection (section 223, TULRCA);
- the industrial action must be supported by a secret ballot of employees, which is organised so that:
 - all those entitled to vote (and no others) are allowed to vote in a ballot;
 - the union sets up the ballot and sends a ballot notice (not later than seven days before the ballot) and copy of the voting papers (not later than three days before the ballot) to the employer of any employees who are entitled to vote;
 - the ballot is managed by an independent scrutineer with the union’s co-operation;
 - the result of the ballot is announced, as soon as reasonably practicable, to the union members who were entitled to vote in the ballot and their respective employers (including the number of votes for and against, and any spoiled voting papers); and
 - the independent scrutineer reports on the conduct of the ballot within four weeks of the ballot taking place, including the ballot arrangements and how it was conducted;
- the union must serve valid notices of industrial action on the relevant employers at least seven days before the industrial action commences;
- the industrial action must start within four weeks of the date of the ballot that approved it; and
- the industrial action must not amount to secondary action or unlawful picketing.

What is the advantage of having industrial action ‘protected’?

Industrial action that is protected (because it has been organised under the procedures described above) will be afforded the following protections:

- the union organising the action will have immunity from tort liability (eg for inciting a breach of contract); and
- employees have greater protection from unfair dismissal if they are dismissed during a period of protected industrial action (see further below).

Protection will not, however, shield employees who take part in the industrial action from a claim that they have breached their employment contracts by ceasing to perform work. However, apart from the ability to dock employees’ pay for not working, legal remedies against the individual employees are very limited: the Courts will not order specific performance of an employment contract, nor grant an injunction against breaching the contract. The practical difficulties of establishing the precise extent (if any) of the loss caused to the employer by any one individual employee when industrial action has taken place may mean the utility of this remedy is low (putting to one side the reputational consequences for an employer if it sues its own employees).

When will industrial action be ‘official’?

Whether industrial action is ‘official’ or ‘unofficial’ is relevant only where a union represents the employees involved. Industrial action will be official if the union whose members are taking part in the action has endorsed or authorised the action. If employees who are members of more than one union are taking part in the action, all the relevant unions must have endorsed the action for it to be official industrial action. Often in the case of wildcat strikes, union officers will endeavour to distance themselves from approval of the action while acknowledging an understanding of the reasons that the employees are taking the action. This is generally to reduce the risk that the employer might successfully bring a damages claim against the union for organising the industrial action.

What is the advantage to employees of industrial action being ‘official’?

The difference largely lies in whether employees have better protection against unfair dismissal. Generally speaking, employees taking part in unofficial industrial

action will find it much more difficult to bring unfair dismissal claims against their employer.

- *If industrial action is official*: an employee who is dismissed while participating in official action *will* be prevented from bringing an unfair dismissal claim against his employer provided that:
 - the dismissal is not ‘automatically unfair’ because the employee was dismissed for any one of a number of specific reasons (eg pregnancy, childbirth, maternity, maternity leave, paternity leave, time off for dependents, protected disclosure);
 - if the industrial action is protected (as described above), the employee is not dismissed during the ‘protected period’ (which is 12 weeks starting from the day the employee started participating in the industrial action) or, if the employee is dismissed after the end of that period, the employee has not stopped taking industrial action before the end of the protected period and the employer has taken reasonable steps to resolve the dispute; and
 - the employer has dismissed *all* the employees who participated in the industrial action and has not selectively re-engaged some of them.

It is a failure to fulfil the last of these requirements that often means employers will *not* be immune from unfair dismissal claims by employees who have taken part in official industrial action and are subsequently dismissed.

These rules have the result that, where industrial action is official (but unprotected), the employer will only be immune if it dismisses workers who are participating provided it has not been selective and the dismissals are not automatically unfair.

- *If industrial action is unofficial*: an employee has no right to bring an unfair dismissal claim if he was taking part in unofficial industrial action at the time of his dismissal, provided that the reason for the dismissal was not one of the ‘automatically unfair dismissal’ categories (described above). As a result, an employer can be selective about those it dismisses during unofficial industrial action.

The Trade Union & Labour Relations (Consolidation) Act 1992 makes no distinction between union members and non-union members in the protection it affords

to persons taking industrial action. Therefore, where a union has called a strike following a successful ballot of its members, unfair dismissal protection extends not only to members of the union but to all employees who participate in that action. However:

- non-union members will not be entitled to vote in a ballot; and, therefore,
- where all participants in the industrial action are non-members, the action cannot be protected.

In the latter case, where all participants are non-members of a union, the industrial action will nevertheless *not* be unofficial industrial action. This is important because the employees will have the additional protections afforded to official industrial action (even though they will not have the advantage of it being protected as well).

Does an employee get continuity of employment for the period of the industrial action?

An employee will lose the period of any strike (or any period that he is locked out of work by the employer) from his period of continuous employment. However, continuity of employment is not broken by industrial action. That is, the clock stops when a strike commences but restarts once the strike finishes.

What happens if a strike in one department means there is no work for other departments to do?

Often a strike or industrial action in one department or work-group within an organisation means that other groups in the organisation are unable to continue work (eg if they rely on supply from the department that is on strike). Employers may wish to send these non-striking employees home without pay or on reduced pay.

However, if an employee is ready and willing to work his contracted hours, his employer must pay him even though there may be no work for him to do. The only exception is where there is a term in employee’s contracts that allows the employer to send them home (on no or reduced pay) if there is no work for them to do (other than as a result of the employer’s actions).

What options does an employer have when faced with unprotected industrial action?

Employers have a number of options in relation to unprotected industrial action. While each option carries both commercial and legal risks and implications, the speed with which a strike starts and finishes is likely to influence which of the options is appropriate in any circumstances. When a wildcat strike occurs, employers will need to be in a position to act nimbly to reduce the effects on their business. Other factors, such as the collective agreement provisions and possible reputational/public relations effects should be considered by an employer when choosing how to respond in particular circumstances.

Broadly, some of the options for employers presented with strikes and other industrial action are to:

- engage in discussions and negotiations with employees representatives (either directly or with the benefit of third party bodies such as ACAS) to endeavour to resolve the underlying dispute. In sectors that have significant social and economic effects for the nation generally, political pressure may often be brought to bear on the government so as to get it involved in such discussions. This option may have limited utility for reducing the impact of wildcat strikes because there may be insufficient time to engage in such discussions (although it may assist preventing repeated action);
- docking employees' pay for the period of the action – employees will generally not have a right to pay if they do not perform work as scheduled and so an employer will be entitled to reduce their pay accordingly, ie for the period when they are not complying with the terms of the employment contract. If the employee is partly performing his duties (and the employer has accepted that), then the employee will have a right to be paid and their pay can be apportioned accordingly;
- respond by locking out the employees from the workplace (and potentially using temporary or substitute labour during the lock-out), although this may inflame the dispute rather than resolve it;
- dismiss the employees engaging in the industrial action – this is often an especially drastic (and perhaps last resort) course of action. It is likely to be unappealing (or even impractical) for a range

of reasons. While employees taking part in official (union endorsed) industrial action cannot normally claim unfair dismissal if the employer dismisses all of them, they may be able to make a claim if the employer selectively dismisses or selectively offers re-engagement;

- start legal proceedings seeking orders from the court that the union cease orchestrating the industrial action. An employer might seek an 'interim injunction' (a temporary order from the court) pending the full resolution of proceedings seeking compensation for damages (see further below). In most situations an interim injunction will effectively kill the industrial action because a full trial rarely, if ever, takes place. Employers will need to consider carefully the benefits of such action (balanced against the costs), especially given that unions are likely to disclaim responsibility for wildcat strikes (because the union may not have officially endorsed the action); or
- start legal proceedings against the employees (and perhaps the trade union) seeking a remedy for the damage that has been caused – this option is often the second stage of the legal action referred to immediately above. Many employers decide not to press on with this type of action once they have obtained an interim injunction – especially because of the low likelihood of recovering all of the revenue/profit lost (individual employees are unlikely to be able to meet large claims and there is also a cap of £250,000 on union liability), as well as the industrial, reputational and commercial implications of instituting full legal proceedings against employees and their union.

What other obligations apply if an employer decides to dismiss employees who have engaged in industrial action?

Does an employer still have to comply with the statutory dismissal and disciplinary procedures when terminating an employee taking industrial action?

Until 6 April 2009, the dismissal and disciplinary procedures in the Employment Act 2002 applied where an employer contemplated dismissing an employee and failure to follow the prescribed procedures meant that the dismissal was automatically unfair.

From 6 April 2009, the position has changed following the amendments made by the Employment Act 2008. Now, a tribunal may uplift compensation for an employee by up to 25 per cent where his employer has unfairly dismissed an employee and has unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (the Code) in relation to the dismissal. The important issue in dismissals for taking part in industrial action is likely, therefore, to be whether any failure by an employer to follow the provisions of the Code was ‘unreasonable’ in the circumstances. A tribunal will generally consider all of the relevant circumstances in coming to a view, on the facts of each case, about whether such a failure was unreasonable. It will be important for employers to endeavour, where possible, to follow the procedures set out in the Code unless they have good reasons for not doing so.

Does an employer have to pay statutory redundancy pay to an employee dismissed because they have participated in industrial action?

An employee who is participating, or has participated, in industrial action may lose their entitlement to a statutory redundancy payment:

- An employee will not be entitled to any statutory redundancy pay if, at the time the employer gives him notice of dismissal by reason of redundancy, the employer would have been entitled to dismiss without notice because the employee has participated in industrial action that constitutes a repudiatory breach of contract.
- If an employee has already been given a notice of dismissal due to redundancy and, during the notice period, takes part in industrial action and is dismissed for gross misconduct, there is no obligation to pay statutory redundancy pay (unless the industrial action concerns terms and conditions of employment). However, in such circumstances the employee might bring a claim to an employment tribunal, which has the power to award the employee ‘a just and equitable’ proportion of the statutory payment.

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