



# Wildcat strikes in the energy and natural resources sector

The 'wildcat' strikes seen in recent days 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, to other businesses in the UK energy industry if the striking spreads and to the UK economy if they continue. There are a number of options that can be taken by the companies affected that may assist in bringing about a swift end to this disruption and helping to avoid such action occurring in the future. Assisted negotiation, dispute resolution and legal proceedings are all possible options.

In recent days, a number of 'wildcat' strikes have occurred at energy and natural resources facilities throughout the UK, including oil refineries and nuclear power plants. Much of this action has ostensibly been related to employee and union concerns about giving preference to British employees, especially in the current economic downturn. This industrial action is already having adverse effects on the ability of the energy and natural resources industry to provide essential products to the community and has the potential to cause additional damage to the economy more generally should they continue. There is also the question of what, if any, knock-on effects will be seen throughout the value chain if this action continues and how those affected by the strikes can minimise the effect on their businesses.

The present action reflects what some see as a growing trend for trade unions and their members to resort to unplanned (or 'wildcat') industrial action. But what can an employer do when a wildcat strike occurs? What must it not do? Legal remedies (or perhaps simply the threat of them) can be a critical aspect of dispute resolution.

## Is there a right to strike?

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 may 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'.

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'. Although that position does not affect UK law directly, it in effect requires the English courts to recognise the right to strike when interpreting questions of EU law.

## When will strikes have legislative 'protection'?

Employers will not be able to bring certain legal claims (known as 'industrial torts') against employees and/or unions who engage in 'protected' industrial action. The protection given to such industrial action is derived from specific legislation, which means that employees and unions must comply with all of the relevant procedures to gain that protection. Wildcat strikes will rarely (if ever) have this protection because there has been insufficient time to undertake the procedures. 'Sympathy' strikes (in which a workforce stops work in support of issues raised at another work site) will also not be protected by the legislation. Picketing will be protected only under certain conditions.

## Interaction with EU law – discrimination and freedom of movement

The genesis of the strikes appears to relate to the application of the EU principles of ‘freedom of movement’ and ‘non-discrimination’ in the EC Treaty (arguably requiring companies operating in the EU to treat all EU workers alike – that is, by not discriminating on the basis of nationality), as well as the operation of the Posted Workers Directive (PWD). The PWD provides that ‘posted workers’ (those sent from one EU member state to work in another) must receive pay, holiday and working hours set by the law in the host state. However, in most cases, the terms of local collective agreements do not need to be observed by the posting company. This appears to have resulted in the perception that the interplay of the non-discrimination principles and the PWD allows the exclusion of British workers from vacancies in British facilities.

## What options does an employer have?

Employers have a number of options in relation to unprotected industrial action. Although 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 need to be in a position to act nimbly to reduce the effect on their business. Other factors, such as the collective agreement provisions and possible reputational/public relations effects, should be taken into account 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 the Advisory, Conciliation and Arbitration Service) to endeavour to resolve the underlying dispute. In sectors that have significant social and economic effects on the nation generally, the government may become involved in such discussions. This option may have limited use for reducing the effect of wildcat strikes, because there may be insufficient time to engage in such discussions (although it may assist in preventing repeats);
- dock 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;
- 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. Although 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 stop orchestrating the industrial action. An employer may seek an ‘interim injunction’ (a temporary order from the court) pending the full resolution of proceedings seeking compensation for damages (see 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 carefully to consider 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.

Employers in the energy and natural resources sector should consider how these options may be used individually, or perhaps in parallel, in dealing with wildcat strikes.

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