Facing industrial action head on
Legal and practical steps to consider when industrial action is initiated

In the current climate, the unfortunate employer who receives statutory notification of proposed industrial action is not uncommon. When negotiations with unions reach an impasse and workplace disruption is threatened, what can employers do?

The past 12 months have seen numerous reports of threatened industrial action over measures taken by employers to deal with the economic downturn. The Government's proposals to make substantial savings across the public sector have also led to speculation about whether we are about to enter a 'winter of discontent'. Such threats are not limited to the UK. The French Government's plans to raise the retirement age saw such threats materialise into a concerted wave of strikes and street protests.

Faced with the prospect of such action, an employer will need to formulate and implement quickly its strategy for dealing with the action to minimise disruption to its business.

What action is being threatened?

When faced with the prospect of industrial action (including strike action or action short of a strike such as an overtime ban, work to rule, a go slow or sit in), an employer will need to first understand whether the action has been authorised by the union and if so, whether it is lawful or unlawful.

Has the action been authorised by a union?

An employer must identify quickly whether action has been authorised or endorsed by a union. Such action is commonly referred to as "official industrial action". A union is not susceptible to legal claims for action it has not authorised or endorsed. Whether or not action is official will also determine an employer's right potentially to dismiss employees participating in the action.

Is the industrial action lawful or unlawful?

The law protects a union which has organised industrial action from being sued successfully by an employer for losses the employer has sustained provided that both the following statutory requirements have been complied with:

- the industrial action is in contemplation or furtherance of a trade dispute (see below); and
- the union has complied with complex balloting and notification requirements. See our checklist here.

Not surprisingly therefore a union will generally pursue lawful action in order to protect itself against liability.

What is a trade dispute?

A trade dispute is defined by statute as a dispute between workers and their own employer and which relates "wholly or mainly" to one or more of the following:

- terms and conditions of employment
- physical conditions of any worker
- engagement or non-engagement of one or more workers
- suspension of employment of one or more workers
- the allocation of work or the duties of employment between workers
- matters of discipline
- a worker’s membership or non-membership of a union
- facilities for union officials
- the machinery for negotiation or consultation, such as union representation rights

It can be action in support of a worker’s colleagues.

Industrial action taken for another purpose, for example, to force workers to join the union, in protest at the dismissal of workers taking unofficial industrial action, or secondary action, will be unlawful and open to challenge.

Secondary industrial action is action by workers whose employer is not a party to the trade dispute to which the action relates, for example a customer or supplier. It is unlawful and will expose a union to claims for damages by the employer with whom they have a dispute and by the employer (i.e. the customer or supplier) whose business is disrupted by the unlawful secondary industrial action. Lawful picketing (see below) may give rise to lawful secondary action where pickets induce workers of other companies to breach their employment contracts e.g. they persuade drivers to turn away without delivering their goods.
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What steps can an employer take in relation to a union?

Negotiations should continue with the union so far as possible. The cost and disruption of industrial action should not be underestimated. However, where negotiations reach a stalemate, an employer may have to threaten or take legal action against the union.

Taking legal action against the union

An employer may challenge whether or not any action endorsed by the union complies with the statutory requirements by way of:

(I) An application for an interim injunction to stop the union from proceeding.

An application may be made to the High Court for an interim injunction preventing the union from proceeding. Whilst the court has a discretion as to whether or not to grant an injunction, it will usually do so where there is a clear breach by the union. However, the employer will have to act quickly and have some evidence which demonstrates that the union is acting unlawfully.

In practice, an injunction is most likely to make a union want to reach an agreement with the employer but if that cannot be achieved a union may re-ballot its members for industrial action. Going through the balloting process again will provide a further window of opportunity for the parties to try and resolve the dispute in question and avert the strike. The employer will also have a period in which to get its business back to normal in the interim and put in place its contingency plans.

If a union fails to comply with an injunction, proceedings can be taken for contempt of court. Such proceedings can result in the imposition of a fine or sequestration (where the union’s funds are placed in the control of a person appointed by the court).

(II) A claim for damages for losses suffered

An employer can also pursue a claim for damages for losses suffered against the union if the basis of the proceedings is a claim that an act endorsed by the union involved breach or interference with the performance of contracts.

What steps can an employer take in relation to employees?

Regardless of whether the industrial action is lawful or unlawful, an employee participating in industrial action will nine times out of ten be in breach of contract. This is a position that an employer should use to its advantage, being careful however that it has identified participating employees accurately.

Which employees are participating in industrial action?

Union membership is irrelevant when determining who is or is not participating. A factual exercise will need to be undertaken.

An employee who fails to attend work during a strike because he is frightened to cross a picket line, will still be regarded as participating in the strike. Employees who are absent from work on other grounds, such as holiday, sickness or other authorised leave, should not be automatically treated as if they are participating in a strike without their confirmation.

Persuasion against industrial action

There is no harm in an employer seeking to dissuade its employees from participating in industrial action. Such a communication to employees may contain the following:

What information should be communicated?

- Set out the matters in dispute between the employer and the unions, the progress made in negotiations to date and the issues outstanding.
- Highlight the detrimental impact that industrial action could have on the business.
- Ask employees to vote against any ballot for industrial action.
- Confirm that employees will not be paid for the days on which they participate in industrial action.
- Confirm that if employees start taking industrial action they will be treated as continuing to do so unless and until (a) the action is called off; (b) they return to normal working; or (c) they tell their employer that they are ceasing to participate.

Inform employees that any period during which they are on strike will not count towards their continuity of employment (although continuity itself will not be broken).
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Stopping pay

Whether the action is lawful or unlawful (see above), an employee who fails to attend work during a strike will be in breach of contract. Accordingly, an employer can stop that employee's pay. Where the employee is still performing some of his/her duties, pay will need to be apportioned to ensure payment is made for the work which has been undertaken.

Dismissing employees

An employer may wish to consider terminating the employment of one or more of those employees participating in industrial action on the basis that the employee concerned, by refusing to perform his/her duties, is in breach of an express contractual obligation to work. However, special rules apply to protect employees where the industrial action is lawful and legal advice should always be taken before dismissing.

When is picketing lawful?

Picketing is only lawful where:
- the picketing is undertaken by:
  - a worker of the employer who is a party to the dispute at or near his place of work;
  - a former worker of the employer who is a party to the dispute (who was dismissed in connection with the dispute or his dismissal is one of the reasons for the dispute) at or near his last place of work with that employer; or
  - a trade union official who represents and is accompanying either of the above at their relevant places of work;
- The purpose of the picketing is to obtain or communicate information or to persuade any person to work or abstain from working; and
- The picketing is done peacefully i.e. there must be no intimidation or threatening behaviour.

What can an employer dismiss a participating employee?

An employer will be able to dismiss an employee participating in unofficial industrial action (i.e. the action is not at the time of dismissal authorised or endorsed by the union) without liability for unfair dismissal. For example, where a wildcat strike has been caused by a militant shop steward.

An employer who dismisses employees taking part in official, lawful industrial action will be liable for claims of automatic unfair dismissal where the employees are dismissed during a "protected period", generally the first 12 weeks of industrial action in which the employee participates (although this may be extended)

However, an employer who dismisses all employees participating in official, lawful industrial action after the protected period may be immune from any unfair dismissal claims where the employer has taken reasonable steps to attempt to resolve the dispute. Specialist legal advice should be sought before dismissing employees in these circumstances.

Dealing with pickets

A strike is often accompanied by picketing which may be organised by the union as part of its strategy to bring attention to the dispute and to persuade the workforce to join in the strike. An employer should not take any action against the pickets unless the picketing is unlawful.

What contingency plans should an employer consider putting in place now?

In the current climate, it will be prudent to consider now contingency plans to cope with potential workplace disruption, particularly where key employees are likely to be involved or affected.

For example, it is a criminal offence for an agency to replace workers participating in industrial action with agency workers and the engaging employer may be liable for aiding and abetting this offence. However, there are practical solutions around this. For example, an employer is able to directly recruit temporary workers in these circumstances.

Calls for Reform

The CBI's Employment Policy Directorate has called for a modernising of the industrial relations legal framework, and, where necessary, an updating of employment law to achieve a "fair balance between the interests of employees and trade unions on the one hand and employers, customers and the general public on the other."

Unsurprisingly the CBI's proposals have not been universally welcomed. The TUC's General Secretary,
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Brendan Barber referred to the UK already having "some of the toughest legal restrictions on the right to strike in the advanced world ... [where] the courts regularly strike down democratic ballots that clearly show majority support for action." Peter Harwood, chief conciliator of the Advisory, Conciliation and Arbitration Service (ACAS) commented that strengthening the rules on the taking of strike action could "inflame the situation" and "spur workers into unofficial action".

Strengthening the legal position further would not eradicate strike action but would make it more difficult for unions. Currently strikes can go ahead provided a majority of those voting support it, irrespective of the turnout. Some of the recent disruptions on the London Underground did not have the overwhelming support of the workforce. This reflects the relative weakness of trade unions today (over 85% of private sector employees are not members of a union) and that employees are less likely to be mobilised into disrupting their employer's business and foregoing payment of their wages unless their own pay and benefits are in jeopardy.

Whilst there do not appear to be any immediate plans by the Government to reform the existing legal framework for industrial relations – would that position change in the face of mass disruption by public sector workers against the effect of the planned spending cuts on their jobs? The widespread disruptions in France which have seen public transport services and infrastructure badly affected; mass fuel shortages; blockades at oil refineries; and even school children joining the protest movement may have the Government here wondering whether the UK has, in fact, got off lightly in recent years.

What has the CBI proposed?

The CBI has developed a package of proposed reforms including recommendations to amend existing statutory provisions to:

- require a ballot of employees before awarding statutory union recognition
- require 40% of balloted members to support a legitimate strike as well as a majority of those voting
- ensure only paid-up union members are eligible to take part in a strike ballot
- require unions to keep up to date records of membership
- require unions to include the following information with the ballot papers that are sent to their members: (a) a written statement from the employer concerning the scope, nature and reason for the dispute; and (b) a notice warning that pay and non-contractual benefits could be withdrawn by the employer from those participating in a strike
- require unions to repudiate unofficial industrial action within 24 hours of it coming to the attention of senior union officers
- increase the financial sanctions faced by unions failing to comply with the law, with damages being calculated for each day of strike action

Industrial action is a legally complex and highly charged area. Our specialist team will be happy to assist you. For further information please do not hesitate to contact your usual Osborne Clarke contact or Christine Bradbury.

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