Lawful industrial action in the UK

A guide for clients
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Introduction

As a result of a series of Acts of Parliament over the last 15 years, the law relating to industrial action is very complicated - perhaps deliberately so. In addition, there are many aspects of the law which are unclear, either because of conflicting court decisions or because of the absence of judicial interpretation.

Speed is of the essence in dealing with industrial disputes. Firstly, because they have an immediate impact on the employer’s undertaking. Secondly, because any legal action is likely to take the form of seeking injunctions and the courts will not grant injunctions unless they are sought speedily.

The purpose of this note is to outline the main legal rules governing industrial action and to identify what steps can be taken by the employer if its employees and/or relevant unions do not comply with any of these rules. This document is intended as a basic outline only and not as detailed legal advice on any particular circumstances. Before pursuing a legal response to industrial action, specific advice should be sought from a suitably specialised lawyer.

The basic legal principles

- Most cases of employees acting together to breach their contracts of employment or interfere with their employer’s business amount to industrial action. This can range from a complete failing to work (strike) to a "work-to-rule", a ban on certain types of work (for example, overtime) or a withdrawal of co-operation.

- Industrial action in breach of contract is unlawful and organising trade unions are at risk of claims for compensation and injunctions whilst the employees taking part are breaching their contracts of employment and they risk disciplinary action, including possible dismissal. However, over many years legislation has been introduced to provide trade unions and employees with a defence, thereby allowing them to take certain action without undue legal risk.

- This defence is only available if:
  - the industrial action is taken “in contemplation or furtherance of a trade dispute”, and
  - a number of specific statutory requirements are complied with. In particular, these include conducting a ballot and notifying the employer in accordance with detailed rules and a prohibition on secondary action and unlawful picketing.

- If industrial action is not covered by this statutory defence then it can be stopped by a court injunction obtained by the employer, by a union member called upon to strike, or by a third party affected by the impact of the industrial action on the supply of goods or services.
If the industrial action is lawful the statutory defence applies then:

- a strike or other industrial action resulting in a total non-performance of work gives the employer a right to dock pay (partial non-performance, such as a work to rule or a refusal to carry out certain tasks, is less straightforward but often pay can be stopped or reduced if certain legal steps are taken by the employer)
- the employee will be participating in ‘protected’ industrial action. A dismissal for taking part is automatically unfair for at least twelve weeks (or, in some circumstances, longer) from the start of industrial action.

Employees dismissed during, and principally because of taking part in, ‘unofficial’ industrial action (not authorised by the union) cannot pursue an unfair dismissal claim at all. Before contemplating disciplinary action or dismissal of employees in these circumstances, specific advice should be sought to ensure the action is ‘unofficial’ and the employer’s action are correctly timed.

Employees dismissed while participating in industrial action which is “official”, but has not been properly balloted and notified, cannot pursue an unfair dismissal claim if the employer dismisses all of the employees taking part in the action. If the employer selectively dismisses employees in these circumstances, they can bring unfair dismissal claims in the normal way. The same principle applies if the action is unofficial and none of the participants is a union member.

As part of its contingency planning, an employer may want to engage agency workers to undertake the work normally performed by employees taking action, or, backfill another employee who has been transferred to cover a striking employee. However, this is expressly prohibited by statute.

What is “in contemplation or furtherance of a trade dispute”?

As mentioned above, the starting point is to ask whether or not industrial action is “in contemplation or furtherance of a trade dispute”. The Trade Union and Labour Relations (Consolidation) Act (TULRCA) defines a trade dispute as relating wholly or mainly to one of the following:

- terms and conditions of employment or physical working conditions
- engagement or non-engagement or termination or suspension of employment or the duties of employment of one or more workers
- allocation of work or the duties of employment as between workers
- matters of discipline
- membership or non-membership of a trade union on the part of a worker
- facilities for officials of trade unions
- machinery for negotiation or consultation (s244 TULRCA).

Not only must this definition be met, but the dispute must be between workers and their own employer.

Individual workers have statutory protection where industrial action is “in contemplation or furtherance of a trade dispute”, but for a union organising or endorsing the action, the protection is not applicable where:

- the union organises or endorses industrial action without first balloting the workers in accordance with the detailed ballot rules
- the union organises or endorses industrial action and fails to give the employer proper notice of the action
• the purpose of the industrial action is to enforce union membership or a “union labour only” clause
• industrial action is taken in response to the dismissal of “unofficial” strikers
• there is secondary action (i.e. sympathetic action by employees of employers who are not in dispute), unless that secondary action amounts to “lawful picketing” which is permissible.

The next section of this guide looks at these rules in more detail

Calling industrial action - the rules on ballots and notification

1. **Minimum seven days notice of ballot**

At least seven days before the opening of a ballot, the trade union must take such steps as are reasonably necessary to ensure that the employer is given written notice of the ballot. This notice must contain the details required by s226A TULRCA, including:

(a) that the union intends to hold a ballot
(b) of the date upon which the ballot will start, and
(c) the following information:
(i) a list of the categories of employee to which the employees concerned belong (i.e. those whom the union reasonably believes to be entitled to vote in the ballot)
(ii) a list of the workplaces at which those employees work
(iii) the total number of employees concerned
(iv) the number of employees concerned in each of the categories listed under (i), and
(v) the number of employees concerned at each workplace in the list under (ii).

In the case of (iii), (iv) and (v), the union should provide an explanation of how the figures were arrived at. The information supplied must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies.

The lists and figures do not necessarily need to be provided in full in situations where the employees pay their union subscriptions by deductions from pay at source, the so-called “check-off” system. However, information provided in this way must enable the employer to readily deduce similar information to that prescribed by (c) (i) – (v) above.

2. **Minimum three days notice of voting paper**

Not less than three days before the ballot starts, a sample voting paper must be sent to the employer. According to section 229 TULRCA, the voting paper must:

(a) state the name of the scrutineer
(b) specify the address to which and date by which it is to be returned
(c) be numbered (although the sample will not normally show a number)
(d) contain words to the effect of one or both of these questions: “Are you prepared to take part (or continue to take part) in a strike?”
"Are you prepared to take part (or continue to take part) in industrial action short of a strike?"

(e) state who will be authorised to call the action
(f) contain the statement "If you take part in a strike or other industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than eight weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later."

For these purposes, an overtime ban and a call-out ban constitute industrial action short of a strike.

3. Specific requirements of a ballot

If a trade union wants to ballot employees at two or more workplaces, then usually it must ballot each workplace separately. However, in certain circumstances it is permissible to hold a single aggregate ballot across a number of workplaces (ss228 and 228A).

If the number of employees entitled to vote is 50 or more the trade union must appoint an independent scrutineer prior to the ballot taking place. The ballot must be conducted secretly by post (s230). According to the non-binding Code of Practice, if first class post is used in each direction, seven days are to be allowed between distribution of the voting papers and return. In the case of second class post it is 14 days.

Entitlement to vote in the ballot must be accorded only to those the trade union reasonably believes, at the time of the ballot, will take part in the industrial action. However, errors in who is entitled to vote, the despatch of voting papers or giving members the opportunity to vote conveniently by post, which are accidental and on a scale which is unlikely to affect the result of the ballot, are disregarded (s232B).

4. Prompt notification of ballot result

As soon as is reasonably practicable after the date of the ballot, the trade union is obliged to notify both the voters and the employer of the number of votes cast, the number of individuals answering “yes” to each question, the number of individuals answering “no” to each question and the number of spoiled voting papers (s231A). Industrial action will have the support of the ballot if the majority of those who cast a vote voted in favour of the type of action proposed (s226(2)). Significantly, this means that the statutory ballot requirements may be satisfied even if only a small percentage (say 20 per cent) of employees vote, provided a majority of that number vote in support of the proposed action.

5. Minimum seven days notice of industrial action

The trade union must take such steps as are reasonably necessary to ensure that the employer receives not less than seven days' written notice of the commencement of the industrial action. The seven days' notice cannot begin to run until the date upon which the employer is notified of the result of the ballot (s234A). As with the ballot notice, this notice must contain the following information in relation to each affected employee (i.e. any employee whom the union reasonably believes will be induced to take part or continue to take part in industrial action):
(i) a list of the categories of employee to which the affected employees belong
(ii) a list of the workplaces at which the affected employees work
(iii) the total number of affected employees
(iv) the number of the affected employees in each of the categories listed under (i)
(v) the number of affected employees who work at each workplace listed under (ii), and
(vi) state whether the industrial action is intended to be continuous or discontinuous (for example, a series of one day strikes); if continuous, state the intended date for action to begin; and if discontinuous, state the intended dates for industrial action.

In the case of (iii), (iv) and (v), the union should provide an explanation of how the figures were arrived at. The information supplied must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies.

As with ballot notices, the lists and figures do not necessarily need to be provided in full in situations where the employees pay their union subscriptions by deductions from pay at source. However, information provided in this way must enable the employer to readily deduce similar information to that prescribed by (i) – (v) above.

6. Four week time limit for industrial action to start

The industrial action must begin within four weeks of the last voting day of the ballot unless the union and the employer agree an extension (of up to four weeks) (s233). If an interim injunction, granted to stop industrial action, is subsequently lifted, the trade union may seek an extension from the court of the validity of the ballot for an equivalent period. (s223(2) and (3).

For a summary of the typical industrial action timeline, see the table at the end of this guide. For information about what court action may be taken if the rules set out above are not observed by the union, see “Injunctions” below

Unofficial action

The notification and balloting rules do not apply to unofficial action – therefore unofficial action in contemplation or furtherance of a trade dispute is legal. However, since this would be rather an obvious loophole, the definition of official action is widely drawn. Action is deemed to be official if it is authorised (beforehand) or endorsed (afterwards) by anyone empowered to do so according to the union rule book or by the union leadership (i.e. National Executive, President or General Secretary). In addition action is official if it is authorised or endorsed by any lesser union official or committee unless the true union leadership promptly and unequivocally repudiates the action in the legally specified manner.

Whether or not the action is authorised or endorsed by a trade union is significant. This is because a union becomes liable under civil law for the industrial action inducing a breach of employment contracts and also for inducing a breach of commercial contracts between the employer and third parties. If it repudiates the action, the union becomes immune from employer legal action but the employee members are at risk of selective dismissal if their employment is terminated beyond the end of the next working day after the notice has been served, if they continue to take part in such action.
Secondary action

Industrial action by people working for an employer who is not a party to an actual or imminent trade dispute is secondary action. It is unlawful, as is calling on employees to take part in secondary action. The single exception is lawful picketing (see below).

Lawful and unlawful picketing

Action by employees in contemplation or furtherance of a trade dispute is unlawful if it amounts to unlawful picketing. To be lawful it must be (s220):

- At or near the pickets’ place of work (with some minor exceptions, for example, for employees who have no clearly established place of work).
- For the purpose of peacefully informing or persuading (as opposed to intimidating or blockading). For example, seeking peacefully to persuade a driver not to deliver goods to a premises by simply explaining the reason for the picket is likely to be lawful picketing.
- Either by a worker employed or until recently employed by the employer who is the party to the dispute, or by a union official picketing with members he personally represents.
- Of a nature that does not obstruct the highway or intimidates. Courts will take account of the Code of Practice on Picketing when looking at this issue. The Code of Practice suggests no more than six people on a picket line.

Injunctions

If the union/employees do not comply with any of the statutory requirements set out above then the “immunity” from legal action against them does not apply. In these circumstances an injunction can be sought from the courts to prevent or stop the industrial action. An injunction to stop or prevent unlawful industrial action may be sought by:

- The employer of the workers concerned.
- Any third party directly affected.
- Any union member called upon to carry out industrial action which does not have the support of a properly conducted ballot.
- Any third party who will or may be adversely affected by the industrial action in question by being deprived of goods or services or receiving goods or services of reduced quality, if he can show that the industrial action does not have the support of a properly conducted ballot.

However, uncertainty has existed over the degree to which trade union failures invalidate any strike that follows. During 2010, a growing number of High Court decisions suggested that minor errors by a trade union could result in successful employer injunctions halting a strike.

In response, trade unions argued that the rigour of the TULRCA provisions is mitigated by a margin for error granted to them. For example, the provisions are often limited by what is reasonable and specifically permit some minor, accidental failures (see above).

In 2011, these arguments found some favour with the Court of Appeal in RMT v Serco [2011] EWCA Civ 226 and employer injunctions are now less frequent and available on fewer grounds. In relation to the typical challenges made by employers in the past to prevent strikes, such as wrong people being balloted and incorrect information in the ballot and industrial action notices, the overall position is now that:
• The obligations to give accurate notices and to ballot accurately are governed by what is reasonable bearing in mind the records held already by the union.
• There is no obligation on the union to prepare or update records specifically for industrial action ballots, but, it must not use information that it knows is wrong.
• The duty to provide an explanation describing how the union arrived at the information provided in the notices is not onerous and the use of a formulaic or generic explanation can suffice.
• If an error is made which reasonably practicable steps should have prevented, it will be forgiven if it is, either, covered by the minor, accidental provision (above), or, if it is a “trifling error” (also known as the "de minimis" principle).

However there are still substantial procedural hurdles faced by unions under the legislation and there may still be cases where effective challenges can be made. For example, the Court of Appeal has held that a delay of nearly two days in informing the employer of the ballot result (the ballot closed midday 1st September and the employer received the result on the 3rd at 11am) was unreasonable.

**Docking the pay of strikers**

The common law principle of “no work, no pay” applies. This is straightforward if employees strike – for whole days on strike the deduction should be calculated by reference to the number of hours lost against the normal working week. For strikes of less than a whole day the right to deduct depends upon whether the contract specifies an hourly rate of pay and upon whether the employer accepts partial performance of the day’s work.

In cases of other kinds of industrial action, such as a go-slow or bans on certain types of work, the right to deduct depends upon whether the employer has accepted the partial performance tendered by the employee. If careful steps are taken it is usually possible either to pay nothing, or to pay less than normal pay.

**Prohibited use of labour hire/agency workers**

An employer faced with a strike or other industrial action would normally seek to put in place a strategy to minimise the negative impact of the industrial action on its business. A discussion of such contingency planning by an employer is beyond the scope of this paper. However, one legal point should be noted in this context. An employer may want to engage labour through an employment agency to perform the duties normally performed by a striking worker, or the duties normally performed by any other worker who has been assigned to cover the striking worker. It is a criminal offence for the agency to supply agency labour in such circumstances, although the restriction does not apply during unofficial action.

Directly hiring temporary employees to perform these roles falls outside the ban but employers are advised to take legal advice to ensure that any such arrangement does not inadvertently fall foul of the law.

**Dismissals and industrial action**

**Dismissal for unofficial action**

If an employee is dismissed while participating in unofficial industrial action, he or she cannot claim unfair dismissal (unless the principal reason for the dismissal was a specifically prohibited reason, such as health and safety).
It is very important to check that the employee was indeed taking part in the industrial action and that, at the time of the dismissal, it was unofficial action for the purposes of that employee. For example, if employees are members of two or more unions but only one has authorised the action, then it may be unofficial action for some employees and official action for others.

**Dismissal for protected action**

An employee who is dismissed for taking part in “protected industrial action” (i.e. in contemplation or furtherance of a trade dispute plus all balloting and other statutory immunity requirements are met) is treated as automatically unfairly dismissed if:

(a) the dismissal takes place within twelve weeks of when the employee first took part in the action (excluding any “locked-out” days);
(b) the dismissal takes place later, but the employee had stopped taking part during that twelve week period; or
(c) the dismissal takes place later in a case where the employee had not stopped taking the action at the end of the twelve week period, but the employer had not taken such procedural steps as would have been reasonable for the purposes of resolving the dispute to which the action relates. In determining whether the employer has taken those steps, regard is to be had to:

- whether the employer or union had complied with procedures in any collective agreement
- whether either side offered or agreed to start or recommence negotiations after the industrial action had commenced, and
- whether either side unreasonably refused a request that a conciliation or mediation service be used.

Where the union and the employer have agreed that conciliation or mediation services will be used, further regard will be had as to whether:

- an “appropriate person” attended the conciliation meetings on behalf of the employer (i.e. one with authority to settle the matter on behalf of the employer) and for the union (the representative responsible for handling the matter)
- the union and employer co-operated with the conciliator or mediator in the making of arrangements to set up meeting;
- the union and employer carried out any actions agreed with the conciliator/mediator and whether that was done in a timely fashion, and
- the employer and union answered reasonable questions put to them at those meetings.

Regard must not be had to the merits of the dispute in assessing whether the employer has taken reasonable procedural steps. In addition, any confidential information provided by the union or employer to the conciliator/mediator as part of the process should not be disclosed to a tribunal without the affected party’s consent.

If the protected period is over before dismissal occurs then the rules for dismissal for official (but not protected) action below apply. For a summary of dismissal rights during industrial action, see the table at the end of this guide.
**Dismissal for official (but not protected) action**

If any employer is to avoid the possibility of unfair dismissal claims by employees dismissed during official (union authorised) industrial action which is not protected action (because it was not properly balloted or notified), or after the protected period for protected action has expired, or during a lock-out by the employer, the employer is required to dismiss all employees who take part in the action (and then either not offer re-engagement to any of them for three months or re-engage them all). If an employer selectively dismisses (or re-engages) employees in these circumstances then they will be able to pursue a claim for unfair dismissal in the normal way. The dismissal will not, however, be automatically unfair (as it would for employees taking protected industrial action).

*Legal advice should be sought before dismissing any employee in connection with industrial action.*

We would ask you to note that this guide is not intended to be exhaustive or a substitute for legal advice. The application of the law often turns upon the specific facts in question; there also remain considerable legal uncertainties and court decisions frequently change the law. You are advised to seek specific advice upon any given scenario.
## INDUSTRIAL ACTION CHECKLIST/EXAMPLE TIMELINE

<table>
<thead>
<tr>
<th>Time</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seven days before Opening Date of ballot (eg notice 01/11 – Opening Date 08/11)</td>
<td>Notice of ballot to be received from trade union</td>
</tr>
<tr>
<td>Three days before Opening Date (eg sample 05/11 - Opening Date 08/11)</td>
<td>Sample voting paper to be received from trade union</td>
</tr>
<tr>
<td>Opening Date</td>
<td>First voting papers sent to affected employees</td>
</tr>
<tr>
<td>One week (1st Class Post)</td>
<td>Voting period</td>
</tr>
<tr>
<td>Two weeks (2nd Class Post)</td>
<td></td>
</tr>
<tr>
<td>Date of Ballot</td>
<td>Final date upon which votes may be received and counted by trade union</td>
</tr>
<tr>
<td>As soon as reasonably practicable after Date of Ballot</td>
<td>Notification of result to members and employers by trade union</td>
</tr>
<tr>
<td>Seven days after notification by employer of result</td>
<td>Earliest date for commencement of industrial action</td>
</tr>
<tr>
<td>Four weeks after Date of Ballot</td>
<td>Last date for:</td>
</tr>
<tr>
<td></td>
<td>1. Submission of scrutineer’s report to trade union</td>
</tr>
<tr>
<td></td>
<td>2. Commencement of industrial action (unless extended by agreement or court order)</td>
</tr>
<tr>
<td>Twelve weeks after start of protected industrial action (excluding any “locked out” days)</td>
<td>End of minimum period when dismissals automatically unfair (see note)</td>
</tr>
<tr>
<td>As soon as reasonably practicable</td>
<td>Final date for obtaining copy of scrutineer’s report from trade union (where request for report made by union member entitled to vote/their employer, within 6 months of the date of the ballot)</td>
</tr>
<tr>
<td>3 months from date of dismissal</td>
<td>End of period that unfair dismissal claims can be filed</td>
</tr>
</tbody>
</table>
### SUMMARY OF DISMISSAL RIGHTS

<table>
<thead>
<tr>
<th>Type of Action</th>
<th>Dismissal Rights</th>
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</thead>
</table>
| **Official Protected Action**  | Automatic unfair dismissal if:                                                                                              | employee dismissed within 12 weeks of first taking part in the action;  
|                                | dismissal takes place after the 12 week protected period, but employee stopped taking part during the 12 weeks;                                                                                      |
|                                | the dismissal takes place after 12 weeks, and the employee had not stopped taking action at the end of the 12 week period, but the employer had not taken the prescribed procedural steps to attempt to resolve the dispute. |
| **Official (not Protected or once the Protected period has expired)** | Dismissal will be unfair unless the employer dismisses all the employees who take part in the action.                                                                  |
|                                | If an employer selectively dismisses (or re-engages) the dismissed employees may claim unfair dismissal.                                                                                                   |
| **Unofficial**                 | Dismissed employee cannot claim unfair dismissal (unless the principal reason for dismissal was another, specifically prohibited, reason).                                                 |

Our experience

Our specialist labour law team has unrivalled experience in both UK and international labour law and trade unions. Effective legal advice in this field, in particular, requires experience and not just book-learning. Our continuous exposure to industrial relations issues gives us a knowledge of strategy and tactical options which we deploy for the benefit of our clients.

Areas of expertise

- trade union collective agreements
- formal claims for trade union recognition
- collective bargaining
- industrial action
- strike injunctions
- information and consultation during large-scale redundancies and business transfers
- establishing employee consultation groups
- collective grievances and failures to agree
- rights of trade union officials and members
- European works councils
- international labour relations
- international or global framework agreements.

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