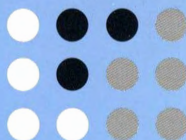
Labour Research Department Booklets



Taking industrial action

• A legal guide •

• September 2017 •

About the Labour Research Department

The Labour Research Department (LRD) is an independent, trade union-based research organisation. Through its publications and enquiry and research services, LRD provides the trade union and labour movement with information on:

- the law at work
- pay and conditions
- equality at work
- health and safety at work
- the economy
- privatisation
- European Union developments
- and many other economic, political and industrial topics

For full details of all LRD services, prices, subscriptions, order forms or free sample copies of regular publications, contact the Secretary, LRD, 78 Blackfriars Road, London SE1 8HF. Tel: 020 7928 3649; Fax: 020 7902 9815; Email: info@lrd.org.uk; Web: www.lrd.org.uk

The LRD Enquiry line
As well as its booklets and other publications, the LRD runs a telephone advice line for affiliated organisations, providing day-to-day advice to reps who are supporting members. The telephone number is: 0207 928 3649. Alternatively, email the LRD at: info@lrd.org.uk. If your branch is not already affiliated to the LRD, please use the same telephone number or email address for details about how to do this.

This booklet aims to provide accurate information and comment on the subject it covers. It is sold and/or offered to subscribers on the understanding that the Labour Research Department is not in business as a lawyer or consultant. This booklet does not contain legal advice and must not be relied on as such.

Printed by RAP Spiderweb, Clowes Street, Hollinwood, Oldham OL9 7LY
0161 947 3700.

Published by LRD Publications Ltd
78 Blackfriars Road, London SE1 8HF
020 7928 3649.

Author: Nerys Owen

Editor: Clare Ruhemann

1/5/September 2017

ISBN 978 1 910168 37 0

Labour Research Department Booklets

contents

Introduction 5

1. The framework of industrial action law 7

The immunities 8
Compensation for breaching the immunities 9
Groups banned from striking 9
What constitutes 'industrial action' 10
Strikes 10
Action short of strike 10
Working to rule 10
Overtime ban 10
Leafleting campaign 11
Industrial disputes in the prison service 12
Lockouts 14

2. Trade Union Act 2016 – key changes 17

Changes to industrial action rules 17
New powers for the Certification Officer 18
Temporary agency workers 19
Wales, Scotland and Northern Ireland 19

3. What is a trade dispute? 21

Trade dispute must be with workers' own employer 22
Trade dispute must already exist 23
Only 'workers' can lawfully strike 24

4. When industrial action is 'official' 25

5. The rules on conducting and reporting on ballots 27

Ballot thresholds 27
All strikes other than in 'important public services' 27
Ballot thresholds for 'important public services' 27
What are important public services? 28
The ballot process 31
Conducting the ballot 31
Establishing who is entitled to vote 33
Accidental failure 34
After the ballot 36
Announcing the result 36

Requirements to notify employers 36
New limited life of ballot mandate 40
Annual reporting of industrial action 41

6. Picketing 42
Summary 42
Picket supervisor 43
Letter of authorisation 43
What to wear 44
Functions 44
Picket location 45
How many can picket? 46
Criminal and civil sanctions 48

7. Ban on supplying temporary agency workers in strikes 49

8. Dismissal of striking workers 51
Scenario 1 – dismissal during official, balloted industrial action 51
Scenario 2 – dismissal during official but unballoted industrial action 52
Scenario 3 – dismissal during unofficial industrial action 53
Exceptions to the ban on unfair dismissal claims 53
"Taking part" 53
Workers off sick 53
Detriment short of dismissal 54

9. Injunctions 56
Who can sue 56
Legal action by a member of the public 56
Legal action by a union member 57
Injunction application by the government 57
Legal consequences of an injunction 58

10. Effect of striking on terms and conditions 59
Continuity of employment/length of service 59
Pay 59
Pay and action short of a strike 60
State benefits for strikers 61

11. Union responses to the Trade Union Act 62
The new ballot thresholds 62
Large-scale disputes 63
Financial support for strikers 64
Getting the vote out 64

Limit to the ballot life 65
Extra information on the ballot paper 66
Other forms of protest 66
Leverage campaigns 66
Visible protest 67
Rise in unofficial action? 68
Rise in strategic litigation? 68

12. The effect of international laws and conventions 69

Industrial action and European Union law 69
Industrial action and human rights 71

Further Information 74

Legal sources and publications 74
Labour Research Department 74
Other useful sources of information 75

Introduction

When the government decided to enact the *Trade Union Act 2016*, described by the TUC as "the most serious attack on the rights of trade unions and their members in a generation", there was no burning crisis in UK industrial relations. On the contrary, figures from the Office for National Statistics showed strikes remaining at a historically low level, even after taking into account recent high-profile examples such as the junior doctors' strike and the industrial action on the Southern Rail network. In 2015, the number of lost working days, at 170,000, was the second lowest annual total since records began in 1891.

At the same time, wages have stagnated since 2008, described by Bank of England governor Mark Carney as "the first lost decade since the 1860s". Data from the Organisation for Economic Cooperation and Development (OECD) released shortly before the June 2017 snap election shows that in 2018, UK workers will face the largest real wage fall of any advanced economy. According to TUC research, average real wages remain lower than they were pre-crisis, down £1,200 a year on 2008. And in June 2017, unsecured personal borrowing – such as personal loans and credit card debt but excluding student loans – topped £200 billion for the first time, as people struggle to get by on diminishing wages.

There is, of course, a direct link between the UK's highly restrictive industrial action laws, in place since the 1980s, and this prolonged decline in real wages, because these laws, dressed up by successive governments as the promotion of "industrial democracy", are designed to impede unions' ability to bargain effectively for decent terms and conditions. As has been stated many times, without an effective right to strike, collective bargaining is reduced to "collective begging".

As well as being highly restrictive, UK strike laws are out of date, designed for a world in which workers are in direct, continuous, full-time employment with a single employer. The law's failure to keep pace with the break-up of the UK workplace, including outsourcing, rising low-paid self-employment (false and genuine), the pernicious spread of intermediaries such as umbrella companies and the growth of the gig economy, is no accident.

The laws are also out of date because of the government's insistence on postal balloting – a mechanism known to depress turnout – although a government review into electronic balloting is to report by the end of 2017 (see box on page 39).

It is more important than ever that union reps and negotiators understand the restrictions posed by the law and how to navigate them, but also to discover what *is* possible.

This booklet sets out the current industrial action laws, including the changes introduced by the *Trade Union Act 2016* (TUA 16), using straightforward language with case law examples where relevant.

The booklet also looks at what additional types of action unions are taking to meet their objectives in helping their members improve their pay and conditions when employers fail to listen.

This booklet does not contain legal advice and must not be relied on as such. In addition, every union has its own strict internal procedures that must always be followed when deciding whether to call industrial action.

1. The framework of industrial action law

Under UK law, there is no positive legal right to strike, or to take any other form of industrial action. Unions can be held legally liable for what are known as the "economic torts" (most commonly, the tort of inducing breach of the employment contract) if they call workers out on strike or industrial action short of strike (IASS) without complying strictly with the many legal rules that govern all forms of industrial action.

The legal framework operates by giving the union and striking workers "immunity" from some (but not all) types of legal claim that can be brought against them, but only as long as:

- industrial action is taken "in contemplation or furtherance of a trade dispute" with the workers' own employer (see Chapter 3); and
- precise statutory conditions, including strict rules as to balloting and notice, have been met (see Chapter 5).

Unions can be taken to court for calling or endorsing unlawful industrial action that is not covered by the immunities. The most common remedy sought by employers is an injunction (an order requiring the union and workers to halt their industrial action immediately - see Chapter 9). However, employers can also be awarded compensation (see page 9). Where an injunction is granted, the union can expect to be ordered to pay the employer's legal costs, which are likely to be substantial.

The main piece of legislation concerning industrial action in the UK is the *Trade Union and Labour Relations Consolidation Act 1992* (TULRCA), as amended by the *Trade Union Act 2016* (TUA 16). Its key parts are:

- Part V: Industrial Action, which covers the rules that must be followed to make industrial action lawful; and
- Sections 20-22: Liability of trade unions in proceedings in tort.

The industrial action regime in TULRCA has been changed in important ways by the TUA 16. The relevant changes are summarised on page 17 and they are explained in more detail throughout this booklet.

This and other statutory legislation is supplemented and interpreted by judicial rulings known as case law. When reaching decisions in cases, UK courts and tribunals must comply with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), as well as relevant international conventions, including those of the International Labour Organisation (ILO).

Several important European-level rulings have impacted on the development of UK industrial action law. The roles played by the ECJ, the ECHR and the ILO are summarised in Chapter 12, with information as to where to find more detail if required.

As well as legislation, there are the following Codes of Practice and non-statutory guidance, which have been updated to take account of the changes made by the TUA 16:

- Code of Practice on Industrial action ballots and notice to employers (Annex 2 includes a sample ballot voting paper);
- Code of Practice on Picketing; and
- non-statutory guidance on the *Important Public Services Regulations 2017*.

These Codes are not legally enforceable, but they can be taken into account in legal proceedings. In practice, a breach of a relevant Code can be expected to be seized on by an employer looking to build a case for an injunction to prevent a strike going ahead.

Criminal laws can also be invoked, including laws prohibiting trespass, breach of the peace and obstruction of the highway (see Chapter 6).

Industrial action laws cover not just strikes but also go-slows, working to rule, picketing, refusing to cross picket lines and lockouts by employers.

The immunities

As long as all the statutory conditions for lawful industrial action have been met, unions, workplace reps and striking workers are given "statutory immunity" (legal protection) from the following legal claims:

- inducing a breach of contract – typically the employment contract (section 219(1)(a), TULRCA);
- interfering with, or inducing interference with a contract (section 219(1)(a), TULRCA);
- threatening to break a contract or interfere with its performance (section 219(1)(b), TULRCA); and
- conspiring to further a trade dispute (section 219(2), TULRCA).

Employees who participate in lawful industrial action are also given some protection from dismissal. The limits of that protection are explained in Chapter 8: Dismissal.

This immunity from legal claims does not extend to other potential claims such as trespass, breach of the peace, or any criminal charges (see page 48). This is the case even if there is a "trade dispute" in existence (see Chapter 3) and a lawful ballot has been conducted (see Chapter 5).

The following types of industrial action are specifically denied the protection of the immunities, even if they have been lawfully balloted. In other words, they can never be lawful:

- action to enforce union membership – a "closed shop" (section 222, TULCRA);
- action to protest a dismissal following unofficial action (section 223, TULRCA);

- "secondary" (or "solidarity") action – action in support of workers who are not employed by the striking workers' own employer (section 224, TULRCA);
- picketing in breach of the picketing laws (including new requirements for "union supervision" introduced by the TUA 16) – see Chapter 6: Picketing (section 220A, TULRCA); and
- action to pressurise an employer to force a supplier or contractor to recognise a trade union (section 225, TULRCA).

Compensation for breaching the immunities

When industrial action breaches the legal requirements set by TULRCA, unions lose the protection of the statutory immunities and are exposed to substantial compensation claims as well as the threat of injunction (see Chapter 9).

Compensation claims can be brought by the employer, a customer or supplier, or a member of the public claiming that the strike is likely to prevent or delay the supply of goods or services to him, or reduce their quality (section 235A(3), TULRCA).

Although employers can claim compensation for each separate action, there is a cap on the damages unions can be asked to pay per episode. That cap, set out in section 22, TULRCA, relates to the size of the union, and is as follows:

Trade union membership	Cap on damages
Less than 5,000	£10,000
5,000 to 24,999	£50,000
25,000 to 99,999	£125,000
100,000 or more	£250,000

The sums involved can be even larger where a union has not complied with an injunction prohibiting the industrial action, that is, where the union is in contempt of court, placing its assets at risk of "sequestration" (seizure).

In cross-border claims based on alleged breaches of European Union law restricting industrial action, unions' potential financial exposure is even greater. There may be no cap on the compensation that can be awarded in this kind of claim (see Chapter 12).

Groups banned from striking

Some groups of worker are forbidden by law from striking in the UK. These include members of the armed services, prison officers, police officers, and civil servants working for the National Crime Agency. Prison officers have campaigned, through their union, the Prison Officers' Association (POA), against the ban for many years, including taking their case to the European Court of Human Rights (see box on pages 12-14 and Chapter 12).

What constitutes 'industrial action'

Most calls by a union for members to take industrial action will amount to an inducement for members to breach their employment contract (or one of the other economic torts set out above), either by striking or engaging in industrial action short of a strike (IASS). There is no general definition of "industrial action". Instead, the issue has been judged "best left to the experience and good sense of employment tribunals" (*Norris v London Fire & Emergency Planning Authority [2013] UKEAT/0146/12/KN*).

Strikes

A strike is defined for some purposes by section 246 of TULRCA as "any concerted stoppage of work", and by section 235(5) of the *Employment Rights Act 1996* (ERA 96) as the cessation of work by a body of employed persons acting in combination, done as a means of compelling an employer to accept or not accept employment terms and conditions.

Action short of strike

Industrial action short of strike (IASS) is any concerted decision to do - or not to do - something within the employment contract, short of a complete stoppage of work, that is aimed at disrupting the employer's business or causing maximum inconvenience, in pursuit of a negotiating position (*Ticehurst v BT PLC [1992] IRLR 219*).

Working to rule

"Working to rule", where a union instructs members to perform their express contract terms to the letter in order to frustrate the employer's business, is a form of industrial action. So is a "**go-slow**". In the leading case of *Secretary of State for Employment v ASLEF (No.2) [1972] 2 QB 455*, drivers were found to be engaged in IASS when they followed the union's call to comply with the rule book to the letter, for example taking so long to check the engine, or opening and closing every door to check for safety, that the system ground to a halt. This, ruled the Court of Appeal, was a breach of the workers' **implied duty of good faith** when carrying out their express contractual duties. What made the drivers' actions unlawful was their motive when performing their contractual duties, which was to cause disruption so as to improve their negotiating position with the employer.

Overtime ban

Courts have ruled that a **concerted refusal to do voluntary overtime** is industrial action, even if there is no contractual obligation to perform it (*Power Packing Casemakers Limited v Faust [1983] ICR 292*), because the aim of withholding the overtime is to pressure the employer to do - or not to do - something.

However, the legal position is not always clear. In *Ministry of Justice v The*

Prison Officers Association [2017] EWHC 1839, the High Court ruled that the unreasonable performance of obligations within the scope of the employment contract - such as checking an engine too thoroughly in the *ASLEF* example - will amount to industrial action (as a breach of the implied duty of fidelity), but that the non-performance of tasks *outside* the scope of the contract, such as the ASLEF train drivers' refusal to volunteer to work on Sundays, was not industrial action, however unreasonable that refusal. This was because the drivers owed no contractual obligation to work on Sundays, meaning that when deciding to withhold their labour, they owed no implied term of fidelity, no matter why they were refusing to work. The High Court followed a Privy Council ruling in the case of *Stevedoring Services Limited v Burgess [2002] UKPC 39*.

The question whether withholding voluntary tasks amounted to industrial action was especially important in the prison officers' dispute, because the law bars prison officers from engaging in any form of industrial action whatsoever (see box, pages 12-14).

Recent examples of balloted IASS include: teachers refusing to carry out classroom observations with the aim of changing the employer's policy on the number and duration of observations; probation staff working strictly to contract hours with no voluntary overtime to secure better pay (in the National Probation Service); an overtime ban by Birmingham refuse workers plus returning to depots for all lunch and tea breaks to protect pay and jobs (members of general union Unite); and BA cabin crew refusing to distribute unfair feedback forms to passengers rating "service quality", where the results were to be fed into the staff performance review process.

Leafleting campaign

A union leafleting campaign aimed at persuading customers to boycott a product or service, or to support the union's campaign, will not amount to the economic tort of interference with a contract, or unlawful inducement to breach a contract. This is because the leaflet is aimed at customers, who are not party to the contract and are free to make their own minds up, as this leading case demonstrates:

> The Transport & General Workers' Union (TGWU) – now merged with Unite – was in dispute with the employer, a mushroom growing business, over proposals to change overtime arrangements to reduce costs. When talks broke down, the union launched industrial action. 89 striking workers were dismissed and in protest, the union's regional officer announced that union members would hand out leaflets outside supermarkets supplied by the employer to inform potential customers of the dispute. The leaflet asked customers to support the dismissed strikers by boycotting the employer's mushrooms at the store.
>
> The Court of Appeal ruled that there was no interference with contracts in this case. The leaflet was directed at customers of the supermarket, not at

the supermarket's managers. The union members were lawfully distributing the leaflets and the prospective customers, as third parties, were free to make up their own minds whether or not to buy the mushrooms.

Middlebrook Mushrooms Limited v TGWU [1993] IRLR 232

Industrial disputes in the prison service

Prison officers are barred from taking industrial action by the *Criminal Justice and Public Order Act 1994*. Section 127 of this Act makes it unlawful for anyone to "induce a prison officer "to take (or continue to take) any industrial action". "Industrial action" has a specific meaning in this context, namely "withholding of services as a prison officer" or "any action that would be likely to put at risk the safety of any person (whether a prisoner, a person working at or visiting a prison, a person working with prisoners or a member of the public)".

The POA prison officers' union has campaigned for the right for its members to strike over many years, in the face of a steady deterioration in UK prison conditions. A rise in prisoner numbers over the five years up to 2017 has coincided with a 28% cut in the number of frontline operational staff. Despite a promise of extra staff by the end of 2018, staffing is still expected to remain below 2010 levels. Drugs are widely available, linked to a rise in violence, assault and riot. The Ministry of Justice's (MoJ) own data has shown that by March 2016, assaults on prison officers in England and Wales had reached the highest level ever recorded.

2016 saw several unofficial protests by POA members over safety concerns, including instructions from the union to withdraw to a place of safety. Under section 100 of the *Employment Rights Act 1996* (ERA 96), it is automatically unfair to dismiss any employees for withdrawing to a place of safety or for taking other appropriate steps to protect their own safety or that of others, if they do so because they reasonably fear serious and imminent danger.

In November 2016 and again in February 2017, the POA made more structured calls for action by members, with the aim of highlighting the risk to members from deteriorating conditions. Specifically, the union recommended that members withdraw from a range of voluntary tasks, following the failure of promised talks with the National Offender Management Service (NOMS). Approximately 10,000 officers participated.

The government responded by resorting immediately to the courts. The MoJ was granted two interim injunctions and the officers returned to their normal duties. Then in July 2017, the MoJ was granted a permanent injunction, banning prison officers from taking any form of industrial action. The MoJ's application came as no surprise to general secretary Steve Gillian, who has accused the MoJ of sheltering behind the courts instead of engaging in proper negotiation. The POA says it remains committed to raising legitimate health and safety concerns within UK prisons and bringing them to the attention of the general public *(Ministry of Justice v The Prison Officers Association [2017] EWHC 1839)*.

Within days of the permanent injunction, in August 2017 the Prison Governors' Association (PGA), a traditionally moderate body, added their voice to the crisis, publicly declaring themselves "devastated" at the "complete decline" in the UK prison service and describing the Justice Secretary's silence as "deafening". Recruitment remains in a "critical" condition, with a net increase of just 75 officers in the year 2016-17. Without enough staff, prisons can only "hold and control" prisoners, says the PGA.

Challenging the ban in the European Court of Human Rights

In 2011, the POA challenged the industrial action ban before the European Court of Human Rights (ECHR) as a breach of the human right to freedom of association (Article 11 of the European Convention on Human Rights), but the application was thrown out on technical grounds. The EHRC ruled that it was not able to rule on the legality of the ban because the issue had already been considered by a different international body - the International Labour Organisation (ILO) Committee on Freedom of Association (CFA). The ruling has been criticised by trade union law expert Professor Keith Ewing and by barrister John Hendy QC who represented the union. They point out that CFA recommendations are not the same as judicial rulings. In particular, the CFA cannot award any remedy if the right to strike is violated - which is why the POA took its claim to the ECHR in the first place *(Prison Officers' Association v The UK Application 72808/10, 6 December 2011)*.

In any event, the CFA's report, published in 2005, was itself very critical of the strike ban. The ILO accepted that where workers are providing "essential services" such as operating a prison, the

right to strike can be limited, or even removed altogether. But where this happens, the ILO says there must be "compensatory guarantees" in place, to make up for the resulting imbalance in bargaining power. Specifically, says the ILO, decisions on pay and conditions should be made by a genuinely independent and impartial external body - not by the government. The ILO criticised arrangements for the prison service in England, Wales and Northern Ireland (but not Scotland), because they fail to meet this test. To date these problems have still not been addressed. The Prison Service Pay Review Body (PSPRB) remains an advisory body, with the Ministry of Justice making the final decision on pay *(ILO Report No.336, March 2005 - Complaint No.2383 dated 20 August 2004)*.

For more information, see *The Trade Union Act 2016 and the failure of human rights* by KD Ewing and John Hendy QC, published in the Industrial Law Society Journal, September 2016.

Lockouts

There is one form of industrial action which is taken by the employer - and that is the "lockout". Lockout is defined in section 235(4) ERA 96 as the closure of a place of employment, the suspension of work, or an employer's refusal to continue to employ employees as a result of a dispute, with a view to compelling employees, or to aid another employer in compelling its employees, to accept employment terms or conditions.

Lockouts are used by employers to exert pressure on workers to accept redundancies and changes to terms and conditions. Where workers refuse to perform the full range of their contractual duties (industrial action short of strike), the employer is likely to be allowed to send them home without pay (see page 60, and the case of *BT v Ticehurst and Thompson [1992] IRLR 219*). This is one form of lockout.

Where there was no preceding industrial action or threat of it, a lockout is likely to be a breach of contract by the employer, and in these circumstances, an employee who can show that they were ready, willing and able to work during the lockout should be able to claim their lost wages. However, note that an employee who leaves their job during a lockout is not allowed to claim to have been constructively dismissed for the purpose of claiming a redundancy payment (section 136(1), (2), ERA 96).

A lockout that takes place in the context of official industrial action will impact on the calculation of the period of protection from unfair dismissal (see Chapter 8: Dismissal). Continuity of employment is not broken by a lockout (see Chapter 8).

Lockouts – a spreading practice

Until relatively recently, lockouts were quite rare in the UK, but they resurfaced in 2012, with a 19-day lockout of 149 workers – the first in many years. It took place at the packaging plant of Austrian-owned company Mayr-Meinhof at Bootle, Merseyside, in a dispute over the withdrawal of redundancy pay terms. Plant workers had been engaged in lawful industrial action (rotating six-hour walk outs), and management responded by locking them out of the factory.

The Mayr-Meinhof lockout was followed in 2013 by the now notorious Grangemouth Oil Refinery dispute, in which petrochemical giant Ineos first locked out its workforce and then threatened the refinery's closure, unless workers, represented by general union Unite, conceded to its demands, including cuts to pay and pensions.

In 2014, the practice spread to the public sector, with what is thought to have been the first ever lockout in NHS history. 78 scientists, pathologists and laboratory staff at Northampton General Hospital Trust were locked out of their workplace, their swipe cards cancelled and access to the laboratory denied, when talks with Unite broke down in a dispute over increased night shifts and cuts to out-of-hours payments. Staff had voted to take industrial action short of a strike (IASS) comprising a ban on overtime, out-of-hours working and training of other staff, and the employer responded with a lockout.

Over 2014-15, lockouts were threatened in the fire services, affecting firefighters and control staff in Essex and Buckinghamshire, in disputes over staff cuts, imposed shift changes and pensions.

In June 2014, tube-cleaning staff belonging to rail union the RMT were locked out in a dispute with their employer, cleaning contractor ISS, over the introduction of biometric fingerprinting technology to sign in and out of work. Staff had voted in a lawful ballot in favour of IASS – boycotting the biometric fingerprinting machine and instead signing on to work using the established method. The employer responded by locking out and sending home everyone who refused to use the new system.

Lockouts are uniquely hostile acts, working against any prospect of reaching a lasting resolution of an industrial

dispute. Commenting on the Northampton Hospital dispute, TUC general secretary Frances O'Grady noted that "rather than seeking to intimidate staff, employers should be talking to union members and trying to resolve disputes. If the strong-arm tactics used in Northampton succeed, it may encourage other employers to think that they too are above the law. If this happens, we should all be deeply concerned."

2. Trade Union Act 2016 - key changes

Before 1 March 2017, UK strike laws were already among the most restrictive in the developed world. Nevertheless, on that date these laws became even more draconian, when an extra layer of restrictions on balloting, notice and picketing were enacted under the *Trade Union Act 2016* (TUA 16). The Act is described by the TUC as "the most serious attack on the rights of trade unions and their members in a generation".

The TUA 16 received Royal Assent on 4 May 2016. During its passage, the legislation was widely criticised, not only by trade unions but also by other voices from across the political spectrum, including the Chartered Institute of Professional Development, the Association of Chief Police Officers, human rights campaigners such as Liberty and Amnesty International, and even Bruce Carr QC, the author of a government-commissioned review of the UK's industrial action laws.

Although a number of important concessions were secured through union campaigning during the passage of the Bill, the TUA 16 in its final form remains a damaging and divisive set of laws that will make it much harder for working people to bargain effectively in support of their jobs and their terms and conditions.

The TUA 16 brought in a number of provisions affecting trade unions in various ways, but this booklet is concerned only with those which impact directly on the right to take industrial action. These are changes to the law on:

- balloting;
- notice;
- picketing;
- reporting industrial action to the certification officer (CO); and
- the expansion of the CO's powers to regulate and penalise trade unions.

This chapter of this booklet contains a brief summary of the key changes, and there is more detail about each one in further chapters.

Changes to industrial action rules

For all industrial action ballots opened on or after 1 March 2017:

- at least 50% of those entitled to vote must participate in the ballot, and for strikes other than in "important public services", a majority of those voting must vote in favour. In other words, "not voting" counts as a vote against the action (see page 27);

- for industrial action in "important public services", again, at least 50% of those entitled to vote must participate in the ballot, but in addition, at least 40% of those entitled to vote must vote in favour (see pages 27-30);
- the period of validity of a ballot (the "ballot life") is limited to six months (or nine months if both sides agree) (see page 40);
- the amount of notice of industrial action that a union must give an employer is 14 (instead of seven) days (see page 38);
- unions must "summarise" the nature of the dispute on the ballot paper (see page 33); and
- unions must specify the type(s) of industrial action short of strike on which the union is balloting, and indicate the likely length of the action (see page 33).

In addition:

- picketing law has changed, adding a new requirement for unions to appoint a "picket supervisor" willing to give their contact details to the police (see Chapter 6: Picketing); and
- unions must make an annual report of all industrial action endorsed by the union in the preceding 12 months, which must be added to the union's existing annual return to the certification officer (see page 41).

New powers for the certification officer

In addition to the changes set out above, the TUA 16 has radically overhauled the role of the certification officer (CO). It has given the CO **new investigatory powers over unions**, including the power to demand production of documents and to call on union officers to give evidence, backed up with financial penalties of up to £20,000. These new powers can be exercised by the CO acting on their own initiative, or at the instigation of a third party (schedules 1 and 2 to the TUA 16). Consultation on the penalties connected to the new powers closed in May 2017.

Writing in his final Annual Report in 2016, outgoing CO David Cockburn echoed the concerns of many commentators when he warned of the potential for abuse of the new statutory right allowing any third party to refer a union to the CO. He anticipated that, in future, unions may face a "myriad" of references by external organisations with something to gain, such as employers or contractors looking for new ways to undermine lawful industrial action. That third party may have substantial financial and legal resources at their disposal, and a CO who does not do their bidding could face the threat of judicial review.

Temporary agency workers

When publishing the Trade Union Bill, the government also announced a consultation on lifting the current **ban on the supply of temporary agency workers** to replace striking workers, reflecting a commitment contained in the Conservative Party manifestos of 2010 and 2015. To date, these proposals have not been implemented, but the government is said to be still considering lifting the ban, in place since 1973 (see Chapter 7).

Wales, Scotland and Northern Ireland

The TUA 16 was vigorously opposed by the Welsh and Scottish governments. Both governments regard the legislation as wholly inconsistent with the principles of partnership on which these administrations rely for the effective delivery of public services.

In **Wales**, the Welsh Assembly has enacted its own *Trade Union (Wales) Act 2017* (TU(W)A), which became law in Wales on 18 July 2017. The TU(W)A disapplies the following parts of the TUA 16, to the extent that they apply to the devolved Welsh authorities:

- the 40% ballot threshold for all strikes in important public services (see Chapter 5);
- sections 13-15, TUA 16, which target public sector facility time (see the Labour Research Department's companion booklet, *Time off for trade union duties and activities*, 2017); and
- section 15, TUA 16, which places restrictions on the system of check-off in the public sector (the system that allows workers to pay their union subs through deductions from their salary at source).

The TU(W)A also includes a ban on devolved Welsh authorities using agency workers to replace striking workers in official industrial action (see Chapter 7).

The Welsh Assembly's decision to pass this law was warmly welcomed by the trade union movement.

However, the Assembly may be heading for a constitutional showdown with the Westminster government, because of changes to the Welsh devolution settlement made by the *Wales Act 2017* (WA 17).

The WA 17 has introduced a "reserved powers" system under which the Welsh Assembly is allowed to legislate on any subject except those which have been "reserved" to Westminster. The "reserved powers" (listed in a new Schedule 7A (section H1) to the *Government of Wales Act 2006* (Schedule 1 to the WA 17)) include "employment and industrial relations, including the subject matter of the *Trade Union and Labour Relations Consolidation Act 1992*". The WA 17 received Royal Assent in January 2017, but the relevant sections were not in force as this booklet goes to press, and cannot come into force without consultation with the Assembly.

As regards **Scotland**, the Scottish First Minister has said that the Scottish Parliament would never have agreed to the TUA 16 had it been given the chance to vote on it. In Scotland, responsibility for substantive employment law, such as industrial action laws (as opposed to employment tribunal administration) is not devolved to the Scottish government, despite calls for this to happen when the government's powers were extended by the *Scotland Act 2016*. Instead, it is the responsibility of Westminster.

The TUA 16 does not apply at all to Northern Ireland.

3. What is a trade dispute?

Only industrial action "**in contemplation or furtherance of a trade dispute**" can be lawful, so employers wanting to halt action by means of an injunction sometimes begin by disputing the presence of a trade dispute. This chapter sets out what is legally considered to be a trade dispute.

The *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) (Section 24) defines a trade dispute, narrowly, as a dispute between workers and their own employer which relates wholly or mainly to:

- terms and conditions;
- the physical conditions in which workers are required to work;
- engagement or non-engagement, termination or suspension of employment or the duties of employment of one or more worker;
- work allocation, or the duties of employment between workers or groups of workers;
- discipline;
- union facilities; or
- the machinery of negotiation (collective bargaining) or union recognition.

A dispute for **political reasons**, unconnected with terms and conditions of employment, such as a refusal by technicians to broadcast to South Africa during the apartheid era, is not a trade dispute *(BBC v Hearn [1977] IRLR 213*).

A dispute over the impact of the national curriculum in schools on the working conditions of teachers was a trade dispute in the case of *London Borough of Wandsworth v NASUWT [1993] IRLR 344*. So was a dispute by teachers over a refusal to teach a disruptive pupil (*P v NASUWT [2003] UKHL 8).*

A "trade dispute" must be with the workers' employer and cannot be a dispute between workers.

The expression "in contemplation or furtherance of" a trade dispute is largely subjective and whether the test is satisfied will depend on whether the union honestly and reasonably believed that the planned action would advance its objectives in the dispute *(Express Newspapers v McShane [1980] AC 672*).

The new requirement in the TUA 16 to include a "summary" of the dispute on the ballot paper (see page 33) is widely expected to produce more injunction applications by employers over the issue of a valid "trade dispute". Employers are expected to claim, for example, that the dispute has not been adequately summarised on the ballot paper, that a fast-moving trade dispute has changed or moved on, or that the dispute has not yet crystallised.

Strike over sixth form college funding was not a political dispute

In March 2016, the government unsuccessfully sought an injunction to block a strike by NUT members at sixth form colleges, by arguing that the strike was not a "trade dispute". Eighty-six per cent of NUT members at 98 sixth form colleges had voted in favour of the action, on a 44% turnout.

Members were asked: "In order to persuade the Secretary of State for Education to increase presently inadequate funding levels which cause detrimental changes to terms and conditions within the sixth-form college sector, are you prepared to take a day's strike action?"

The government argued that the dispute was about funding cuts and was part of the union's political "Save Our Colleges" campaign. Mr Justice Kerr rejected the government's application, ruling that any trial was likely to conclude that the NUT's strategy was to protect members' terms and conditions and that there was therefore a lawful trade dispute. The one-day strike went ahead. (*Secretary of State for Education v NUT, Judgment of Mr Justice Kerr, 15 March 2016*)

Trade dispute must be with workers' own employer

The requirement for industrial action to involve a dispute with the worker's own employer has a number of important consequences. First and foremost, it makes secondary or solidarity action (action on behalf of workers who are contracted to another organisation) illegal (see also section 224, TULRCA). For example, in organisations where the workforce is made up of a mix of directly employed and agency staff, the direct employees cannot strike in support of the agency staff, even if their roles are practically identical, because they do not share the same employer.

The law makes it harder to organise effective action where the workforce is highly fragmented. For example, in 1999, train operating company Connex was granted an injunction to stop industrial action by rail workers protesting about rail safety, because responsibility for safety lay not with their employer but with Railtrack, a separate company (*Connex SE v RMT [1999] IRLR 259*).

Where groups of workers are split up, for example where public services are outsourced, the ban on supporting workers of a different employer makes it very difficult to organise effective action to support former colleagues who have been newly outsourced. The European Court of Human Rights (ECHR) has refused to declare the UK's ban on secondary action a breach of Article 11 of the European Convention on Human Rights, even in the limited circumstances of a strike to support the terms and conditions of newly outsourced ex-colleagues following a TUPE transfer (*RMT v UK [2014] ECHR 366*).

This feature of the law also makes it more difficult to take action over future changes to terms and conditions, planned by an incoming employer following a TUPE transfer. In the case of *Westminster City Council v UNISON [2001] IRLR 524*, the Court of Appeal ruled that a dispute over the imminent contracting out of public sector housing services to a private sector organisation was a trade dispute between workers and their own employer, the council. The dispute concerned the planned change to the employer's identity as well as workers' legitimate fears as to what the transfer meant for their future employment, including the implications of leaving the public sector, such as moving to a smaller employer with more limited opportunities for career development, a greater risk of imposed changes to contract terms and greater job insecurity over time. These all formed part of the trade dispute, ruled the court.

But a different result was reached in *UNISON v The UK [2002] IRLR 497*, a case which reached the ECHR, highlighting how much depends on the factual evidence in each case. This case concerned a dispute between UNISON members and their current employer – the University College Hospital Trust in London (UCHT). UCHT was negotiating to transfer parts of its undertaking to several private companies that were planning to build and run a new hospital. UNISON sought a guarantee from UCHT that any employees who transferred to the as yet unidentified new employer(s) would be given the same protection and employment rights as UCHT personnel. When this was refused, the union balloted for industrial action. The dispute was ruled not to be with the workers' own employer. The real dispute, ruled the court, was with the future employer, and was (at least partly) for the benefit of future employees. It therefore fell outside section 244, TULRCA.

The definition of trade dispute normally excludes disputes between workers and the government, unless the government is the employer, or sets the working conditions that are in dispute, or if the dispute is referred to a joint body on which there is statutory provision for a minister to be represented (*London Borough of Wandsworth v NASUWT [1993] IRLR 344, Section 244(2), TULRCA).*

However, even in disputes where the government is not the employer, in some circumstances it may be able to obtain an injunction to stop a strike (see page 57).

Trade dispute must already exist

For a ballot to be valid, the trade dispute must already exist when the ballot is called. For example, the former NUR London Underground workers' union (now the RMT), lost its protection from the "immunities" by including matters in its ballot which were not yet the subject of an industrial dispute (*London Underground v NUR [1989] IRLR 341).* This kind of claim is likely to become more frequent with the new requirement under the TUA 16 to provide a "summary" of the dispute on the voting paper (see page 33).

Only 'workers' can lawfully strike

For industrial action to be lawful, the trade dispute must be between "workers and their employer". The law protects "workers" because in principle, anyone who provides their services under a contract to work personally (that is, any "worker") must be entitled to withdraw their labour.

The genuinely self-employed are not workers, so a dispute between a group of self-employed people and a contracting organisation cannot be a "trade dispute" for the purposes of section 244, TULRCA. The genuinely self-employed cannot ballot for lawful industrial action in the UK. Genuinely self-employed "undertakings" that band together to withhold services in order to enforce prices or other terms and conditions also risk falling foul of European Union competition law. However, the position is not the same for individuals who have been misclassified as self-employed when they are really workers or employees, as shown in this important EU ruling:

> A collective agreement on pay rates for "substitute musicians" was struck down by the Netherlands Competition Authority as illegal price fixing between independent "undertakings". The case was referred to the European Court of Justice which ruled that competition law cannot be used to prevent collective agreements that aim to improve the working conditions of "workers", so the key question was whether the musicians were "workers" as opposed to self-employed "undertakings".
>
> Following earlier rulings, the ECJ confirmed that someone will be a worker – and therefore be entitled to have their terms and conditions negotiated on their behalf by a trade union and to participate in lawful industrial action to enforce those terms and conditions – if they are under the employer's direction as regards, for example, when, where and how they perform tasks, if they do not share in the commercial risks or profits of the business and if, during the relationship, they are integrated into the employer's undertaking.
>
> *FNV Kunsten Informatie en Media v The Netherlands [2014] Case C/413/13*

For more information about genuine and false self-employment, see the Labour Research Department's annual publication, *Law at Work*.

4. When industrial action is 'official'

A union will only be liable in relation to the relevant economic torts (see Chapter 1) if that union has **authorised or endorsed** the industrial action, making it "official".

Section 20, *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) says that a trade union will have done this where the industrial action was authorised or endorsed by:

- anyone empowered by the union's rules to do, authorise or endorse acts of the kind in question (section 20(2)(a), TULRCA);
- the principal executive committee, the president or general secretary (section 20(2)(b), TULRCA); or
- any other committee of the union, or any other union official (whether employed by it or not) (section 20(2)(c), TULRCA).

"Any other committee" includes any group of people constituted under union rules (section 20(3)(a), TULRCA). Where a group organises or coordinates industrial action, any decision by that group, or by an individual within the group, will come within the definition of "any other committee" (section 20(3)(b), TULRCA).

The wide third category - "*any other committee of the union, or any other official of the union, whether employed by it or not*" - has the effect of making unions legally responsible for industrial action embarked on in its name, including any industrial action authorised by local union officials, even if the union views the action as unofficial because it breaches union rules. To avoid liability, the union, through its executive, president or general secretary, must "repudiate" (disown) the action "as soon as reasonably practicable" after finding out about it.

The rules about repudiation are set out in section 21 and are tightly drawn. They require the union to "do its best" to give individual written notice of the fact and date of repudiation "without delay" to the committee or individual who called the action (section 21(2)(a), TULRCA), and to every union member who the union reasonably believes to be taking part in the industrial action, and to the employer of every such member (section 21(2)(b), TULRCA). The notice must include this statement:

> "Your union has repudiated the call (or calls) for industrial action to which this notice relates and will give no support to unofficial industrial action taken in response to it (or them). If you are dismissed while taking unofficial industrial action, you have no right to complain of unfair dismissal".

Industrial action that has not been authorised or endorsed by the union, or that has been repudiated, is termed "unofficial action". Unofficial action is not protected by the immunities. This means that striking workers are

exposed to legal action for damages by the employer or by a customer or supplier of the employer for any losses caused by the action.

Employers can lawfully victimise unofficial strikers, by dismissing selected individuals who are taking part. Any strike action in support of someone who is dismissed for participating in unofficial action is not protected by the immunities, even if the later action is official and has been balloted (section 223, TULRCA).

An employee has no right to complain of unfair dismissal if, at the time of dismissal, he was taking part in an unofficial strike or other unofficial industrial action (section 237(1), TULRCA), although there are some exceptions (section 237(1)(A), TULRCA). In particular, an employee dismissed while taking unofficial action will still be able to bring a tribunal claim if the main reason for dismissal related to jury service, family-friendly statutory rights, health and safety, working time, rights as an employee representative, making a protected disclosure, flexible working, pension scheme membership and asserting rights to ask for time off for study and training (see also Chapter 8: Dismissal).

For the purpose of the right to claim unfair dismissal, if industrial action has been repudiated by a trade union, it is not treated as "unofficial" until the end of the next working day after the day of the repudiation (section 237(4), TULRCA).

Strikers who are engaged in unofficial action (just like those engaged in official action) are also at risk of prosecution under the criminal law, for offences such as causing a breach of the peace (see Chapter 6: Picketing).

Once unofficial action has been started, only by repudiating it and then holding a lawful ballot can the union adopt the action as official.

The inadequacy and unfairness of the industrial action laws in the context of "unofficial" action was highlighted in this well-known dispute involving in-flight catering company Gate Gourmet:

> Gate Gourmet had been in discussions with the (then) T&G general union over proposed changes to staffing levels and working practices, expected to result in hundreds of redundancies among permanent staff. Even so, the company hired 120 seasonal workers without consulting the union. Employees spontaneously assembled in the canteen to find out what was happening, but managers told them that if they did not return to work within three minutes they would be sacked. The company then sacked 677 workers. Because there had been no ballot or notification procedure, the action was unofficial and the employees were not protected by unfair dismissal laws. Balloting after the event would not have made the action lawful.
>
> *Sehmi v Gate Gourmet London Ltd; Sandhu and others v Gate Gourmet London Ltd, EAT/264/08, EAT/0265/08*

5. The rules on conducting and reporting on ballots

For unions to have the benefit of the "immunities" in relation to industrial action (see Chapter 1), there must have been a ballot meeting strict statutory requirements (Sections 226-235, TULRCA). The TUA 16 has made several important changes to balloting law, affecting all ballots opened on or after 1 March 2017. These changes are reflected throughout this chapter.

Even before the TUA 16 became law, the rules on balloting and notice were already extremely complicated and highly restrictive. As far back as 2002, the Committee of Experts on the European Social Charter concluded that "the United Kingdom does not guarantee the right to take collective action within the meaning of Article 6.4 of the Charter: the notion of lawful industrial action is restrictive, the procedural requirements are onerous, the consequences for unions where industrial action is found not to be lawful are serious, and the workers have limited protection against dismissal when taking industrial action". With the TUA 16, matters have gone from bad to worse.

Ballot thresholds

For all ballots opened **on or after 1 March 2017**, there are now two ballot thresholds. Which one applies will depend on whether the majority of the balloted workers are carrying out an "important public service".

All strikes other than in 'important public services'

For all industrial action ballots except those in which the majority of workers carry out an "important public service", industrial action is not lawful unless at least 50% of those who were entitled to vote in the ballot did so. In addition, a majority of those voting must have voted in favour of the action (section 226(2A), TULRCA, section 2, TUA 16).

This change to the law on turnout - requiring at least half of those balloted to participate in the ballot - replaces the previous requirement for a simple majority to vote in favour. It means that a failure to vote is a vote against the action.

Ballot thresholds for 'important public services'

For industrial action in which a majority of workers carry out an "important public service", a higher ballot threshold applies. In this case, again, industrial action is not lawful unless at least 50% of those entitled to vote in the ballot did so, but in addition, **at least 40% of those entitled to vote in the ballot must vote in favour** (section 226(2B), TULRCA, section 3, TUA 16).

How does the maths in ballots work?

For industrial action by workers not engaged in important public services:

- **If 1,000 members are balloted, then at least 500 must vote, in which case of those 500, at least 251 must vote yes.**

For industrial action in important public services:

- **If 1,000 members are balloted, then at least 500 must vote, in which case of those 500, at least 400 must vote yes.**

What are important public services?

There are six categories of "important public service" (section 3, TUA16): health services; education of under-17s; fire services; transport services; nuclear decommissioning; and border security.

There are five separate sets of *Important Public Services Regulations 2017* - one for each category except nuclear decommissioning, for which regulations have yet to be drafted. Non-statutory guidance on these regulations was published in January 2017.

Here are the services that are included in each category:

- **Health services**: emergency ambulance services, including ambulance drivers, ambulance control room services and treatment by paramedics; hospital A&E; hospital-based high-dependence and intensive-care units; hospital-based psychiatric services for conditions requiring immediate attention to prevent serious injury, serious illness or loss of life; and hospital-based obstetric and midwifery services for conditions requiring immediate attention to prevent serious injury, serious illness or loss of life. As well as public hospitals, the definition captures private hospitals that mainly provide publicly funded health services;
- **Education of under-17s**: teaching and other services provided by teachers and head teachers except at fee-paying schools;
- **Fire services**: services by fire-fighters in extinguishing fires and protecting life and property in the event of fires, including services provided by fire and rescue authority personnel in dealing with calls for emergency help and organising the response (both public and private sector);
- **Transport services**: London local bus services; passenger railways (including underground, metro and tramway); civil air traffic control; airport and port security services involving access to secure areas, screening, search and patrol activities. Both public and private sector workers are covered. Passenger railway services include services for the carriage of customers by rail or tramway, maintenance and repair of trains and network, signalling or controlling, and "any station

services that are essential to enable passenger trains to operate safely and securely". Eurotunnel is excluded;

- **Border security**: examining people who enter and leave the UK (immigration services), examining goods for import or export (customs); patrol by sea; collection of security data for the purpose of carrying out immigration, customs and border patrol duties; direction or control of any of these functions by a border force officer.

(Section 226(2E), TULRCA, section 3 TUA16, five sets of Industrial Action (Important Public Services) Regulations 2016)

Section C of the government guidance on the *Important Public Services Regulations* includes a table giving examples of some of the roles that the government regards as being caught by the 40% balloting threshold.

The 40% "yes" threshold must be met if a **majority** of workers involved in the trade dispute carry out an "important public service". Unions have a defence if they had a "**reasonable belief**" that workers were not engaged in "important public services" (section 3(2), TUA 16).

The non-statutory government guidance says that workers with multiple duties who spend only part of their time delivering an important public service and the rest of their time on other responsibilities will only be regarded as delivering an important public service if they are "**normally engaged in delivering this service**". The guidance fixes the onus firmly on the union "to consider, when deciding to conduct the ballot, what is normal in the specific circumstances of their sector or workplace", and "whether they hold sufficient information to reasonably believe whether or not a majority of workers are normally engaged in important public services".

When it comes to deciding whether someone "normally" delivers important public services, the guidance reminds unions of their statutory duty under section 24(1), TULRCA to compile and maintain a register of members' names and addresses and, "so far as reasonably practicable", to keep the entries accurate and up-to-date.

The guidance lists some (non-exhaustive) factors for unions to consider when deciding whether someone "normally" engages in delivering the important public service. The factors look designed to capture every possible permutation:

- how regularly the worker delivers important public services;
- the proportion of time the worker spends delivering important public services;
- whether the worker is contracted to deliver important public services;
- whether the substantive role of the worker is to deliver important public services at the time of the ballot or likely industrial action; and
- whether the worker has been temporarily allocated to different duties, and the time period this is expected to last for.

An earlier government proposal to set ballots for "ancillary workers" at the new higher threshold was abandoned before the Bill became law.

The ILO and the 40% threshold

In August 2015, the TUC lodged a formal complaint to the ILO Committee of Experts on the Application of Conventions and Recommendations concerning the TUA 16, describing the Act as "a full-frontal assault on the industrial and political freedoms of the British trade union movement" and a demonstration of "the government's contempt for the civil liberties of trade unions and their rights under international law".

In particular, the TUC argues that, viewed cumulatively, the disproportionate procedural burdens on workers wanting to exercise their right to strike infringe ILO Convention 87 on Freedom of Association and Protection of the Right to Organise (1949), while restrictions on political funding in the TUA 16 (and in the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014*) impede trade union political freedom to campaign for the repeal of the TUA 16, in further breach of ILO Convention 87. The TUC's full submission is available from the website of the Institute of Employment Rights.

In its response, the ILO concludes, in particular, that the 40% balloting threshold for workers engaged in "important" public services falls below ILO standards.

The ILO accepts that in principle, the right to strike can be limited when workers provide "essential" services. However, there is a big difference between this concession and the UK government's decision to limit the strike rights of workers who provide "important" public services. The ILO defines essential services as "those services the interruption of which could endanger the life, personal safety or health of the whole or part of the population".

Specifically, the 40% threshold imposed by the TUA 16 should not be applied to primary and secondary education, or transport services, says the ILO: this change to the balloting threshold will "severely impede" the ability of workers in these sectors to organise in defence of their occupational interests.

As a separate point, the ILO accepts that limits on the freedom of essential service workers to strike may be justified in some circumstances, for example through the use of a minimum service agreement negotiated with the union, so that the "right to strike of the large majority of workers" is preserved, but

"users' basic needs are met and facilities operate safely or without interruption".

But the ILO has long been clear that if the strike rights of essential service workers are to be curtailed in any way, there must be "**compensatory guarantees**" in place, in the form of "adequate, impartial and speedy" independent conciliation and mediation procedures, so that disputes are resolved fairly, any deadlock is put to arbitration and any awards are promptly and fully implemented.

It is vital, says the ILO in its *Principles concerning the right to strike*, that all members of the bodies entrusted with dispute resolution under this framework are - and appear to be - strictly impartial, both to the employers and the workers.

Needless to say, there is nothing in the TUA 16 about creating this kind of independent framework for dispute resolution for essential service workers.

The ILO also wants the government to review the available balloting methods, with a view to "modernisation", which it regards as directly relevant to the fairness or otherwise of the new 50% turnout threshold (see box on page 39).

The ballot process

The balloting and notification process includes detailed restrictions, all of which must be complied with in order to retain the union's statutory "immunity" from liability for economic torts. These rules have been changed in important respects by the TUA 16.

In *Metrobus Limited v Unite [2009] IRLR 851*, the UK Court of Appeal ruled that the UK's (pre-TUA 16) restrictive balloting and notice rules were not disproportionate restrictions on the human right to freedom of association (Article 11, European Convention on Human Rights) (see also Chapter 12).

Conducting the ballot

Here are the rules on conducting the ballot:

- there must be a secret postal ballot, with the ballot paper sent to the member's nominated address, specifying the address and date for return (sections 227-230, TULRCA);
- voting must be free of cost to the member. In practice, this means using a pre-paid and pre-addressed envelope (section 230, TULRCA);
- at least seven days must be allowed for its return if using first class post (14 days if using second class);

- written notice of the ballot must be sent to the employer at least seven days before the intended date for opening the ballot (that is, at least seven days before the first day on which a voting paper is sent to anyone who is entitled to vote) (section 226A, TULRCA). See also pages 36-39: Notice to the employer;
- for ballots of 50 or more workers, an independent scrutineer, such as Electoral Reform Services, must be appointed by the union. They will need to prepare a report on the ballot arrangements and must be named on the ballot paper (section 226, TULRCA);
- under the scrutineer's terms of appointment, they must be able to report to the union as soon as reasonably practicable after the last day of the ballot, and in any event no later than four weeks after that date (section 226B(1)(a), TULRCA);
- the voting paper must specify who is authorised to call the action (section 229, TULRCA);
- not later than three days before the opening day of the ballot, a sample voting paper must be sent to the employer (section 226A(1)(b), TULRCA);
- voters must be asked on the voting paper whether they support strike action or action short of a strike. If being asked to vote on both, there must be two separate questions (section 229, TULRCA);
- if action short of strike (such as an overtime ban) is to be called but may be followed by full strike action, workers must be asked two separate questions, one relating to the limited action and the other to the full strike action;
- members must be able to indicate by "yes"/"no" their views on the proposed action (section 226, TULRCA). The Code of Practice on Balloting says there should be nothing additional on the ballot paper to encourage members to vote in a particular direction (Code, Para 36);
- voting papers must be numbered consecutively;
- voting papers must inform employees of their rights not to be unfairly dismissed. Specifically, the following words must appear on the voting paper: "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 12 weeks after you started taking part in the action, and depending on the circumstances, may be unfair if it takes place later". The statement must not be commented on or qualified in any way (section 229, TULRCA);
- separate ballots must be held for separate workplaces, unless the dispute involves only common terms. Where there is at least one individual affected by the dispute in each workplace, the ballots can be aggregated into a single ballot. Ballots can also be aggregated where linked by occupation and employer(s) (section 228, TULRCA);

- for all ballots opened on or after 1 March 2017 (TUA 16):
  - the voting paper must include a "summary" of the matter(s) in issue in the trade dispute;
  - if the voting paper asks about industrial action short of a strike, the types of industrial action must be specified (on the voting paper or elsewhere); and
  - the voting paper must "indicate" the period(s) within which the industrial action (or each type of industrial action) is expected to take place (section 5, TUA 16, sections 229(2B-D), TULRCA).

The new requirement to include a "summary" of the matters in dispute on the voting paper is widely expected to result in more injunction applications, challenging whether the "summary" is adequate or disputing the ballot's validity, by arguing that the dispute has not yet crystallised, has changed or moved on.

Although the law states that the voting paper must specify, in the event of a "yes" vote, who can call action, the courts have ruled that common sense permits a certain amount of delegation:

> In a dispute called by the TGWU general union, the ballot paper indicated that the general secretary was the officer authorised to call the strike, but the fact that the action was called by another official, after consultation with the general secretary, did not invalidate the ballot.
>
> *Tanks & Drums v TGWU [1991] IRLR 372*

There is a sample voting paper at Annex 2 to the Code of Practice on Balloting.

A union is clearly entitled to campaign for a "yes" vote. This does not amount to an unlawful call for, or endorsement of, industrial action before the date of the ballot (*London Borough of Newham v NALGO [1993] IRLR 83*).

Establishing who is entitled to vote

All those workers that the union reasonably believes at the time of the ballot will be called on to take action (and nobody else) should be balloted (section 227, TULRCA).

A ballot's validity will not be affected if a union induces new members to take part in the strike who only joined the union once the ballot had closed (Balloting Code of Practice, Para 22, *London Underground v RMT [1995] IRLR 636*), or members who only took jobs in the balloting constituency once the ballot had closed.

Giving a vote to employees who have already taken voluntary redundancy is likely to invalidate the ballot (*British Airways plc v Unite the Union [2009] EWHC 3541*).

As already indicated, those balloted must be only those members the union reasonably considers will be called upon to take part in industrial action,

and nobody else (section 227, TULRCA). However, some court rulings have suggested that those balloted need not necessarily be limited to members who are directly affected by the relevant trade dispute. For example, in *BT v CWU [2004] IRLR 58*, the High Court ruled that the union had not breached the law when, in a dispute over a new productivity scheme, some balloted members would not have been party to the new scheme.

Here is another example:

> In a dispute over payments to tube drivers for working Boxing Day, the union balloted 1,950 members at various listed depots and 998 voted (920 voting in favour). London Underground argued that the ballot should have been limited to the 480 members rostered to work on Boxing Day, on the basis that section 227, TULRCA requires the union to ballot only those members who, at the time of the ballot, are expected to be induced to "take part" in the action.
>
> The judge disagreed, ruling that those balloted need not necessarily be limited to those who will actually be on strike, that is, withdrawing their labour on the particular strike day. "Taking part", said the judge, can include not only those who take the strike action but also those who would associate themselves with the action in some other way, for example, joining picket lines, without actually breaching their contract because they were not rostered to work on that day. The injunction was refused.
>
> *London Underground v ASLEF [2012] IRLR 196*

Now that the TUA 16 sets minimum balloting thresholds, unions will need to take even greater care when defining the trade dispute and identifying the balloting constituency. Any ambiguity in the scope of the balloting constituency could provide yet another ground for legal challenge by employers.

Accidental failure

"Accidental failures" to comply with the rules on deciding who should be asked to vote, on dispatching voting papers and on enabling members to vote by post can be disregarded if, taken together, their scale is unlikely to affect the result (section 232B(1)(b), TULRCA). "Accidental" simply means "unintentional" (*Balfour Beatty Engineering Services Limited v Unite the Union [2012] EWHC 267).*

A landmark Court of Appeal ruling in the case of *RMT v Serco Limited t/a Serco Docklands and ASLEF v London & Birmingham Railway Limited t/a London Midland [2011] EWCA Civ 226,* has had an important impact on the judicial approach taken to minor breaches of the balloting rules in at least some cases:

> Strike action was approved by 87% of ASLEF members (on a turnout of 78%) and 80% of RMT members (on a turnout of just under 50%). The

employers obtained injunctions because of minor errors in the balloting and notification process. Through human error, ASLEF had given ballot papers to two drivers who were not entitled to vote, although it had genuinely believed it was balloting drivers who could be induced to strike and no one else.

On appeal to the Court of Appeal (CA), the injunctions were revoked. The CA confirmed that the balloting and notice provisions must be given a "likely and workable" interpretation, and commented that this was exactly the sort of scenario for which the "accidental mistakes" exception was designed.

RMT v Serco Limited t/a Serco Docklands and ASLEF v London & Birmingham Railway Limited t/a London Midland [2011] EWCA Civ 226

This important ruling was followed by the High Court when it refused to grant the injunction sought by construction firm Balfour Beatty in a dispute by Unite members over the threat to impose new terms and conditions and to abolish collective bargaining in the industry:

In this case, Balfour Beatty argued that Unite had failed to take sufficient steps to ensure that all those entitled to vote in the ballot were sent ballot papers by post. Deciding in the union's favour, the judge emphasised that the balloting rules must not be approached in a way which "leads to rigidity". Instead, "practical realities" must be taken into account, including, in particular, a union's difficulties in keeping up-to-date and accurate membership records. The interpretation of the rules must be "workable" and even-handed.

Construction, in particular, is an industry in which workers regularly move from site to site and change employers, noted the judge, who commended the efforts of Unite officials, over more than 500 hours, to identify all members the union reasonably believed could be called on to take industrial action, described by the judge as formidable, painstaking, time-consuming and expensive.

Having failed to secure an injunction, the employer's proposals in the construction industry were withdrawn.

Balfour Beatty Engineering Services Limited v Unite the Union [2012] EWHC 267 (QB)

Trade union solicitors Thompsons, who represented the unions in both cases, welcomed these rulings, but at the same time cautioned that they "should in no way be taken as a licence to let up on painstaking membership data checking procedures, and precision with the wording of ballot and action notices, and other balloting procedures", describing the UK's industrial action laws, (even before the TUA 16) as "among the most restrictive in the Western world".

The higher balloting thresholds introduced by the TUA 16 may lead to a resurgence in the type of cases in which employers pick holes in the union's

compliance with the balloting process in order to support an injunction application, especially if the 50% turnout threshold (or the 40% "yes" threshold for "important public services") has been met but only by a narrow margin.

After the ballot

Announcing the result

As soon as the vote is completed, unions have further important procedural responsibilities that must be met for the ballot to be lawful:

- unions must ensure the votes are fairly and accurately counted;
- as soon as possible after the vote, members must be informed of:
  - the number of workers entitled to vote in the ballot;
  - the number of votes cast;
  - how many voted for and against each question on the voting paper;
  - the number of spoiled or invalid voting papers; and
  - for all ballots opened on or after 1 March 2017, whether the number of votes cast was as least 50% of those entitled to vote (and whether at least 40% of the balloting constituency voted in favour of a strike in "important public services") (section 231, TULRCA, section 6, TUA 16).
- as soon as possible after the vote, the result must be notified to the employer, providing the information listed on page 37 (see Requirements to notify employers, stage 3); and

The scrutineer's report must be delivered by the union to the employer, or to anyone entitled to vote in the ballot, on request at any time within six months of the date of the ballot (section 231B, TULRCA).

Where there have been separate ballots of different workplaces (section 228, TULRCA), only the workplaces that have met the threshold for industrial action can be called out.

A union member can use section 109, TULRCA to take legal action against their own union where a valid ballot has not been held before official action.

A failure to meet any of the balloting obligations, including the new obligations introduced by the TUA 16, will mean that the protection from legal action provided by the "immunities" is lost (see Chapter 1).

Requirements to notify employers

Before taking industrial action, the union must give notice to employers at the **four key stages** set out below (section 226A, TULRCA).

Stage 1

When deciding to ballot for industrial action, the union must notify the employer in writing that the union intends to hold a ballot, and the date on which it believes the ballot will begin. The notice must be received by the employer at least seven days before the ballot opens (that is, at least seven days before the first day on which a voting paper is sent to anyone who is entitled to vote).

The notice must include either:

a) a list of the categories to which the workers belong and their workplaces, plus figures (with an explanation of how they were arrived at), showing the number of workers balloted, the number in each category and at each workplace; or

b) if the employer makes deductions for payments to the union (check off), either the same list as in (a) above, or such information (such as a check off list) as will enable the employer to "readily deduce" the information sought in (a) (section 226A(1), TULRCA).

If only some workers pay their dues through check off, the notice can include a combination of the two types of information.

When compiling the list of worker categories, unions need only provide numbers in general job categories, and do not need to be limited to any particular categories, such as those used for pay purposes (*RMT v Serco Limited t/a Serco Docklands and ASLEF v London & Birmingham Railway Limited t/a London Midland [2011] EWCA Civ 226*).

There is no requirement to supply the names of those members being balloted.

Stage 2

No later than three days before the ballot commences, the employer must have received a sample copy of the ballot paper (section 226A, TULRCA, Balloting Code, para 19).

Stage 3

As soon as possible after the ballot result has been declared, the union must notify the employer of the outcome (section 231A, TULCRA), providing information as to the:

- number of workers entitled to vote;
- number of votes cast;
- number who answered in favour and against to each question;
- number of spoiled or invalid voting papers; and
- for all ballots opened on or after 1 March 2017, a statement that the number of votes cast was as least 50% of the balloting constituency, and that at least 40% voted in favour in any strike in "important public services".

The requirement to notify the employer "as soon as possible" has been interpreted strictly by courts. There can be no delay at all in sending the notice of the ballot result to the employer. For example, in *Metrobus Limited v Unite [2009] EWCA Civ 829*, an accidental two-day delay resulting from the failed delivery of a fax from Electoral Reform Services containing the ballot result was judged too long.

In particular, the law does not allow a union to delay sending the notice to the employer until a formal decision has been made whether or not to call the action (*Metrobus*, above).

Stage 4

For all strike ballots opened on or after 1 March 2017, the union must give the employer 14 days' notice before the balloted industrial action can begin (or seven days if the employer agrees). This is double the amount of notice that was previously required (seven days). This change to the law will give employers extra time to prepare to limit the impact of the strike (section 8, TUA 16, section 234A, TULRCA). The notice must be in writing, giving information on:

- the total number of workers the union reasonably believes will take part in the action (described in the TULRCA as "affected workers");
- a list of the categories into which the affected workers fall (and the number of affected workers in each category);
- a list of the locations where they work (and the number of affected workers at each location);
- an explanation of how the figures provided have been reached;
- the date the action will begin, or the date of each stoppage if planning a series of stoppages;
- whether the action planned is continuous (giving the intended start date), or discontinuous (giving the intended dates when it will occur); and
- a statement that the union gives notice under section 234A, TULRCA.

There is no requirement to provide the names of striking workers. If the affected workers pay union subs via check off, the check off list can be provided.

The notice should enable the employer to "readily deduce", upon receiving it, the work categories of some or all of the workers likely to strike, and the workplace(s) where some or all of them work (section 234A(5B), TULRCA). The main aim of this part of the legislation is to enable the employer to prepare in advance for the strike.

When providing an explanation as to how the figures in the statutory notifications have been arrived at, the union must provide figures that are as accurate as possible in the light of information in the union's possession at the time of providing the figures. Union officers are not required to take

any extra steps to obtain additional information from members. In particular, there is no obligation to provide information about precisely who did what and when, when compiling the data (*RMT v Serco Limited t/a Serco Docklands and ASLEF v London & Birmingham Railway Limited t/a London Midland [2011] EWCA Civ 226*).

The Balloting Code says that when providing the explanation as to how the figures were arrived at, unions should consider describing the sources used, such as membership data held centrally or at regional offices, data collected from surveys or other sources, while observing that "it is not reasonable to expect union records to be perfectly accurate and to contain detailed information on all members". If union data is known to be incomplete or to contain other inaccuracies, the Code suggests that it is "desirable practice" to describe, in the notice, the main deficiencies. "In some cases, the figures will be estimates, based on assumptions and the notice should therefore describe the main assumptions used when making estimates".

Paragraph 14 of the Code suggests that information is in a union's possession if it is held for union purposes in a document (electronic or otherwise) in the possession or control of an officer or employee of the union. Information held by shop stewards or lay reps is probably not "in the union's possession" for this purpose, says the Code.

Online balloting in strike ballots

The government has consistently resisted union campaigns for electronic balloting in strike ballots, insisting on postal-only voting, which is known to depress turnout. However, this opposition, ostensibly on security grounds, has looked increasingly shaky as more organisations (including the Conservative Party) adopt electronic balloting, and as the government continues to roll out its own "Digital by Default" strategy for all public services.

The ILO Committee of Experts has now added its voice, pointing out that whether or not the new 50% turnout threshold in the TUA 16 breaches ILO standards will depend, at least in part, on the ballot method used. The ILO has invited the government to review the ballot method with employers and trade unions, with a view to "modernisation".

To secure the passage of the TUA 16 into law, the government agreed to commission an independent review into the delivery of secure methods of electronic balloting (including the use of pilot schemes to inform its design and implementation), before being rolled out across union strike ballots. Government minister Nick Boles undertook to the House of Commons that if security concerns are met, electronic balloting will be implemented.

Section 4(3), TUA 16 requires the secretary of state to consult and report back to both Houses of Parliament on the government's response to the review. The review was launched in November 2016, chaired by Sir Ken Knight, to report back to parliament no later than December 2017. Consultation closed on 17 July 2017.

The terms of reference of the review are to examine:

- electronic and physical security of e-balloting methods, including risks such as interception, impersonation, hacking, fraud or misleading or irregular voting practices;
- if any system can safeguard against risks of intimidation of union members and protect anonymity of ballot responses;
- security and resilience of existing practices of balloting union members; and
- the aims of the TUA 16, which are to ensure that strikes affecting important public services are supported by a clear mandate from those entitled to vote.

To implement electronic balloting, the government could either use existing powers in section 54, *Employment Relations Act 2004* (*Means of voting in balloting and elections*) or introduce it using fresh legislation.

New limited life of ballot mandate

For all ballots opened on or after 1 March 2017, section 9 of the TUA has limited the life of the ballot mandate. Under the regime that preceded the TUA 16, as long as industrial action started within four weeks of the ballot (or up to eight weeks with the employer's agreement), the ballot mandate stayed intact for as long as the dispute continued. This allowed negotiations to continue, set against the backdrop of a credible on-going industrial action threat.

The TUA 16 has removed the requirement for unions to start their industrial action within four weeks. But at the same time, the life of the ballot mandate has been limited to just six months. The parties are allowed to agree an extension of up to three months (section 234, TULRCA, section 9, TUA 16).

This means in practice that if a dispute has not been resolved within six months of the date the ballot closes, the union must re-ballot in order to continue the industrial action (see also Chapter 11: Union responses to the TUA 16).

Annual reporting of industrial action

Starting from 1 March 2017, the TUA 16 has imposed a new statutory duty on unions to report annually on industrial action. Specifically, the union must make an annual return to the certification officer (CO) of all industrial action "taken in response to any inducement" by the union. This must detail the nature of any trade dispute and industrial action and when any action was taken. The union must also disclose the results of any industrial action ballot held during the year, including a detailed breakdown of the ballot results (section 32ZA, TULRCA).

The information must be added to Form AR21 – the existing trade union annual return on membership and funding, which must be filed before 1 June "in the calendar year following that to which it relates" (section 32(2), TULRCA).

Failure to comply in full can lead to a legal enforcement order (equivalent to a court order) and financial penalties of between £200 and £20,000.

A key government aim of this change, when first proposed, was to force unions to either endorse or disown unofficial protests (leverage) in which their members participate. In practice, the new duty provides yet another opportunity for union-busting organisations to report unions to the CO (see page 18).

6. Picketing

Summary

Peaceful picketing is covered by sections 220 and 220A of the *Trade Union and Labour Relations Consolidation Act 1992* (TULRCA). The picketing rules have been changed in important respects by the *Trade Union Act 2016* (TUA 16).

The law says that workers can attend "at or near [their] own place of work", for the purpose of "peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working", as long as they are acting "in contemplation or furtherance of a trade dispute" (section 220, TULRCA). If they are a union official, they can attend at or near the workplace of a member "he is accompanying and whom he represents".

For all strikes where a ballot opened on or after 1 March 2017, the TUA 16 has added an extra hurdle to holding a lawful picket, namely the need for **union supervision** of all pickets by a picket supervisor (section 220A, TULRCA, section 10, TUA 16).

The **Code of Practice on Picketing** has been updated to reflect the changes in the TUA 16. The Code can be downloaded from the Gov.UK website. It is not legally enforceable, but it can be taken into account in legal proceedings. Evidence of picketing in breach of the Code is likely to make it easier for an employer to obtain an injunction.

Pickets can seek to peacefully persuade workers and others, such as suppliers, not to cross the picket line, but anyone who decides to cross must be allowed to do so.

Unions and their members must comply with the criminal law, for example laws on public order and trespass, and should follow any directions issued by the police.

Workers who protest in connection with an industrial dispute in ways that fall outside the statutory definition of picketing (for example, because they are not "at or near" their own workplace, because the picketing is not "peaceful", or because there is no "picket supervisor"), will lose the benefit of the "immunities" (see Chapter 1), leaving them open to legal claims for damages. In addition, they will have no protection from unfair dismissal, with some limited exceptions (see Chapter 8: Dismissal). This is the case even if the strike itself is protected by a lawful ballot.

If pickets breach their employment contracts, or suppliers breach supply contracts by refusing to deliver goods or services, in a dispute that is not protected by the "immunities", anyone who organised or encouraged the protest can also be liable for the economic tort of inducing a breach of contract.

Picket supervisor

The TUA 16 has introduced a new requirement for "union supervision" of pickets (section 220A, TULRCA). The law requires the union to appoint a "picket supervisor" who must be "familiar" with the Picketing Code. If more than one union is involved in the picketing, each union must appoint its own picketing supervisor.

To ensure that all picket supervisors are "familiar" with the Code, unions need to provide training on the details of the Code to all activists who are likely to be involved in picketing.

Most of the new rules about the picket supervisor are found in the Act itself - not in the non-statutory Code. This has important consequences. It means that a failure to comply with any of the requirements relating to the picket supervisor, for example a failure by the picket supervisor to "wear something" that "readily identifies" him or her as such (section 220A(8), TULRCA), to be sufficiently "familiar" with the Picketing Code (section 220A(3)), or to hand over an "approval letter" (see below) fast enough (section 220A(6)), will make the whole picket unlawful and lose the pickets the benefit of the "immunities". This is regardless of whether the failure prejudiced the employer in any way, or whether the pickets themselves are at fault (section 219(1)(b), as amended, TULRCA).

The union or the picket supervisor must take reasonable steps to tell the police the picket supervisor's name, the planned location of the picket and how to contact him or her (section 220A(4), TULRCA).

TULRCA is silent as to the uses to which the police can put these names and contact details, a situation described by Oxford law professor Alan Bogg as "ripe for abuse".

Whether or not someone is a trade union member is "sensitive personal data" (section 2(d), *Data Protection Act 1998*). In addition, members' human right to privacy under Article 8 of the European Convention on Human Rights must be respected. Serious concerns have been raised about the chilling effect of the new obligation to provide activists' identity and contact details to the police, especially against the backdrop of trade union blacklisting (For more information, see LRD's annual publication, *Law at Work*).

Letter of authorisation

The TUA 16 requires the union to give the picket supervisor a letter stating that the picketing is approved by the union (the "approval letter" - section 220A(5), TULRCA). The letter need not include the picket supervisor's "personal details" (although these do need to be given to the police - see above). Paragraph 15 of the Picketing Code places the responsibility squarely on the union to ensure the letter does not breach data protection laws.

Only the employer that is involved in the trade dispute, or someone acting on its behalf (such as a manager or security guard) is entitled to see the

letter (section 220A(6), TULRCA, Para 15, Picketing Code). There is no requirement to show it to a member of the public or the police.

If asked by the employer or someone acting on their behalf to show them the letter, the picketing supervisor must do so "as soon as reasonably practicable" (section 220A(6), TULRCA). The Code envisages just a short delay in handing over the letter, on the basis that the picketing supervisor may be away from the picket line. For example, where there are several picket lines (such as where a workplace like a station or hospital has several points of entry), the Picketing Code allows a picket supervisor to supervise more than one picket line, but only provided they can attend each picket line at short notice (Picketing Code, Para 13). If the picket supervisor fails to hand over the letter as soon as reasonably practicable, the whole picket will be unlawful and the pickets will be at risk of legal action. They will also stand to lose all protection from dismissal (see Chapter 8).

The arrangements contemplated by the Picketing Code make absolutely no allowance for the realities of the 21st century workplace, such as part-time or shift work, or childcare responsibilities. During the picket, the picket supervisor must remain present where the picket is taking place or "readily contactable by the police and able to attend at short notice" (section 220A(7)(b), TULRCA). "Contactable", says the Code, means being "able to return quickly so as to provide advice on peaceful picketing" (Para 13, Code).

What to wear

While on the picket line, the picket supervisor must wear "something" that readily identifies him or her as such (section 220A(8), TULRCA). The Code suggests "a tabard, armband or badge" (Code, paragraph 13). Under the TUA 16, only the picket supervisor is legally required to wear "something" that identifies them as such, but the Code itself goes further, suggesting that "badges or armbands" should be worn by all "authorised" pickets, so they can be "clearly identified" while picketing.

Functions

Section F of the Picketing Code (paras 59-61) lists the "functions" of the picket supervisor as follows:

- not to claim the authority and support of a union unless the union is willing to accept legal responsibility;
- to maintain close contact with the police and seek directions as to how many people should be on the picket line at any one time and where to stand to avoid obstructing the highway (see page 46: number of pickets);
- to ensure pickets understand the law and the Picketing Code and that picketing is peaceful and lawful;
- to distribute "badges and armbands" to all "authorised" pickets;

- to ensure that workers from other places of work do not join the picket line and that any "offers of support" on the picket line from "outsiders" are "refused". (This is what the Code says (para 61), but there is no law against members of the public stopping to show their support for striking workers, as long as they do not cause a breach of the peace or obstruct the public highway);
- to ensure that the number of pickets at any entrance or exit from a place of work is not so great as to cause "fear and resentment" among those seeking to cross the picket line;
- to keep close contact with their union office and with the offices of any other unions involved in the picketing; and
- to ensure that the movement of essential goods and services is not disrupted. The Code contains a list of "essential supplies and services" including, for example, medicines, heating fuel, salt for gritting roads and food for livestock, as well as the operation of essential services - police, fire, ambulance and so on (Code, Section G).

Picket location

If workers cannot picket immediately in front of their workplace, the law requires the picket to be "at or near" their place of work (section 220A, TULRCA). The phrase allows workers some leeway, and the following case provides an example:

> Workers dismissed by a company sited on a trading estate were unable to picket their own workplace, so they mounted a picket on the entrance to the trading estate. The Court of Appeal ruled that this was "at or near" their place of work.
>
> *Rayware v TGWU [1989] IRLR 134*

However, the decision in *News Group Newspapers Limited v SOGAT No.2 [1986] IRLR 337* was more restrictive. This case concerned the relocation of Rupert Murdoch's publishing interests from Fleet Street to Wapping in East London. One of the many arguments used by Murdoch against the action was that picketing at Wapping could not benefit from the statutory immunities because the pickets' place of work was elsewhere (that is, Fleet Street). The High Court agreed that the picketing was not protected by the immunities, in a decision later endorsed in the case of *Union Traffic Limited v TGWU [1989] IRLR 127*.

The revised Picketing Code suggests that "at or near" means "at or near an entrance to or exit from the factory site or office at which the picket works" and that "picketing should be confined to a location, or locations, as near as practicable to the place of work" (Code, para 22).

Union officials who are elected or appointed to represent the striking workers can also picket at their members' place of work.

Members who normally work from several different locations, such as lorry drivers or field engineers, can lawfully picket any place from which they work, or the place from which their work is "administered" - normally their head office (section 220(2), TULRCA). A picket supervisor who is "readily contactable by the police" and who meets all the other requirements summarised above will be needed.

Mere "occasional ports of call" were not regarded as someone's place of work in the case of *Union Traffic v TGWU [1989] IRLR 127.*

Workers who are not in employment who were dismissed while on strike have a continuing right to picket lawfully at their former place of work (section 220(3), TULRCA).

Secondary picketing (picketing at a workplace that is not the member's own) is not protected - even if those working at the other place of work share the same employer or are covered by the same collective bargaining agreement.

The law does not protect anyone who pickets without permission on or inside premises that are private property (including in the open air). This would be trespass and can result in civil proceedings (Code, para 26). In this connection, there is growing concern at the amount of land, especially in new city developments, that is accessible to the public and looks like a public space, but is in fact privately owned, described by the Guardian newspaper as "the insidious creep of pseudo-public spaces", especially in London. There is no right to picket or protest on private land, even if it looks like public space, and there is worrying evidence of high-handed and arbitrary penalties by private security firms when individuals infringe their rules.

How many can picket?

One of the most controversial aspects of the Picketing Code (retained in the latest version) is the recommendation that the number of pickets at a workplace entrance should not exceed six. The Code states: "Pickets and their organisers should ensure that in general, the number of pickets does not exceed six at any entrance to, or exit from, a workplace. Frequently a smaller number will be appropriate" (Section E, para 56, Picketing Code). The Code is non-binding, and a failure to observe its provisions will not make picketing automatically unlawful. However, breaches of the Code are admissible in evidence and are likely to be relied on in any legal action. In practice, this aspect of the Code is now indirectly enforceable, by virtue of the new statutory requirement for picket supervisors to be "familiar" with its terms.

In practice, a group of more than six pickets risks being judged not to be "peaceful" and to lose the benefit of the immunities. For example:

> During the 1984-85 miners' strike, pickets were posted at a pit in South Wales. Although six pickets stood at the colliery gates, about 60 demonstrated across the road. The court ruled that the mass demonstration was a common law nuisance.
>
> *Thomas v South Wales NUM [1985] IRLR 136*

In the 2005 Gate Gourmet dispute, the court granted an injunction to limit pickets outside the company's offices, but not at other locations:

> The High Court granted an injunction limiting the number of pickets outside Gate Gourmet's Heathrow offices to six and limiting picketing so that pickets could not approach workers entering and leaving work. However, it refused a request to limit the number of pickets near the entrance of a nearby Gate Gourmet plant at Beacon Hill.
>
> The injunction was made against the union and also individuals. Although there had been no ballot, union officials were present on the picket line and aware what was going on, and the union had not repudiated (disowned) the action.
>
> *Gate Gourmet London Limited v TGWU [2005] IRLR 881*

Threats to control wider protest and union use of social media

At the start of the consultation that preceded the TUA 16, the government sought feedback in relation to a series of even more authoritarian changes, namely:

- **to create a new criminal offence of "intimidation" on the picket line;**
- **to require unions to provide 14 days' advance notice of all picketing and protest plans, including where they would take place, how many people would be involved, whether there would be "loudspeakers, props, banners etc.", union plans to use networks such as Twitter and Facebook and the content of any blogs or websites in support of the action;**
- **to extend the Picketing Code to cover the use of social media during industrial disputes; and**
- **to require unions to report annually on their involvement with picketing and protest (as opposed to industrial action) during the year.**

For the time being, these proposals have not been taken forward, and it is possible that their real purpose was to act as a smokescreen to obscure the main proposals – the raised balloting thresholds – rather than as serious legislative plans. Nevertheless, the plans reveal the alarmingly authoritarian rationale that lay behind the TUA 16, masked by benign appeals to "industrial democracy".

Criminal and civil sanctions

The "immunities" only protect a lawful picket from claims for breach of contract - not from the many potential criminal offences that could be committed during a picket, such as trespass, assault, harassment, breach of the peace, obstruction of the highway, obstruction of a police officer, disorderly conduct, threatening behaviour, riot or affray; or from civil offences such as private nuisance, noise nuisance, slander, or defamation from an offensive placard. Offences could also be committed when using social media to protest about a dispute, such as malicious communications, defamation, or breaches of the *Data Protection Act 1998*, for example when using personal data to organise protests.

There are also specific offences, identified in section 241, TULRCA, of "intimidation or annoyance by violence or otherwise". These originate from the *Conspiracy and Protection of Property Act 1875* and are punishable by up to six months in prison or a maximum fine of £5,000.

In addition, police have powers to give directions to protestors, and to arrest those who fail to comply.

Under section 15, TULRCA, it is unlawful for a union to pay an individual's fines for criminal activity or contempt of court. If union trustees allow union funds to be used for "unlawful purposes", section 16, TULRCA allows any member to apply to court for a remedy.

Finally, as has already been shown, pickets can lose the benefit of the immunities very easily indeed (see page 43). The multitude of restrictions, in the words of Oxford law professor Alan Bogg, has a "chilling effect on civic protest, without any credible justification". During government consultation in 2014, the Association of Chief Police Constables described the anti-strike laws as already "broadly fit for purpose" and said that the police needed no more extra powers.

7. Ban on supplying temporary agency workers in strikes

Since 1973, there has been a ban on the supply by employment businesses of temporary agency workers to replace striking workers who are participating in official (but not unofficial) industrial action, or to cover the work of employees of the hirer who have been assigned to cover work normally carried out by a striking worker (regulation 7, *Conduct of Employment Agencies and Employment Businesses Regulations 2003*).

Employment businesses have a defence if they did not know that industrial action was planned, so it is important for unions to put them on **written notice** of strike plans.

The ban reflects the established position of the International Labour Organisation (ILO) which is that using replacement workers to break a strike is a breach of ILO Convention 87 on Freedom of Association and the right to strike. In addition, ILO Recommendation 188 on private employment agencies states that they "should not make workers available to a user enterprise to replace workers of that enterprise who are on strike".

However, this is under threat, as the government in 2015 proposed lifting the ban as part of a Conservative manifesto commitment to get rid of what it described as "nonsensical restrictions" on employers. The consultation document, published in July 2015, suggested that the government was considering lifting the ban in key public-sector disputes - education and the postal service were cited as examples. But the published draft regulations are wide enough to allow strike breaking by agencies in all disputes.

In response, the ILO Committee of Experts has asked the government to "review this proposal with the social partners concerned, bearing in mind ... that the use of striker replacements should be limited to industrial action in essential services".

The government's proposed measure is not supported by the main representative body for employment agencies - the Recruitment and Employment Confederation (REC). Speaking to the BBC in September 2015, the REC head of policy described her organisation as "not convinced that putting agencies and temporary workers into the middle of difficult industrial relations situations is a good idea for agencies, workers or their clients".

The government was clear during consultation that lifting the ban "would allow employers facing industrial action to hire temporary agency workers from employment businesses, who would then be able to perform some of the functions not being carried out due to the industrial action". In other words, the proposal, if implemented, would wholly negate workers' human right to withdraw their labour to achieve an industrial objective, by permitting

the hire of a replacement workforce. The move would be reminiscent of the 19th century cotton strikes.

Added to the doubling of the time employers have to prepare for a strike, from seven to 14 days – as introduced by the TUA 16 (see page 38) – a government decision to lift the ban would make it even easier for employers to organise a substitute strike-breaking workforce.

The government is said to be still considering whether to make this change.

8. Dismissal of striking workers

Members who take part in official industrial action (that is, action endorsed or authorised by the union) have some limited protection from dismissal. Unofficial strikers have no such protection (see Chapter 4).

Workers who are not union members but who take part in official industrial action can be protected, as long as at least some of their group are members of a union that has authorised or endorsed the action (section 237(2)(b), TULRCA).

There are three separate scenarios to consider as to the legitimacy of dismissing striking workers:

Scenario 1 - dismissal during official, balloted industrial action

Section 238A, TULRCA makes it automatically unfair for an employer to dismiss employees where the reason or principal reason for dismissal is that the employee took official, balloted industrial action during the "protected period". The protected period lasts for the first 12 weeks of industrial action.

The **12-week period can be extended** if employees are still taking action after 12 weeks but the employer has not taken "reasonable steps" to try to resolve the dispute. This could happen, for example, if the employer unreasonably refuses an offer to re-open negotiations, or of mediation or conciliation through Acas. The 12-week period is also extended to include any time when employees are locked out (see Chapter 1) (*Employment Rights Act 1996*, Schedule 5, section 238A, TULRCA).

Under sections 238A and 238B, TULRCA, when deciding whether an employer has failed to take reasonable steps during conciliation/mediation (thereby extending the 12-week period), a tribunal can take into account, for example, whether the parties:

- followed any relevant collective procedures established between them;
- offered to commence or resume negotiations after starting protected industrial action;
- unreasonably refused an offer of arbitration or conciliation;
- were represented by an appropriate person (for example, someone with authority to handle/settle the dispute);
- cooperated in arranging meetings;
- fulfilled a commitment to take certain action; and
- answered reasonable questions put to them.

When deciding whether an employer has taken "reasonable steps", the tribunal is not allowed to consider the merits of the trade dispute (section 238A(7), TULRCA).

Information about the right to protection from dismissal during the first 12-weeks of official balloted industrial action must be included on the ballot paper.

Once the 12-week period has ended, employees taking part in official balloted industrial action are barred from claiming unfair dismissal unless they have been **selectively dismissed**. Selective dismissal is where some, but not all, striking workers are dismissed, or where all are dismissed but some are taken back within three months.

Once the three months have passed, employers can hire whoever they want without risking unfair dismissal claims.

Selective dismissal is covered by section 238(2)(a), TULRCA, which states that if an employer responds to industrial action by dismissing some but not all striking workers, those whose employment is terminated can challenge their dismissal in the tribunal.

Selective rehiring is covered by section 238(2(b), TULRCA, which states that if an employer who has dismissed employees for taking industrial action selectively rehires some but not all of them during the three-month period, those not offered new employment can similarly challenge their dismissal.

The offer of selective rehiring can come from the employer, its successor or an associate company, and can be for the same job or another suitable job. (There is no explicit requirement for the job to be on substantially the same terms and conditions.)

Unusually, the time limit for bringing a claim based on selective dismissal or rehiring is six months from the date of dismissal (rather than the usual three months) (section 239(2), TULRCA).

The purpose of these rules is to prevent employers picking and choosing who to take back (section 238, TULRCA). During the three-month period, the employer must take back everybody or nobody.

For strike ballots opened on or after 1 March 2017, pickets will lose their protection from dismissal, even if action is official and balloted, if there is a failure by the union or picket supervisor to comply with the new requirements for union supervision of pickets under the TUA 16 (see Chapter 6: Picketing).

Scenario 2 – dismissal during official but unballoted industrial action

Employees dismissed during official but unballoted action (that is, action that has been authorised or endorsed by the union, but where there has been no ballot), have no right to claim unfair dismissal, unless there is selective dismissal or re-engagement (as defined above) from among those taking part in the industrial action or lockout (section 238, TULRCA).

Scenario 3 – dismissal during unofficial industrial action

Workers dismissed during unofficial industrial action have no right to claim unfair dismissal. Employers can freely choose to dismiss some but not all of the striking workers during unofficial industrial action without any legal comeback (with a few exceptions in cases such as health and safety dismissals – see below). See also Chapter 4: Official and unofficial action.

Where industrial action has been repudiated by a trade union, it will not be treated as "unofficial" for the purpose of the right to claim unfair dismissal until the end of the next working day after the day of the repudiation (section 237(4), TULRCA).

Exceptions to the ban on unfair dismissal claims

Employees who are dismissed or made redundant wholly or mainly for one of a series of reasons, can still bring a tribunal claim for unfair dismissal even if the industrial action is official and balloted but outside the protected period (scenario 1), official but unballoted (scenario 2) or unofficial (scenario 3) (section 237(1A) and 238 (2A), TULRCA). These reasons include health and safety, working time, requesting the right to work flexibly, acting as an employee representative, or making a protected disclosure.

"Taking part"

To be barred from bringing a claim for unfair dismissal in the employment tribunal, employees must have been **taking part in industrial action at the time of the dismissal**. If they have already returned to work and are then dismissed, they are not prevented from bringing claims.

Whether employees were "taking part" in industrial action is a question of fact for the tribunal, not the employer, to decide (*Jenkins v P&O Ferries [1991] ICR 652, Coates v Modern Methods and Materials Limited [1982] IRLR 318*). The decision must be based on *what* the worker was or was not doing – not why (*Lewis v E Mason & Sons [1994] IRLR 4*).

According to the case of *Winnett v Seamarks Brothers Limited [1978] IRLR 387*, "taking part" in industrial action does not just mean withholding the labour you were contractually obliged to perform when the action was taking place. Workers can be "taking part" in industrial action from the moment the action is called, although their own shift may not be scheduled to begin until several hours later (see also the case of *London Underground v ASLEF [2012] IRLR 196*, summarised on page 34).

Workers off sick

Workers who are already off sick before a strike starts are not generally viewed as taking part in it, but employment tribunals have concluded that workers were dismissed while taking part in industrial action even though they are off work sick or on holiday, where they have associated themselves actively with the strike, by attending at the picket line, or taking part in other activities of the striking workers "with a view to furthering their aims" (*Bolton Roadways Limited v Edwards [1987] IRLR 392*).

It is always a question of fact. For example:

> An industrial tribunal was wrong to rule that an employee who was off sick for the whole period of a strike was taking part in the strike action just because he regularly attended the factory to hand in his medical certificate and in the course of his visits, talked to the pickets at the gate. "No reasonable tribunal could have regarded such fleeting encounters between a sick employee and his striking colleagues as participation in the strike action."
>
> *Hindle Gears Limited v McGinty [1984] IRLR 477*

Someone who is already on strike when they fall ill is likely to be considered to be continuing to be on strike.

The ILO has repeatedly criticised UK law for allowing the dismissal of striking workers, saying it breaches international standards.

"Taking part" in industrial action

When reading employment tribunal cases that concern whether or not someone was "taking part" in industrial action, it is important to bear in mind that many such cases were brought by dismissed employees who were challenging whether those employees who were kept on or reinstated after the strike were "taking part" in it (that is, selective dismissal/ rehiring). They were not challenging other issues, such as whether wages could be deducted due to industrial action (see Chapter 10), or whether they themselves were fairly dismissed. Most of the cited cases predate the introduction of the "protected period" for striking workers, brought into law by the *Employment Relations Act 1999* (initially eight weeks, but later expanded to 12 weeks).

Detriment short of dismissal

Although employees have some limited statutory protection from unfair dismissal when taking official industrial action, they have no statutory protection against being subjected to negative treatment short of dismissal ("detriment"), for example, having benefits removed, or being demoted or forced to change duties or shifts, in retaliation for taking industrial action.

This was highlighted during the British Airways dispute of 2009-11, when the airline punished striking cabin crew by withdrawing their valuable travel privileges, which were not reinstated when the dispute settled in 2011. Members brought a claim in the European Court of Human Rights alleging that the UK government's failure to protect workers from detriment short of dismissal infringes Article 11 – the human right to freedom of association, but the court ruled the claim inadmissible (*Roffey v The UK, Application*

No.1278/11, 21 May 2013). For more information, see Chapter 12. The airline's continued failure to reinstate travel benefits to 1,400 affected workers is the subject of ongoing strike action, most recently in July 2017.

No more tribunal fees

Following the resounding success by public services union UNISON in its judicial review challenge to the government's tribunal fee regime, the entire regime has been declared unlawful. There are currently no tribunal fees for any claims in the employment tribunal, and the government must take immediate steps to reimburse £27 million of fees paid since 2013. (*UNISON v Lord Chancellor [2017] UKSC 51*)

9. Injunctions

The injunction (interdict in Scotland) is the most popular legal remedy sought by employers. An injunction is a court order to do or refrain from doing something. It may be granted where:

- there is an allegation of unlawful action;
- there is a serious issue to be tried;
- the employer alleges a harm greater than that which the workers would suffer by having to call off their action; and
- the employer alleges that any damages awarded at a later full trial would not adequately compensate for harm suffered.

Applications for an injunction without notice to the union are generally not allowed. Section 221(1), TULRCA says the court "shall not grant the injunction" unless satisfied that all reasonable steps have been taken to give the union notice and an opportunity to be heard. In practice, notice is often extremely short and informal, allowing little time to prepare.

When deciding whether to grant an injunction, the court must consider the likelihood of the union succeeding in establishing a trade dispute protected by the immunities (section 221(2), TULRCA).

Any injunction can include an order that the union take specific steps to ensure members bring the action to a halt and to prevent further industrial action (section 20(6), TULRCA).

When deciding whether to grant an injunction, courts can consider the "public interest", in the sense of potential disruption to external third parties and to the national economic well-being (*Associated British Ports v TGWU [1989] IRLR 305*).

Who can sue

Legal action can be taken not only by an employer, or a customer or supplier of the employer, but also by a union member or a member of the public.

Legal action by a member of the public

An individual (not a company) can apply for an injunction against a union or an individual for calling, organising or encouraging **unlawful industrial action** (that is, action outside the immunities) where its likely effect is to delay the supply of goods or services to that individual or reduce their quality (section 235A, TULRCA). It is "immaterial" whether or not the member of the public is entitled to be supplied with the goods or services in question (section 235A(3)).

This section was originally designed with public services in mind, to enable individuals to take action against public service unions in the context of social services, hospital services, the fire service, railways and so on. But it also applies to the private sector.

Legal action by a union member

There are two potential grounds for action against a union by a member. The first is a claim for an injunction to prevent a union from encouraging or supporting unballoted industrial action (section 62, TULRCA). The basis for this kind of claim is that every member has a legal interest in union funds.

As long as industrial action is protected by the immunities, a union can spend its funds freely in support of lawful industrial action, as long as the union rules allow the expenditure.

The second kind of legal action members can bring is a claim against the union for breach of its own rules. In the context of industrial action, this could occur if, for example, the union rule book required a specific majority for a ballot, over and above the statutory threshold, which has not been fulfilled, or if the union has spent money supporting industrial action in a way that its rules do not permit.

One particular use of funds is absolutely banned to unions (but not to anyone else), namely the payment of members' fines (section 15, TULRCA). A union that pays off a member's fine risks legal action by another member.

In addition, it is against the law for unions to discipline workers who refuse to support or participate in industrial action (section 65(2)(a), TULRCA).

Injunction application by the government

In a case that may be the first of its kind, in 2016 the secretary of state for education was allowed to apply for an interim injunction to try to stop a strike by sixth-form colleges even though it was not the employer or an affected third party – although the application itself was unsuccessful. The government was allowed to make the application on "public interest" grounds and because of the role of the secretary of state as the guardian of education in England and Wales:

> The NUT called a day's strike action by teachers in sixth-form colleges. The secretary of state for education had no legal claim against the union for inducing breaches of contract, because any such claim belonged to the employer. These teachers were employed directly by the colleges, not by the secretary of state. But the Court (Kerr J) accepted that the secretary of state could apply for an injunction because of the public interest involved and the secretary of state's status as both the target of the strike action and the guardian of education in England and Wales.
>
> The union successfully defeated the secretary of state's intervention in this case and no injunction was granted (see box on page 22). Even so, the case is an important indicator of the courts' potential willingness to grant injunctions in appropriate cases and is significant given the break-up of public services and their outsourcing to private sector bodies.
>
> *Secretary of State for Education v NUT, 14 March 2016, Kerr J*

Legal consequences of an injunction

Failure to comply with an injunction can lead to contempt of court proceedings, and in some circumstances to sequestration (seizure) of the union's assets. This can happen where a union fails to repudiate unlawful strike action after the grant of an injunction. If the union does repudiate the action (see Chapter 4), union funds are safeguarded, but members who remain on strike are placed at risk of selective dismissal.

Normally, unions are the targets of injunctions, but they can also be taken out against one or more named individuals. Those served with an injunction face the risk of contempt of court proceedings (including fines and even imprisonment) if they do not comply.

It is well recognised that in the context of industrial action, even though normally granted as an "interim" measure until the claim is finally decided, injunctions usually bring a dispute to an end. Research by Professor Gregor Gall has shown that, where interim injunctions are sought, they are granted more often than not, and that where an interim injunction has been awarded, the union will not usually re-ballot.

Gall's research also highlighted how very few injunction applications are about picketing, which Gall suggests is indicative of the "decline of effective picketing as a tool in the armoury of trade unions during strikes" (all the more so following the new restrictions imposed by the TUA 16, summarised in Chapter 6).

For more information, see "Injunctions as a legal weapon in industrial disputes in Britain, 1995 - 2005", Gall, *British Journal of Industrial Relations,* June 2006.

10. Effect of striking on terms and conditions

Continuity of employment/length of service

Going on strike (or being locked out by the employer) will not break someone's continuity of employment (section 216, *Employment Rights Act 1996* (ERA 96). However, the period spent on strike (and/or locked out) is not added to their length of service.

Pay

Employers are generally entitled to deduct pay for days when a worker is on strike. This is because a worker has no general right to be paid if they are not ready and willing to perform their contractual duties (*Miles v Wakefield MDC [1987] AC 539*). The amount to be deducted for each day of industrial action can be specified in the employment contract, or a collective agreement.

If there is no specific agreement on strike pay but the contract provides for normal contractual working hours or a working week, and wages are calculated by reference to those hours/days/weeks, pay must be apportioned based on the terms of the contract (that is, by the number of working days/hours, as opposed to calendar days). A five-day working week produces a formula for calculating a day's pay of 1/260, reached by deducting the 104 weekend and non-working days from the 365 days in the normal calendar year (*Yarrow v Edwards Chartered Accountants [2007] UKEAT/0116/07*). The employer should only deduct from wages one day's pay for a one-day strike, and cannot also deduct the holiday pay the employee would have earned by working on that day (*Cooper v Isle of Wight College [2007] EWHC 2831*).

For some workers, the number of working hours is not fixed and the salary is paid annually. For example, teachers are contractually required to carry out duties throughout the year - both "directed time", spent at the school premises, and "undirected time" (spent setting work, marking, writing reports and so on) all year round. In these circumstances, unless the contract says something different, employers must calculate a day's pay by apportioning the annual salary over 365 days. This was decided by the Supreme Court in the following case:

> The Supreme Court was asked to decide the correct deduction of one day's pay for strike action from the salaries of sixth-form college teachers. The employer argued that it could deduct strike pay from the teachers calculated as 1/260th of their annual salary, based on the premise that they worked Monday to Friday, 52 weeks of the year, bringing the total to 260 working days a year.

> The teachers disagreed. They argued that since their obligations under their employment contract were not limited to fixed hours, the college should have applied section 2 of the *Apportionment Act 1870,* which says that "periodical payments in the nature of income" such as wages, should accrue at an equal rate day-to-day unless the contract says something different. In addition to the working time spent in college (directed time), the teachers' contracts required them to work whatever extra hours were needed (known as undirected time) to discharge their duties effectively.
>
> The evidence showed that the teachers regularly worked evenings, weekends, and during the holidays to carry out their contractual duties. The Supreme Court agreed with the teachers and applied the *Apportionment Act,* ordering that the maximum the College could deduct for a day's pay due to strike was 1/365th of their annual salary.
>
> *Hartley v King Edward VI College [2017] UKSC 39*

For teachers whose terms and conditions are covered by the "Burgundy Book", this provides expressly for pay deductions for industrial action to be calculated based on a 1/365 deduction.

Pay deductions due to industrial action are not an unlawful deduction from wages (section 14(5) ERA 96). However, the tribunal can make a finding as to whether what has taken place really was industrial action, instead of relying on an assertion by the employer that it was (*Gill v Ford Motor Company [2004] IRLR 840*).

Pay and action short of a strike

Industrial action is increasingly likely to be a call for industrial action short of strike (IASS), such as a work to rule, an overtime ban, or a marking boycott, as opposed to a full strike. In these circumstances, the employer may still be able to deduct a full day's or shift's pay, but to do so, they must have spelled out clearly and in advance (for example, in the written contract terms, or in a notice before the strike begins) that part-performance of contractual duties is not acceptable and will not be paid *(Wiluszynski v London Borough of Tower Hamlets [1989] IRLR 259, BT v Ticehurst and Thompson [1992] IRLR 219).*

In *Miles v Wakefield MDC [1987] AC 53,* Mr Miles, a registrar and member of NALGO, engaged in IASS by refusing to officiate marriages on a Saturday morning (the most popular time for holding weddings). The council made it clear that Miles would not be paid anything for the three-hour shift if he worked it without conducting weddings. Miles worked the shift performing all his other duties and brought a legal claim for his wages for the three hours. By a majority, the House of Lords (now the Supreme Court) concluded that he had no right to be paid for any of the Saturday morning shift.

Where the contract makes it clear that an employee who takes industrial action will not be paid regardless of whether the action is all out or partial,

a striking worker will have no claim to be paid for the value of work done (legally known as "quantum meruit") *(Spackman v London Metropolitan University [2007] IRLR 744).*

State benefits for strikers

Although strikers are **mostly excluded from claiming state benefits**, they should be able to continue to receive Working Tax Credit and Child Tax Credit. However, in June 2012, the Department of Work and Pensions announced that once the Universal Credit (UC) benefit changes are fully rolled out, striking workers will no longer be allowed to access these benefits.

Anyone taking industrial action loses their entitlement to claim most other benefits. The same is true for anyone laid off because of industrial action, unless it can be shown that they have no direct interest in the dispute at their place of work.

The **dependants of strikers** or those laid off are entitled to claim benefits. However, when calculating their "personal allowances" , so as to assess entitlement to means-tested benefits (for example, Employment and Support Allowance), a deduction of £40.50 a week will be made (2017-18). This is meant to represent the amount the striker may receive in union strike pay. It is deducted regardless of whether any strike pay is actually received. Any strike pay over that amount will be classed as income and taken fully into account when assessing entitlement. The dependants of non-union members on strike have the same amount deducted.

For more information, see the Labour Research Department's annual booklet, *State Benefits and Tax Credits 2017: a trade union guide to in-work benefits*

11. Union responses to the Trade Union Act

It is early days to assess the impact of the *Trade Union Act 2016* (TUA 16), affecting all ballots called on or after 1 March 2017. However, there have already been several successful ballots for industrial action since the law changed.

Examples include the three-day strike by Bank of England support staff (cleaners, security and maintenance staff) in August 2017, organised by general union Unite members over an imposed 1% pay rise - the first strike at the Bank in almost 40 years; three weeks of threatened strike action affecting 1,100 workers across the Argos distribution network, over the failure to negotiate a national agreement with Unite covering redundancy terms and pay; and the strike by Serco employees (domestic staff, porters and security workers) at London's Barts Health NHS Trust, for an extra 30p an hour.

This chapter looks at ways in which unions might overcome some of the barriers to industrial action and protest put in place by the new law.

The new ballot thresholds

The new balloting thresholds are designed to reduce the number of strikes and make it harder for workers to bring industrial action to protect their terms and conditions.

Even a ballot that meets the thresholds - but only just - may be more vulnerable to challenge by employers seeking to pick holes in it (see Chapter 5) to secure an injunction (see Chapter 9).

However, a ballot that comfortably beats the new thresholds is likely to strengthen the union's negotiating position, bringing added legitimacy and greater leverage. This applies to both formal balloting and consultative balloting, which is often used as a means of increasing leverage over employers in a dispute.

Even the government's own impact assessment noted that strikes called after clearing the balloting thresholds will be taking place "on the basis of clear support from union members" (government impact assessment, 2015: para 8, rationale for intervention, 2015). And the ballots supporting several recent high-profile private sector strikes that pre-date the TUA 16, such as the BA cabin crew mixed fleet dispute, or the Southern rail dispute, comfortably exceeded the new thresholds.

Future strikes are likely to be energised by the stronger support behind the ballot result, and by the increased involvement of activists in maintaining momentum and securing the result needed. Unions can try to use the new 50% turnout threshold to increase turnout by spelling out that "not voting" now counts as an actual vote against the strike.

There is also every possibility that the need for extra engagement and more motivated activists on the ground to ensure a high turnout will make disputes more bitter, protracted and harder to resolve, even at workplaces where there is a pattern of high turnouts.

Large-scale disputes

It may prove especially difficult for large groups of workers located across geographically spread out workplaces to meet the new thresholds, according to Professor Gregor Gall of Bradford University. In particular, the threat of **large-scale public-sector strikes** may no longer carry the same political leverage, because national ballots are less likely to be won. This is especially the case where there is uneven membership density, and where some workplaces have no union activists. Around two-thirds of recent major strikes in the public sector would not have been possible under the new thresholds (government impact assessment, 2015, para 34). This includes the major public sector strikes on pay and pension reform.

The public services UNISON ballot in the Scottish local government pay negotiations in May 2017 provided the earliest indicator of the logistical challenges to future large-scale industrial action in public services. The ballot was run for action to support union negotiations to end the 1% pay cap, which has been eroding the pay of local government staff for nearly a decade. A total of 15,214 votes were cast, and 62.7% of those who voted supported the action, but the 50% turnout threshold was not met (turnout was just 22.8%), so the action could not go ahead.

In a more positive example, Scottish education union EIS balloted lecturers at 20 further education (FE) colleges to uphold the terms of a national collective bargaining agreement for FE wages in Scotland. Turnout (59.1%) comfortably exceeded the 50% threshold, representing 2,622 votes in favour and just 98 against (a "yes" vote of 96.4%). Six days of strike produced a breakthrough in negotiations and, in May 2017, Colleges Scotland committed to implementing the 2016 pay agreement.

In future, great care will be needed to define the trade dispute clearly and to target the ballot at those constituencies most likely to vote – and to vote yes. Professor Gall suggests that, on national issues, unions may decide to organise several distinct ballots, to avoid calling a single national ballot, and to ballot areas and regions of membership more selectively, focusing on the strongest areas with the highest density and levels of activism. Ballots will still be won, says Gall, but their leverage in large-scale industrial action may be reduced because fewer areas will be impacted.

Another solution might be to focus on balloting members with the most strategic power, such as those engaged in revenue collection or "just in time" systems. "Rather than bringing out the whole local government workforce, unions may look at taking selective strike action by particular groups of workers who can have a big impact financially or strategically, such as traffic wardens or refuse collectors," according to Gall.

Financial support for strikers

Unions have in the past - and may do so more in the future - established strike "hardship funds" from central resources to help support those who lose pay by going on strike.

During the successful Scottish FE strike (see page 63), the union ran a targeted strike hardship fund for those most in need, aimed, for example, at part-time lecturers whose work timetable coincided with the strike action.

As part of its response to the TUA 16, general union Unite has announced a new £35 million strike fund. (The union has also changed its rules, to remove the words "so far as may be lawful", so as to allow it to take action to defend its members' rights even if it is forced outside of the law by the TUA 16.)

Another option is to raise a strike levy from members to support those taking action. One effective way of using it in a large-scale dispute would be to only call on groups of members with the organisation and leverage to impact on the employer's business to take action, but to raise the levy from all those affected by the dispute. This was used some years ago in successful action to win a 35-hour week in the engineering sector.

Getting the vote out

As well as traditional methods - well trained activists, face-to-face persuasion at workplace level, and visible leadership and resources from the national union - unions are using innovative ways to get the vote out. These include collecting more email addresses, using YouTube videos, WhatsApp and other digital media, and trialling electronic balloting for consultative ballots.

Higher education union UCU is adding an "I've voted" button to every email sent by the union during a ballot. After voting, the member can click on the button to let the union know, so that attention and resources can be focused on members who have not yet voted, and to keep a tally of how the ballot is progressing. The process will not tell the union how a member has voted, only that they have voted. UCU has also produced a publication "*Get the vote out*", with practical guidance on how to secure a high turnout.

Unions with tight organisation and higher levels of occupational and union identity (such as train drivers, postal workers and firefighters) may be more likely to attain the new thresholds, but even they are not complacent. The FBU firefighters' union told LRD that decisions about industrial action at the FBU go before the union's national executive committee to ensure that there is sufficiently high union density and strength of feeling for a clear mandate, and campaign vigorously for a high turnout.

Likewise, the CWU communications union says it rarely loses an industrial action ballot, but it too uses a variety of methods, including national and local briefings for reps, so that everyone knows what must be done to secure a "yes" vote.

Electronic balloting, if introduced (see box on page 39) could increase

turnout. Unions will need to take practical steps to be ready for electronic balloting if the government gives it the go-ahead.

One possible impact of the higher thresholds may be more use of strategic industrial action short of strike (IASS), as opposed to full-blown strike, as more workers may be likely to vote in favour of IASS. But the TUA 16 presents challenges to IASS, in particular the new six-month limit to the ballot life (see below), and the new requirement to include information on the ballot paper about the types of action planned, and the period(s) when they will take place (see Chapter 5).

Limit to the ballot life

In recent years, discontinuous, rather than continuous industrial action has become common currency for unions, but the new limit to the ballot life of six months (see page 40) is designed to make discontinuous action harder to achieve.

This feature of the TUA 16, aimed at reducing disputes, may end up producing the opposite effect, because unions cannot afford to allow a ballot mandate to expire. They may decide to "front-end" their action, that is, instead of organising just one or two-day strikes, they may call more action at the start. Oxford academic Alan Bogg speculates that this change could precipitate a "sharp escalation in industrial conflict, as trade unions seek to maximise their industrial advantage before the ballot mandate elapses".

Sampson Low, head of policy at UNISON says there is a risk that the new six-month ballot life will cause negotiations to break down. Any negotiations where the dispute is not resolved would have to stop so as to allow the ballot to be re-run, dragging the dispute out unnecessarily. This is especially likely in a large-scale dispute, given the amount of time needed for a lawful and effective postal ballot using second class post. Some employers may intentionally delay negotiations so as to invalidate the ballot, or toughen their stance as the deadline approaches. "Tactical behaviour like this is unlikely to improve industrial relations between unions and employers in the long term," says HR magazine *Personnel Today*.

A number of unions feel this change to the rules could work to unions' advantage. The CWU says that "re-balloting could actually re-energise and put life back into a long-running dispute". And Andy Newman of the GMB general union suggests that "it is not unusual in certain industrial disputes for the resolve of the workforce to stiffen once action has been engaged – the time limits may therefore change the tempo of industrial campaigns, such that unions re-ballot to demonstrate strength of feeling to an employer during the course of a dispute".

He adds: "The momentum of any industrial campaign that has lasted more than six months may be flagging, and ... may profit from regrouping and reappraisal by the union. This is unlikely to damage many disputes."

Extra information on the ballot paper

Unions may be able to use the new requirement to include a "summary" of the dispute on the ballot paper (see page 33) to their advantage, but it also presents a range of new problems.

In particular, the requirement may produce more injunction applications, with employers questioning the existence of a "trade dispute" between the parties, arguing that a fast-moving trade dispute has changed or moved on, or that the dispute has not yet crystallised (see Chapter 3).

In addition the "detailed crystallisation" of the matters in dispute required on the ballot paper, says Bogg, could lead the union to adopt an entrenched bargaining position, fearing that any compromise could be used by the employer to cast doubt on the original mandate.

However,used wisely, this new requirement may help in identifying a clearly defined issue around which members can engage, which is likely to be a key part of any successful campaign strategy.

Other forms of protest

Leverage campaigns

Another likely outcome of the new restrictions is a rise in the sorts of innovative leverage tactics that have already been in play for several years. Even Bruce Carr QC, author of a government review into the law on industrial disputes, has suggested that if anything, the new law is "likely to increase the use of leverage campaigns".

Unite describes these as campaigns involving protest action to raise awareness among shareholders, customers, competitors, suppliers and the local and wider community of an employer's poor treatment of workers. A union commits resources and time to making all interested parties aware of the treatment being received by members at the hands of an employer, asking those parties to make moral and ethical decisions about their future relations with the employer.

According to Unite: "Leverage is about the democratic right of the union to ensure that immoral employers cannot hide behind veils of secrecy and must conduct their business in an open and transparent fashion and accept the consequences of the moral judgements that may follow. It is in no way a replacement for collective strength. The development of industrial power remains vital if workers are to have the ability to win long-term."

It is "not a call for unofficial action".

An example of a successful campaign was in the construction industry, over the BESNA (Building Engineering Services National Agreement) dispute of 2012. The campaign, which used social media to mobilise protestors, stopped the so-called "BESNA 7" construction contractors from reneging on industry agreements and imposing inferior contracts on thousands of workers.

In 2017, similar protests are ongoing as this booklet goes to press, over the failure of Danish-based Babcock & Wilcox Volund to pay industry rates on the "energy from waste" project in Port Clarence, Teesside, in breach of the National Agreement for the Engineering Construction Industry. This wage undercutting would be illegal in Denmark, says the GMB, as that country has implemented the EU Posted Workers' Directive in a way which requires companies that bring in overseas workers to follow the relevant domestic industrial agreement.

The GMB's Andy Newman feels that leverage tactics have been effective in drawing attention to issues - examples include dressing up as a crocodile and protesting outside the workplaces of those personnel managers who participated in the unlawful practice of blacklisting. The success of these tactics probably explain why, in its early stages, the *Trade Union Bill* proposed restrictions to leverage practices (see Chapter 6). However, these were withdrawn.

Recent examples of innovative campaigns and protests have included Unite's campaign against retailer Sports Direct, the GMB's campaigns against online retailers ASOS and Amazon, the Hungry for Justice campaign in the fast food and hospitality sector, supported by the BFAWU bakers' union, and the coordinated road closure action by London taxi drivers to protest at Transport for London's handling of the cab trade.

Visible protest

Some unions have been considering a variation on the traditional picket as a way of making their dispute more visible to the public. The FBU points out that, although some fire stations are located in town centres with lots of passing traffic and pedestrians, others are hidden away behind industrial estates. So instead of organising a picket, "it may be more effective in some cases to have a stall in the town centre, with firefighters handing out leaflets about why they are taking action".

In August 2017, Unite coordinated three consecutive protests linked to three different industrial disputes, all concerning poor pay. The first, by striking Serco employees (domestic staff, porters and security workers) at London's Barts Health NHS Trust, was held outside the offices of international finance house JP Morgan, where Serco was due to present its half-yearly financial results to investors. The protest was designed to draw attention to Serco's profits (£82 million in 2016) as compared with the striking workers' claim for an extra 30p an hour.

The second protest took place outside the offices of the Civil Aviation Authority, and concerned the approval by British Airways to lease nine Qatar Airways aircraft to cover striking cabin crew on the BA mixed fleet. The third protest was a rally outside the Bank of England to support the workers' three-day strike.

Another example of innovative campaigning has been the CWU's postcard campaign in its dispute with the Post Office over cuts, privatisation and

pensions provision. The postcards explained the union's case to the public and asked them to complete postcards in response to a government consultation on the future of the Post Office. The cards called for an immediate halt to the cuts and a fundamental change in direction. The union gathered over 75,000 postcards supporting its position in the dispute.

In another example, reps from the Public and Commercial Services Union (PCS) campaigning over poor working conditions and zero-hours contracts (ZHCs) at leading museums targeted visitors to the opening of the V&A's "Disobedient Objects" exhibition - an exhibition about the powerful role that objects play in grassroots movements for social change. They leafleted members of the public as they arrived and urged speakers at the event to mention and support their fight for fair pay at the museum. Reps have also used online petitions to support their campaign and have encouraged museum visitors to write letters to senior management and trustees, supporting their case.

Rise in unofficial action?

Several commentators have predicted a rise in new forms of civil disobedience in the industrial sphere, including wildcat strikes of the kind seen at the Lindsey Oil refinery in 2009, prompted by anger and frustration at increasingly byzantine laws limiting industrial protest. These issues are exacerbated by the spread of precarious working, including growing false self-employment and "zero hours" contracting. Where work is insecure and employment laws fail to protect vulnerable workers, spontaneous unofficial direct protest may appear more accessible for these workers than balloted strikes through a trade union.

Rise in strategic litigation?

Finally, the higher ballot thresholds may lead to even more use by unions of strategic litigation to achieve their industrial objectives, especially following the momentous Supreme Court victory by public services union UNISON in its judicial review challenge to the government's tribunal fees regime (*R (UNISON) v Lord Chancellor [2017] UKSC 51*).

12. The effect of international laws and conventions

Industrial action and European Union law

When deciding cases, UK courts and tribunals must comply with judgments of the European Court of Justice (ECJ).

European Union (EU) law gives all workers the fundamental right to negotiate collective agreements and to take collective action - including strike - to defend their interests (Article 28, Charter of the Fundamental Rights of the EU). EU law also imposes a legal duty on member states to promote collective bargaining (Article 6 of the European Social Charter of the members of the Council of Europe).

However, several key ECJ rulings concerning industrial action have damaged the ability of unions to organise strikes to defend the wages and collectively agreed terms and conditions of their members when an employer from another EU member state wants to undercut those terms by using cheaper labour.

At issue has been a conflict between the "four EU freedoms" - free movement of goods, capital, services, and people - and the right of workers to strike to protect their working conditions.

The two key ECJ rulings are *Viking Line International Workers' Federation & Another v Viking Line ABP, Case C 438/05 [2007] ECR 1-10779* (known as "Viking"), and *Laval un Patneri v Svenska Byggnadsarbetareforbundet C-341/05 [2008] IRLR 171* (known as "Laval"). Both rulings make it harder for workers to strike to defend their terms and conditions where those strike rights clash with an employer's right to set up and do business in another member state.

Both cases involved **protest strikes** against plans to replace workers from one EU member state with lower paid workers from another:

- In *Viking*, the purpose of the strike was to stop a Finnish shipping company reflagging its vessel in Estonia, where it would be able to take on less expensive Estonian crew.
- In *Laval*, the purpose of the strike was to force a building company to accept the terms of a Swedish collective agreement, instead of employing Latvian workers on cheaper terms and conditions.

In both cases, the ECJ accepted the "fundamental" and "overriding public importance" of workers' right to strike. But at the same time, the judges went on to impose severe limitations on that right. In both cases, the court concluded that the strikes were a disproportionate and unlawful interference with the employers' EU fundamental freedoms. Here is a summary of the ECJ's key conclusions:

- the right to strike must always be exercised in a manner that is **compatible with other EU laws**, including the "four freedoms";
- industrial action must always have a "legitimate aim" that can be justified in the **public interest**, such as the protection of workers and jobs under threat;
- the type of industrial action chosen by the union must be suitable (i.e. **proportionate**) to the aim, taking into account its effects (for example on the employer, suppliers and the wider economy); and
- before taking industrial action, unions must have **exhausted all other available means** of achieving the aim that would impact less dramatically on the employer's EU freedoms.

These two EU rulings have imposed very significant limitations on unions. They face the threat of potential bankruptcy, through an award of substantial damages, if a court decides, after the event, that their chosen form of industrial action was "disproportionate" or "premature", or that the aim was not "legitimate", and that a company should be compensated for resulting commercial losses.

Unlike compensation for unlawful industrial action in breach of the "immunities" under UK law (see Chapter 1), there may be no cap to the amount of compensation that can be awarded under EU law.

An attempt by the European Commission to address these issues through regulation (known as the draft Monti II Regulation) was abandoned in 2012, when member states failed to agree.

In 2016, train operator Govia Thameslink tried to take advantage of EU law to halt the Southern rail strikes. This was the first time an employer had tried to use EU law in the English courts to stop a strike. The claim failed, and the case brought a little welcome clarity for unions. The Court of Appeal (CA) took a restrictive approach. It ruled that an injunction can only ever be granted to stop a strike where the object or purpose - as opposed to the "effect" - of the industrial action is to interfere with one of the four EU freedoms:

> Instead of attacking the Southern Rail strikes in the way unions have come to expect (such as by attacking the union's compliance with balloting or notice rules or questioning the existence of a trade dispute), Govia had argued that the Southern rail strikes were an unlawful interference with its EU rights to **freedom of establishment,** on the basis that the company is 35% French-owned. Govia also argued that the strike breached its EU freedom – and those of its passengers – to provide services.
>
> Govia's legal representatives argued that the strike would discourage part-French owned Govia from expanding its UK operation. But the CA ruled that injunctive relief is only available under EU law where the object or purpose – as opposed to the effect – of the industrial action is

to interfere with an EU freedom. In this case, ASLEF's purpose in striking was not to prevent Govia setting up or continuing business in the UK but instead to stop the spread of driver-only operated trains. There was no breach of EU law in this case.

The same applied to the claim based on the EU freedom to provide services. It was not the object of the strike to stop passengers using Govia's services. All strikes inevitably affect an employer's business or their supply of services. That is the whole point of industrial action. If Govia's interpretation of EU law were correct, then employers that happened to be part-owned by an EU company would be in a better position to resist industrial action in the UK than their domestic competitors, which cannot be right.

Finally, the CA pointed to Article 11 of the European Convention of Human Rights – the right to freedom of association (see below). It would be incompatible with Article 11, said the judges, and with the status of the right to strike as a fundamental right, to ask the courts to judge the legality of any strike with a cross-border border element, with the onus on unions to prove that their actions are not "disproportionate". Govia's injunction application was rejected.

Govia GTR Railway Limited v ASLEF [2016] EWCA Civ 1309

While the *Govia* ruling provides some clarity, the basic limitations introduced by the *Viking* and *Laval* rulings remain in place. These rulings are based on fundamental EU treaty rights and will therefore be directly affected by the UK's decision to leave the EU, to take effect from 31 March 2019. It is not yet possible to predict how the law will treat cross-border strikes of this kind after Brexit, as this will depend on the terms of the UK's exit.

Industrial action and human rights

The UK, like almost all European states, has signed the European Convention on Human Rights (the Convention). Convention rights have been codified into English law by the *Human Rights Act 1998* (HRA). When deciding cases, courts and employment tribunals must take Convention rights into account, as interpreted by the European Court of Human Rights (ECHR) in Strasbourg.

The human right most relevant to the right to take industrial action is Article 11, which says that "everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests".

The right to freedom of association is not absolute. Instead, it is "qualified". This means that the right can be limited, but only if any limitation is set by law, is necessary and proportionate, and has a legitimate aim, namely national security or public safety, preventing disorder or crime, protecting health or morals or the rights and freedoms of others.

Article 11(2) allows countries to restrict the right to freedom of association

by members of the armed forces, the police or the administration of the State. The UK government has relied on this exemption to ban strikes by members of the armed forces, prison officers (see box on page 12 of Chapter 1), police officers and civil servants working for the National Crime Agency.

In a landmark decision, the ECHR has ruled that the human right to freedom of association includes the right to bargain collectively:

> Mr Demir belonged to a union of Turkish civil servants that negotiated a collective agreement with the municipal council which led to pay increases and other benefits. The council then broke the terms of the collective agreement. But when the workers made a claim to the Turkish courts, the courts responded by declaring that under Turkish law, it was unlawful for a trade union of civil servants to enter into collective agreements. The agreement was set aside and the workers were ordered to repay their pay increases.
>
> The workers took a claim to the EHCR which ruled that the right to bargain collectively with the employer is an essential element of the right to form and join trade unions. By preventing a trade union of civil servants from making collective agreements, Turkey was in breach of Article 11.
>
> *Demir v Turkey [2009] IRLR 766*

As well as making new law by confirming, beyond doubt, that the right to bargain collectively is a human right, the *Demir* case was very important because in its judgment, the ECHR confirmed for the first time that international conventions, such as the International Labour Organisation (ILO) Convention 87 on Freedom of Association and Protection of the Right to Organise (1949), should be taken into account when deciding rulings about Article 11.

The ECHR has since confirmed that the right to freedom of association also includes the right to strike (*Tymoshenko v Ukraine [2014] ECHR 1016*).

However, the ECHR has refused to declare that the UK's ban on secondary industrial action (action in support of workers employed by a different employer) infringes Article 11, even in the limited circumstances of a strike to protect the terms and conditions of newly outsourced ex-colleagues following a TUPE transfer (*RMT v UK [2014] ECHR 366*) (see also Chapter 1).

In general, said the ECHR in the *RMT* case, the court will not interfere with a country's industrial relations policy unless it is "manifestly unreasonable", and governments should be given a particularly wide margin of appreciation (i.e. flexibility) when deciding whether laws prohibiting "accessory" rights (that is, secondary or "solidarity" strike action) are lawful.

In the same case, the ECHR refused to rule on whether the UK's complex balloting and notice rules (see Chapter 5) infringe Article 11. The RMT's claim was declared "inadmissible" because on the particular facts of the case, the

union had eventually been able to comply with the rules and exercise the right to strike:

> Power company EDF held the contract to manage the London Underground power network. RMT balloted its members over pay and conditions and gave a notice to EDF describing the category of workers balloted as "Engineer/Technician". EDF responded saying that it did not recognise these categories because the categories it used were more precise. EDF was granted an injunction, on the basis that RMT had failed to comply with the notice procedure.
>
> At this stage, RMT had no practical alternative but to collect the data in the form requested by EDF and issue a fresh industrial action notice, which led to an improved offer. The ECHR ruled that RMT's challenge to the TULRCA balloting and notice procedure was inadmissible because the union had been able (eventually) to comply with the procedure and exercise its right to strike. The ECHR disregarded the fact that the byzantine complexity of the balloting and notice rules left the union with a £79,219.25 bill for the employer's legal costs relating to the injunction, and ignored the financial and logistical burdens of compliance.
>
> *RMT v UK [2014] ECHR 366*

The *RMT* case is one of a series of disappointing rulings that has led trade union law experts to conclude that for the time being, the ECHR may have "effectively closed its doors to British workers and their unions seeking to rely on the Convention". (For more information, see *The Trade Union Act 2016 and the failure of human rights* by KD Ewing and John Hendy QC, Industrial Law Society Journal, September 2016).

Further Information

Legal sources and publications

The *Trade Union and Labour Relations Consolidation Act 1992*, along with the other legislation referred to in this booklet, can be downloaded from www.legislation.gov.uk. Paper copies are available from your local library. Always check the publication date to ensure it is up-to-date.

Most of the cases referred to in this booklet can be downloaded free of cost from the website of the British and Irish Legal Information Institute: www.bailii.org. Some older cases (pre-2000) may not appear on the Bailii website. They will be published in hard copy law reports, such as the Industrial Relations Law Reports (IRLR) or the Industrial Cases Reports (ICR) which can be obtained from your local library. The Labour Research Department (LRD) holds paper editions of the IRLR (but not the ICR) for the years from 1979-2008.

Starting from March 2017, employment tribunal rulings are now published on an online searchable database: www.gov.uk/employment-tribunal-decisions. Earlier rulings can be obtained by attending in person at the tribunal offices in Bury St Edmunds for English and Welsh decisions, or in Glasgow for Scottish decisions, or by ordering a copy of a specific ruling for a fee. Where a case was brought with the support of a union, the union may be able to supply a copy of the tribunal's written judgment.

Labour Research Department

LRD publishes regular booklets on legal issues of interest to trade union reps and members, and on union strategies to tackle those issues. Relevant titles are highlighted in this booklet. LRD's monthly pay and conditions journal, *Workplace Report*, provides up-to-date commentary on legal developments and analysis of negotiated collective agreements across different sectors.

LRD also maintains a searchable database known as "Payline", containing over 2,000 union-negotiated collective agreements, available to LRD Payline subscribers. Check if your union is a subscriber.

Information on LRD's publications and details of how to order are available at: www.lrdpublications.org.uk, or by contacting LRD, 78 Blackfriars Road, London SE1 8HF, tel: 020 7928 3649.

Other useful sources of information

Individual unions: Most unions have produced updated guides on issues relating to industrial action for their members, available from the union website.

Advisory, Conciliation and Arbitration Service (Acas): www.acas.org.uk. Acas provides collective conciliation services in collective disputes. It also runs the Acas Helpline: 0300 123 1100.

Central Arbitration Committee (CAC): makes awards of statutory union recognition and deals with union requests for disclosure of information: tel: 020 7904 2300; www.cac.gov.uk, enquiries@cac.gov.uk.

Certification Officer: www.gov.uk/government/organisations/certification-officer; tel: 020 7210 3734; email: info@certoffice.org.

Equality and Human Rights Commission (EHRC): www.equalityhumanrights.com.

Trade Union Congress (TUC): www.tuc.org.uk. The main TUC online hub.

Institute of Employment Rights (IER): www.ier.org.uk; a labour movement think-tank providing critical analysis and policy ideas around trade union rights and labour law.

Campaign for Trade Union Freedom: www.tradeunionfreedom.co.uk; a campaigning organisation set up to defend and enhance trade unionism, oppose anti-union laws and promote and defend collective bargaining.

Industrial Law Society (ILS): www.industriallawsociety.org.uk. ILS is a charity set up to promote understanding of labour law and industrial relations and to stimulate debate.

• Notes •

LRD affiliation — the vital package of trade union information and support

Affiliation gives you a selection of the LRD's publications and services. It's the best way you and your organisation can benefit from the information we provide.

Organisation affiliation

For only £124.50, your union branch or workplace organisation package will include:

- **Labour Research**, the UK's monthly trade union magazine.
- A year's supply of **LRD Booklets**, including ***Law at Work.***
- A year's unlimited access to the **Enquiry Service**, LRD's union rep helpline.

Individual affiliation

For only £80.00, you can affiliate as an individual and your package will include:

- **Labour Research**, the UK's monthly trade union magazine.
- A year's supply of **LRD Booklets**, including ***Law at Work.***

Publications Online — LRD's electronic, fully searchable database

For only an extra £112.75, you can access over 10 years of valuable archive and up-to-the-minute trade union information at the touch of a button!

☐ Our union would like to affiliate and enclose **£124.50**

☐ I would like to affiliate as an individual and enclose **£80.00**

☐ Please add **Publications Online** to my/our affiliation for an extra **£112.75**

☐ Enclosed is a cheque for £ ____________ **OR** ☐ Please invoice us for £ ____________

Name ______________________________ **Union** ______________________

Address ____

______________________________ **Postcode** ______________________

Tel ______________________________ **Email** ______________________

☐ Please send my branch secretary full details of LRD's publications and services:

Branch sec's name ______________________ **Union** ______________________

Address ____

Return to:

Labour Research Department, FREEPOST, 78 Blackfriars Road, London SE1 8YX

Tel: 020 7928 3649 Fax: 020 7902 9815 Email: info@lrd.org.uk www.lrd.org.uk

BKT0917

UK laws on industrial action were already some of the most restrictive in the developed world before the draconian *Trade Union Act 2016* came into force. On 1 March 2017 that Act, described by the TUC as "the most serious attack on the rights of trade unions and their members in a generation", introduced an extra layer of restrictions on balloting, notice and picketing.

This booklet aims to help union reps and negotiators understand the restrictions, navigate them and discover what they can do within those confines. It also looks at other types of action unions are taking to meet their objectives in helping members improve their pay and conditions when a dispute arises.

£10.00

Labour Research Department Booklets

www.lrd.org.uk