

Trade union and industrial action briefing

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2009 saw more employers facing threatened industrial action and the trend looks likely to continue in 2010. This briefing discusses recent developments in this area and in trade union law generally and offers some practical tips for employers.

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Ballot irregularities

A union that endorses strike action must have followed the correct ballot requirements in order to avoid liability for inducing employees to breach their contracts during a strike. Three companies in the last year have successfully prevented a strike taking place by identifying irregularities within the union's ballot process.

EDF v RMT

EDF complained to the High Court that the RMT had failed to comply with statutory requirements for a ballot notice. A union is required to take such steps as are reasonably necessary to ensure the notice contains a list of the "categories of employee" to which the employees entitled to vote in the ballot belong. The information must be as accurate as reasonably practicable in the light of the information in the union's possession at the time.

EDF employed approximately 270 staff to work on the London Underground. EDF categorised those employees as "fitters, jointers, test room inspectors, day testers, shift testers or OLBI fitters". When the RMT gave EDF notice of the ballot, it stated that the members who would be entitled to vote were "all those members... employed by the company in the category of engineer/technician". EDF claimed that this notice was defective because it could not identify which categories of its employees were being invited to take part in a strike.

The Judge held that EDF was entitled to be told which trades were being balloted and might subsequently be called out on strike. It would make a material difference to

EDF if it had to face, for example, a trade room inspector withdrawing his labour as opposed to a fitter. They may have different skills, different roles and the loss of one might have significantly different effects to the loss of the other. The fact that the union did not record its members using the employer's categories was not decisive, given that it could have contacted shop stewards at the workplace to obtain this information and it had given this sort of detailed information in a previous ballot notice.

The RMT argued that granting an injunction would be premature as it had not stated an intention to strike but had just stated an intention to put the strike to a vote. The Judge disagreed and granted EDF an injunction on the basis that "*prospects of a strike and the consequences of an unlawful strike [were] sufficiently imminent*".

Metrobus v Unite

Metrobus obtained an injunction against Unite's proposed strike on the basis of a number of procedural defects in the ballot process.

A union is required as soon as reasonably practicable after the holding of a strike ballot to take steps to inform the employer of the result of the ballot. Unite delayed 20 hours in notifying Metrobus of the ballot result. The High Court considered that this was a failure to notify Metrobus sufficiently promptly. Rather than waiting passively for the result, Unite could have proactively contacted the independent scrutineer to find out. Even if it was reasonable to wait until it received the scrutineer's report, it was not reasonable to wait for the General Secretary's email authorising a strike before notifying the employer.

The High Court also found that there were a number of defects in the information provided on the ballot and strike notices. In relation to all non-check-off employees, a union must provide lists of the category and workplaces of employee, plus the total number, the number in each category and workplace, and an explanation of how those figures were arrived at – whether or not there are also check-off employees (for whom less information is required). The union here had failed to provide the necessary explanation for the non-check-off employees.

Unite appealed the decision arguing that reliance on this level of defect to prevent the strike taking place seriously

restricted a union's ability to hold a strike. The Court of Appeal confirmed that the procedural failings by Unite were sufficiently serious to warrant the granting of an injunction. It held that the statutory ballot and notice provisions are not so onerous or disproportionate as to be incompatible with the right to freedom of assembly and association (under article 11 of the European Convention on Human Rights).

British Airways v Unite

BA announced its intention to embark on a cost-cutting and efficiency exercise including a reduction in its cabin crew headcount. In response, Unite called for a 12-day strike over the Christmas period. Unite provided BA with the notice of intention to ballot cabin crew for the strike, the notice of the ballot results and the notice of strike action.

BA applied to the High Court to grant an injunction against the strike going ahead. Only those trade union members whom it is reasonable at the time for the union to believe will be induced to take part in industrial action should be allowed to vote in the ballot and included in the figures given to the employer in the ballot and strike notices. BA claimed that Unite had included a significant number of employees who had already accepted voluntary redundancy and so would not be employed by BA during the proposed strike.

The Court found that it was practicable and reasonable for Unite to have enquired as to which employees would be leaving BA's employment. Unite also could have issued instructions to employees that they should not vote if they would be leaving BA prior to the strike, but did not. Overall the balloting process was sufficiently flawed to justify the granting of an injunction.

A strict approach

In conclusion, the courts appear to be taking a strict approach to interpreting the statutory ballot provisions and unions are being punished if they have not taken sufficient care in the way they run a ballot for a strike. Companies faced with the prospect of a strike would be wise to examine the union's conduct of the ballot with a fine tooth comb, albeit recognising that unions will still be allowed to breach the procedural rules without this giving rise to an injunction provided that breaches are minor in nature. One word of caution – some commentators have questioned whether the UK courts are correct in their view that the complexity of UK balloting law does not contravene human rights. An application to the European Court of Human Rights is not out of the question.

Dismissing strikers

Employers faced with strike action may wish to consider dismissals among other options (see **Practical steps to take when a strike is threatened**). *Sehmi v Gate Gourmet* last year highlighted the complex rules on whether dismissal is fair. This will depend on whether the strike is unofficial, official or protected, and whether the employee is or had been participating in the strike.

Protected action

A protected strike is one that is lawfully organised by a union (ie, it concerns a valid trade dispute and the union has complied with the complex statutory balloting and notification requirements).

Unofficial v official strike action

An employee is treated as participating in an *official* strike if one of the following conditions is met:

- He is a member of a trade union and the strike is authorised or endorsed by that union.
- He is not a member of a trade union, but some of the employees taking part in the strike are members of a trade union which has authorised or endorsed the strike.
- Neither he nor any of those taking part in the strike are members of a trade union.

If none of those conditions are met, the strike is *unofficial* in relation to that employee.

When can an employer dismiss strikers?

An employer will be immune from an unfair dismissal claim by an employee provided that the dismissal is *not automatically unfair*; and

- either the employee is participating in an *unofficial* strike at the time of dismissal; or
- the employer has dismissed all participants in *official* strike action at the same establishment and has not offered to re-engage any of them on a selective basis within three months of the dismissals.

Automatic unfairness

A dismissal for which the reason, or principal reason, is that the employee took part in a *protected* official strike is automatically unfair if the date of dismissal falls:

- during the first 12 weeks beginning with the day the employee started participating in the strike (the "protected period");
- after the protected period if there was no participation in the strike by the employee after the protected period; or
- where the employee continues to participate after the protected period, any time before the employer has taken such procedural steps as would have been reasonable to resolve the industrial dispute (disregarding the merits of the dispute).

A dismissal is also automatically unfair if for a reason relating to jury service, leave for family reasons, flexible working, health and safety, the employee's function as an employee representative (insofar as this relates to collective redundancy, transfer of an undertaking or negotiating working time arrangements) or a protected disclosure made by the employee.

When can an employer dismiss ex-strikers?

If an employee is dismissed *after* taking part in industrial action, they are eligible to bring a claim of unfair dismissal. Dismissal for participation in a strike would technically count as a misconduct dismissal (to which the Acas Code of Practice on Disciplinary and Grievance Procedures would apply). Such a dismissal could be fair depending on the circumstances (provided it does not fall foul of the protected strike rules above).

In *Sehmi v Gate Gourmet* it was ruled fair to dismiss employees for having participated in an unofficial strike of a few days, given the likely serious damage to the employer's business.

Participation

"Participation" does not require positive action – passive observance or unauthorised absence was held to be enough to amount to participation by an employee in the strike in *Gate Gourmet*.

Notice

An employee's refusal to work by going on strike is likely to constitute a repudiatory breach of the contract of employment, so dismissal without notice or pay in lieu of notice will generally be permitted.

Fair Share Fee Schemes

A recent employment tribunal decision has ruled that a Fair Share Fee Scheme was unlawful.

A union's negotiating services will commonly be to the benefit of non-union member employees as well as union members. Unions have therefore sought to negotiate with employers the imposition of a Fair Share Fee Scheme (FSFS) as a way of ensuring that the cost of the union services benefitting non-members is paid for by them, through an agreement between employer and union under which deductions are made from non-union members' wages and paid to the union. Practitioners have debated the legality of such schemes, which have been operated in particular by Unite for several years. This is the first ruling on the legality of such a scheme.

Trade union legislation provides that it is unlawful to subject an employee to detriment:

- by requiring payments because he is not a union member
- by an act the purpose of which is to compel the employee to become a union member.

An employment tribunal recently ruled in *Samuels v London Bus Services* that the FSFS was an unlawful detriment on the first ground (but not the second). Union members paid subscription fees calculated on a different basis from the FSFS fee (although incorporating it) and the only reason why a non-union member paid the FSFS fee instead was because he wasn't a union member. However, the purpose

of the scheme was held to be the removal of the perceived injustice between union and non-union members and not to compel union membership.

Further the FSFS was held to be contrary to the human right not to be deprived of one's possessions except in the public interest. The underlying principle of the FSFS to maintain good industrial relations was held to be in the public interest provided deductions were proportionate and transparent. However, here they were not transparent as there was no direct relationship between the fee and the benefit provided to the employee, and employees were given insufficient information to check how the money was spent.

The employee was therefore entitled to compensation from the employer.

The decision is not being appealed and so calls into question the continued use of FSFSs.

Collective agreements and TUPE

Where a company has just taken over a new business, or a contract to provide services to a client, the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") will usually apply. The company (transferee) will acquire the employees engaged in that business/service on their existing terms and conditions from the previous owner/contractor (transferor). This will include any contractual term (express or implied) providing that employees' pay will be set by collective agreement negotiated between the transferor and a union from time to time. Does this mean that, if the transferor still has a business with employees and continues to negotiate new pay rates with the union, or if the terms are set by multi-employer collective bargaining which continues, those terms will bind the transferee, even though it has no involvement in the collective bargaining?

Until recently there was a tension in the case law on this issue. The European Court of Justice has adopted a so-called 'static' approach, ruling that the transferee is bound only by the terms of a collective agreement in force at the date of transfer. The ECJ ruled that a transferee is not bound by an agreement negotiated by the transferor post-transfer, as this interferes with the transferee's right to freedom of association under Article 11 of the European Convention of Human Rights. (*Werhof v Freeway Traffic Systems*)

In contrast, the EAT here has adopted the 'dynamic' interpretation, deciding that the transferee would be bound by the outcome of the annual pay negotiations between transferor and union if their contracts so provided. (*Whent v T. Cartledge*)

The same issue arose in the recent case of *Alemo-Herron v Parkwood Leisure*. The transferee argued that the ECJ decision overruled the EAT's position, whereas the employees argued that giving effect to the *Werhof* judgment would amount to taking away an established right under domestic law and therefore contrary to EC member states' right to introduce more favourable provisions than the minimum EU law requirement.

The EAT followed *Whent*, but the Court of Appeal has now overruled the EAT's decision and ruled that TUPE must be construed in line with ECJ law permitting rights to be frozen at the point of transfer. This is good news for transferees,

particularly for businesses which have acquired ex-public sector employees under TUPE, because it removes the spectre of having pay rises imposed on them through the output of collective negotiations to which they are not a party.

Practical steps to take when a strike is threatened – steps to prevent a strike or minimise disruption to business

Preventing a strike

- Keep communications with employees and trade unions open.
- Understand management's position on contentious issues and communicate this clearly to the employees and trade unions.
- Keep your ears to the ground regarding employee dissatisfaction in the workplace. Monitor employee blogs online.
- Entertain any requests from the trade union to make use of negotiation or mediation services.
- Point out the downside of striking to employees. These include:
 - no pay for the period during which industrial action is taken;
 - length of service will be shortened by the days spent striking and this will have an impact when calculating certain rights under the contract of employment (eg, pension) and some statutory rights (eg, redundancy pay). Striking will usually not break an employee's continuous employment;
 - no right to claim benefits whilst on strike;
 - jobs will be put at risk. Striking workers may be summarily dismissed for repudiatory breach of contract (see **Dismissing strikers**).
- Take action against the trade union or seek an injunction in the High Court if the trade union has failed to comply with legal balloting requirements (see **Ballot irregularities**). To take legal action, the employer will have to gather information evidencing that the ballot has not been properly conducted.

Minimising disruption to the business once a strike has commenced

- Review availability of access to alternative resources to meet the needs of business continuity.
- Employ temporary employees directly on fixed term contracts to overcome the effects of the strike. Do not use "scab labour" employed and supplied by an employment agency specifically to replace striking workers (this is contrary to the Conduct of Employment Agencies and Employment Business Regulations 2003). An employer can however replace any pre-supplied agency worker who leaves with another agency worker, provided the new recruit does the same work as his predecessor.
- If employment contracts permit, redeploy employees from one part of the business to another to cover for the striking workers. Consider logistics and practical consideration of getting in additional people.
- Continue constructive dialogue with the trade union (if possible) in order to resolve issues in dispute as soon as possible.
- Ensure that non-striking workers are not intimidated by striking employees or the trade unions.
- Call the police and request them to take appropriate measures if pickets:
 - use threatening or abusive words or behave in a threatening manner to other employees, suppliers or customers who are in close proximity to the picket line;
 - deliberately get in the way of people or vehicles attempting to enter or leave the premises;
 - possess offensive weapons; or
 - cause damage to property.

New legislation

Revised Acas Code on time off for trade union duties and activities

A new Code on union-related time off replaces the 2003 version from 1 January 2010. Tribunals must take the Code into account where relevant. Important changes include provisions that:

- although employers do not normally have to pay for time spent outside the individual's working hours, this does not apply where the individual works flexible hours such as night shifts and needs to act during normal hours;
- pay for time off must be calculated having due regard to shift premia, performance related pay, bonuses and commission; pay-related performance targets may need to be adjusted to take account of time spent on union matters;
- the use of e-learning tools is recommended where available and appropriate, but as an additional tool rather than as a replacement to attendance at approved union training courses;
- where necessary employers should ensure that work cover and/or workload reductions are provided when time off is required;
- although there is no statutory right to access to facilities except in collective redundancies/TUPE transfer situations, facilities should be provided where resources permit, to include space where confidential discussions can be held;
- union representatives must respect the confidentiality of information given to them; likewise, employers must respect the confidentiality of communications between union representatives and their members/union.

The Code is at:

<http://www.acas.org.uk/CHttpHandler.ashx?id=274>.

Acas has also published a non-statutory guide covering time off for union representatives (<http://www.acas.org.uk/CHttpHandler.ashx?id=2307&p=0>) and a second guide on time off for non-union representatives (<http://www.acas.org.uk/CHttpHandler.ashx?id=2308&p=0>).

Regulations outlawing blacklisting of union members

On 2 March 2010 regulations came into force making it unlawful to compile, supply, sell or use lists of trade union members where the purpose of the list is to facilitate discrimination by employers and employment agencies against workers on grounds of trade union membership or activities. BIS guidance on the regulations is at <http://www.berr.gov.uk/files/file54675.pdf>.

Discrimination on the grounds of trade union membership or activities is already unlawful. The new regulations bolster the law to prohibit the practice of blacklisting following the recent discovery of blacklisting practices in the construction industry. Employees who are discriminated against because they are mistakenly included on a blacklist of union members will now be able to claim.

Individuals can complain to an employment tribunal if they have been refused employment or employment agency services or been subjected to a detriment or dismissal for a reason relating to a blacklist. Compensation is subject to a minimum of £5,000 and maximum of £65,300.

Alternatively, individuals can make a complaint in the county court against an alleged compiler, distributor, seller or user of a prohibited list, provided they have suffered a loss or are threatened by a potential loss. They can apply for damages, including damages for injury to feelings, and for orders restraining or preventing the compilation, use, sale or supply of the blacklist.

Feedback

As this is a new publication which we hope to issue periodically, we would very much welcome your feedback. Please do email anna.henderson@herbertsmith.com with your comments, including any particular union-related issues you would like to see covered.

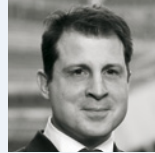
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