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Weighing up the tactical scenarios: what are the options if employees do not return to work after the initial 12 weeks of a strike?

Who holds the cards?

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Long-running industrial action: immunity from tort liability

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- Period of validity of ballot – 6 months; may be extended by agreement up to 9 months (TULR(C)A, s234(1))
- Without prejudice to the possibility of a fresh ballot (TULR(C)A, s234(1A)(a)
- In theory, therefore, no limit to period for which the union may secure immunity from tort liability for inducing industrial action – provided it complies with balloting and notice requirements
- But there will be other factors – both legal and practical – which may restrict the parties' freedom of action

What are ‘the cards’?

- Use of temporary staff
- Potential dismissals
- Workers’ wages
- Other legal action against individuals
- Financial impact on business
- Level of support for the action

Restriction on strike breaking

- Conduct of Employment Agencies and Employment Businesses Regulations 2003, reg. 7
- Employment business shall not introduce/supply a work-seeker to perform the duties normally performed by a striking worker (or those of another worker being used to cover a striking worker)
- Unless the employment business does not know and has no reasonable grounds for knowing that the worker is taking part in industrial action
- Failure to comply is a crime: Employment Agencies Act 1973 s5(2)
- Employer may be liable for aiding/procuring, conspiracy and/or encouraging a crime
- No restriction on direct recruitment of temporary staff
- So: temporary cover is difficult (but not impossible), what about permanent replacement?

Industrial action & dismissals: overview

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- **Protected** industrial action – where taking part in protected industrial action is the reason or principal reason for dismissal, it will be automatically unfair (TULR(C)A, s238A), provided that
  - Participation in the industrial action was limited to a protected period, or
  - Where it was not so limited, the employer had not taken such procedural steps as would have been reasonable to resolve the trade dispute
- **Official but un-protected** industrial action – ET has no jurisdiction in respect of dismissals during such action *if* all relevant employees are dismissed and not re-engaged; but subject to ordinary unfair dismissal principles if only some are (TULR(C)A, s238)
  - (except where the reason or principal reason is one of the normal automatically unfair reasons stipulated in s238(2A))
- **Unofficial** industrial action – dismissal during such action is automatically fair (TULR(C)A, s237)
  - (except where the reason or principal reason is one of the normal automatically unfair reasons stipulated in s237(1A))
- Dismissal after unprotected/unofficial action – ordinary unfair dismissal principles apply (Sehmi v Gate Gourmet [2009] IRLR 807, EAT, para 12)

- Focus of this talk is on on-going official industrial action for which the union has immunity under TULR(C)A, s219

Protected industrial action (1) TULR(C)A, s238A

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- Protected industrial action is action for which the union has immunity under TULR(C)A, s219
- If reason or principal reason for dismissal is participation in such action, it will be automatically unfair under s238A(2), if
  - The date of dismissal is within the 'protected period' (s238A(3))
  - The employee returned to work within the 'protected period' (s238A(4)), or
  - The employee continued to participate after the 'protected period' but the employer had not taken such steps as would have been reasonable for the purposes of resolving the trade dispute (s238A(5))
- 'Protected period' = 12 weeks beginning with the day on which the employee starts to take protected industrial action (extended by any period of lock-out) (s238A(7A)-(7D))
- Date of dismissal = date on which notice was given (not the date it expires), or if no notice the EDT (s238(5) & 238A(9))
  - Notice is given (or summary dismissal is effective) when the relevant communication is actually received by the employee (Sehmi v Gate Gourmet, para 10)

Protected industrial action (2)
Reasonable steps to resolve the dispute

- Where the employees participation exceeds the protected period, the ET has to assess whether the employer took such procedural steps as would have been reasonable for the purposes of resolving the trade dispute (s238A(5)(c))

- In doing so it must have no regard to the merits of the dispute (s238A(7))

- And it must have regard, in particular, to (s238A(6) & 238B):
  - Whether the employer or union complied with procedures under an applicable collective or other agreement;
  - Whether the employer or union sought negotiations after the start of the industrial action;
  - Whether the employer or union unreasonably refused a request to use conciliation or mediation services;
  - If conciliation/mediation services were used:
    - Whether the employer or union sent an 'appropriate person' as their representative;
      - 'Appropriate person' = a person with authority to settle/handle the dispute (or authorised by such a person to make recommendations to him in that regard)
    - Whether the employer or union cooperated in making meeting arrangements;
    - Whether the employer or union fulfilled any commitment given during conciliation/mediation;
    - Whether during conciliation/mediation, the employer's or union's representatives answered any reasonable question put to them about the trade dispute

- To be assessed as at date of dismissal

Official but unprotected action (1)

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Dismissal of all strikers

- After the end of the 'protected period', then unless the employer has not taken reasonable steps to resolve the dispute, continuing participation in industrial action for which the union has immunity under s219 becomes official but unprotected
- ET has no jurisdiction to hear a claim in respect of dismissal during industrial action if all relevant employees are dismissed and not re-engaged within 3 months (s238(1)-(2))
- Relevant employees = employees at the establishment where the claimant works who at the date of dismissal were taking part in the action
- Date of dismissal = date on which notice was given (not the date it expires), or if no notice the EDT (s238(5))
  - Notice is given (or summary dismissal is effective) when the relevant communication is actually received by the employee (Sehmi v Gate Gourmet, para 10)
- Practical question is: how feasible is it to dismiss & replace all strikers?
- Likely to depend on level of participation in the strike

Official but unprotected action (2)
Selective dismissal / re-engagement

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- Ordinary unfair dismissal principles apply to selective dismissal / re-engagement of strikers (s239(1))
- For selective re-engagement it is the reason for not re-engaging that counts (s239(3))
- Whilst withdrawal of labour is necessarily repudiatory on contractual principles, it does not follow that it will necessarily be fair for unfair dismissal purposes (Sehmi v Gate Gourmet, para 36)
- Moreover, in order to justify selective dismissal/re-engagement, it will generally be necessary to show something more which makes it reasonable to treat some employees differently – e.g. improper behaviour on a picket line or in connection with the strike
- Using the strike as a convenient occasion to selectively discard employees for pre-existing concerns which would not themselves have been sufficient to merit dismissal is very unlikely to be fair (Laffin & another v Fashion Industries (Hartlepool) Ltd [1978] IRLR 448, EAT, paras 8-9)
- Considerations of procedural fairness still apply, though as in all cases particular circumstances (e.g. particularly egregious behaviour for which no explanation could be possible) may make it reasonable to curtail the process (McLaren v NCB [1988] ICR 370, CA, 377E-G; Sehmi v Gate Gourmet, para 39)

Dismissals: summary of the balance of power

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- During the protected period: no fair dismissals possible
- After the protected period, the balance of power will largely depend on:
  - Whether the employer has taken reasonable procedural steps to attempt to resolve the dispute: failure to do so will mean fair dismissals remain impossible
  - Whether there are grounds for selective dismissal / non re-engagement: are there particular individuals behaving improperly?
  - But absent such factors, the extent to which the employer can afford to dismiss all striking employees – which in turn essentially depends on the factors that will be key to the parties' relative strength in the dispute in any event:
    - The strength of the employer's overall financial position;
    - The availability of alternative labour;
    - The financial ability of the workers (with any support available from their union) to continue the strike; and
    - The level of support for, and participation in, the action

Workers' wages

- Deductions in respect of strike action are excluded from the unauthorised deductions regime (ERA, s14(5))
- As a matter of contract, wages for each day of strike action may be deducted – the amount depending on whether the contract expressly apportions a particular amount to each day or other period, or in default 1/365 (Miles v Wakefield MDC [1987] ICR 368, HL; Hartley & others v King Edward VI College [2017] 1 WLR 2110, SC)
- This, therefore, is the principal financial pressure on workers that will affect how long they can continue to strike – and may be influenced by support that the union is able to provide

Other legal action v individuals

- Immunity under TULR(C)A, s219, applies only to liability in tort
- Claims may in theory be maintained against striking workers for damages for their individual breaches of contract
- However, such claims face considerable problems in practice, e.g. –
  - Establishing individual causation of loss: in some cases it may be possible to infer that each individual has caused an equal proportion of the whole loss (cf NCB v Galley [1958] 1 WLR 16, CA), but in most cases such an analysis will be highly questionable and likely to engage complex questions about the test for individual causation in contract cases and its interrelationship, in this context, with workers' rights under ECHR, Art. 11
  - Representative action under CPR Part 19 may be difficult and suing every single striking worker impractical (not to mention the likely further exacerbation of industrial strife)
  - In practice, individuals are unlikely to have the funds to pay, and significant costs could be expended to no avail
- Therefore, whilst the threat of such action may sometimes be deployed, it is unlikely in most cases to be a particularly significant factor in practice

Conclusion: the primacy of practical factors

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- In the context of dismissals during industrial action, it has been said that, *'the whole policy of the law as enshrined in [TULR(C)A] is to withdraw the law from the field of industrial disputes'* (Gallagher & others v Wragg [1977] ICR 174, EAT, 178H *per* Phillips J)
- Avoiding legal dispute, given the technicalities, may be a vain hope
- But the above analysis suggests that the practical effect of the legal regime may indeed be to encourage industrial settlement of the dispute by affording primacy to the fundamentals of the industrial parties' respective bargaining positions:
  - The unfair dismissal regime incentivises the parties to conciliate
  - But beyond that (and any improper conduct by individuals), the industrial parties' freedom to act will largely be constrained by their respective financial positions, the availability of alternative labour, and the level of support for and participation in the action
  - In practice, therefore, who 'holds the cards' legally will be determined by who holds them industrially and the best advice to both sides will generally be to recognise the industrial realities and conciliate the dispute