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Department for  
**Employment  
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# ER 29

## Industrial action and the law: a guide for employers



## Introduction

Anyone organising a strike or other industrial action would be liable to legal proceedings by employers, and others such as their customers and suppliers, who are deprived by such action, if they were not given special protection. This protection is provided by statutory immunities from legal liability.

This booklet is designed to give employers and their customers and suppliers a general understanding of the law relating to industrial action. In particular, it describes legal remedies against certain forms of industrial action. The booklet will also assist trade unions and workers to understand the protections afforded them by the law if they organise or take industrial action. It may also be useful for individuals contemplating proceedings if the supply of their goods and services is affected by unlawful industrial action. The legislative and underlying common law provisions are dealt with only in outline and details which might be significant in any particular case may not be covered.

Please note that this booklet gives **general guidance only** and should not be regarded as a complete or authoritative statement of the law. Authoritative interpretations of the law can only be given by the courts. Readers should be alert to the possibility of developments in case law that may affect the rights described.

Further information can be obtained from the Labour Relations Agency (LRA). For the addresses of its two offices see [Appendix 2: Useful addresses](#).

The contents of this booklet apply equally to men and women. For simplicity, however, the masculine pronoun is used throughout.

Any reference throughout this booklet to Jobs and Benefits offices includes JobCentres.

This booklet, [others in the series](#) and [related publications](#) are free to download from the Departmental website at [www.delni.gov.uk/erpublications](http://www.delni.gov.uk/erpublications). Alternatively they may be obtained upon request from your local [Jobs and Benefits office](#). For information on [Jobs and Benefits offices](#): FREEPHONE 0800 353530.

Upon request, consideration may be given to making this booklet available in alternative formats and in other languages for people who are not proficient in English.

The Employment Rights ('ER') series of booklets is updated on a regular basis. As part of this updating process the Department would welcome any comment/s from members of the public regarding the content of these booklets.

All comments should be addressed to:

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## **What are the 'statutory immunities'?**

When workers go on strike or take other forms of industrial action they will usually, by doing so, be in breach of their contracts of employment or their contracts for services. This means that when trade unions or trade union officials, or others, call for or otherwise organise industrial action they are in practice calling for breach, or interference with the performance, of contracts. They may also be interfering with the ability of the employer of those taking the industrial action, and of other employers, to fulfil commercial contracts.

Under the common law, which is basically case-law developed by the courts as opposed to statute law passed by Parliament or the Northern Ireland Assembly, it is unlawful to induce people to break a contract or to interfere with the performance of a contract, or to threaten to do either of these things. This means, for example, that without some special protection, trade unions or trade union officials would face the possibility of legal action being taken against them for inducing breaches of contract every time they called a strike.

The 'statutory immunities' were introduced into legislation to stop this happening. They have the effect that trade unions and individuals can, in certain circumstances, organise industrial action without fear of being sued in the courts. It should be noted that the immunities protect principally those who call for, threaten to call for, or otherwise organise industrial action. They do not protect individuals who take industrial action from legal proceedings by their employer for breaking their contracts, although they can in certain circumstances protect them from dismissal.

The available immunities are subject to a number of restrictions, so as to provide an effective remedy against some of the most damaging and disruptive industrial action. It is also a condition of immunity that before calling a strike or other industrial action a trade union must first obtain the support of its members through a properly conducted ballot, and that it must provide at least seven days' notice to an employer of official industrial action to be taken against him.

## Tests for determining whether there is ‘statutory immunity’

When a trade union or individual calls for, threatens to call for, or otherwise organises industrial action a number of tests must be satisfied if the union, or other person, calling for or organising the action is to have the protection of the statutory immunities. In summary, immunity will apply only where:

- There is a trade dispute, and the action is called in contemplation or furtherance of that dispute.
- A trade union which calls for, or otherwise organises, the action has first held a properly conducted secret ballot.
- A trade union which calls for, or otherwise organises, the action has provided the required notice of official industrial action to employers likely to be affected, following the ballot.
- The action is not ‘secondary action’ (unless the act is a call for such industrial action made in the course of peaceful picketing at a picket’s own place of work as the law allows).
- The action is not intended to promote union closed shop practices, or to prevent employers using non-union firms as suppliers.
- The action is not in support of any employee dismissed while taking unofficial industrial action.
- The action does not involve unlawful picketing.

These conditions are examined separately and in more detail in pages 7 to 19 of this booklet.

## **How the law works when the ‘statutory immunities’ do not apply**

### **Who can bring proceedings?**

Where immunity for organising industrial action does not apply, employers and others (such as their customers and suppliers)<sup>1</sup> who are adversely affected, or likely to be adversely affected, by the action may take civil proceedings in the courts against the responsible union or individual.

It is, of course, still necessary for the person wishing to bring civil proceedings to show that an unlawful, unprotected, act has been done or is threatened; that he is party to a contract which will be (or has been) broken or interfered with by the unlawful act; and that he is likely to suffer loss, or has done so, as a result.

In addition, an individual deprived of goods or services because of the unlawful organisation of industrial action (i.e. inducement of industrial action which is not protected by statutory immunities) can also bring proceedings to stop this happening. For this purpose, it is not necessary for the individual to show that he is party to a contract which will be (or has been) broken or interfered with by the unlawful act.

For further information see the booklet **Industrial action and the law: a guide for individuals whose supply of goods or services is affected by unlawful action (ER 30)**.

### **Who can be sued?**

Civil proceedings will normally be taken against the trade union or individual organising the industrial action. In the case of picketing, it may be possible to sue the individual pickets who are inducing interference with the performance of contracts, as well as the organisers of the unlawful picketing.

The fact that a union is responsible for organising industrial action for which there is no immunity does not prevent legal proceedings from being brought against the individual organisers.

### **Trade union liability**

The law lays down the circumstances in which a trade union is to be held responsible for a relevant act (such as inducing, or threatening to induce, a breach, or interference with the performance, of a contract). Where these circumstances apply, a union will be held responsible for a relevant act regardless of any term or condition to the contrary in its own rules, or in any other contractual provision or rule of law.

Under the law, a union will be liable for any relevant act which is done (or authorised or endorsed) by:

- its Executive Committee;
- its General Secretary or President;
- any person given power under the union's own rules to do so; or
- any other committee of the union or any official <sup>2</sup> of the union, including those who are employed by the union and those, like shop stewards, who are not.

For these purposes:

- (i) *a 'committee of the union' is any group of persons constituted in accordance with the rules of the union; and*
- (ii) *a relevant act will be taken to have been done (or authorised or endorsed) by an official if it was done (or authorised or endorsed) by a group of persons, or any member of a group, to which an official belonged at the relevant time if the group's purposes include organising or co-ordinating industrial action.*

However, if a relevant act which is done (or authorised or endorsed) by such a committee or official is 'effectively repudiated' by the union's Executive Committee, General Secretary or President, the union will not be held liable.

In order to avoid liability in this way, the Executive Committee, President or General Secretary of the union must repudiate the act as soon as reasonably practicable after it has come to the knowledge of any of them, and the union must, **without delay**:

- give written notice of the repudiation to the committee or official in question; and
- do its best to give individual written notice of the fact and date of the repudiation to (i) every member of the union who it has reason to believe is taking part - or might otherwise take part - in industrial action as a result of the act; and (ii) the employer of every such member.

The written notice of repudiation given to the union's members must contain the following 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 will have no right to complain of unfair dismissal.'

However, even if it takes these steps a union will not be considered to have 'effectively repudiated' an act if:

- the Executive Committee, President or General Secretary subsequently behave in a way which is inconsistent with the repudiation; or
- at any time up to three months after the repudiation, a party to a commercial contract which has been, or may be, interfered with by the relevant act requests the union's Executive Committee, President or General Secretary to confirm that the act has been repudiated, and written confirmation is not given forthwith.

## Remedies

Where immunity does not apply, those party to contracts which are broken, or the performance of which is interfered with, by the organisation of (or a threat to organise) industrial action, may seek an injunction from the courts.

An injunction may be granted on an interim basis pending a full hearing of the case, but the union or individual against whom the order is sought will have the legal right to be given a chance to put their case.

If an injunction is not obeyed, those who sought it can go back to court and ask to have those concerned declared in contempt of court. Anyone found to be in contempt of court may face heavy fines or other penalties which the court may consider appropriate. For example, a union may be deprived of its assets through sequestration (where the funds are placed in the control of a person appointed by the court who may, in particular, pay any fines or legal costs arising from the court proceedings).

It is also possible to claim damages for losses suffered (which may, but need not, be preceded by an application for an injunction) if the basis of the proceedings is a claim that an act involved breach, or interference with the performance, of contracts. There are upper limits on the amounts which can be awarded by way of damages in any proceedings against a trade union (for details contact the Labour Relations Agency – see [Appendix 2](#)).

## Other unlawful acts

Where there is legal immunity for those who organise industrial action, this protects only those organisers from legal action for a relevant act (such as inducing breaches, or interference with the performance, of contracts). There is no immunity for strikers or their organisers who commit *other civil wrongs or criminal offences*.

To give two possible examples:

- If strikers or their organisers commit an unlawful trespass, for example by entering premises without authority or by staging a 'sit-in', they are liable to be sued for that and any other unlawful acts involved just like any other members of the public who occupy premises unlawfully.
- If strikers or their organisers commit a criminal offence, such as intentional damage to property, they are liable to be arrested and prosecuted by the police in the same way as anyone else who commits such an offence.

It should also be noted that the union has immunity only if the **sole ground** of liability is a relevant act (such as inducing breach of contract). If some other ground of liability exists then immunity will be lost.

## When is there a 'trade dispute'?

A person or trade union who calls for, threatens to call for, or otherwise organises industrial action has legal immunity only if acting **in contemplation or furtherance of a 'trade dispute'**.

This means that if immunity is to apply - for example, to any call for industrial action - those concerned must be able to show: (i) that there is a 'trade dispute', or that a 'trade dispute' is imminent; and (ii) that the action is being called for in contemplation, or in furtherance, of that dispute.

The law provides a detailed definition of what constitutes a 'trade dispute' for this purpose. In general, however, there are two main conditions which normally must be satisfied:

- there must be a dispute between **workers and their own employer**; and
- the dispute must be **wholly or mainly about employment related matters** such as their pay and conditions, jobs, allocation of work, discipline, negotiating machinery or trade union membership.

The relevant definition does **not** cover disputes:

- between groups of workers or between trade unions, where no employer is involved in the dispute;
- between workers and an employer other than their own employer;
- between a trade union and an employer, where none of that employer's workforce are in dispute with him;
- which are not wholly or mainly about employment related matters like pay and conditions;
- which relate to matters occurring overseas (except where workers taking action in this country in support of the dispute are likely to be affected by its outcome).

## **Secret ballots on ‘official’ industrial action**

If a trade union decides to call on its members to take or continue industrial action, it will have no immunity unless it first holds a properly-conducted secret ballot.<sup>3</sup> The circumstances in which a trade union is regarded as being responsible for organising such action, and the remedies available if a union calls for industrial action without having immunity, are described on pages 1 to 5 of this booklet.

The law prescribes certain requirements which must be satisfied in relation to such a ballot. These requirements are as follows:

### **Independent scrutiny**

For a ballot where more than 50 members are given entitlement to vote<sup>4</sup>, the union must appoint a qualified person<sup>5</sup> as the scrutineer of the ballot<sup>6</sup> whose terms of appointment must include the production of a report on the conduct of the ballot. This report must be produced as soon as reasonably practicable after the date of the ballot, and in any event not later than four weeks after that date.

The union must provide a copy of the scrutineer's report to any union member who was entitled to vote in the ballot, or any employer of such a member, who requests one within six months of the date of the ballot. The copy must be supplied as soon as reasonably practicable, and free of charge (or on payment of a reasonable fee specified by the union).

### **Notice of the ballot and sample voting paper for employers**

The union must take such steps as are reasonably necessary to ensure that any employer who it is reasonable for the union to believe will be the employer of any of its members who will be entitled to vote receives certain information in advance of the intended opening day of the ballot (i.e. the first day when a voting paper is sent to any person entitled to vote), as follows:

- Not later than the seventh day before the intended opening day, written notice;
- stating that the union intends to hold the ballot;
- specifying the date which the union reasonably believes will be the opening day of the ballot; and
- provides a list of the categories of employee to which the affected employees belong, figures on the number of employees in each category, the numbers of employees at each workplace and the total number of affected employees; together with an explanation of how these figures were arrived at.

However, these lists and figures do not necessarily need to be supplied in full in situations where some or all of the employees pay their union subscriptions by deductions from pay at source e.g. through 'check off' or 'DOCAS' systems. In such circumstances, the notice must contain either:

- those same lists, figures and explanations as set out above; or
- such information as will enable the employer to readily deduce the total number of employees affected, the categories of employee to which they belong, the number of employees concerned in each of those categories, the workplaces at which the employees concerned work and the number of them at each of these workplaces.

The 'employees affected' are those whom the union reasonably believes will be entitled to vote in the ballot.

But a notice will not fail to satisfy the requirements simply because it does not name any employees. Not later than the third day before the intended opening day, a sample of the voting paper (and any variants of it) which will be sent to his employees.

### **Timing of the ballot and related action**

If the inducement of industrial action to which the ballot relates is to be protected by the law, some part of the action must be induced and start to take place within four weeks from the date of the ballot. This period may be extended to *eight weeks* if the union and employer agree <sup>7</sup>. (To reduce the risk of misunderstanding, both parties may find it helpful for such agreements to be in writing.) If a ballot results in a 'Yes' vote for both a strike and action short of a strike, and action short of a strike is induced and starts to take place within the relevant period, the ballot would also continue to protect strike action subsequently, and vice versa.

A union cannot avoid liability merely by holding a properly conducted secret ballot after previously calling for industrial action without one.

### **Entitlement to vote**

All those members who it is reasonable at the time of the ballot for the union to believe will be called upon to take part in or continue with the industrial action <sup>8</sup> must be given the opportunity to vote. No one else may be given a vote without invalidating the ballot.

The ballot will also be invalidated if anyone denied entitlement to vote is subsequently called on to take part in the action by the union with the exception of union members who were not members at the time of the ballot or who were members but who it was not reasonable for the union to expect would be called upon to take action (for example because they changed jobs after the ballot).

Where the members of a union with different workplaces are to be balloted, a separate ballot will be necessary for each workplace unless one of the conditions set out below is met. It will be unlawful for the union to organise industrial action at any such workplace where a majority of those voting in the ballot for that workplace have not voted 'Yes' in response to the relevant required question (or questions). (If an employee works at or from a single set of premises, his workplace is those premises. If not, it is the premises with which his employment has the closest connection.)

In summary, the conditions for holding a single ballot for more than one workplace are:

- at each of the workplaces covered by the single ballot there is at least one member of the union affected<sup>9</sup> by the dispute; or
- entitlement to vote in the single ballot is given, and limited, to all of a union's members who, according to the union's reasonable belief, are employed in a particular occupation or occupations by one employer or any of a number of employers with whom the union is in dispute; or
- entitlement to vote in the single ballot is given, and limited, to all of a union's members who are employed by a particular employer or any of a number of employers with whom the union is in dispute.

It is possible for a union to hold more than one ballot on a dispute at a single workplace. If the conditions above are met, some or all of those ballots may also cover members in other workplaces.

### **Voting procedures**

Voting must be by the marking of a voting paper.

The voting paper must:

- state the name of the independent scrutineer;
- clearly specify the address to which, and the date by which, it is to be returned;
- be marked with a number, which is one of a series of consecutive numbers used to give a different number to each voting paper;
- make clear whether voters are being asked if they are prepared to take part in industrial action which consists of a strike, or in industrial action short of a strike, which for this purpose includes overtime bans and call-out bans; and
- specify the person or persons (and/or class or classes of person/s) whom the union intends to have authority to make the first call for

industrial action to which the ballot relates, in the event of a vote in favour of industrial action<sup>10</sup>.

Those voting must be allowed to do so without interference from, or constraint imposed by, the union or any of its members, officials or employees. So far as reasonably practicable every member properly entitled to vote must be:

- able to vote in secret;
- sent a voting paper by post to his home address (or any other address which he has requested the union, in writing, to treat as his postal address); and
- given a convenient opportunity to vote by post at no direct cost to himself<sup>11</sup>.

While the question (or questions) may be framed in different ways, the voter must be asked to say by answering 'Yes' or 'No' whether he is willing to take part in or continue with the industrial action. If the union has not decided whether the industrial action would consist of a strike or action short of a strike (including overtime bans or call-out bans), separate questions in respect of each type of action must appear on the voting paper.

The following statement must appear on every 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 a strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than eight weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later.' That statement must not be qualified or commented upon by anything else on the voting paper.

The voting paper must specify the person, persons, or description of persons who the union intends to have authority to call for industrial action to which the ballot relates, in the event of a vote in favour of industrial action. For this purpose, anyone so specified need not be authorised under the union's rules to call on members to take industrial action, but must be among those for whose acts the union is responsible in law - see pages 3 to 5 of this booklet.

### **Majority support**

Majority support must be obtained in response to the question (or questions) on the voting paper which are appropriate to the type of industrial action concerned, i.e.:

- In the case of a strike, majority support must be obtained in response to a question on the voting paper which asks if members are prepared to take part in (or continue with) strike action.
- In the case of action short of a strike, majority support must be obtained in response to a question on the voting paper which asks if

members are prepared to take part in (or continue with) action short of a strike.

- If the action consists or may consist of a strike and other industrial action, majority support must be obtained for each type of action in response to separate questions on the voting paper asking if members are prepared to take part in (or continue with) each type.

### **Announcement of ballot results**

A union must, as soon as reasonably practicable after holding an industrial action ballot, take steps to inform all those entitled to vote <sup>12</sup>, and their employer(s), of the number of:

- votes cast in the ballot;
- individuals answering 'Yes' to the required question (or questions);
- individuals answering 'No' to the required question (or questions); and
- spoiled voting papers.

Where separate workplace ballots are required, these details must be notified separately for each such workplace to those entitled to vote there.

### **Features of the application of the balloting requirements**

The following material deals with the application of particular features of these balloting requirements.

#### **What if any particular requirement is not satisfied?**

Apart from certain small accidental failures that are unlikely to affect the result, a failure to satisfy the statutory requirements <sup>13</sup> relating to the ballot or giving employers notice of industrial action will give grounds for proceedings against a union by an employer, a customer or supplier of an employer, or an individual member of the public claiming that an effect or likely effect of the industrial action would be to prevent or delay the supply of goods or services to him or to reduce the quality of goods or services so supplied. With the exception of failures to comply with the requirements to give notice to employers, these will also give grounds for action by the union's members.

If a union fails only to provide the required notice of intent to ballot, or the sample voting paper, to a particular employer who should have received it, only: (i) that employer, or (ii) any individual deprived of goods or services because of the industrial action, can bring proceedings. Failure to satisfy any other balloting requirements will expose the union to proceedings brought by others (for example by its own members).

### **What happens if there is a call for industrial action by a person not specified on the voting paper, but no call from any person so specified?**

A ballot will not give a union protection against legal proceedings if industrial action is called by a person not specified on the voting paper (or by a person of a description not so specified). So if there is a call for action by someone - for whose act the union was responsible in law - other than a specified person, and no call is made by a specified person, the union would be at risk of proceedings being brought against it unless it effectively repudiated the call. (Pages 4 to 5 of this booklet describe this 'repudiation' process.).

### **Code of Practice on Industrial Action Ballots and Notice to Employers**

The Department for Employment and Learning has produced a Code of Practice on Industrial Action Ballots and Notice to Employers, which provides guidance to trade unions and employers on promoting good practice in the conduct of trade union industrial action ballots.

Failure to observe the provisions of the statutory Code does not in itself render a union, or anyone else, liable to any legal proceedings. However, where proceedings are brought against a union the provisions of the Code are admissible in evidence, and may be taken into account by a court if they appear relevant to any question before it. (Its status is thus similar to, for example, the Highway Code in relation to legal proceedings in connection with offences under Road Traffic Acts.)

## Notice to employers of 'official' industrial action

In order to be protected against proceedings by:

- an employer party to contracts of employment or services which would be broken or interfered with by the action; or
- an individual deprived of goods or services because of the action,

a union's call for industrial action will need to be covered by adequate notice of official industrial action.

To provide such notice, the union will have to take such steps as are reasonably necessary to ensure that the employer of workers which the union believes have been, or will be, called upon to take part in (or continue with) official industrial action receives a written notice from the union which:

- reaches the employer **after** the union has taken steps to notify the employer of the result of the ballot relating to the industrial action, **but no less than seven days before the day (or the first of the days) specified in the notice;**
- specifies: (i) whether the union intends the industrial action to be 'continuous' or 'discontinuous' <sup>14</sup>; and (ii) the date on which any of the affected employees will be called on to begin the action (where it is continuous action), or the dates on which any of them will be called on to take part (where it is discontinuous action);
- provides a list of the categories and workplaces of the employees that the union is going to ballot, figures on the numbers of employees in each category, figures on the numbers of employees at each workplace, the total numbers of affected employees; together with an explanation of how the figures provided were arrived at. However, these lists and figures do not necessarily need to be provided in full in situations where the employees pay their union subscriptions by deduction from pay at source e.g. where some or all of the employees pay through the "check-off" or "DOCAS" systems. In such circumstances, the notice must contain either:
  - (iii) *those same lists, figures and explanations as set out in (a); or*
  - (iv) *such information as will enable the employer to readily deduce the total number of employees concerned, the categories of employee to which they belong, the number of employees concerned in each of those categories, the workplaces at which the employees concerned work and the number of them at each of these workplaces*

Where only some of the employees concerned pay their union contributions by the "check off", the union's notice may include both types of information. That is, the lists, figures and explanations should be provided for those who do not pay their subscriptions through the

check off whilst information relating to check off payments may suffice for those who do.

The “employees concerned” are those whom the union reasonably believes will be entitled to vote in the ballot

The lists and figures or information supplied should be as accurate as is reasonably practicable in the light of the information in the union’s possession at the time when it complied with this requirement of the law.

- contains such information in the union's possession as would help the employer to make such plans and bring information to the attention of those of his employees who the union intends should take part in the action;
- states that it is a notice given for the purposes of Article 118 of the Trade Union and Labour Relations (Northern Ireland) Order 1995; and
- is given by any officer, official or committee of the union for whose act of inducing industrial action the union is responsible in law (as described on pages 3 to 5 of this booklet).

Changes in the union's intentions, for example as to the dates on which action is to be taken, require further notices to be given accordingly.

With the exception of the requirements relating to continuous and discontinuous action and to the need to give further notices in the event of changes in the union's intentions, the statutory requirements applying to notice of industrial action are for the most part the same as those applying to notice of industrial action ballots, although the content may differ from that given at the earlier because of changes in circumstances.

Where continuous industrial action is suspended, for example for further negotiations between the employer and union, the union must normally give the employer a further notice before resuming the action. The exception to this requirement is where the union agrees with the employer that the industrial action will cease to be authorised or endorsed with effect from a date specified in the agreement but may be authorised or endorsed again on or after another date specified in the agreement and the union:

- ceases to authorise or endorse the action with effect from the specified date; and
- subsequently re-authorises or re-endorses the action from a date on or after the originally specified date or such later date as may be agreed with the employer.

For this exception to apply, the resumed industrial action must be of the same kind as covered in the original notice. That will not be so if, for example, the later action is taken by different or additional descriptions of workers. In order to avoid misunderstanding, both parties may find it helpful for such agreements to be in writing.

## Secondary industrial action

It is unlawful to call for, threaten to call for, or otherwise organise secondary industrial action. Such an act by any person or trade union does not have the protection of the 'statutory immunities' described on pages 1 to 6 of this booklet.

Secondary action - which is sometimes referred to as 'sympathy' action, or 'solidarity' action - is defined as industrial action by workers whose employer is not a party to the trade dispute to which the action relates. Secondary action can be taken by those working under contracts of employment, or any contract under which one person personally does work or performs services for another.

For these purposes:

- where more than one employer is in dispute with his workers, the dispute between each employer and his workers is treated as a separate dispute;
- industrial action which is 'primary' action (i.e. in contemplation or furtherance of a dispute between workers and their own employer) is not regarded as 'secondary' action simply because it has some effect on another dispute between workers and a different employer;
- calls on workers to breach, or interfere with the performance of, contracts will not be regarded as calls to take secondary action if made in the course of attendance for the purpose of peaceful picketing as the law allows (see pages 20 and 21 of this booklet).

## Industrial action to promote closed shop practices or against non-union firms

### Closed shop practices

There is no immunity for any call for, threat to call for, or other organisation of industrial action to establish or maintain any sort of union closed shop practice.

Statutory immunity is not available where the reason, or **one of the reasons**, for the industrial action is:

- that an employer employs, has employed or might employ, a person who is not a member of any trade union, of a particular trade union, or of one of a number of particular trade unions; or
- to pressurise an employer into discriminating against a person on the grounds of non-membership of any trade union, of a particular trade union, or of one of a number of particular trade unions.

An employer discriminates against a person who is not a union member if his conduct in relation to people who are or may be employed by him is:

- different according to whether or not the people are or are not members; and
- more favourable to those people who are members.

### Non-union firms

In addition, there is no immunity for a relevant act (such as calling for, threatening to call for, or otherwise organising industrial action) which is either:

- designed to exert pressure on an employer to persuade him to impose union labour only or recognition requirements on contractors<sup>15</sup>; or
- taken by the employees of one employer and interferes with the supply (whether or not under a contract) of goods or services by a second employer, or can reasonably be expected to have that effect, where the reason, or **one of the reasons** for the action is that the supplier of the goods or services does not recognise, negotiate, or consult with trade unions or trade union officials.

## Industrial action in support of an employee dismissed while taking 'unofficial' industrial action

There is no immunity for any call for, threat to call for, or other organisation of industrial action where the reason, or one of the reasons, for that action is the fact or belief that an employer has dismissed any employee in circumstances where the employee has no right to complain of unfair dismissal because he was dismissed while taking 'unofficial' industrial action.

For these purposes:

- an 'employer' in relation to an employee includes, in the case where the employment has ceased, the employer for whom he used to work;
- an employee who was a member of a union (other than for purposes unconnected with his employment) when he began to take the industrial action, or at the time he was dismissed, will be regarded as having been dismissed while taking 'unofficial' industrial action if, at the time of his dismissal, the act of calling for, threatening to call for, or otherwise organising the industrial action was not the act of the union either: (i) because it was done by a person for whose acts the union was not responsible in law (see pages 3 to 5 of this booklet); or (ii) because, although done by a person for whose acts the union was responsible in law, the act has been 'effectively repudiated' by the union's Executive Committee, President or General Secretary (see pages 4 to 5 of this booklet). (However, where the relevant act of the union because it has been so 'repudiated', an employee is not regarded as taking 'unofficial' industrial action until a full 'working day'<sup>16</sup> has passed since the day on which the repudiation took place.);
- an employee who was not a union member when he began to take the industrial action in the course of which he was dismissed, nor when he was dismissed, will not be regarded as having been dismissed while taking 'unofficial' action unless, at the time of dismissal, there were others also taking the action who were members of a union which had not authorised or endorsed the action.

## Picketing

When pickets try to persuade people not to go into work, or not to deliver or collect goods, they may in effect be inducing them to break, or interfere with the performance of, their contracts of employment. They may also be interfering with the ability of the employers of those people to fulfil their commercial contracts.

Inducement in the course of picketing is not in itself lawful simply because the industrial action supported by the picketing is lawfully organised. For such inducement to be lawful it must satisfy certain conditions laid down by the law.

These conditions include the following:

- that the picketing is at or near the pickets' own place of work; and
- that the purpose of the picketing is **peacefully** to obtain or communicate information, or **peacefully** to persuade a person to work or not to work.

There are, however, three exceptions to the rule that an inducement in the course of picketing has immunity only if it is done at or near the pickets' own place of work.

First, a trade union official may accompany a member of his union whom he represents so long as the member is picketing at his own place of work. Secondly, a person (for example, a mobile worker) who does not normally work at one particular place, or for whom it is impracticable to picket at his actual place of work, may picket at the premises of the employer from which he works or from which the work is administered. Thirdly, a person who is not in employment may picket at his former place of work in contemplation or furtherance of a trade dispute, but only if the termination of his employment gave rise to or is connected with the dispute in support of which he is picketing.

It should be noted that picketing which is not peaceful and which, for example, leads to violent or abusive behaviour, intimidation or obstruction of the highway, is likely to involve offences under the criminal law. The law gives no protection to people who commit such offences in the course of picketing and they may be arrested and prosecuted by the police (see also pages 3 to 5 of this booklet).

More detailed information is contained in a statutory Code of Practice on Picketing, which is available from the Department for Employment and Learning (see [Appendix 2](#)). The Code outlines the law on picketing and gives practical guidance on its conduct. In particular, it recommends that pickets and their organisers should ensure that in general the number of pickets does not exceed six at any entrance to a workplace.

As with the Code of Practice on Industrial Action Ballots and Notice to Employers described on page 13 of this booklet, failure to observe the provisions of the statutory Code of Practice on Picketing does not in itself render a union, or anyone else, liable to any legal proceedings. However, where proceedings are brought against a union, the provisions of the Code are admissible in evidence, and may be taken into account by a court if they appear relevant to any question before it. (Its status is thus similar to, for example, the Highway Code in relation to legal proceedings in connection with offences under Road Traffic Acts.)

## **Dismissal of employees taking industrial action**

An employer may take various measures, up to and including dismissal, against any employee who takes industrial action. An employee who is dismissed by his employer while taking industrial action may lose his right to claim unfair dismissal.

### **How does taking industrial action affect an employee's right to claim unfair dismissal?**

With certain exceptions, the law prevents an industrial tribunal from considering a claim of unfair dismissal on its merits if the employee was dismissed while taking part in industrial action. This means that the industrial tribunal cannot find the dismissal of the employee to be unfair. The courts have interpreted this legislation as applying to any industrial action - whether or not it involves breach, or interference with, the performance of the employee's contract of employment. The exceptions are as follows:

#### **Dismissal for taking part in 'protected' industrial action starting after 24 April 2000**

Where an employee starts taking 'protected' industrial action after 24 April 2000, it will be unfair to dismiss him for this reason unless his industrial action lasts for more than eight weeks and the employer has taken such procedural steps as are reasonable to try to resolve the dispute.

The Employment Relations (NI) Order 2004 introduced a new provision which changed the length and scope of the protected period for industrial action. For industrial action commencing on or after 24 July 2005, the length of 'protected' industrial action is extended from eight to twelve weeks. Lock-out days, where an employer prevents striking employees from returning to work, are disregarded when determining this twelve week period. For example, where an employer locks out employees taking 'protected' industrial action, for ten days, during the twelve week period, the twelve week period will be extended by ten days.

Employees who believe they have been unfairly dismissed in this way have the right to complain to an industrial tribunal, regardless of their length of service or age.

If the tribunal finds that an employee has been unfairly dismissed, it can make an award of compensation comprising a *basic award*, based on the employee's age, length of service and weekly pay and calculated in a similar way to a redundancy payment, and a *compensatory award*, which is an amount the tribunal considers just and equitable for the loss which the employee has suffered as a result of the dismissal, subject to a limit of £63,000<sup>17</sup>. If no employees are still taking protected industrial action over the relevant dispute and if the employee so wishes, the tribunal may make an order for the employee to be re-instated or re-engaged. If the employer refuses to comply with the order, the tribunal may make an award of compensation consisting of the basic and compensatory awards mentioned

above and an *additional award* of between 26 and 52 weeks' pay (subject to a maximum of £17,160)<sup>18</sup>. For more details, see the Employment Rights booklet **Unfairly dismissed? (ER13)**.

### **What is 'protected' industrial action?**

Industrial action is 'protected' if an employee is induced to take it by his union and the union in doing so complies with the legal requirements governing the organisation of industrial action set out elsewhere in this booklet. If the union repudiates the industrial action (see pages 4 to 5), it ceases to be protected after the working day following the day of the repudiation. (For example, if the union repudiates the action on a Monday, industrial action taken on or after the Wednesday will not be protected.)

### **What are 'reasonable procedural steps'?**

It is for the tribunal in considering a claim for unfair dismissal to decide whether the employer has taken such procedural steps as are reasonable to resolve the dispute to which the industrial action relates. In doing so, the tribunal will not consider the merits of the dispute but will have regard to whether the employer and union had complied with the procedures in any applicable collective or other agreement and whether, after the protected industrial action had begun, they had:

- offered or agreed to start or restart negotiations;
- unreasonably refused a request to make use of conciliation services; or
- unreasonably refused a request to make use of mediation services in relation to the procedures to be used to resolve the dispute.

### **Selective dismissal or re-engagement during industrial action**

A tribunal may also entertain claims of unfair dismissal on their merits if the employer discriminates between those taking part in industrial action - other than 'unofficial' industrial action - by:

- dismissing some of those taking part in the action, but not others; or<sup>19</sup>
- offering re-engagement to any employee dismissed while taking part in industrial action within three months of his dismissal, but not to all those dismissed<sup>20</sup>.

An employee dismissed while taking 'unofficial' industrial action (see page 19) will not generally be able to claim unfair dismissal, regardless of whether the employer has discriminated between those taking such action by dismissing, or re-engaging, only some of them.

In addition, the law recognises certain cases of dismissal as requiring special protection. Further details of instances where an employee who is dismissed during the course of industrial action will always be able to make a claim for

unfair dismissal can be found in Articles 143(1) and 144(2) of the Employment Rights (Northern Ireland) Order 1996. These cases, generally, relate to family reasons, health and safety, employee representation and whistleblowing. More information can be found in the Employment Rights booklet **Unfairly dismissed? (ER13)**.

## Endnotes

1. As explained in pages 7 to 19 of this booklet, if there is no immunity because of a union's failure to provide an employer with notice of its intent to conduct an industrial action ballot, sample voting paper, or notice of official industrial action, only the employer of the workers concerned (or an individual deprived of goods or services by the action) can bring proceedings.
2. An 'official' is any person who is an officer of the union or of a branch or section of the union or any person who is elected or appointed in accordance with the union's rules to be a representative of its members, including any person so elected or appointed who is an employee of the same employer as the members, or one or more of the members, he is elected to represent - e.g. a shop steward.
3. The law gives union members a statutory right to restrain their union from inducing them and others to take any industrial action without the support of a properly conducted ballot. This statutory right is described more fully in **Industrial action and the law: a guide for employees (ER27)**.
4. Entitlement to vote in the ballot must be given to all the union's members who it is reasonable at the time of the ballot for the union to believe will be induced to take part in or continue with the industrial action, and to no other members.
5. As determined by *S.R. 1992 No. 241*.
6. Where separate workplace ballots are required, the scrutiny procedures must be followed in respect of each separate ballot if the number of members given entitlement to vote aggregated across all of the ballots is more than 50.
7. A union may be allowed to make its first call for industrial action more than four weeks after the date of the ballot if either (a) the employer and union agree on an extension, for example to enable talks which are making progress to continue, of up to eight weeks after the date of the ballot or (b) an injunction granted by a court or an undertaking given by the union to the court prohibits the union from calling for industrial action during some part, or the whole, of the four weeks following the date of the ballot, and the injunction subsequently lapses or is set aside or the union is released from its undertaking. In the latter case, a union may forthwith apply to the court for an order which, if granted, would provide that the period during which the prohibition had effect would not count towards the four week period for which ballots are normally effective. However, if the court believes that the result of a ballot no longer represents the views of union members, or that something has happened or is likely to happen which would result in union members voting against taking, or continuing with, action if there were a fresh ballot, it may not make such an order. In any case, a ballot can never be effective if a union's first call for industrial action is made more than twelve weeks after the date of the ballot.
8. The union may choose whether or not to give a vote to 'overseas members' i.e. any member (other than a merchant seaman or offshore worker) who is outside Northern Ireland for the whole of the voting period. However, members who are in Great Britain throughout the voting period for an industrial action ballot and who will be called upon to take part in, or continue with, the industrial action must be given entitlement to vote in the ballot if (i) their place of work is in Northern Ireland and the ballot is of members at their place of work; or (ii) the industrial action to which the ballot relates will involve members in Northern Ireland as well as Great Britain and the ballot is a general one covering workplaces in both Northern Ireland and Great Britain. Members required to be given entitlement to vote by either of these requirements do not count as 'overseas members' for the purpose of the law on industrial action balloting.

9. Article 109A(5) of the 1995 Order defines for this purpose which members are affected by a dispute.

10. Where a person who has not been specified on the voting paper calls industrial action before it is first called by a specified person, then - in order to be certain that the ballot will give protection against legal proceedings - the union should if possible ensure that the call by the unspecified person is effectively repudiated.

11. There is a limited exception to these rules for the balloting of union members who are merchant seamen where the union reasonably believes that they will be employed in a ship at sea (or outside Northern Ireland) at some time in the period during which votes may be cast and that it will be convenient for them to vote while on the ship or where the ship is.

12. If overseas members of a trade union have been given entitlement to vote in an industrial action ballot the detailed information about its result need not be sent to them, but the information supplied to non-overseas members in accordance with the statutory requirements must distinguish between votes cast, individuals voting, and spoiled ballot papers to show which details relate to overseas, and which to non-overseas, members. (For these purposes members in Great Britain given entitlement to vote do not count as 'overseas' members.)

13. Set out in Articles 104-115 and Article 118 of the Trade Union and Labour Relations (Northern Ireland) Order 1995 (as amended).

14. For these purposes, industrial action is 'discontinuous' if it is to involve industrial action other than on all the days when it might be taken by those concerned. An indefinite strike would, therefore, be 'continuous'; an overtime ban might be 'continuous' or 'discontinuous', depending on whether the ban applied to overtime working on all the days on which overtime would otherwise be worked, or to overtime working on only some of those days.

15. It should be noted that the law also prohibits companies, local authorities and others from imposing on contractors requirements that make it a condition of a contract, or of obtaining a contract, that the contractor employs only trade union members or recognises, negotiates or consults with trade unions. These related provisions are set out in detail in a separate booklet **Union membership: rights of members and non-members (ER31)**.

16. A 'working day' for these purpose means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971.

17. This figure is revised annually in line with the retail prices index.

18. This is because for the purposes of this calculation a week's pay is subject to a limit of £330, revised annually in line with the retail prices index.

19. To avoid such a claim of unfair dismissal from a person dismissed while taking part in industrial action, the employer needs to treat in the same way only those who were taking part in the industrial action **on the date of his dismissal** and who **work at the same establishment**.

20. However, after a three month period, the employer may offer re-engagement to any of the employees dismissed while taking part in industrial action, without a tribunal being able to hear a claim of unfair dismissal from employees not offered re-engagement.

## Appendix 1: Booklets in this series

Booklets in this series are available online from [www.delni.gov.uk/erbooklets](http://www.delni.gov.uk/erbooklets) or can be obtained by contacting the Department.

- ER 1 *Individual rights and responsibilities of employees*
- ER 2 *Written statement of employment particulars*
- ER 3 *Redundancy entitlement statutory rights*
- ER 4 *Redundancy consultation and notification*
- ER 5 *Your rights if your employer is insolvent*
- ER 6 *Unjustifiable discipline by a trade union*
- ER 7 *Time off for public duties*
- ER 8 *Continuous employment and a week's pay*
- ER 10 *Suspension from work on medical or maternity grounds*
- ER 12 *Pay statements: what they must itemise*
- ER 13 *Unfairly dismissed?*
- ER 14 *Guarantee payments*
- ER 15 *Rights to notice and reasons for dismissal*
- ER 16 *Maternity rights: a guide for employers and employees*
- ER 17 *Help with meeting redundancy costs for employers in financial difficulty*
- ER 18 *Dismissal: fair and unfair - a guide for employers*
- ER 19 *Limits on payments and awards*
- ER 21 *Contracts of employment: changes, breach of contract and deductions from wages*
- ER 22 *Criminal records and employment*
- ER 23 *Payment of union subscriptions through "check off"*
- ER 24 *Time off for dependants*
- ER 25 *Parental leave: a guide for employers and employees*

- ER 26**      *Time off for study or training*
- ER 27**      *Industrial action and the law: a guide for employees*
- ER 28**      *Trade union executive elections*
- ER 29**      *Industrial action and the law: a guide for employers*
- ER 30**      *Industrial action and the law: a guide for individuals whose supply of goods or services is affected by unlawful industrial action*
- ER 31**      *Union membership: rights of members and non-members*
- ER 33**      *Trade union political funds*
- ER 34**      *Rights to paternity leave and pay*
- ER 35**      *Adoptive parents: a guide for employers and employees*
- ER 36**      *Flexible working: a guide for employers and employees*

Additional employment rights publications, covering a range of other issues, can be found online at [www.delni.gov.uk/erpublications](http://www.delni.gov.uk/erpublications) or can be obtained from the Department.

## Appendix 2: Useful addresses

### Certification Officer for Northern Ireland

10-12 Gordon Street  
Belfast  
BT1 2LG

**Tel:** 028 9023 7773  
**Fax:** 028 9023 2271  
**Textphone:** 028 9023 8411  
**Website:** [www.nicertoffice.com](http://www.nicertoffice.com)  
**Email:** [info@nicertoffice.com](mailto:info@nicertoffice.com)

### Department for Employment and Learning

Redundancy Payments Service  
Room 203  
Adelaide House  
39-49 Adelaide Street  
Belfast  
BT2 8FD

**Tel:** 028 9025 7956  
**Freephone:** 080 0585 811  
**Fax:** 028 9025 7555  
**Website:** [www.redundancyni.gov.uk](http://www.redundancyni.gov.uk)  
**E-mail:** [rpsquery@delni.gov.uk](mailto:rpsquery@delni.gov.uk)

### The Health & Safety Executive for Northern Ireland

83 Ladas Drive  
Belfast  
BT6 9FR

**Tel:** 028 9024 3249  
**Fax:** 028 9023 5383  
**Textphone:** 028 9054 6896  
**Freephone Helpline:** 080 0032 0121  
**Website:** [www.hseni.gov.uk](http://www.hseni.gov.uk)

### Department for Employment and Learning

Employment Relations Policy and  
Legislation Branch  
Room 203  
Adelaide House  
39-49 Adelaide Street  
Belfast  
BT2 8FD

**Tel:** 028 9025 7580  
**Website:** [www.delni.gov.uk/er](http://www.delni.gov.uk/er)  
**E-mail:** [erbooklets@delni.gov.uk](mailto:erbooklets@delni.gov.uk)

### The Equality Commission for Northern Ireland

Equality House  
7-9 Shaftesbury Square  
Belfast  
BT2 7DP

**Tel:** 028 9050 0600  
**Fax:** 028 9033 1544  
**Textphone:** 028 9050 0589  
**Website:** [www.equalityni.org](http://www.equalityni.org)  
**E-mail:** [information@equalityni.org](mailto:information@equalityni.org)

### Industrial Court

Room 203  
Adelaide House  
39-49 Adelaide Street  
Belfast  
BT2 8FD

**Tel:** 028 9025 7599  
**Fax:** 028 9025 7555  
**Website:** [www.industrialcourt.gov.uk](http://www.industrialcourt.gov.uk)  
**E-mail:** [enquiries@industrialcourt.gov.uk](mailto:enquiries@industrialcourt.gov.uk)

### **Labour Relations Agency**

Head Office  
2-8 Gordon Street  
Belfast  
BT1 2LG

**Tel:** 028 9032 1442

**Fax:** 028 9033 0827

**Textphone:** 028 9023 8411

**Website:** [www.lra.org.uk](http://www.lra.org.uk)

**E-mail:** [info@lra.org.uk](mailto:info@lra.org.uk)

### **NI Business Info**

(website giving information on a wide range of issues for employers)

**Website:** [www.nibusinessinfo.co.uk](http://www.nibusinessinfo.co.uk)

### **Labour Relations Agency**

Regional Office  
1-3 Guildhall Street  
Londonderry  
BT48 6BJ

**Tel:** 028 7126 9639

**Fax:** 028 7126 7729

**Textphone:** 028 9023 8411

**Website:** [www.lra.org.uk](http://www.lra.org.uk)

**E-mail:** [info@lra.org.uk](mailto:info@lra.org.uk)

### **Office of the Industrial Tribunals and the Fair Employment Tribunal**

Killymeal House  
2 Cromac Quay  
Ormeau Road  
Belfast  
BT7 2JD

**Tel:** 028 9032 7666

**Fax:** 028 9023 0184

**Website:** [www.employmenttribunalsni.org](http://www.employmenttribunalsni.org)

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website: [www.delni.gov.uk](http://www.delni.gov.uk)