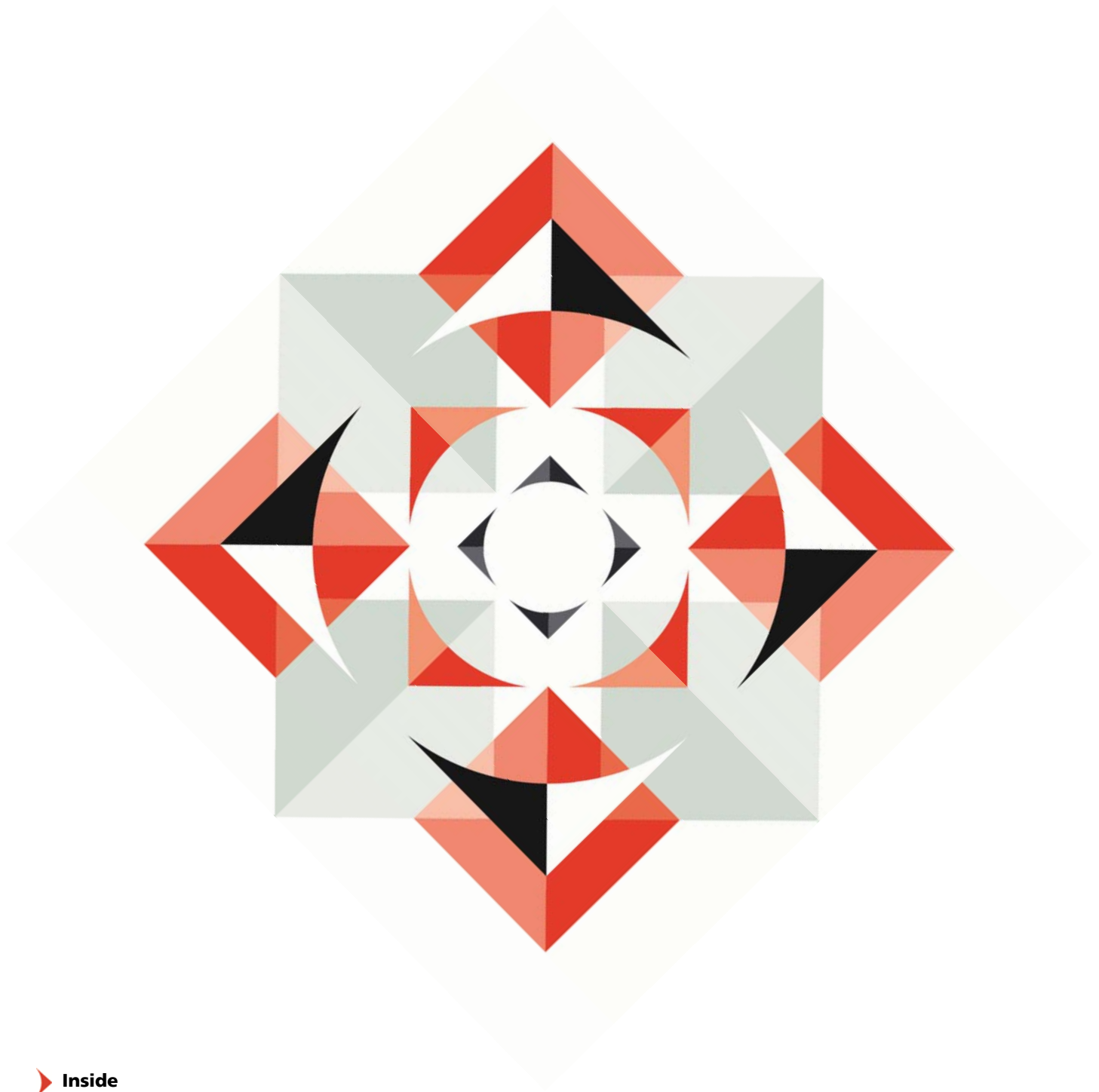


Industrial action



► Inside

What is industrial action?
Is it lawful or unlawful?
When is it protected?
When can it be challenged?
What can be done in practice?
Contingency planning
On the horizon



Introduction

Economically turbulent times have seen an increase in trade unions 'flexing their muscles' by way of industrial action. This Inbrief outlines the law in this area and gives employers practical tips for responding to and avoiding conflicts.

What is industrial action?

Industrial action is not defined in statute but, as a general guide, it amounts to concerted action taken to put pressure on an employer. It includes strikes and actions short of a strike such as picketing, work-to-rule, go-slow and a ban on call-out.

Whether actual or threatened, industrial action can be disruptive and costly. Employers, however, are not powerless. There are many ways either to challenge industrial action or to minimise its impact.

Is it lawful or unlawful?

When threatened with industrial action, an employer can reap rewards by seeking to establish whether or not it is lawful.

Nearly all industrial action is potentially unlawful as it usually involves employees breaching their employment contracts. The breach could be of an express term (e.g. employees on strike would breach an express term which required a 9-5 working day), or a less obvious "implied" term (e.g. refusing to work overtime could breach an implied term not to operate contract terms to frustrate an employer's business). Unions, by calling for industrial action, will in turn be acting unlawfully by inducing employees to breach their contracts.

However, both unions and the employees who participate in industrial action can gain extensive protection against liability if they can show that the action has been called in compliance with a complex statutory balloting and notification regime. For the employer, identifying shortcomings can provide useful bargaining chips in union negotiations, and even a basis on which to stop the action in Court.

When is it protected?

Industrial action is protected if the union has endorsed/authorised the action (and has not effectively repudiated it), and:

- > it is in contemplation or furtherance of a narrowly defined trade dispute
- > the only reason why it is unlawful is because the action is a tort (i.e. a legal wrong) that:
 - > induces another to break a contract

(which is not an employment contract with an employer who is not party to the trade dispute), or interferes or induces another to interfere with its performance or

- > consists in threatening that a contract (which is not an employment contract with an employer who is not party to the trade dispute) will be broken, its performance interfered with, or to induce another to break the contract or interfere with its performance
- > if it amounts to an agreement, the agreement is to do or bring about something which itself would not be actionable in tort
- > if the action is picketing, it takes place at or near the picket's place of work (or, in the case of a union official only, at or near the place of work of an accompanying union member whom the official represents) and is for the purpose only of peacefully obtaining/communicating information or persuading others to work or abstain from working
- > the reason for the action is not the employment of (or failure to discriminate against) a non-union member or a dismissal connected with unofficial action
- > it is not for the purposes of requiring that work is done by union members (or non-members) only, or that suppliers recognise, negotiate or consult with a union, or refusing to deal with suppliers/prospective suppliers on union membership grounds

The union's acts will only be protected if, in addition, it has correctly balloted for the industrial action, and given proper notice to relevant employers, following statutory procedures.

When can it be challenged?

Industrial action can be challenged if it fails to meet the above conditions.

Shortcomings in balloting and notification procedures have historically provided the most fruitful source of legal challenges to industrial action. Although recent judicial decisions have



become more “union friendly” – suggesting that Courts will only grant an injunction to stop a strike on the basis of shortcomings in the constituency balloted by the union if they are satisfied that the union has acted in bad faith – it still remains beneficial to scrutinise the legislation and assess whether the union has complied. A non-exhaustive list of potential defects includes:

- > Balloting members in circumstances where the union knows those individuals cannot possibly be induced to strike (e.g. because the union has information in its possession showing that they will have left employment before the first date of any strike action).
- > Conversely, excluding from the ballot members who will be included in the strike call.
- > Failing to provide sufficiently detailed or specific information to the employer about the employees who are to be balloted and induced to strike.
- > Failing to notify the employer and those balloted of the result as soon as reasonably practicable after it is communicated (and failing to provide certain categories of information about the result).

Moreover, industrial action is rarely standalone and may lead to illegal behaviour which leads to the loss of protected status. Picketing is a common example of action which can easily lead to trespass, harassment or assault. A breach of contract can itself be a criminal offence if done wilfully and maliciously knowing that serious injury, or danger to human life are probable consequences.

Encouraging others to participate can amount to criminal behaviour where it involves persistently following someone, or hiding someone's tools, clothes or other property.

Various other unprotected torts may be committed in connection with industrial action, ranging from inducing breaches of statutory duty, to defamation, to breaches of fundamental EU rights of the employer, and it can pay to be aware of these. Unions are increasingly pursuing campaigns which go beyond traditional forms of industrial action,

such as media campaigns, supply-chain targeted action, think-tanks, letter-writing and demonstrations, and it is often in this context that torts may be committed.

What can be done in practice... if the action is protected?

- > **Withhold pay:** where employees have breached their contract, employers can withhold pay. The amount withheld should be a reasonable reflection of the work lost / damages caused. Employers should give advance notice of why and how deductions are being made. Unless a contractual provision holds otherwise (and dependent on the employee's normal working week and how they are paid), an employer will usually be able to deduct 1/260 of a full time worker's annual salary for every strike day. Watch out for employees who obtain sick notes or are absent for other reasons who could claim unlawful deductions from wages.
- > **Refuse to accept partial performance:** if employees fail to fully perform their contract, employers can adopt an 'all or nothing' approach by refusing to accept partial performance. The key is to make it clear to workers that if they attend work, they are expected to complete all their duties, and any partial performance of work is on a voluntary basis, for which no payment will be made. Implied acceptance of partial performance, e.g. managers giving out instructions, should be avoided.
- > **Dismissal:** dismissal should be a last resort given the risks of tribunal claims and damage to industrial relations. Where the action is protected, dismissal will be unfair if the reason is the industrial action, and the dismissal takes place during a period of 12 weeks from the date the employee started participation in the industrial action (or longer if a lock-out has taken place (see below) or the employee stopped action before the 12 week period ended). If the employee continues the industrial action for the 12 week period, the employer must take certain procedural steps to resolve the dispute.

- > **Lock-out:** for example, if the complete closure of a certain factory or office is required for health and safety reasons. A key risk is that non-participating employees may claim this amounts to a breach of the employer's obligations.

What can be done in practice... if the action is not protected?

- > **Injunctions:** the most immediate course of action is usually an “interlocutory injunction” (a temporary order that industrial action should stop / must not take place), pending a full hearing at which the court will decide whether or not it is lawful. Cases very rarely reach a full hearing, which means the initial hearing is likely to serve as the effective final determination of the matter.
- > **Damages:** where industrial action is unlawful, as well as from employees, employers may claim damages from the union, limited to a statutory maximum (currently £250,000, depending on the number of union members).
- > **Dismissal:** where industrial action is “unofficial” (i.e. employees are members of a union which has not endorsed/authorised the action, or has repudiated it), employees have no right to claim unfair dismissal unless the principal reason for the dismissal was related to certain protected matters such as jury service, family, health and safety, working time, employee representative, protected disclosure and/or flexible working cases. If the industrial action is official, but not protected, then dismissals which take place during a lock-out or industrial action and do not relate to time off for dependants or the above protected matters, can only be found to be unfair if the employee is re-engaged within three months, and/or the employer has not dismissed all relevant workers.
- > **Withhold pay / refuse partial performance / lock-out:** as is the case for protected action, if there is a breach of contract, employers can deduct pay, refuse partial performance and, in extreme cases, lock out the employees.

Contingency planning

When industrial action is threatened, employers should consider:

- > **Temporary staff:** What potential there is to use temporary staff to cover for striking employees. However, there is a need for considerable care here, as it is a criminal offence to knowingly supply temporary staff to cover for striking employees in some circumstances.
- > **Risk assessment:** Assess whether working conditions will be safe (e.g. can machinery be operated safely if staff refuse to work overtime?).
- > **Record-keeping:** Payroll need to know which employees' pay should be withheld. Records may be useful later because industrial action can affect employees' statutory rights, such as unfair dismissal, maternity and sick pay. Record-keeping must comply with data protection rules, which afford special protection to union membership.
- > **PR:** Speed is of the essence. People often believe the first version of events they hear, which may not always present both sides of the story! Internally, a memo setting out the employer's position, employee's key rights and possible consequences of industrial action, enclosing key guidance (e.g. the picketing code of practice), may be appropriate.
- > **Seeking resolution to negotiation:** Ultimately, legal tools will normally only provide bargaining power; very rarely do they prompt a complete climbdown on the union's part. It is important to remain open to exploring conciliation and mediation services, via ACAS, or following methods prescribed by collective agreements.

On the horizon... is there a right to strike?

No court order can force anyone to work, but in limited circumstances, unions and employers

can enter into an enforceable agreement that no industrial action will take place. Unions are also increasingly entering the fray when key legal decisions are made, including the question of whether legislation in the UK goes far enough to enshrine a "right to strike". In 2001 the European Court of Human Rights ("ECtHR") confirmed that a key element of Article 11 of the European Convention on Human Rights (right to freedom of association including the right to form and to join trade unions) is the right to strike. Referring to this Article 11 right, in 2014 the RMT brought a further case in the ECtHR against the UK government. The RMT alleged that the UK's strict statutory requirements for a valid industrial action ballot and its ban on secondary industrial action ('sympathy strikes') was contrary to Article 11. The ECtHR disagreed. It held that UK law did provide an adequate mechanism for the RMT to strike; in this instance the union had been able to continue its dispute after holding a ballot and providing a compliant ballot notice. With regard to the ban on sympathy strikes, the ECtHR agreed that the ban did interfere with union members' rights under Article 11. However, it provided that such interference was lawful where it was prescribed by law and designed to pursue a legitimate aim which was necessary and proportionate to achieve that aim. In this instance, the "legitimate aim" of the UK's industrial action laws was that of protecting the rights and freedoms of persons not connected to the industrial dispute. It is also notable that the ECtHR promised to leave UK legislation unchallenged unless it is "manifestly without reasonable foundation". Consequently, many consider that the ECtHR's decision represents a great defeat for the trade union movement.

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