August 2016

NHS industrial action and work to rule FAQs

Important amendments to question 31 – June 2016

Question 31 of this document relates to the amount of pay which should be deducted for a strike day. Previously the guidance said that in the absence of an agreement to the contrary 1/365th of the annual salary should be deducted for each strike day. However, Section 340 of the current junior doctors’ contract incorporates the apportionment provisions contained in section 54 of the Whitley Council General Conditions of Service.

In the case of monthly paid employees, this means that a day’s pay should be calculated as the monthly sum divided by the number of days in the particular month. This will result in a deduction which may be slightly higher or slightly lower than a calculation based on 1/365th of annual salary depending on the number of days in the month in which the industrial action took place.

We are aware that anomalies can arise when employers deduct salary on an hourly basis where partial performance of duties applies. There is no similar definition within the terms and conditions covering hourly pay or any national agreement on how this should be apportioned. In these circumstances employers will need to make their own arrangements to ensure that deductions are made appropriately.

LATEST POSITION

Following negotiation between the BMA, the Secretary of State for Health and NHS Employers, on 5 July 2016, the BMA announced that junior doctors had voted not to accept the terms of the new junior doctors’ contract agreed in May 2016. Following this announcement, on 11 August 2016, the new Chair of the British Medical Association Junior Doctors Committee (J DC), confirmed her intention to request the BMA Council to authorise a rolling programme of escalated industrial action to commence in early September 2016. As yet it is not clear if or when any further industrial action will take place, and what form any industrial action will take.
The frequently asked questions (FAQs) cover the following key areas:

- Current position
- Trade dispute with employer
- Emergency life saving care and exemptions
- Dealing with anomalies in ballot notices and requests for information
- Votes – aggregating and separate sites
- Notice of result and ballot and calling out
- Injunctive proceedings
- Contingency planning
- Picketing
- Strike action - pay
- Who is participating?
- Taking action as a result of industrial action
- Action short of a strike
- Action short of a strike – withholding pay
- Immunity

As this is a complex area of law, the FAQs are lengthy and set out in detail (including references to statute and case law where applicable) the rights and responsibilities of employers, staff and unions under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

Where there is a risk of industrial action, the priority for employers in the NHS will be to ensure that any disruption does not put patient welfare or safety at risk. As a result, as well as focussing on the legal issues relating to industrial action, these FAQs also emphasise the practical considerations for trusts, in particular the need for early local discussions with the BMA and BDA to gain a clear picture of the likely impact of any action at a local level (for example, how many staff are expected to take action, which rotas/departments will be affected) and to agree wherever possible a protocol for ensuring critical and emergency care is not disrupted.

Although the FAQs generally focus on possible action by the junior doctors called by the BMA, the same principles also apply to any action taken by dental trainees as a result of the BDA ballot. We will continue to update these FAQs as the position regarding any further rounds of industrial action becomes clearer.

Other resources which NHS employers may find useful to be aware of are:

- The GMC’s FAQs
- The BMA’s own guidance for hospital doctors not involved in industrial action.
CURRENT POSITION

1. What is the current situation with regard to the ballot? Can the BMA call for further strike dates without holding another ballot? If so, how much notice would they have to give of any further action?

The ballot called by the BMA in the autumn of 2015 will remain valid, provided that any further action relates to the same dispute as that ballot. Whilst there is a potential argument that the dispute has moved on somewhat since the initial ballot, we do not believe that a challenge to the legitimacy of the fresh rounds of action would succeed – in essence the dispute remains around the terms and conditions of the new junior doctors’ contract and its imposition.

The ballot granted a mandate both for strike action, and action short of a strike. In theory action can be called months or years after the ballot is held, although it may become more difficult for a union to argue that it is the same dispute where a significant time period has elapsed. When the Trade Union Act comes into force there will be a 4 month limitation on strike action, but currently there is no limitation period. Accordingly, the BMA can continue to call for additional strike action under the existing ballot. The BMA would need to give employers seven days’ notice of any further industrial action, as previously.

TRADE DISPUTE WITH EMPLOYER

2. Can trusts resist industrial action on the basis that any dispute is not with the employer and is a political dispute with the Government?

There is a potential argument that the dispute is with the Government and not with the employer but NHS employers do not have a strong argument on this point, having taken Counsel’s advice on this issue at the time of the previous industrial action over the government’s proposed pension reforms. In effect, it could be argued either way and until tested, the courts’ approach remains uncertain on this point.

The BMA could rely on section 244(2) TULRCA which states that a dispute between a Minister of the Crown and any workers shall, notwithstanding that he is not the employer of those workers, be treated as a dispute between those workers and their employer if the dispute relates to matters which:

1. have been referred for consideration by a joint body on which, by virtue or provisions made by or under any enactment, he is represented or

2. cannot be settled without him exercising a power conferred on him by or under an enactment.

In the light of Counsel’s previous advice we do not think we have a strong argument which will succeed on this point.
EMERGENCY LIFE SAVING CARE

3. Can the requirement to provide emergency/life saving care be used to prevent strike action being taken?

Potentially, yes but this is ultimately a decision for the Attorney General. Section 240 TULRCA states that a person commits an offence who wilfully and maliciously breaks a contract of services or hiring, knowing or having reasonable cause to believe that the probable consequences of his doing so, either alone or in combination with others, will be to endanger human life or cause serious bodily injury or to expose valuable property, whether real or personal to destruction or serious injury (section 240 (1)(a) and (b)).

Note that this liability is personal, so that ultimately any failure to provide critical care, thus endangering life could result in criminal prosecution of individual employees. That is the starting point when it comes to assessing any potential legal liability, as well as in negotiation with the BMA over possible exemptions. It would be appropriate to remind junior doctors of their obligations to ensure that in any action they take they do not endanger life or risk causing serious injury (see also FAQ 4 below). In this respect the GMC’s position is clear, that any doctor contemplating industrial action must follow GMC guidance and must make the care of their patient their first concern.

4. Can we argue that all patient focussed areas should be exempt from industrial action?

The areas that would generate potential legal liability under section 240 of TULRCA are those which, if not covered, would be likely to endanger life / cause serious harm. This would not include all areas of patient care, but would clearly include areas such as critical care, A&E, maternity, dialysis, pharmacy and radiology.

There is no legal framework covering exemptions, and therefore employers do not have a right to insist that certain areas of the workplace should be completely exempt from industrial action under TULRCA. It is good practice for discussions to take place between unions and employers in the run up to industrial action, as it is in both parties’ interests to ensure that critical care is protected. The employer has a public duty to ensure that this is done; and the employees face potential criminal sanctions if it is not.

5. How should we approach exemptions for emergency care cover?

We understand that the BMA has refused to agree exemptions on a national level, but that local negotiations have taken place. Whilst an employer cannot force unions to agree exemptions, we recommend that discussions should be continued with the BMA at a local level to the extent that this matter has not already arisen. Trusts may wish to write to the BMA asking them to clarify what they mean by ‘emergency care’ or the ‘Christmas Day model’. Whilst it is difficult to predict where the greatest staff shortages will be in relation to each department (given that it is not only union members but also potentially non-union members who may take part in industrial action), it is recommended that Trusts identify which departments they believe should be proposed as being exempt from industrial action. We would suggest that areas
such as critical care, A&E, maternity and radiology should all be included within the exemptions. The BMA’s own national document also suggests that they believe areas such as acute inpatients, urgent attendances or new admissions” are covered by the “emergency care” model.

Where agreement cannot be reached, then employers may wish to remember that there is no legal obligation to do so. The obligation on both employer and employee is to ensure that life is not endangered. This is ultimately a question of fact rather than one for negotiation - either life is endangered or it is not.

If the BMA locally refuses to negotiate over exemptions, employers are advised to write to the BMA (escalating to the Full Time Officer and the BMA nationally as appropriate) and where necessary to junior doctors to remind them of their duties as set out in the GMC guidance, setting out the areas that they consider to be critical and seeking assurance that the BMA will work with the Trust ensure that patients are not harmed or put at risk.

6. **Will it be possible to negotiate exemptions where the BMA is proposing a full withdrawal of labour?**

It may be possible to agree certain exemptions locally, but it is likely that the BMA will not be prepared to agree any amendments. The BMA is relying on the fact that consultants and other medical staff will be available to provide emergency cover where required, and therefore there will be no breach of section 240 TULRCA and doctors will not be in breach of their duties to patients. There may be certain areas, however, where staffing issues may mean that emergency care cannot be provided, and these should be flagged locally with the BMA in advance. Again, we would advise trusts to remind junior doctors of their duty to put patients first as per the GMC guidance.

**DEALING WITH ANOMALIES IN BALLOT NOTICES AND REQUESTS FOR INFORMATION**

7. **If the BMA tells the employer that they will be balloting “all members employed by your organisation paying subscriptions by DOCAS” from which you will be able to deduce the numbers, categories and workplaces of the employees concerned, can they do this without providing anything more?**

Yes. Section 226A (2)(b) provides that the unions can provide either the list of numbers, categories and workplaces of the employees, or simply refer employers to the information held by them from which they can readily deduce the information.

8. **Where the ballot notice includes a list of members described as “non-DOCAS membership” and there are anomalies or inaccuracies in that information (i.e. “workers who do not work at the organisation” or “unknown” categories of worker or workplaces) what should an employer do, and what are
the factors a court will consider in granting an injunction?

Unions have to provide information which is as accurate as reasonably practicable. Employers should consider what information the BMA is likely to have in its possession and whether they feel that the union could have provided more comprehensive information and what evidence the employer has to support this assertion. For example, what information does the employer provide periodically to the BMA which would enable the union to provide more accurate information?

The Code of Practice on Industrial Action Ballots and Notices to Employers recommends that it would be good industrial relations practice for an employer who believes the notice he has received does not contain sufficient information to comply with the statutory requirements, to raise this with the union promptly before pursuing the matter in the courts.

Employers should also be aware of s232B which deals with the effect of small or accidental failures in regard to the ballot itself and provides that any failures may be disregarded if it is or if they, taken together, are, ‘accidental and on a scale which is unlikely to affect the result of the ballot’.

In considering this the courts have previously upheld an injunction restraining industrial action where the union balloted 91 members and of those, 25 voted in favour of strike, 17 against strike and 49 abstained. It was subsequently discovered that a further 25 members had not received the ballot papers and were not given a chance to vote. The court considered that this number was too significant a number to be disregarded and allowed an injunction.

In each case where a ballot notice has been served it will be important to assess the numbers of employees being balloted and the impact of the scale of error on the outcome of the ballot.

In view of the cost of pursuing injunctive proceedings, as recommended by the Code of Practice, we would advise that clarity is sought initially where there are errors or inaccuracies which either do not comply with the legal requirements or which makes contingency planning difficult.

If an injunction is requested the courts will look at whether the union’s efforts in providing the information were reasonable or unreasonable. Until the case of London Midlands v Serco, courts would intervene in such circumstances and there was little appetite to allow unions to hide behind an inaccurate database.

However, following this case, if unions are doing the best they can to provide information, even where they have negligently or carelessly maintained data, doing the best they can is likely to be sufficient. There is no duty on the union to keep an up to date database. If the employer is being deliberately misled by the union where it is believed that they hold information this position can be challenged more robustly. Employers should be aware that the threshold to show that the information is ‘deliberately vague’ is a high one which will require good quality evidence and for those reasons obtaining an injunction in these circumstances can be difficult particularly where the margin of error is on a small scale.

9. We hold information which appears to be more accurate than the information in the BMA’s possession - should we share this with the BMA and how should the trust respond to a request from the BMA for information?
NHS bodies should be clear that any sharing of information with the union is in breach of the Data Protection Act 1998 (DPA), as assisting with a request from a union about its members does not fall within the “necessity” category of the DPA. Similarly, as the employer is effectively helping the union to fulfils legal obligations under TULRCA, it is difficult for the employer to rely upon the exemption that disclosure is to comply with a legal obligation. There is nothing in any ACAS or other authoritative guidance which suggests that an employer ought to disclose or check off information in connection with such a ballot. Unless there is clear consent for this information to be released to the BMA, consent needs to be obtained. In practice this should not be difficult for the union to facilitate.

For a number of reasons it may be tactically better to ensure that the information in the union’s possession, even where this requires the trust to provide it, is better than the information which the union is holding.

If the employer has better quality information and sends a document in electronic format which holds accurate information regarding workplaces and categories, and the union is provided with this following service of the ballot notice, the union should then go through this to update/correct the information in the strike notice, in the event of the ballot supporting strike action. If they do not carry out a further filtering process in readiness for service of the strike notice, the employer can say that the union has not made reasonable attempts to make the strike notice as accurate as they could, even though the employer has provided the better quality data. This can put the employer in a stronger position to challenge the unions initially in a letter before action which indicates the extent of the union’s failures. If this does not receive an adequate response, you may have grounds for an injunction and should obtain legal advice on your position.

Data Protection Act issues aside, providing better information may help you to plan for industrial action. Where the BMA fails to ensure that strike notices are as accurate as the information which you have provided to them, you are likely to have better grounds for challenging a failure to meet the legal requirements.

10. **Can the unions ballot members who are not due to work on the day of action which is identified?**

Yes. In *London Underground Ltd v ASLEF* [2011] the ballot asked members whether they were in favour of industrial action on Boxing Day. Members who were not due to work on Boxing Day were balloted and London Underground argued that ASLEF could not have reasonably believed that such members would be induced to take part in the strike and therefore the ballot was defective. The High Court disagreed.

The wording of section 227 of TULRCA refers to the entitlement to vote in the ballot being given to all those who will be induced to ‘take part’ in the action. The ballot is not required to be limited to those persons who will be induced to withdraw their labour in breach of contract. The judge referred to the *Bolton Roadways* case (see below in ‘Who is Participating’) where it was established that someone who is on holiday or sick leave is capable of taking part in a strike.

11. **How accurate does the BMA need to be in terms of whom it sends ballot papers to?**

Under section 230(2), so far as is reasonably practicable every person entitled to vote in the ballot must have a voting paper sent to him and be given an opportunity to vote. In terms of the conduct of the ballot, so far
as is reasonably practicable voting should be in secret and the votes fairly and accurately counted. Section 230(4) goes on to state that any inaccuracy in counting shall be disregarded if it is accidental and on a scale which could not affect the result of the ballot. There have been a number of cases recently which have looked at whether unions have complied with their duties in organising a ballot.

In *British Airways v Unite*, Unite sent ballot papers to employees who were due to leave employment under a voluntary redundancy scheme. It was held that Unite had not taken reasonable steps to exclude these people from the ballot and therefore the ballot was defective and an injunction was granted.

In the more recent case of *Balfour Beatty Services Limited v Unite* the High Court found that the unions are not required to take all steps that are reasonably practicable to ensure the accuracy of the balloting constituency. Instead union officials can exercise their own judgement. In addition, in this case it was found that ‘accidental’ means no more than unintentional - it does not require the failure to be caused by some occurrence outside the union’s control. The current case law appears to seek to strike a balance with regard to small accidental errors. However, if there are defects in the balloting process which have a genuine and material impact on the outcome, the ballot will still be open to challenge.

**VOTES - AGGREGATING AND SEPARATE SITES**

12. **Is it possible to aggregate votes across the NHS in determining whether to strike and how would that work?**

Yes. Technically under section 228 TULRCA, there should be separate ballots for those union members entitled to vote at each workplace. "Workplace" is defined in section 228(4)(a) as "the single set of premises at or from which the person works". Case law suggests that "premises" is wide enough to cover different units or departments that are contained in the same building or situated at the same location. It would not be wide enough to cover all of a Trust's sites within a particular area. When separate workplace ballots are held the majority has to answer yes at each workplace to support industrial action.

However, section 228A provides that there can be a single ballot if:

- the workplace of each member entitled to vote in the ballot is the workplace of at least one member of the union who is affected by the dispute (228A(2));
- entitlement to vote is given to all union members at those sites who the union reasonably believes have a common occupation, and are employed by a particular employer or by any number of particular employers with whom the union is in dispute. So the union could ballot all junior doctors in one single ballot (228A(3)); or
- entitlement to vote is given to all members of the union who are employed by a particular employer or by any number of particular employers with whom the union is in dispute (but no others) (228A(4))

The last exception will only apply where the union ballots all its members across the different employers. In terms of section 228A(3), if the union ballots its junior doctor members at two employers but not at
all of the employers where junior doctor members are employed, a single ballot will need to be held at each employer.

13. **Can non-balloting unions also call their members out on strike in sympathy and gain immunity from inducing a breach of contract by relying on the fact that they have the same “trade dispute”?**

No. They will effectively be inducing their members unlawfully to go out on strike, which means that they do not have immunity from breach of contract.

14. **What happens if members at a particular site vote against the strike? Presumably that site will not be protected and they could not then come out in sympathy with those members who have voted for strike action at another site?**

Where a vote has not been aggregated, this is correct as it would be secondary action.

However in cases where a union has aggregated the vote across a number of workplaces and the majority is in favour of industrial action, it is lawful for the union to organise industrial action in any such workplace even if members at a particular workplace have voted against strike action.

**NOTICE OF RESULT OF BALLOT AND CALLING OUT**

15. **Does the union need to inform the employer of the result of a ballot notice and/or that the union is calling industrial action?**

As soon as reasonably practicable after holding the ballot, the union must take such steps as are reasonably necessary to ensure that every relevant employer is informed of the result of the ballot, giving the same information as it is required to give under section 231 to the persons entitled to vote, i.e. the total number of votes cast, the numbers of "Yes" and "No" votes and the number of spoiled voting papers. Our view is that the publication of a statement on the BMA’s website that action will be taken would not be sufficient to constitute notice to every relevant employer and instead each employer must be contacted individually.

The ballot will cease to be effective within four weeks of the close of the ballot (unless extended by agreement for eight weeks) and expires at midnight on the final day.

"Relevant employer" means any employer who it is reasonable for the employer to believe was the employer of any persons entitled to vote at the time of the ballot (s231A(2)). Where a union ballots members employed by different employers, the union must supply the information to each of the employers concerned. If the union fails to do so, the industrial action will not be regarded as having the support of a ballot in relation to that particular employer. A union may, therefore, still call on its members to take action where the employer of those members was informed of the ballot result, even if other employers were not informed.
16. **How much notice does a union need to give the employer, for it to be classed as legal industrial action - specifically in relation to notice to strike? What information does the union need to give the employer when calling employees out on strike?**

Unions must take such steps as are reasonably necessary to ensure that any affected employer receives within the "appropriate period" a "relevant notice" covering the proposed industrial action. "Appropriate period" is the period starting with the day on which the union informs the relevant employers of the ballot result, and ending with the 7th day before the (first) day of action. The notice must be received by any employer who it is reasonable for the union to believe is the employer of an affected employee (s 234A[2]). Where a union fails to give seven days' notice of strike action, the action will be unprotected and an injunction could be sought by an employer preventing strike action.

A "relevant notice" must contain essentially the same information as in the ballot notice (under section 226A) regarding categories of employees and their workplaces, together with figures showing the total number of employees, the number of employees in each category, and the number in each workplace. However, the relevant notice differs from the ballot notice in that it must give this information in respect of the "affected employees", who are those who the union reasonably believes will be induced to take part in the action. Therefore, it is possible that a greater number of employees will need to be included in the relevant notice than in the ballot notice as there may well be employees who will be induced to take part in the strike who were not entitled to vote or who are not even union members.

One thing for employers to consider is whether there are differences between the ballot notice and relevant notice in terms of the personnel. This could be relevant if for example junior doctors have rotated during the relevant period and are no longer employed by the particular trust.

Unions are only required to provide information in the relevant notice that is as accurate as reasonably practicable. There is no duty on a union to keep an up to date database of members. Section 234A(3)(a)(ii) allows unions to meet their obligations in relation to the relevant notice by referring to affected employees from whose wages the employer makes deductions from pay representing payments to the union ["check-off"]. Such information must enable the employer readily to deduce the total number of affected employees, the categories to which they belong and the number of affected employees in each category, and the workplaces at which they work, together with the numbers of affected employees at each workplace. In the case of non check-off employees, case law has determined that a union must provide a list of the number of employees, the number in each workplace and category, with an explanation of how the figures were arrived at, as the employer will be unable to readily deduce that information itself.

17. **Is there a long stop date for the effectiveness of a ballot? If the BMA wanted to call members out on dates in addition to those already given are they required to hold a new ballot? Does it make any difference whether the action is 'continuous' or 'discontinuous'?**
Under section 234, a ballot is 'effective' for the periods specified - i.e. four weeks or eight weeks with the agreement of the employer (or the special provisions where there are intervening court proceedings). Section 233(3)(b) states that the industrial action must begin within this effective period. However, there does not appear to be any long stop date for continuous or discontinuous action. The only requirement is that the employer is given at least seven days' notice of the action, so in the case of discontinuous action, either a full list of dates needs to be specified at the outset, or a separate seven days' notice is required for each date that was not originally specified.

If continuous industrial action is suspended by agreement between the employer and the unions and when the suspension date and the recommencement date are also agreed, no further notice is required to recommence the continuous action. In addition no further notice is required if the action has been interrupted by a court order. However, in any other circumstances, a further period of notice must be given before the continuous action is resumed.

If additional dates for strike action are proposed, the main basis on which they could be challenged by employers is whether the industrial action is the "same industrial action". If different workers/workplaces are involved, or the dispute has changed in some way from the current dispute, then a fresh ballot will be needed. A recent case offers useful guidance on this point. In Westminster Kingsway College v University and College Union [2014] the union and employer were in negotiations regarding a pay increase for the year 2013/2014. When an agreement could not be reached strike action was taken in December 2013. By February 2014 the negotiations had ended without resolution. When pay negotiations for the year 2014/2015 were opened and a strike was organised for October 2014 (the union relying on the ballot for the December 2013 strike), the employer applied for an injunction. The court ordered an interim injunction preventing strike action on the basis that it was not supported by a valid ballot. The industrial action for 2013/2014 stopped in February 2014 and the ballot for that action did not authorise the strike for October 2014.

This case is useful for employers where negotiations move on, and disputes evolve over time. Where the dispute has changed, employers can rely on this in challenging the validity of a strike on the basis that a previous ballot no longer covers it.

**INJUNCTIVE PROCEEDINGS**

18. On the basis that an injunction is seen as a last resort and we try to work with the BMA to get clarifications, please clarify the 'cut off date' (i.e. the date by which we can challenge any breach of requirements) and the basis for that?

There is no cut off date but the Code of Practice advises employers to raise any challenge about breaches of the requirements promptly. You may challenge the breach of requirements at any point following service of the ballot notice or the notice of strike action, but in the latter case, clearly the sooner the better to ensure that you have time to send a letter before action and, if necessary, pursue an application for an injunction.
19. What are the practicalities of bringing injunction proceedings?

Each Trust would need to apply for its own injunction and if there are similarities in the issues being challenged by a number of NHS bodies, it would be wise for Trusts to consider making financial contingencies for proceedings and considering with legal advisers how this can be managed in the most cost efficient way (e.g. pooling of a budget for some organisations to take up particular challenges).

Each Trust would need to support their application with witness evidence regarding the alleged breach of procedure.

CONTINGENCY PLANNING

20. If the Trust’s payroll department holds the names of employees for whom deductions are made regarding union subscriptions, can the Trust use this information to identify junior doctors for the purpose of better contingency planning and if it does use this information, would it amount to a breach of the DPA?

Information as to whether a person is a member of a trade union is sensitive personal data under the DPA. The conditions for processing such data lawfully include that explicit consent to processing having been given by the data subject (the employee). Agreement and notification by an employee to the Trust to deduct union subscriptions from salary would not on its own be sufficient for the employer to rely upon to justify the disclosure of information to the union. In the event of a request, we recommend that each employer should check the terms of any consent to see whether wider disclosure is permitted. If not, further consent is required.

There are other statutory conditions which allow the processing of sensitive personal data. These include where disclosure is necessary for the purpose of performing any legal obligation imposed by law on the employer. However, it is difficult to see how an employer could sustain an argument that they were complying with a legal obligation when there is no obligation on the employer under TULRCA to provide information - that duty falls upon the unions not the employer.

21. Could we send an email to junior doctors persuading them not to strike or take action short of a strike?

Junior doctors can be contacted to try and discourage them from taking part in industrial action but the language used by Trusts should be measured and conciliatory.

In trying to persuade people not to take action, Trusts may wish to consider the following:

- expanding on the bigger picture, for example the reputational and financial damage to the organisation (and inconvenience to its service users and patients) if the strike goes ahead, with attendant adverse consequences for future pay and employment prospects.
- explaining that if junior doctors are opposed to the strike, it is
important they use their vote and therefore ensure the strike is not approved by default on a low turnout. Supporters of the strike are generally more likely to vote than those opposed.

- reminding junior doctors (but not in a confrontational fashion) that they will not be paid while they take part in a strike.
- reminding junior doctors of their duty to ensure that harm to patients is not caused and of the guidance issued by the GMC.

22. **Can volunteer personnel be legally requested and/or offer to help keep a service running during industrial action by substantive personnel (if skills and training are appropriate)? Can we redeploy substantive staff?**

Trusts faced with industrial action will no doubt want to consider reorganising or bringing new staff in to deal with the shortage of employees owing to the industrial action.

There is only one legal restriction on the way in which employers approach this situation and that is under paragraph 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 which prevent an employment business from supplying the employer with agency workers to perform the duties normally performed by a worker taking part in a strike or other industrial action. According to these Regulations, this restriction is imposed only on the employment business, not the employer although there has been commentary that the employer may be liable for aiding and abetting the offence.

“Employment business” under the Regulations means an employment business under section 13(1) and (3) of the Employment Agencies Act 1973 which is “the business...of supplying persons in the employment of the person carrying on the business to act for and under the control of other persons in any capacity”. This definition is sufficiently vague that it could include any Trusts supplying staff to others and in our view covers NHS Professionals.

In the 1973 Act the definition of employment business contains exceptions under section 13(7) and as originally enacted an exception was included for any agency for the supply of nurses under the Nurses Agencies Act 1957. However, this section was repealed by the Care Standards Act 2000. The result is that nurses agencies will fall within the definition of employment agencies and businesses for the purpose of the Regulations.

It is open to Trusts to use in-house banks and volunteer personnel to cover staff absences due to strike action. Using locums will not be unlawful unless they are supplied through an employment business for the purpose of doing the work that would have otherwise have been performed by those taking action. To the extent that a certain number of agency staff are used by Trusts on a permanent basis to supplement staffing levels, employers may continue to use these workers. However, such agency staff should not be moved to cover the work of an employee who is taking industrial action. Instead they should be left in their role, and permanent staff who are not taking part in the strike may be moved to cover a staffing shortage in a particular ward.

Some Trusts are looking at alternative ways to increase capacity such as increasing the numbers of phlebotomists, pharmacists and doctors’ assistants on wards, plus additional secretarial and IT support. It is also
possible to approach GPs to provide cover, which is permissible as long as via direct engagement rather than an agency.

Where Trusts are planning to move workers to deal with staff shortages one important point to consider is the skill set of the individual to ensure that they are capable of performing the role in question - clearly this is particularly pertinent in the case of junior doctors. We recommend that a worker’s skill base is established and a risk assessment carried out to ensure that they are competent.

The RCN has advised its members that they should attend work but should not undertake any work outside their professional competency or if it falls outside their contract of employment. They should also not undertake any voluntary overtime if it is to cover the work of striking colleagues.

23. **Can we ask junior doctors if they intend to take industrial action?**

There is no objection to asking staff in advance whether or not they intend to strike, although they will not be obliged to answer or may change their mind at the last minute. The request should be made as widely as possible given that both BMA members and non-union members may strike or take action short of a strike (see below). Trusts should not put pressure on staff to confirm whether or not they intend to strike; requests should be made politely and staff should be informed that they are under no obligation to inform the Trust of their intentions but are being requested to do so in order to assist the Trust with its planning. Junior doctors should be reminded that the BMA is encouraging its members to inform their employer if they will be taking strike action – the BMA’s guidance on this point states “the BMA has advised junior doctor members who intend to take part to inform their clinical manager in advance to allow cancellation of NHS commitments that cannot be delivered on a day of action”

24. **Can student nurses take action in support of the junior doctors?**

We understand that at least one university has permitted or is encouraging its student nurses to walk out of their placements within trusts for a short period on 10 February in support of the junior doctors and to protest against the current situation in relation to bursaries. This would not be protected action as the universities are not a party to the dispute between the junior doctors and the Trusts. However, as the students are not employees, either of the universities or the Trusts, there is little action that can be taken against them, particularly if their actions are supported by the university. In theory, Trusts could terminate their placements, or terminate the relationship with the university, but in practice this is unlikely to be a workable solution. We would recommend that, where this is an area of concern, Trusts should speak to the universities to express their concerns, and also to students to remind them of the need to put patient safety first and the risks to patients if they do not attend at a time when the Trust is likely to be understaffed.

**PICKETING**
25. **Is there a maximum number of picketers permitted?**

Under section 220, picketing (which will attract immunity from liability for the industrial action torts conferred by section 219) will be lawful where it is undertaken at or near (not on) the place of work by:

1. a worker of the employer,
2. an ex-worker of the employer who has been dismissed in connection with the trade dispute, or
3. a trade union official accompanying someone under (a) or (b).

The purpose of picketing can only be to obtain or communicate information, or to persuade any person to work/abstain from working. In addition, picketing must be done peacefully (with no threatening or intimidating behaviour).

Section 220 makes no reference to the number of pickets allowed on a picket-line. The reference to “peacefully” means that large numbers of pickets can make a picket line intimidating which is why the Code of Practice on picketing (https://www.gov.uk/government/publications/code-of-practice-picketing) states that there should be a maximum of six pickets at each entrance/exit of a workplace.

The Code of Practice does not make it unlawful to have more than six pickets at the picket line nor is less than six a guarantee of lawfulness. The Code of Practice is instead a guide to the number of people that should not intimidate others trying to attend work and cross the picket line. Courts will usually try and limit a picket line to six.

26. **Are picketers allowed to have supporters with them?**

Unless an individual falls within the three categories identified above, they will not be lawfully picketing. A "supporter" who does not fall within the scope of section 220 would have no legal right to remain at or near the Trust's entrances/exits. They could therefore be moved on by police and are potentially committing a civil or criminal offence. There is no tort or crime of unlawful picketing. Instead there is a loss of statutory protection from the industrial torts under section 219 and pickets leave themselves exposed under other torts and criminal offences. Whether an offence actually takes place will of course depend on what happens on the picket line.

27. **Can pickets stop deliveries?**

Pickets cannot impede essential services. If a service is non-essential the picket line can try and persuade the supplier not to enter the workplace but it cannot stop the supplier from entering. The overall requirement of section 220 is to picket peacefully.

**STRIKE ACTION – PAY**

28. **An employer can withhold pay for any day on which the employee takes part in a strike. What is a defined as a ‘day of action’?**

Employees who participate in industrial action will be in breach of their
employment contract in failing to perform their duties. Trusts are not obliged to pay employees during the time they are taking part in industrial action. There is no statutory definition of ‘day of action’ but it is safe to assume that the day in question commences at midnight and runs for 24 hours.

29. **If the ballot were to lead to industrial action for part of a day, should Trusts accept partial performance of a shift and simply deduct part of that day’s pay from the striking doctors’ salaries, or can Trusts take the view that this partial performance is not acceptable and that a whole day’s pay should be deducted. Do we have to show deductions for industrial action on the employee’s payslip?**

Under section 8 of the Employment Rights Act 1996, employers are required to provide employees with an itemised pay statement at or before any time at which any payment of salary is made. Section 8(2) states that particulars should be contained of any fixed or variable deductions from the gross amount and the purposes for which the deductions are made. An employee who considers that their employer has failed to comply with the requirements of section 8 may make an application to the Employment Tribunal. Section 12 ERA provides that an Employment Tribunal has the power to make a declaration of non-compliance with section 8 and, where appropriate, award compensation up to the amount of the unnotified deduction.

In the event that an employee takes industrial action and their salary for that month is reduced accordingly, this is unlikely to amount to a “deduction” that must be described on the payslip. An employee who takes industrial action is not entitled to be paid for that time and, accordingly, their gross salary for that period will be lower than their normal entitlement. In this case it should be sufficient for the payslip to display the reduced gross salary for that month.

Where the salary for the month in which the industrial action takes place is not reduced, this will result in an overpayment of salary for that period. In these circumstances, section 14(1) ERA provides that an employer is lawfully entitled to deduct the amount of the overpayment from a later payment of wages. Any such adjustment will amount to a deduction for the purposes of section 8 and employers would therefore be obliged to set out the deduction and the reason for it on the payslip.

We are aware that the ESR does not allow for deductions which are made for industrial action to be shown on the employee’s payslips. If the reduction in gross pay is made in the month the action is taken there may be no problem, if the reduction is not made in the month in which the action is taken, it may be possible for Trusts to argue that junior doctors who have taken part in industrial action clearly know the purpose of the deduction when it is made, assuming they have been informed that they would not be paid for any time they spent on strike action. There nevertheless remains a risk that Trusts could be liable to make repayments of deductions to employees.

One way to mitigate the risk would be for employers to send a covering note with the payslip, setting out the amount of the deduction and the reason for it. The practicalities of this may of course depend on the numbers of employees who take action at a particular Trust. This would not wholly remove the risk as section 8 requires that the information be
set out on the payslip itself and not in a separate document; however, it
would significantly minimise the risk of an Employment Tribunal
making a monetary order. If it is possible to make a note on the payslip
itself, this would of course be preferable.

It is important that this information is provided to the junior doctors at
the time, or before, the payment is made, so Trusts should take steps
as early as possible to identify which employees are affected.

30. Could junior doctors challenge a partial deduction of salary
in the courts?

An employee would not be able to bring a claim for unlawful deduction
of wages in the Employment Tribunal. This is because there is an
exception under section 14 of the Employment Rights Act 1996, in
respect of deductions made on account of an employee taking part in a
strike or other industrial action. However employees could bring claims
for breach of contract in respect of unpaid salary in the High Court or
county court.

31. How much should be deducted?

Where partial performance is not acceptable and where the employees
are paid an annual salary, then salary is deemed to accrue from day to
day, and this means calendar day, not working day (section 2,
Apportionment Act 1870) which is 1/365th of the annual salary for every
strike day.

However, if the contract indicates a contrary intention, the
Apportionment Act can be disapplied. It is therefore important to
consider whether the contract and/or policy documents set out how a
day’s pay is to be calculated. If it does, it may not be difficult to argue for
a more realistic deduction based on the number of working (not
calendar) days in a year. In Cooper and others v Isle of Wight College
[2008], the High Court considered that “where there is a definition of a
normal working week in the contract and a contractual entitlement to
holiday pay”, this would indicate an intention to disapply the
Apportionment Act and so “the salary payable whether expressed
annually or otherwise or whenever paid should be apportioned over the
days of the normal working week throughout the year”.

Section 340 of the current junior doctors’ contract incorporates the
apportionment provisions contained in section 54 of the Whitley Council
General Conditions of Service. In the case of monthly paid employees,
this means that a day’s pay should be calculated as the monthly sum
divided by the number of days in the particular month. Unless agreed
locally, Trusts should not calculate a full day’s pay by reference to the
number of working hours.

Junior doctors are not entitled to be paid banding supplements or other
payments such as pension contributions for any period on strike action.

A claim for unlawful deductions in relation to wages which have been
withdrawn for taking part in industrial action cannot be brought in the
tribunal and should instead be brought in the county courts, which
carries a greater risk in terms of costs

32. **What steps do we need to take if we do not want to accept partial performance?**

As we have stated above, the employer may wish to argue that only working part of an employee’s shift equates to partial performance of his/her contract. If an employer warns employees in advance that part performance will not be acceptable and they continue to work only part of the shift, the employer may accept the breach of contract and deduct pay for the entire shift. This would not involve physically removing the employees from the premises but they would need to be told that partial performance is not acceptable and that any work they do would be voluntary. This may well inflame a situation as it would amount to a "lock out" by the employer and would not assist in maintaining service levels. Employees would need to be informed in advance of the action that part performance would not be acceptable.

**WHO IS PARTICIPATING?**

33. **Can non-union employees take part in industrial action?**

TULRCA makes no distinction between union members who have been balloted and non-union members in terms of the protection given to those who participate in industrial action. A non-union member of staff will be protected if they take part in strike action and there are amongst those taking part in the strike action members of a trade union by which the action has been authorised or endorsed.

However, an employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike. Section 237 deals with unofficial action. It is important to note that the same industrial action can be official for one employee and unofficial for another - what is important is to identify whether 237(2) applies to a particular employee. Section 237(2) states that a strike or other industrial action will be unofficial in relation to an employee unless:

1. he is a member of a trade union and the action is authorised or endorsed by the union;
2. he is not a member of a trade union, but there are among those taking part in the industrial action, members of a trade union by which the action has been authorised or endorsed.

The result of section 237(2) appears to be that employees who are members of unions which have not authorised or endorsed the action will be taking part in unofficial action if they go out on strike. If they are taking part in unofficial action, they will not have the right to complain of unfair dismissal to an employment tribunal if their employer dismisses them. In our view members of unballoted unions do not gain protection simply because they are members of a trade union. Employees who join a union which has authorised or endorsed the action following the ballot but prior to the action will be protected; however any employees who join a union which has not authorised or endorsed the action will not receive protection.

Whether a union has endorsed or authorised an act is a question of fact but it is a separate matter from whether they have balloted about the
industrial action. If a union endorses or authorises industrial action but has not balloted its members about this, it will lose its immunity under section 219 from inducing breach of contract. Unions that have not balloted but who endorse or authorise the action and, as a result, their members go out on strike, would lose their immunity.

34. Can BMA members who have not been balloted take part in the industrial action?

Strictly, yes. However, importantly the BMA in its national guidance to hospital doctors not involved in industrial action (see link to this guidance at the start of these FAQs) is advising that its members who have not been balloted should not participate in the action. This is helpful for Trusts who should draw this to the attention of its BMA member employees who have not been balloted.

In addition, the BMA cannot call out or induce to strike any members whom it has not balloted. If it does so the action will no longer be protected. So, for example, the BMA cannot encourage its consultant members to take action in support of the junior doctors, although strictly there is nothing to stop consultants who are BMA members or who are not members of any union, from taking action in support of their colleagues.

Section 232(A) provides that industrial action shall not be regarded as having the support of a ballot if:

1. the union member was a member of the trade union at the time the ballot was held;
2. it was reasonable at that time for the trade union to believe he would be induced to take part in the industrial action;
3. the union member was not accorded entitlement to vote in the ballot; and
4. he was induced by the union to take part in the industrial action.

35. If someone was on planned annual leave/maternity leave during the period of any industrial action, will this remain and be paid under normal arrangements?

In terms of pre-booked annual leave, it would ordinarily be advisable for this to remain and be paid as such, even if it coincides with industrial action as long as the employee does nothing which is consistent with associating with the strike or taking part. If employees indicate that they will be participating in strike action (for example by responding to a letter of enquiry from the employer), then they can be assumed to be on strike rather than on annual leave.

To illustrate this, in the case of Hulse and anor v E Hillier and Son (Engineering) Ltd, an employee had a day’s holiday booked on a date which was subsequently selected for strike action. On the day itself he contacted management to check that the holiday was still available to him and then went to work to collect some tools. He spoke to workers on the picket line. It was found that this action did not mean that he had associated himself with the workers. Instead he had made a positive decision to take holiday rather than join the strike.
However, under the *Boltons Roadways Ltd v Edwards and ors* case (see below) an employee who is not contractually required to work because of holidays or sickness can still be viewed as taking part in a strike if he or she associates him or herself with the strike. Whether Trusts withhold pay in relation to staff who have holiday booked during a day that is selected for industrial action will depend on whether there is any evidence that the employee has been taking part in the industrial action in advance of the day or on the day itself.

The same approach could be taken to employees who are on maternity leave. If an employee on maternity leave associates herself with the strike, it would be open to treat her in the same way as someone who has prebooked holiday and withholding pay will depend upon the evidence that the employer has that she has associated with the strike.

In terms of annual leave requests which are submitted in the run up to a strike day and which will coincide with it, there is nothing to prevent a Trust taking a policy decision that such requests will be refused using the argument that the industrial action will cause staffing issues within the Trust and therefore no further annual leave can be approved for that day.

If an employee is absent without permission during a period of industrial action, it is legitimate to ask them if they were on strike on the relevant day or days for the purposes of establishing whether pay should be withheld. Unless there is evidence to the contrary, it would be acceptable to assume that the employee is participating in strike action and that their pay should be withheld.

36. **Does this advice change in relation to sick leave?**

No - the key issue is whether the employee has taken part in the action or indicated a prior intention to do so, even if they are off work ill. To illustrate the case law approach to this issue, in *Hindle Gears Ltd v McGinty and others*, the EAT held that an employee who had been off sick and had presented certificates to that effect since well before a particular strike date began was not participating in the action. In this case it was held that the employee attending work for the purpose of handing in his medical certificate who spends some time with pickets could not be said to be participating in the industrial action.

On the other hand, an employee who has been taking part in the action, or indicated an intention to do so, is likely to be held to be still taking part even if he or she happens to be too ill to work. In *Bolton Roadways v Edwards and others* the EAT held that an employee was taking part in industrial action even though he phoned in sick on the morning of the strike. The tribunal had found that he was taking part because, before falling sick, he had actively associated himself with the action, offering support and advice to a group of pickets. The EAT held that the fact that the employer did not know of these activities was irrelevant.

37. **How can this process be managed? Will doctors give medical certification for one day when the current process is self-certification for 7 days? - and if they do, should we expect staff to take extra time off to get the medical certificate? This will also get complicated if the strike day is in the middle of a period of self-certificated leave?**

Trusts may wish to introduce new arrangements for reporting sickness
on the first day of absence if this coincides with the first day of
industrial action. Trusts may consider introducing a requirement that
any period of absence during industrial action should be supported by a
doctor’s certificate (as an exception to the practice of allowing self
certification for the first seven days of sickness) or that such an
employee must report to a nominated occupational health advisor.

Such a policy should be introduced in advance of any dispute so that
employees have notice of this requirement. Trusts who are facing
difficulty on this issue may consider offering to pay for any charge made
by the doctor for a medical certificate to ensure that the change in the
sickness reporting arrangements are seen to be fair and reasonable in
the circumstances. Employers should bear in mind that they could incur
a significant cost where the requirement to provide doctor’s certificates
during strike action applies to all staff (and not only those who are in
the relevant department or who are union members due to strike that
day) to try and discourage those who go out in sympathy of striking
employees. For those employees who have commenced a period of self
certification prior to strike action, unless there is evidence to the
contrary, in line with the McGinty case above, it is recommended that
they should not be assumed to be participating in strike action. It is
legitimate to ask employees if they were on strike for the purposes of
establishing whether pay should be withheld.

38. **Can we stop junior doctors from going out on strike and then
undertaking private practice work or carrying out locum work for another Trust?**

There are no reported Court cases that we are aware of, dealing with
the point. Regarding the private practice work, an employee could
potentially still meet the requirement under s238A(91) TULRCA that
he/she is taking protected industrial action by withdrawing his/her
labour “if he commits an act which, or a series of acts each of which, he
is induced to commit by his or her union, provided the union’s action in
doing so is protected under S219 from liability in tort for inducement to
break, or interfere with, contracts”.

We would suggest that, if any Trust is concerned or has evidence that
junior doctors may be proposing to work elsewhere on the day, they
should flag this with their local BMA rep/officer and explain that the
Trust’s position will be that it will be very concerned if any doctors are
absent not because they are striking at all, but because they are
choosing to work elsewhere, and seek confirmation from the BMA that
they will be advising their members against this. With regard to private
practice, the Trust could also point out that it would be a deeply
unattractive position for junior doctors to find themselves in, if they
were found to be taking the opportunity to work in paid private practice
when striking about a dispute over their NHS pay.

Regarding locum work, in our view there is a stronger argument
(although again this is untested) that the doctors would not meet the
requirement under s238A(1) and that they would therefore lose
protection under TULRCA. We would recommend flagging this up with
the BMA, as above. Trusts should also be aware of this when
considering covering the duties of striking workers from an in-house
bank.

39. **Is a trade union official entitled to time off for activities to**
prepare for industrial action?

Under section 168, union officials are entitled to paid time off for carrying out duties concerned with negotiations with the employer related to matters falling within section 178(2) (collective bargaining) and the performance on behalf of the employees of functions that are related to matters falling within section 178(2) that the employer has agreed may be performed by the trade union. Section 168(3) stipulates that the occasions on which and the purposes for which time may be taken off must be reasonable in all the circumstances.

Whilst it has previously been found that a union meeting to consider proposals for strike action was capable of constituting a union duty under section 168 so the officials were entitled to paid time off, it was suggested that time off planning industrial action directly damaging to the employer might sometimes be reasonably refused.

The duration and frequency of the time off will have a bearing on whether it is deemed to be reasonable or not under section 168(3) and therefore whether an employer must permit the time off.

Where the union official is taking part in industrial action, he/she will not be entitled to paid or unpaid time off work.

TAKING ACTION AS A RESULT OF INDUSTRIAL ACTION

40. **Trusts want to offer overtime following industrial action in order to clear backlogs but do not want to offer it to anyone who took industrial action, on the basis that this would in effect be paying them for taking action. Can they do this?**

TULRCA provides protection against unfair dismissal for those taking part in official strike action (section 238A). TULRCA also provides protection against detriment and dismissal for workers in relation to union membership or activities (sections 146 and 152). TULRCA does not, however, contain a separate provision which offers protection against any detriment short of dismissal which is taken by an employer because a worker has participated in industrial action.

Refusing to offer overtime to a worker who has taken industrial action may be viewed by the relevant employee as a detriment in that they are being put at a disadvantage. The question arises whether doing so falls under section 146 and constitutes union activities. Again, TULRCA does not contain a definition of union activities.

Section 146(1) states that a worker has the right not to be subjected to any detriment by his employer for the sole or main purpose of penalising him from taking part in the activities of an independent trade union at an appropriate time.

The definition of “appropriate time” (outside working hours or at a time where the employer agrees to the worker taking part in the union activities) causes difficulties for those who take part in the strike and as a result it is unlikely that those taking part in the action will benefit from section 146.

That point aside, there is an EAT case which has looked at the issue of whether industrial action falls under section 146. In *London Borough of Islington v Hutchings* it was submitted that there is a clear distinction
between that which falls within the description of ‘trade union activity’ and that which falls within the description of ‘participating in industrial action’. The EAT found that merely participating in industrial action, as a trade union member, cannot of itself, fall within the provisions of section 146.

The result of the above is that junior doctors who are not offered overtime because they were taking part in the strike will not have a remedy as far as their statutory rights are concerned.

There will be the usual problems about constructive dismissal (but we would query whether a doctor will really argue that refusal of an overtime shift constitutes a repudiatory breach of their employment contract) and in addition Article 11 of the ECHR could come into play. There is an argument that TULRCA is inconsistent with Article 11 of the ECHR in failing to provide protection from detriment for taking part in a strike. The European Court of Human Rights has determined that other national legislation which permits the imposition of a detriment for exercising the right to strike is an impermissible impediment and amounts to an unjustified breach of Article 11. There is always, therefore, a chance (albeit a slim one) that those junior doctors who are not offered overtime challenge their employing body on the basis of Article 11.

41. Can Trusts defer a junior doctor’s incremental date if they go on strike?

To some extent this will depend on a Trust’s usual practice – would the Trust tend to defer incremental dates where the doctor is absent for other reasons such as sickness absence? If not, then it may be more difficult to justify deferring incremental dates as a result of absence due to industrial action. However, as stated above, there is no protection under section 146 TULRCA for workers who suffer a detriment whilst taking strike action. Accordingly, there is little legal risk in deferring incremental dates. The decision whether to defer or not may depend on whether Trusts believe this is likely to deter sufficient numbers of junior doctors from participating in the strike action, or whether it is likely to cause further unrest.

ACTION SHORT OF A STRIKE

42. What other action could the BMA take instead of a strike?

A strike is defined as any concerted stoppage of work but industrial action can take many other forms, for example, go slows, work to rule or a ban on overtime. ‘Action short of a strike’ is a term used to cover industrial action which does not constitute a stoppage but where work is affected in some way. Unions are not obliged to inform employers of what form any action short of a strike will take, although in practice they will often do so. For example, in October 2014 Unison announced that there would be four days of action short of a strike from Tuesday 14th October to Friday 17th October, focussing on making sure that members took their breaks. This was therefore ‘work to rule’ in that the employees were complying strictly with the express terms of their contracts of employment.
If junior doctors come into work and ‘work to rule’, will there be a breach of contract?

It is important to note that, even if there is a breach of contract, provided a “work to rule” is covered by a legitimate ballot and the BMA has given due notice of action under TULRCA, those doctors taking action are protected under the statute. The relevant issue here is whether the employer can withhold pay - and it will be entitled to do so if there has been a breach of contract.

This depends in part on their contract of employment and how hospital staffing operates on a day to day basis. Under the Working Time Regulations 1998 workers are, of course, entitled to rest breaks of 20 minutes for every six hours of work and may be entitled to longer rest periods under their contract of employment. Where rest breaks are factored into the running of the particular area so that legal staffing levels are maintained at all times, disruption should be kept to a minimum. The taking of a break should already be accounted for and the doctors will no doubt seek to argue that they will not be in breach of contract. Where rest breaks are not rostered into the junior doctors’ shift and it is instead left to the junior doctors to arrange and take breaks as and when they can, the taking of a rest break which jeopardises compliance with minimum staffing levels is more likely to amount to a breach of contract.

We do have a number of decisions on work to rule which support employers in the view that work to rule will constitute a breach of contract.

The first is Secretary of State for Employment v ASLEF where employees were urged by unions to ban overtime, rest day and Sunday working. The effect of this action was mass disruption even though the employees had been working to a literal interpretation of their rule book. The decision of the Court of Appeal was that although they had been working to their contracts of employment the overall effect of the actions had breached an implied term of the contract that the employee would co-operate with the employer and therefore the employer was entitled to withhold pay.

In British Telecoms v Ticehurst it was found that an employee had breached the implied duty of faithfulness and cooperation and that this meant that BT was entitled to withhold pay. Whether the action of taking breaks breaches the employee’s contract of employment will, in our view, depend on the way in which a ward is run. Where breaks are factored in, and disruption will be minimal it is unlikely to constitute a breach of contract.

If employers receive notice from the BMA of proposed action short of a strike, it will be essential to review rotas in order to establish which junior doctors will be, or will be likely to be, in breach of their contract and which will not.

**ACTION SHORT OF A STRIKE - WITHHOLDING OF PAY**

If the employee is taking part in action short of a strike, can pay be withheld?

Where the employee is in breach of contract in taking part in action short of a strike, this raises the possibility of making a deduction from
pay for the period during which the employee is not performing his/her duties by taking part in the action short of a strike.

In working to rule by taking rest breaks employees are not partially performing their contract but may be in breach of contract as is explained above. This is not therefore a matter of deduction for partial performance but rather whether a day’s pay can be deducted. This point is discussed at questions 28 to 32 above. One option available to employers faced with this scenario is to make clear that it will not accept work to rule and that employees should not attend work - this is known as a lock out - and that, if they do attend, attendance will be regarded as purely voluntary for which they will not be paid. However, the risk, of course, for employers in the healthcare sector in refusing to accept work to rule in this way is that patient safety and care could be further compromised. The junior doctors themselves will be conscious of any duties they may have under their code of conduct and should also be aware of the criminal offence which can be committed by an employee under section 240 in terms of endangering life or causing serious harm.

45. What steps should therefore be taken in the event of proposed action short of a strike?

Employers are likely to need to negotiate locally with BMA representatives to agree a protocol on how to deal with any action. It will be important to try to agree the following points:

- Which departments and rotas will be affected
- What constitutes emergency/urgent care
- What is expected of junior doctors who are due to work
- How the deduction from pay will be calculated in respect of partial performance
- How holidays and sickness will be dealt with

**IMMUNITY**

46. Do the immunities associated with a legal ballot provide legal protection against any action taken by the regulatory bodies for health professionals?

The protection offered to employees who take part in official industrial action is in relation to dismissal by their employer in that the employee can bring a claim for unfair dismissal. TULRCA does not confer protection on an employee for action taken by his/her regulatory body. If regulatory bodies threaten or take action where an employee is lawfully striking, it is difficult to see how the regulatory body can take action against the employee. However, where there is a breach of contract, for example, an unreasonable refusal to carry out working duties normally expected of the employee, which leads to endangerment of life or injury to a patient, this may put the decision to take action by a regulatory body in a different light.
47. **If the ballot papers invite support for strike action only, does immunity apply only to strike action and not to any action short of a strike?**

Immunity under section 219 only applies where the requirement for a ballot has been complied with and under section 226 it states that industrial action shall be regarded as having support of a ballot only if the majority of those voting in the ballot answer “yes” to industrial action of the kind to which the act of inducement relates. Therefore, if a union were to try to call out members to take part in action short of strike action where the ballot only refers to strike action, then the action will not have a lawful mandate and the risk for them will be that they lose their immunity under section 219.