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## INTRODUCTION

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). We have split the FAQs into three shorter sections of guidance to break down the advice and have produced an accompanying flowchart as a summary of the information referenced in the FAQs.

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 NHS organisations, in particular the need for early local discussions with the relevant unions to gain a clear picture of the likely impact of any action at a local level (how many staff are expected to take action, which rotas/departments will be affected, for example) and to agree wherever possible, a local protocol for ensuring that care is not disrupted so as to endanger human life or cause serious bodily injury.

The information provided in these FAQs applies when unions conduct a ballot of their membership under section 226A of TULCRA to seek to obtain support for strike action and action short of full strike action. The legislative requirements around statutory ballots do not apply to “consultative” or “indicative” ballots which are carried out in order for unions to assess whether their membership would “in principle” be prepared to take industrial action. Any union would be required to undertake a further statutory ballot in accordance with the legislation before they could call for any form of lawful industrial action to be taken should they have undertaken a ‘consultative or indicative’ ballot first.

## SECTION 1

### 1. BALLOTS

#### 1.1 Do we need to provide time off for union representatives in relation to this matter?

*There is no right to time off for trade union representatives taking part in industrial action. However, where a union representative is not taking part in industrial action but seeks to take time off to take part in campaigning regarding the ballots or attending meetings this can be unpaid as a trade union activity. The amount of time off and occasions which are taken by representatives must be reasonable in all the circumstances.*

Trade union members are entitled to unpaid time off to take part in the activities of the union and activities where the individual is acting as a representative of the union under section 170(3) of TULRCA. This will include preparation for industrial action.

Trade union representatives are entitled to paid time off work under section 168 where employers recognise the union for trade union duties, such as matters which the employer has agreed are the subject of collective bargaining, for example negotiating terms and conditions of employment.

The amount of time and occasions which are taken by members must be reasonable in all the circumstances. It is likely that members will seek to take time off to take part in campaigning regarding the ballots or attending meetings which can be unpaid as a trade union activity. We recommend that employers and trade union representatives come to an agreement regarding what is “reasonable” time off work giving consideration to the workloads of the team in which a trade union member works and the needs of their colleagues and managers. The [ACAS Code of Practice on time off for trade union duties and activities](#) provides helpful guidance for managing these issues in the workplace.

Employers are not obliged to provide union representatives with access to all areas of the workplace in order to campaign. A supportive approach to permitting campaigning on site and in a restricted area is recommended but it would be reasonable for organisations to take the view that representatives should not attend wards or other service areas where there is a risk that they will interfere with service provision.

#### 1.2 How much detail must be provided by unions about who will be balloted? Where the Unions tell 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.*

In the ballot notice, unions must give reasonably accurate numbers of employees to be balloted, broken down by workplace and job categories (i.e. broad job titles or similar description) unless DOCAS information is relied upon. There is no statutory definition of “categories”. In the 2019 case of *BA plc v British Airline Pilots’ Association*, the

Court of Appeal (CA) dismissed a claim by BA that the pilots union (commonly known as BALPA) was in breach of its duty to notify BA of the categories of pilots it had balloted for strike action. In its ballot notice, BALPA provided a list of the ranks of pilots to be balloted. BA argued that this was not sufficient because, among other things, the notice did not state to which fleet the pilots were assigned. BA argued that without this information it was unable to plan to deal with the strike and therefore the ballot notice did not comply with requirements of section 226. The CA emphasised that the word “categories” is not defined in the legislation, but is a broad and flexible term. An employer will almost always be able to complain that more detailed information or a different method of categorisation could be used. The approach must be an objective rather than subjective one – was the information provided sufficient to meet the statutory requirements? In this case it was. In fact, the categorisation used by BALPA was the established way of referring to pilots used by BA and the pilots’ contracts of employment did not specify the fleet to which they were assigned. The statutory requirements were met and BA’s claim for an injunction failed.

In most cases, unions are likely to refer to job titles to identify different categories of members who will be balloted. Under section 226A, the lists of categories and the workplaces which must be provided in the notice of the ballot are in relation to “employees concerned” which are employees of that particular employer.

### 1.3 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?

The [Code of Practice: Industrial action ballots and notice to employers](#) recommends that it would be good industrial relations practice for an employer who believes the notice it 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.

The unions have to provide information which is as accurate as reasonably practicable in light of their databases (which are sometimes out of date). Employers should consider what information the unions are likely to have in their possession and whether they feel that the unions 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 unions which would enable them to provide more accurate information?

Only substantial errors will be enough for a court to override the employees’ article 11 rights under the European Convention on Human Rights to take collective action by granting an injunction, so trivial errors will normally be ignored. Employers should also be aware of section 232B 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 taken together they are, ‘accidental and on a scale which is unlikely to affect the result of the ballot’.

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.

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 were prepared to 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.

### 1.4 We hold information which appears to be more accurate than the information in the union's possession – should we share this with the union and how should the organisation respond to a union's request for information?

*Information sharing may help you to plan for industrial action and put you in a stronger position to challenge any failure to meet the necessary legal requirements but it is essential to comply with data protection legislation*

There is nothing in any ACAS or other authoritative guidance which suggests that an employer ought to disclose information it has to a union in connection with such a ballot but for a number of reasons, it may be better to ensure that the information in the union's possession, even where this requires the organisation to provide it, is better than the information which the union is holding.

Provided the employer can provide information in a way which does not disclose personal data (i.e. it can provide anonymous data), where 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 in good time, the union should then go through this to update/correct the information before any ballot notice or strike notice is served. If they do not carry out a further filtering process in readiness for service of the notices, the employer can argue that the union has not made reasonable attempts to make the notices 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, employers may have grounds for an injunction and should obtain legal advice on their position.

Data protection issues aside, providing better information may help you to plan for industrial action. Where the union fails to ensure that 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.

### 1.5 Who can be balloted?

*The unions must ballot all the members who it is reasonable at the time of the ballot for the union to believe will be induced to take part or continue to take part in the industrial action in question (section 227).*

The union is not restricted to only balloting any or all members who are directly affected by the trade dispute. In deciding who should be entitled to vote in the ballot, the union can choose to ballot a wider group than those directly affected by the matter in dispute (effectively encouraging those members to strike in support of their directly affected colleagues) if they reasonably take the view that those members will be induced to take part in the industrial action.

There is no time limit imposed on recently recruited union members: if they are a member who will be induced to take part in industrial action, they can vote in the ballot. Some members may be recruited during the ballot period and unions may impose a cut-off date (e.g. 7 days before the end of the ballot) after which no new ballot papers are sent out.

### 1.6 How accurate do the Unions need to be in terms of who they send ballot papers to?

*The unions are required to take 'reasonable steps' to ensure they ballot the correct members. Small and accidental errors are permitted and will not invalidate the process.*

Under section 230(2), so far as is reasonably practicable every person entitled to vote in the ballot (as defined in FAQ 1.5 above) must have a voting paper sent to them 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 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 it knew 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 *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 may have a substantial impact, the ballot could be open to challenge. Employers should consider whether the error undermines the democratic mandate for action. If it does, it is likely to be a substantial error that the court will take into account.

### 1.7 Does the ballot paper have to be in a specific format?

*Yes. The union must provide the employer with a sample ballot paper which contains the required information no later than three days before the opening day of the ballot.*

In order for the ballot paper to be valid, it must ask one or both of the following questions:

- whether the member is prepared to take part in a strike with only a 'yes' or 'no' answer
- whether the member is prepared to take part in or continue to take part in industrial action short of strike with only a 'yes' or 'no' answer

The ballot paper must also include the following:

- a summary of the matters in dispute;
- the period or periods within which industrial action is expected to take place;
- the address to which it must be returned;
- the details of who is authorised to call on members to take part in industrial action;
- the name of the appointed independent scrutineer (required where there are more than 50 union members entitled to vote in the ballot); and

- the following statutory wording in full (without qualification or comment):
  - *"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 strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than twelve weeks after you started taking part in the action and, depending on the circumstances, may be unfair if it takes place later."*

The ballot paper must also be given one of a series of numbers relevant to that ballot.

### 1.8 Where doctors in training are employed using the Lead Employer Trust (LET) model, what are the notification requirements?

The notification requirements under TULRCA apply so that the unions only have to notify the LETs of the ballot of the doctors. There is no requirement for the unions to also notify the Host Trusts the doctors are deployed to, as they are not employed directly by them.

For the purposes of TULRCA, the Host Trust effectively only has the status of a “workplace”. As such, this is only relevant to the question of the balloting constituency under S228 and S228A (which is a decision for the unions to make if there are common terms and conditions).

LETs will receive the notice of ballot of doctors and will be presented with information about the members entitled to vote. LETs will either be referred to DOCAS or provided with lists of categories of employees concerned and the workplaces of these employees (and the numbers in each category and at each workplace). Host Trusts are therefore likely to be listed as a workplace in the notice of ballot.

There is no obligation on LETs to notify Host Trusts of the notice of ballot but we would suggest that a protocol is established that such information shall be sent to Hosts to enable workforce planning.

## 2. TRADE DISPUTE WITH THE EMPLOYER

### 2.1 What is a trade dispute?

*A trade dispute is a dispute between workers and their employer which relates wholly or mainly to one or more matters which are listed in the legislation including the terms and conditions of employment.*

The current issue regarding the national public sector pay awards will constitute a trade dispute (as defined by Part V of TULCRA between workers and their employer).

### 2.2 Can organisations resist industrial action on the basis that any dispute is not “with the employer” and is a political dispute with the Government?

*No. There is a potential argument that disputes with NHS organisations which centre on the implementation of national policy are in fact with the Government and not with the individual employer. However, having considered the*

*matter previously at the time of the industrial action over the government's proposed pension reforms, we do not consider that this is a strong point.*

The unions could rely on section 244(2) 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:

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

In *Secretary of State for Education v National Union of Teachers*, which involved similar circumstances, the union was able to rely on section 244(2) to say there was a 'trade dispute'.

### 2.3 How many union members need to have turned out to vote in the ballot, and how many need to have voted in favour of the industrial action before it can legally go ahead?

*In the NHS: (a) at least 50% of those entitled to vote in the ballot must have turned out to vote, (b) a simple majority of those who turned out must have voted in favour of industrial action, and (c) where the majority of those entitled to vote in the ballot are normally engaged in "important public services", at least 40% of members entitled to vote must have voted in favour of industrial action.*

At least 50% of the members who are entitled to vote in the ballot must have done so ('turn out') (section 226(2)(a)(iia)).

In addition, where the majority of those entitled to vote in the ballot are normally engaged in 'important public services' (which can include those who work within the fire, health, transport, education of those under 17 and border security sectors), at least 40% of those entitled to vote must have voted in favour of the action (section 226 (2A) – (2F)). Each one of these services has accompanying regulations specifying the type(s) of employee who are covered – for example, the Important Public Services (Health) Regulations 2017 (SI 2017/132). The government has also published non-statutory [guidance](#) on the Important Public Services Regulations 2017. This is intended to provide advice for unions on applying the 40% threshold in practice and suggests examples of workers who will be covered in each sector.

The Important Public Services (Health) Regulations 2017 list the following as important public services for the purposes of section 226:

- a) the ambulance services listed below:
  - i. dealing with, and organising a response to, a call made by telephone or another device to an emergency telephone number and received by a provider of ambulance services;
  - ii. the diagnosis or treatment of a person in response to such a call, irrespective of whether the person is subsequently transferred to a hospital, or another place where further health services may be provided; and



- iii. the conveyance of a person to a hospital or another place where further health services may be provided in response to such a call.
- b) accident and emergency services in a hospital;
- c) services which are provided in high-dependency units and intensive care in a hospital;
- d) psychiatric services provided in a hospital for conditions which require immediate attention in order to prevent serious injury, serious illness or loss of life; and
- e) obstetric and midwifery services provided in a hospital for conditions which require immediate attention in order to prevent serious injury, serious illness or loss of life

The government non-statutory guidance provides advice for unions on applying the 40% threshold in practice and suggests examples of workers who will be covered in each sector. Where a ballot involves a mixture of workers, some carrying out an important public service and some not doing so, the 40% threshold will apply if a majority (over half) of the union members who are eligible to vote in the ballot are delivering an important public service, unless the union reasonably believes this not to be the case.

The guidance goes on to state that where workers have multiple duties, spending only part of their time delivering an important public service, they will be considered to be delivering an important public service only if they are “normally engaged” delivering in this service. The following (non-exhaustive) list of factors may assist in deciding whether this is the case:

- a) how regularly the workers deliver important public services;
- b) the proportion of time that the worker spends on delivering important public services;
- c) whether the worker is contracted to deliver important public services;
- d) whether the substantive role of the worker is to deliver important public services at the time of the ballot or likely industrial action; and
- e) whether the worker has been temporarily allocated to different duties, and the time period this is expected to last for.

The union is only required to hold a reasonable belief in relation to applicability of the 40% threshold. This means that if the union reasonably believes that the majority of members who are entitled to vote in the ballot are not carrying out an important public service, then it will have a defence to legal challenge, even if that later turns out to be an erroneous belief. As part of ongoing discussions with unions, where an employer receives notification of a ballot, it should consider asking for clarification from the union about whether it believes that the 40% threshold applies.

Where the 40% threshold does not apply, unions will still have to satisfy the 50% turnout threshold and a simple majority must have voted in favour of industrial action.

*Balloting thresholds example:*

*Ballot of 1000 union members in affected ‘bargaining unit’ in an NHS Trust, 600 of them vote, with 450 voting in favour of industrial action*

- 60% have voted (600 of 1,000), which exceeds the 50% threshold (500 members)

- 45% of eligible members voted in favour (450 of 1000), which exceeds the 40% 'important public services' threshold (if this applies)
- 75% of those who actually voted (450 of 600) voted in favour, which exceeds the 'simple majority' requirement

*If only 301 of the 600 who voted had voted in favour, and the "important public services" threshold applied, any industrial action based on that ballot result would be unlawful, as although the simple majority requirement would have been met, the important public services threshold would not have been (of the 1,000 eligible, 400 would have had to vote in favour).*

## 2.4 What happens if the balloting thresholds are not met?

*If the balloting thresholds are not met, the unions will not be able to call their members out to take lawful action.*

This will usually result in the strike action being proposed being 'called off'. However, if the unions decided to go ahead with the strike action, they will effectively be inducing their members unlawfully to go out on strike. This means that the strike action is not 'protected' and so the unions will not have immunity from legal action by the employer to recover compensation from the unions for breach of contract and/or obtain an interim injunction from the High Court to stop the strike from happening.

## 3. VOTES – AGGREGATING AND SEPARATE SITES

### 3.1 Is it possible to aggregate votes across the NHS in determining whether to strike and how would that work?

*Yes. In the context of a dispute over terms and conditions in NHS, it would be possible for a union to organise a single national aggregated ballot of staff for whom common collectively-agreed terms and conditions apply. A union can organise an aggregated ballot across more than one workplace, and even across more than one employer. Aggregation of votes could be used by the unions as a way of organising staff on a national basis and may allow them to meet the required ballot thresholds (in FAQ 10 above) more easily.*

Under section 228, the general rule is that 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 an organisation'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 an exception to this general rule; A union is entitled to hold a single ballot across a number of different workplaces if it makes sense to do so because they all have a specific factor in common:

- Common interest(s) (228A(2))

There can be a single ballot if, at each of the workplaces covered by the ballot, the union has at least one of its members affected by the dispute, or

- Common occupation(s) (228A(3))

There can be a single ballot where the entitlement to vote is given to all union members who have an occupation of a particular kind (or kinds) and are employed by one or more of the employers with whom the union is in dispute.

For example, a union could ballot in one single ballot all porters or all nurses at NHS organisations. However, if the union ballots its porter members at two or more employers but not at all of the employers where porter members are employed, a single ballot will need to be held at each employer; or

- Common employer(s) (228A(4))

There can be a single ballot where the entitlement to vote is given to all members of the union who are employed by one or more of the employers with whom the union is in dispute. All members with the specific factor in common across all the different employers / workplaces must be balloted. If not, single ballots will need to be held at each employer / workplace.

The aggregation of votes presents a risk nationally amongst the NHS given that the concentration of membership of the unions is considerably higher at certain employers than others. In the context of a dispute over terms and conditions in the NHS, it would be possible under section 228A for a union to organise a single national aggregated ballot of staff for whom common collectively-agreed terms and conditions apply, irrespective of where they work, or who employs them. Aggregation of votes could be used by the unions as a way of organising staff on a national basis and may allow them to meet the required ballot thresholds (in FAQ 10 above) more easily where they effectively aggregate votes between all employers. In cases where a union has aggregated the vote across a number of workplaces in accordance with the legislation 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.

The legislation does not require the unions to advise employers whether the ballot(s) are being conducted by workplace or aggregated or both. Neither does the legislation require the unions to set out how they will aggregate ballots (if they choose to do so). All the union is required to do is tell each employer there is going to be a ballot(s), give the employer enough information to know which of their employees is entitled to vote in it and report the result(s) to each employer. However, we recommend that as part of discussions leading up to the ballot and before the ballot opens, employers ask unions to clarify if and how they will aggregate the ballot.

### 3.2 What happens if members at a particular workplace vote against the strike? Presumably members of that workplace could not then come out in sympathy with those members who have voted for strike action at another site?

*The answer to this will depend upon whether there has been a single ballot across a number of workplaces / employers or not (see FAQ 12 above).*

In cases where a union has aggregated the vote across a number of employers/workplaces in accordance with the legislation and the majority is in favour of industrial action, it is lawful for the union to organise industrial action in any workplace included in the aggregated ballot even if the majority of members at a particular workplace might have voted against strike action or the threshold has not been reached at that workplace.

Where a vote has not been aggregated, separate workplace / employer ballots must be held and the thresholds passed and a majority has to answer “yes” at each workplace to support industrial action. If the union calls their members at the workplace to strike anyway, they will effectively be inducing their members to take unlawful secondary action (which is action taken in support of a trade dispute that they are not directly involved in - also known as a sympathy strike). This means that the strike action is not ‘protected’ and so the unions will not have immunity from legal action by the employer to recover compensation from the unions for breach of contract and/or obtain an interim injunction from the High Court to stop the strike from happening.

### 4. NOTICE OF RESULT OF BALLOT AND CALLING OUT

#### 4.1 Does the union need to inform the employer of the result of a ballot notice and/or that the union is calling industrial action? How would this obligation be affected if the ballot notice is aggregated?

*Yes, notice of the result must be provided and this should be done as soon as reasonably practicable after the ballot closes. When votes are aggregated, the "ballot result" refers to the result aggregated across all the employers and workplaces involved and employers will not be notified of the result at a single employer/workplace.*

As soon as reasonably practicable after holding the ballot (normally on the same day that the union gets the result from the scrutineers), the union must take such steps as are reasonably necessary to ensure that every relevant employer is informed of the result of the ballot. Employers are entitled to request a copy of the scrutineers' report so that they can see the results of the ballot and when it was reported (section 231B(2)).

The following information must be provided:

- a) the total number of employees who were entitled to vote in the ballot;
- b) the number of votes cast in the ballot;
- c) the number of employees answering "Yes" to the question (or as the case may be, to each question);
- d) the number of employees answering "No" to the question (or as the case may be, to each question);
- e) the number of spoiled or otherwise invalid voting papers returned;
- f) whether or not the number of votes cast in the ballot is at least 50% of the number of employees who were entitled to vote in the ballot; and
- g) where the majority of those who were entitled to vote in the ballot were at the relevant time normally engaged in the provision of important public services, unless at that time the union reasonably believed that not to be the case, whether the number of employees answering "Yes" to the question (or each question) is at least 40% of the number of individuals who were entitled to vote in the ballot.

Our view is that publishing a statement on a union's website that action will be taken is not sufficient to constitute notice to every relevant employer and instead each employer must be contacted individually.

The ballot ceases to be effective within six months of the close of the ballot (unless extended by agreement between the union and each relevant employer to nine months). Any action which is taken outside of this period will not be deemed as having the support of a ballot.

Notice of the result must be given to a "relevant employer" which means any employer who it is reasonable for the union to believe was the employer of any persons entitled to vote at the time of the ballot (section 231A(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 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.

### 4.2 How much notice does a union need to give the employer, for it to be classed as lawful 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?

*Notice must be provided at least fourteen days before the start of the strike or action short of strike action (which can be reduced to seven days by agreement). The strike notice must include the start date of the strike, state whether the action is to be continuous (i.e. for a defined or open period of time covering more than one day) or discontinuous (i.e. a series of single or multi-day strikes with normal working in between) and give details of who will be called out which must be “as accurate as is reasonably practicable”.*

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 fourteenth day before the (first) day of action (unless seven days is agreed between the union and each relevant employer). The notice must be received by any employer who it is reasonable for the union to believe is the employer of an affected employee (section 234A(2)).

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 but who the union did not reasonably believe at the time of the ballot would be induced to take industrial action. For example, where a member of staff joins a union after the ballot has taken place, so that they have not voted, the union can still induce them to take industrial action despite the fact they were not balloted. Where unions fail to provide accurate details of those who will be induced to strike, the validity of the notice provided by the unions can be challenged in the high court with a view to preventing the planned industrial action.

One thing for employers to consider is whether there are differences between the ballot notice and relevant notice in terms of the personnel. If, for instance, a re-organisation has taken place which means that personnel were included in the ballot notice who are to be made redundant, the ballot procedures may be open to challenge.

Unions are only required to provide information in the relevant notice that is as accurate as reasonably practicable in light of the information that union officials and employees hold. 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.

Where a union fails to give fourteen days' notice of strike action, the action will be unprotected and an injunction could be sought by an employer preventing strike action.

### 4.3 Is there an 'expiry date' for the effectiveness of a ballot? If unions want 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'?

*Industrial action will only be considered to have the support of a ballot in the period up to six months from the last day of the ballot or a period up to nine months if agreed between the union and the employer.*

Under section 234, as amended, a ballot is 'effective' for the periods specified – i.e. six months from the close of the ballot or nine months with the agreement of the employer (and subject to special provisions where there are intervening court proceedings).

Regardless of whether the action is continuous or discontinuous, where new dates are planned outside the 6/9 month period of effectiveness, then a fresh ballot will be needed.

Industrial action can take place over the whole of the 6/9 month period (continuous action) or the union may identify a series of single or multi-day strikes and then work as normal on other days during the 6/9 month period (discontinuous action).

## SECTION 2

### 5. INJUNCTIVE PROCEEDINGS

5.1 On the basis that an injunction is seen as a last resort and we try to work with the unions to get clarifications, what is 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 with the unions.*

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. An application for an injunction must be served three clear business days before an injunction hearing, which means that letters must be sent soon after the 14-day strike notice so that there is time during the second week of notice to issue an application if the dispute is not resolved by agreement.

5.2 What are the practicalities of bringing injunction proceedings?

Each employer must apply for its own injunction (as the trade dispute in this scenario is deemed to be between the employer and the worker, despite the fact that the pay increases have been set by the Government) and if there are similarities in the issues being challenged by a number of NHS bodies, it would be wise 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 employer would need to support their application with witness evidence regarding the alleged breach of procedure.

### 6. EMERGENCY LIFE SAVING CARE

6.1 What happens if staff continue to strike even though the unions have agreed a derogated safe staffing level? **New – added 23.12.22**

The derogations which are agreed between the unions and employers are an informal agreement and are not legally enforceable and so do not themselves place any legal obligation on staff to work or not to work during a strike.

Employees who are permitted or instructed by the union to work during strike action in a derogated area are likely to be doing so to maintain critical patient services and protect patient safety.

The codes of conduct which apply to regulated staff will continue to apply throughout strike action, and employees should be aware of their obligations under the codes (see [NMC code](#), [HCPC code](#) and [GMC good medical practice](#)).

### 6.2 How can we ensure that staff safely follow derogations that have been agreed? **New – added 23.12.22**

In planning for a period of industrial action, organisations should discuss derogations with trade unions as soon as possible; derogations agreed with unions may lead to a service being derogated in full or derogated partially i.e. a reduced level of service operating during the period of industrial action.

Trade union members walking out in a derogated area would still be taking official protected action; the only way in which the action could become unofficial is where the union effectively repudiates the action so that it is no longer authorising or endorsing the action.

The trade unions have been clear in their messaging that working as per an agreed derogation is a way of demonstrating support for a strike; employers are encouraged to work with their local trade union representatives around the reinforcement of this message.

Employers can raise awareness of Section 240 TULRCA 1992 obligations with their employees, and importantly we would recommend that employees are directed to seek further information from their unions about whether their preference to take strike action could be viewed as refusal to co-operate with derogations where safe and essential care cannot be provided by use of other staffing methods in a derogated area, such as redeploying staff from lower risk duties, cancelling lower risk work or using bank staffing.

Section 240 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 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 9b)). Any legal proceedings regarding Section 240 would have to be taken forward by the Attorney General and, to our knowledge, no such proceedings have been taken in the past.

#### **Updated 12 Jan 2023:**

We are aware that the BMA has obtained a legal opinion from Lord Hendy KC on this FAQ (in relation to the application of section 240). However, this was based on a previous version of the FAQ and not the version updated on 23.12.22, prior to publication of the BMA article on 29.12.22 containing the opinion. Nevertheless, in terms of the legal analysis contained within Lord Hendy KC's opinion (which comprises paragraphs 5 and 6), that analysis appears to broadly accord with the legal position as set out in the previous version of the FAQ. The original FAQ did not state, as indicated in the opinion, that section 240 "compels an automatic exemption from the right to strike". Nevertheless, as stated above, section 240 is a factor in agreeing minimum levels of service on strike days and is an issue on which members should seek further advice from their unions if needed. Working in partnership with unions to agree appropriate derogations on NHS strike days should remain a key focus for NHS organisations.

### 6.3 Can we argue that all patient focussed areas should be exempt from industrial action?

*Organisations can take this position, but if agreement cannot be reached with the unions on exemptions, employers do not have the right to insist that certain areas of the workplace are exempt.*

In the past, some union branches have raised the issue of exemptions with NHS employers. Employers do not have a right to insist that certain areas of the workplace should be exempt from industrial action under TULRCA but exemptions often form part of the discussions between unions and employers in the run up to industrial action.

Section 240, which is referred to at FAQ 6.1, makes it a criminal offence for a person to strike or take other industrial action if to do so is likely to endanger human life or cause serious bodily harm.



Unison's handbook refers to the fact that branches should be prepared to grant exemptions where there would otherwise be a direct danger to life and limb of any person, such as in the emergency services. It goes on to state that exemptions should not be based on the administrative convenience to the employer and exemptions will not be necessary where management make their own arrangements, such as deploying workers prepared to break the industrial action.

The RCN's handbook states that employer requests for exemptions will be discussed with the Industrial Dispute/Strike Committee locally and that the Committee will seek approval from the country or regional board via the Oversight Committee before agreeing any exemptions. The handbook states that beyond the life preserving care model, exemptions should be avoided although it does go on to say that members who would suffer long-term financial loss because of taking industrial action may be included in an exemption, for example pregnant women, members whose state benefits would be affected and members in their last year of pensionable service.

Whilst an employer cannot force unions to agree exemptions, we recommend that discussions should be initiated with unions at a local level to the extent that this matter has not already arisen. 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 non-union members who may take part in industrial action) and so it is recommended that organisations identify which departments they need to indicate to the unions should be exempt from industrial action. We believe that it is unlikely that a union will agree that all patient focussed areas will be exempt. However, it is clear that areas such as critical care, A&E, maternity, pharmacy and radiology should all be included within the exemptions.

If a union is refusing to negotiate on exemptions, the employer could write to employees in those areas pointing out that they consider them to be critical and that failure to attend work could place employees in breach of section 240, however, the onus should be on unions/individual staff members to ensure that those areas designated critical are covered.

## 6.4 Can employers cancel planned annual leave during the period of industrial action?

Under the Working Time Regulations 1998, which set out the right to statutory annual leave, Regulation 15 gives an employer the right to cancel requested holiday. There is a notice provision set out which requires the employer to give notice of at least the number of days being taken as leave. So, if someone has two weeks' leave booked, an employer must give notice at least two weeks before it starts in order to cancel the leave.

As well as providing reasonable notice, we recommend that employers provide legitimate and proportionate business reasons for the cancellation which should be explained to the employee and recorded in as much detail as possible. An employer should have thoroughly explored alternative options before deciding to cancel leave.

Here, the impact of the strike, which could not have been anticipated when leave was initially agreed, would likely be sufficient to cancel some leave. However, employers would need to be able to set out, in each case, the specific impact of the anticipated action on the service and on patient safety, and the alternative options they have considered in order to mitigate that impact.

Employers should also, ideally, give individuals the opportunity to respond to the decision, to make suggestions and to explain the impact of the cancellation on them. We recommend that employers look at each situation on a case-by-case basis, as far as is possible. Given that we are approaching the end of the leave year, in these exceptional circumstances, it is presumed that employers will permit leave to be carried over but this is something to confirm and employers will also need to take into account any local policies and local contractual terms which make reference to the cancellation of leave.

## 7. CONTINGENCY PLANNING

7.1 If the organisation's payroll department holds the names of employees for whom deductions are made regarding union subscriptions, can it use this information to identify members of staff for the purpose of better contingency planning and if it does use this information, would it amount to a breach of data protection legislation?

*The information can potentially be used, but the organisation would need to ensure that this is done in way that is compliant with data protection legislation, and, it may be of limited value in any event as employees who are not trade union members can participate in industrial action.*

Information as to whether a person is a member of a trade union is classed as special category data under the UK data protection legislation. Where employers are processing such data, they must be able to satisfy a 'lawful basis' under both Article 6 of the UK GDPR (which relates to all personal data) and, additionally, Article 9 of the UK GDPR (which relates specifically to special category data).

One of these lawful bases is consent to processing (explicit consent under Article 9), which must be freely given by the data subject (the employee). Agreement and notification by an employee to the organisation to deduct union subscriptions from salary would not, on its own, be sufficient for the employer to justify the use of it to identify which individuals are likely to be involved in industrial action. There are also issues with using consent in an employment context, where there is a perceived imbalance of power between an employer and an employee, meaning that obtaining lawful consent in this context can be difficult.

Under Article 6 of the UK GDPR, there are two other lawful basis which may apply:

- 'Public task' - that the processing is necessary for statutory or regulatory obligations, i.e. in the continuation of healthcare services which the organisation is required to provide; and / or
- 'Legitimate interests' - whereby the processing is in the legitimate interests of the organisation, such as to be able to continue business as normal (note that this lawful basis should not be relied upon by public bodies when performing their public functions, however, contingency planning is not necessarily a public function but an employment function relevant to all employers, not just public bodies).

In terms of the additional lawful basis under Article 9 of the UK GDPR, the following may be relevant:

- 'Employment' – that the processing is necessary for employment purposes (subject to having an appropriate policy document in place);
- 'Reasons of substantial public interest', such as legal or regulatory obligations (subject to having an appropriate policy document in place);
- 'In the provision of health care', which includes the managing or health care systems and services; and / or
- 'For reasons of public interest in the area of public health', which may include NHS resource planning – although this is largely intended to apply to resource planning around threats to public health, such as pandemics, and not strike action.

These lawful bases should only be relied upon where the processing is necessary, which means it must be more than just ‘useful’, it must be proportionate. Therefore, if there is a means of contingency planning which is less intrusive, then the personal data in question should not be processed for this purpose.

As well as being able to justify the processing, you would also need to:

- a) ensure that employees are aware of this processing before it takes place (transparency requirement);
- b) consider the principle of fairness, i.e. whether employees would reasonably expect you to use this information for this purpose and whether such processing would have unjustified adverse effects on them; and
- c) consider whether using an employee’s union membership status for this reason breaches the purpose limitation principle, i.e. the principle that personal data should only be used for specified and explicit purposes, and not further used for incompatible purposes.

Organisations which believe that have a legitimate basis for processing data in this way should think about conducting a data protection impact assessment to identify and minimise any data protection risks.

Given all of the requirements under the data protection legislation, it would probably be difficult to justify such processing, and irrespective of the lawfulness of the processing, there is a high prospect that the use of data in this way could be misconstrued, leading to complaints being made and exacerbating a volatile situation.

## 7.2 Could we contact staff to seek to persuade them not to strike or take action short of a strike?

*Yes. Staff can be contacted to try and discourage them from taking part in industrial action but the language used should be measured and conciliatory to avoid any allegation of intimidation or bullying. There is no prescribed time at which employers should contact staff about this matter.*

The NMC has been criticised in the past after issuing a statement suggesting that nurses who went on strike could be breaching their code of conduct. This language was deemed to be intimidating and they were forced to withdraw this statement after Unison threatened legal action.

In trying to persuade people not to take action, organisations 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
- reminding employees (but not in a confrontational fashion) that they will not be paid while they take part in a strike

Where unions are putting pressure on members to take strike action, we recommend that employers remind staff that they are not obliged to participate and if they are in an exempted group, they should not participate.

## 7.3 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)? [Updated July 2023.](#)

*Yes. Organisations 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 but must be clear on the limitations imposed by regulations.*

From 10 August 2023, organisations will need to ensure that no temporary staff (work seekers supplied by an employment business, where the worker is in the employment of the employment business and is supplied to act for

or under the control of the hirer) are used to perform the duties normally performed by a worker of the hirer who is taking part in a strike action. **Please see the current position.**

On 13 July 2023, following a judicial review claim, the High Court found that the Government's decision to introduce regulations in July 2022 which permitted the use of temporary staff to replace striking workers was unlawful. The effect of the Quashing Order issued by the High Court is that from 10 August 2023 the prohibition contained in Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) (the "Conduct Regulations") will apply.

Regulation 7 of the Conduct Regulations states as follows:

*(1) Subject to paragraph (2) an employment business shall not introduce or supply a work-seeker to a hirer to perform—*

*(a) the duties normally performed by a worker who is taking part in a strike or other industrial action ("the first worker"), or*

*(b) the duties normally performed by any other worker employed by the hirer and who is assigned by the hirer to perform the duties normally performed by the first worker,*

*unless in either case the employment business does not know, and has no reasonable grounds for knowing, that the first worker is taking part in a strike or other industrial action.*

*(2) Paragraph (1) shall not apply if, in relation to the first worker, the strike or other industrial action in question is an unofficial strike or other unofficial industrial action for the purposes of section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992.*

Whilst the Conduct Regulations, generally, apply to both employment agencies and employment businesses, Regulation 7 applies to employment businesses only. Employment agencies, as defined by the Conduct Regulations, find persons employment in comparison to employment businesses, which supply their own workers to hirers on a temporary basis. It should also be noted that the prohibition in Regulation 7 applies to official strike action or other official industrial action only

It is open to organisations to use in-house banks, volunteer personnel, existing staff moving into areas outside their specialty, the use of management staff and / or possibly workforce sharing agreements with other organisations to cover staff absences due to strike action.

Where organisations are planning to move workers or engage temporary 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 and that they are undertaking tasks within the scope of their contract of employment (unless staff agree to a short term variation to terms of employment for the purposes of covering staff shortages during industrial action). In order to ensure the health and safety of patients and other staff, we recommend that, in addition to the usual recruitment and safeguarding checks, a worker's skill base is established and a risk assessment carried out to ensure that they are competent.

## 7.4 Can we ask consultant staff to cover the work of junior doctors in the event of industrial action?

Please see [our supplementary FAQs](#) on consultant and SAS doctor support during strike action of junior doctors.

## 7.5 Can we ask employees if they intend to take industrial action?

Yes.

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 union members and non-union members may strike or take action short of a strike (see FAQ 8.2 below). Managers should avoid any suggestion of intimidation or bullying when asking employees about the strike.

### 7.6 If employees come in at 11am, can we ask them to take their breaks later so we can run extra clinics over lunch?

Yes.

Provided the employees get the breaks they are entitled to under the Working Time Regulations 1998, and in accordance with their contractual entitlement, the employer can specify the time at which they take the break.

### 7.7 Can unions co-ordinate strike action?

Yes.

There is nothing in the legislation which would prevent a number of different unions taking lawful industrial action over the same period and co-ordinating action for the same day. This is likely to form part of early discussions regarding contingency planning once the results of a ballot are known, and discussions in respect of exceptions particularly where action is taken over the winter pressures period.

### 7.8 Union representatives are proposing to access the site to view wards and services and call out any staff working outside of the derogation agreed in the event of industrial action. Can they do this?

*There is no legal right for trade union representatives to access NHS sites for such purposes on strike days although access may be agreed as part of negotiations on derogated areas.*

We anticipate that union representatives may consider that organisations are not complying with agreed derogations if they permit members to attend work above the agreed minimum safety levels. However, the safe levels of staffing should be agreed on the basis that they are minimum levels of staffing rather than an upper limit. This is particularly important as some of those providing services may not be members of the striking union or may be members of that union who are choosing not to take strike action. In those circumstances, it is important that individuals are not prevented from working by the employer. It is equally important for service planning and patient care reasons that individuals are not removed from work during their shifts because more employees have chosen to attend than the union anticipated.

It would be inappropriate for organisations to force employees to strike even if they are a member of a union which has voted in favour of strike action, whether that is within or outside a derogated service. There are scenarios where organisations may wish to consider a lock out (i.e. taking the position that staff are not permitted to work) but that is only usually considered when an employee is offering partial performance of their contractual duties during industrial action and the employer does not deem partial performance to be acceptable. Where staff employed in derogated areas are ready and willing to work on a strike day in accordance with their contract, they should be permitted access to the workplace so they can carry out their duties.

From a union relations perspective, employers risk inflaming the dispute if they actively seek to persuade union members to attend work above and beyond agreed safety levels in derogated areas. However, we recommend that

it is made clear to representatives during local negotiations that any staff wishing to attend work on a strike day will be permitted to do so.

Employers are not legally obliged to provide union representatives with access to the workplace in order to campaign or to observe derogated areas. It is reasonable for organisations to take the view that representatives should not attend wards or other service areas where there is a risk that they will interfere with service provision, particularly given the reduced staffing levels during a strike.

Employers should, however, bear in mind that trade unions may insist on such access and maintenance of specific staffing levels as part of locally-negotiated derogations/exemptions. Employers would then need to consider whether they were prepared to agree to such access/monitoring in order to reach agreement. Nevertheless, if permission to attend a workplace is granted trade union representatives must not in any way intimidate members who have not gone out on strike.

**7.9 We are aware that union members have been told that if the order to strike is given and their branch voted to strike, members must strike or relinquish membership. Can they do this?**

*No – whilst a union may state that it expects its members to follow the decision of the majority who have voted for strike action at their employer, trade unions cannot discipline members who refuse to participate in industrial action.*

The right not to be unjustifiably disciplined is contained in section 64 and section 65 of TULR(C)A. This provides that an individual is unjustifiably disciplined if the conduct which constitutes the reason, or one of the reasons, for disciplining him or her consists of failing to join or support any strike or industrial action, or showing opposition to (or lack of support for) such action.

A union member is ‘disciplined’ if a ‘determination’ is made, or purportedly made, that he or she should:

- be expelled from the union or from any particular branch or section of the union
- be fined or subjected to any other financial penalty
- have any of his or her union subscriptions treated as unpaid or as paid for a different purpose
- be deprived of access to any benefits, services or facilities which would normally be available through union membership (the suspension of a member constitutes discipline)
- be subjected to any other detriment (distributing a list of strike breakers has been found to be subjecting the named individuals to a detriment).

Forcing members to relinquish their membership for failure to take part in a strike is likely to amount to unjustifiable disciplinary action and therefore representatives should not be indicating that this is a consequence of failure to strike (although this is, of course, a matter for the unions).

## **8 WHO IS PARTICIPATING?**

**8.1 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. This means that the strike action is not 'protected' and so the unions will not have immunity from legal action by the employer to recover compensation from the unions for breach of contract and/or obtain an interim injunction from the High Court to stop the strike from happening.*

Tactically, employers will need to be alert to evidence of inducement (literature being circulated etc.) and this might prove difficult to obtain in advance of any day of strike. If members of non-balloting unions (unions that are not carrying out statutory ballots of their members on any proposed industrial action) ask about their degree of protection and what their position is then the employer should advise them to talk to their unions about the lawfulness of the action.

Our view is that the numbers of those non-balloting union members going out on sympathy strikes is likely to be low as there is a risk of dismissal for such individuals. Where dismissal is being considered, we recommend that it is approached very carefully by employers and that legal advice is sought.

## 8.2 Can non-union employees take part in industrial action?

Yes.

TULRCA makes no distinction between union members who have been balloted and employees who are not union members in terms of the protection given to those who participate in industrial action (note the difference with members of a union which has not balloted in FAQ 8.1). A non-union member of staff will be protected against dismissal 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.

Section 237 deals with unofficial action. Whether action is official or unofficial is important in determining the protection available to employees in relation to dismissal. This is a separate matter to whether the action is lawful or unlawful for the purposes of determining whether unions have statutory immunity.

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 section 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:

- a) he is a member of a trade union and the action is authorised or endorsed by the union; or
- b) 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 unions which have not carried out a statutory ballot 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 carried out a statutory ballot, it will lose its immunity from inducing breach of contract under section 219.

### 8.3 If someone was on planned annual leave during the period of any industrial action, will this remain as annual leave and be paid under normal arrangements?

*Potentially. Whether organisations 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.*

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. Whilst it is possible for employers to cancel pre-planned holiday (providing sufficient notice is given), we suggest that this may cause considerable employee relations difficulties and there is also the matter of the individual's costs of prebooked holiday to be considered.

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 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 organisations 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 employers to treat her in the same way as someone who has prebooked holiday and withholding pay will depend upon clear 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 an organisation taking a policy decision that such requests will be refused using the argument that the industrial action will cause staffing issues within the organisation 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.

### 8.4 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 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 Employment 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.

### 8.5 How can this process be managed? Will doctors give medical certification for one day when the usual process is self-certification for seven 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-certified leave?

*In advance of any strike action, organisations 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.*

They 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 strike action so that employees have notice of this requirement. Organisations which 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 (referred to in FAQ 8.4 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.

### 8.6 Can staff on strike undertake agency work? [Updated July 2023.](#)

*Yes, but from 10 August 2023, employers cannot engage agency staff to undertake the work of those on strike (see 7.3 above).*

An employee participating in a strike is only withdrawing their labour from their employer. There is nothing in the legislation that would prevent them from working for another employer whilst on strike. However, in practice, it may be unlikely that they will undertake such work as this would undermine the strike effort and pit them against their union.

Employers should also be aware that from 10 August 2023, the supply of work-seekers by employment businesses to cover the duties of those taking industrial action will be prohibited. Organisations thinking of making use of

temporary workers in the future to carry out the duties of staff taking strike action will need to make alternative arrangements, for example, use of their own in-house banks and volunteer personnel.

### 8.7 Is a trade union official entitled to time off for activities to prepare for industrial action?

*There is no right to time off for trade union representatives taking part in industrial action. However, where a union representative is not taking part in industrial action but is preparing and representing members involved, unpaid time off should be permitted. The amount of time and occasions which are taken by representatives in preparing must be reasonable in all the circumstances.*

Trade union members are entitled to unpaid time off to take part in the activities of the union and activities where the individual is acting as a representative of the union under section 170(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). This will include preparation for industrial action.

Trade union representatives are entitled to paid time off work under section 168 where employers recognise the union for trade union duties, such as matters which the employer has agreed are the subject of collective bargaining, for example negotiating terms and conditions of employment.

The amount of time and occasions which are taken by members must be reasonable in all the circumstances. It is likely that members will seek to take time off to take part in campaigning regarding the ballots or attending meetings which can be unpaid as a trade union activity. We recommend that employers and trade union representatives come to an agreement regarding what is “reasonable” time off work giving consideration to the workloads of the team in which a trade union member works and the needs of their colleagues and managers. The [ACAS Code of Practice on time off for trade union duties and activities](#) provides helpful guidance for managing these issues in the workplace.

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

## 9 PICKETING

### 9.1 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:

- a) worker of the employer,
- b) an ex-worker of the employer who has been dismissed in connection with the trade dispute, or
- c) 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). However, there is nothing to stop other people lawfully protesting alongside the picket line.

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.

If the employer considers that the picket is not being conducted lawfully (i.e. the picketers are intimidating those trying to attend work), it may be possible to obtain an interim injunction to stop the picket if the Court agrees that the statutory immunity has been lost.

Under Section 220A, the union must appoint a picket supervisor who must be an official or other member of the union who is familiar with any provisions of a Code of Practice. The union or picket supervisor must take reasonable steps to tell the police—

- a) the picket supervisor's name;
- b) where the picketing will be taking place; and
- c) how to contact the picket supervisor.

The union must provide the picket supervisor with a letter stating that the picketing is approved by the union which must be presented to the employer where requested as soon as is reasonably practicable.

While the picketing is taking place, the picket supervisor must be present where it is taking place and wear something identifying them as the picket supervisor, or be readily contactable by the Union and the police, and able to attend at short notice.

## 9.2 Are picketers allowed to have supporters with them?

*No - not as part of official picketing if they do not fall within the three categories above. However, they could be present and exercising their human right of protest despite not being part of the official picket.*

A “supporter” who does not fall within the scope of section 220 may nonetheless have a legal right to remain at or near the organisation's entrances/exits if they are lawfully protesting in a public place. They could be moved on by police only if they are committing a 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 – violence or harassment would be unlawful.

## 9.3 Can pickets stop deliveries?

*No, but it may be part of lawful protest to delay deliveries by protesting in an entrance way or road.*

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.

However, a temporary obstruction of the highway by protesters may be lawful protest taking into account factors such as the location, duration, nature and extent of the obstruction and the importance of the issues at stake (DPP v Ziegler [2021]).

## 9.4 Where can staff picket?

The law provides that peaceful picketing can take place at or near the place of work. Picketing tends to take place at entrance and exit points of organisations to raise awareness of strike action although there is no statutory requirement that picketing must take place at only entrance or exists. However, unions will be aware of the criminal offences which can potentially be committed during picketing (breach of the peace) including trespass if they enter private land (including an area of the workplace) where they do not have permission to picket. As part of discussions regarding industrial action, employers can insist that picketing does not take place its private land and highlight the importance of ensuring that picketing does not interfere with the ability of service users and staff to enter and leave the buildings.

## SECTION 3

### 10 STRIKE ACTION – PAY

#### 10.1 Can employers withhold pay for any day on which the employee takes part in a strike? What is a defined as a ‘day of action’?

Yes.

The contractual right to be paid is dependent upon an employee being ready and willing to work. Employees are therefore not entitled to be paid for any period during which they are on strike (as they are not willing to work). An employee also has no right to bring a claim for unlawful deductions in relation to wages which have been withdrawn for 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.

#### 10.2 Does this mean 24 hours or the individual’s contracted working hours or overtime?

*This depends upon the terms of the contract and whether their pay is calculated and paid by the hour or salaried.*

Part 2 section 7 of Agenda for Change (AfC) deals with payment of annual salaries in terms of calendar days rather than working days. It refers to the apportionment of annual salaries for full time employees at 7/365<sup>th</sup> for each week and 1/365<sup>th</sup> for each day where paid weekly or 1/12<sup>th</sup> for each calendar month and for each day the monthly sum divided by the number of actual days in the particular calendar month where paid monthly. *[Note: The national terms and conditions of service for NHS doctors and dentists in training contain the same monthly apportionment provisions (clause 81), but there is no reference to apportionment of salaries in the national terms for SAS doctors or consultants]*

If a deduction of 1/260<sup>th</sup>, or another rate where an employee works compressed hours, were to be made for those staff working under AfC and the employees object, the risk would be that organisations face an unlawful deductions from wages claim, because the deduction of a day’s pay is a greater sum. However, locally, apportionment may have been amended in contracts of employment and where that is the case, 1/260<sup>ths</sup> or another rate which has been agreed for those working compressed hours could legitimately be selected. If the organisation subsequently decided to calculate a day’s pay according to the more generous 1/365<sup>th</sup> formula, we suggest that it is made explicit that this is a gesture of goodwill and not intended to set a precedent in any future 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.

If the contract specifies normal working hours and pay is calculated by the hour, then the deduction will be determined by reference to the hours which are not worked. For a shift worker who works part of a shift on a non-strike day, the employee should be paid for those hours and only the hours which fall within the strike day and which are not worked should be deducted unless the employer is not willing to accept part performance.

If the employees are paid a salary, then this is deemed to accrue from day to day, and this means calendar day, not working day (section 2, Apportionment Act 1870) which is 1/365<sup>th</sup> of the annual salary for every strike day.

However, if the contract indicates a contrary intention, the Apportionment Act can be disapplied. If so, 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*, 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".

In *Hartley v King Edward VI College*, the Supreme Court considered the meaning of day to day accrual in the context of deducting pay for a day of industrial action. In that case, the court decided that the teachers' pay accrued over 365 days, and therefore only 1/365ths for the day of action should be deducted and not 1/260ths. It was relevant that the teachers worked evenings and weekends despite their contract providing that their working days were Monday to Friday. The court found that in order to disapply section 2, it was necessary for contracts of employment to contain express provisions disapplying the statutory apportionment principle.

### 10.3 How is an employee's pay affected if their shift falls partly within and partly outside the day of strike action, with the result that they only work part of their shift?

*Again, to some extent this may depend on whether the employee's pay is calculated by the hour, or whether they are paid a salary that accrues from day to day.*

However, if the employee's shift runs from, say 7pm-7am, with the strike starting at midnight, they may be entitled to pay in respect of a proportion of the day for which they work. If, however, that same employee is due to work again at 7pm that evening, they will presumably not start their shift until midnight, so they will in fact have missed an entire day's work, and therefore lose a full day's pay.

The issues are broadly the same as discussed above at FAQs 10.1 and 10.2.

The employer may wish to argue that only working part of an employee's shift equates to partial performance of his/her contract. An option usually available to employers faced with this scenario is to make clear that it will not accept partial performance and that employees should not attend work. 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 them 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 and would not assist in maintaining service levels. Employees would need to be informed in advance that part performance would not be acceptable.

### 10.4 What happens if industrial action is arranged for only a short period of time? Whilst there will be organisations who will accept partial performance of a shift and simply deduct the hours' pay attributable to the strike, others may 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?

*Yes, deductions made from an employee's wages for a day of action or partial performance should be clearly set out on the payslip. If this is not possible, sending a covering note with the payslip, setting out the amount of the deduction and the reason for it, will significantly minimise any risk of claims for non-compliance.*

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. As such, deductions made from an employee's wages for a day of action or partial performance should be clearly set out on the payslip. ESR (as detailed in user notices 3244 and 3248) now has the facility to provide a payslip message detailing the deduction and the reason for it.

In the recent case of *Ridge v Her Majesty's Land Registry* the Employment Appeal Tribunal (EAT) declined to order a payment to the employee in respect of un-notified deductions for overpayments made for sickness absence, on the basis that the employee clearly knew what the deductions were for. However, this case does not provide that there is no obligation to itemise deductions and their purpose, but rather confirms that it may not always be appropriate to make a monetary award.

It may be possible for organisations to argue that employees 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 organisations could be liable to make repayments of deductions to employees, something which an Employment Tribunal can order under section 12 of the Employment Rights Act 1998 following a reference by an employee.

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. Section 8 requires that the information be set out on the payslip itself and not in a separate document; however, a covering note would significantly minimise the risk of a Employment Tribunal making a monetary order in our view. 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 employees at the time, or before, the payment is made, so organisations should be taking steps at an early stage to identify which employees are affected.

## 10.5 What if the unions encourage staff to participate in any strike action for a short period e.g. for 30 minutes only. Should we allow this?

*This is a matter for each employer and depends upon whether it is willing to accept part performance (see FAQ 10.7 below) by the employee.*

If it is, then only salary for 30 minutes of work should be deducted for taking part in strike action. For the remainder of their shift, the employee should receive their normal pay. If the employer is not willing to accept part performance, it should be made clear to the employees that regardless of the time they take out on strike, they will not receive pay for the entire shift as part performance is not acceptable and any work they choose to undertake will be on a voluntary basis only.

## 10.6 Could employees challenge a partial deduction of salary in the courts?

Yes.

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 for partial performance of the contract.

### 10.7 What steps do we need to take if we do not want to accept partial performance?

The employer needs to warn employees in advance of the action that part performance will not be acceptable. If any employee continues to work only part of the shift or does not work their full duties during any part of the shift worked, the employer may accept the breach of contract and deduct pay for the entire shift.

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. An option usually available to employers faced with this scenario is to make clear that it will not accept partial performance and that employees should not attend work - this is known as a lock out. If an employer warns employees in advance that part performance will not be acceptable and they continue to work only part of the shift or does not work their full duties during any part of the shift worked, 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 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.

### 10.8 What are the rules on deducting pay if someone works different hours? For example, a staff member strikes for three hours of their 12 hour shift. Do we utilise the calendar day rule? Or do we deduct pay based on what would be an hourly rate for that band or bank rate?

Employers can withhold pay when employees are on strike (see FAQ 10.1). The amount withheld depends on:

- the terms of the contract,
- how their pay is calculated and paid (by the hour or paid a salary that accrues from day to day) (FAQs 10.3 and 10.4), and,
- whether the employer is prepared to accept part performance (see FAQ 10.7).

ESR has been configured to facilitate pay deductions on both a calendar day and an hourly basis. The hourly basis can be used when staff have not taken strike action for an entire day. This approach is effectively a good will gesture by employers that allows them to be more generous than the contractual terms regarding apportionment of salary – it encourages striking staff to attend work on a day of action (as they are paid for hours worked) and assists employers to maintain safe service levels.

It is important that employers note that, in accordance with Part 2, Section 7 of AfC, the maximum pay deduction for each strike day for salaried staff working under AfC terms is 1/365th of their annual salary if paid weekly or 1/12th of salary divided by the number of days in that calendar month rule if paid monthly (unless a local variation to AfC applies). ESR calculates the deduction on this basis.

In view of this, employers making pay deductions by the hour for a day of action via ESR should ensure that this more generous approach does not inadvertently lead to a pay deduction that exceeds the calculation of a day's pay over calendar days, which is likely to occur where hours are deducted and staff work condensed hours and shifts which are longer than standard hours. If this occurs, the risk would be that the organisation faces breach of contract claims.

Examples: -

- Employee A is salaried on national AfC terms and paid weekly. They go on strike for three hours of their 12-hour shift (6am-6pm), but work the remaining hours. It is open to the employer to deduct either a day's pay under the contract of employment (1/365th of salary) or be more generous, accept their part-performance, and only deduct three hours' pay.
- Employee B is salaried on national AfC terms and paid monthly. They go on strike for an entire day and do not work any of their rostered 12-hour shift on the day of action (6am-6pm). The employer should deduct a day's pay at 1/12th of salary divided by the number of days in that calendar month as there is no part-performance by the employee on the day of action. Where the employer deducts 12 hours' pay for the shift, this deduction is likely to exceed a day's pay at the applicable contractual rate and in breach of contract unless the terms of the contract have been varied locally to allow for apportionment on an hourly basis.
- Employee C is salaried on AfC terms but the apportionment of their annual salary and a day's pay has been disapplied through local agreement. They go on strike for an entire day and do not work any of their rostered 12-hour shift on the day of action (6am-6pm). As per the local agreement, the employer should deduct 12 hours' pay (the actual hours unworked on the day of action) as the AfC apportionment rules do not apply.

### 10.9 Is London weighting included in the pay deductions made for a strike day? If so, at what rate?

London weighting or the High-Cost Area Supplement (HCAS) are expressed as a percentage of basic pay under AfC and are pensionable. In our view, as a payment which is paid monthly and accrues with salary each day, it can be included in the deduction that is made for a strike day. AfC does not expressly deal with the apportionment of the annual HCAS payment, but Section 2 of the Apportionment Act 1870 applies so the correct rate of the deduction is 1/365th of the annual sum for each day of strike action.

### 10.10 What if the hours that were due to be worked on a strike day would have attracted unsocial hours' payments? Should those enhancements be deducted from strike day pay and, if so, at what rate?

Any unsocial hours' payments that would have applied to hours not worked on a strike day can be deducted from pay as they do not form part of annual salary for the purposes of apportionment and, in accordance with Part 1, Section 2 of AfC, unsocial hours' payments are calculated and paid by reference to actual hours worked during specific days and times. Any deductions should be calculated on the same basis (i.e., by the hour) and not in the same way as the deductions for annual salaries/payments (i.e., by the day).



The same principle would apply to any on-call payments that would have been payable on a strike day had the individual worked as rostered.

Organisations should consider whether the amount they deduct in respect of annual salary is calculated on the basis of basic salary (and HCAS where applicable) only and does not already take into account enhanced payments so as to avoid deducting too large an amount.

Please refer to [guidance on enhancement deductions for juniors doctors](#).

### 10.11 Should we ensure that strike pay deductions are applied consistently across all staff groups, e.g., nurses, physios, medics?

From an industrial relations point of view, it would be preferable for employers to apply a consistent approach to issues of pay deductions across all staff groups, but this may not always be possible where different terms and conditions apply.

For example, whilst AfC uses a 1/365th approach to apportionment (if paid weekly, or 1/12th divided by the number of days in that calendar month, if paid monthly) The national terms and conditions of service for NHS doctors and dentists in training take a 1/12th divided by the number of days in that calendar month approach to apportionment (clause 81 and 82 of schedule 2), there is no reference to apportionment of salaries in the national terms for SAS doctors or consultants. Again, we recommend that this issue is checked at a local level to identify and ensure that the differing apportionment provisions in the contracts of the striking staff groups are applied (or dis-applied if the employer is to accept part performance) correctly.

### 10.12 What happens if someone strikes on a bank holiday?

This depends on whether the staff member would have been rostered to work or not.

Section 13 of Agenda for Change (AfC) sets out the terms and conditions governing annual leave and public holidays. Paragraph 13.4 states that “*Staff required to work or to be on-call on a general public holiday are entitled to equivalent time to be taken off in lieu at plain time rates, in addition to the appropriate payment [set out in Section 2] for the duties undertaken.*” If staff work part-time then their “*public holiday entitlement shall be added to their annual leave entitlement, and they shall take public holidays they would normally work as annual leave*” (paragraph 13.7).

For staff rostered to work on a bank holiday who instead go out on strike, employers will be entitled to withhold / deduct from pay:

1. a maximum of one calendar day’s basic salary (see [Industrial action FAQs](#) - FAQs [10.2-10.9](#) for further details), and
2. any payment of unsocial hours’ payments that would have applied and that have already been authorised and processed. (Note that where unsocial hours’ payments are applied and processed after the bank holiday in question, the organisation can take the position that it will not authorise such payment as the employee has not provided duties at the relevant time and deduct basic salary only for the strike day).

Staff rostered to work a bank holiday are “*entitled to equivalent time to be taken off in lieu at plain time rates*” (AfC 13.4) (in addition to any pay due for the hours worked). However, it is a reasonable position for employers to take that the entitlement to TOIL (and the entitlement to pay due for any hours worked), only arises where the bank holiday is actually worked. The RCN accepts this point in their FAQs [[NHS Pay FAQs | Royal College of Nursing](#)]

([rcn.org.uk](http://rcn.org.uk)]. Where organisations provide TOIL as an additional day of leave to employees to be taken at a different date, they will not need to award the additional day. Where organisations deal with TOIL through the public holiday entitlement of 8/9 days which is accrued at the start of each leave year, they will be able to deduct one day's leave from that entitlement.

Where organisations consolidate annual leave and public holidays under 13.2 of AfC, the TOIL issue should not arise as an employee already benefits from public holidays regardless of their work pattern. The only impact on staff working under this arrangement where they take strike action on a bank holiday will therefore be in respect of the pay that is deducted.

Where staff are not rostered to work during the bank holiday and this is a standard rest period for them (e.g. one of their two days of weekly rest for a full time member of staff), no change should be made to their pay/leave entitlements even where they take part in the strike by joining a picket line. However, where the bank holiday is taken as part of their public leave entitlement and they are receiving leave pay for that day, if there is evidence that the employee has been taking part in the industrial action in advance of or on the day itself, an organisation may lawfully withhold pay on the basis that the employee's actions are technically in breach of contract (see Industrial action FAQs – FAQ 8.3). However, clear evidence would be required to do this, and we do not currently know of any employers that have withdrawn holiday pay on this basis.

## 11 TAKING ACTION AS A RESULT OF INDUSTRIAL ACTION

### 11.1 Organisations 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?

*Yes - as the law stands, employees cannot bring claims against their employer under section 146 if the employer subjects them to a detriment (for example, by withholding or failing to offer overtime) because they took part in industrial action. However, this may change once the outcome of the appeal to the Supreme Court in the Mercer case is known.*

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. This omission in the law is currently under challenge in the Supreme Court.

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. 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 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 unless it is judicially redrafted by the Supreme Court in *Mercer*.

There is case law regarding whether industrial action falls under section 146 and individuals are therefore protected against detriment:

- 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.
- In *Mercer v Alternative Future Group Ltd* and another, the June 2021 decision of the EAT to extend the protection of striking employees was overturned by the CA in March 2022; the CA held that section 146 does not extend to those taking part in industrial action and so does not protect them from detriment short of dismissal albeit that there remains a question for public bodies about when a detriment could be claimed to be a breach of Article 11 (freedom of assembly and association) of the European Convention on Human Rights. On 14 December 2022, UNISON was granted permission to appeal to the Supreme Court and the hearing is expected to take place in March 2023.
- Prior to the CA's decision in *Mercer*, in November 2021, the EAT had extended the protections for striking employees even further in the case of *Ryanair v Morais and others*, finding that both section 146 and Regulations 3 and 9 of the Blacklisting Regulations apply to all union industrial action, without qualification or restriction. This decision is being appealed to the CA, but the case has been put on hold until the outcome of any further appeal in *Mercer* is known.

Therefore, as the law stands, employees cannot bring claims against their employer under section 146 if the employer subjects them to a detriment (for example, by withholding or failing to offer overtime) because they took part in industrial action. However, this may change once the outcome of the appeal to the Supreme Court in the *Mercer* case is known.

## 12 ACTION SHORT OF STRIKE

### 12.1 What other action could the unions take instead of a strike?

*Other potential action includes refusal to carry out overtime or to carry out certain tasks or a go slow approach but such action would require the support of a ballot.*

A strike is defined in section 246 as 'any concerted stoppage of work'. This is typically thought of as a 'walk out' or full withdrawal of labour on a set day or days.

'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. For example, clinicians could be asked to attend their usual place of work but take the position that non-urgent procedures would be cancelled with emergency work only being undertaken.

However, it is important to note that the definition of a strike is potentially broad enough to include any action short of a strike that involves a mutually planned refusal to work (for example, a ban on overtime and rest-day working). This means that only those forms of industrial action that do not actually involve any stoppage of work, such as a withdrawal of goodwill, a go-slow or a work-to-rule, will definitely fall outside the [section 246](#) definition of a 'strike'. Therefore, the employer may have grounds to challenge any such action if the union has not complied with the balloting and notice requirements set out above. However, in practice, unions are likely to err on the side of caution and ensure that action short of a strike is dealt with for balloting and notice purposes to ensure that they do not lose their immunity if they decide to opt for action which falls short of a stoppage of work. The unions will be required to provide notice to employers that action short of a strike will be taken in accordance with Q12 onwards.

Immunity under section 219 only applies where the requirement for a ballot has been complied with. 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.

### 12.2 If staff come into work and ‘work to rule’, will there be a breach of contract?

*This depends in part on the contract of employment and how departments operate on a day to day basis.*

Under the Working Time Regulations 1998, workers are 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 a department 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 worker will no doubt seek to argue that they will not be in breach of contract. Where rest breaks are not rostered into a ward's shift and it is instead left to staff 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 CA 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.

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

## 13 ACTION SHORT OF STRIKE – WITHHOLDING PAY

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

*Yes, but given the risks of withholding pay in full, employers should instead consider a deduction for part performance to mitigate risks.*

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.

The first question is whether the employer wants to accept partial performance by the employee. An option usually available to employers faced with this scenario is to make clear that it will not accept partial performance and that employees should not attend work - this is known as a lock out. However, the risk, of course, for employers in the healthcare sector in refusing to accept partial performance in this way is that patient safety and care could be further compromised.

Employees themselves will be conscious of any duties they may have under relevant codes 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. One option for employers is to make clear that whilst employees may attend work, partial performance will not be accepted and that any work undertaken will be voluntary. However, such an approach will no doubt be controversial and be likely to lead to industrial relations difficulties. To the extent that employees are present at work in order to provide emergency care, we suggest that they should receive an element of pay commensurate with work in fact carried out. On this basis, rather than paying a full day's salary for what will effectively be work in breach of contract for many employees, employers should consider making a deduction from pay for partial performance.

### 13.2 How much pay should be withheld for partial performance?

*There is no set method for calculating a deduction in respect of partial performance of a contract of employment. In the healthcare sector where the loss attributable to partial performance is difficult to quantify, this is particularly problematic.*

There are no reported healthcare cases on this issue but there are two teaching cases which are of assistance in trying to quantify the cost of loss of an employee's service. In the first, *Royle v Trafford Borough Council*, a teacher refused to take on a further five pupils to a class of 31. The employer withheld salary for a period of six months because of this refusal and Mr Royle brought a claim in the High Court. The court held that the employee was entitled to his salary for six months but less a deduction of 5/36ths which the court considered to be just in respect of his refusal to take on the additional students.

In *Sim v Rotherham Metropolitan District Council*, the employer set-off part of teachers' wages where they had refused to cover for colleagues. The court ruled that the teachers had a contractual duty to behave professionally, and to refuse to cover was to behave unprofessionally and therefore in breach of contract. The set-off was proportionate to the time they would have spent covering colleagues.

The roles which are undertaken by those employees who choose to take action short of a strike will vary enormously. Attributing a cost to each part of each employee's role is clearly unworkable from an administrative point of view. Instead, we suggest that a protocol should be agreed in advance with local union/JNC representatives as to how the deductions will be calculated.

We recommend that the starting point should be rotas overall, to try and establish the percentage of time spent on work other than urgent/emergency work in an average day per rota, rather than having to look at each individual job plan. An average deduction could then be made from the salary due to staff in respect of the usual duties which they will not carry out on the rota.

This may not prove feasible and so a more uniform approach (e.g. making a deduction of 20% from the salaries of all who take action) might be considered. Such an approach is not immune from challenge. Employers will be in the best position to defend a legal challenge if the deduction generally reflects the extent of the partial performance.

Employers should also be mindful of the practical difficulties associated with requiring changes to payroll and the possible financial penalties that might be imposed by external payroll providers.

### 13.3 Could employees challenge a partial deduction of salary in the courts?

Yes.

As stated above, 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, but that is a more expensive forum.

### 13.4 What steps should be taken in the event of proposed action short of a strike?

*We recommend that employers commence negotiations locally with union 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 in particular in respect of such areas as A&E, oncology and maternity
- What is expected of staff due to work
- How the deduction from pay will be calculated
- How holidays and sickness will be dealt with

## 14 IMMUNITY

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

No.

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 their regulatory body or protection from any clinical negligence claims from patients.

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, it is possible that regulatory bodies may take an interest in such matters as a potential breach of professional codes of conduct.

### 14.2 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?

Yes.

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.

# FAQs – Contingency Planning and Industrial Action



## GUIDANCE NOTE

December 2022

The information contained in this note is for general guidance purposes only. It should not be relied upon as a substitute for legal advice on specific facts or matters and we recommend that you contact your usual Capsticks' employment law adviser for detailed advice.

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