



Industrial action: why it will pay employers to be prepared

The recent marked increase in industrial action will undoubtedly continue during the two-year public-sector pay freeze announced in the emergency budget and while further job cuts remain possible. In fact, we may be experiencing a lull before the storm. The private sector is not immune either, as meagre pay deals, efficiency drives and steps to tackle burgeoning pension deficits place all employers at risk of action.

The current union balloting requirements for industrial action have been criticised because a simple majority can result in lawful strike action, even if only a small proportion of those eligible actually voted. The government may review industrial action legislation, depending on how unions react to the effects of spending cuts in the coming months.

One option for change could be the proposals outlined by the CBI. It is advocating a statutory threshold of 40 per cent of the balloted workforce voting in support before a strike is deemed to be lawful.

Nowadays, notification of a ballot may not necessarily lead to a strike. Increasingly, unions are using ballots as a tactical move to “up the stakes” in a negotiation, rather than as a last resort before a strike. According to Peter Turnbull of Cardiff Business School, there are about 1,000 strike ballots every year, but fewer than a couple of hundred go ahead. Nevertheless, employers should have a strategy in place for responding to threatened or actual industrial action. Given the commercial and legal need to respond promptly, they cannot afford to be complacent.

Several prominent court decisions have shown how difficult it is for unions to comply with balloting rules. Back in 1990, the balloting provisions were described as a “minefield in which it is all too easy to stray from the paths of safety and legality” by the late Lord Donaldson in the case *Post Office v Union of Communication Workers* (CA 1990 ICR 258).

Since then, legislation has been tightened further, prompting Unite joint-general secretary Tony Woodley to say that the right to strike is “hanging by a thread”, although the U-turn made by the Court of Appeal in the most recent [British Airways v Unite](#) case makes for a more balanced interpretation of the complex rules (see panel, below).

There are three key areas that unions must get right: notification of intention to ballot; the process for the ballot itself; and the way in which the outcome is communicated to members. Employers should check all aspects of the process to ensure the information is as accurate as possible. For example, have all the members in the balloting constituency been balloted? Or have the wrong people been balloted? This is what happened in round one of the BA strikes, when Unite balloted staff who had accepted voluntary severance.

Unions must state the total number of members balloted and the categories of workers involved. Last year, EDF prevented a planned London Underground strike because the union had categorised some of its members as “technicians/engineers” rather than “test room fitters” and “shift testers” (*EDF Energy Powerlink Ltd v National Union of Rail Maritime and Transport Workers*, 2009 EWHC 2852 QB).

Employers need to factor these types of considerations into a strategy for tackling industrial action to be able to move quickly if they do wish to litigate. But the strategy should not only involve scrutinising every ballot process

for mistakes. Litigation is only one option. As the Court of Appeal pointed out, mediation or Acas conciliation may be more appropriate in some disputes.

After all, if unions are turning to ballots as a tactical move to put employers under pressure, employers should look creatively at their options to respond.

BA v Unite

The legality of Unite's latest industrial action depended on the outcome of a ballot of union members conducted between January and February this year. The Court of Appeal had to consider the union's alleged failure to comply with the statutory provisions on communicating the result of the ballot to its membership. The court looked at the emails, texts, tweets and website information the union had used and ruled that it had complied with the legislation. The court also gave a message regarding dispute resolution: industrial disputes should be settled by mediation, not litigation.

Key points

- Unions must: notify employers of their intention to ballot; process the ballot in strict accordance with the rules; communicate the result to union members and their employer.
- The CBI is pressing to raise the threshold on a vote for strike action to 40 per cent of the workforce involved.
- Employers should be ready to challenge any aspect of the voting process, but they should also be thinking creatively about ways to resolve the dispute.

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