

Strikers – Protection against Dismissal Sean Jones

Introduction

1. This handout looks at the legal consequences in three different sets of circumstances:
 - (1) Dismissals before the strike or other industrial action (“action”) has begun;
 - (2) Dismissals during unofficial action; and
 - (3) Dismissals during official action.
- (1) Dismissals before the strike has started
2. An employer gets wind that there is an after hours union meeting in the canteen about the possibility of balloting for strike action. He marches up and dismisses all those attending. Have the employees been unfairly dismissed?
3. The chances are that they have been. **TULR(C)A 1992, s. 152** makes it automatically unfair to dismiss an employee for taking part in the activities of an independent trade union at an appropriate time”. Unless an employer has agreed that employees can take part in trade union activities during working hours, “an appropriate time” means, in essence, outside work. **Britool v Roberts** [1993] IRLR 483 EAT confirmed that preparations for strike action may amount to trade union activities.
4. Note that there is no need, in such cases, for employees to have worked for a year. Beware the possibility of interim relief.
- (2) Dismissals during unofficial action
5. **TULR(C)A 1992, s. 237(1)** provides that:

“An employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike or other unofficial industrial action”.

Note that this stripping of protection is not limited to cases where the *reason* for dismissal is that he took part in the strike or other action. For instance, an employee dismissed on capability grounds in circumstances that would otherwise be unfair is not protected.
6. There are a series of exceptions, however, which allow claims where the reason for dismissal (or for selection for redundancy) was one of the “prohibited reasons” ie: jury service; maternity and family leave; health and safety; employee representatives for working time purposes; employee representatives for redundancy or transfer of undertakings; protected disclosure, flexible working, assertion of a statutory right to time off to care for dependants [S. 237(1A)].
7. Discrimination liability would also, of course, be preserved.
8. A strike or other action will be unofficial unless it has been “authorised or endorsed” by a trade union and either the relevant employee is a member of the trade union or other participants are [S. 237(2)]. If none of the participants are union members the action is not “unofficial”. Union members cannot bring about this result, however, by all resigning their

memberships. If they were members when the action commenced they are treated as being members throughout [S. 237(6)].

9. If a union repudiates a pre-existing authority or endorsement, the action remains official until the end of the following working day [S. 237(4)]. There are detailed rules as to when a union will be taken to have effectively repudiated set out at **TULR(C)A 1992, s. 21**. They have to write to the committee or official that has called the action; do their best to communicate the repudiation to individual members (warning that they risk dismissal without being able to claim unfair dismissal) and give notice to the employer.

10. In a case where an employer gives notice, the “time of dismissal” is the date on which the notice is given [S. 237(5)].

(3) Dismissals during official action

11. There is a complex regime set out in **TULR(C)A, 1992, 238A**.

12. The regime applies where an employee is induced to do something by an act (e.g. calling for a strike) which is covered by the **TULR(C)A 1992, s. 219** exemption from tort liability. In other words, it applies where there has been a ballot. [S. 238A(1)]

13. An employee is unfairly dismissed if:

(1) The reason or principal reason for the dismissal is that he took the protected industrial action; and

(2) Either:

(a) He is dismissed within the “protected period”;

(b) He is dismissed after the end of the protected period but he had stopped taking the protected industrial action before the protected period had come to an end; or

(c) He is dismissed after the end of the protected period, he had not stopped taking the protected industrial action before the protected period had come to an end but the employer had not “taken such procedural steps as would have been reasonable for the purposes of resolving the dispute to which the protected industrial action relates”. [S. 238A (2) to (5)]

14. The “protected period” is made up of the “basic period” and any “extended period”. The “basic period” is a period of 12 weeks beginning with the first day of the protected action. The “extended period” is the number of days (if any) on which the employee was locked out of the workplace by the employer during the basic period. [S. 238A (7A) to (7D)]

15. The question as to whether “reasonable procedural steps” have been taken is assessed by looking at whether:

– The Employer/Union complied with procedures set out in any relevant in collective agreements;

– Whether (once the action had started) the Employer/Union offered to commence/resume negotiations;

– Whether (once the action had started) the Employer/Union unreasonably refused a request to use conciliation services;

- Whether (once the action had started) the Employer/Union unreasonably refused a request to use mediation services. [S. 238A(6)]
- 16. Even if conciliation or mediation services are engaged, there is a further set of requirements governing whether appropriate use has been made of those services (for which see S. 238B). They include, for instance, whether the parties co-operated in making arrangements to use the services.
- 17. In assessing the reasonableness of the procedural steps one does not look at the underlying merits of the dispute. [S. 238A(7)]
- 18. There is no qualifying period of employment for the protection. [S. 239(1)]
- 19. Note that there is a 6 month time limit for claims [S. 239(2)]
- 20. Some measure of protection is afforded to employees even where S. 238A is not available. **TULR(C)A 1992, s. 238** applies where action is “official” (and therefore outside s. 237) but not “protected” (and therefore outside s. 238A).
- 21. Where a dismissal takes place during a lock out or when the employee is taking part in a strike or other industrial action the ET can only consider a claim for unfair dismissal if other participants employed at the same establishment are not dismissed or if there is a selective offering of re-engagement within 3 months of the dismissal.
- 22. Once again there is an exception where the dismissal is for one of the “prohibited” reasons. Again, there is no qualifying period of employment required and there is a 6 month time limit for claims.

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