

INDUSTRIAL ACTION AND THE LAW

A guide for employees, trade
union members and others

2010

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Introduction

This document is designed to give employees, trade union members, and others a general understanding of the statutory rights and protections given to those who are called upon, or otherwise induced, to take industrial action. These rights are additional to any others which a union's own rulebook may provide.

The contents of this document apply equally to men and women but, for simplicity, the masculine pronoun is used throughout. Except where otherwise indicated, "court" is used to mean the High Court in England and Wales and the Court of Session in Scotland.

When a trade union calls for, threatens to call for, or otherwise organises industrial action, its members may wish to consider the following matters:

Does the organisation of industrial action comply with the terms of the union's rulebook?

If not, a member may wish to bring legal proceedings against his union on grounds of breach of contract to ensure that those terms are complied with¹.

Has there been (or is there likely to be) a properly conducted secret ballot in which all those who will be called upon to take part in the industrial action have been (or will be) given entitlement to vote?

If not, a member induced (or likely to be induced) to take part in such action may wish to exercise his right to take legal proceedings to restrain his union from calling for the action without the support of a ballot.

The potentially serious consequences of taking industrial action, regardless of whether an instruction by their union to do so is lawful or not.

Industrial action may put jobs at risk. If a member decides to disobey his union's instruction to take such action, he has statutory protection against union discipline taken because he refuses to take industrial action.

This document gives general guidance only and is not a substitute for professional legal advice. Authoritative interpretations of the law can be given only by the courts.

¹ The union rulebook forms a "contract of membership". If any of the rules of the union are broken, a member may bring an action in the courts for breach of contract.

The consequences for employees of taking industrial action

Employees who take industrial action will know that there may be damaging financial consequences for them, since they are unlikely to receive any pay if they withdraw their labour. They should also be aware that they are putting their jobs at risk.

An employer may take various measures, up to and including dismissal, against any employee who takes industrial action. An employee who is dismissed by his employer while taking industrial action may lose his right to claim unfair dismissal.

How does taking industrial action affect an employee's right to claim unfair dismissal?

With certain exceptions, the law prevents an employment tribunal from considering a claim of unfair dismissal on its merits if the employee was dismissed while taking part in industrial action. This means that the employment tribunal cannot find the dismissal of the employee to be unfair. The courts have interpreted this legislation as applying to any industrial action - whether or not it involves breach, or interference with, the performance of the employee's contract of employment. The exceptions are as follows.

Dismissal for taking part in "protected" industrial action starting on or after 24 April 2000

Where an employee started taking "protected" industrial action on or after 24 April 2000, it is unfair to dismiss him for this reason unless his industrial action lasts for more than eight weeks and the employer has taken such procedural steps as are reasonable to try to resolve the dispute. Employees who believe they have been unfairly dismissed in this way have the right to complain to an employment tribunal, regardless of their length of service or age.

The Employment Relations Act 2004 introduces a new provision which changes the length and scope of the "protected" period for industrial action. For industrial action commencing on or after 6 April 2005, the length of protected industrial action is extended from eight to twelve weeks.

Lock-out days, where an employer prevents striking employees from returning to work, are disregarded when determining this twelve week period. For example, where an employer locks out employees taking "protected" industrial action, for ten days, during the twelve week period, the twelve week period will be extended by ten days.

If the tribunal finds that an employee has been unfairly dismissed, it can make an award of compensation comprising a basic award, based on the employee's age, length of service and weekly pay and calculated in a similar way to a redundancy payment, and a compensatory award, which is an amount the tribunal considers just and equitable for the loss which the employee has suffered as a result of the dismissal, subject to a limit of

£50,000² 2. If no employees are still taking protected industrial action over the relevant dispute and if the employee so wishes, the tribunal may make an order for the employee to be re-instated or re-engaged. If the employer refuses to comply with the order, the tribunal may make an award of compensation consisting of the basic and compensatory awards mentioned above and an additional award of between 26 and 52 weeks' pay (subject to a maximum of £11,960³). For more details, see: Unfairly dismissed?

What is "protected" industrial action?

Industrial action is "protected" if an employee is induced to take it by his union and the union in doing so complies with the legal requirements governing the organisation of industrial action. More details of these requirements are given in Industrial action and the law. If the union repudiates the industrial action⁴, it ceases to be protected after the working day following the day of the repudiation. (For example, if the union repudiates the action on a Monday, industrial action taken on or after the Wednesday will not be protected).

What are "reasonable procedural steps"?

It is for the tribunal in considering a claim for unfair dismissal to decide whether the employer has taken such procedural steps as are reasonable to resolve the dispute to which the industrial action relates. In doing so, the tribunal will not consider the merits of the dispute but will have regard to whether the employer and union had complied with the procedures in any applicable collective or other agreement and whether, after the protected industrial action had begun, they had:

- offered or agreed to start or restart negotiations;
- unreasonably refused a request to make use of conciliation services;
- unreasonably refused a request to make use of mediation services in relation to the procedures to be used to resolve the dispute; or
- where the parties have agreed to use the services of the mediator or conciliator, section 28 of the Employment Relations Act 2004 introduces new matters which the tribunal is to have particular regard to when

² This figure is revised annually in line with the retail prices index.

³ This is because for the purposes of this calculation a week's pay is subject to a limit of £230, revised annually in line with the retail prices index.

⁴ The circumstances in which an individual may do an act which renders a union responsible in law, and the "repudiation" process, are described in the Industrial action and the law: a guide for employers, their customers and suppliers, and others. If an act is to be "effectively repudiated", for example, it must be repudiated by the union's Principal Executive Committee, President or General Secretary as soon as reasonably practicable after coming to the knowledge of any of them, and the union must take certain steps thereafter (which include doing its best, without delay, to give written notice of the repudiation to relevant members and to the employer(s) of such members).

assessing whether an employer has taken reasonable procedural steps to resolve the dispute with the union.

Selective dismissal or re-engagement during industrial action

A tribunal may also entertain claims of unfair dismissal on their merits if the employer discriminates between those taking part in industrial action - other than "unofficial" industrial action - by:

- dismissing some of those taking part in the action, but not others⁵; or
- offering re-engagement to any employee dismissed while taking part in industrial action within three months of his dismissal, but not to all those dismissed⁶.

An employee dismissed while taking "unofficial" industrial action will not generally be able to claim unfair dismissal, regardless of whether the employer had discriminated between those taking such action by dismissing, or re-engaging, only some of them.

In addition, the law recognises certain cases of dismissal as requiring special protection. Further details of cases where an employee who is dismissed during the course of industrial action will always be able to make a claim for unfair dismissal can be found in sections 237(1) and 238(2A) of the Trade Union and Labour Relations (Consolidation) Act 1992. These cases, generally, relate to family reasons, health and safety, employee representation and whistle blowing. More information can be found in: Unfairly dismissed?

In what circumstances is an employee regarded as taking part in "unofficial" industrial action?

An employee who was a member of a union (other than for purposes unconnected with his employment) when he began to take the industrial action, or when he was dismissed, will be regarded as having been dismissed while taking "unofficial" industrial action if, at the time of his dismissal, the union has not authorised or endorsed the act of calling for, threatening to call for, or otherwise organising the industrial action. This will be the case where the act was done by a person for whose acts the union was not responsible in law or the act has been "effectively repudiated" by the union's Principal Executive Committee, President or General Secretary 4.

⁵ To avoid such a claim of unfair dismissal from a person dismissed while taking part in industrial action, the employer needs to treat in the same way only all those who were taking part in the industrial action on the date of his dismissal and who work at the same establishment.

⁶ However, after a three month period, the employer may offer re-engagement to any of the employees dismissed while taking part in industrial action, without a tribunal being able to hear a claim of unfair dismissal from employees not offered re-engagement.

(Where the relevant act has ceased to be an act of the union because it has been so "repudiated", an employee is not regarded as taking "unofficial" industrial action until a full "working day"⁷ has passed since the day on which the repudiation took place. But when that time has passed, any employee taking, or continuing to take, the industrial action will be regarded as taking "unofficial" action whether or not he has been told of the repudiation by written notice or by any other means.)

An employee who was not a union member when he began to take the industrial action in the course of which he was dismissed, nor when he was dismissed, will be regarded as having been dismissed while taking "unofficial" action unless, at the time of dismissal, there were others also taking the action who were members of a union which had authorised or endorsed the action, or unless none of those taking part in the action were members of a trade union.

⁷ "working day" for these purposes means any day other than a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday under the Banking and Financial Dealings Act 1971.

Industrial action ballots

The law gives every union member the right to apply to the court for an order to restrain his union from inducing him and other members to take any kind of industrial action in the absence of a properly conducted secret ballot, in which the majority of those voting indicate they support the action.

Who can apply to the court?

Any member induced, or likely to be induced, by his union to take industrial action (ie a strike or action short of a strike) without a properly conducted secret ballot supporting the action may apply to the court. A member may apply whether or not he is able or intends to comply with the inducement.

How quickly can a court hear an application?

The timetable for hearing an application is a matter for the court. However, it can grant an injunction on an interim basis to restrain the union from organising the industrial action pending a full hearing of the case. A court may be willing to consider an application on this basis very quickly.

What can a court do?

If the court is satisfied that:

- the union has authorised or endorsed⁸ any industrial action without the support of a properly conducted secret ballot; and
- members, including the member applying to the court, are likely to be, or have been, induced to take part (or continue to take part);

it must make an order requiring the union to take steps to ensure that:

- there is no, or no further, inducement by the union, of members to take or continue to take part in the industrial action; and
- no member does anything after the order is made as a result of unlawful inducement prior to the making of the order.

The union will therefore have to withdraw any authorisation or endorsement of the industrial action which led to the order, and do so in such a way as to leave members in no doubt that it has been withdrawn.

Having complied with the order, it will then, of course, be open to the union to conduct a proper secret ballot which would give it protection from legal proceedings for organising industrial action.

⁸ union is only responsible in law for inducing industrial action if it "authorises or endorses" the inducement, so making the action "official". A union might "authorise" the inducement of industrial action from the outset, or "endorse" industrial action induced earlier after the action has started. The circumstances in which a union will be held to have authorised or endorsed action are laid down in statute. The Employment Legislation document Industrial action and the law provides further details.

What if a union fails to obey the court order?

If the court order is not obeyed, anyone who sought it can go back to court and ask that the union (or any particular individual(s) concerned) be declared in contempt of court.

A union found to be in contempt of court may face heavy fines or other penalties which the court may consider appropriate; for example, refusal to pay fines may lead the court to order the union's assets to be seized.

In addition, the law provides a special statutory right under which a union member may bring legal proceedings against the union's trustees on the ground that they have caused or permitted the unlawful application of union property (see section on Unlawful use of union funds or property by trustees).

What is a "properly conducted secret ballot"?

The law sets out a number of requirements which must be satisfied if the ballot is to give the union protection against proceedings for organising industrial action. A failure to satisfy any of these requirements means that a member can bring proceedings to stop his union calling for industrial action⁹. The requirements are set out under the following seven headings:

Independent Scrutiny

For a ballot where more than 50 members are given entitlement to vote¹⁰, the union must appoint a qualified¹¹ person as the scrutineer of the ballot, whose terms of appointment must include the production of a report on the conduct

⁹ There are additional requirements to be satisfied if a union's organisation of industrial action is to be protected from proceedings brought by an employer, or by an individual deprived of goods or services because of unlawfully organised action. Details of these requirements are set out in the Employment Legislation guidance Industrial action and the law and Industrial action and the law: Citizen's right to prevent disruption - Guidance.

¹⁰ For the purposes of deciding whether there is a requirement for scrutiny of an industrial action ballot (see above), the number of those regarded as being entitled to vote in a ballot will be determined by adding together all those given entitlement to vote (see section on "Entitlement to vote"), regardless of whether separate place of work ballots are required (see section below on "Balloting members at more than one workplace"). Where the number produced is more than 50, the scrutiny procedures must be followed in respect of the ballot or in respect of each separate place of work ballot.

¹¹ The Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993 specifies conditions which must be satisfied in order for an individual or partnership to qualify for appointment as a scrutineer. It also specifies certain bodies by name as being qualified.

The Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993 (Amendment) Order 2010. (Statutory Instrument No 437) amends the 1993 order by replacing the list of bodies specified by name as being qualified for appointment. In broad terms, the current order covers practising solicitors, qualified accountants and six named bodies: the Association of Electoral Administrators, DRS Data Services Limited, Electoral Reform Services Limited, the Involvement and Participation Association, Opt2Vote Limited, and Popularis Limited. Contact details are listed in the document Trade union executive elections: a guide for trade unions, their members and others.

of the ballot. This report must be produced as soon as reasonably practicable after the date of the ballot, and in any event not later than four weeks after that date.

- The union must ensure that the scrutineer carries out the functions required to be part of his terms of appointment, and that there is no interference with this from the union, or any of its members, officials or employees; and comply with all reasonable requests made by the scrutineer for the purpose of carrying out those functions.
- The union must provide a copy of the scrutineer's report to any union member who was entitled to vote in the ballot, or any employer of such a member, who requests one within six months of the date of the ballot. The copy must be supplied as soon as reasonably practicable, and provided free or on payment of a reasonable fee specified by the union.

Timing of the ballot and related action

- The ballot must always be held before a union calls for, or otherwise organises, industrial action.
- The union's first call for industrial action to which the ballot relates must be made before the end of the period of four weeks¹² beginning with the date of the ballot or such longer period not exceeding eight weeks as the union and employer may agree. Industrial action to which the ballot relates must also first take place within that period.
- A union cannot avoid liability merely by holding a properly conducted secret ballot after previously calling for industrial action without one.

Entitlement to vote

- All those members, but only those members, who it is reasonable at the time of the ballot for the union to believe will be induced by the union to

¹² A union may be allowed to make its first call for industrial action more than four weeks after the date of the ballot if either (a) the employer and union agree on an extension, for example to enable talks which are making progress to continue, of up to eight weeks after the date of the ballot or, (b) an injunction granted by a court or an undertaking given by the union to the court prohibits the union from calling for industrial action during some part, or the whole, of the four weeks following the date of the ballot, and the injunction subsequently lapses or is set aside or the union is released from its undertaking. In the latter case, a union may forthwith apply to the court for an order which, if granted, would provide that the period during which the prohibition had effect would not count towards the four week period for which ballots are normally effective. However, if the court believes that the result of a ballot no longer represents the views of union members, or that something has happened or is likely to happen which would result in union members voting against taking action, or continuing with, action if there were a fresh ballot, it may not make such an order. In any case, a ballot can never be effective if a union's first call for industrial action is made more than twelve weeks after the date of the ballot.

take part in the industrial action must be given an entitlement to vote in the ballot¹³.

- No-one else may be given a vote, and no-one denied entitlement to vote may subsequently be called on to take part in the action by the union, without invalidating the ballot. However, the validity of the ballot will not be affected if the union subsequently calls upon members to take part in industrial action who were not members at the time of the ballot, or who were members but who it was not reasonable to expect would be called upon to take action (for example because they changed jobs after the ballot).

Balloting members at more than one workplace

Where the members of a union with different workplaces are to be balloted, a separate ballot will be necessary for each workplace unless one of the conditions set out below is met. It will be unlawful for the union to organise industrial action at any such workplace where a majority of those voting in the ballot for that workplace have not voted "yes" in response to the relevant required question (or questions) (see below). (If an employee works at or from a single set of premises, his workplace is those premises. If not, it is the premises with which his employment has the closest connection).

In summary, the conditions for holding a single ballot for more than one workplace are:

- at each of the workplaces covered by the single ballot there is at least one member of the union affected by the dispute; or
- entitlement to vote in the single ballot is given, and limited, to all of a union's members who, according to the union's reasonable belief, are employed in a particular occupation or occupations by one employer or any of a number of employers with whom the union is in dispute; or
- entitlement to vote in the single ballot is given, and limited, to all of a union's members who are employed by a particular employer or any of a number of employers with whom the union is in dispute.

¹³ The union may choose whether or not to give a vote to "overseas members" (ie members other than merchant seamen and offshore workers who are outside Great Britain at the time of the ballot). However, members who are in Northern Ireland throughout the voting period for an industrial action ballot and who will be called upon to take part in, or continue with, the industrial action must be given entitlement to vote in the ballot if (i) their place of work is in Great Britain and the ballot is of members at their place of work: or (ii) the industrial action to which the ballot relates will involve members in Great Britain as well as Northern Ireland and the ballot is a general one covering workplace in both Great Britain and Northern Ireland. Members required to be given entitlement to vote by either of these requirements do not count as "overseas members" for the purposes of the law on industrial action balloting.

It is possible for a union to hold more than one ballot on a dispute at a single workplace. If the conditions above are met, some or all of those ballots may also cover members in other workplaces.

Voting procedures

Voting must be by the marking of a voting paper.

The voting paper must:

- state the name of the independent scrutineer;
- clearly specify the address to which, and the date by which, it is to be returned;
- be marked with a number, which is one of a series of consecutive numbers used to give a different number to each voting paper.
- make clear whether voters are being asked if they are prepared to take part in industrial action which consists of a strike, or in industrial action short of a strike, which for this purpose includes overtime bans and call-out bans; and
- specify the person or persons (and/or classes of person/s) whom the union intends to have authority to make the first call for industrial action to which the ballot relates, in the event of a vote in favour of industrial action.

Those voting must be allowed to do so without interference from or constraint imposed by the union or any of its members, officials or employees.

So far as reasonably practicable every member properly entitled to vote must be:

- able to vote in secret;
- sent a voting paper by post to his home address (or any other address which he has requested the union, in writing, to treat as his postal address)¹⁴; and
- given a convenient opportunity to vote by post at no direct cost.

¹⁴ There is a limited exception for the balloting of union members rules in the case of the balloting of members who are merchant seamen who the union reasonably believes will be employed in a ship at sea (or outside Great Britain) at some time in the period during which votes may be cast and that it will be convenient for them to vote while on ship or where the ship is. So far as reasonably practicable, the union must ensure that, in these circumstances, those members get a voting paper while on board ship (or at the place where the ship is located), and an opportunity to vote on board ship (or at that place).

The voting paper must contain at least one of the following questions, framed so as to require a "yes" or "no" answer:

- a question (however framed) which requires the voter to say whether he is prepared to take part (or to continue to take part) in a strike;
- a question (however framed) which requires the voter to say whether he is prepared to take part (or continue to take part) in industrial action short of a strike, which for this purpose includes an overtime or call-out ban.

The following statement must appear on every voting paper: "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 a 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." That statement must not be qualified or commented upon by anything else appearing on the voting paper.

The voting paper must specify the person, people, or description of people whom the union intends to have authority to call for industrial action to which the ballot relates, in the event of a vote in favour of industrial action. For this purpose anyone so specified need not be authorised under the union's rules to call on members to take industrial action, but must be among those for whose acts the union is responsible in law¹⁵.

Counting of votes

Votes cast must be accurately and fairly counted (only accidental misrecording on a scale which could not affect the result is allowable without the ballot being rendered invalid).

Majority Support

Majority support must be obtained in response to the question (or questions) on the ballot paper which is appropriate to the type of industrial action concerned ie:

- In the case of a strike, majority support must be obtained in response to a question on the voting paper which asks if members are prepared to take part in (or continue with) strike action;

¹⁵ Guidance on whose acts are to be held to be "acts of the union" for this purpose is given in the Employment Legislation document Industrial action and the law. For example, a call for industrial action by any of a union's officers or officials (including a shop steward) will be an act for which the union is responsible in law.

- In the case of action short of a strike, majority support must be obtained in response to a question on the voting paper which asks if members are prepared to take part in (or continue with) action short of a strike;
- If the action consists or may consist of a strike and other industrial action, majority support must be obtained for each type of action in response to separate questions on the voting paper asking if members are prepared to take part in (or continue with) each type.

Announcement of ballot results

As soon as is reasonably practicable after the ballot the union must take steps necessary to ensure that all those entitled to vote, and any employer who it is reasonable for the union to believe was at the time of the ballot the employer of any such person, are informed of the number of:

- total votes cast in the ballot;
- "Yes" votes to the question (or, if more than one, each question) on the voting paper;
- "No" votes to the question (or, if more than one, each question) on the voting paper;
- spoiled voting papers

Where separate workplace ballots are required, these details must be notified separately for each such workplace to those entitled to vote there.

Statutory Code of Practice on industrial action balloting

The Secretary of State has issued a Statutory Code of Practice to promote good practice in the conduct of trade union industrial action ballots: Industrial action ballots and notice to employers.

Failure to observe the provisions of the Statutory Code does not in itself render a union, or anyone else, liable to any legal proceedings. However, where proceedings are brought against a union, the provisions of the Code are admissible in evidence, and may be taken into account by a court if they appear relevant to any question before it. (Its status is thus similar to, for example, the Highway Code in relation to legal proceedings in connection with offences under Road Traffic Acts).

Unjustifiable discipline by a union

There can be serious consequences for those taking part in "official" industrial action (see section on The consequences for employers of taking industrial action). In the past union members have been disciplined by their unions for working during a strike or other industrial action, but union members should be allowed to make up their own minds whether or not to take (or continue) industrial action.

The law makes union discipline unjustifiable in these circumstances. This helps ensure that individuals are free to decide for themselves whether or not to take or continue with industrial action.

What is meant by "union" discipline?

An individual will have been disciplined by a union if any of the following penalties are imposed on him:

- expulsion from the union or from any branch or section of it;
- payment of a sum of money (for example, as a fine) to the union, any branch or section of it, or to any other person;
- treatment of his union subscriptions, or any other payment he has made to the union or any branch or section of it, as unpaid or paid for a different purpose (eg to pay a fine);
- deprivation (even if only temporarily or in limited circumstances) of any benefits, services or facilities which would otherwise be available to him as a member.

An individual will also have been disciplined by a union if:

- another trade union, branch or section, is encouraged or advised not to accept him as a member; or
- he is subjected to any other detriment or disadvantage not listed above.

An individual is treated as having been disciplined by a union not only where the decision to impose the penalty was made in accordance with union rules but also where it was made:

- by an official of the union (for example, a member of the executive, a trustee, or an elected shop steward); or
- by a group which includes an official of the union.

When is discipline relating to industrial action unjustifiable?

Discipline will be unjustifiable if it is for:

- failing to take part in or support any strike or other industrial action;

- showing opposition to, or lack of support for, any strike or other industrial action;
- failing to break, for any purpose connected with a strike or other industrial action, any obligation imposed by or under a contract of employment; or
- encouraging or assisting another person to honour his contract of employment or other agreement with his employer.

Examples of conduct for which individuals are protected against unjustifiable discipline are:

- going to work despite a call to take strike or any other industrial action (the individual is protected whether or not there has been any kind of ballot and whatever its outcome);
- crossing a picket line (including one mounted by the individual's own union at his own place of work)
- speaking out against a call to take strike or other industrial action;
- refusing to pay a levy to fund a strike or other industrial action, including one described as "compulsory" or imposed under union rules.

Individuals will also be protected against unjustifiable discipline if, for example, they refuse to pay a fine imposed on them by a union for working during a strike, or if they have indicated their intention to go to work during a dispute.

Union discipline will also be unjustifiable¹⁶ in a number of other circumstances. These are described in full in Unjustifiable discipline by a trade union - Guidance. Union discipline will, for example, be unjustifiable if it is imposed on an individual for consulting or seeking advice or assistance from the Certification Officer or any other person.

How can a complaint be made?

An individual who believes he has been unjustifiably disciplined by a trade union may make a complaint to an employment tribunal. This should be done

¹⁶ Disciplinary action may not, however, be unjustifiable if it is for unprotected conduct which formed part of protected conduct. If the union can distinguish between the two parts and show that individuals would be disciplined for the unprotected part whether or not it took place in connection with the protected conduct, then discipline for the unprotected conduct will not be unjustifiable. For example, a member who spoke out against a call to take industrial action would be protected against unjustifiable discipline because such conduct is protected under the law. However, if he expressed his opposition to the proposed industrial action by acting in a disruptive way at a union meeting and the union could show that individuals who acted in that way were always disciplined, then disciplinary action for disruptiveness would not be unjustifiable. Disciplinary action for making the assertion itself would, however, be unjustifiable, even if members had previously always been disciplined for making assertions.

within three months of the union's disciplinary decision. Tribunals have discretion to extend this period only where:

- they consider it was not reasonably practicable for the complaint to be presented within three months; or
- any delay was due to a reasonable attempt by the individual to appeal against the decision or to have it reconsidered by the union.

An application form ET 1 (E/W) or ET 1 (Scot) is in the booklet Making a claim to an Employment Tribunal available from Jobcentre Plus offices, Citizens Advice Bureaux, from the BIS publications Orderline on 0845 015 0010, or from the Employment Tribunals Service website. The applicant should send the completed form to the appropriate Tribunal Office as explained in the booklet.

What happens next?

Conciliation

A copy of the application form is sent to the Advisory, Conciliation and Arbitration Service (Acas). An Acas conciliator will attempt to assist the parties to reach a voluntary settlement without the need for a tribunal hearing if the parties concerned ask him to do so or if he thinks that there is a reasonable chance of success. Conciliators can also assist, at the request of any of the parties concerned, before a formal complaint has been made to a tribunal.

Voluntary procedures

A union may have procedures for settling complaints made by members. Where such procedures exist, individuals may wish to make use of them, and an employment tribunal can extend the time limit for making an application where such procedures have been used.

Tribunal hearing

If a voluntary settlement is not reached, or the application is not withdrawn, the member's complaint of unjustifiable discipline will be heard by the employment tribunal. The tribunal will then decide whether the disciplinary action has infringed the right of the member not to be unjustifiably disciplined.

If the tribunal finds the complaint of unjustifiable discipline well-founded, it will make a declaration to that effect.

This may be sufficient remedy in itself, particularly if the union withdraws the disciplinary action. The individual has the right, however, to make an application for compensation to be paid by the union and/or for an order that the union pay to him the amount of any fine he has paid but not had refunded.

An application for compensation or for an order should be made to:

The application will be considered if it is made more than four weeks but less than six months after the date of the tribunal's declaration that disciplinary action was unjustifiable.

How much compensation can be paid?

The tribunal will award whatever compensation it considers just and equitable in all the circumstances. Factors taken into account will include, where appropriate, the individual's duty to reduce any financial loss, and whether or not his conduct contributed to the disciplinary action. The current maximum amount of compensation which may be awarded is £65,200. Additionally, the amount of compensation payable will be not less than £6,100 where, on the date that the application was made to the Employment Tribunal, the determination infringing the applicant's right not to be unjustifiably disciplined has not been revoked or where the union has failed to take all the steps necessary for securing the reversal of anything done for the purpose of giving effect to the determination. These figures are revised annually in line with the retail prices index.

Appeals

An appeal can be made to the Employment Appeal Tribunal (EAT) on any question of law arising from an employment tribunal's decision or the proceedings before it.

What if the discipline in question takes the form of expulsion from the union?

In addition to the right not to be unjustifiably disciplined, individuals now have the right not to be excluded or expelled from a union for anything other than a 'permitted reason'. The permitted reasons are defined in law, and include geographical or occupational limits on recruitment and conduct - but not the conduct described in this document for which discipline would be unjustifiable. An individual who is expelled from the union for any other reason may bring a complaint to an employment tribunal, and may be awarded compensation.

An individual who is expelled from his union for conduct described in this document may therefore have two rights of complaint: one under the law relating to unjustifiable discipline, and one under the law on exclusion or expulsion from a trade union. In this situation, the individual may make two separate complaints to the employment tribunal, but if one of those complaints is declared to be well-founded, he will not be able to proceed with the second.

Further information about the right not to be excluded or expelled from a trade union may be found in Union membership and non-membership - Guidance.

Unlawful use of union funds or property by trustees

When a union organises industrial action, it will be vulnerable to legal proceedings unless it ensures that it complies with statutory requirements and with the provisions of the union's own rulebook. In addition, if it fails to comply with any such requirement it may also be using its funds or property unlawfully. It would certainly be unlawful, for example, for a union to continue to use its funds or property to support industrial action if, as a result of legal proceedings, a court has issued an order against the union restraining it from inducing that action.

The law guarantees a union member's right to take legal action against the trustees of his union in such circumstances. A union member has the right to take legal proceedings against his union's trustees if they apply, or permit the application, of union funds or other property for unlawful purposes. Union trustees cannot under any circumstances, including those which might arise during industrial action, unlawfully use union funds or property, or allow them to be used, for unlawful purposes. Nor may they comply with any unlawful direction given to them under the rules of the union without risking legal proceedings being taken against them by a union member.

When can a member apply to the court?

A member may apply to the court if the trustees of his union have:

used its funds or property unlawfully, or allowed them to be used in such a manner; or

complied with any unlawful direction to apply union funds or property - whether or not such a direction is given under the union's rules.

The member may also apply if he believes that his union's trustees propose to do any of these things.

Who can apply to the court?

Where the claim is that union trustees are proposing to use the union's funds or property unlawfully, or comply with an unlawful direction, any member may apply to the court. If the claim is that the union's funds or property have already been used unlawfully, or an unlawful direction has been complied with, the application to the court must be made by a current member who was also a member when the funds or property were used, or when there was compliance with the direction.

How quickly can a court hear an application?

The timetable for hearing an application is a matter for the court. However, it can grant an order on an interim basis which will apply pending a full hearing of the case and the court may be willing to consider an application on this basis very quickly. What remedy is available? If the court is satisfied that a union's trustees have acted, or propose to act, unlawfully in the manner complained of, it has the power to:

- require the trustees to take specified steps to protect or recover the union's property;
- appoint a receiver¹⁷ of the union's property;
- remove one or more of the trustees.

If the court makes an order in response to a complaint concerning application of union property in breach of the terms of a court order - ie to facilitate contempt of court - it must order the removal of all the union's trustees, except for any who can convince it that they should remain. These powers are without prejudice to any other power which the court may have to remedy a breach of trust by union trustees.

What if the trustees fail to take action specified by the court?

If the trustees fail to comply with an order of the court then they will be in contempt and will be liable as individuals for any penalties, such as fines, which the court may impose for contempt. It will be unlawful for a union to pay their fines or otherwise indemnify them¹⁸.

What if the court appoints a receiver?

The receiver will remain in control of the union's funds until the court is satisfied that it is right to return that control to the union's trustees.

What if the court removes one or more trustees?

If the court orders the removal of a trustee, it will be apparent from the terms of the trust (set out in the union's rules) whether there is a requirement for a new trustee to be appointed in his place or whether the trust can be administered by the remaining trustees.

If the court removes all the trustees, it can be expected to place the union's funds in the hands of a receiver until the union appoints suitable new trustees in accordance with its rules.

¹⁷ In Scotland, a judicial factor on the union's property

¹⁸ It is unlawful for the property of a union to be applied in or towards indemnifying individuals for any penalty imposed by a court for an offence or for contempt of court. This is described in more detail in Trade union funds and accounting records – Guidance.

