LEGAL OPINION

# Shoot first and ask questions later?

**A recent ruling has clarified the employer's position when dismissing unofficial strikers.**

HR professionals should know that staff who are dismissed while participating in an unofficial strike or unofficial industrial action are barred from claiming unfair dismissal under section 237 of the Trade Union and Labour Relations (Consolidation) Act 1992. Industrial action will be deemed unofficial if it is not authorised or endorsed by a union.

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## Gate Gourmet

Some issues relating to this exclusion from the right to claim unfair dismissal were explored recently by the Employment Appeal Tribunal (EAT) in the conjoined appeals of several staff who had been dismissed in August 2005 during a period of unofficial industrial action against Gate Gourmet, which supplied in-flight food to British Airways. While the claims of each of the appellants had failed before the employment tribunal and their appeals also failed before the EAT, some appeals gave rise to interesting issues:

One employee did not attend work for two days of the strike but "kept his head down". He was dismissed when he attempted to return to work on the third day. As he was trying to return to work, he was not participating in unofficial action at the time of his dismissal. He was therefore able to claim unfair dismissal.

However, the original tribunal held that his dismissal for not working on the first two days was fair, and the EAT agreed. The EAT held that, while the withdrawal by an employee of his labour will not necessarily justify dismissal in every case, it is within the range of reasonable responses to dismiss an employee where he deliberately absents himself in a manner plainly liable to do serious damage to the employer's business. It also held that nothing in the case law from the European Court of Human Rights or the European Court of Justice on the right to strike deprives employers of the right to dismiss employees for having participated in unofficial action.

## Union official

Another employee, who was a union official, was found to have participated in the unofficial action by virtue of his attendance at a staff meeting in a canteen. His appeal failed. The employment tribunal was entitled, as a matter of fact, to decide that the union official had participated in the industrial action as those present in the canteen meeting, when they had been dismissed, were participating in the unofficial action by virtue of their refusal to continue their work. The employee's status as a union official did not exempt him from that conclusion.

The approach that the employer had taken in this case was described by the EAT as "shoot first and ask questions later". This clearly has its attractions for an employer: it means that the unofficial action is dealt with speedily and it gives the employer the best chance of taking advantage of the exclusion from the right to claim unfair dismissal of those dismissed while participating in unofficial action. Furthermore, an employer need not follow any sort of procedure if the dismissal takes place while the employee is participating in unofficial action. Indeed, in this particular EAT case, each of the claims of unfair dismissal failed at tribunal, and each of the appeals against those decisions also failed.

## Useful reminder

Nonetheless, this decision serves as a useful reminder to employers that they can only rely upon the exclusion from bringing unfair dismissal claims if: the strike or industrial action in question is unofficial, by virtue of it not being authorised or endorsed by the relevant union; and, equally as important: the employee can be shown to have been participating in the action at the time of dismissal – rather than, for example, being absent from work due to illness.

**KEY POINTS**

- If employees strike, go slow, work to rule or take other forms of industrial action, they can be dismissed without the risk of unfair dismissal claims.
- This only applies if employees are dismissed when taking part in action that is not endorsed or authorised by a trade union.
- It does not apply if they are – at the time – on holiday, on sick leave, or trying to return to work.

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