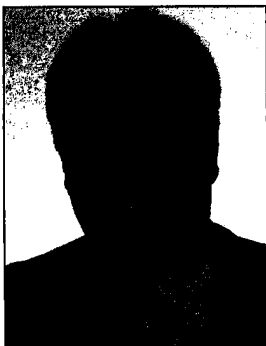


Legal protections for union members

Charles Wynn-Evans summarises some key legal protections that are extended to trade union members



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'The Employment Relations Act 1999 (Blacklists) Regulations 2010 came into force on 2 March 2010, introducing a new ground of automatically unfair dismissal. They protect both employees who have refused work as a result of an employer relying on a blacklist and workers already employed.'

The increase in industrial action over recent months across various sectors of the economy has naturally led to an increased focus on the legalities of industrial action, especially given the high-profile litigation that has arisen from these disputes. Whether a strike occurs or not, if employers' relationships with trade unions and their members deteriorate, the protections afforded to union members by the law can become problematic for all concerned. This article summarises the rights granted to employees and workers through membership (or non-membership) of a trade union, and the employment law implications of official and unofficial industrial action for dismissal claims. Unless otherwise indicated, statutory references are to the Trade Union and Labour Relations (Consolidation) Act 1992.

Independence

Many of the rights accorded to trade unions and their members depend on the union being 'independent', a status that is confirmed by a certificate of independence issued by the certification officer. This is distinct from employer-funded or organised house unions and staff associations. Under s5, an independent trade union is one that:

- is not dominated or controlled by an employer, group of employers, or one or more employers' associations; and
- is not subject to interference from an employer, or any such group or association, tending towards control

(whether as a result of its provision of financial or material support, or any other means).

Relevant factors include:

- sources and stability of finance;
- material support from the employer;
- the history of the union's establishment;
- the employer's ability to interfere in the union's operations under its rule book; and
- the union's approach to negotiations.

Recruitment

Employees must not be refused employment or employment-agency services on the grounds of membership (or non-membership) of a trade union, or an unwillingness or refusal to become or remain a member of a trade union (s137). Although discrimination against job applicants on the grounds of trade union membership is prohibited, there is no such provision in relation to any previous trade union activities.

If the tribunal upholds a complaint, it must make a declaration to this effect. In addition, it may award compensation, assessed on the basis of damages for breach of statutory duty. This can include damages for injury to feelings (s140(2)). Section 138 establishes similar protections in relation to the services of an employment agency.

Time off

Union members and officials are entitled to a 'reasonable' amount of time off work in various specified situations. What is 'reasonable' will inevitably depend on the circumstances. An employer can refuse the request of an employee who wishes to take unreasonable periods of time off and can impose reasonable conditions on the exercise of the right (such as requiring them to work on a particularly busy day).

Members of recognised independent trade unions are entitled to take reasonable, unpaid time off to participate in union activities and to consult union learning representatives (s170). However, this right does not entitle employees to take time off to participate in industrial action (s170(2)), such as attending mandatory union meetings held for the purpose of disrupting the employer's production schedules.

Employees who are officials of an independent trade union recognised by their employer for collective bargaining are permitted reasonable, paid time off to:

- carry out their duties in connection with collective bargaining

negotiations and the performance of other permitted collective bargaining functions;

- participate in information and consultation over collective redundancies or transfers under TUPE (the Transfer of Undertakings (Protection of Employment) Regulations 2006);
- agree new terms for the workforce following a TUPE transfer in an insolvency situation; and
- undergo training in aspects of industrial relations relevant to their duties that has been approved by the Trades Union Congress or trade union. Accompany a fellow worker to a disciplinary or grievance hearing.

For these purposes, a union official is an officer of the union, or an employee elected or appointed in accordance with the union's rules to be a representative of union members in the workplace (s119).

Trade union members can complain that they have not been permitted unpaid time off for trade union activities (s170). Where the tribunal

finds a complaint about time off is well-founded, it will make a declaration to that effect. It may also award such compensation as it considers just and equitable, having regard to the employer's default in failing to permit time off and to any resulting loss sustained by the employee. Since the tribunal may take the extent of the employer's default into account as well as any loss suffered by the employee, compensation may be awarded even where there is no actual loss (*Skiggs v South West Trains* [2005]).

Employees who are members of a recognised independent trade union can take reasonable time off to perform duties as a union learning representative, providing that the union has given the employer notice in writing that:

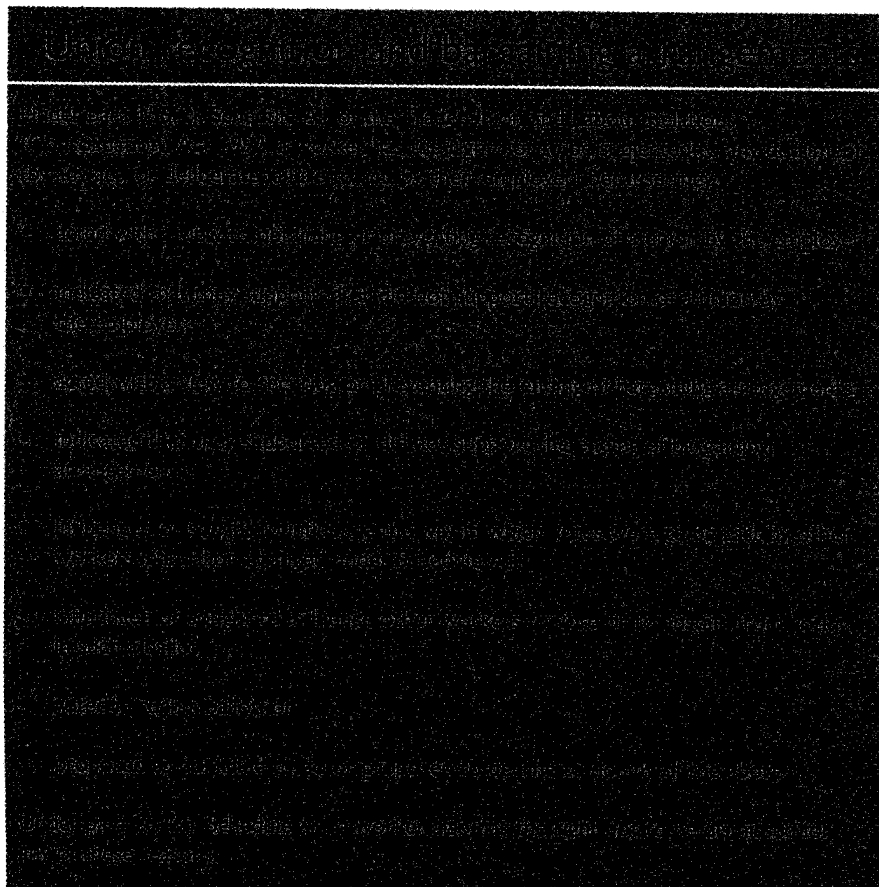
- the employee is a trade union learning representative; and
- the representative is, or will be, sufficiently trained to carry out the relevant duties.

The purpose of a learning representative includes arranging training, promoting the value of training and analysing training needs (s168A). A union representative or union learning representative can complain to the employment tribunal that the employer has failed to permit them to take time off to carry out their duties or has failed to pay them for such time (ss168, 168A and 169).

Protection from detriment

Section 146 includes the right of workers who are members of independent trade unions not to be subjected to detriment as a result of trade union membership or activities where the conduct of the employer (by act or omissions) is for the sole or main purpose of:

- preventing or deterring them from being or seeking to become a member of an independent trade union, or penalising them for doing so;
- preventing or deterring them from taking part in the activities of an independent trade union at an appropriate time, or penalising them for doing so;



- preventing or deterring them from making use of trade union services at an appropriate time or penalising them for doing so; or
- compelling them to become a member of any trade union, a particular trade union or one of a number of particular trade unions.

This provision protects workers from being subjected to a detriment as individuals. Failure to show that the worker has been singled out for unfavourable treatment means that the complaint will fail.

Detrimental treatment will be within the scope of s146 where the action affects the employee's 'pay and conditions, hours of work, terms of employment, promotion,

Detriment and recognition or bargaining

Part VIII of Schedule A1 (the statutory trade union recognition provisions) prohibits the detrimental treatment of workers in connection with the recognition and de-recognition of trade unions (see box on 19).

In establishing a claim under s146, the burden is on the claimant to show that they are a worker and that their employer has subjected them to a detriment as an individual. The burden of proof then shifts to the employer to show that the sole or main purpose for which action was taken (or not taken) against the claimant was not trade union membership.

If the tribunal upholds the worker's complaint, it must make

union recognition, or the securing of bargaining arrangements (para 161, Schedule A1); and

- dismissal for taking official industrial action (s238A).

Additionally, the dismissal of an employee who has been selected for redundancy on grounds relating to union membership, activities or non-membership will automatically be unfair under s153 if:

- the principal reason for the dismissal was that the employee was redundant;
- the redundancy situation applied equally to one or more other employees who held similar positions to the employee's and who were not dismissed; and
- the reason the employee was selected for redundancy was one of those specified in s152 (union membership, activities or non-membership).

Although discrimination against job applicants on the grounds of trade union membership is prohibited, there is no such provision in relation to any previous trade union activities.

or any other benefits, or incidents, of their actual employment' (*National Coal Board v Ridgway & anor* [1987]). Section 146 also engages where the detrimental conduct affects the worker in their capacity as a member or officer of a union (*F W Farnsworth Ltd v McCoid* [1999]). Dismissal is dealt with separately under s152.

The protection of these provisions only engages where the worker's activities are conducted at an 'appropriate time', which includes a time that is:

- outside their working hours, including any time when, in accordance with their contract of employment, they are required to be at work (s145A(3)); or
- within working hours during which, in accordance with arrangements agreed with or consented to by the employer, it is permissible for the worker to take part in the activities of a trade union or make use of trade union services (s145A(2)).

a declaration to that effect and may award such compensation as it considers just and equitable in all the circumstances (s149).

Protection from dismissal

Certain reasons for dismissal are categorised as 'automatically unfair' and there is no qualifying requirement for an employee to have been continuously employed by the employer for one year (s108 Employment Rights Act 1996 (ERA)).

In relation to trade union activity or membership, there are currently four categories of automatically unfair dismissal:

- dismissal for a reason relating to a trade union blacklist prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010 (the Blacklist Regulations);
- dismissal in connection with trade union membership, activities or use of union services (s152);
- dismissal in connection with an application or campaign for trade

Trade union blacklists

The Blacklists Regulations came into force on 2 March 2010, introducing a new ground of automatically unfair dismissal, contained in s104F ERA. The Regulations were prompted by the discovery that a company was maintaining a blacklist of construction workers known to be trade union members and activists, and was selling the information to employers within the industry.

Regulation 3 of the Blacklists Regulations prohibits blacklists. It states that no one may compile, use, sell or supply a list:

- containing details of people who are or have been members of trade unions, or who are taking part or have taken part in trade union activities; or
- compiled with a view to being used by employers or employment agencies for the purposes of less favourable treatment in the recruitment or treatment of workers.

The Blacklists Regulations protect both employees who have refused work as a result of an employer relying

on a blacklist and workers already employed. Pursuant to s104F(1) ERA, an employee will be regarded as having been unfairly dismissed if the reason or principal reason for the dismissal relates to a prohibited list and the employer:

- has contravened Regulation 3 in relation to the list;
- relied on information supplied by someone contravening Regulation 3; or
- knows, or ought to have known, that the information relied on contravenes Regulation 3.

In terms of the burden of proof, if there are facts from which the tribunal could conclude, in the absence of any other explanation, that the employer contravened Regulation 3 or relied on information supplied in contravention of Regulation 3, it must find that such contravention or reliance occurred, unless the employer can show otherwise. For dismissals relating to trade union blacklists under s104F, there is a minimum basic award of £5,000 (s 210(1C)).

Trade union-related dismissal

Section 152(1) provides that a dismissal is automatically unfair if the principal reason for it is that the employee:

- was, or proposed to become, a member of an independent trade union;
- took part, or proposed to take part, in the activities of an independent trade union at an appropriate time; or
- was not a member of any trade union, a particular trade union or one of a number of particular trade unions, or had refused, or proposed to refuse, to join or remain in a union.

A dismissal is also automatically unfair if one of the reasons for it was the employee's refusal, or proposed refusal, to pay money or suffer deductions from wages in lieu of union membership (s152(3)).

Trade union membership

Section 152(1)(a) protects employees against dismissal on the grounds of past, present or proposed membership of an independent trade union. This includes membership of a particular branch or section of a union. Employees are protected even if, at the date of dismissal, they have not decided which particular union to join (*Cotter v Lynch Brothers* [1972]). Expressing a desire to bring a union into the workforce is not, however, sufficient to invoke protection (*Carter v Surya Rice* [1998]).

Trade union activities

Section 152(1)(b) makes it automatically unfair to dismiss an employee for taking part in trade union activities or proposing to do so. To be protected by this provision, the employee's activities must fall within the statutory definition of union activities and have taken place 'at an appropriate time', as described above.

Dismissal and recognition or bargaining

An employee will have been automatically unfairly dismissed if one of the reasons for dismissal was certain conduct related to an application or campaign for trade union recognition or the securing of bargaining arrangements. The relevant protected activities are the same as in the detriment provisions listed in the box on 19.

Dismissal for taking official action

Section 238A provides that a dismissal will be automatically unfair if the reason, or principal reason, for the dismissal is that the employee took 'protected industrial action'. This is provided that the dismissal occurred:

- during the protected period of within eight weeks of the employee first taking part in the action;
- after the end of the protected period, but the employee had ceased to take part in the industrial action before the end of that period; or
- after the end of the protected period, but the employer had not taken reasonable procedural steps to resolve the dispute.

For these purposes, industrial action is protected if the individual is induced to take it by their union and the union is protected under s219 from liability under tort law. If the union repudiates the industrial action, the status of the action will change from official to unofficial. In these circumstances, s238A(8) gives employees a day's grace in which to cease the action.

Dismissal during unofficial action

Dismissal during 'non-protected' industrial action will not be automatically unfair. Additionally, an employer is immune from unfair dismissal claims as long as it dismisses all those taking part in the action and does not selectively re-engage any of them within a three-month period. If the employer is selective, the employment tribunal will be able to hear claims for unfair dismissal.

Employees have no right to complain of unfair dismissal if, when they were dismissed, they were taking part in unofficial industrial action unless there was another reason for the dismissal. These reasons comprise jury service; maternity or family leave; health and safety; acting as an employee representative for the purposes of the working time, redundancy or transfers of undertakings provisions; whistleblowing; or asserting the right to take time off work to care for dependants.

Day-to-day treatment

In the heat of a battle between an employer and a trade union, the parties may focus on the technicalities of the balloting process. However, an awareness of the wider legal framework is important, given the potential for expensive and protracted disputes arising from the day-to-day treatment of union members. ■

