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Managing the threat of industrial action

Industrial disputes often have unique characteristics that will influence the nature of an employer's response. However, although employers may have to adopt disparate responses to each threat of industrial action, it is important that their approach is considered within a general framework that will take into account the following key strategic issues:

- assessing the scale of the problem
- dispute resolution
- contingency planning
- communications.

Assessing the scale of the problem

It is important for an authority to be as clear as possible about the potential impact of any industrial action, how the dispute may be resolved and what the cost of resolution might be. Points to consider will include:

- Is the dispute official?
- Who is likely to be involved in the action?
- Who is likely to be affected by the action?
- Are key employees likely to be involved or affected?
- Will contingency plans need to be considered or initiated?

- Is there any prospect of the dispute spreading to other groups of employees?
- What level of support is the action likely to attract?
- Will the dispute affect the operation of the authority's statutory duties?
- Can exemptions be agreed with the trade union to ensure specified key employees are not involved in the action?

Dispute resolution

Perhaps the most important matter for consideration before and during industrial action is the possibility for an amicable settlement.

The nature of any settlement will depend upon whether the dispute is national or specific to the authority. If the dispute is national, an authority should think carefully before attempting to reach a local settlement ahead of a national resolution. In any event, an authority should approach the regional or national employers' secretary before reaching any local settlement in a national dispute.

Where the dispute is local, an authority may consider the following points in an attempt to resolve the dispute:

- Are the relevant full-time trade union officials aware of the dispute?

In some cases, the full-time officials can act as a mediator, moderator or conciliator in a local dispute.

- Has full use been made of all the available dispute machinery? This may include bodies such as local joint consultative committees and any existing provincial or national conciliation and arbitration machinery. For instance, disputes arising from proposed changes to Part 3 of the NJC Agreement should be referred to the regional joint secretaries for conciliation.
- Have the parties considered referring the dispute to an external body for arbitration or conciliation? Bodies such as ACAS can provide an independent conciliation service and increasing numbers of trade disputes are now referred to binding or non-binding mediation.

- Has the authority's case been fully and clearly explained to both the local and full-time trade union officials, and to the workforce involved? It is important that all parties involved in the dispute are aware of the consequences and implications of industrial action, including the loss of any essential services to the community and the possibility of legal and/or disciplinary action against the trade union or employees.
- What are the costs of settling the dispute? Authorities should establish a cost for their minimum fallback position, and consider whether the cost is reasonable.
- What are the associated costs of a settlement? Authorities should give consideration to any adverse knock-on effects a settlement might have in other parts of the organisation, or in the wider local government community. For instance, will a settlement lead to an escalation of industrial relations problems, perhaps by encouraging other groups of workers to present an associated claim (possibly under Equal Pay legislation) or by fostering resentment.

Authorities should also consider the adverse effect that a dispute might have on employee morale and the wider employee relations' climate.

If a resolution is not possible (or desirable after giving consideration to the above points) an authority should prepare the ground for managing the industrial action.

Contingency planning

If it appears that industrial action will take place, the authority should draw up, as a minimum, contingency measures to:

- Ensure all statutory duties are met
- Maintain essential service delivery wherever possible
- Ensure that health and safety in the workplace is not put at risk
- Recover authority property.

It may be possible for the authority to draw up contingency plans that allow service delivery to continue unchanged during a period of industrial action.

Compliance with statutory duties

Authorities should consider which, if any, of their statutory duties might be breached by the industrial action. A potential breach may have an effect on an authority's response and its expediency.

Maintaining essential services

It is important that the authority carefully considers whether any of the work that will be disrupted by the action is essential. This may be because it fulfils a statutory duty, would present a health and safety risk or is strategically important. Where the authority identifies work that must be covered it should consider the following options.

- **Reallocating work to staff not taking part in the action:** This should present no contractual problems, although the authority will not wish to endanger goodwill with those staff not participating in industrial action by asking them to perform additional duties that are either unreasonable or for which they are not competent to perform.
- **Reallocating work to other groups of staff:** This is potentially more problematic. The general principle is that employees cannot be forced to perform alternative work if it conflicts with their contract of employment, unless it is reasonable for the employer to request them to do so.

The reasonableness of a request is difficult to define. However, the appropriateness of the work in relation to the employee's current duties, position and skills/qualifications can be taken into consideration. In addition, a request to undertake additional duties is more likely to be considered reasonable if the work is necessary to prevent a breach of an authority's statutory duty or is vital to service provision.

The fact that the work is normally carried out by staff involved in

the industrial action will not in itself make a request to cover the work unreasonable.

If the request is reasonable, the refusal by a non-striking employee to undertake the work may entitle the employer to regard them as being party to the industrial action. However, as mentioned above, authorities may wish to act sensitively to maintain the goodwill of staff not taking part in the dispute.

- **The use of temporary, agency or contract workers:** In some circumstances an authority may not be able to maintain essential services by utilising existing staffing resources. In particular, where the dispute impinges the performance of a statutory duty, an authority has a duty to avoid or end such a breach and it may consider taking on additional staff. In respect of agency workers, employers are, from 10 August 2023, once again prevented from sourcing workers via this route. Regulation 7 of the Conduct of Employment Agencies and Business Regulations 2003 provides that an agency acting as an employment business cannot supply a temporary worker to replace an individual taking part in lawful industrial action or to perform the work of someone who has been transferred to perform the duties of the person taking industrial action. Regulation 7 had been repealed with effect from 21 July 2022 and so there was, for a period of time, no longer a legal bar to using agency workers for such purposes, except that a devolved Welsh authority continued to be prohibited from using agency workers in these circumstances due to section 2 of the Trade Union (Wales) Act 2017. However, following a successful legal challenge to the repeal of regulation 7 by a number of trade unions, the High Court issued an order quashing the repeal with effect from 10 August 2023. This means that the situation has reverted back to the pre-21 July 2022 position.

Compliance with Health and Safety duties

The operation of health and safety legislation is not suspended during a period of industrial action. Employers will continue to have a statutory duty to provide a healthy and safe work environment for all employees

who remain at work and other people in the workplace. The employer, however, will have no obligations in respect of employees absent from work due to strike action.

Where industrial action is planned, an employer will need to consider what the health and safety consequences will be. Risk assessments should be reviewed and, if necessary revised. Specific action may need to be taken. For example, authorities may need to come to some arrangement with employee representatives to ensure essential safety measures are carried out before industrial action takes place. During industrial action short of a strike, and where employees remain at work, risks may arise from inadequate supervision or the failure to carry out essential maintenance or safety procedures. Again it may be necessary for employers to discuss these matters with representatives of the workforce.

Whatever form the industrial action takes though the employer should also consider whether it is necessary to take steps to protect employees who do not support the action from being harassed or intimidated by other employees. For example, the employer may want to make it clear that such harassment, intimidation or similar behaviour will be dealt with as a disciplinary matter. The employer may also want to ensure that employees are made aware of the fact that picketing will be unlawful if its not conducted peacefully – read more: **Department for Business, Energy and Industrial Strategy Code of Practice on Picketing (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594788/Code_of_Practice_on_Picketing.pdf)**.

Employees also have a duty under health and safety legislation to take care of their own health and safety, as well as that of colleagues remaining at work. For example, all machinery/equipment that may be used by other employees during a period of strike action must be left in a safe state for use, as in normal circumstances. This could include maintaining or co-operating in the maintenance of safety equipment up until the time any strike action occurs. An operator of a dangerous machine could be in breach of their own legal obligations if they go on strike without taking reasonable measures to ensure that the machinery can be safely left unattended or used by another employee.

Finally, there is a duty on all persons, regardless of their employment status, to not intentionally or recklessly interfere with or misuse anything provided in the interests of health, safety or welfare.

Return of authority property

Authorities should ensure that employees who retain council equipment as part of their normal duties return the property before they take industrial action. This could include, for instance, employees who hold keys to council buildings or vehicles.

Communications

During any period of industrial unrest it is very important that an authority adopts a clear communications strategy. The authority should:

- Open a communication channel to essential/key people, such as elected members and line managers, and ensure they are kept up to date with all developments.
- Give responsibility for communications to a nominated senior officer.
- Consider establishing a co-ordinating committee of officers and/or elected members whose departments will be affected by the action in order to ensure accurate and timely dissemination of information and the adoption of a consistent response.
- Consider preparing reports or publicity material for the press and employees for distribution prior to the action. It is especially important to decide whether distributing any publicity material from the authority would be helpful before the ballot takes place. Authorities should bear in mind that propaganda materials will be used by the trade union in soliciting support for the action, both among the affected staff, other staff, elected members and in the media. They should consider how and what to communicate to staff in order to counter the influence the trade union will have during this critical period.
- Ensure that proper and consistent administrative arrangements are in place for the reporting and recording of participants in the action.

- Ensure that lines of communication to the trade union(s) are kept open so that any problems can be resolved quickly and any possibility of a resolution discussed promptly.
- Ensure that the telephone and computer systems remain operational, wherever possible.
- Where the issue in dispute is national, prompt communication between the local authority and their regional employers' association is essential. Authorities will need to make arrangements to ensure that employer communications from national or regional level reach the appropriate persons in the authority without delay.
- Consider restricting the trade union's access to the facilities normally provided by the employer, such as the internal mail system or IT. For instance, local authorities could stop trade unions using internal e-mails that encourage people to take part in industrial action by either suspending the facilities agreement or making such acts subject to the disciplinary procedures.

Reminder

Authorities should note that under the Trade Union and Labour Relations (Consolidation) Act 1992 trade unions must take such steps as are reasonably necessary to ensure that employers are given at least seven days' notice in writing of their intention to hold a ballot for industrial action. In addition, the trade union must take similar steps to provide the employer with at least 14 days' notice of any industrial action (or seven days' notice if the employer agrees). This time should allow employers to consider and implement contingency measures.