

ONLINE RESOURCE CHAPTER D

INDUSTRIAL ACTION AND STATUTORY

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D.1 INDUSTRIAL ACTION AND TRADE UNION

LIABILITY

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This chapter examines the law of trade disputes and industrial action in the UK, i.e. the collective labour law which regulates industrial action taken by the members of a trade union where collective relations between the employer and the workforce have broken down. The position of the trade union in private law and under the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') will be analysed. The legal framework in relation to the statutory immunities from liability conferred on trade unions in such circumstances will be explored in the context of the legality of industrial action in European law and under the European Convention on Human Rights ('ECHR'). Thereafter the position of the individual worker engaged in industrial action will be addressed. In particular, we will focus on the impact of a strike or industrial action on the striking employee's contract of employment and the means adopted by collective labour law to protect that individual from unfair dismissal.

D.1.1 Examining the nature and legality of collective industrial action

In essence, a strike or other industrial action taken against the backdrop of a labour dispute between an employer and a trade union is a threat by the members of the latter to withdraw their labour in concert in the event that the former refuses to accept the terms demanded by the latter. The economic fall-out of a strike or industrial action is directly affected by the bilateral-monopoly situation within which management and labour find themselves. Consider the following extract:

R. Posner, 'Some Economics of Labor Law', (1984) 51 *University of Chicago Law Review* 988, 997–8

The economic function of the strike requires consideration at this point. It is related to the bilateral-monopoly character of labor-management negotiations. When a nonlabor market becomes cartelized, members of the cartel raise their price and, anticipating some substitution away from their product by consumers, reduce output, but not to zero. But if there were only one consumer for the cartel's product, he might say to the cartel, 'I won't buy from you at the higher price,' and they would then face the choice of either backing down or not selling to him. This happens occasionally in nonlabor markets, but in labor markets it happens often. The union deals with a single employer (or several employers bargaining as one in a multi-employer bargaining unit), who may be tempted to refuse to accept the union's demands (i.e., may threaten to buy nothing rather than come to terms), and then the union must either strike in order to enforce its terms or else back down. The union cannot just write off this 'customer' as marginal, as a product monopolist often can when he raises his price; for each employer's work force will be represented by its own local union (often more than one), and if the union ignores the workers' interests they will vote the union out and the employer will be free to go his own way. Thus we have a classic example of bilateral monopoly: the union and employer can deal only with each other and a refusal to deal, by imposing costs on the other party, makes him more likely to come to terms. The strike imposes costs on both parties: on the employer, by forcing him to reduce or cease production, and on the workers, by stopping their wages. The balance of those costs will determine the ultimate settling point between the union's initial demand and the employer's initial offer. Labor law affects these costs. For example, the [law] allows the employer, if there is a strike, to hire replacements for the striking workers . . . [Secondly, the law prescribes that the employer] may not fire the striking workers who have been replaced.

Despite the economic damage wrought on all parties, workers included, as a phenomenon, strikes have proved remarkably impervious to challenge, and no commentator would seriously suggest that we should return to the 19th Century when they were illegal and amounted to a criminal offence. But what is it about strikes that we continue to tolerate them as an acceptable, albeit disruptive, feature of the modern economy? In the following extract, the various hallmarks of a strike are identified, together with the policy rationales in favour of its recognition as a justifiable practice in law:

**O. Kahn-Freund and B. Hepple, *Laws Against Strikes*, (London, Fabian Society, 1972)
4–8**

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Why is it that in all democratic countries the ‘freedom to strike,’ or, as it is sometimes put, the ‘right to strike,’ is considered to be a fundamental freedom, alongside the freedom to organize, to assemble peacefully, to express one’s opinion? Why is the right to strike or, perhaps better, the potentiality of a strike, that is, of an event which is of necessity entails a waste of resources, and damage to the economy, nevertheless by general consent an indispensable element of a democratic society? Or to put it the other way, why is there no one (outside a very insignificant lunatic fringe) who . . . would even attempt to argue that all strikes should be made illegal? . . .

What is a strike?

. . . the concept of a strike contains two elements: one is the cessation of work, the other is the element of concerted action. Unless there is a complete cessation of work, there is no strike . . . There can be concerted industrial action which does not amount to a strike; go-slow, work to

rule, overtime ban . . . Cessation of work means that those taking action leave, and stay away from, the employer's premises . . . The second element of the concept of a strike is equally important; a strike presupposes concerted action. Parallel actions of isolated individuals do not amount to a strike . . .

The rationale

Why, then, should the law permit the use of the concerted stoppage of work as a means of enforcing rights or their improvement? What is the justification, the rationale of the right or the freedom to strike? To this fundamental question there are at least four answers.

These are based on the equilibrium argument, the autonomy argument, the voluntary labour (or Benthamite) argument, and the psychological argument.

In the context of the use of the strike as a sanction in industrial relations, the equilibrium argument is much the most important of the four. It is simple enough, and it was, in all its simplicity, stated as long ago as 1896 by Oliver Wendell Holmes, in a classic passage of a dissenting opinion in the Supreme Judicial Court of Massachusetts. 'Combination on the one side is patent and powerful. Combination on the other side is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . . If it be true that working men may combine with a view, among other things, to getting as much as they can for their labour, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.' (*Vegeahn v Guntner*, 167 Massachusetts

92; 44 NE 1077 at 1081 . . .) The concentrated power of accumulated capital can only be matched by the concentrated power of the workers acting in solidarity . . .

The second argument, the need for autonomous sanctions, is linked with collective bargaining. Except in marginal situations, conditions of employment cannot be regulated by legislation . . . The rules of employment have to be made outside the framework of law-making in the technical sense, that is through collective bargaining. This need for, and existence of, a body of autonomous norms is not peculiar to labour relations (we find it in commercial relations of many kinds) but what is characteristic of labour relations is that the individual whose rights are involved does not participate in the rule-making process, hardly ever in the workers' side and frequently not on the employers' side. Moreover, it is (in some important instances at least) a continuous process of bargaining, a process of rule-making by collective entities acting through an often informal procedure which, in many cases, goes on without interruption. Nor are these rules only designed to regulate the mutual rights of individual employers and workers (such as wages, holidays, hours of work and overtime); they also govern the conditions of engagement, the labour market, the question who is to do work where and to do what . . .

How can such rules be enforced through sanctions provided by law, through the judgments of courts and the machinery for their enforcement? It is not only desirable that those who have made the autonomous rules should also wield the sanctions, and not leave the enforcement to individuals who did not participate in the rule-making. It is far more important that the substance of many of these norms defies the use of legal sanctions. This is one reason why 'the right of workmen to strike is an essential element in the principle of collective bargaining.' (This is the way Lord Wright put it in the House of Lords in the leading case of *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch* [1942] 1 All ER 142 at 157.) It is, in

other words, an essential element not only of the unions' bargaining power, that is for the bargaining process itself, it is also a necessary sanction for enforcing agreed rules.

As a sanction the strike or the threat of a strike can be far more expeditious and stringent than any legal procedure, especially in response to a unilateral action taken by management, such as fixing a new piece rate or resorting to discipline without consultation. In such a situation the sanction is a kind of self-help which the law, and often even an agreed grievance procedure, is too slow to supplant. The strike is here the equivalent of the managerial prerogative, the factual power of management unilaterally to change the conditions of work . . . The argument derived from autonomy can be put in the severely practical terms of social necessity.

The case for freedom to strike can also be put in terms of social ethics. If people may not withdraw their labour, this may mean that the law compels them to work, and a legal compulsion to work is abhorrent to systems of law imbued with a liberal tradition and compatible only with a totalitarian system of government . . . this argument, ultimately based on the Benthamite postulate of the freedom to dispose of one's labour, is likely to impress the legal mind more than the arguments derived from social reality . . .

Lastly, it is now widely accepted that the strike is sometimes a necessary release of psychological tension, especially where men and women have to work under physical or psychological strain. How much weight this argument carries is a difficult question, but it cannot be neglected . . .

However, the imperative need for a social power countervailing that of property overshadows everything else. If the workers are not free by concerted action to withdraw their labour, their organisations do not wield a credible social force. The power to withdraw their labour is for

the workers what for management is in its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses the freedom to strike puts the workers at the mercy of their employers. This—in all its simplicity—is the essence of the matter.

A number of justifications are harnessed in this passage for the proposition that strikes ought to be permitted and protected by law. To the four cited in this extract, we may add the ‘democratic’, ‘fundamental human right’, and ‘corporate governance’ arguments. The ‘democratic’ argument posits that the freedom of workers to participate in a strike is an essential component of a free, democratic society. Democratic societies can be contrasted with totalitarian and dictatorial political regimes, where democratic participation of workers in industrial action is proscribed by law. Meanwhile, the ‘fundamental human rights’ justification invokes the ideology of universal human rights and casts strike action as a fundamental and inalienable right conferred in favour of individual workers.¹ In EU law, the European Court of Justice (‘ECJ’) in *International Transport Workers’ Federation v Viking Line ABP*,² and *Laval un Partners Ltd v Svenska*³ recognized the individual’s right to strike as a fundamental principle. This is reflective of the position in terms of Article 28 of the

¹ *London Underground v National Union of Railwaymen Maritime and Transport Staff* [1996] ICR 170, 181G–H per Millett LJ. See the reference to the human rights arguments made in opposition to the passing of the Trade Union Act 2016 in the Parliamentary debates: A. Bogg, ‘Beyond Neoliberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45 *Industrial Law Journal* 299, 329–30.

² [2008] IRLR 143, 156.

³ [2008] IRLR 160, 170.

European Union Charter of Fundamental Rights ('EUCFR') and Article 11 of the ECHR.⁴ As for the argument based on 'corporate governance' theory, Moore contends that in order to legitimize and sustain labour's acceptance of the unilateral discretionary prerogative vested in employers as a result of the authoritarian structure inherent within the contract of employment, it is essential that recognition and protection for industrial action is provided by the law. In this way, the threat of industrial action serves to reduce the agency costs associated with the ability of directors to extract private benefits of control at the expense of labour, thus generating an in-built incentive for employers to reduce their costs of production.⁵

However, in light of the previous paragraph, rather surprisingly, there is no such thing as an inalienable right to strike in UK law:

***BA v BALPA* [2019] EWCA Civ 1663 at para. 4**

Simler LJ:

At common law, (the position is different under the Convention and the Social Charter, which confer qualified rights to strike) there is no right to strike and those who take part in strike

⁴ *RMT v UK* [2014] IRLR 467; 481, *Enerji Yapi-Yol Sen*, App. No. 68959/01, 21 April 2009

(ECtHR); *Association of Academics v Iceland* [2019] IRLR 189; *Ognevenko v Russia* [2019] IRLR 195; K. Ewing and J. Hendy 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 1; and A. Bogg and K. Ewing, 'The Implications of the *RMT* Case' (2014) 43 *Industrial Law Journal* 221.

⁵ M. Moore, 'Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance' (2014) 43 *Industrial Law Journal* 398, 398–9.

action will usually be acting in breach of their contract of employment, and unions who authorise or endorse such action will be liable for inducing a breach of contract and potentially other economic torts. To enable unions to organise industrial action and employees to participate in such action, Parliament has granted certain immunities in tort. Immunity was first granted by the Trade Disputes Act 1906 in very wide terms. The current protection is much narrower and is afforded by s 219 Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act') for industrial action 'in contemplation or furtherance of a trade dispute.'⁶

Metrobus Ltd v Unite the Union [2010] ICR 173, 209B–C

Maurice Kay LJ:

In this country, the right to strike has never been much more than a slogan or a legal metaphor. Such a right has not been bestowed by statute. What has happened is that, since the Trade Disputes Act 1906, legislation has provided limited immunities from liability in tort. At times the immunities have been widened, at other times they have been narrowed. Outside the scope of the immunities, the rigour of the common law applies in the form of breach of contract on the part of the strikers and the economic torts as regards the organisers and their union.

⁶ Sourced from BAILI at [https://www.bailii.org/cgi-](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/1663.html&query=(balpa))

[bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/1663.html&query=\(balpa\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2019/1663.html&query=(balpa)) (last visited 30 December 2019).

Lord Wedderburn of Charlton, ‘Industrial Relations and the Courts’ (1980) 9 *Industrial Law Journal* 65, 69–70

In strict juridical terms, there does not exist in Britain any ‘right’ to organize or any ‘right’ to strike. The law still provides no more than a ‘liberty’ to associate in trade unions and certain ‘liberties’ of action by which trade unions can carry on industrial struggle. Statutory provisions protect trade unions or workers’ strikes and other industrial action from illegalities which would otherwise be imposed upon them by the law, largely by the common law created by judicial decisions. When he goes to court . . . to defend himself, the trade union official believes he is defending his ‘rights’; but he finds that judges see his statutory protections as some form of ‘privilege.’ Such an attitude on the part of the judiciary at once becomes the source of tension, even hostility, between British trade unions and the ordinary courts. Judges—taking the statute for what it seems to be—note that ‘when Parliament granted immunities to the leaders of trade unions, it did not give them any *rights*. It did not give them a *right* to break the law or to do wrong by inducing people to break contracts. It only gave them immunity if they did . . . [such statutes] are to be construed with due limitations as so to keep the immunity within reasonable bounds.’ That has been the natural approach of the judiciary since the ‘immunities’ were first enacted in 1871.

Instead, as noted in these passages, trade unions and persons engaged in strike action are protected by the law, but in no way can those legal safeguards be described as conferring a legal right to engage in industrial action. The nature of the legal protection conferred on trade unions and individual employees can be characterized as a ‘conditional’, limited freedom to

strike⁷ in the strict liberal conceptualization of the word:⁸ that is to say—as we will see in section D.3.2—trade unions will be free to call out their member workers on strike, without attracting civil liability, if they satisfy conditions of a substantive and procedural nature which are prescribed in statute.

If the ability of trade unions to call on their worker members to withhold their labour is properly characterized as a freedom rather than a right, why is it that it is treated as a ‘conditional’ freedom? The answer lies in the premise that a balance has to be struck between the destructive harm caused by strike action to the economy and wider society on the one hand, and the inherent prerogative of the trade unions and their individual worker members to withdraw their labour as a countervailing force to management, on the other. In the UK, this equilibrium has been reached through the technique of conferring a freedom to strike which is conditional on meeting various statutory criteria. For example, the trade union will be liable unless it complies with statutorily set provisions, which confer a statutory immunity from suit. The UK approach can be contrasted with EU law: although the right to strike is a

⁷ See R. Dukes, ‘The Right to Strike under UK Law: Something More Than a Slogan?’ (2011) 40 *Industrial Law Journal* 302, 303.

⁸ At this point in the discussion, we leave to the side the fact that the European Court of Human Rights (‘ECtHR’) unequivocally endorsed the right to strike in *RMT v UK* [2014] IRLR 467, 481, and Bogg and Ewing’s persuasive argument that such a right is now incorporated into UK law being ‘forged in jurisprudence’, on which, see A. Bogg and K. Ewing, ‘The Implications of the *RMT* Case’ (2014) 43 *Industrial Law Journal* 221, 222–4. However, see the reaction to the decision of the ECtHR in *Unite the Union v UK* [2017] IRLR 438 and its effect on, and compatibility with, *RMT v UK* in K. Arabidjieva, ‘Another Disappointment in Strasbourg: *Unite the Union v United Kingdom*’ (2017) 46 *Industrial Law Journal* 289, 295–8.

fundamental principle of EU law, the ECJ has ruled that it must be exercised in a manner which is proportionate. Proportionality is just as much a form of limitation on the lawfulness of a strike as the more laboured UK technique. In this context, ‘proportionality’ is used in the sense of whether there was a ‘least restrictive alternative’ to achieving the trade union’s legitimate aim, instead of the strike action.⁹

The fact that the participation of an individual employee in a strike or other industrial action has repercussions for his or her legal position should not be overlooked. Some of those consequences are identified and critiqued in the following extract:

K. Ewing, *The Right to Strike* (Oxford, Clarendon Press, 1991) 141

The legal position of the British worker engaged in a labour dispute is quite remarkable. A strike, for whatever reason, is a breach of contract; any form of industrial action short of a strike can lead to the total loss of pay; those engaged in industrial action may be dismissed with impunity (regardless of the reason for the industrial action); there is no right to unemployment benefit; and strikers and their families are penalised by social welfare legislation, even when the dispute is the singular fault of the employer. Yet given the new theoretical framework for contemporary labour law, the legal position on this, and on many

⁹ *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2008]

ICR 741, 777 and, for commentary, see A. C. L. Davies, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) 37 *Industrial Law Journal* 126, 135 and 143–4. For illustrations of the operation of the proportionality measure in the context of industrial action, see *Svenska Transportarbetareförbundet and Seko v Sweden*, Appn 29,999/16, Decision, 1 December 2016, discussed in K. Ewing and J. Hendy, ‘The Strasbourg Court Treats Trade Unionists with Contempt: *Svenska Transportarbetareförbundet and Seko v Sweden*’ (2017) 46 *Industrial Law Journal* 435, 440–2.

other issues, is perfectly understandable. The new market efficiency model sees the function of labour law as being designed to reduce or at least lessen the impact of obstacles to the efficient working of the labour market. Given that trade unionism and collective bargaining together constitute one such obstacle, it would make perfect sense to eliminate the strike weapon which forms the power base of collective bargaining. Remember Lord Wright's famous dictum that 'The right of workmen to strike is an essential element in the principle of collective bargaining.'¹⁰ Indeed, if anything, it could be argued that policy on the question under discussion, as in other areas, has been too cautious given the gulf between the paradigm legal framework dictated by the market efficiency model of labour law, and the legal framework of contemporary British labour law. Why, for example, should there be any restrictions on the employer's power of dismissal; and why should strikers' families receive any payment by way of income support. There is no humanity in the marketplace.

Reflection points

1. Should UK law recast the ability of workers to engage in strike action as a positive right to strike? If so, why? If not, why not?
2. Do you find the seven arguments in favour of the legal recognition of strikes and industrial action to be persuasive? Give reasons for your answer.

Additional reading on the nature and legality of collective industrial action

1. O. Kahn-Freund and B. Hepple, *Laws Against Strikes* (London, Fabian Society, 1972).

¹⁰ *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435, 463.

2. Lord Wedderburn of Charlton, 'Industrial Relations and the Courts' (1980) 9 *Industrial Law Journal* 65.
3. K. Ewing, 'Another Step in the "Right" Direction' (1982) 11 *Industrial Law Journal* 209.
4. K. D. Wedderburn, *The Worker and the Law*, 3rd edition (Middlesex, Penguin, 1983) chapter 10.
5. K. Ewing, 'The Right to Strike' (1986) 15 *Industrial Law Journal* 143.
6. G. Morris, 'Industrial Conflict' 16 *Industrial Law Journal* 185.
7. R. Welch, *The Right to Strike: A Trade Union View* (London, Institute of Employment Rights, 1991).
8. K. Ewing, *The Right to Strike* (Oxford, Clarendon Press, 1991).
9. Lord Wedderburn, 'The New Politics of Labour Law: Immunities or Positive Rights?' in *Employment Rights in Britain and Europe* (London, Lawrence and Wishart, 1991) chapter 4.
10. T. Novitz, *International and European Protection of the Right to Strike* (Oxford, OUP, 2003).
11. K. Ewing, *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006* (Liverpool, Institute of Employment Rights, 2006).
12. S. Honeyball, *Great Debates in Employment Law* (Basingstoke, Palgrave Macmillan, 2011) chapter 6.
13. B. Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 *Industrial Law Journal* 203.

14. M. Moore, 'Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance' (2014) 43 *Industrial Law Journal* 398.
15. C. Villiers, 'Post-crisis Corporate Governance and Labour Relations in the EU (and Beyond)' (2014) 41 *Journal of Law & Society* 73.
16. E. Tucker 'Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes' in A. Bogg and T. Novitz (eds), *Voices at Work* (Oxford, OUP, 2014) 455.
17. A. Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *Industrial Law Journal* 299.
18. A. Bogg, "'Individualism" and "Collectivism" in Collective Labour Law' (2017) 46 *Industrial Law Journal* 72.

D.2 TRADE UNION LIABILITY AND STATUTORY IMMUNITIES

If, as was established in section D.3.1, UK law does not recognize a positive right to strike, then a natural follow up question is how, if at all, the law approaches the organization and participation of workers in industrial action. In this chapter, the primary focus is on the regulation of the potential liability of the organizers of industrial action—the trade unions: section D.3.3 addresses the position of the individual employee. The analysis will begin by looking at the historical relationship between the common law and industrial action. The focus will then shift to examine the common law liabilities a trade union may face for organizing strike action and the immunity which statute provides from these liabilities. This analysis of the statutory immunities will also entail some examination of the statutory

conditions which must be satisfied for the strike organisers to qualify for the immunity, e.g. the statutory concept of a ‘trade dispute’ and the pre-strike balloting and notice requirements. The scope of the statutory immunities will be scrutinized—exploring both liabilities which are not covered by the statutory immunities and the circumstances in which the statutory immunity of strike organizers may be removed i.e. the exceptions to statutory immunity, e.g. secondary action and unlawful picketing.¹¹ Finally, the effect that participation in industrial action has on a participant’s contract of employment will be considered at section D.3.3. For example, the statutory protections conferred on employees engaged in official strike action that is protected will be addressed.

D.2.1 Trade union liability and immunity in historical context

A historical analysis of trade union liability for strike action depicts a ‘game of cat and mouse’ played between the courts and Parliament.¹² Traditionally, Parliament sought to minimize, and the courts to maximize, the extent to which the taking of, and participation in, industrial action attracted legal sanctions.¹³ The relationship between the common law liability of trade unions and the statutory immunities from these liabilities dates back to the 19th century. The Conspiracy and Protection of Property Act 1875 (‘the 1875 Act’) provided that a combination to do or procure any act in ‘contemplation or furtherance of a trade

¹¹ See TULRCA 1992, ss. 220 and 224 and *RMT v UK* [2014] IRLR 467.

¹² Lord Wedderburn, ‘Industrial Relations and the Courts’ (1980) 9 *Industrial Law Journal* 65. See also P. Smith, ‘Labour under the Law: a new law of combination, and master and servant, in 21st century Britain?’ (2016) 46 *Industrial Relations Journal* 345, 345–7.

¹³ P. Elias, B. Napier, and P. Wallington, *Labour Law: Cases and Materials* (London, Butterworths, 1980) 210.

dispute' should not be a criminal conspiracy unless the act itself would be punishable as a crime.¹⁴ This reversed the position which prevailed during the first half of the 19th century, which dictated that the organization of industrial action was a criminal conspiracy both at common law and under statute.¹⁵ As such, where trade unions organized, co-ordinated, and participated in industrial action, their conduct constituted a common law restraint on trade for which they were potentially civilly liable in damages, and also potentially liable to criminal sanctions.

However, the purpose of the statutory protection from civil liability afforded to trade unions was to be short-lived. The common law reacted by developing new forms of civil liability not covered by the statutory immunity. Evidence of this reaction is furnished by cases such as *Allen v Flood*¹⁶ and *Quinn v Leatham*¹⁷ where the tort of conspiracy was first recognized. The effect of this development was that liability for conspiracy was transferred from the criminal law to the civil law. The vulnerability of trade unions to emerging forms of civil liability in the early 20th century was compounded by the decision of the House of Lords in the seminal case of *Taff Vale Railway Co v Amalgamated Society of Railway Servants*,¹⁸ where it was held that a registered trade union was liable to pay damages from its funds for torts committed by those acting on its behalf. Parliament responded to this expansion of trade

¹⁴ Conspiracy and Protection of Property Act 1875, s. 3.

¹⁵ *R v Bunn* (1872) 12 Cox 316.

¹⁶ [1898] AC 1.

¹⁷ [1901] AC 495.

¹⁸ [1901] AC 426.

union civil liability at common law¹⁹ by introducing a blanket immunity from civil liability in the Trade Disputes Act 1906 ('the 1906 Act').²⁰ The 1875 Act, together with the 1906 Act, provided what Kahn-Freund described as the twin pillars supporting the freedom to strike. The 1875 Act supplied protection against criminal prosecution, whilst the 1906 Act covered civil action.²¹ The statutory safeguards afforded to trade unions would again, however, prove to be incomplete. In the case of *Rookes v Barnard*,²² the House of Lords decided in 1964 that the 1906 Act did not cover the newly recognized tort of intimidation. Parliament's reaction to this expansion of trade union civil liability came a year later in the form of the Trade Disputes Act 1965, which provided trade unions with statutory immunity from the tort of intimidation. Such was the game of 'see-saw' between the courts and Parliament.

Since the coming into force of the Trade Disputes Act 1965, the attitude towards the scope of the statutory immunity afforded to trade unions can be described as something of a 'political shuttlecock'—with the coverage of the immunity frequently adjusted to reflect the broader policies of the government in power towards the regulation of industrial action.²³ This

¹⁹ P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983) 298–9.

²⁰ The 1906 Act, ss. 2–5 and R. Kidner, 'Lessons in Trade Union Law Reform: The Origins and Passage of the Trade Disputes Act 1906' (1982) 2 *Legal Studies* 34.

²¹ P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London, Stevens, 1983) 299.

²² [1964] AC 1129. Kahn-Freund described this decision as a 'frontal attack on the right to strike' at (1964) 14 *Federation News* 30, reprinted in (2017) 38 *Historical Studies in Industrial Relations* 81.

²³ J. Bowers et al., *The Law of Industrial Action and Trade Union Recognition*, 3rd edition (Oxford, OUP, 2019) 70.

process of judges extending the liability of trade unions at common law, and Parliament reacting by covering the new forms of liability through statutory immunities is, as Wedderburn and Kahn-Freund have argued, the classic leitmotiv of the relationship between the courts and Parliament during the 19th–20th centuries.²⁴

Lord Wedderburn, *The Worker and the Law: Text and Materials*, 3rd edition (London, Penguin Books, 1986) 577

Just as combination, ‘conspiracy’ and ‘coercion’ were at the heart of many of the nineteenth-century developments, so breach of contract, and especially breach of the employment contract, is the base on which much of the civil law of this century rests. Any attempt in Britain to create a positive right to withdraw labour would need to change that and give the worker an individual right to take industrial action with others without breaking his employment contract.

. . . [O]ur law did not take that path. Instead, from 1875 onwards Parliament provided for those organizing industrial action ‘immunities’ in trade disputes against tort liabilities. The judges then expanded tort liabilities. Parliament then, belatedly, countered the judicial expansions of liabilities by adjusting the ‘immunities’ (often with some gaps or uncertainties remaining). But in 1980 the process changed. Parliament began to narrow or destroy the ‘immunities,’ joining in on the other side. Legal analysis of the legality of strikes today, therefore, involves not two but three questions:

- (1) Is there liability at common law?
- (2) Is there an ‘immunity’ against it?

²⁴ For further historical analysis, see generally O. Kahn-Freund and B. Hepple, *Laws Against Strikes* (London, Fabian Society, 1972).

(3) Has that ‘immunity’ now been removed?

Let us in parenthesis note that the classical pendulum that swung to and fro between 1875 and 1980—judge-made liability, parliamentary immunity, then more liability—did not arise merely from the peculiarities of ‘creative’ judges (though it is often best illustrated by them). It derived from the very nature of the common law, its attitude to property and to the social order, its ability to achieve mutations in its doctrines, and its relationship to Parliament. When, as in 1964 or 1969, the judges created a new tort (like intimidation) or, as in 1982, imported into labour law a new doctrine of ‘economic duress’ so that trade dispute immunities were outflanked, they repeated a process as old as the common law. This is one reason why legislation finds it hard to come to grips with this elusive creature.²⁵

D.2.2 The rationale for the development of the economic torts

Before we embark on an analysis of the economic torts for which a trade union organizing strike action may be civilly liable, it is first necessary to identify the role that they are designed to perform and how they have developed.²⁶ The common law ‘has traditionally been reluctant to become involved in devising fair rules of competition’.²⁷ However, this does not mean ‘that in the field of economic rivalry anything goes . . . business people are not free to promote their own businesses at the expense of others by whatever means they may choose . .

²⁵ See also the discussion in P. Smith, ‘Labour under the Law: a new law of combination, and master and servant, in 21st century Britain?’ (2016) 46 *Industrial Relations Journal* 345, 348–50.

²⁶ See H. Carty, ‘The Modern Functions of the Economic Torts: Reviewing the English, Canadian, Australian and New Zealand Positions’ (2015) 74 *Cambridge Law Journal* 261, 261–2.

²⁷ <IBT>*OBG Ltd v Allan* [2008] 1 AC 1</IBT>, 34B–E per Lord Hoffmann.

. [t]here are limits'.²⁸ The economic torts establish these 'limits' in order to protect commerce but without unduly inhibiting competition. This conceptualization of the economic torts as striking a kind of balance between the interests of commerce and competition is shared by Carty:

H. Carty, *An Analysis of the Economic Torts*, 2nd edition (Oxford, OUP, 2010) 4

The better approach . . . is to see all these torts as protecting against the infliction of economic harm, against a background of competition. They impinge on competitive practices generally. So all of the economic torts set limits on economic behaviour. Thus the main 'industrial' economic tort, inducing breach of contract, dates from a trade competition case, *Lumley v Gye*, while unlawful means conspiracy is often alleged against those who participate in commercial fraud (as indeed it was in *Total Network*). Moreover, the notion of competition can be applied (in a loose sense) not only to commercial endeavour but also to 'competition' in the industrial relations sphere. So Cane accepts that 'industrial action designed to improve wages and conditions is a form of competitive activity in the sense that the aim of the action is to achieve a redistribution of wealth from the employer to the employees, just as traders seek to divert wealth from their competitors to themselves.'²⁹

The question which must be asked throughout our analysis of the economic torts is, therefore, whether the law draws a suitable line between industrial action which is not tortious (i.e. constitutes lawful commercial behaviour and is within the boundaries of fair competition) and industrial action which is tortious (i.e. constitutes wrongful commercial behaviour).

²⁸ *ibid.*, 53D–H per Lord Nicholls.

²⁹ P. Cane, *Tort Law and Economic Interests*, 2nd edition (Oxford, Clarendon, 1996) 472.

In the previous section of this chapter, we discussed the historical nature of the expansion of the economic torts in the 19th–20th century. This expansion often took place in the context of cases concerning industrial action in the workplace. The judiciary sought to deny trade unions the immunity from liability in statute by either expanding the scope of existing economic torts or recognizing new economic torts not covered by the statutory immunity.³⁰ For example, trade unions could be liable for conspiracy by lawful means (sometimes called ‘simple’ conspiracy) and conspiracy by unlawful means.³¹ The torts of direct and indirect inducement to breach a contract (as they were then)³² were used as a platform upon which to extend liability in tort to interference with contract.³³ The tort of intimidation was recognized after *Rookes v Barnard* as was a ‘genus tort’ of unlawful interference with trade and

³⁰ S. Deakin and J. Randall, ‘Rethinking the Economic Torts’ (2009) 72 *Modern Law Review* 514; P. Elias and K. Ewing, ‘Economic Torts and Labour Law: Old Principles and New Liabilities’ (1982) 41 *Cambridge Law Journal* 321; and H. Carty, *An Analysis of the Economic Torts*, 2nd edition (Oxford, OUP, 2010) 3.

³¹ *Mogul Steamship Co. v McGregor* [1892] AC 25; *Allen v Flood* [1898] AC 1; *Quinn v Leathem* [1901] AC 495; and, more recently, see *Total Network SL v Revenue and Customs Comrs* [2008] 1 AC 1174. For commentary on the post-OBG status of the conspiracy tort, see P. Davies and P. Sales, ‘Intentional Harm, Accessories and Conspiracies’ (2018) 134 *Law Quarterly Review* 69.

³² See *DC Thomson & Co v Deakin* [1952] Ch 646.

³³ *JT Stratford & Son Ltd v Lindley* [1965] AC 269; *Torquay Hotel Co Limited v Cousins* [1969] 2 Ch 106; *Falconer v ASLEF and NUR* [1986] IRLR 331; and D. Payne, ‘The Tort of Interference with Contract’ (1954) 7 *Current Legal Problems* 94.

employment (now referred to as ‘causing loss by unlawful means’).³⁴ Together this ‘patchwork’ list of economic torts created a framework for liability which was unclear.³⁵

The economic torts were, however, authoritatively reconsidered in the recent decision of the House of Lords in *OBG Ltd v Allan*.³⁶ Delivering the leading speech, Lord Hoffmann took the opportunity to review the authorities and reformulate the law on economic torts into what he described as a ‘two tort analysis’. This recalibration was founded upon the following dicta of Lord Watson in *Allen v Flood*:

Allen v Flood [1898] AC 1, 96

Lord Watson:

There are . . . two grounds upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly . . . induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor . . . it may yet be to the detriment of a third party; and in that case . . . the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.

³⁴ *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 and *Merkur Island Shipping Corp. v Laughton* [1983] 2 AC 570.

³⁵ H. Carty, ‘The Economic Torts in the 21st Century’ (2008) 124 *Law Quarterly Review* 641.

³⁶ [2008] 1 AC 1.

Inducing Breach of Contract (D.2.3.1)

Lord Hoffmann took the view that the distinction between direct and indirect inducement of contract served no purpose. The cases involving indirect inducement of contract were better viewed as examples of causing loss by unlawful means. He also rejected the extension of the *Lumley v Gye* tort to interference with contract (i.e. not intending to breach the contract but merely 'hindering' or 'disrupting' the performance of the contract).

Causing Loss by Unlawful Means (D.2.3.2)

Causing loss by unlawful means encompasses the cases which previously fell under the tort of unlawful interference with trade and business – albeit using different terminology.

Conspiracy (D.2.3.4)

The judgements in *OBG* do not expressly interfere with the integrity of the traditional distinction between lawful conspiracy (sometimes referred to as 'simple' conspiracy) and unlawful conspiracy. However, Lord Hoffmann does express the opinion that the tort of lawful conspiracy is 'anomalous'.



Intimidation (3.2.3.3)

The judgements in *OBG* do not contain any detailed consideration of *Rookes v Barnard*. Lord Hoffmann did, however, indicate that intimidation was to be viewed as an example of 'unlawful means' – one of the ingredients required when establishing liability for the tort of causing loss by unlawful means as opposed to an economic tort in its own right.

Figure D.1 *Illustration of the economic torts post-OBG v Allan*

In light of this extract, we now turn to address the current legal position in greater depth.

D.2.3 The economic torts

The law recognizes four economic torts which are shown in Figure D.1. We now consider each in turn.

D.2.3.1 Inducing a breach of contract

The first economic tort we consider is inducement to breach a contract. Tortious liability for inducing a breach of contract was first established in the case of *Lumley v Gye*.³⁷ In this case, a singer who had an exclusive performing contract with the claimant was persuaded by the defendant to break her contract and sing for him instead. The court held that the defendant's

³⁷ (1853) 2 E & B 216.

action, i.e. inducing the singer to breach her contract with the claimant, was tortious. The origins and nature of the tort are explored in the following extract. So too is Lord Hoffmann's exposition of the key ingredients which must be present before liability for inducing a breach of contract can be established:

***OBG v Allan* [2008] 1 AC 1, 18H–31B**

By permission of Incorporated Council of Law Reporting: extracts from the Law Reports Appeal Cases (AC) and the Industrial Cases Reports (ICR).

Lord Hoffmann:

Inducing breach of contract

1. Liability for inducing breach of contract was established by the famous case of *Lumley v Gye* . . . The court based its decision on the general principle that a person who procures another to commit a wrong incurs liability as an accessory . . . For a court in 1853, the difficulty about applying this principle to procuring a breach of contract was that the appropriate action for the wrong committed by the contracting party lay in contract but no such action would lie against the procurer. Only a party to the contract could be sued for breach of contract. The answer, said the court, was to allow the procurer to be sued in tort, by an action on the case. There was a precedent for this mixing and matching of the forms of action in the old action on the case for enticing away someone else's servant: see Gareth Jones 'Per Quod Servitium Amisit' (1958) 74 LQR 39. Some lawyers regarded that action as a quaint anomaly, but the court in *Lumley v Gye* treated it as a remedy of general application. The forms of action no longer trouble us. But the important point to bear in mind about *Lumley v*

Gye is that the person procuring the breach of contract was held liable as accessory to the liability of the contracting party. Liability depended upon the contracting party having committed an actionable wrong . . .

Inducing breach of contract: elements of the Lumley v Gye tort.

To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so . . . The question of what counts as knowledge for the purposes of liability for inducing a breach of contract has also been the subject of a consistent line of decisions. In *Emerald Construction Co Ltd v Lowthian* [1966] 1 WLR 691, union officials threatened a building contractor with a strike unless he terminated a sub-contract for the supply of labour. The defendants obviously knew that there was a contract—they wanted it terminated—but the court found that they did not know its terms and, in particular, how soon it could be terminated. Lord Denning MR said (at pp; 700–701) ‘Even if they did not know the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.’ This statement of the law has since been followed in many cases and, so far as I am aware, has not given rise to any difficulty. It is in accordance with the general principle of law that a conscious decision not to inquire into the existence of a fact is in many cases treated as equivalent to knowledge of that fact . . . It is not

the same as negligence or even gross negligence: in *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479, for example, Mr Ferguson did not deliberately abstain from inquiry into whether disclosure of the secret process would be a breach of contract. He negligently made the wrong inquiry, but that is an altogether different state of mind. The next question is what counts as an intention to procure a breach of contract. It is necessary for this purpose to distinguish between ends, means and consequences. If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach. Mr Gye would very likely have preferred to be able to obtain Miss Wagner's services without her having to break her contract. But that did not matter. Again, people seldom knowingly cause loss by unlawful means out of simple disinterested malice. It is usually to achieve the further end of securing an economic advantage to themselves . . . On the other hand, if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended. That, I think, is what judges and writers mean when they say that the claimant must have been 'targeted' or 'aimed at' . . . Finally, what counts as a breach of contract? In *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch 106, 138 Lord Denning said that there could be liability for preventing or hindering performance of the contract on the same principle as liability for procuring a breach. This dictum was approved by Lord Diplock in *Merkur Island Shipping Corporation* [1983] 2 AC 570, 607–608. One could therefore have liability for interference with contractual relations even though the contracting party committed no breach. But these remarks were made in the context of the unified theory which treated procuring a breach as part of the same tort as causing loss by unlawful means. If the torts are to be separated, then I think that one cannot be liable for inducing a breach unless there has

been a breach. No secondary liability without primary liability. Cases in which interference with contractual relations have been treated as coming within the *Lumley v Gye* tort (like *Dimbleby & Sons v National Union of Journalists* [1984] 1 WLR 67 and 427) are really cases of causing loss by unlawful means.

Let us now put Lord Hoffmann's exposition of the constituent elements of the inducement to breach contract tort into practice. Consider Hypothetical A:

Hypothetical A

Danny's Demolishers Ltd ('the Employer') is the leading demolition company in the UK. Two-thirds of its 2,560 employees are members of a representative organization called the National Union of Demolition Workers ('NUDW'). Negotiations have been ongoing between the Employer and the NUDW regarding improved employee wages. The negotiations are hindered by the Employer's refusal to succumb to the demands of NUDW. Eventually, the negotiations completely break down. In response to this, the NUDW calls its members out on strike. 2/3rds of the Employer's workforce do not attend work as they are on strike. As a result, the Employer suffers economic loss since some of the demolition contracts are not performed.

The Employer seeks compensation for the losses incurred whilst the employees were on strike. The Employer does not wish to dismiss any of the striking employees as they will be needed for upcoming work. Instead the Employer wishes to sue NUDW for inducing the employees to breach their contracts of employment. What must the Employer establish in order to do this?

From Lord Hoffmann's judgment we may distil a number of criteria for the establishment of the tort of inducing breach of contract in an industrial action context. In summary, there are four central features, which are now addressed, and depicted in Figure D.2:

1. *Inducement*—It must be established that the NUDW have induced the employees of the Employer to breach their employment contracts. Merely advising the employee is not enough—there must be an element of pressure or persuasion.³⁸
2. *Knowledge of the contract*—The NUDW must know about the contracts of employment between the Employer and the employees. The court will undertake a subjective analysis to determine whether the NUDW has knowledge of those contracts.³⁹ Bearing in mind that strike action will generally constitute a breach of an employment contract, it would appear that the NUDW's knowledge of the *existence* of the contracts of employment is sufficient for the purposes of establishing liability.⁴⁰ It is also clear from Lord Hoffmann's judgment that knowledge will be fixed on the

³⁸ *DC Thomson & Co Ltd v Deakin* [1952] Ch 646; *JT Stratford & Son Ltd v Lindley* [1965] AC 269; and *Union Traffic Ltd v Transport and General Workers Union* [1989] IRLR 127.

³⁹ *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479 approved in *Mainstream Properties v Young* [2008] 1 AC 1. See also *Beans Group Ltd v Myunidays Ltd* [2019] EWHC 320 (Comm) and *Wolff v Trinity Logistics USA* [2019] 1 WLR 3997 on the requisite test of 'knowledge'.

⁴⁰ *JT Stratford & Son Ltd v Lindley* [1965] AC 269 approved in *Merkur Island Shipping Corp. v Laughton* [1983] 2 AC 570, 608–9 per Lord Diplock and followed in *Associated Newspaper Group v Wade* [1979] ICR 664. In the latter decision, the Court of Appeal held that the union officials 'must have known' strike action would constitute a breach of the strikers' employment contracts.

NUDW if they turn a ‘Nelsonian’ blind eye to the existence of contracts of employment with the Employer.⁴¹

3. *Intention*—The NUDW must be shown to have intentionally ‘attacked’ or ‘targeted’ the contractual rights of the Employer vis-à-vis the employees.⁴² The Employer need only demonstrate that the NUDW intended to cause the employees to breach their employment contracts. The Employer does not need to show that it suffered harm. In *South Wales Miners’ Federation v Glamorgan Coal Co. Ltd*,⁴³ a strike was called to further the interests of the members of the defendant union. Liability for inducing breach of contract was imposed on the union despite the fact that the interests of the claimant mine owners were also served—by restricting coal production, the price of coal increased.
4. *Breach of Contract*—To establish the tort of inducing breach of contract, it is a fundamental requirement that there has been a breach of contract by the employees in question. This ingredient is important to our understanding of the nature of inducing a breach of contract: the NUDW incurs liability which is secondary to the primary breach by the striking employees (i.e. the breach of the employment contract). This is what Lord Hoffmann means when he alludes to there being ‘[n]o secondary liability without primary liability’.⁴⁴

⁴¹ *Emerald Construction Co. Ltd v Lowthian* [1966] 1 WLR 691 and K. Wedderburn, ‘Inducing Breach of Contract and Unlawful Interference with Trade’ (1968) 31 *Modern Law Review* 440.

⁴² H. Carty, *An Analysis of the Economic Torts*, 2nd edition (Oxford, OUP, 2010) 42.

⁴³ [1905] AC 239.

⁴⁴ *OBG Ltd v Allan* [2008] 1 AC 1, 31A per Lord Hoffmann.

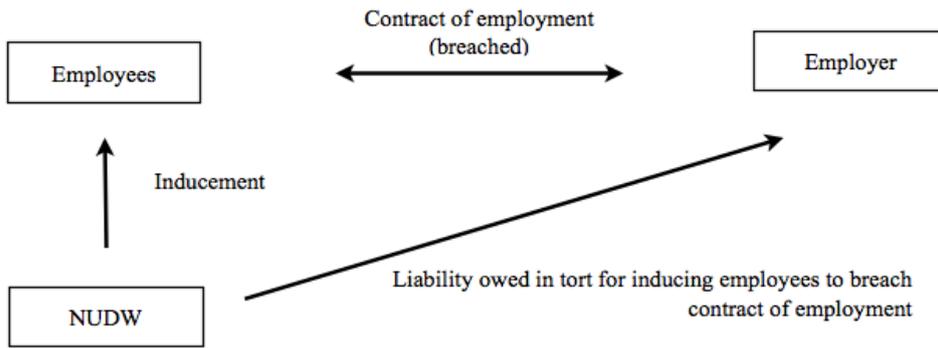


Figure D.2 *NUDW liability to the Employer for inducing a breach of contract*

At its heart, the tort of inducing a breach of contract is designed to offer compensation to a party where it has suffered from unjust competition. In this way, there is an underlying presumption that union activity in this regard is inherently anti-competitive. However, some commentators are not so convinced. Consider the following extract:

H. Collins, *Employment Law*, 2nd edition (Oxford, OUP, 2010) 148

Perhaps the . . . tort of inducing breach of contract is too broad and indiscriminating for a competitive market economy. Persuading another person to break a contract because it is to their economic advantage to do so should surely not constitute a tort if the market is to be competitive. The contract breaker may have to pay compensation for losses, but wealth maximizing breaches of contract need to be permitted, in order to allow businesses to find the best opportunities for profit in a constantly changing marketplace. The idea that every inducement to breach a contract should be unlawful under competition laws is too sweeping because, unlike the law of conspiracy, it does not distinguish between actions designed merely to damage a business and those that serve a competitive purpose. Thus the underlying

problem for unions is perhaps best understood as the over-extended competition laws as much as the complexities of the system of statutory immunities.⁴⁵

Reflection points

1. In light of the above extract, consider the economic reasons why it might actually be anti-competitive to permit an employer to claim compensation against a trade union where the latter causes the former's employees to breach their contracts of employment by taking strike action.
2. Do you find Collins' arguments convincing? Give reasons for your answer.

D.2.3.2 Causing loss by unlawful means

The second tort expounded by Lord Hoffmann in his 'two tort analysis' is causing loss by unlawful means. The following dicta from his Lordship's judgment traces the origins and nature of the tort as well as pointing out the key differences between causing loss by unlawful means and inducing breach of contract. Lord Hoffmann also sets out the criteria which must be satisfied in order to establish the tort of causing loss by unlawful means:

***OBG v Allan* [2008] 1 AC 1, 19E–21A**

By permission of Incorporated Council of Law Reporting: extracts from the Law Reports Appeal Cases (AC) and the Industrial Cases Reports (ICR).

Lord Hoffmann:

⁴⁵ See also D. Howarth, 'Against *Lumley v Gye*' (2005) 68 *Modern Law Review* 195.

Causing loss by unlawful means

The tort of causing loss by unlawful means has a different history. It starts with cases like *Garret v Taylor* (1620) Cro Jac 567, in which the defendant was held liable because he drove away customers of Headington Quarry by threatening them with mayhem and vexatious suits . . . In such cases, there is no other wrong for which the defendant is liable as accessory.

Although the immediate cause of the loss is the decision of the potential customer or trader to submit to the threat and not buy stones or sell palm oil, he thereby commits no wrong. The defendant's liability is primary, for intentionally causing the plaintiff loss by unlawfully interfering with the liberty of others. These old cases were examined at some length by the House of Lords in *Allen v Flood* [1898] AC 1 and their general principle approved. Because they all involved the use of unlawful threats to intimidate potential customers, *Salmond on Torts* 1st ed (1907) classified them under the heading of 'Intimidation' and the existence of a tort of this name was confirmed by the House of Lords in *Rookes v Barnard* [1964] AC 1129.

But an interference with the liberty of others by unlawful means does not require threats . . .

Salmond's tort of intimidation is therefore only one variant of a broader tort, usually called for short 'causing loss by unlawful means', which was recognized by Lord Reid in *J T*

Stratford & Son Ltd v Lindley [1965] AC 269 . . . The tort of causing loss by unlawful means differs from the *Lumley v Gye* principle, as originally formulated, in at least four respects.

First, unlawful means is a tort of primary liability, not requiring a wrongful act by anyone else, while *Lumley v Gye* created accessory liability, dependent upon the primary wrongful act of the contracting party. Secondly, unlawful means requires the use of means which are unlawful under some other rule ('independently unlawful') whereas liability under *Lumley v Gye* . . . requires only the degree of participation in the breach of contract which satisfies the general requirements of accessory liability for the wrongful act of another person: for the

relevant principles see *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 and *Unilever v Chefaro* [1994] FSR 135. Thirdly, liability for unlawful means does not depend upon the existence of contractual relations. It is sufficient that the intended consequence of the wrongful act is damage in any form; for example, to the claimant's economic expectations Under *Lumley v Gye*, on the other hand, the breach of contract is of the essence. If there is no primary liability, there can be no accessory liability. Fourthly, although both are described as torts of intention Because damage to economic expectations is sufficient to found a claim, there need not have been any intention to cause a breach of contract or interfere with contractual rights. Under *Lumley v Gye*, on the other hand, an intention to cause a breach of contract is both necessary and sufficient. Necessary, because this is essential for liability as accessory to the breach. Sufficient, because the fact that the defendant did not intend to cause damage, or even thought that the breach of contract would make the claimant better off, is irrelevant.

Again, we may extract from Lord Hoffmann's dicta certain key ingredients that are required to establish the liability of the NUDW for the tort of causing loss by unlawful means. We illustrate the application of these criteria with the benefit of Hypothetical B:

Hypothetical B

Unlike Hypothetical A, the NUDW does not call the employees of Danny's Demolishers out on strike. Before beginning demolition of any building, Danny's Demolisher's (DD) must obtain an asbestos certificate. This certificate confirms that an asbestos survey has been undertaken and any asbestos in the building has been removed. DD does not provide any asbestos services, but instead uses a sub-contractor who specializes in asbestos surveys and removal—Nick's Asbestos Services (NAS). NAS is smaller than DD, employing about 1,000

asbestos surveyors and removal operatives but, like DD, a large number of its staff (3/4) are members of the NUDW. Seeking to put pressure on DD, the NUDW calls its members from NAS out on strike. As a result of 3/4 of its workforce being on strike, NAS is unable to provide DD with the asbestos services it needs. As a result, DD suffers economic loss since, without an asbestos certificate, it cannot start the demolition of any buildings. In this instance, DD's claim lies against the NUDW in causing loss by unlawful means. What criteria must DD satisfy to establish the tort?

1. *Knowledge of the contract*—In Hypothetical A, liability for inducing a breach of contract required the NUDW to have knowledge of the contract of employment between the Employer and the striking employees. In Hypothetical B, however, the knowledge requirement is different. DD must be able to establish that the NUDW had knowledge of the commercial contract between DD and NAS.⁴⁶ This is because the intention of the NUDW must be to cause DD loss by means of unlawfully interfering with their contractual relations with NAS. It will be difficult for DD to show that the NUDW intended to cause DD loss if the NUDW had no knowledge of the commercial contract between DD and NAS.
2. *Intention*—DD must show that the NUDW intended to cause DD loss. DD must, therefore, show that the intention of the NUDW in inducing employees of NAS to breach their employment contracts was to ensure that NAS could not provide asbestos services to DD, thus causing DD loss. DD must be shown to have been the intended

⁴⁶ *Merkur Island Shipping Corp. v Laughton* [1983] 2 AC 570, 592 per Lord Diplock: 'the more indirect the action of the defendants, the more difficult may it be to prove their knowledge of an intention to interfere with the performance of the principal contract'.

target of the NUDW's industrial action—i.e. inducing the employees of NAS to breach their contracts is the means by which the NUDW reaches its end goal of causing loss to DD.⁴⁷ If the NUDW's intention is shown to be to induce employees of NAS to breach their contracts—rather than to cause loss to DD—then the requisite intention for causing loss by unlawful means would not have been established. The NUDW's targeted intention must be to cause loss to DD—it is not enough that loss to DD is an inevitable consequence of their intention.⁴⁸

3. *Unlawful means*—The loss sustained by DD must be caused by unlawful means. What exactly constitutes unlawful means has been the subject of some debate.⁴⁹ Lord Hoffmann defines an act as unlawful in terms of whether the act is 'independently actionable [by a third party]'.⁵⁰ Lord Nicholls on the other hand, proposes a broader definition of unlawfulness to include 'all acts which a person is not permitted to do' or 'doing what you have no legal right to do'.⁵¹ Whilst Lord Hoffmann's independent actionability test was preferred by the majority in *OBG*,⁵² the definition of

⁴⁷ *Allen v Flood* [1898] AC 1, 96 per Lord Watson and *OBG v Allan* [2008] 1 AC 1, 35E–G per Lord Hoffmann.

⁴⁸ *Barretts and Baird v IPCS* [1987] IRLR 3; *Associated British Ports v TGWU* [1989] ICR 557, 579 per Butler-Sloss LJ and 586 per Stuart-Smith LJ.

⁴⁹ Cf. *Daily Mirror Newspapers v Gardner* [1968] 2 QB 762 with *Gouriet v Union of Post Office Workers* [1978] AC 435 and *Lonrho Ltd v Shell Petroleum Ltd (No. 2)* [1982] AC 173 (HL).

⁵⁰ *OBG v Allan* [2008] 1 AC 1, 32B–35G per Lord Hoffmann.

⁵¹ *ibid.*, 53D–57B per Lord Nicholls.

⁵² *ibid.*, 85F per Baroness Hale and 91H per Lord Brown. Lord Walker's acceptance of Lord Hoffmann's 'independent actionability' test at 75C–D is more hesitant.

unlawfulness is by no means settled.⁵³ In the NUDW's case, inducing the employees of NAS to breach their employment contracts is the unlawful means by which DD's loss is caused. Since the inducement to breach the contract is independently actionable by NAS, DD will be able to establish the 'unlawful means' required to impose liability on the NUDW. Figure D.3. illustrates the operation of the relevant criteria:

<Figure D.3 to appear at of close to this point, above following caption>

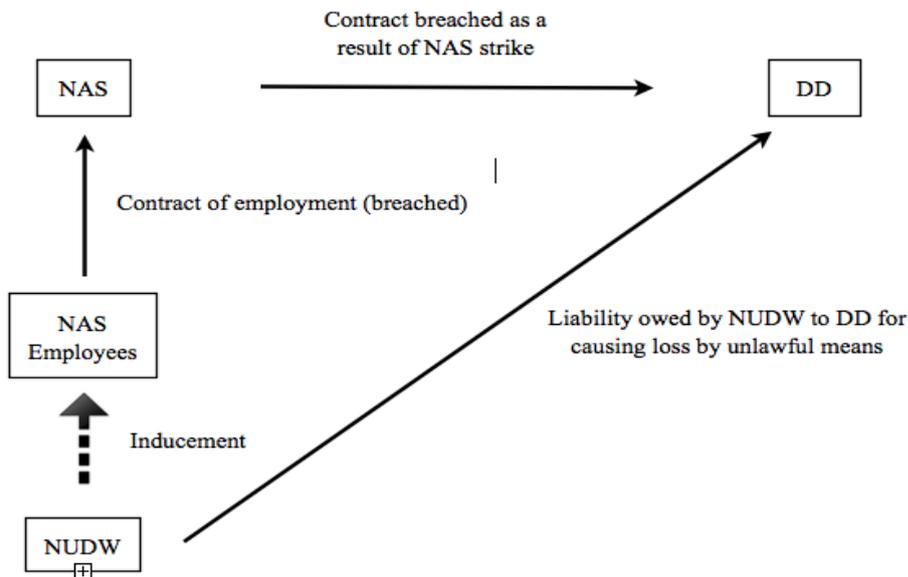


Figure D.3 *NUDW liability to DD for causing loss by unlawful means*

D.2.3.3 Intimidation

⁵³ See H. Carty, *An Analysis of the Economic Torts*, 2nd edition (Oxford, OUP, 2010) 84–98 and S.

Deakin and J. Randall, 'Rethinking the Economic Torts' (2009) 72 *Modern Law Review* 514, 544–50.

The third economic tort we consider is intimidation. Intimidation is a tort of considerable antiquity. The early case law recognizes the tort of intimidation in the context of threats to inflict physical harm.⁵⁴ However, tortious liability for a threat to breach a contract was not recognized until the decision of the House of Lords in *Rookes v Barnard*.⁵⁵

***Rookes v Barnard* [1964] AC 1129, 1168–1209**

By permission of Incorporated Council of Law Reporting: extracts from the Law Reports Appeal Cases (AC) and the Industrial Cases Reports (ICR).

[The following is a brief summary of the facts:] Rookes was employed by BOAC as a skilled draughtsman and was a member of the draughtsmen's union (AESD). Together, BOAC and AESD operated an informal closed shop arrangement. In 1955, Rookes resigned his membership from AESD owing to a disagreement with the union. Officials of the union (of which Barnard was one) threatened the employer, BOAC, that unless they dismissed Rookes, union members would go on strike. As a result of this, Rookes was given notice by BOAC and his contract of employment was lawfully terminated. Rookes sued the union officials alleging that they had committed the tort of intimidation.

Lord Reid:

The [dismissed employee] in this case could not take a benefit from contracts to which he was not a party or from any breach of them. But his ground of action is quite different. The [AESD] here used a weapon in a way which they knew would cause him loss, and the

⁵⁴ *Garrett v Taylor* (1620) Cro Jac 567 and *Tarleton v M'Gawley* (1793) Peake NP 270.

⁵⁵ [1964] AC 1129.

question is whether they were entitled to use that weapon—a threat that they would cause loss to B.O.A.C. if B.O.A.C. did not do as they wished. That threat was to cause loss to B.O.A.C. by doing something which they had no right to do, breaking their contracts with B.O.A.C. I can see no difference in principle between a threat to break a contract and a threat to commit a tort. If a third party could not sue for damage caused to him by the former I can see no reason why he should be entitled to sue for damage caused to him by the latter. A person is no more entitled to sue in respect of loss which he suffers by reason of a tort committed against someone else than he is entitled to sue in respect of loss which he suffers by reason of breach of a contract to which he is not a party. What he sues for in each case is loss caused to him by the use of an unlawful weapon against him—intimidation of another person by unlawful means. So long as the defendant only threatens to do what he has a legal right to do he is on safe ground. At least if there is no conspiracy he would not be liable to anyone for doing the act, whatever his motive might be, and it would be absurd to make him liable for threatening to do it but not for doing it. But I agree with Lord Herschell (*Allen v. Flood*) that there is a chasm between doing what you have a legal right to do and doing what you have no legal right to do, and there seems to me to be the same chasm between threatening to do what you have a legal right to do and threatening to do what you have no legal right to do. It must follow from *Allen v. Flood* that to intimidate by threatening to do what you have a legal right to do is to intimidate by lawful means. But I see no good reason for extending that doctrine. Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation, and, if there is no technical reason requiring a distinction between different kinds of threats, I can see no other ground for making any such distinction . . .

Lord Devlin:

It is not, of course disputed that if the act threatened is a crime, the threat is unlawful. But otherwise is it enough to say that the act threatened is actionable as a breach of contract or must it be actionable as a tort? My Lords, I see no good ground for the latter limitation . . . The essence of the offence is coercion. It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and unlawful as against the party threatened . . . I find therefore nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. All that matters . . . is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of—whether it is a physical club or an economic club or tortious club or an otherwise illegal club.

The recognition of the applicability of the tort of intimidation in the context of a threat to breach a contract in *Rookes v Barnard* was, at the time, controversial. Writing prior to his taking up judicial office, Hoffmann described the decision as a ‘bold instance of judicial law-making’.⁵⁶ The tort of intimidation does, in theory, have significant implications for the liability of trade unions in so far as liability for *organizing* strike action is extended to merely *threatening* strike action.⁵⁷ Despite this, the tort of intimidation has attracted little

⁵⁶ L Hoffmann, ‘*Rookes v Barnard*’ (1965) 81 *Law Quarterly Review* 116.

⁵⁷ K. W. Wedderburn, ‘The Right to Threaten Strikes’ (1961) 24 *Modern Law Review* 572 and K. W. Wedderburn, ‘Intimidation and the Right to Strike’ (1964) 27 *Modern Law Review* 257. See too K. W. Wedderburn, ‘The Trade Union and Labour Relations Act 1974’ (1974) 37 *Modern Law Review* 525, 539.

consideration since *Rookes*. There was scant discussion of the tort of intimidation in *OBG v Allan*, although Lord Hoffmann does take the view that intimidation is better viewed as an example of an act which can constitute the ‘unlawful means’ necessary for establishing the tort of causing loss by unlawful means.⁵⁸ This means that, post-*OBG*, intimidation is no longer to be viewed as an economic tort in its own right, but rather a sub-category of the tort of causing loss by unlawful means.

As such, the principal elements of the tort of intimidation post-*Rookes* are twofold:

1. *Threat*—The threat must be of the ‘or else’ kind and must cause the person threatened to act in the desired manner.⁵⁹ Threats are distinguished from idle abuse⁶⁰ and warnings.⁶¹ For example, a warning of ‘union trouble’ will not constitute a threat as it could involve either lawful or unlawful conduct.⁶² The threat must also be effective—the person must comply with the demand rather than risk the threat being carried into execution. Liability for the tort of intimidation will not be established unless the employer threatened succumbs to the pressure of the trade union making the threat.⁶³

⁵⁸ *OBG v Allan* [2008] 1 AC 1, 19H per Lord Hoffmann.

⁵⁹ *Hodges v Webb* [1920] 2 Ch 70, 89 per Peterson J.

⁶⁰ *News Group Newspapers Ltd v SOGAT* 82 [1987] ICR 181, 204 per Stuart-Smith J.

⁶¹ *Conway v Wade* [1909] AC 506, 510 per Lord Loreburn LC and *Pratt v BMA* [1919] 1 KB 244, 261 per McCardie J.

⁶² *Pete’s Towing Services Ltd v NIUW* [1970] NZLR 32.

⁶³ *Morgan v Fry* [1968] 2 QB 710. This view is also accepted by leading commentators on the economic torts: R. Stevens, *Torts and Rights* (Oxford, OUP, 2007) 190; J. Thomson, ‘Redrawing the landscape of the economic wrongs’ (2008) *Edinburgh Law Review* 267, 270; and J. W. Neyers, ‘The economic torts as corrective justice’ (2009) 17 *Torts Law Journal* 1, 7. For an alternative

2. *Unlawfulness*—The threat must be to do something unlawful. There is no definition of unlawfulness for the tort of intimidation,⁶⁴ but Carty takes the view that coherence in the law of economic torts dictates that unlawfulness for the purpose of intimidation must be the same as for causing loss by unlawful means.⁶⁵ In this way, it is likely that ‘unlawfulness’ for the purpose of intimidation will require the unlawful act to be independently actionable by a third party.⁶⁶

D.2.3.4 Conspiracy

Since industrial action is by its nature collective, involving as it does workers acting in concert, it is self-evident that the law of conspiracy will have a leading role to play in this area. It was noted earlier that the civil courts developed the tort of conspiracy only a few years after the 1875 Act conferred statutory immunity on trade unions from criminal liability in conspiracy.⁶⁷ There are in fact two types of civil conspiracy—lawful/‘simple’ conspiracy and unlawful conspiracy:

1. *Conspiracy by lawful means*—Conspiracy by lawful means is committed where two or more persons combine together with intent to injure the claimant by the use of means

view, see S. Deakin and J. Randall, ‘Rethinking the Economic Torts’ (2009) 72 *Modern Law Review* 514.

⁶⁴ H. Carty, *An Analysis of the Economic Torts*, 2nd edition (Oxford, OUP, 2010) 113.

⁶⁵ *ibid.*, 113.

⁶⁶ L. Hoffmann, ‘*Rookes v Barnard*’ (1965) 81 *Law Quarterly Review* 116.

⁶⁷ *Mogul Steamship Co. v McGregor, Gow & Co.* [1892] AC 25 HL; *Allen v Flood* [1898] AC 1 HL; and *Quinn v Leathem* [1901] AC 495 HL. And for more recent consideration see the recent House of Lords decision in *Total Network SL v Revenue and Customs Comrs* [2008] 1 AC 1174.

which, although being lawful in themselves, are used with the predominant purpose of harming the claimant rather than advancing the legitimate interests of the combiners.⁶⁸

2. *Conspiracy by unlawful means*—This tort is committed where two or more persons combine together with intent to injure the claimant by the use of means which are unlawful in themselves.⁶⁹ It can be taken from Lord Hoffmann’s judgment in *OBG* that ‘unlawfulness’ carries the same definition as for causing loss by unlawful means. Conspiracy to commit a crime or commit a tort against the employer would be examples of unlawfulness in this context.⁷⁰

The tort of lawful conspiracy has been the subject of sustained criticism over the years and its relationship with the other economic torts is currently being worked out post-*OBG v Allan*.⁷¹ Critics argue it is anomalous that acts, lawful if committed by an individual, can be made unlawful by the mere fact that they are committed in combination.⁷² Any theoretical difficulty which may have been caused by this has been offset to some extent by the development of a robust ‘justification defence’ to the allegation of lawful conspiracy. If a trade union can show a genuine trade union reason for industrial action, then a conspiracy to organize that

⁶⁸ *Mogul Steamship Co. v McGregor, Gow & Co.* [1892] AC 25 HL 2 and *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435.

⁶⁹ *Kuwait Oil Tanker CO SAK v Al Bader* [2000] 1 All R (Comm) 271.

⁷⁰ *Total Network SL v Revenue and Customs Comrs* [2008] 1 AC 1174.

⁷¹ For example, see P. S. Davies and P. Sales, ‘Intentional Harm, Accessories and Conspiracies’ (2018) 134 *Law Quarterly Review* 69.

⁷² Lawful conspiracy was described as a ‘highly anomalous cause of action’ by Lord Diplock in *Lonhro Ltd v Shell Petroleum Ltd (No. 2)* [1982] AC 173, 188. The tort was again described as ‘anomalous’ by Lord Hoffmann in *OBG v Allan* [2008] 1 AC 1, 22F.

industrial action will not be actionable regardless of any loss which may be incurred by the employer as a result. This is because the employer will not be able to demonstrate that the union's predominant purpose was to harm him—since the trade union can counter that the predominant purpose was to further the interests of its members.⁷³ Examples of trade unions successfully invoking the justification defence to lawful conspiracy claims include:

- a. *Reynolds v Shipping Federation*—conspiracy by union members to organize industrial action to enforce a closed shop arrangement.⁷⁴
- b. *Crofter Hand Woven Harris Tweed Co Ltd v Veitch*—conspiracy to strike for higher wages.⁷⁵
- c. *Scala Ballroom (Wolverhampton) Ltd v Ratcliffe*—conspiracy to take industrial action to stamp out a colour bar operated by the employer.⁷⁶

Reflection points

1. Do you find the distinction drawn between primary and secondary liability a convincing basis for distinguishing between the tort of causing loss by unlawful means and the tort of inducing a breach of contract? Give reasons for your answer.
 2. To what extent are the torts of intimidation and conspiracy still relevant today?
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D.2.4 The statutory immunities

⁷³ *Sorrell v Smith* [1925] AC 700.

⁷⁴ [1924] 1 Ch 28.

⁷⁵ [1942] AC 435.

⁷⁶ [1958] 1 WLR 1057.

The immunity of trade unions from liability for certain torts finds its expression in section 219 of TULRCA:

Section 219 Protection from certain tort liabilities

- (1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only—
 - (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or
 - (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.
- (2) An agreement or combination by two or more persons to do or procure the doing of an act in contemplation or furtherance of a trade dispute is not actionable in tort if the act is one which if done without any such agreement or combination would not be actionable in tort.
- (3) Nothing in subsections (1) and (2) prevents an act done in the course of picketing from being actionable in tort unless:
 - (a) it is done in the course of attendance declared lawful by section 220 (peaceful picketing), and
 - (b) in the case of picketing to which section 220A applies, the requirements in that section (union supervision of picketing) are complied with.

(4) Subsections (1) and (2) have effect subject to sections 222 to 225 (action excluded from protection)⁷⁷ and to sections 226 (requirement of ballot before action by trade union) and 234A (requirement of notice to employer of industrial action); and in those sections ‘not protected’ means excluded from the protection afforded by this section or, where the expression is used with reference to a particular person, excluded from that protection as respects that person

Section 219 is generally understood to provide a trade union with immunity from liability in respect of the following torts:

1. Inducement to breach a contract (section 219(1)(a));
2. Interference with a contract (section 219(1)(a));
3. Intimidation (section 219(1)(b)); and
4. Conspiracy (section 219(2)).

Earlier in this chapter we looked at how *OBG v Allan* transformed the landscape of the law on economic torts. Their Lordships held that the cases recognizing the tort of interference with contract were not to be followed. Intimidation was also said to be an example of causing loss by unlawful means as opposed to a tort in its own right. One may observe at this stage that the immunities conferred by section 219 are somewhat outdated. Section 219 continues to provide immunity from interference with contract—which is no longer a recognized economic tort. Section 219 makes no reference to the tort of causing loss by unlawful means—but confers immunity for the tort of intimidation—now recognized as a sub-category

⁷⁷ For the impact of section 222 on the protections conferred by section 219, see *Birmingham City Council v Unite the Union* [2019] IRLR 423.

of causing loss by unlawful means. As such, there is a mismatch between the economic torts at common law and the immunity from tortious liability contained in section 219. Earlier, the point was made that the statutory immunities often embody a reaction by the legislature to the development of economic torts at common law: the ‘cat and mouse’ phenomenon. The technique of listing various identifiable forms of liability for which a trade union will be immune, instead of providing a comprehensive immunity from all civil liability, means that those organizing industrial action have, historically, been vulnerable to the development of new economic torts. In this way, whilst the common law develops incrementally, the statutory immunities remain static: the reformulation of the economic torts in *OBG* has left section 219 of TULRCA out of sync with the common law.

A pertinent question is whether the mismatch between statute and common law jeopardizes the scope of protection conferred on trade unions by section 219. For example, the provision makes no reference to the tort of causing loss by unlawful means. This raises the question as to whether the statutory immunity covers this tort at all. Two justifications may be put forward for the view that section 219 does indeed extend immunity to causing loss by unlawful means in the future:

(1) The first justification is put forward by Simpson.⁷⁸ Section 219 covers the torts of interference with contract (section 219(1)(a)) and intimidation (section 219(1)(b)).

These are no longer viewed as individual economic torts, but rather examples of the tort of causing loss by unlawful means. The line of argument is that if actions which are now considered as examples of the tort of causing loss by unlawful means are

⁷⁸ B. Simpson, ‘Economic Tort Liability in Labour Disputes: The Potential Impact of the House of Lords’ Decision in *OBG Ltd v Allan*’ (2007) 36 *Industrial Law Journal* 468.

covered, then it stands to reason that the tort they are examples of would be covered too.

- (2) Secondly, one may argue that section 219 indirectly extends immunity to causing loss by unlawful means. If we look back to Hypothetical B, the NUDW causes loss to DD by unlawful means. The inducement of NAS's employees to breach their employment contracts by striking (thus causing loss to DD) is the unlawful means used by the NUDW.

As such, whilst there is perhaps an argument that some legislative amendment of section 219 to reflect the law of economic torts post-*OBG* would be beneficial, it may be simply more desirable than necessary.

D.2.5 Qualifying for the statutory immunity

The statutory immunities from liability in tort only extend to 'act[s] done in contemplation or furtherance of a trade dispute'. This aspect of section 219 is of great practical significance.

Wedderburn famously dubbed the expression 'act[s] done in contemplation or furtherance of a trade dispute' as the golden formula—since the courts' decision to grant or deny statutory immunity often turned on whether the trade union's action came within the perimeters of this

phrase.⁷⁹ The ‘golden formula’ is the substantive condition placed on the supply of the statutory immunity.⁸⁰ Essentially, it posits two questions:

1. Is there a ‘trade dispute’?
2. Are the actions of the trade union ‘in contemplation or furtherance’ of that trade dispute?

These two questions will be considered in turn.

D.2.5.1 The concept of a ‘trade dispute’

Section 244 Meaning of ‘trade dispute’ in Part V

- (1) In this Part a ‘trade dispute’ means a dispute between workers and their employer which relates wholly or mainly to one or more of the following—
- (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
 - (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
 - (c) allocation of work or the duties of employment between workers or groups of workers;
 - (d) matters of discipline;

⁷⁹ First used in K. Wedderburn, *The Worker and the Law* (Middlesex, Penguin Books, 1965) 222. For commentary on the interpretation of the golden formula, see K. Ewing, ‘The Golden Formula: Some Recent Developments’ (1979) 8 *Industrial Law Journal* 133 and K. Ewing, ‘Another Step in the “Right” Direction’ (1982) 11 *Industrial Law Journal* 209.

⁸⁰ *Metrobus v UNITE* [2010] ICR 173, 209E per Maurice Kay LJ.

- (e) a worker's membership or non-membership of a trade union;
- (f) facilities for officials of trade unions; and
- (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

D.2.5.1.1 Parties to the dispute

In order to fall within the scope of the 'golden formula' the trade dispute must be between 'workers and their employer'.⁸¹ 'Worker' is defined in section 244(5) as including persons whose employment was terminated in connection with the dispute or was itself one of the circumstances giving rise to the dispute. As for the meaning of the word 'dispute', there is no specific definition in TULRCA. Mr Justice Kerr adopted a dictionary-style approach to its interpretation, noting in *Secretary of State for Education v National Union of Teachers*⁸² that it 'is an ordinary English word which simply means a disagreement about an issue'.⁸³ It is also essential that the dispute is between workers and their *present* employer. Workers will not, therefore, be able to establish that they are engaged in a trade dispute if the counter-party to the dispute is a prospective (as opposed to the present) employer.⁸⁴ If the party responsible

⁸¹ TULRCA, s. 244(1).

⁸² <IBT>[2016] IRLR 512</IBT>.

⁸³ *ibid.*, 516 at para. 39.

⁸⁴ *University College London Hospital NHS Trust v UNISON* [1999] IRLR 31 and *TGWU v Associated British Ports* [2001] EWCA Civ 2032.

for the funding of any pay settlement in terms of the industrial dispute is someone other than the employer, this will not necessarily preclude a court finding that the dispute is between the workers and their employer;⁸⁵ this is particularly the case where the trade union is seeking to protect its members from public funding decisions taken by the Secretary of State.⁸⁶ As for the identity of the employer, the courts have on occasion been willing to lift the corporate veil in cases where the employer artificially transfers its business into a new trading company so as to claim that there can be no trade dispute with the newly incorporated company. In *Examite Ltd v Whittaker*,⁸⁷ Lord Denning MR opined that ‘[i]n these trade dispute cases I think we ought to pull aside any curtain over limited companies and see what the real truth is . . . it seems to me plain that the words “employers” and “workers” apply to employers whatever the particular hat those particular employers may wear from time to time’.⁸⁸

D.2.5.1.2 Subject of the trade dispute

The next question is whether the dispute relates ‘wholly or mainly’ to one or more of the prescribed subjects of trade dispute listed in sections 244(1)(a)–(g). The prescribed subjects pertain to different aspects of the working relationship (e.g. the terms and conditions of employment (section 244(1)(a)) as well as union related activity (e.g. trade union

⁸⁵ *ISS Mediclean Ltd v GMB* [2015] IRLR 96 and *Secretary of State for Education v National Union of Teachers* [2016] IRLR 512.

⁸⁶ See *Secretary of State for Education v National Union of Teachers* [2016] IRLR 512 and TULRCA, s. 244(2).

⁸⁷ <IBT>[1977] IRLR 312</IBT>.

⁸⁸ *ibid.*, 313. However, contrast this with *Dimbleby & Sons Ltd v NUJ* [1984] IRLR 161 and the discussion on ‘enterprise confinement’ in secondary action considered later, at section D.2.6.1.2.

membership (section 244(1)(e)). Of particular significance in practice, however, are disputes pertaining to the following three issues:

- a. *Terms and conditions of employment*—the courts have adopted a liberal interpretation of the phrase ‘terms and conditions of employment’. It has been held to include not only written contractual terms and conditions but also those terms which are not formally incorporated into the employment contract but are understood and applied by the parties in practice either ‘habitually or by common consent’.⁸⁹ Section 244(1)(a) has also been held to apply not just to the content of the terms and conditions of employment but also the manner in which they are applied.⁹⁰

One potential limitation is that section 244(1)(a) only applies to disputes about terms and conditions of employment with the *present* employer and not *future* employers.

As such, in *University College London Hospital NHS Trust v UNISON*,⁹¹ where NHS workers went on strike in relation to possible changes to terms and conditions of employment with their proposed new employer (a consortium looking to take over the NHS Trust), this was held not to be a legitimate trade dispute.

- b. *Engagement/non-engagement/termination or suspension of employment*—Obvious examples which would fall in this category are dismissals and redundancies. This category also includes redundancies which are feared although not necessarily

⁸⁹ *BBC v Hearn* [1977] IRLR 273, 275 per Lord Denning, approved in *Hadmor Productions Ltd v Hamilton* [1982] IRLR 102, 108 per Lord Diplock and *P v NAS/UWT* [2003] ICR 386, 393 per Lord Hoffmann.

⁹⁰ *P v NAS/UWT* [2003] ICR 386.

⁹¹ *University College London Hospital NHS Trust v UNISON* [1999] IRLR 31, noted by J. Hendy, ‘Caught in a Fork’ (2000) 29 *Industrial Law Journal* 53.

formalized and imminent. The trade union will simply have to go to the length of showing that the fear of redundancies is genuine.⁹² For instance, in *Hadmor Productions Ltd v Hamilton*,⁹³ the fact that redundancy notices had not yet been issued at the time a decision was taken to ‘black’ a television programme was held not to be fatal to the legitimacy of the industrial action taken. The court also took into account the fact that the union’s fears for the job security of its members would be heightened at a time of high unemployment.

- c. *Allocation of work*—This category of trade dispute is limited to disputes between workers/groups of workers employed by the same employer. So if an employer’s business is divided into separate companies, which may be operating on the same premises (e.g. a manufacturing and a distribution division), a dispute over the allocation of work between those companies would not be a ‘trade dispute’.⁹⁴

D.2.5.1.3 Related ‘wholly or mainly to’

It is axiomatic that the trade dispute must be ‘wholly or mainly’ related to one of the matters set out in section 244(1)(a)–(g). This aspect of section 244(1) enjoins the court to undertake a factual analysis of what the subject of the dispute in question actually is, and then check the subject of the dispute against the list of statutorily prescribed trade dispute subjects adumbrated in section 244(1)(a)–(g). In deciding what the dispute is actually about, the court

⁹² *Health Computing Ltd v Meek* [1980] IRLR 437 and *General Aviation Services (UK) v TGWU* [1975] ICR 276.

⁹³ [1983] 1 AC 191.

⁹⁴ *Dimbleby & Sons Ltd v NUJ* [1984] IRLR 161; H. Carty, ‘Economic Torts, Secondary Action and the Corporate Veil’ (1984) 100 *Law Quarterly Review* 342.

will not only consider the circumstances which caused it to arise, but also the reason for its emergence and any events leading up to it.⁹⁵ The test is an objective one—i.e. the court must decide whether the subject of the dispute at hand is ‘related wholly or mainly’ to an accepted subject of trade dispute in s244(1)(a)–(g). The fact that the trade union genuinely believes the dispute is wholly or mainly related to an accepted subject of trade dispute in section 244(1)(a)–(g) will not be sufficient.⁹⁶ There is also a distinction to be drawn between what it is that the dispute wholly or mainly relates to, and the particular reason that the parties are in dispute.⁹⁷ For example, in *Argos Ltd v Unite the Union*,⁹⁸ it was held that a dispute related wholly or mainly to terms and conditions of employment or machinery for negotiation or consultation with the employer in terms of section 244(1)(a) and (g), even though the primary reason for the dispute concerned the union’s objections to transferring employees no longer forming part of a national forum for talks between the employer and union, amongst many other matters.

If the dispute is judged not to be wholly or mainly related to one of the subjects listed in section 244(1)(a)–(g) (e.g. a personal dispute),⁹⁹ then the test will not be satisfied. Previous legislation required only that the dispute be ‘connected’ with one of the acceptable categories

⁹⁵ *London Borough of Wandsworth v National Association of Schoolmasters/Union of Women Teachers* [1994] ICR 81, 83 per Neill LJ.

⁹⁶ *Mercury Communications Ltd v Scott-Garner* [1984] Ch 37, 98 per Dillon LJ.

⁹⁷ *ibid.*, 79G–H per Sir John Donaldson.

⁹⁸ [2017] EWHC 1959 (QB).

⁹⁹ *Huntley v Thornton* [1957] 1 WLR 321; *Conway v Wade* [1909] AC 506; *J T Stratford & Son Ltd v Lindley*; *Star Sea Transport Corporation of Monrovia v Slater* [1978] IRLR 507; and *PBDS (National Carriers) Ltd v Filkins* [1979] IRLR 356.

of trade dispute.¹⁰⁰ As such, in *NWL Ltd v Woods*,¹⁰¹ Lord Diplock held that '[e]ven if the predominant object were to bring down the fabric of the present economic system by raising wages to unrealistic levels . . . this would not . . . make it any less a dispute connected with terms and conditions of employment—and thus a trade dispute, if the actual demand that is resisted by the employer is, as to terms and conditions which his workers are to be employed'.¹⁰² The modern terminology 'related wholly or mainly' is narrower in scope than 'connected to' and is accordingly interpreted more restrictively by the courts.¹⁰³ It requires there to be a stronger causative link between the subject of the dispute and the acceptable subjects of trade dispute listed in s244(1)(a)–(g).¹⁰⁴

¹⁰⁰ See Trade Disputes Act 1906, s. 29(1). The expression 'connected with' was amended to 'relates wholly or mainly to' by TULRCA, s. 18(2)(c).

¹⁰¹ [1979] 1 WLR 1294.

¹⁰² *NWL Ltd v Woods* [1979] 1 WLR 1294, 1304 per Lord Diplock.

¹⁰³ See *Mercury Communications Ltd v Scott-Garner* [1984] Ch 37 and discussion in B. Simpson, 'A Not So Golden Formula: In Contemplation or Furtherance of a Trade Dispute after 1982' (1983) 46 *Modern Law Review* 463 and J. Elgar and B. Simpson, 'The Impact of the Law on Industrial Disputes Revisited: A Perspective on Developments over the Last Two Decades' (2017) 46 *Industrial Law Journal* 6, 9.

¹⁰⁴ *Trade Union Immunities* (Cmnd 8128, 1980) para. 190, 'there should be some measurement of the importance of the trade dispute element and that a dispute should only fall within the definition of trade dispute if that element is found to be significant compared with other elements'.

The formulation ‘relating wholly or mainly to’ has been criticized for presenting a hurdle to public service workers engaging in industrial action.¹⁰⁵ Consider the following. If public service workers are in a dispute over job cuts, although job cuts fall clearly within the definition of a trade dispute, the dispute may also involve challenging elements of broader government policy, e.g. if the job cuts are related to reductions in public spending or privatization. If the link between the dispute and government policy is sufficiently strong, the court may view the dispute as a political one as opposed to an industrial one which falls within the scope of section 244. The issue is considered by Kahn-Freund:

O. Kahn-Freund, ‘Legal Framework’ in A. Flanders and H. Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, Oxford, 1954) 126–7

There is, however, another side to this matter, and this has been the subject of one of the keenest legal and political controversies of this century. Where exactly is the borderline between a strike connected with a trade dispute, e.g. a sympathetic strike, and a political strike? . . . The definition of a ‘trade dispute’ in the Act of 1906 rests on a theory of society and politics which, even in 1906, was open to grave doubt and which today is plainly untenable. It rests on the assumption that one can separate economic from political motives and economic action from political action. To show that the economic and the political elements cannot be kept in watertight compartments, at any rate in the sphere of life with which we are concerned, one does not have to refer to the millions of employees who are serving the state and public corporations. The problem would be the same if there was no public enterprise in this country at all. The level of wages depends today only partly and

¹⁰⁵ B. Simpson, ‘The Summer of Discontent and the Law’ (1989) 19 *Industrial Law Journal* 234 and, more recently, K. Ewing and J. Hendy, *Days of Action: The Legality of Protest Strikes against Government Cuts* (Liverpool, Institute of Employment Rights, 2011).

perhaps only to a minor extent on decisions of private employers. In all sorts of ways it depends on governmental policies. It is hardly possible to think of any major labour dispute in which the government is not somehow involved. How, then can anyone, judge, juror or private citizen, determine how far any strike is intended primarily to induce the employers to pay wages of a certain amount or the government to change its policy. The law as it stands today reflects the conditions of the nineteenth century. Perhaps it was then possible to draw a line between the sphere of the 'State' and the sphere of 'Society.' Today any attempt to do so is doomed to failure. It may be possible to carry on with the present law for many years to come, but one should at least realize that its foundations are shaky. These foundations are the social and political convictions on which all law-making rests, and with them we reach the limits of the law.

The courts have categorized strikes which are motivated by a desire to protest against new legislation or economic policy affecting union members, as political strikes.¹⁰⁶ Disputes will, however, fall within the scope of section 244 of TULRCA if the Government policy has a sufficiently direct effect on the striking employees. So where denationalization of British transport gave rise to potential redundancies, the court in *General Aviation Services (UK) v TGWU*¹⁰⁷ reached the conclusion that the dispute was not a political one, but one falling within the scope of the statutory definition of 'trade dispute'. Similarly, in *London Borough*

¹⁰⁶ *Associated Newspaper Group v Flynn* (1970) KIR 17; *Beaverbrook Newspapers Ltd v Keys* [1978] IRLR 34; and *Gouriet v Union of Post Office Workers* [1978] AC 435.

¹⁰⁷ [1974] ICR 35.

of *Wandsworth v NAS/UWT*,¹⁰⁸ the proposed boycott of the assessment of pupils under a new national education curriculum was held to be related ‘wholly or mainly’ to one of the statutorily prescribed disputes in section 244(1). The court found that the member’s concerns related to the increased workload which a new curriculum would generate.

D.2.5.1.4 Action in ‘contemplation or furtherance’ of a trade dispute

The statutory immunities conferred on trade unions by section 219 of TULRCA apply only to acts done in ‘contemplation or furtherance’ of a trade dispute. Owing to the fact that section 244(1) defines a ‘trade dispute’ as one arising between workers and their employer, by implication, secondary or ‘sympathy’ action is unlawful.¹⁰⁹ Some light is shed on the expression ‘contemplation or furtherance’ in the following extract:

Conway v Wade [1909] AC 506, 509–22

Lord Loreburn:

[E]ither a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing and the act is done in support of one side to it. There must be a dispute, however, its subject matter may be defined, and a mere personal quarrel or a grumbling or an agitation will not suffice. It must be something definite and of real substance
...

¹⁰⁸ [1994] ICR 81. See also *Westminster City Council v UNISON* [2001] ICR 1046 and *Secretary of State for Education v National Union of Teachers* [2016] IRLR 512, 517–18 per Mr Justice Kerr.

¹⁰⁹ See also later, at section D.2.6.1.2; and section 224 of TULRCA which explicitly deems secondary action to be unlawful.

Lord Shaw:

The contemplation of such a dispute must be the contemplation of something impending or likely to occur . . . [it does] not cover the case of coercive interference in which the intervener may have in his own mind that if he does not get his own way he will thereupon take ways and means to bring a trade dispute into existence . . . With regard to the term ‘furtherance’ of a trade dispute, I think that must apply to a trade dispute in existence and that the act done must be in the course of it and for the purpose of promoting the interests of either party or both parties to it.

The judgments of Lord Loreburn and Lord Shaw yield the insight that the expression ‘in contemplation or furtherance’ incorporates a time element. The action must be either when the trade dispute is about to or is likely to happen (‘contemplation’) or when a trade dispute is already in existence (‘furtherance’).¹¹⁰ The statutory immunity conferred by section 219 therefore extends to acts which take place before a ‘live’ trade dispute between workers and their employer. In deciding whether action is in ‘contemplation or furtherance’ of a trade dispute, the court will undertake a subjective analysis—i.e. it will look to see that the trade union genuinely believes that the action taken is in contemplation or furtherance of a trade dispute.¹¹¹ The justification for, and policy behind, this approach is encapsulated in the following passage:

¹¹⁰ *Bents Brewery Co Ltd v Hogan* [1945] 2 All ER 570; *J T Stratford & Son Ltd v Lindley* [1965] AC 269; and *Stewart v AUEW* [1973] ICR 128.

¹¹¹ For the ‘objective’ approach which applied prior to the decision of the House of Lords in *Express Newspapers Ltd v McShane* [1980] ICR 40, see *Beaverbrook Newspapers Ltd v Keys* [1978] ICR

***Express Newspapers Ltd v McShane and Ashton* [1980] AC 672, 685G–94E**

By permission of Incorporated Council of Law Reporting: extracts from the Law Reports Appeal Cases (AC) and the Industrial Cases Reports (ICR).

Lord Diplock:

My Lords, during the past two years there has been a series of judgments in the Court of Appeal [that have had] . . . the effect of imposing on the expression ‘An act done by a person in contemplation or furtherance of a trade dispute,’ . . . an interpretation restrictive of what, in common with the majority of your Lordships, I believe to be its plain and unambiguous meaning. The terms in which the limitations upon the ambit of the expression have been stated are not identical in the various judgments, but at the root of all of them there appears to lie an assumption that Parliament cannot really have intended to give so wide an immunity from the common law of tort as the words [in the legislation] would, on the face of them, appear to grant to everyone who engages in any form of what is popularly known as industrial action.

My Lords, I do not think that this is a legitimate assumption on which to approach the construction [in the legislation], notwithstanding that the training and traditions of anyone whose life has been spent in the practice of the law and the administration of justice in the courts must make such an assumption instinctively attractive to him. But the manifest policy of the [legislation] was to strengthen the role of recognized trade unions in collective

582; *Star Sea Transport Corp. of Monrovia v Slater, The Camilla M* [1978] IRLR 507; and *Associated Newspapers Group v Wade* [1979] ICR 664.

bargaining, so far as possible to confine the bargaining function to them, and . . . may well have felt so confident that trade unions could be relied upon always to act ‘responsibly’ in trade disputes that any need for legal sanctions against their failure to do so could be obviated.

This being so, it does not seem to me that it is a legitimate approach to the construction of the sections that deal with trade disputes, to assume that Parliament did not intend to give to trade unions and their officers a wide discretion to exercise their own judgment as to the steps which should be taken in an endeavour to help the workers’ side in any trade dispute to achieve its objectives. And if their plain and ordinary meaning is given to the words ‘An act done by a person in contemplation or furtherance of a trade dispute,’ this, as it seems to me, is what section [219 of TULRCA] does. In the light of the express reference to the ‘person’ by whom the act is done and the association of ‘furtherance’ with ‘contemplation’ (which cannot refer to anything but the state of mind of the doer of the act) it is, in my view, clear that ‘in . . . furtherance’ too can only refer to the state of mind of the person who does the act, and means: with the purpose of helping one of the parties to a trade dispute to achieve their objectives in it.

Given the existence of a trade dispute . . . this makes the test of whether an act was done ‘in . . . furtherance of’ it a purely subjective one. If the party who does the act honestly thinks at the time he does it that it may help one of the parties to the trade dispute to achieve their objectives and does it for that reason, he is protected by the section. I say ‘may’ rather than ‘will’ help, for it is in the nature of industrial action that success in achieving its objectives cannot be confidently predicted. Also there is nothing in the section that requires that there should be any proportionality between on the one hand the extent to which the act is likely to, or be capable of, increasing the ‘industrial muscle’ of one side to the dispute, and on the other

hand the damage caused to the victim of the act which, but for the section, would have been tortious. The doer of the act may know full well that it cannot have more than a minor effect in bringing the trade dispute to the successful outcome that he favours, but nevertheless is bound to cause disastrous loss to the victim, who may be a stranger to the dispute and with no interest in its outcome. The act is none the less entitled to immunity under the section . . . The belief of the doer of the act that it will help the side he favours in the dispute must be honest; it need not be wise, nor need it take account of the damage it will cause to innocent and disinterested third parties. Upon an application for an interlocutory injunction the evidence may show positively by admission or by inference from the facts before the court that the act was not done to further an existing trade dispute but for some ulterior purpose such as revenge for previous conduct. Again, the facts in evidence before the court may be such as will justify the conclusion that no reasonable person versed in industrial relations could possibly have thought that the act was capable of helping one side in a trade dispute to achieve its objectives. But too this goes to honesty of purpose alone, not the reasonableness of the act, or its expediency . . .

Lord Scarman:

It follows . . . that, once it is shown that a trade dispute exists, the person who acts, but not the court, is the judge of whether his acts will further the dispute. If he is acting honestly, Parliament leaves to him the choice of what to do. I confess that I am relieved to find that this is the law. It would be a strange and embarrassing task for a judge to be called upon to review the tactics of a party to a trade dispute and to determine whether in the view of the court the tactic employed was likely to further, or advance, that party's side of the dispute.

The judgments of Lord Diplock and Lord Scarman recognize that the court is not best placed to decide whether action taken by a trade union will further a trade dispute.¹¹² The role of the court is to ensure that the trade union genuinely believes its action will further the trade dispute. The subjective element to the ‘contemplation or furtherance’ test is, in this respect, deferential to the trade union and represents a rare example of pro-union judicial activism in the industrial action case law.

This leads us finally to question whether it is justifiable to persist with the existing convoluted technique of conferring statutory immunities in connection with civil liabilities imposed under a suite of continuously expanding common law economic torts.¹¹³ The most obvious alternative approach would be simply to recognize a positive right to strike. This more up-front approach, is particularly attractive in light of the casting of such a right as a fundamental principle of EU law in *International Transport Workers’ Federation v Viking Line ABP*,¹¹⁴ and *Laval un Partners Ltd v Svenska*.¹¹⁵ Further, such a basic right is enshrined in Article 28 of the EUCFR:¹¹⁶

¹¹² K. W. Wedderburn, *The Worker and the Law*, 3rd edition (Middlesex, Penguin, 1986) 571.

¹¹³ For commentary, see A. Hughes, ‘Liability for Loss Caused by Industrial Action’ (1970) 86 *Law Quarterly Review* 181, 201–2.

¹¹⁴ [2008] IRLR 143, 156.

¹¹⁵ [2008] IRLR 160, 170.

¹¹⁶ For commentary, see A. Koukiadaki, ‘The Far-Reaching Implications of the *Laval* Quartet: The Case of the UK Living Wage’ (2014) 43 *Industrial Law Journal* 91 and J Prassl and M. Freedland, (eds), *Viking, Laval and Beyond* (Oxford, Hart Publishing, 2015). As for the position of the right to strike under the ECHR, see *RMT v UK* [2014] IRLR 467, 481; *Enerji Yapi-Yol Sen*, App. No.

P. Elias and K. Ewing, ‘Economic Torts and Labour Law: Old Principles and New Liabilities’, (1982) 41 *Cambridge Law Journal* 321, 356–8

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. . . the continuing development of the common law . . . raise[s] fundamental questions about the value of a system of immunities for the protection of the freedom to strike . . . An alternative method of guaranteeing the freedom is by a system of positive rights [which] . . . has been canvassed on many occasions but . . . rejected. It has been argued that the technical legal problems of such a solution would be formidable, not least because it would involve the introduction of a doctrine of suspension of . . . the individual contract of employment in strikes. Another problem . . . is the position of peace obligations in collective agreements: would they risk illegality because they fetter the inalienable right to strike? A recent commentary . . . suggests that a right to strike would . . . be an instrument of trade union weakness, rather than strength . . . [because it] would [not] protect or permit unofficial industrial action or official action in breach of agreed procedures. They also [suggest] a right to strike would create a right exercisable by individual employees which would entail technical difficulties relating to the contract of employment [and] unfair dismissal . . .

But although these arguments are interesting, they are unconvincing . . . There are three key questions . . . The first is to consider what strike action is to be permitted; the second to

68959/01, 21 April 2009 (ECtHR); K. Ewing and J. Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *Industrial Law Journal* 1; A. Bogg and K. Ewing, ‘The Implications of the *RMT Case*’ (2014) 43 *Industrial Law Journal* 221; K. Ewing and J. Hendy, ‘The Strasbourg Court Treats Trade Unionists with Contempt: *Svenska Transportarbetareförbundet and Seko v Sweden*’ (2018) 46 *Industrial Law Journal* 435; and J. Hendy and T. Novitz, ‘The *Holship Case*’ (2018) 47 *Industrial Law Journal* 315.

determine what is the most effective way of guaranteeing that freedom . . . and the third to decide to which legal relationships those guarantees are to apply. Questions relating to the protection to be afforded to unofficial and unconstitutional action will indeed arise under the first question, but then they will have to be considered . . . regardless of the means adopted to establish the freedom. But since strikes in such circumstances may be protected by the present immunities, there is no reason to believe that they would be necessarily or automatically unlawful if there were a positive right to strike . . . So far as the third question is concerned, there is no reason why the right should not be limited to affect certain specific legal relationships only, and not be recognized as having an overriding status in all contexts . . .

The advantage of a rights based system is that the right could exist regardless of common law developments. So even if the judges developed new causes of action, this would be largely irrelevant in the labour field because they would always be secondary to the primary statutory right . . . [Of course, t]he judges might still find ways to qualify the right—and most systems with a concept of positive rights have a doctrine of abuse of right . . . [but j]udges might be less jealous of a right than an immunity and might consequently respond more positively to a new hierarchy of norms which places the right to strike above other competing common law claims.

However, it should be stressed that even in EU law, the ECJ in *International Transport Workers' Federation v Viking Line ABP* ('Viking'),¹¹⁷ and *Laval un Partners Ltd v Svenska*

¹¹⁷ [2008] IRLR 143, 156. See A. C. L. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37 *Industrial Law Journal* 126.

(‘*Laval*’)¹¹⁸ treated the fundamental right to strike as a principle which could not be taken too far. The right to strike, the ECJ held, must be exercised in a manner that is proportionate. As such, the industrial action must not extend beyond what is necessary to achieve the trade union’s objective, e.g. protecting jobs or employment conditions. Furthermore, before resorting to the right to strike, the union must first exhaust all other available means to achieve their desired objectives. The ECJ’s approach in *Viking* and *Laval* chimes with Ewing’s note in the passage that a positive right to strike will inevitably be limited to some extent.

D.2.6 The scope of the statutory immunities

Having examined the liabilities that trade unions may encounter for organizing a strike, and the concomitant immunity from liability conferred upon trade unions by statute, it is now necessary to assess the scope of the statutory immunities. This assessment may be split into two parts. First, we must establish whether there are any circumstances in which the immunity conferred upon trade unions may be removed. Secondly, we must consider the potential liabilities which a trade union organizing industrial action may face which are not covered by the statutory immunity.

D.2.6.1 Removal of statutory immunity

The benefit of the statutory immunities will be removed if the trade union fails to comply with the statutory pre-strike ballot and notice requirements and where it engages in secondary action or unlawful picketing. We now turn to address each of these provisions.

¹¹⁸ [2008] IRLR 160, 170.

D.2.6.1.1 Industrial action without the support of a pre-strike ballot or compliance with notice requirements

Section 219 stipulates that the trade union's immunity from liability in tort is subject to the requirement that the industrial action take place with the support of a ballot and that the employer is notified of the planned industrial action.¹¹⁹ As such, the pre-strike ballot and notice procedure acts as a procedural condition to the operation of the statutory immunities.¹²⁰ The statutory immunity conferred by section 219 will be removed if a majority of those voting in the ballot¹²¹ fail to answer affirmatively to the organization of strike action or action short of a strike.¹²² Section 233(3) provides that there must have been no call for industrial action prior to the ballot.¹²³

¹¹⁹ TULRCA, s. 219(4).

¹²⁰ *Metrobus v UNITE* [2010] ICR 173, 209E per Maurice Kay LJ.

¹²¹ It is not possible to vote by e-balloting, although at the time of writing, a report by Sir Ken Knight had been published recommending that a test of e-balloting on non-statutory ballots be undertaken before the Secretary of State takes any decision. The Government are currently consulting with stakeholders on these recommendations: see <https://www.theyworkforyou.com/wrans/?id=2018-10-30.185640.h> (last visited 5 January 2020).

¹²² TULRCA, ss. 226(2)(b)(iii) and 229(2)(a)–(b).

¹²³ For a case where there was a question as to whether there had been a prior call, see *Govia Thameslink Railway Ltd v ASLEF* [2016] IRLR 686. It was held in this case that the test as to whether there had been a prior call involves enquiring whether there had been an inducement to breach of contract. For comment, see See K. Ewing and J. Hendy, 'The Strasbourg Court Treats Trade Unionists with Contempt: *Svenska Transportarbetareförbundet and Seko v Sweden*' (2018) 46 *Industrial Law Journal* 435, 441.

Most significantly, as a result of the introduction of section 2(1) of the Trade Union Act 2016, a controversial 50 per cent turnout requirement is imposed. That is to say that at least 50 per cent of the workers entitled to vote must actually have done so, i.e. a quorum prescription.¹²⁴ For an example of how this works in practice, see Hypothetical C:

Hypothetical C

The National Union of Demolition Workers (NUDW) is in dispute with Danny's Demolisher's (DD) over terms and conditions relating to the wages and salaries of its members employed by DD. The NUDW ballots its membership proposing that industrial action be taken against DD. 2,400 members of the NUDW who are employed by DD are entitled to vote. Although 940 of those eligible members voted in favour of industrial action under the ballot, the industrial action cannot take place with the benefit of the statutory immunity from suit under section 219 of TULRCA, since only 1,150 members actually voted, which is fewer than the 50 per cent minimum threshold imposed by section 226(2)(a)(iia) of TULRCA.

The Government introduced this 50 per cent quorum in 2016 on the grounds that the taking of industrial action sanctioned by a low turnout is undemocratic, and to stress the exceptional nature of strike action in statutory terms, i.e. that it should only be used when all other measures have been exhausted.¹²⁵ However, Ford and Novitz make the counter-arguments

¹²⁴ TULRCA, ss. 226(2)(a)(iia)

¹²⁵ See DBIS, *Trade Union Reform, Consultation on Ballot Thresholds in Important Public Services*, BIS/15/418 at paras 1 and 3, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445433/BIS-15-418-consultation-on-ballot-thresholds-in-important-public-services.pdf (last visited 5 January 2020).

that the imposition of the 50 per cent threshold would have stopped 46.2 per cent of the strikes that took place between 2002 and 2014,¹²⁶ which serves to highlight the ‘potential incompatibility of the ballot thresholds with Article 11 . . .’ of the ECHR:

M. Ford and T. Novitz, ‘An Absence of Fairness . . . Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 *Industrial Law Journal* 522, 534–5 . . . several factors point to the potential incompatibility of the ballot thresholds with Article 11(2): their inconsistency with the ILO (and ESC) decisions; the high levels of the threshold compared with other elections; the *de facto* serious effects of 50% turnout threshold . . . on the taking of primary action, striking at the very substance of Article 11; the findings of the [Regulatory Policy Committee] which call into question whether there is sufficient evidence to justify the amendments . . . and . . . the decision of the Government not to allow strike ballots to be held in ways which would generate broader participation than voting by post.

¹²⁶ M. Ford and T. Novitz, ‘An Absence of Fairness . . . Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 *Industrial Law Journal* 522, 529, citing research undertaken by Darlington and Dobson: R. Darlington and J. Dobson, *The Conservative Government’s Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Liverpool: Institute of Employment Rights, 2015) 24–8. For an interesting discussion on the decline in the incidence of strikes, or the ‘withering away of the strike’ as a tool of industrial conflict, see E. Tucker, ‘Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes’ in A. Bogg and T. Novitz (eds), *Voices at Work* (Oxford, OUP, 2014) 455.

The last factor shows clearly why, on a proportionality test, the same aims could be met in a less restrictive manner . . .¹²⁷

Moreover, empirical evidence from examining the impact of majority and quorum requirements on the success of industrial ballots in the UK and Australia leads to the conclusion that these procedural prescriptions impede access to lawful industrial action:

B. Creighton, C. Denvir, A. Johnstone, S. McCrystal, and A. Orchiston, ‘Pre-Strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action’ (2019) 48 *Industrial Law Journal* 343, 370

In the abstract, the imposition of compulsory pre-strike ballots on trade unions appears relatively benign and, as experience in the UK and Australia demonstrates, is politically difficult to challenge. However, in both countries, the simple idea that unions should ballot members before taking industrial action has resulted in complex, formalistic and highly technical legal regimes, and these regulatory choices have the effect of making strike action more and more difficult to take in practice . . . Through examining . . . the impact of quorums on ballot success, the role of ballot mode in respect of ballot success and the factors that impact choice of ballot mode, the article shows that the cumulative effect of the regulatory arrangements in practice has a negative impact upon what is ostensibly a democratic process. The combined effect of these provisions inhibits the capacity of workers to exercise their rights.

¹²⁷ For a comprehensive assessment of the 50% minimum turnout reform and its likely impact, see R. Dukes and N. Kountouris, ‘Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45 *Industrial Law Journal* 337, 345–55.

It should be stressed that ‘important public services’ are subject to a *separate* ballot threshold, namely the requirement that at least 40 per cent of those entitled to vote in the ballot have given their positive approval to the strike. Again, this was introduced by section 3 of the Trade Union Act 2016, inserting section 226(2A)–(2F) into TULRCA. Let’s now see how this 40 per cent threshold in section 226(2A)–(2F) of TULRCA operates in practice with the benefit of Hypothetical D:

Hypothetical D

The National Union of Fire Workers (NUFW) is in dispute with an employer over terms and conditions relating to the wages and salaries of its members employed by that employer. The NUFW ballots its membership proposing that industrial action be taken against the employer. 2,400 members of the NUFW who are employed by the employer are entitled to vote. The ballot resulted in a majority of 940 of those eligible members voting in favour of industrial action with an overall voter turnout of 1,700 members. Although in excess of 50 per cent of the members voted and the minimum turnout requirement was satisfied (1,700 divided by 2,400 members = 70.83%), the industrial action cannot take place with the benefit of the statutory immunity from suit under section 219 of TULRCA, since only 940 members voted in favour, which is fewer than the 40 per cent minimum threshold imposed by section 226(2A)–(2F) of TULRCA in the case of ‘important public services’ such as firefighting.

The meaning of the expression ‘important public services’ is set out in a series of statutory instruments,¹²⁸ and includes services falling within the following categories:

¹²⁸ See Important Public Services (Health) Regulations 2017 (SI 2017/132); Important Public Services (Fire) Regulations 2017 (SI 2017/134); Important Public Services (Transport) Regulations 2017 (SI

- Health services;
- Education of those aged under 17;
- Fire services;
- Transport services;
- Decommissioning of nuclear installations and management of radioactive waste and spent fuel; and
- Border security.

The breadth of the services included within this list has been subject to criticism for extending beyond areas that put the life, security, safety, or health of individuals at risk.

Equally subject to adverse comment is the 40 per cent threshold, particularly when taken together with the 50 per cent minimum turnout requirement:

M. Ford and T. Novitz, ‘An Absence of Fairness . . . Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 *Industrial Law Journal* 522, 532–3

The Government also proposed that when a majority of workers in the ballot constituency are subject to a 40% threshold, the entire ballot should be subjected to that threshold (as well as to the 50% turnout requirement). The Consultation Paper acknowledges that this exercise may be ‘administratively difficult’ for unions to undertake, but provides no compensating measures. A union’s records of job categories may not be up to date, and its records of its members’ jobs may not correspond exactly to the functions and roles (and ancillary functions) to be listed in the forthcoming regulations. If it holds separate workplace ballots in a strike, it will need to try and perform this calculation for each workplace; if the ballot is an

2017/135); Important Public Services (Education) Regulations 2017 (SI 2017/133); and Important Public Services (Border Security) Regulations 2017 (SI 2017/136).

aggregate one held under section 228A of TULRCA, the union must perform the calculation across many workplaces and for what may be hundreds of different categories. The real effect of this proposal (without cooperation from an employer and without e-balloting or secure workplace ballots) is to make it prohibitively difficult to call large-scale strikes across the public sector because it potentially extends the reach of the 40% threshold far beyond the ‘important public services’ used to justify its imposition. Unions may be forced to hold the ballot in accordance with the 40% threshold rule, knowing that if they do not do so it may be impracticable for them to demonstrate that more than half the workers in the relevant ballot constituency were not in what the government defines as ‘important public services’. That this problem may lead to injunction applications is envisaged by the Consultation, but is not regarded as a cause for concern.¹²⁹

The trade union must also notify the employer of the following not less than seven days before the ballot:¹³⁰

- its intention to hold a ballot;
- the date of the ballot;
- a sample of the voting paper;
- the categories of employee to which the employees belong and a list of their workplaces;¹³¹ and

¹²⁹ See also the discussion in R. Dukes and N. Kountouris, ‘Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45 *Industrial Law Journal* 337, 345–55.

¹³⁰ TULRCA, s. 226A(1)(a).

¹³¹ There is no requirement for the employer to provide the trade union with the exact job titles or descriptions of each of the employees since the word ‘categories’ is intended to be broad and

- the total number of employees involved and the number in each category.¹³²

It ought to be stressed that nothing in TULRCA obliges the union to furnish the employer with the names of the employees who are entitled to vote or who may participate in the industrial action.¹³³ The courts have, however, held that notices which are too broad or vague will not satisfy the employer notice requirement. For example, the union cannot refer to ‘all members of the union employed in all categories at all workplaces’.¹³⁴ Alternatively, if the employer makes union deductions direct from employee wages, information may be provided to the employer to enable the employer readily to deduce the relevant information as to the employees involved in the industrial action (i.e. categories of employee and number of employees involved in each category).¹³⁵

As for the sample of the voting paper to be provided in the notice to the employer, section 229 of TULRCA imposes various requirements concerning its content, as follows:

- state the name of the independent scrutineer;
- clearly specify the address to which, and the date by which, it is to be returned;
- be given one of a series of consecutive whole numbers every one of which is used in giving a different number in that series to each voting paper printed or otherwise produced for the purposes of the ballot;

flexible, e.g. listing the participating employees by rank will suffice: *BA plc v BALPA* [2019] EWCA Civ 1663, [2020] IRLR 43.

¹³² TULRCA, ss. 226(2)–(5).

¹³³ TULRCA, ss. 226(2G), but cf. *Blackpool and Fylde College v NATFHE* [1994] IRLR 227.

¹³⁴ *RMT v London Underground* [2001] IRLR 228.

¹³⁵ TULRCA, ss. 226A(2) and 226(2C).

- be marked with its number;
- include a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates;
- where the voting paper contains a question about taking part in industrial action short of a strike, the type or types of industrial action must be specified (either in the question itself or elsewhere on the voting paper).
- indicate the period or periods within which the industrial action or, as the case may be, each type of industrial action is expected to take place.¹³⁶
- specify either (i) a question (however framed) which requires the person answering it to say, by answering ‘Yes’ or ‘No’, whether he is prepared to take part or, as the case may be, to continue to take part in a strike, or (ii) a question (however framed) which requires the person answering it to say, by answering ‘Yes’ or ‘No’, whether he is prepared to take part or, as the case may be, to continue to take part in industrial action short of a strike.
- specify who, in the event of a vote in favour of industrial action, is authorized for the purposes of section 233 of TULRCA to call upon members to take part or continue to take part in the industrial action; and
- include the following statement (without being qualified or commented upon by anything else on the voting paper):

¹³⁶ However, the wording of section 229(2D) does not impose any requirement on a trade union to set out the specific dates on which the industrial action is to be taken: *Thomas Cook Airlines Ltd v British Airline Pilots Association* [2017] IRLR 1137.

‘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.¹³⁷

An independent scrutineer must be appointed to report on a number of matters pertaining to the lawfulness and quality of the ballot.¹³⁸ The scrutineer’s report must be made available upon request by anyone entitled to vote or by the employer.¹³⁹ Every person who is entitled to vote in the ballot must be allowed to do so without interference or constraint by the union and without cost to himself or herself.¹⁴⁰ The ballot itself must be conducted in secret and the persons entitled to vote must be given the opportunity to vote by post.¹⁴¹ Once the ballot has been conducted, all persons entitled to vote are to be told:

- the number of individuals who were entitled to vote in the ballot;
- the number of votes cast in the ballot;

¹³⁷ TULRCA, s. 229. See *ISS Mediclean Ltd v GMB* [2015] IRLR 96 where an employer’s challenge to the content of the ballot paper was dismissed by the High Court.

¹³⁸ TULRCA, s. 226B. However, note the exclusion from the independent scrutineer requirement in respect of ‘small ballots’ in TULRCA, s. 226C.

¹³⁹ TULRCA, s. 231B.

¹⁴⁰ TULRCA, s. 230(1). For a case where the union was held to have ‘interfered’ with the ballot, see *Royal Mail Group v CWU* [2019] EWCA Civ 2150.

¹⁴¹ TULRCA, s. 230(2) and (4).

- the number of individuals answering ‘Yes’ to the question, or as the case may be, to each question;
- the number of individuals answering ‘n
No’ to the question, or as the case may be, to each question;
- the number of spoiled or otherwise invalid voting papers returned;
- whether or not the number of votes cast in the ballot is at least 50 per cent of the number of individuals who were entitled to vote in the ballot; and
- where section 226(2B) applies, whether or not the number of individuals answering ‘Yes’ to the question (or each question) is at least 40 per cent of the number of individuals who were entitled to vote in the ballot.¹⁴²

This information must also be supplied to the employer as soon as is reasonably practicable.¹⁴³

The terms of section 234A of TULRCA also impose an obligation on the trade union to give the employer a period of notice of the industrial action. Section 234A(4) specifies that the period is two weeks’ notice. TULRCA also regulates the period of the mandate within which the industrial action must take place. The mandate to take industrial action comes to an end six months after the date of the ballot, subject to such longer duration not exceeding nine months as is agreed between the union and the members’ employer.¹⁴⁴ As noted by Ford and Novitz, this ‘enables the employer to stall, delay or prolong negotiations, knowing that if the [six]-month deadline passes the union will face the expense and inconvenience of a further

¹⁴² TULRCA, s. 231(g).

¹⁴³ TULRCA, s. 231B.

¹⁴⁴ TULRCA, s. 234(1).

ballot if it wishes to retain the ability to take industrial action, even though the same dispute continues'.¹⁴⁵ If the union proposes to proceed with industrial action based on the ballot after this six-month timeframe, it is likely that any application by the employer for an interim injunction will be granted by the court, as in the decision of the High Court in *Westminster Kingsway College v University and College Union*.¹⁴⁶

In response to criticisms that the balloting requirements were becoming too stringent, a 'small and accidental failures' defence was introduced to prevent trade unions having their statutory immunities removed for minor deviations from the balloting requirements.¹⁴⁷ The courts had initially construed the defence narrowly, requiring that the error be both unintentional and unavoidable before it would satisfy the 'small and accidental errors' defence.¹⁴⁸ However, in *National Union of Rail, Maritime & Transport Workers v Serco, ASLEF v London & Birmingham Railway Ltd ('RMT v Serco')*,¹⁴⁹ Lord Justice Elias was prepared to interpret the defence more purposively. He concluded that a requirement that errors be both unintentional and unavoidable could frustrate the entire purpose of the 'small and accidental' errors

¹⁴⁵ M. Ford and T. Novitz, 'An Absence of Fairness . . . Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44 *Industrial Law Journal* 522, 538.

¹⁴⁶ [2014] EWHC 4409 (QB).

¹⁴⁷ TULRCA, s. 232B.

¹⁴⁸ For example, see *Metrobus v UNITE* [2010] ICR 173 ('*Metrobus*'). For commentary, see R. Dukes, 'The Right to Strike under UK Law: Not Much More Than a Slogan?' (2010) 39 *Industrial Law Journal* 82.

¹⁴⁹ [2011] ICR 848. See R. Dukes, 'The Right to Strike under UK Law: Something More Than a Slogan?' (2011) 40 *Industrial Law Journal* 302.

defence contained in section 232B. He preferred to view the defence as accounting for human errors in the process of complying with the balloting requirements.¹⁵⁰

The decisions¹⁵¹ in *Metrobus* and *RMT v Serco* were reached in the heat of industrial action organized in response to the public sector cuts in 2008–2011. Employers sought interim injunctions and full injunctions against the trade unions in order to thwart union-planned industrial action on the grounds that the requirements in sections 226 and 234A of TULRCA had been breached. In response, the trade unions contended that they had satisfied the pre-strike balloting and notice requirements, but interestingly, they also sought to harness Article 11 of the ECHR in aid of their case. The unions argued that the balloting provisions represented a disproportionate interference with their Article 11 ECHR right to freedom of association. For example, in *Metrobus*, the Court of Appeal rejected the trade union's argument that the intricate pre-strike balloting and notice requirements represented a disproportionate interference with their Article 11 ECHR right to freedom of association. Holding that Article 11 had no application to the case on the grounds that the legislation had been carefully adapted over the years in order to strike a balance between the interests of employers, unions, and members of the public, the Court of Appeal took the step of doubting whether the decision of the ECtHR in *Enerji Yapi-Yol Sen*¹⁵² was good authority for the legal

¹⁵⁰ [2011] ICR 848, 862H–864G and 869E–871H.

¹⁵¹ This, and the following paragraph is largely reproduced from D. Cabrelli, 'Examining the Labour Law and Social Dimension of Human Rights: the UK and South Africa' in E. Reid and D. Visser, *Private Law and Human Rights* (Edinburgh, Edinburgh University Press, 2013) 403–5.

¹⁵² App. No. 68959/01, 21 April 2009 (ECtHR). It is likely that such a view could no longer be maintained subsequent to the ECtHR's comprehensive endorsement of the right to strike in *RMT v*

proposition that the Article 11 right to freedom of association incorporated the right to strike.¹⁵³ The Court of Appeal pointed to the fact that *Enerji Yapi-Yol Sen* contained a ‘less fully articulated judgment’ than that of the Grand Chamber in *Demir and Baykara v Turkey*.¹⁵⁴

In the subsequent case of *BA v UNITE*,¹⁵⁵ recognizing that he was bound by the decision of the Court of Appeal in *Metrobus*, Mr Justice Cox nonetheless stated that ‘[s]ooner or later, the extent to which the current statutory regime is in compliance with [the UK’s] international obligations . . . and with relevant international jurisprudence will fall to be carefully reconsidered’.¹⁵⁶ Mr Justice Cox’s words proved particularly prescient: in *RMT v Serco*, whilst holding that the question of the compatibility of the pre-strike balloting and notice requirements with Article 11 of the ECHR should not be revisited, as it had been settled by the Court of Appeal in *Metrobus*, Lord Justice Elias did recognize that the ECtHR had ‘in a number of cases confirmed that the right to strike is conferred as an element of the right to freedom of association conferred by Article 11(1) of the [ECHR] which in turn is given effect by the Human Rights Act [1998]’.¹⁵⁷ This is a particularly telling passage from Elias LJ’s judgment as it represents the first time that the Court of Appeal has come close to an acknowledgement that there has been something which is little short of a revolution

UK [2014] IRLR 467, 481. See also *Guler v Turkey* [2018] IRLR 880; *Association of Academics v Iceland* [2019] IRLR 185; and *Ognevenko v Russia* [2019] IRLR 195.

¹⁵³ *Metrobus* [2009] IRLR 851, 858 per Lloyd LJ.

¹⁵⁴ [2009] IRLR 766 (ECtHR).

¹⁵⁵ [2010] IRLR 423.

¹⁵⁶ [2010] IRLR 423, 426.

¹⁵⁷ [2011] ICR 848, 853E–F.

recently in the jurisprudence of the ECtHR when it comes to the rights of trade unions pursuant to Article 11. It may be the lynchpin upon which a subsequent decision of the Supreme Court explicitly recognizing the right to strike and collective bargaining in the UK may hang. In fact the issue was raised before the ECtHR in *RMT v UK*,¹⁵⁸ but, to the disappointment of commentators,¹⁵⁹ the ECtHR refused to resolve the matter on the basis that the facts of that case were not appropriate to enable it to do so.¹⁶⁰

D.2.6.1.2 Secondary action

Secondary action is excluded from the statutory immunity conferred upon trade unions by section 219 of TULRCA:

Section 224 Secondary action

(1) An act is not protected if one of the facts relied on for the purpose of establishing liability is that there has been secondary action which is not lawful picketing.¹⁶¹

(2) There is secondary action in relation to a trade dispute when, and only when, a person—

¹⁵⁸ [2014] IRLR 467.

¹⁵⁹ A. Bogg and K. Ewing, ‘The Implications of the *RMT* Case’ (2014) 43 *Industrial Law Journal* 221, 231–5. Bogg has described the decision in *RMT v UK* as ‘doctrinally odd, and may be explicable as a “political” rather than a “legal” decision, given the stated preference of some Government Ministers to withdraw from the ECHR’: see A. Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45 *Industrial Law Journal* 299, 328.

¹⁶⁰ [2014] IRLR 467, 475. See K. D. Ewing and J. Hendy QC, ‘The Trade Union Act 2016 and the Failure of Human Rights’ (2016) 45 *Industrial Law Journal* 391, 412–20 for extensive discussion of the legal effect of Article 11 of the ECHR in this context.

¹⁶¹ See later, at section D.2.6.1.3, for a definition of ‘lawful picketing’.

(a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or

(b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance, and the employer under the contract of employment is not the employer party to the dispute . . .

(4) For the purposes of this section an employer shall not be treated as party to a dispute between another employer and workers of that employer; and where more than one employer is in dispute with his workers, the dispute between each employer and his workers shall be treated as a separate dispute.

In this subsection ‘worker’ has the same meaning as in section 244 (meaning of ‘trade dispute’) . . .

(6) In this section ‘contract of employment’ includes any contract under which one person personally does work or performs services for another, and related expressions shall be construed accordingly.

The definition does not focus on the type of action which will constitute ‘secondary action’ but rather whether the employer is a ‘primary’ or ‘secondary’ employer. The employer that is the party to the trade dispute will naturally be regarded as the primary employer for the purpose of the action.¹⁶² Any employer that is not a party to the trade dispute will be regarded as a secondary employer. If a trade union induces employees of the secondary employer to breach their contracts of employment or threatens the secondary employer that the employees

¹⁶² TULRCA, s. 224(2).

will breach such contracts, then the trade union will be engaging in secondary action. The circumstances in which a trade union will be involved in secondary action are illustrated in Hypothetical E:

Hypothetical E

Before beginning the demolition of any building, Danny's Demolishers (DD) must obtain an asbestos certificate. This certificate confirms that an asbestos survey has been undertaken and any asbestos in the building has been removed. DD does not provide any asbestos services, but instead uses a sub-contractor who specializes in asbestos surveys and removal—Nick's Asbestos Services (NAS). NAS is smaller than DD, employing about 1,000 asbestos surveyors and removal operatives but, like DD, a large number of its staff (3/4) are members of the NUDW. The NUDW is in a trade dispute with DD. Seeking to put pressure on DD, the NUDW organizes a boycott of DD contracts. Although there is no trade dispute between NAS and its employees, the employees of NAS engage in a boycott—refusing to perform any works for DD—as an act of solidarity with the employees of DD. NAS, as a result of the boycott, is unable to provide DD with the asbestos services it needs. As a result, DD suffers economic loss since, without an asbestos certificate, it cannot engage in the demolition of any buildings.

In Hypothetical E, the NUDW has engaged in 'secondary action'. The trade dispute is between DD and the NUDW (representing DD's employees). DD is, therefore, the 'primary' employer. The NUDW induces the employees of NAS to breach their contracts of employment by engaging in a boycott of DD contracts. NAS is not an employer which is party to the trade dispute between DD and the NUDW. NAS is, therefore, the 'secondary' employer. In organizing a boycott by the employees of the 'secondary' employer, the NUDW

has engaged in secondary action. By virtue of section 224 of TULRCA, the NUDW's immunity from liability for organizing the boycott will be removed since the action was taken against an employer which was not a party to the trade dispute (i.e. a secondary employer).

It should be noted that primary action in relation to one dispute will not be treated as secondary action in relation to another dispute.¹⁶³ Consider again Hypothetical E, but in this instance suppose there is also a separate trade dispute between NAS and the NUDW.

Between the NUDW and NAS, NAS is a primary employer. If the NUDW's action against NAS means that asbestos surveys cannot be supplied to DD, its action against NAS (the primary employer) is primary action. In this case, DD has no cause of action against the NUDW based on unlawful secondary action: action that is primary action against NAS cannot be counted as secondary action against DD.

The restriction on secondary action has been justified on both economic and policy grounds. In economic terms, secondary action causes loss to employers who are not immediately party to the dispute. The secondary action creates a 'ripple effect' as the reverberations of the dispute between the primary employer and the trade union are felt by a broader class of third parties. Economically, it may be efficient for the law to limit any attempt by a trade union to cause loss to more employers than those who are party to the dispute (i.e. secondary employers).¹⁶⁴ The policy justification for limiting secondary action is closely linked to the economic argument. Secondary action creates a ripple effect which can negatively impact upon employers who have no connection to the trade dispute—i.e. they are 'innocent' or 'neutral'. The law, it is argued, should protect secondary employers against conduct that is

¹⁶³ TULRCA, s. 224(5).

¹⁶⁴ Department of Employment, *Removing Barriers to Employment* (Cm 655, 1989), para. 3.10.

economically damaging to their business that is attributable to disputes to which they are not a party and unable to resolve:¹⁶⁵

Trade Union Immunities (1980) (Cmnd 8128)

Secondary action . . . is usually taken either to make more effective an existing strike or simply to express support for employees who are in dispute with their employer. It can be undertaken spontaneously by employees on their own initiative, often attracting the term ‘sympathetic action,’ or, perhaps reluctantly, on instructions from the union. The issue in dispute might be held to involve a principle of general application to employees beyond the immediate disputants and, therefore, to be fought and defended by such employees; or a narrow domestic issue of little or no concern to employees of employers not in dispute . . . [secondary action] . . . has customarily been used by unions to put additional pressure on the employer in dispute to settle by sealing off his sources of supply and/or his outlet for sales. It has been particularly used where primary industrial action by the employees of the employer in dispute has proved ineffective. In recent years, however, there have been disturbing signs that, with the growing strength of trade union organisation, secondary action is being used, not for its traditional purpose of putting commercial pressure on the employer in dispute, but indiscriminately, in both official and unofficial disputes, to spread the consequences of the dispute to as many people as possible, to inflict damage on the economy and to put pressure on the community as a whole . . . The basic question to be considered is how far, if at all, the law should provide immunity for those organizing secondary action. On the one hand trade union solidarity and assistance to fellow workers has long been a feature of industrial

¹⁶⁵ Lord Wedderburn, ‘Secondary Action and Gateways to Legality: A Note’ (1981) 10 *Industrial Law Journal* 113.

disputes in Great Britain. On the other hand those who are not parties to a dispute (including other workers) are entitled to protection from reckless and indiscriminate interference with their business and livelihood. Sympathetic action has too often been used as the pretext for extending a strike or blacking to involve employees and employers who have no interest or connection with the original dispute. Its purpose can become simply to inflict maximum damage and the interests of those not involved in the dispute and the community as a whole can suffer severely . . .

In the recent decision in *RMT v UK*,¹⁶⁶ although the ECtHR recognized that Article 11 of the ECHR entailed a right to strike, and that secondary action was an integral component of that right, the UK's ban on secondary action was upheld. The ECtHR decided that the statutory prohibition on secondary action did not have the effect of striking at the very substance of the trade union's freedom of association in Article 11 of the ECHR. It also opined that Member States such as the UK must be afforded a margin of appreciation as to how a proper balance between the interests of labour and management ought to be struck and also how trade union freedom and the protection of the occupational interests of union members should be secured. However, these justifications for restricting secondary action are not without their critics. American scholars Summers and Wellington argue that neither the economic nor the policy justifications hold up to close scrutiny.¹⁶⁷ They point to the effect of a ban on secondary action, namely that it unjustifiably deprives a trade union of one element of its economic

¹⁶⁶ [2014] IRLR 467. For discussion, see A. Bogg and K. Ewing, 'The Implications of the *RMT Case*' (2014) 43 *Industrial Law Journal* 221.

¹⁶⁷ C. W. Summers and H. H. Wellington, *Cases and Materials on Labour Law* (New York, Foundation Press, 1968) 279–81.

strength that it ought to be legitimately permitted to apply, to exert pressure on an employer with whom it is engaged in a dispute. They reject the argument that secondary action should be abolished because it inflicts economic injury on third party neutrals on the ground that ordinary strike action in a labour dispute will also hurt such innocent people. Further, they are not convinced that such third parties will necessarily be completely innocent or neutral: ‘[a] clothing store may profit from the sweatshop wages of the suit manufacturer, the trucking company, which hauls finished goods from a struck plant has a hollow claim of neutrality, and a builder who sub-contracts to a non-union plumbing contractor wears a tattered cloak of innocence’.¹⁶⁸

Another criticism of the withdrawal of immunity for secondary action is that it applies even where the employer splits his business amongst several different companies. The courts have refused to pierce the corporate veil to take account of the financial realities of the employer’s business or create an exception for ‘associated employers’.¹⁶⁹ If a dispute between one company and its employees in a group directly affects workers in a second company in the same group, possibly operating from the same premises, the workers in the second company cannot take industrial action in solidarity with the workers from the first company. The scope of lawful industrial action by workers in the second subsidiary company may be defined by the way the employer structures the corporate entity in which they are employed. In addition, the vertical disintegration of ‘Fordist’ employers into atomized firms along the supply

¹⁶⁸ C. W. Summers and H. H. Wellington, *Cases and Materials on Labour Law* (New York, Foundation Press, 1968) 280.

¹⁶⁹ *Dimpleby and Sons Ltd v NUJ* [1984] IRLR 161.

chain¹⁷⁰ and the emergence of new flexible modes of production¹⁷¹ has generated circumstances whereby workers engaged at the same plant, office, or factory may in fact find that they are working for a whole host of distinct and varied employers.¹⁷²

D.2.6.1.3 Picketing

Section 224(1) of TULRCA provides that the prohibition on secondary action does not apply to ‘peaceful picketing’ that is ‘lawful’ (section 224(1) read with section 224(3)). The definition of ‘peaceful picketing’ is provided by section 220 of TULRCA:

Section 220 Peaceful picketing

- (1) It is lawful for a person in contemplation or furtherance of a trade dispute to attend—
 - (a) at or near his own place of work, or
 - (b) if he is an official of a trade union, at or near the place of work of a member of the union whom he is accompanying and whom he represents, for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working.

- (2) If a person works or normally works—
 - (a) otherwise than at any one place, or

¹⁷⁰ See **Chapters 1 and 4**, sections 1.2.1 and 4.1.1; and H. Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *Oxford Journal of Legal Studies* 353.

¹⁷¹ For example, outsourcing, franchising, joint ventures, teleworking, sub-contracting, ‘Uber-ization’, ‘gig economy’, etc.

¹⁷² For commentary on this phenomenon of ‘enterprise confinement’, see Lord Wedderburn, ‘Freedom of and Philosophies of Labour Law’ (1989) 18 *Industrial Law Journal* 1, 27–30.

- (b) at a place the location of which is such that attendance there for a purpose mentioned in subsection (1) is impracticable, his place of work for the purposes of that subsection shall be any premises of his employer from which he works or from which his work is administered.
- (3) In the case of a worker not in employment where—
- (a) his last employment was terminated in connection with a trade dispute, or
 - (b) the termination of his employment was one of the circumstances giving rise to a trade dispute,
- in relation to that dispute his former place of work shall be treated for the purposes of subsection (1) as being his place of work.

In order to benefit from the protection of sections 220 and 224 of TULRCA, the union must appoint a ‘picket supervisor’ in terms of section 220A, i.e. an identifiable person to supervise the picketing at the relevant location. A number of conditions are prescribed which must be satisfied. First, the picket supervisor must be contactable by the union and the police and able to attend at short notice. He/she must be an official or other member of the union who is familiar with the provisions of the Code of Practice on Picketing.¹⁷³ It is incumbent on the union or picket supervisor to take reasonable steps to inform the police of his/her name, the location of the picketing, and how to contact him/her. The picket supervisor must also bear a letter of authorization from the trade union and wear attire or some kind of armband that is sufficiently visible to enable him/her to be readily identified. In fact, it is a condition that the

¹⁷³ See ‘Code of Practice on Picketing’ (2017), available at

<https://www.gov.uk/government/publications/code-of-practice-picketing> (last visited 5 January 2020).

letter of authorization must be shown as soon as reasonably practicable to any person acting on behalf of the employer. If there is a failure to comply with any one of these seven conditions, Ford and Novitz spell out the implications in the following passage:

M. Ford and T. Novitz, ‘An Absence of Fairness . . . Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 *Industrial Law Journal* 522, 542–4
. . . it is not only the union which will lose the benefit of the protective shield of section 220; so will the *individual* pickets . . . [an alleged breach of one of the seven conditions is] likely to be a fresh source of forensic disputes in injunctions, will result in the loss of the shield against the employer, even if it suffers no prejudice as a result, and give rise to other, potentially very serious legal consequences . . . The tort of inducement of breach of contract can be committed by the ‘presence alone’ of pickets, even without active persuasion . . . The individual pickets will lose the protective shield of section 220 even though they had no power to appoint a supervisor. So long as the union is held to have ‘induced’ the acts of the pickets, the pickets’ industrial action will not be ‘protected industrial action’ for the purpose of unfair dismissal protection under section 238A,¹⁷⁴ because the union’s action will not be covered by the immunity in section 219.¹⁷⁵

¹⁷⁴ See later, at section D.3.2.3, for a discussion of ‘protected industrial action’.

¹⁷⁵ See also the discussion in R. Dukes and N. Kountouris, ‘Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45 *Industrial Law Journal* 337, 355–60, where the conclusion is drawn that it ‘may be practically very difficult to comply with’ the reforms to picketing law introduced by the Trade Union Act 2016 and that ‘finding it increasingly difficult to picket lawfully, unions may make greater use of precisely the types of leverage which the Government claimed in its Consultation to wish to put a stop to’, on which, see L. McCluskey, ‘Can Unions Stay Within the Law Any Longer?’ [2015] 44 *Industrial Law Journal* 439.

It should be stressed that the satisfaction of the terms of section 220 do not operate to make picketing lawful. Picketing is unlawful *unless* it falls within the scope of the statutory definition of peaceful picketing, and peaceful picketing will be lawful if it falls within the terms of section 224(3) of TULRCA. Lawful and peaceful picketing is, therefore, an exception to the general prohibition on secondary action.¹⁷⁶ The definition of ‘peaceful picketing’ furnished by section 220 concerns itself with: (1) the location of the picket,¹⁷⁷ and (2) the purpose of the picket.¹⁷⁸ These two elements will be considered in turn.

Location

Picketing must take place at or near the picketer’s place of work.¹⁷⁹ Picketers will usually congregate around the entrance to and exits from the employer’s premises, since the people who they are seeking to influence are inevitably the strike breakers and the employer’s customers and suppliers who will use those entrances and exits. The statute obviously does not specify the distance away from the entrance at which a person may be and yet remain ‘at or near his own place of work’. This will be a question which will be decided on the facts of each case.¹⁸⁰ The court will take into account the reason for the choice of location of the

¹⁷⁶ See TULRCA, s. 224.

¹⁷⁷ TULRCA, s. 220(1)(a).

¹⁷⁸ TULRCA, s. 220(1).

¹⁷⁹ TULRCA, s. 220(1)(a).

¹⁸⁰ *News Group Newspapers Ltd v SOGAT* 82 [1987] ICR 181. The courts may also grant an ‘exclusion zone’ injunction to prevent the trade union and its general secretary from causing unlawful protest or demonstration: *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] IRLR 695.

picket rather than being tied to any strict notions of geographical proximity to the picketers' place of work.¹⁸¹

Purpose

The purpose of the picket must be to peacefully obtain or communicate information or peacefully persuade someone to work/abstain from working.¹⁸² This aspect of section 220 allows pickets to set up placards and banners and to chant or call out to some extent. It allows picketers to approach strike breakers and to seek to persuade them to join the strike.¹⁸³ It does not, however, entitle pickets to force anyone to stop and listen to their views.¹⁸⁴ Nor does statutory protection extend to shouting abuse or threats or the use of violence. For example, the court has declared picketing by miners to be unlawful which typically necessitated a large police presence and caused strike-breakers to have to be brought to work in specially constructed buses with windows capable of protecting them from missile attacks.¹⁸⁵ Courts have also held that the sheer weight of numbers of picketers may be inconsistent with the

¹⁸¹ *Gate Gourmet London Ltd v TGWU* [2005] IRLR 881.

¹⁸² TULRCA, s. 220(1).

¹⁸³ *Broome v DPP* [1974] AC 587, 597 per Lord Reid: 'I see no ground for implying any right to require the person whom it is sought to persuade to submit to any kind of constraint or restriction of his personal freedom . . . If the driver stops, the picket can talk to him, but only for so long as the driver is willing to listen.'

¹⁸⁴ *Broome v DPP* [1974] AC 587, 599 per Lord Reid.

¹⁸⁵ *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20; *Thomas v Newsgroup Newspapers* [2001] EWCA Civ 1233; and *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397.

notion of peaceful picketing.¹⁸⁶ This is not explicitly stated in section 220 but can be implied from the requirement that the picketing must be ‘peaceful’.¹⁸⁷

A Code of Practice on Picketing has been produced by the UK Department for Business, Energy and Industrial Strategy¹⁸⁸ to guide the parties involved in an industrial dispute. It is not legally binding, but there is evidence that the courts will have regard to its contents in shaping the law. For example, the judiciary have drafted orders in relation to picketing with reference to the requirement that picket lines contain no more than six people.¹⁸⁹ This limitation on the number of pickets gives rise to ECHR considerations. Article 11 of the ECHR confers on individuals the right to freedom of peaceful assembly. It is arguable that a court order which restrains a picket of more than six people is in breach of Article 10 or 11. This issue was considered *obiter* in *Gate Gourmet v TGWU*,¹⁹⁰ although it should be noted that the court found the actions of the picketers to be unlawful on the facts of the case.¹⁹¹

¹⁸⁶ B. Bercusson, ‘Picketing, Secondary Picketing and Secondary Action’ (1980) 9 *Industrial Law Journal* 215.

¹⁸⁷ See ‘Code of Practice on Picketing’ (2017), available at <https://www.gov.uk/government/publications/code-of-practice-picketing> at paras 2, 9, 12, 13, 19, 30–32, 35, and 47 (last visited 5 January 2020).

¹⁸⁸ See ‘Code of Practice on Picketing’ (2017).

¹⁸⁹ *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20, 70G–H per Scott J and *News Group Newspapers Ltd v SOGAT* 82 [1987] ICR 181, 231 per Stuart-Smith J.

¹⁹⁰ [2005] IRLR 881.

¹⁹¹ *Gate Gourmet London Ltd v TGWU* [2005] IRLR 881.

***Gate Gourmet London Ltd v Transport and General Workers' Union* [2005] EWHC 1889 at para. 26**

Fulford J:

One issue raised for determination is whether, on the evidence as it currently stands, the unlawful activity is sufficiently linked to the numbers present at sites A or B so as to justify the grant of an injunction at this interlocutory stage as regards the size of the picket at either location. This is an area where both common law and Convention rights are clearly in play: the right to peaceful assembly has a long and important history in our democratic system of government and a court will be slow to deny those who seek it the opportunity, within the law, to express their opposition to some event that concerns their lives. A consequence of limiting the number entitled to attend at either site A or B to 10 (or some other small number), as suggested by the claimant, is that many who have not in any way breached the law will be denied an opportunity to express their point of view and concerns in this public way.¹⁹²

This being said, unlike the concept of 'secondary action', there is scant jurisprudence on the impact of Article 11 of the ECHR on the UK statutory picketing regime. It is hard to say with any certainty whether the ECtHR would view limitations on the legally permissible number of picketers as a breach of the Article 11 rights of picketing workers. One may equally argue

¹⁹² Sourced from BAILI at [http://www.bailii.org/cgi-](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2005/1889.html&query=gate+and+gourmet+and+london&method=boolean)

[bin/markup.cgi?doc=/ew/cases/EWHC/QB/2005/1889.html&query=gate+and+gourmet+and+london&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2005/1889.html&query=gate+and+gourmet+and+london&method=boolean) (last visited 5 January 2020).

that interference with the exercise of the picketers' Article 11 right is justified in order to prevent crime and protect the rights of others (e.g. the strike-breakers).¹⁹³

Picketers may commit any of the economic torts discussed earlier. In practice, it is common for picketers to be liable for inducing a breach of contract, i.e. persuading strike-breakers to breach their contracts of employment by joining the picket line. Prior to the decision of the House of Lords in *OBG v Allan*,¹⁹⁴ picketers were commonly liable for the 'indirect' form of inducing a breach of contract by preventing the performance of commercial contracts between an employer and customers or suppliers.¹⁹⁵ However, in *OBG*, the House of Lords held that this form of action is now more appropriately categorized as an example of the tort of 'causing loss by unlawful means'.¹⁹⁶

In addition to liability arising from the economic torts, picketing gives rise to a range of other forms of civil and criminal liability. Importantly, the point should be made that picketers are *not* granted statutory immunity from the following civil and criminal liabilities:

Civil liability

¹⁹³ ECHR, Article 11(2). For example, see the discussion in *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] IRLR 695, 699–702. For Ford and Novitz's thoughts on this issue, see M. Ford and T. Novitz, 'An Absence of Fairness . . . Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44 *Industrial Law Journal* 522, 541.

¹⁹⁴ [2008] 1 AC 1.

¹⁹⁵ *Union Traffic Ltd v TGWU* [1989] ICR 98.

¹⁹⁶ See section D.2.3.2 earlier.

- a. *Trespass*: It was once thought that trespass to the highway was committed by using the highway for purposes not reasonably incidental to passage.¹⁹⁷ As such, if a picket line was located on a road used as an entrance by the strike-breakers/suppliers to the employer's premises, then this would constitute trespass.¹⁹⁸ The scope of trespass was, however, redefined by the House of Lords in *DPP v Jones*.¹⁹⁹ Their Lordships held that reasonable use of the highway could potentially extend to peaceful and non-obstructive assembly.²⁰⁰ In this way, there is perhaps less scope for picketers to be liable for trespass to the highway, although liability will depend on the conduct of the picketers in question and the facts of the particular case.
- b. *Public/Private Nuisance*: Public nuisance is the unlawful interference with the 'enjoyment of a right common to all Her Majesty's subjects' e.g. the public right of free passage along the highway.²⁰¹ Pickets may also be liable for the tort of private nuisance, which is committed where a person unlawfully interferes with another's use or enjoyment of land.²⁰² Such nuisance is likely to occur in relation to the entrances and exits of an employer's premises.²⁰³

¹⁹⁷ *Harrison v Duke of Rutland* [1893] 1 QB 142; *Hickman v Maisey* [1900] 1 QB 752; and *Hubbard v Pitt* [1975] ICR 77.

¹⁹⁸ *News Group Newspapers Ltd v SOGAT* 82 [1987] ICR 181.

¹⁹⁹ <IBT>[1999] 2 AC 240</IBT>.

²⁰⁰ *ibid.*, 254 per Lord Irvine LC.

²⁰¹ *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169, 184 per Romer LJ.

²⁰² *Marshall v Blackpool Corp.* [1935] AC 16.

²⁰³ One issue has been whether picketing will constitute a nuisance. Lord Denning's dissenting judgment in *Hubbard v Pitt* [1975] ICR 308, 318 is often relied upon as authority for the

- c. *Harassment*: There is no common law of harassment: the crime and civil tort of harassment is found in statute.²⁰⁴ Section 1 of the Protection from Harassment Act 1997 makes it a tort for a person to pursue a *course of conduct* which amounts to harassment and which the person knows or ought to know amounts to harassment. Harassment is defined as conduct which: (i) occurs on at least two occasions; (ii) which is targeted at the claimant; (iii) which is calculated in an objective sense to cause alarm or distress; and (iv) which is objectively judged to be oppressive and unreasonable.²⁰⁵ For alleged harassment to give rise to criminal consequences, it must ‘cross the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable . . . [and t]o cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability’.²⁰⁶ A claimant must be an individual and not a corporate entity,²⁰⁷ and as such, an individual employee of DD may claim harassment but not DD. DD will also be vicariously liable for the conduct of its employees who

proposition that picketing requires an added element of illegality in order to give rise to liability in private nuisance: ‘Picketing is not a nuisance in itself. Nor is it a nuisance for a group of people to attend at or near the . . . [claimant’s] . . . premises in order to obtain or to communicate information or in order to peacefully persuade. It does not become a nuisance unless it is associated with obstruction, violence, intimidation, molestation or threats.’

²⁰⁴ Protection from Harassment Act 1997.

²⁰⁵ See *Hammond v International Network Services UK Ltd* [2007] EWHC 2604 (QB) at para. 30 per Coulson J.

²⁰⁶ *Majrowski v Guy’s and St Thomas’ NHS Trust* [2006] ICR 1199, 1207 per Lord Nicholls.

²⁰⁷ Protection from Harassment Act 1997, s. 1(3)(c).

commit the statutory civil tort of harassment in the course of their employment.²⁰⁸ The defendant to a statutory harassment claim can also raise the defence that ‘in the particular circumstances the pursuit of the course of conduct was reasonable’.²⁰⁹ This defence may be viewed as protecting the defendant’s right to freedom of speech and freedom of expression. One may argue that pickets could rely on this defence in exercising their Article 11 ECHR rights, but there is little evidence that such an argument would succeed.²¹⁰

Criminal liability

An offence is committed under section 241 of TULRCA where a person engages in ‘intimidation or annoyance by violence’:

Section 241 Intimidation or annoyance by violence or otherwise

(1) A person commits an offence who, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, wrongfully and without legal authority—

- (a) uses violence to or intimidates that person or his spouse or civil partner or children, or injures his property,
- (b) persistently follows that person about from place to place,

²⁰⁸ *Majrowski v Guy’s and St Thomas’ NHS Trust* [2006] ICR 1199.

²⁰⁹ Protection from Harassment Act 1997, s. 1(3)(c).

²¹⁰ However, it has been held that pursuit of a course of conduct amounting to harassment in breach of an injunction would be unlikely to satisfy the ‘reasonableness’ defence to an allegation of harassment: *R v DPP, ex parte Mosley* (QBD, 9 June 1999, unreported).

- (c) hides any tools, clothes or other property owned or used by that person, or deprives him of or hinders him in the use thereof,
- (d) watches or besets the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place, or
- (e) follows that person with two or more other persons in a disorderly manner in or through any street or road.

These criminal offences are of considerable antiquity. They were first enacted in section 7 of the 1875 Act. The term ‘wrongfully and without legal authority’ requires an activity to give rise to tortious liability before it can give rise to liability under section 241 of TULRCA. In this way, the section serves to impose criminal liability upon conduct which is already actionable as a civil wrong.²¹¹ As such, ‘watching and besetting’ the place of work where picketers are stationed falls within the scope of peaceful picketing under section 220, and will not give rise to liability under section 241 owing to the fact that the picketing is not ‘without legal authority’. The Government had intended to overhaul the laws on industrial protest and intimidation in response to the alleged conduct of strikers in the Grangemouth oil refinery dispute in the autumn of 2013.²¹² The Government commissioned Bruce Carr QC to undertake a review of the law in light of the evidence, and the findings of the Carr Report

²¹¹ *Ward Lock & Co. Ltd v Operative Printers Assistants’ Society* (1906) 22 TLR 327, 329 per Moulton LJ.

²¹² See ‘PM eyes laws against industrial intimidation after Grangemouth’ (*The Independent*, 6 November 2013), available at <http://www.independent.co.uk/news/uk/politics/pm-eyes-law-against-industrial-intimidation-after-grangemouth-8925297.html> (last visited 5 January 2020).

were published in October 2014.²¹³ However, having reached the view that there was an insufficient body of evidence to warrant law reform, the Carr report recommended no change. Nonetheless, the Government pressed on with vague reforms to curtail protest and intimidation in the context of trade disputes in the Trade Union Bill, which were subsequently dropped before the passing of the Trade Union Act 2016.

Another criminal offence that picketers may find themselves committing is ‘obstruction of the highway’. It finds its expression in section 137 of the Highways Act 1980, which provides that ‘if a person without lawful authority or excuse in any way wilfully obstructs the free passage along the highway he is guilty of an offence and liable to a fine’. The decision in *Broome v DPP*²¹⁴ provides an example of such criminal conduct. Here, picketers who stood in front of a lorry preventing it from proceeding along the motorway or entering the employer’s premises were found to have committed the offence of obstructing the highway.²¹⁵

Thirdly, if a picketer ‘obstructs a police constable in the execution of his duty’, this is a criminal offence. Police constables are under a duty to prevent the occurrence of a breach of the peace and it is a criminal offence for a person to obstruct the police in the execution of this duty.²¹⁶ This offence is frequently committed by picketers who attempt to push past

²¹³ *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes* (15 October 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363806/Carr_Review_Report.pdf (last visited 5 January 2020).

²¹⁴ [1974] AC 587.

²¹⁵ *Broome v DPP* [1974] AC 587.

²¹⁶ Police Act 1996, s. 89(2).

police officers who are trying to restrain them from approaching a particular person or location.²¹⁷

Finally, picketers may be rendered criminally liable under various public order offences under the Public Order Act 1986. The primary offences relevant to picketing are: rioting,²¹⁸ violent disorder,²¹⁹ affray,²²⁰ fear or provocation of violence,²²¹ harassment, alarm or distress,²²² and failure to comply with public procession requirements.²²³

If we subject the law on picketing to an evaluation, this leads us to question the degree to which individuals engaged in coercive activities or compulsion ought to be protected by the law. Commentators of a neoliberal hue would argue that picketing should be proscribed given the means adopted by the picketers, irrespective of the justifiability of the ends employed. Why then should picketers be treated any differently to afford them the right to engage in such conduct?

B. Bercusson, ‘One Hundred Years of Conspiracy and Protection of Property: Time for a Change’ (1977) 40 *Modern Law Review* 268, 271–2

The activity of picketing may embrace a wide range of activities. The pickets may limit themselves to merely observing scabs; they may attempt to communicate information to them

²¹⁷ *Kavanagh v Hiscock* [1974] QB 600 and *Moss v McLachlan* [1985] IRLR 77.

²¹⁸ Public Order Act 1986, s. 1.

²¹⁹ Public Order Act 1986, s. 2(1).

²²⁰ Public Order Act 1986, s. 3(1).

²²¹ Public Order Act 1986, s. 4(1).

²²² Public Order Act 1986, s. 5(1).

²²³ Public Order Act 1986, ss. 11–14C.

as to the existence of a strike; they may go beyond this and attempt to persuade them not to aid the employer by working for him (or in the case of customers, doing business with him)—using placards, speaking, shouting and persisting despite refusals to attend. They may go beyond persuasion to where their behaviour amounts to a threat—through their mere presence, by their physical violence, social ostracism or economic boycott; or they may engage in actual assaults, destruction of property or the physical blocking of entrances and interference with traffic. Picketing activity may range from one extreme to the other on this spectrum.

These activities, if abstracted in isolation from the context in which they are undertaken, appear meaningless or senseless. It is only when placed in relation to the purposes that they are intended to achieve that they can be understood as rational human behaviour . . . The purposes which render picketing a form of rational behaviour are first, to communicate information about the strike to the unaware; secondly to persuade non-strikers to join the strike; and thirdly, to prevent, by moral pressure or physical obstruction, scabs from operating the plant.

. . . The courts were aware of the purposes of picketing but have declined to accord them any recognition in law. In considering the activity of pickets, no recognition was to be granted to the purposes sought to be achieved. They could certainly never cloak actions with legality by virtue of their legitimacy . . . any attempt ‘to compel people’ in pursuance of these purposes was unlawful. On the question of what was or was not compulsion, the court withdrew from any consideration of the purposes of the compulsion. No consideration was given to whether compulsion in picketing was the same as compulsion in other circumstances. No attempt was made to distinguish picketing activity from any other form of activity by virtue of its context .

. . The actions of pickets were to be assessed by the same criteria as the actions of strollers in

the park. Picketing . . . was not distinguishable from any other form of activity: the criteria for assessing its legality were no different at common law.²²⁴

Reflection point

1. This passage argues that the abstraction of the ends of the picket from the means employed is unwarranted. Do you agree? Give reasons for your answer.

D.2.6.2 Liabilities not covered by statutory immunity

We now address how the statutory immunity regime maps on to the various economic torts recognized by the common law. In particular, we will discover that the statutory immunities are under-inclusive. The variety of economic torts where there are gaps in protection are now considered.

D.2.6.2.1 Contractual liability

One potential source for concern for a trade union organizing industrial action is the importation of the contractual doctrine of economic duress into the law of industrial action. The doctrine of economic duress stipulates that if a party to a contract is obliged to enter into or agree to certain terms because of illegitimate coercion by the other party, it may claim that the contract is voidable for duress and claim repayment of anything paid under the contract.²²⁵ This argument was made in *Universe Tankships Inc. of Monrovia v ITWF*²²⁶ by

²²⁴ See V. Craig, 'Picketing and the Law' (1975) SLT (News) 137.

²²⁵ *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd* [1979] QB 705; *Pao On v Lau Yiu Long* [1980] AC 61; *Syros Shipping Co. SA v Elaghill Trading Co.* [1981] 3 All ER 189; *B&S*

an employer seeking to recover payments made into an employee welfare fund whilst his business was ‘blacked’ by employees of his business partners. The House of Lords allowed the employer to recover the payments by a 3:2 majority. Since TULRCA only provides immunity from *tortious* liability, the immunities are bypassed since the employer’s claim for restitution of payments made rests in *contract*.²²⁷ The fact that contractual liability is outside the scope of the statutory immunity does, therefore, appear to be of particular practical significance.

D.2.6.2.2 Statutory liability

Contracts and Design Ltd v Victor Green Publications Ltd [1984] ICR 419; and *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] All ER 714.

²²⁶ [1982] 2 All ER 67, noted (1982) 45 *Modern Law Review* 556.

²²⁷ However, in *Universe Tankships*, the House of Lords’ imposition of liability on the trade union for exerting economic duress on the employer was interpreted in line with the then equivalent causes of action in tort. Their Lordships acknowledged that it would be unsatisfactory if the payment was voidable for economic duress but, had the action been pleaded in tort, the trade union’s action would have fallen within the scope of the statutory immunities. This would have frustrated the purpose and intention of the immunity provisions: [1982] 2 All ER 67, 77 per Lord Diplock. Sterling argues that their Lordships would not have concluded economic duress was present if the trade union’s actions qualified for immunity under statute: see M. Sterling, ‘Actions for Duress, Seafarers and Industrial Disputes’ (1982) 11 *Industrial Law Journal* 156. This is consistent with the majority’s conclusion that, if the case was considered under TULRCA, the trade union would not have qualified for immunity. *Universe Tankships* also concerned a one-off payment by an employer to an employee welfare fund, which is uncommon in practice.

The tort of inducing a breach of contract has been developed to apply to circumstances where parties are induced into violating other legal rights. Of particular interest in the context of trade union liability is the development of the tort of inducing a breach of statutory duty. The basis for the tort of inducing a breach of statutory duty was established by the Court of Appeal in *Meade v London Borough of Haringey*.²²⁸ The case concerned a trade union's liability to a local authority which closed schools following a strike by school caretakers and support staff. The closure of the schools was a breach of the local authority's statutory duty under the Education Act 1944. Both Lord Denning MR and Lord Justice Everleigh remarked obiter that it was tortious for the trade union to induce the local authority to breach its statutory duty and, more importantly, that such tortious action would not be covered by the statutory immunities.²²⁹ The existence of this tort was confirmed by the Court of Appeal in *Associated British Ports v TGWU*,²³⁰ but subject to the important caveat that the statutory duty breached must be independently actionable. The effect of this condition is that the claimant must demonstrate that the statute was passed to confer the benefit of rights on a class which includes him and is actionable by him. As such, although narrowed by the decision in *Associated British Ports v TGWU*, the tort could, however, remain practically significant when workers striking are in the public sector and therefore more likely to be the subject of statutory duties.²³¹

²²⁸ [1979] ICR 494.

²²⁹ *ibid.*, 499 and 506 per Lord Denning MR and Everleigh LJ.

²³⁰ [1989] 3 All ER 796, reversed by the House of Lords on other grounds at [1989] IRLR 399.

²³¹ P. Davies and M. Freedland, *Labour Law Texts and Materials*, 2nd edition (London, Wiedenfeld and Nicolson, 1984) 755. See too *Barretts & Baird (Wholesale) Ltd v IPCS* [1987] IRLR 3.

On this note, the following public sector workers are subject to statutory restrictions on their freedom to strike:²³²

- the Armed Forces;²³³
- merchant seamen;²³⁴
- the Police;²³⁵
- postal workers;²³⁶ and
- prison officers.²³⁷

In 2014, the Conservative Party had proposed to make it their policy to restrain the ability of London Underground workers to engage in industrial action.²³⁸ As such, tube employees would have been added to the aforementioned list. However, this policy has not been implemented and instead, it may be in the future that London Underground workers are included within the regulations promulgated by the Secretary of State under the power

²³² See generally G. Morris, *Strikes in Essential Services* (London, Mansell, 1986).

²³³ Armed Forces Act 2006, s. 15.

²³⁴ Merchant Shipping Act 1995, s. 58 read with TULRCA, s. 240(4).

²³⁵ Police Act 1996, s. 91.

²³⁶ Postal Services Act 2000, s. 83.

²³⁷ Criminal Justice and Public Order Act 1994, s. 127.

²³⁸ See ‘Tory government would ban “wildcat strikes” on tube, says Boris Johnson’ (*The Guardian*, 30 April 2014), available at <http://www.theguardian.com/politics/2014/apr/30/tory-government-ban-wildcat-strikes-underground-boris-johnson> (last visited 5 January 2020).

conferred in terms of section 226(2C) regarding the 40 per cent voting turnout approval threshold pursuant to a ballot.²³⁹

Section 240 of TULRCA also contains ‘endangering life’ provisions. This makes it an offence for a person to wilfully and maliciously breach a contract of employment where they know or have reasonable cause to believe that the probable consequence of the breach would be endangering human life or exposing valuable property to destruction or serious injury.

Section 240 extends to persons employed as doctors, firemen, nurses, etc. There have, however, been no recorded instances of prosecution under section 240.²⁴⁰ Statutory emergency provisions may be applied to render strike action unlawful where a state of emergency is declared under section 1(1) of the Emergency Powers Act 1920. A state of emergency exists where events threaten, ‘by interfering with the supply and distribution of food, water, fuel or light or with the means of locomotion, to deprive the community or any substantial proportion of the community, of the essentials of life’.

D.2.7 Labour injunctions

An employer has the option of going to court to prevent a trade union engaging in industrial action where it is alleged that the union has failed to adhere to the statutory requirements for the statutory immunity conferred under section 219 of TULRCA. For example, it may seek a labour injunction to restrain industrial action if it contends that the action is not being taken in

²³⁹ For example, by amending the Important Public Services (Transport) Regulations 2017 (SI 2017/135) to include the London Underground: see section D.2.6.1.1.

²⁴⁰ J. Bowers et al., *The Law of Industrial Action and Trade Union Recognition*, 3rd edition (Oxford, OUP, 2019) 136.

‘contemplation or furtherance of a trade dispute’ or there has been a failure to comply with the pre-strike balloting and notice requirements laid down in sections 226–234A of TULRCA. Where the employer is seeking an interlocutory/interim injunction,²⁴¹ the relevant test is that stipulated by Lord Justice Elias in *RMT v Serco*,²⁴² to the effect that only ‘in a very exceptional case should an injunction be granted in the face of the likelihood of a trade dispute defence succeeding’.²⁴³

***RMT v Serco* [2011] ICR 848, 854E–855D**

By permission of Incorporated Council of Law Reporting: extracts from the Law Reports Appeal Cases (AC) and the Industrial Cases Reports (ICR).

Elias LJ:

This appeal is directed at the granting of an interim injunction. Normally such an injunction is intended merely to hold the ring pending trial, and the test for determining whether it should be granted or not is the balance of convenience, provided at least that the claimant can show an arguable case. This is the well-known *Cyanamid* case: *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. It has long been recognized that, in the context of proposed industrial action, it is unjust to trade unions to determine the question in that way. The balance of

²⁴¹ An attempt to obtain an interlocutory injunction to prevent a strike based on Article 49 of the Treaty on the Functioning of the European Union was refused in *Govia GTR Ltd v ASLEF* [2017] IRLR 246.

²⁴² [2011] ICR 848.

²⁴³ B. Simpson, ‘The Labour Injunction and Industrial Action Ballots’ (2013) 42 *Industrial Law Journal* 54, 56.

convenience in strike cases almost always lies in favour of granting the injunction pending trial, given in particular the difficulty of assessing the employer's loss, the fact that in any event there is a limit to the damages recoverable from the union, and the harm to the general public which most strikes cause. However, in practice because the trial will take place months after the proposed industrial action is to take place, the momentum for the strike will in most cases have been lost. The result is that the determination of the interlocutory issue is in practice likely to determine the entire action. So the courts have recognized that in disputes of this nature it is incumbent on them to have regard to the underlying merits of the claim, and in practice that involves considering whether the union would be likely to be able to establish at trial that the immunities are applicable: see *NWL Ltd v Woods* [1979] ICR 867. Section 221 of [TULRCA] now encapsulates this principle. It provides that, where a defendant claims that he was acting in contemplation of furtherance of a trade dispute, the court must have regard to the likelihood of his establishing that defence at trial. So if the appeals succeed, the injunctions ought to be discharged. It does not follow that as a matter of law the interim injunction has to be refused if the court finds that it is more likely than not that the union will succeed at trial in showing that the immunities will apply. However, it will have to be a very exceptional case indeed for that not to be the consequence: see the *NWL* case and *Dimbleby & Sons Ltd v National Union of Journalists* [1984] ICR 386. It is not suggested that either of these cases falls into that exceptional category. The role of this court on an appeal from the grant or refusal of an interim injunction is described by Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1982] ICR 114, 117. That case was concerned with the question whether in its discretion the court ought to have granted an injunction. Dillon J held that even if, contrary to his view, the union was not likely to establish a trade dispute defence, none the less there was no purpose in granting the injunction on the particular facts of that case. The Court of

Appeal took a different view [1981] ICR 690. Lord Diplock said that it was not for the Court of Appeal simply to substitute its view for that of the first instance judge. The function is one of review, and in the absence of further material evidence invalidating the exercise of discretion by the first instance judge, the Court of Appeal should only interfere where the judge had misdirected himself or reached a conclusion which is unsustainable on the evidence before him. [Counsel for the employer] submits, and I accept, that this means that we should not interfere with the decision of the judge below unless we are satisfied that the judge's assessment of the likelihood of the trade dispute defence succeeding was plainly wrong.

This guidance was followed in *London Underground Ltd v ASLEF*²⁴⁴ and *Balfour Beatty Engineering Services Ltd v Unite*.²⁴⁵

Reflection points

1. In your opinion, to what extent should the statutory immunities from liability mirror the common law economic torts? Give reasons for your answer.
2. Do you agree with the decision of the ECtHR in *RMT v UK* [2014] IRLR 467? If so, why? If not, why not?

Additional reading on trade union liability and statutory immunities

²⁴⁴ [2012] IRLR 196.

²⁴⁵ [2012] ICR 822. For extensive discussion, see R. Dukes and N. Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) 45 *Industrial Law Journal* 337, 341–5 and N. Countouris and M. Freedland, 'Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK' (2010) 1 *European Labour Law Journal* 489.

1. P. Elias and K. Ewing, 'Economic Torts and Labour Law: Old Principles and New Liabilities' (1982) 41 *Cambridge Law Journal* 321.
2. B. Simpson, 'Strike Ballots and the Law: Round Six' (2005) 34 *Industrial Law Journal* 331.
3. B. Simpson, 'Economic Tort Liability in Labour Disputes: The Potential Impact of the House of Lords' Decision in *OBG Ltd v Allan*' (2007) 36 *Industrial Law Journal* 468.
4. K. Ewing and J. Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 1.
5. H. Carty, 'The Economic Torts in the 21st Century' (2008) 124 *Law Quarterly Review* 641.
6. S. Deakin and J. Randall, 'Rethinking the Economic Torts' (2009) 72 *Modern Law Review* 514.
7. R. Dukes, 'The Right to Strike under UK Law: Not Much More Than a Slogan?' (2010) 39 *Industrial Law Journal* 82.
8. H. Carty, *An Analysis of the Economic Torts*, 2nd edition (Oxford, OUP, 2010) 3.
9. J. Prassl, 'To Strike, To Serve? Industrial Action at British Airways: *British Airways plc v Unite the Union (Nos. 1 and 2)*' (2011) 40 *Industrial Law Journal* 82.
10. R. Dukes, 'The Right to Strike under UK Law: Something More Than a Slogan?' (2011) 40 *Industrial Law Journal* 302.
11. B. Simpson, 'The Labour Injunction and Industrial Action Ballots' (2013) 42 *Industrial Law Journal* 54.
12. A. Bogg and K. Ewing, 'The Implications of the *RMT Case*' (2014) 43 *Industrial Law Journal* 221.

13. M. Ford and T. Novitz, 'Legislating for Control: The Trade Union Act 2016' (2016) *45 Industrial Law Journal* 277.
14. A. Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) *45 Industrial Law Journal* 299.
15. R. Dukes and N. Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) *45 Industrial Law Journal* 337.
16. K. D. Ewing and J. Hendy QC, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) *45 Industrial Law Journal* 391.
17. J. Elgar and B. Simpson, 'The Impact of the Law on Industrial Disputes Revisited: A Perspective on Developments over the Last Two Decades' (2017) *46 Industrial Law Journal* 6.
18. B. Creighton, C. Denvir, A. Johnstone, S. McCrystal, and A. Orchiston, 'Pre-Strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action' (2019) *48 Industrial Law Journal* 343

D.3 RIGHTS OF INDIVIDUALS PARTICIPATING IN INDUSTRIAL ACTION

Having established the liability of those organizing industrial action (i.e. trade unions), our attention now turns to the position of those participating in industrial action (i.e. employees). This analysis will begin with an examination of the effect of industrial action on the contract of employment. For example, does industrial action constitute a breach of the employment

contract? We will then move on to consider the interface between the laws of industrial action and unfair dismissal. An employer with a striking workforce may wish to dismiss the strikers, and with that point in mind, we address the circumstances in which the employer is permitted to do so, as well as the protection provided to employees from a dismissal related to industrial action. Finally, the extent to which participation in industrial action affects other employment rights in relation to redundancy and continuity of employment will be examined.

D.3.1 Participation in industrial action and the contract of employment

There is a general tendency to distinguish between the situation where employees go on strike without giving notice and the situation where the strike is preceded by participating employees giving the employer a ‘strike notice’. In the case of the former, the courts treat the strike action as a repudiatory breach of contract. This is justifiable on the basis that there is ‘a settled, confirmed and continued intention on the part of the employee not to do any of the work which under his contract he had engaged to do, which was the whole purpose of the contract’.²⁴⁶ Striking without notice allows the employer to accept the repudiatory breach of contract and treat the contract of employment as terminated. As for the situation where the employee serves a pre-strike notice, this makes little difference to his legal position under the contract of employment. The notice is treated only as notice that the employee will participate in strike action and, thus, commit a repudiatory breach of contract:

***Stratford (JT) and Son v Lindley* [1965] AC 269, 285B–D**

²⁴⁶ *Simmons v Hoover Ltd* [1977] ICR 61, 76G per Phillips LJ.

Lord Denning MR:

Suppose that a trade union officer gives a ‘strike notice.’ He says to an employer: ‘We are going to call a strike on Monday week unless you increase the men’s wages by £1 a week’—or ‘unless you dismiss yonder man who is not a member of the union’—or ‘unless you cease to deal with such and such a customer.’ Such a notice is not to be construed as if it were a week’s notice on behalf of the men to terminate their employment, for that is the last thing any of the men would desire. They do not want to lose their pension rights and so forth by giving up their jobs. The ‘strike notice’ is nothing more nor less than a notice that the men will not come to work. In short, that they will break their contracts . . .

The courts adopt a contextual approach to the interpretation of pre-strike notices by examining the meaning and effect of the notice against the backdrop of the facts of the case to determine whether the employee could have intended the notice to constitute a termination of his/her employment contract. As such, if it is clear that the strikers want their job back after the strike action has been taken, the pre-strike notice will not be treated as evincing an intention to terminate the employment relationship.²⁴⁷ The position at common law is, therefore, as follows: strike action, with or without notice, will constitute a repudiatory breach of the contract of employment. This position at common law applies regardless of whether the strike is official/unofficial or constitutional/unconstitutional (i.e. where, before a

²⁴⁷ *Boxfoldia Ltd v NGA* [1988] IRLR 383.

strike, the union has fulfilled all the procedures laid down in a collective agreement).²⁴⁸ Strike action entitles the employer to accept the repudiatory breach and treat the contract as terminated.²⁴⁹

So far we have dealt with the classic situation where the employee goes on strike. However, let us consider the position where the strike is called in response to the employer's repudiatory breach of contract. This situation is sometimes referred to as a 'defensive strike', i.e. where the employee is striking to *defend* against a breach of contract by the employer.

Elias has argued that the adoption of defensive strike action in response to repudiatory breach of contract by the employer should not be treated as a breach of the employment contract.²⁵⁰

This position is justified on two grounds:

- (1) Employees can lawfully initiate the strike by 'concerted constructive dismissals' which, provided that it is made clear that they are resigning in response to the employer's repudiatory breach, need not require any period of notice.²⁵¹ Elias argues employees could then claim wrongful dismissal if they are not subsequently re-engaged. In addition, since the employees are only responding to a repudiatory breach

²⁴⁸ For an analysis of the effect of constitutionalizing labour rights, see J. Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267.

²⁴⁹ For the alternative 'suspension of the contract of employment' approach put forward by Lord Denning, see *Morgan v Fry* [1968] 2 QB 710, 728. This reasoning was ultimately rejected.

²⁵⁰ P. Elias, 'The Strike and Breach of Contract: A Reassessment' in K. Ewing, C. Gearty, and B. Hepple, *Human Rights and Labour Law: Essays for Paul O'Higgins* (London, Mansell, 1994).

²⁵¹ *ibid.*, at pages 258–61.

by the employer, their unfair dismissal rights would not be jeopardized: it will be recalled that employees who have been constructively dismissed may claim unfair dismissal even though they continue to work for the same employer.²⁵²

- (2) If the employer refuses to supply the entire consideration due under the contract of employment (e.g. implementation of a wage cut), the employee has a correlative right to refuse work. Elias relies on the dicta of Lord Templeman in *Miles v Wakefield Metropolitan District Council*: ‘In a contract of employment wages and work go together. If the employer declines to pay, the worker need not work.’²⁵³ However, Elias’s argument has not persuaded the courts to treat defensive strikes differently from any other kind of strike. It is clear from the authorities that defensive strikes continue to be approached as a repudiatory breach of the contract of employment.²⁵⁴

Notwithstanding that it is clear that a strike will constitute a breach of contract, the effect of industrial action short of a strike on the contract of employment is less clear. Where the

²⁵² See Chapter 16, section 16.2.2.1; *Hogg v Dover College* [1990] ICR 39; and *Alcan Extrusions v Yates* [1996] IRLR 327.

²⁵³ [1987] AC 539, 562. Yet it should be noted that later in the same judgment, Lord Templeman made an apparently strong assertion that any form of industrial action will constitute a repudiatory breach of contract: ‘[i]ndustrial action is unique in that in order to be effective the action must involve a repudiatory breach of contract designed to harm the employer . . . Any form of industrial action by a worker is a breach of contract which entitled the employer at common law to dismiss the worker because no employer is contractually bound to retain a worker who is intentionally causing harm to the employer’s business’.

²⁵⁴ *Wilkins v Cantrell and Cochrane (GB) Ltd* [1978] IRLR 483 and *Marsden v Fairey Stainless Ltd* [1979] IRLR 103.

industrial action is inconsistent with the employee's contractual obligations, the action will clearly constitute a breach of contract. For instance, in *Ticehurst and Thomson v British Telecommunications Ltd*,²⁵⁵ a manager participating in a union campaign which consisted of a withdrawal of goodwill was found to be in breach of the implied term to serve her employer faithfully within the requirements of her employment contract. The picture becomes somewhat blurred when the industrial action in question takes the form of a 'work to rule' or ban on voluntary overtime. An employee participating wilfully in a work to rule with the objective of disrupting the employer's business will be viewed as breaching the implied term of mutual trust and confidence.²⁵⁶ In order to determine whether the employee was engaged in such wilful disruption, the court must examine the employee's intentions. Such a subjective analysis of the employee's state of mind sits uneasily with orthodox contractual principles, which view contractual breaches objectively and do not normally entail any consideration of the motives of the alleged contract-breaker.²⁵⁷ Even if the court *did* take into account the motive behind the employee's breach of contract, it could be arguable that participation in industrial action is motivated by employees looking to further their own economic interests—not wilful disruption of the employer's business for its own sake.²⁵⁸

Go-slows are viewed with similar disdain by the courts. In *General Engineering Services Ltd v Kingston and St Andrews Corp.*,²⁵⁹ a go-slow by firemen was held by the Privy Council to

²⁵⁵ [1992] IRLR 219.

²⁵⁶ *Secretary of State for Employment v ASLEF (No. 2)* [1972] 2 QB 455.

²⁵⁷ *Forslind v Bechely-Crundall* 1922 SC (HL) 173, 179 per Viscount Haldane.

²⁵⁸ B. Napier, 'Working to Rule—A Breach of the Contract of Employment' (1972) 1 *Industrial Law Journal* 125.

²⁵⁹ [1988] 3 All ER 867.

constitute repudiation of an essential term of their contracts of employment to carry out their work expediently. Whilst the analysis so far demonstrates that a broad range of industrial action will constitute a breach of the contract of employment, this does not mean any removal of goodwill will constitute a *repudiatory* breach. In *Burgess v Stevedoring Services Ltd*,²⁶⁰ the Privy Council held that employees participating in an overtime ban were not in breach of contract. Lord Hoffmann rejected the argument that employees were in repudiatory breach ‘for refusing to do things altogether outside their contractual obligations (like going to work on Sunday) merely because they do not have a bona fide reason for refusal . . . [t]hey do not have to have any reason at all’.²⁶¹

There are two reasons, however, why an employer may wish not to dismiss striking employees. The first reason is a practical one and is described by Lord Justice Donovan in the following extract:

Rookes v Barnard [1963] 1 QB 623, 682–3

Donovan LJ:

There can be few strikes which do not involve a breach of contract by the strikers. Until a proper notice is given to terminate their contract of service, and the notice has expired, they remain liable under its terms to perform their bargain. It would, however, be affectation not to recognise that in the majority of strikes, no such notice to terminate the contract is either given or expected. The strikers do not want to give up their job; they simply want to be paid

²⁶⁰ <IBT>[2002] IRLR 810</IBT>.

²⁶¹ *ibid.*, 813.

more for it or to secure some other advantage in connection with it. The employer does not want to lose his labour force; he simply wants to resist the claim. Not till the strike has lasted some time, and no settlement is in sight, does one usually read that the employers have given notice that unless the men return to work their contracts will be terminated, and they will be dismissed.

So whilst the employer has the power to dismiss striking employees, it may not always be in the employer's commercial interests. In practice, it may be more desirable for the employer to pursue the trade union in tort. The second explanation for the reticence to dismiss striking workers on the part of the employer is a legal one: dismissing employees who are participating in industrial action may constitute unfair dismissal. With that thought in mind, we now consider the interface between industrial action and unfair dismissal.

D.3.2 Participation in industrial action and unfair dismissal

The applicability of the statutory unfair dismissal regime to confer protection from dismissal on employees engaged in industrial action invokes a number of key statutory concepts. First, we must distinguish between 'unofficial' and 'official'/'non-unofficial' industrial action: see section 237 of TULRCA. Secondly, a distinction is forged in statute between 'official'/'non-unofficial' industrial action that is not 'protected' and such action that is 'protected' under statute: see section 238A of TULRCA. We examine each of these notions in turn.

D.3.2.1 Dismissal of employees participating in unofficial industrial action

The notion of 'unofficial' industrial action finds its expression in section 237 of TULRCA:

Section 237 Dismissal of those taking part in unofficial industrial action

(1) 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 . . .

(2) A strike or other industrial action is unofficial in relation to an employee unless—

(a) he is a member of a trade union and the action is authorized or endorsed by that union, or

(b) he is not a member of a trade union but there are among those taking part in the industrial action members of a trade union by which the action has been authorized or endorsed.

Provided that, a strike or other industrial action shall not be regarded as unofficial if none of those taking part in it are members of a trade union.

(3) The provisions of section 20(2) apply for the purpose of determining whether industrial action is to be taken to have been authorized or endorsed by a trade union.

(4) The question whether industrial action is to be so taken in any case shall be determined by reference to the facts as at the time of dismissal.

Provided that, where an act is repudiated as mentioned in section 21, industrial action shall not thereby be treated as unofficial before the end of the next working day after the day on which the repudiation takes place.

The removal of unfair dismissal protection from unofficial strikers was introduced in 1990 as part of a series of measures designed to discourage unofficial industrial action.²⁶² It was

²⁶² Green Paper, ‘Unofficial Action and the Law’ (Cm 821, 1989). See

https://openlibrary.org/works/OL14885035W/Employment_Department_Unofficial_Action_and_the_Law_Proposals_to_Reform_the_Law_Affecting_Unofficial (last visited 5 January 2020).

argued that restrictions on selective dismissals impeded an employer's ability to remove unofficial strikers from its workforce. Section 237 of TULRCA operates to ensure that the employee has no right to present a complaint of unfair dismissal where at the time of the dismissal the employee was taking part in an unofficial strike or other unofficial industrial action. The only exception to this rule is where it is shown that the dismissal was for jury service or family reasons, or because the employee has taken certain specified action in relation to health and safety or flexible working, had acted as an employee representative, or had made a protected disclosure under the 'whistleblowing' provisions.²⁶³ Industrial action is unofficial *unless*:

- (a) the person striking is a member of a trade union and the action is authorized by that union; or
- (b) the person striking is not a member of a trade union but is participating in industrial action alongside others who *are* members of a trade union and that trade union has authorized the action.

The trade union's endorsement or repudiation of industrial action in relation to section 237 is dealt with in accordance with the principles set out in section 20 of TULRCA:

Section 20 Liability of trade union in certain proceedings in tort

- (2) An act shall be taken to have been authorized or endorsed by a trade union if it was done, or was authorized or endorsed—
 - (a) by any person empowered by the rules to do, authorize or endorse acts of the kind in question, or

²⁶³ See TULRCA, s. 237(1A). In other words, where the reason or principal reason for the dismissal is one of the automatically unfair reasons: see **Chapter 16**, section 16.2.4.2.

- (b) by the principal executive committee or the president or general secretary, or
- (c) by any other committee of the union or any other official of the union (whether employed by it or not).

D.3.2.2 Dismissal in connection with non-unofficial, but unprotected

industrial action

Where industrial action is not unofficial, but is not ‘protected’ under section 238A of TULRCA, the tribunal will have no jurisdiction to consider an unfair dismissal complaint where, at the date of dismissal, the employer was conducting a lock-out or the complainant was participating in a strike or other industrial action: section 238 of TULRCA. However, there is an exception. The tribunal will have jurisdiction to hear the employee’s claim if the employee can show that either:

1. One or more ‘relevant employees’ of the employer of the claimant employee have not been dismissed; or
2. A relevant employee has, before the expiry of the period of three months beginning with that employee’s date of dismissal, been offered re-engagement and the complainant employee has not been offered such re-engagement.

This statutory provision is designed to tackle victimization through selective dismissal or re-engagement, i.e. where the employee has been dismissed along with others participating in non-unofficial industrial action, but is subsequently treated less favourably because the others are re-hired.

Section 238 of TULRCA contains no definition of a ‘strike’. The courts have on occasion turned to the definition contained in the strike ballot provisions, which define a strike as a

‘concerted stoppage of work’.²⁶⁴ Section 235 of the Employment Rights Act 1996 (‘ERA’) also contains this definition of a strike, but this definition applies only to the statutory concept of ‘continuity of employment’²⁶⁵ and is irrelevant for the purposes of section 238 of TULRCA.²⁶⁶ The expression ‘concerted stoppage of work’ is given its ordinary and natural meaning, and its interpretation is strictly a question of fact for the tribunal. This is evident from the following extract, albeit in the context of defining a ‘lock-out’:

Express and Star Ltd v Bunday [1988] ICR 379, 388A–B

May LJ:

This is a point which frequently arises on this type of construction question. What are the necessary elements of a lock-out, or for that matter of a bicycle or an elephant is not in my opinion a question of law. Nor I think is it necessarily a question of law whether a court or tribunal was correct in thinking that the presence of a particular element or ingredient in a given state of affairs is necessary before that can be, for instance, a ‘lock-out.’ This may be a mixed question of law and fact. Alternatively, it may be solely a question of fact which it is for the expert tribunal to determine.

²⁶⁴ TULRCA, s. 246, *Tramp Shipping Corp. v Greenwich Marine Inc.* [1979] ICR 261 and *Connex South-Eastern v RMT* [1999] IRLR 249.

²⁶⁵ See Chapter 3, section 3.2.2.

²⁶⁶ *McCormick v Horsepower Ltd* [1980] ICR 278 and *Rasool v Hepworth Pipe Co Ltd* [1980] ICR 494.

The treatment of the definition of a ‘strike’ as a question of fact has been the subject of criticism. In *Lewis and Britton v E Masons & Sons*,²⁶⁷ a lorry driver refused to drive from Wales to Edinburgh without an overnight heater when instructed to do so by his employer. The EAT upheld the tribunal’s finding that one person acting alone was capable of taking part in industrial action. It was open to the tribunal to find that an individual could take part in industrial action by himself where the individual’s conduct aimed to coerce the employer to improve the terms and conditions of his employment. The outcome in *Lewis and Britton* suggests that an employee could be treated as taking part in industrial action where he refuses to carry out a lawful instruction of his employer in order to gain improved terms of employment. This approach significantly widens the scope of the legal definition of a ‘strike’. It also sits uneasily with earlier authorities and the statutory direction that strike action must be ‘concerted’ or ‘collective’, i.e. that it requires more than one person.²⁶⁸ In this respect, one may conclude that the treatment of the legal definition of a strike in *Lewis and Britton* is open to doubt.

In the same way as the definition of a ‘strike’, whether there is a ‘lock-out’ is treated as a question of fact for the tribunal to decide. The courts will treat the definition of a ‘lock-out’ contained in the ERA for the purposes of the notion of ‘continuity of employment’ as of assistance here. Section 235(4) of the ERA defines a ‘lock-out’ in the following manner:

²⁶⁷ [1994] IRLR 4.

²⁶⁸ TULRCA, s. 246. See too TULRCA, s. 238(1)(b) which refers to employees ‘taking part’ in industrial action, thus implying that more than one person is participating in the strike. *Tramp Shipping Corp. v Greenwich Marine Inc.* [1975] ICR 261, 266 per Lord Denning; *Coates v Modern Methods and Materials Ltd* [1982] ICR 763; and *London Underground Ltd v RMT* [1995] IRLR 636.

Section 235 Other definitions

(4) . . . ‘lock-out’ means—

- (a) the closing of a place of employment,
- (b) the suspension of work, or
- (c) the refusal by an employer to continue to employ any number of persons employed by him in consequences of a dispute, done with a view to compelling persons employed by the employer, or to aid another employer in compelling persons employed by him, to accept terms or conditions of or affecting employment.

The treatment of a ‘lock-out’ as a question of fact can be problematic when a court has to decide whether the employees have organized a strike and the employer has put in place a lock-out in reaction thereto, or vice versa:

Express and Star Ltd v Bunday [1987] ICR 58, 68C–E

Popplewell J:

In the present case the workforce were plainly not going to work single keying. The employers were not going to continue to employ them unless they did work single keying. There might well have been the situation in which the workforce took action that would have amounted to industrial action or strike. In this case the workforce were plainly prepared to take industrial action or to go on strike, but they had not in fact done so and the management took the course, which is readily understandable of seeking to get some change in the position.

It is because it was the management who said to the workforce unless you are willing to do what you have not done before you will be suspended, and then suspended them, that constitutes the lock-out; whereas it might equally as well have happened that the workforce said if you want us to do this work we shall take industrial action and then have taken industrial action. In the latter case it would have constituted strike or other industrial action. Thus narrow is the distinction.

As for the meaning of the expression ‘other industrial action’ in section 238 of TULRCA, once again, this is a question of fact for the tribunal to determine on the facts and circumstances of the case. The phrase is something of a catch-all provision, which includes action short of a strike such as a ‘go-slow’ or a ‘work to rule’, but the list is by no means closed. The phrase is not restricted to action which constitutes a breach of the contract of employment (e.g. go-slow as a breach of the implied term of co-operation).²⁶⁹ A ban on voluntary overtime was held to be ‘other industrial action’ by the Court of Appeal in *Faust v Power Packing Casemakers Ltd.*²⁷⁰ Giving the leading judgment, Lord Justice Stephenson appears to have found it sufficient that the action applied pressure on the employer and that it was designed to extract some benefit from the employer to the advantage of the employees’ terms and conditions of employment.²⁷¹

A tribunal must be satisfied that the complainant is a ‘relevant employee’ in order to have jurisdiction to hear an unfair dismissal claim under section 238 of TULRCA. The complainant will be a relevant employee if, at the date of dismissal, he was participating in a

²⁶⁹ *Secretary of State for Employment v ASLEF (No. 2)* [1972] 2 QB 455.

²⁷⁰ [1983] IRLR 117.

²⁷¹ See too *Rasool v Hepworth Pipe Co. Ltd* [1980] ICR 494.

strike or other industrial action. It is a question of fact for the tribunal to decide whether or not an individual is taking part in industrial action.²⁷² The employee's conduct is viewed objectively by the court. In *Coates v Modern Methods and Materials Ltd*,²⁷³ an employee stayed away from work during strikes because she was frightened of crossing the picket line. The majority of the Court of Appeal ruled that the test of whether the frightened employee 'participated' in the industrial action was to be 'judged by what the employee does and not by what he thinks or why he does it'.²⁷⁴ It thus follows that employees who are absent from work due to sickness or holiday leave during the industrial action may still be held to be taking part in it, particularly if they associate themselves or have been involved with the organization of the action (e.g. attending the picket line).²⁷⁵ Equally, however, the employer's decision to dismiss will be viewed objectively by the courts. In this way, an employer who dismisses on the reasonable but mistaken belief that those he dismissed participated in industrial action is not protected.²⁷⁶ The concept of 'relevant employee' is wider in scope for the purpose of a lock-out. The employee does not need to be 'participating' in the action which led to the

²⁷² *Coates v Modern Methods and Materials Ltd* [1982] ICR 763 and *Naylor v Orton & Smith Ltd* [1983] IRLR 233.

²⁷³ [1982] ICR 763.

²⁷⁴ *ibid.*, 777 per Stephenson LJ.

²⁷⁵ *Bolton Roadways Ltd v Edwards* [1987] IRLR 392 and *Hindle Gears Ltd v McGinty* [1985] ICR 111. The EAT overturned the tribunal's decision that a sick employee who spent time talking to pickets while handing in his medical certificate was participating in industrial action.

²⁷⁶ *Thompson v Woodland Designs Ltd* [1980] IRLR 423; *Bolton Roadways Ltd v Edwards* [1987] IRLR 392; *Manifold Industries Ltd v Sims* [1991] IRLR 242; and *Jenkins v P&O European Ferries (Dover) Ltd* [1991] ICR 652; but cf. *McKenzie v Crosville Motor Services Ltd* [1989] IRLR 516

employer instituting a lock-out, but only has to be ‘directly interested in the dispute in contemplation or furtherance of which the lock-out occurred’.²⁷⁷ Anyone who is likely to be immediately and automatically affected by the outcome of the dispute is deemed to be a ‘relevant employee’ in the context of a lock-out.²⁷⁸

The employee must be taking part in the industrial action on the actual date he or she is dismissed in order to fall within the definition of a ‘relevant employee’. This was a prominent issue in the case of *Heath v Longman (JF) (Meat Salesmen) Ltd.*²⁷⁹ Here, a dispute about overtime payments in respect of weekend working resulted in the employer informing the employees that they would be dismissed if they did not attend work during the upcoming weekend. The complainant and two of his colleagues went out on strike in response to this ultimatum, but, after meeting with their union representatives, one of them informed the employer that the strike was at an end and that they would attend work on the upcoming weekend. The employer dismissed all three of the employees notwithstanding that it was aware that the strike action was over. The National Industrial Relations Court held that the employer was no longer free to dismiss those who took part without any risk of unfair dismissal on the ground that the strike had ceased and the men had returned to work. As such, employees will not be held to be participating in strike action at the date of dismissal where

²⁷⁷ TULRCA, s. 238(3).

²⁷⁸ See Lord Brandon’s judgment in *Presho v DHSS (Insurance Officer)* (1984) IRLR 74, where he interprets the same definition of ‘relevant employee’ in another statutory context. Lord Brandon’s definition appears to have been followed in the context of industrial action in *Fisher v York Trailer Co. Ltd* [1979] IRLR 385.

²⁷⁹ [1973] ICR 407.

they are dismissed for threatening, or announcing an intention, to strike but have not yet actually engaged in strike action.²⁸⁰

What is absolutely key to the jurisdiction afforded to an employment tribunal under section 238 is the notion that the employer selectively dismissed or re-engaged those who participated in the industrial action leading to the dismissal. At this stage, the employee claiming unfair dismissal needs to demonstrate that either:

- a. Another ‘relevant employee’ of his employer was not dismissed; or
- b. Another relevant employee was offered re-engagement²⁸¹ before the expiry of the period of three months beginning with that employee’s date of dismissal, and the complainant had not been offered re-engagement. As such, the tribunal will have no jurisdiction under section 238 where an employer waits until the expiry of the three month period and makes an offer to re-engage certain employees selectively.²⁸² The offer must be made specifically to the individual as opposed to a press advert for job applications.²⁸³ Correspondence with the dismissed employee to the effect that he will

²⁸⁰ *Midlands Plastics Ltd v Till* [1983] IRLR 9; but cf. *Winnett v Seamark Bros Ltd* [1978] ICR 1240.

²⁸¹ This is defined in section 238(4) of TULRCA as ‘an offer (made either by the original employer or by a successor of that employer or an associated employer) to re-engage an employee, either in a job which he held immediately before the date of dismissal or in a different job which would be reasonably suitable in his case’.

²⁸² K. Ewing, *The Right to Strike* (Oxford, Clarendon Press, 1991) 57–9.

²⁸³ *Crossville Wales Ltd v Tracey* [1993] IRLR 60.

be re-engaged if he applies for the job he was dismissed from, will constitute an offer of re-engagement.²⁸⁴

It should be stressed that proving that the employer's decision to dismiss was selective only gives the tribunal *jurisdiction* to hear the unfair dismissal claim. Section 238 of TULRCA does not concern itself with the fairness of the dismissal, which will be determined according to general principles of unfair dismissal law. For instance, the employer may be able to demonstrate that the dismissal was *prima facie* fair under section 98 of the ERA.²⁸⁵ Where the complainant's claim relies on the employer's selective re-engagement of employees (as opposed to selective dismissal), the relevant question the tribunal must answer is 'not whether the initial dismissal was justified but whether the refusal to re-engage the applicants was justified when some employees have been taken back'.²⁸⁶

D.3.2.3 Dismissal of employees participating in official industrial action

The protection from unfair dismissal afforded to employees participating in official industrial action is governed by section 238A of TULRCA:

Section 238A Participation in official industrial action

²⁸⁴ *Williams v National Theatre Board Ltd* [1982] ICR 715. See *Hindle Gears Ltd v McGinty* [1985] ICR 112, 113–14 per Waite J.

²⁸⁵ For example, see *Sehmi v Gate Gourmet* [2009] IRLR 807 where it was held that the dismissal of those taking part in industrial action will be within the range of reasonable responses even if the absence is not very prolonged (employee dismissed for missing three consecutive shifts).

²⁸⁶ *Edwards v Cardiff City Council* [1979] IRLR 303, 305 per Slynn J.

(1) For the purposes of this section an employee takes protected industrial action if he commits an act which, or a series of acts each of which, he is induced to commit by an act which by virtue of section 219 is not actionable in tort.

(2) An employee who is dismissed shall be regarded for the purposes of Part X of the [ERA] as unfairly dismissed if—

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee took protected industrial action, and

(b) subsection (3), (4) or (5) applies to the dismissal.

(3) This subsection applies to a dismissal if the date of the dismissal is within the protected period.

(4) This subsection applies to a dismissal if—

(a) the date of the dismissal is after the end of that period, and

(b) the employee had stopped taking protected industrial action before the end of that period.

(5) This subsection applies to a dismissal if—

(a) the date of the dismissal is after the end of that period,

(b) the employee had not stopped taking protected industrial action before the end of that period, and

(c) 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 . . .

(7A) For the purposes of this section ‘the protected period’, in relation to the dismissal of an employee, is the sum of the basic period and any extension period in relation to that employee.

(7B) The basic period is twelve weeks beginning with the first day of protected industrial action.

(7C) An extension period in relation to an employee is a period equal to the number of days falling on or after the first day of protected industrial action (but before the protected period ends) during the whole or any part of which the employee is locked out by his employer.

(7D) In subsections (7B) and (7C), the ‘first day of protected industrial action’ means the day on which the employee starts to take protected industrial action (even if on that day he is locked out by his employer) . . .

(9) In this section ‘date of dismissal’ has the meaning given by section 238(5).

The protection afforded by section 238A has a temporal aspect in the sense that the treatment of the dismissal as automatically unfair only lasts 12 weeks, subject to extension in limited circumstances. This protection is buttressed by the fact that some restrictions which apply under the general law of unfair dismissal do not apply to section 238A. For example, the employee does not have to satisfy the usual qualifying period of two years’ continuous employment in order to be eligible to bring an unfair dismissal claim.²⁸⁷ Nor is there any restriction on the age of the employee claiming unfair dismissal.²⁸⁸ As can be seen from section 238A, the dismissal of an employee will only be automatically unfair if the industrial

²⁸⁷ See ERA, s. 108(1) and Chapter 16, section 16.2.1.1.

²⁸⁸ TULRCA, s. 239(1).

action which the employee is participating in is ‘protected’. Industrial action is protected if the employee is induced to take part in the industrial action ‘by an act which by virtue of section 219 is not actionable in tort’.²⁸⁹ As such, the protection afforded by section 238A is contingent upon the trade union having complied with the complex legal requirements governing the organization of industrial action (e.g. balloting requirements, restrictions on secondary action, etc.).

The unfair dismissal protection usually lasts for 12 weeks, but may be extended where the employer has failed to take ‘such procedural steps as would have been reasonable for the purposes of resolving the dispute to which the protected industrial action relates’.²⁹⁰ This aspect of section 238A enjoins the court to consider whether the employer or the union complied with the procedures laid down in any applicable collective agreement,²⁹¹ and whether, after the start of the protected industrial action, either party had:

- offered or agreed to commence or resume negotiations;²⁹²
- unreasonably refused a request that conciliation services be used;²⁹³ and
- unreasonably refused a request to use mediation services in relation to the procedures to be used to resolve the dispute.²⁹⁴

²⁸⁹ TULRCA, s. 238A(1).

²⁹⁰ TULRCA, s. 238A(5)(c).

²⁹¹ TULRCA, s. 238A(6)(a).

²⁹² TULRCA, s. 238A(6)(b).

²⁹³ TULRCA, s. 238A(6)(c).

²⁹⁴ TULRCA, s. 238A(6)(d). TULRCA, s. 238A(6)(e) refers to s. 238B, which in turn deals with aspects of ‘mediation’ and ‘conciliation’ services.

Section 238A(6) can be viewed as imposing on the employer a duty to at least attempt to resolve the dispute before the 12 week period runs out. Without such a duty, an unscrupulous employer may wish to simply let the 12 week period run out and dismiss the striking employees without fear of unfair dismissal claims. This statutory provision ensures that employees facing such unscrupulous employers are protected—by extending the period of protection from unfair dismissal beyond 12 weeks in these circumstances.

D.3.3 Industrial action and other employment rights

Whilst protection from unfair dismissal is arguably the most important right afforded to an employee participating in industrial action, here we shall briefly consider two additional forms of protection. First, the protection of an employee's continuity of employment in the event that he or she participates in industrial action. Secondly, the circumstances in which an employee participating in industrial action will have the statutory right to a redundancy payment.

D.3.3.1 Continuity of employment

A week during any part of which an employee takes part in a 'strike' does not count for the purposes of calculating the employee's period of continuous employment.²⁹⁵ However, in contrast to the usual position when a week cannot be credited, continuity remains unbroken so that the period of employment before and after the week in which the strike took place can be aggregated.²⁹⁶ It has also been held that the employee's continuity of employment will not

²⁹⁵ ERA, s. 216(1).

²⁹⁶ ERA, s. 216(2).

be broken where the employee is dismissed during the strike and subsequently re-engaged.²⁹⁷

Identical provision is made for weeks during any part of which the employee is locked-out from work. The week of the lock-out counts for continuity purposes in the same way as it would for a strike.²⁹⁸

D.3.3.2 Redundancy

Strikes and other industrial action frequently embody a response to the threat of redundancies by an employer. Section 140(1) of the ERA stipulates that taking industrial action in these circumstances will constitute a breach of contract which entitles the employer to dismiss without having to make a redundancy payment. Where the employee is under notice of a redundancy and goes on strike, section 140(2) directs that section 140(1) does not apply and the employee remains entitled to a redundancy payment. If the employee goes on strike during notice of redundancy, the employer may serve the striking employee with a notice under section 143 of the ERA stipulating that he/she will be required to make up any time lost during the strike before he/she will be entitled to the redundancy payment. As for selecting employees for redundancy, ‘a valid matter to be considered is the loyalty of those who served during the strike but . . . by the same token to give carte blanche to the loyalty of those who did work is likely to cause indignation to those . . . who did not stay loyal to the

²⁹⁷ *Hanson v Fashion Industries (Hartlepool) Ltd* [1980] IRLR 393; *Bloomfield v Springfield Hosiery Finishing Co Ltd* [1972] ICR 91; and *Clarke Chapman John Thomson Ltd v Walters* [1972] ICR 83.

²⁹⁸ ERA, s. 216(3).

management'.²⁹⁹ Some indication as to the circumstances in which participation in industrial action may be a fair basis for redundancy selection was given in *Cruikshank v Hobbs*.³⁰⁰ The EAT held that selecting striking employees for redundancy on the basis of their participation in strike action would be fair where:

1. The strike had caused or aggravated the redundancy;
2. After a long strike, the difficulties of reintroducing strikers due to technical or administrative changes during their absence; and
3. The friction which would arise from dismissing non-strikers and replacing them with the strikers would impair morale and efficiency.

²⁹⁹ *Laffin and Callaghan v Fashion Industries (Hartlepool) Ltd* [1978] IRLR 448, 450 per Mr Justice Phillips.

³⁰⁰ [1977] IRLR 725.