

**Local authorities' and schools' responses
to industrial action by school teachers**

**Advice from the
National Employers' Organisation for School Teachers (NEOST)**

The role of local authorities and governing bodies

Although local authorities are the employers of teachers in community schools, under the School Staffing (England) Regulations 2009 or, in Wales, the Staffing of Maintained Schools (Wales) Amendment Regulations 2009, many key duties are placed upon governing bodies. It is the view of NEOST, therefore, that in all schools, governing bodies should take responsibility for taking appropriate action in response to industrial action.

Even though governing bodies have this responsibility, local authorities will want to have a clear overview of how things develop to ensure that public money is properly accounted for. They will want to ensure that any response made by governing bodies is reasonable and does not lead to the authority being liable for costs that might arise from any legal proceedings.

Therefore, local authorities will want to assist schools in dealing with the practical effects of industrial action in so far as they can. Governing bodies and head teachers should be encouraged to keep schools open to maintain continuity of educational provision, taking into account health and safety requirements.

What is industrial action?

There is no legal definition of industrial action. However, case law has established that:

- Industrial action must be concerted action against the employer's interests. It does not, therefore, usually cover action taken by an individual
- It must be taken in order to put pressure on the employer in an attempt to achieve some objective

When are employees taking part in industrial action?

As a basic guide, employees will probably be taking part in industrial action if they:

- Collectively withdraw their labour
- Refuse to undertake some of their duties
- Refuse to carry out reasonable instructions
- Take part in a sit-in, go-slow or work to rule
- Take part in picketing

Deducting Pay

With industrial action, including action short of a strike, a response may be to deduct pay and governing bodies are entitled to determine that pay is withheld for work not done.

Where **strike action is taken for a complete day** or a number of days, our recommendation is that a deduction of pay should be made on the basis of 1/365 for each day's action. Paragraph 3 of Section 3 of the *Conditions of Service for School Teachers in England and Wales* (the 'Burgundy Book') specifies this rate of deduction for unpaid leave of absence, giving industrial action as an example. This rate of deduction was confirmed in the case of *Smith v Kent County Council* [2004] EWHC 412 <http://www.bailii.org/ew/cases/EWHC/QB/2004/412.html>

For industrial action short of a strike or '**partial performance**' of duties an employer is entitled to refuse to accept the partial performance of the contract of employment offered by employees. This would mean telling employees that they should only attend work when they are prepared to work in full compliance with their contracts. Until they do so they will have no entitlement to pay.

The extent of the breach is immaterial to an employer's entitlement in law to refuse partial performance, although it is an important industrial relations consideration. This was illustrated in the case of *Wiluszynski v London Borough of Tower Hamlets* [1989] IRLR 259 in which employees were instructed by their union to refuse to answer elected members' queries. This formed only a very small part of their duties. The authority warned those taking part that, until they were prepared to work normally, any work carried out would be regarded as voluntary and they would not be paid. The Court of Appeal upheld the Council's action.

In many cases, employees will, despite such instructions, continue to attend work and claim pay for the work they have carried out. It is, therefore, imperative that governing bodies make their non-acceptance of partial performance clear to teachers. Specifically, teachers should be made fully aware that any work undertaken will be regarded as voluntary and will not attract any pay. The courts have issued a warning to employers that they must be able to show that their position was genuine and that employees who continue to work could not have been confused or misled (for example, by being issued with work). The employer is not, however, required to send employees home or prevent them in some other way from performing any work if the employees insist on doing so.

Despite the legal entitlement to deduct all pay in instances of partial performance, governing bodies and local authorities may decide that it is in the interests of continuing to provide a service, in this case to continue to provide education to the students at the school, to take a different approach.

In many instances an employer is likely to prefer to allow employees to continue to work during industrial action short of a strike, and instead make an appropriate deduction from their pay. The issue then is the assessment of an appropriate deduction.

In principle, the deduction represents damages arising from the employee's breach of contract. The Court of Appeal in *Sim v Rotherham Metropolitan Borough Council* [1986] IRLR 391 applied the principle of 'equitable set-off' to pay deductions in these circumstances. In other words, the employee's breach of his or her contract gives the employer a claim in damages. Instead of having to take that claim separately to a county court, the employer can set it off against the employee's wages.

It is often difficult to make a pre-estimate of the damages caused by each individual employee's breach of contract. In practice, deductions are usually restricted to a proportion of pay that fairly recognises the fact that the employee is not performing their full contractual duties. Governing bodies that make a reasonable attempt to do this should withstand any legal challenge, and the cases below set out how the courts have approached deductions.

In *Miles v Wakefield Metropolitan District Council* [1987] IRLR 193, Mr Miles, who was a registrar of births, marriages and deaths, refused to perform marriage ceremonies on Saturday mornings as part of a programme of industrial action. He carried out his duties normally, including marriage ceremonies on other days of the week. The House of Lords held that the authority was entitled to withhold 3/37ths of his weekly pay as 3 of his 37 weekly hours were worked on a Saturday.

In *Royle v Trafford Metropolitan Borough Council* [1984] IRLR 184, a teacher refused, as part of a campaign of industrial action, to take classes different from those for which he had been previously responsible or to accept additional children into his classes. The High Court held that a proportionate deduction of 5/36ths of the teacher's salary was a reasonable estimate of the damages incurred. This was based on the number of children excluded by the teacher from the class. The Court noted that no replacement teacher had been employed to teach the children excluded from the class, and that the authority had not been required to meet any claim from parents for failure to educate their children.

When communicating their response to teachers, governing bodies should ensure that it is made clear to them that deductions are made in lieu of damages for their breach of contract. Under no circumstances should deductions be viewed or presented as a penalty for taking industrial action.

Where action which constitutes partial performance is co-ordinated across a local authority area it may be appropriate to arrive at a consistent approach to the deduction to be applied to teachers in all the schools. This should also avoid any accusation that an individual school is acting unreasonably and any challenges for making deductions which are disproportionately high or low.

Making alternative arrangements for others to undertake work not being undertaken by teachers taking industrial action

It is unlikely that teachers who are not members of the union(s) taking industrial action will be prepared to undertake the work that those taking the action would have undertaken. Regulation 7 of the Conduct of Employment Agencies and Employment Business

Regulations 2003 makes it unlawful for agencies to supply or introduce work seekers to replace employees who are undertaking official industrial action if the agency is aware of the action. Therefore it is not advisable for governing bodies to seek to engage the services of employment agencies for this purpose.

Where picketing takes place, employees not directly involved in the industrial action may refuse to cross picket lines. Such employees can normally be regarded as being on strike and treated accordingly. Occasionally however, employees may be willing to cross picket lines but are reluctant to do so for fear of their safety. In such circumstances, the governing body should try and ensure that the teacher is given every protection in crossing the picket line, or where practicable, is given the opportunity to work at another establishment. If the governing body considers the teacher has made every effort to cross the picket line but was unable to do so, then the governing body may decide not to treat their absence as industrial action.

Other considerations for local authorities

Local authorities will want to advise governing bodies of:

- the need to deter industrial action by advising teachers that
 - any refusal to undertake their contracts of employment is regarded as a breach of contract; and
 - a deduction of wages on account of the breach of contract will be made for those teachers engaging in the action (taking care not to present this as a penalty for taking the action);
- the potential for challenges if no deduction is made, which may appear to condone industrial action which is in breach of the school's statutory duty to provide education;
- that any inconsistency in response is likely to be seen to be supporting the validity of the reason for the action, thus strengthening the unions' position.

Local authorities will also want to ensure that any response is proportionate and does not lead to an avoidable escalation of the dispute. Consideration should be given to whether a response in any given situation will be taken as setting a precedent for any subsequent industrial action.

Further information

More information, including on managing the threat of industrial action, the requirements for ballots and employer notification, breach of contract and wider industrial relations and legal implications can be found via the following link:

<http://www.lge.gov.uk/lge/core/page.do?pagelD=119711>