



## 21st century picketing

By **Philip Cameron** - 31 October 2019

Strikes are commonly accompanied by picketing. But, what actually is a picket? It is not a term defined in law, but generally understood to be a form of protest or demonstration in the context of industrial action. Recent trends have seen mass pickets and the development of “cyber-picketing”.

### What is a picket?

Despite not being legally defined, the law makes it very clear that there are a large number of hoops which both those picketing and the trade union must jump through to ensure that the picketing is not unlawful. Provided that the picketing complies with those requirements it will be protected or “immune” from civil actions. Importantly, there is no criminal law protection for those who picket. Accordingly, there is no immunity for those who commit criminal acts such as public order offences or where there is trespass on private land.

One of the core elements of picketing is attempting to persuade other employees not to cross the picket line. Any employee who agrees not to cross the picket line will be in breach of their employment contract. Persuading workers to break their contracts of employment will on the face of it be an inducement to breach of contract. However, the law gives immunity against to those who are picketing lawfully.

### Ensuring that picketing is lawful

However, ensuring that picketing is done lawfully is not entirely straightforward. Picketing is only lawful where: (i) it is at or near the place of work; and (ii) undertaken only by a worker employed by a party to the dispute (or a former worker whose last employer is party to the dispute or the worker’s dismissal is one of the reasons for the dispute), or a trade union official who represents and accompanies such workers. Third, the purpose of the picketing must be to obtain or communicate information or to persuade any person to work or abstain from working. Last, the picketing must be done peacefully without intimidation or threatening behaviour.

Where a trade union organises, or encourages its members to take part in any picketing, a number of other conditions must be

satisfied such as a union-appointed official must supervise the picketing and take reasonable steps to inform the police of his/her identity, contact details and place of picketing; the supervisor must be either present at the picket, or readily contactable by the union and police and able to attend at short notice and while present the supervisor must wear something that readily identifies him/her as such.

The government has issued a Code of Practice on picketing to give practical guidance. Whilst not legally binding, the Code will be admissible in evidence and may be taken into account by a court or tribunal when determining the lawfulness of activities. The Code recommends that the number of pickets be generally limited to six people but that usually a smaller number will be appropriate. The Code provides that the maintenance of essential supplies, services and operations should not be impeded by picketing.

Clearly then, picketing, despite having no legal definition, is a highly regulated activity and it is not entirely easy to stay on the right side of the law. The Code sets out clear guidelines as to the size of the picket which means that mass picketing is highly unlikely to be lawful and those who are on the picket will not benefit from the immunity the law offers. It can lead to intimidation or threatening behaviour. These can result in convictions for public order offences.

### **Unlawful picketing**

A good example of where the courts are prepared to draw the line is in *Thames Cleaning and Support Services Ltd v United Voices of the World and Elia*. In this case mass picketing was proposed by a group of cleaners. The employer sought an injunction to restrain the mass picketing which the employer described as potentially violent. An “anti-picketing injunction” was granted. It set out limits on the number of representatives that could attend the picket and on the actions that they could undertake. For this the defendants could be liable for an unlawful means conspiracy. The injunction would cover an “exclusion zone”, which was not out of sight of the building (10 metres away). The actual picket was limited to 6 persons in line with the Code.

### **The future of picketing?**

Given the extent of the legal requirements to keep picketing lawful, and the difficulties around organising large lawful pickets, cyber-picketing has recently been the subject of employment tribunal litigation. This cyber-picketing occurred in the context of a strike and was intended to cause maximum disruption on strike days so as to strengthen the union’s hand. It was not actually sanctioned by the union. In the *Picturehouse Cinemas* claims the cyber-picketing contemplated involved disrupting the employer’s online cinema booking system by selecting tickets and putting them into the basket but not actually purchasing them. This would mean that the tickets were unavailable for an hour and hence disrupt the business of the cinema with the intention that there would be fewer tickets sold on strike days and hence increasing the leverage of the striking workers. Interestingly, different tribunals came to different views about whether the cyber picketing amounted to trade union activities.

In order to be lawful, picketing must comply with a large and complex set of rules. Accordingly, those who engage in disputes with their employers are finding new and innovative ways to cause business disruption and to maximise the impact of strikes. Be prepared to see more of these.