



Keep calm and carry on: covering striking workers

By **Philip Cameron** - 31 October 2019

A question often asked by employers who are facing a strike or other forms of industrial action is whether or not they can engage agency workers to cover for those who are taking part in the strike. That would be a relatively easy means of covering the disruption, either by engaging the agency workers to undertake the work of those on strike or to cover the roles of those employees who have been redeployed within the business to cover those on strike.

Although nice and easy, it would be unlawful. This prohibition is set out in the Employment Agencies Act 1973. This act makes it a criminal offence for an employment business to supply agency workers to perform the duties of striking workers and/or to cover the duties of workers who have been re-deployed by the employer to replace those on strike. An employment business, according to the statute, is one which supplies persons in the employment of the employment business to act under the control of other persons in any capacity.

The seemingly good news for employers is that any liability for breach lies with the employment business. Further, there can be no liability on the employment business where it did not know or if it had no reasonable grounds of knowing that the supply of workers was to replace those on strike. This defence is very narrow and may be difficult to rely upon: many strikes make the news and it is increasingly difficult to see how with social media an employment business might not have knowledge or at least have reasonable grounds for knowing about a strike. While the actual employer is not directly liable for this offence it can be found liable for aiding and abetting an offence. So, employers also need to tread very carefully.

The government recently considered removing this prohibition, but after consultation no proposals to carry this out have been put forward. Notably, earlier this year, the police were asked to investigate the use of agency workers to replace striking workers at the Department of Business, Energy and Industrial Strategy, the government department responsible for employment rights.

The prohibition is defined rather narrowly. It applies to an employment business, which is defined as the business of supplying persons. There is no prohibition against the provision of services. Therefore, where an employer faced with a strike can clearly show that it is engaging, say, cleaning services, rather than cleaners to cover strikers then this would not be unlawful. However, this is of course a very fine line. In this case, if the service provider is a specialist cleaner and not an employment business then this would help

to show that the use of the workers is not a contravention of the statute. Outsourcing functions to a third party for the duration of the disruption may therefore be an option worth considering.

There are a number of other options available to employers to cover striking workers. The most common of these is to re-deploy existing employees from other parts of the business. That may often involve a very different job to the one that the employee usually does. Contracts need to be carefully drafted so as to allow an employer to change an employee's duties or hours, albeit temporarily. Often, this is the most practicable short-term solution, but may of course have a detrimental impact on employment relations within the workforce and cause tension between those on strike and those who temporarily fill their positions. For the reasons set out above, extreme care needs to be taken if an employer wishes to fill those jobs temporarily vacated, since the use of agency workers will not be permitted.

There is no prohibition on an employer employing workers directly to cover the strike. An employment business can be used to source such employees, but they must become employees of the employer. They can be engaged on fixed term contracts that are extendable in the event action continues.

In addition, there is nothing unlawful in an employment business supplying agency workers to an employer once the strike is over to assist in dealing with any backlog.

One of the reasons for strikes is to cause disruption to the employer to increase the union's leverage where it is in dispute with the employer about some aspect of terms and conditions. It is not too difficult for a well-organised employer to mitigate the effects of that disruption. Despite the prohibition on agency workers, employers have a range of options available to ensure that they have cover during strikes. An important consideration will be the need to decide whether covering the work of those on strike may serve to exacerbate the dispute. Often, an employer can live with short-term disruption and can re-deploy existing employees to cover temporarily.

With changes to employment law being seen by many as inevitable when the UK leaves the EU and/or with a new government we may very well see an increase in industrial action.