

## XpertHR Weekly Podcast

Original XpertHR podcast: 19 June 2015

Susan Dennehy:

Hello and welcome to XpertHR Weekly with me, Susan Dennehy. I'm joined again this week by Marc Meryon. This is a special two-part podcast. Last week we looked at trade unions and Marc provided lots of very practical tips on how to deal with disputes in the workplace. This week, Marc will again be providing lots of practical tips.

We start by looking at action that can be taken by workers during a dispute and what employers can do about it, including picketing the employer's premises and leafleting, and what employers really need to think about before taking action.

We then move on to discuss the fate of trade unions and industrial action now that the government has decided to introduce a new trade unions bill which will impact on the activity of trade unions generally. Welcome back, Marc.

Marc Meryon:

Thank you very much and thank you for asking me to participate.

Susan Dennehy:

We're going to move on now and start to look at picketing. There is a government code of practice on picketing. The government has said it wants to restrict it but can you tell us, what actually is picketing? [0:01:03.6]

Marc Meryon:

Well, picketing is governed by the Code of Practice and so picketing arises if a union has got a lawful ballot mandate. Then it is allowed to picket under the 1992 Act or to conduct a picket and the Code of Practice sets out what's allowed in picketing. There's a very thin line, however, between picketing and protest. So if the union has got a valid mandate, it can organise a picket and the Code defines the limits of that, namely up to six employees who can picket at their own workplace for the purpose of peacefully persuading people not to work. So anything that doesn't take place within that definition isn't a picket. It will be a protest and would be subject to other forms of challenge.

Picketing is something which has always posed difficulties. Although, as I've said, the Code talks about there being six employees, it is very difficult for employers to get injunctions to enforce that amount and in some of the most notorious examples of picketing, such as the Gate Gourmet one, for example, going

back a few years now, where there were many multiples of six people participating, even then the court was reluctant to intervene.

So this is an area which is very uneasy and where you're trying to balance rights in what's obviously quite an emotional context.

Susan Dennehy:

So you made the distinction there between protesting and picketing. [0:02:18.9]

Marc Meryon:

Yes, so – and we may come onto this later on in terms of potential reforms to strike law – but one of the potential consequences might be that if people find it harder to go on strike, then they will find other ways to express their grievances and that would be in the form of protests, and Unite has conducted a leverage campaign on a number of disputes in the past, which is a form of organised protest, and it's something which has been inherited from the United States, where there's a long history of corporate campaigns, and I wouldn't be surprised if there was increase in uptake in that sort of protest activity if it became harder to go on strike.

Susan Dennehy:

I was just going to say we're going to come onto that in a minute. Can we just look at secondary picketing? How's that different from picketing? [0:03:06.5]

Marc Meryon:

So, secondary action arises where a union tries to induce employees to take industrial action and the employer of those employees is not involved in the trade dispute. So, to give you an example, it might arise where a business has outsourced cleaning services and the transferee is mistreating the outsourced workers. Then the employees in the original business might want to take action in protest about the fact that their former colleagues who have now been transferred elsewhere are not being treated properly, as they see it. However, the union in that example couldn't induce the employees in the original employer, the transferor to take action as the trade dispute would be between the new employer, the transferee, and the outsourced workers.

And so developing that point... And so that's secondary action, where you're getting involved in someone else's dispute, effectively. However, by its very nature, picketing is something that involves inducing employees of other employers, not across a picket line. Because if you're standing outside your depot, it won't be just employees, fellow employees who are coming through the gates, it'll be delivery people from other organisations and so forth.

And so with a picket line you will inevitably be inducing employees of another employer not to work normally, but the law

creates a special exemption for that. So if you have a valid picket, it is exempt from the rules on secondary action.

Susan Dennehy: And what are the consequences for industrial action if there's an unlawful secondary picketing going on? Quite drastic, aren't they? [0:04:34.5]

Marc Meryon: Yes. If a union is trying to pursue secondary action then it is unlawful and it could be injuncted. It's not something that you're allowed, so to speak, to have a strike over.

Susan Dennehy: And has it an effect on the strike that's going on? Does it make that unlawful? [0:04:51.5]

Marc Meryon: You'd have to look at how the union had organised that, as to whether it had organised two different ballots, for example, but if you could show that the real purpose of the dispute was the secondary, so to speak, motive or secondary dispute and not a cooked-up dispute with the original employer, then yes, you'd be able to take action.

Susan Dennehy: And sometimes you see employers have employees that don't turn up when there's a strike going on and all of a sudden they've got relatives appearing from abroad that they have to meet or they're off sick and the employer suspects there may be actually strike action. Is there anything the employer can do in those circumstances? [0:05:26.8]

Marc Meryon: It can and this is a very hard area because you are asking, as the employer, you are asking your employees to do something which is very difficult, which is to cross a picket line and that can have long-term consequences for them in the workplace, and so it's not easy, so you can understand fully why people might not want to do that and why they might try and duck out of the issue by staying at home, pretending they're ill or whatever else. Unfortunately the employer needs to resolve the situation so it can't just let that go, so what the employer can and often does do is to suspend the ability for the employee to take annual leave during the course of the dispute. Indeed could suspend people's right to take paid sick leave, or only to allow people to get paid sick leave if they have got a doctor's certificate for every day of absence, for example.

That may go beyond the rules of the sickness scheme. It may breach the rules of the holiday scheme but better, one might say, from the employer's perspective to take a risk on that, potentially face a deductions of wages complaint in the future, but force the issue to ensure that people don't try and find a way of avoiding coming into work. And so that is what employers will often do and it's something which is very hard but necessary.

- Susan Dennehy: Yeah, I think they used to call them 'blacklegs'. I don't know if they still do. People crossing picket lines. Or is that from the '70s? [0:06:43.1]
- Marc Meryon: Yes, we can think of all sorts of pejorative phrases from the 1970s which might describe people in those situations. I mean, often people are called 'scabs' or things like that. It can get very emotional now in that both the pickets and management may film the picket line, the pickets, with a view to filming people who are crossing the picket line, so they post it on Facebook to name and shame, in effect, those who have gone to work. Management to film the people who are doing the filming and doing the, what they would call 'harassing of' people who want to work, so as to identify people who have breached their disciplinary and harassment policies and therefore take action against them in due course. So it can get very emotional.
- Susan Dennehy: And what can employers do if striking workers are demonstrating on their premises and/or are intimidating employees going into work or their suppliers? Is there anything they can do? [0:07:3.0]
- Marc Meryon: They can and pickets have a difficult job in the sense that they can't go onto an employer's premises because they don't have permission. So that would be trespass and the employer could call the police and try and get them thrown off, or use security guards to throw them off.
- The pickets can't stand in the highway 'cause cars and trucks need to get by and they can't – or shouldn't really – loiter on the pavement because the pavement is there for people to travel from one place to another, rather than stand still.
- So you can see why pickets and strikers may sometimes end up on the employer's premises. The employer can object to that. The employer's perfectly free also to refuse pickets or strikers access to facilities, so they can't go to the loo onsite or they can't get into the staff canteen and so forth.
- Susan Dennehy: And you often see these employees giving out leaflets and things like that. Is there anything the employer can do about that if it feels that the information on the leaflet is incorrect or defamatory against the employer? [0:08:22.4]
- Marc Meryon: Often happens and I get asked this probably every few weeks and sometimes the communications from the union and union reps are very hard-hitting, can be defamatory, can also actually, in fact, can be very amusing sometimes. They have a good turn of phrase, so to speak, playing on the employer's name possibly or something to bring out an issue. The general advice is resist the temptation to go to law on this. All you're going to do is get yourself embroiled in long-term legal proceedings which will

carry on long after the dispute ended and will become a distraction.

Susan Dennehy: And the employer – are they required to negotiate all the time there's a threat of action or the action's actually taking place? Are they under a legal duty to negotiate? [0:09:04.4]

Marc Meryon: Not directly, although coming back to what we talked about with dismissals before, if you don't try and negotiate then even once the twelve-week period has elapsed, you may still be at risk of unfair dismissal for failing to try to negotiate, which is why most employers will try and negotiate and after all, no one wants the bad publicity, the disruption, reputational damage of having a dispute, so normally people will want to try and negotiate to resolve it.

Sometimes, for example in relation to a work-to-rule, where the union may ask people to refuse to use a piece of technology or do something which is very disruptive to the business but which they will argue shouldn't disentitle people to be paid, the employer's forced into the position of actually escalating the dispute in order to bring it to a head, in order to resolve it. So not negotiation as such but a way of, I suppose, a negotiating tactic.

Susan Dennehy: And you said that an employer can't dismiss for twelve weeks while the action's going on. Are there any other things that the employer might be able to do? [0:10:02.6]

Marc Meryon: Well in the past I've advised people on demoting staff who have participated in industrial action, applying disciplinary proceedings to them removing benefits. There was a very well known speech a couple of years ago about removing travel concessions, for example. So technically all of these things could be done as the only fixed protection, so to speak, is against dismissal.

However, for public sector employees there's an opportunity possibly for them to argue that they can directly enforce their Article 11 rights to freedom of association against their employer and might therefore argue that additional sanctions are in breach of those rights. So they may conceded that you can deduct pay for the duration of the dispute but not to do anything on top of that. Or duration of the strike, I should say.

And there's also a risk that if you were to demote someone, for example, for participating in industrial action, that you're creating a long-term legacy. So you might not want to do it for that reason. Sometimes employers will take away rights to overtime or shift-swapping or things like that, for the duration of the dispute and one might say that's fair in a sense, for the duration of the dispute, because they want to encourage people who are working to carry on working and people who are not to come back to work.

Susan Dennehy: This could create a legacy, and you can see that from the travel concessions with British Airways.

Marc Meryon: Yes.

Susan Dennehy: So moving on, talking about strikes and the future and the government has now said that it's going to reform trade union law and we've got a new Trade Unions Bill. Can you tell us a bit about what we know? It's still very much at proposal stage. [0:11:31.2]

Marc Meryon: Very much so. Very early stages. I think we can really only speculate at the moment about how those proposals might take shape. I think, however, it's pretty clear there are some core points. First of all, that the mandate for strike action won't arise unless at least 50% of the members who are being balloted have actually voted and a majority of them have voted 'yes'. So that's putting in a key requirement that at least 50% actually participate in the ballot.

There's going to be a higher test for essential public services or certain services which are defined as being health, education, fire and transport. So for people working in those services, at least 40% of those who are balloted must vote for industrial action, as well as there being a majority voting in favour. So that's making it a much more tangible and harder test.

So for example, in the London bus disputes of earlier this year, early 2015, the turnout and correspondingly the number of people voting 'yes' was way below those sorts of thresholds. So those strikes would not have been lawful under these proposals.

Susan Dennehy: So looking at the new thresholds, can we drill down a bit into the detail. What is a simple majority? [0:12:45.3]

Marc Meryon: Okay, so under the existing rules, if 100 members are balloted and only five vote and three vote 'yes' and two vote 'no', then there is a valid mandate because you have a simple majority – three against two, out of five, voting in favour of the industrial action. Under the new rules, if 100 members are balloted, then at least 50 must vote (50% of the 100), and of them, 26 must have voted 'yes' and a smaller number voting 'no', because you need a simple majority still of those 50 voters for there to be a valid mandate.

If the employer's also providing an essential service, then again at least 50 of the 100 must vote and at least 40 must vote 'yes'.

Susan Dennehy: So your 26 would not make it? [0:13:37.0]

Marc Meryon: Wouldn't make it, no. And then obviously fewer than 40 voting 'no' for there to be a valid mandate. So the test has gone up. So if you take it to its most extreme from this example (which isn't

representative but it does illustrate the point), at the moment you could potentially have a mandate for strikes in the central services where just three out of 100 members vote 'yes', but in the future at least 40 are going to have to vote 'yes'. So that's a very big difference.

The rules on essential public services I await with interest to see how that's going to be defined because I suspect it may not be easy.

Susan Dennehy:

A definition's going to be crucial here, isn't it? [0:14:14.8]

Marc Meryon:

Yes. The other things which are being contemplated are repealing the current ban on employers using agency workers to do the job of a striker. At the moment that's actually a criminal offence and something which a number of employers are not aware of. Of course you could easily contemplate replacing some people with agency workers if they're doing an unskilled job but you're not going to be replacing, let's say, a train driver or a pilot anytime soon with an agency worker unless there's a big bank of agency workers available, which may well not be the case.

Imposing a time limit on the validity of a ballot. At the moment the mandate lasts indefinitely so provided the union's conducted the ballot and provided it does take an action within the first month of getting that ballot mandate, then the ability to take industrial action in reliance on that ballot continues indefinitely. So it could be months, it could potentially even be years, as long as the union makes it clear to its members that industrial action is something which it is continuing to either use or want to use in pursuance of the dispute.

We got an injunction on that last year where a union had had a ballot in November, had a strike in December and didn't do anything until the following September and we argued then that that was too long a period of time when the union had said nothing and therefore we could argue the ballot mandate had expired.

What's now being proposed is to make it much clearer so that there will be a definite cut-off point after which the union would have to re-ballot.

Susan Dennehy:

Is there any idea how long they might say would be a reasonable time limit? [0:15:43.4]

Marc Meryon:

No clarity. I wouldn't be surprised if it was something like three or four months. And to be honest with you, most disputes are resolved in that period of time anyway, so that will probably be what we're looking at. What it might mean is that the union then feels encouraged to get on with it in terms of taking action, so it

might mean that it's less relaxed about waiting and seeing and it wants to take action because it knows it's got a finite time in which to do so.

The other areas: preventing the intimidation of employees wishing to continue working. We were talking about picketing earlier on and so that's an area which the government has said it wants to legislate for. And opting into the political fund so that members have to say that they want to contribute, rather than opting out and saying they don't.

Susan Dennehy: So that's a complete change-around, isn't it? Because you can opt out at the moment? [0:16:28.5]

Marc Meryon: Yes.

Susan Dennehy: And now you have to opt in.

Marc Meryon: Yeah, which inertia being what it is, will be much harder to persuade people that that's what they should be doing.

Susan Dennehy: It'll be interesting to see what effect that has, actually, on the political fund.

Marc Meryon: Yes.

Susan Dennehy: And in your experience, Marc, knowing what you know about these supports for strikes and looking at all those through the supposed changes, will strikes still be lawful on the new thresholds or do you think there'll be a dramatic effect that a lot of these proposed strike actions will fall short of these new thresholds? [0:16:55.6]

Marc Meryon: I think that a number of recent strikes would not have been lawful under these new rules. We mentioned the London bus strikes of earlier this year, but a number of other ones would still have satisfied the test, even in the essential services of health, education, fire and transport.

I think the other point to make, though, is that whilst it's not listed as one of the objectives, it wouldn't be surprising if the government is taking the stance that it wants greater participation in ballots for them to be lawful, that there will be calls for the government to allow electronic voting. Because after all, that would possibly make it much easier for people to vote, providing one can assure oneself as to the security and reliability of that mechanism. And if that was to happen, then of course you could see the participation and possibly the majority voting going up very significantly. So there's a chance that the law may have additional changes which could make it much easier for people to vote and therefore for the participation to be achieved.



And I think another potential unintended consequence is that if you put up the threshold then you're going to make unions work that much harder to achieve it, and of course if the unions were to succeed in doing that in a particular dispute, then their mandate for action is much stronger and the employer would feel under much more pressure to concede the demands the union's bringing. So again, a potential unintended consequence of changing the thresholds.

Susan Dennehy:

A million-dollar question, but what in your view are going to be the practical consequences of these changes? [0:18:29.7]

Marc Meryon:

Very difficult to say but I think we have already seen over the last four or five years an increase in protest activity, an increase in corporate campaigns, and so if it becomes harder to take strike action then I think the temptation for unions to resort to that sort of tactic is going to increase. As we've mentioned, increased pressure possibly on the government to concede electronic voting. And increased participation in ballots and therefore higher turnouts and more pressure on employers.

I think there's also a chance that unions will be much more discerning about who they ballot, so that rather than balloting the entire workforce and trying to persuade an awful lot of people a) to vote and b) to vote the right way, the union might focus on just the small group that's most affected by the dispute or tactically choose just a small group that could exert the most damage on the employer's business and just get them to vote. So we could see a tactical change in the way that ballots are conducted.

Susan Dennehy:

So much more strategic?

Marc Meryon:

Yes.

Susan Dennehy:

Thank you Marc for that extremely useful guidance and helpful advice.

Marc Meryon:

My pleasure. Thank you.

Susan Dennehy:

There are more resources on our website. Remember you can listen to the first part of this two-part podcast series on trade unions and industrial action by going to the audio and video section of our website or by searching 'XpertHR Weekly' on iTunes.

That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Susan Dennehy. We are back again next Friday. But until then, it's goodbye from us.