

Make Work Pay: Protection from detriments for taking industrial action Consultation response on behalf of Thompsons Solicitors LLP

Thompsons is the most experienced trade union, employment rights, and personal injury law firm in the country, with 19 offices across the UK. It acts only for trade unions and their members on employment and industrial relations issues.

Thompsons represents most UK trade unions and advises on the full range of employment rights issues through its specialist Trade Union Law Group and employment rights department.

Thompsons is a large employer with over 250 employees.

Section 2 – Options for Secondary Legislation

Option A - Prohibit all detriments for taking industrial action (Government's lead option)

Question 1: Do you support prohibiting all detriments for taking industrial action?

Yes

Question 2: What benefits might come from prohibiting all detriments for taking industrial action?

Those identified in the consultation, but particularly (a) alignment with existing detriments legislation and (b) future-proofing.

Question 3: What concerns or challenges do you see from prohibiting all detriments for taking industrial action?

Those identified in the consultation.

Question 4: How might prohibiting all detriments for taking industrial action influence employers' ability to manage workplace disputes and industrial action?

Positive impact

This is a question about perception without consideration of the rectitude of that perception, and so is flawed. Understanding the proper contextual background is important, and the following two passages from case law illustrate this:

“Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. In more recent times, further measures have also been adopted under legislation giving effect to EU law. In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice” – Lord Reed, R (on the application of UNISON) v Lord Chancellor [2017] IRLR 911 Supreme Court.

“...the Strasbourg court’s recognition of the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members, and the right to engage in collective bargaining, underlines the importance of the right to strike as a means of defending these interests. As Mr Ford put it, the core right to advocate for the interests of trade union members is devoid of substance if it is not backed by a right to take strike action. That is certainly part of the reason why this right is protected” – Lady Simler, Secretary of State for Business and Trade v Mercer [2024] UKSC 12 Supreme Court.

The inescapable conclusion from Mercer is that employees’ Article 11 rights have *always* been able to be infringed, and therefore what the *Employment Rights Act 2025* is changing is the ability to seek a remedy. Some employers may see this as an infringement on their managerial prerogatives, but the reality is that the pre-Mercer position has been a decades-old violation of employee rights since its inception. That violation gave the employer an unfair advantage. This is not an exercise in granting additional rights, but is about putting right the inability to gain remedy for an infringement of an existing right and any objections should be seen through this lens.

Question 5: Would this option have an impact on industrial relations?

Positive impact

Again, this is a question about perception without consideration of the rectitude of that perception, and so is flawed. The Foreword notes the aim of the legislation, “*The Act fosters a new partnership of cooperation between trade unions, employers and the government. This partnership will work successfully when employers are respected by trade unions and when trade unions are given space and support to effectively represent workers’ collective voice.*”. Legality and enforcement aside, imposing detriments for taking industrial action is poor industrial practice. The only employers who are likely to be disaffected by these changes are those who adopt such poor practice, but some friction for them is perhaps a necessary part of the Act’s intended cultural shift.

Option B - Create a list of prohibited detriments

Question 6: Do you support creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

No

Question 7: What benefits might come from creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

For the reasons both set out in the consultation and in our response to question 8, the main benefits appear to arise for those wishing to limit or evade obligations under s.236A *Trade Union and Labour Relations (Consolidation) Act 1992*.

Question 8: What concerns or challenges do you see from creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

This is a rectification of UK law as interpreted through Article 11. As the ECtHR noted in *Demir v Turkey* [2008] 48 EHRR 54, “*The Court further observes that it has always referred to the 'living' nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see Soering v United Kingdom, (1989) 11 ECHR 439, paragraph 102, Series A no. 161; Vo v France [GC], (2004) 17 BHRC 1, paragraph 82; and Mamatkulov and Askarov v Turkey [GC], nos. 46827/99 and 46951/99, (2005) 18 BHRC 203, paragraph 121).*”

So long as we have s.3 *Human Rights Act 1988* this ‘living’ approach must be applied purposively and a list is not readily consistent with it. A list has little or no ‘living nature’ and its contents can ossify. The doctrine of *expressio unius est exclusio alterius* ensures that matters which are not on a statutory list cannot migrate their way onto it. One need only take a cursory look at 50 years of the talented application of imagination to circumventing employment protections to see why a list is too immutable for this task. Since Employment Tribunals are famously ‘creatures of statute’ with no inherent jurisdiction the common law has no ameliorative role to play. For this legislation to be effective a list approach should not be adopted.

We are opposed to the idea that any detriments are excluded from s. 236A. The idea of the “list” effectively means some detriments can be excluded even where they are imposed for the “sole or main purpose” of preventing, deterring or penalising protected industrial action. There is no such distinction in s. 146 of the Trade Union and Labour Relations (Consolidation) Act 1992. The reason for that is it would allow an employer to impose non-prescribed detriments on workers and effectively permit trade union discrimination without breaching statute. The same logic needs to apply to this new provision.

Furthermore as referenced above, any attempt to distinguish between types of detriment in this context has no basis in the Article 11 case law. A consistent line of cases law from Strasbourg, including *Karacay v Turkey* (Ap No. 6615/03, 27 March 2007) and continuing with *Guler v Turkey* [2018] IRLR 880, has held that any sanctions, however minimal, which dissuade or penalise trade union members from participation in lawful strikes are incompatible with Article 11.

Question 9: Which types of detriments do you believe should be included in the prohibited list? Please explain why.

Not applicable – given response above.

Question 10: Which types of detriments do you believe should not be included in the prohibited list? Please explain why.

Not applicable – given response above.

Question 11: Would this option have an impact on workers’ willingness to participate in industrial action?

Positive impact

A better phrasing for this question would be ‘*Would this option have an impact on workers’ willingness to exercise their article 11 right to participate in industrial action?*’. If workers can still be subject to detriments that are not prescribed by legislations than it would negatively impact their willingness to take industrial action. That is inconsistent with Article 11.

Question 12: Would this option impact employers’ ability to manage disputes and industrial action?

No impact

Employers do not ‘manage industrial action’ – trade unions do. Employers will have the very same ability to negotiate with the trade union, or workers’ representatives, as before. Similarly, their ability to undertake any necessary managerial action is also unaffected. The fact that Miles v Wakefield MDC [1987] IRLR 193 House of Lords remains untouched leaves an employer able to deduct the pay of striking workers which self-evidently gives employers considerable leverage in managing disputes. . The only thing which would impact them is the ability to infringe their employee’s Article 11 rights now comes with consequences.

Section 3 – Awards for failing to comply with ACAS Code of Practice

Question 13: Should claims made under Section 236A of TULRCA be added to Schedule A2, meaning that an employment tribunal can adjust an award by up to 25% where the employer or employee unreasonably failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?

Yes

For the reasons given in the consultation.

Question 14: Is there anything else on this subject that the government should consider?

There is the question of one form of detriment being an employer suing their employee for breach of contract in reliance on industrial action being a fundamental breach of contract. In this regard we set out the evidence provided by Professor Alan Bogg and Michael Ford KC to The Employment Rights Public Bill Committee (ERB69),

‘39. Another area that may need further specific attention is the position at common law that industrial action will almost always be a repudiatory breach of contract: see **Simmons v Hoover Ltd** [1977] ICR 61. Lady Simler recognised that suing individual strikers for a breach of contract was very likely to amount to an Article 11 violation: see [87] in the judgment. A detriment provision would not amount to a suspension of the employment contract during industrial action, although in many countries the doctrine of contractual suspension is treated as a corollary of treating the right to strike as a protected human right. It would not be straightforward to introduce a doctrine of suspension into the UK system of strike law because UK law permits a wide range of industrial action short of a full strike.¹ It isn’t clear, for example, how a contract could be suspended if an employee is still providing

¹ On the history of the doctrines of suspension and breach in English law on strikes, see A Bogg, “The Hero’s Journey: Lord Wedderburn and the ‘Political Constitution’ of Labour Law” (2015) 44 Industrial Law Journal 299, 337-346.

extensive performance under the contract (as in a withdrawal of certain duties such as marking examinations in industrial action at a university). The simplest solution would be to stipulate that workers enjoy an immunity from damages claims for breach of contract where that claim relates to protected industrial action.’

Thompsons Trade Union Law Group

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