

## Managing Strike Action (Northern Ireland) – FAQs

### January 2017

Some of the issues covered in these questions and answers have been clearly determined by the courts. Some issues, however, are still uncertain. Members seeking to advise their governors on these matters should check with the governors' legal advisers/EA/CCMS/NICIE before acting. In all decision making, there is a duty under law to safeguard the welfare of all children.

#### 1. Who decides what to do?

Most decisions on managing the key issues arising from strike action (e.g. deduction of pay) are a matter for the employer.

#### 2. Who is the employer?

In a school, it will not be the principal. EA is the Employing Authority for Controlled Schools, CCMS for catholic maintained schools and NICIE for most Integrated schools. The employer in the case of voluntary grammar schools is the governing body and it should make those decisions.

#### 3. Should the school or college stay open?

The decision whether to keep a school or college open must be taken on the basis of the safety of staff and children or students. The head or principal cannot relinquish that responsibility and if given a direct instruction from an employer to keep the school open, the head or principal should insist on a clear, unambiguous written instruction to that effect.

If something were to go wrong, the test would be whether the head or principal did or should have reasonably foreseen the problem.

#### 4. Where does the principal stand if the school stays open?

If a school is open, the principal and the school have a duty of care. There is no reason why in a school the principal cannot supervise a large group in order to cover a gap in the timetable created by the strike. ASCL takes the view that all its members may respond to a request from the principal to assist in this matter. It is arguable in law that all staff on site have a similar duty of care. However, it may be imprudent to insist on it as other unions may then instruct members to leave the site when they are not actually timetabled for pupil contact and this may lead to further conflict and less supervision.

#### 5. Can the school try to break the strike by employing other staff?

There is no reason in law why an employer should not employ non-union or union labour to fill the places of striking teachers for the day, although agency or supply teachers may not be hired to replace striking employees. Teaching assistants may be used and there is no legal reason why staff who are in should not be detailed to cover for those taking strike action.

However, ASCL would **not** recommend that members advise this action to employers as it may cause a considerable escalation in union action that may spread to other unions and which may leave lasting resentments and conflicts among staff.

#### 6. Can those taking strike action be disciplined?

It is lawful to strike as the result of a properly constituted ballot. Employers may deduct pay from strikers but should not otherwise penalise or victimise them. To do so is unlawful.

#### 7. What is the deduction?

If the strike is for one day, then one day's pay. If for less than a day, or if the action takes the form of a work to rule or refusal to do some duties but not others, the employer has the choice to accept the partial fulfilment of a contract or not. If the employer gives notice that he will not, then he can deduct a day's pay. If he does not, he can either deduct nothing or deduct pro rata a fraction of a day's pay (*Sims v Rotherham*). In the past, it was difficult for any employer in Northern Ireland to assess the proportion of a contract which had not been delivered. However, as a consequence of the teachers' unions insistence on a time budget for every teacher in every school, a base line has now been established and as a result, the employers are

now in a position where pay may be deducted where a contract has not been fulfilled. The board of governors and the employers can reasonably require a copy of every teacher's time budget from school leaders. They can also reasonably request that the head or principal provides information about which members of staff did or did not fulfil their directed time obligations.

However, responsibility for the management of industrial action rests with the employer and not the head or principal of a school. The employer, **not the head/principal**, should determine what proportion of the contract has not been fulfilled and, as a consequence, what proportion of pay should be deducted. It is essential that heads/principals do not place themselves in situations where they are making decisions about pay deductions. Heads/Principals do not have authority to make such decisions as that is the responsibility of the employer.

#### **8. May members of other unions refuse to work 'in sympathy'?**

It is not lawful to take industrial action without a ballot. Members of other unions who refuse to cross a picket line are in breach of contract and may be disciplined accordingly. The NASUWT, for example, has made this clear to their members.

Sympathetic action is also illegal and anyone taking it can be disciplined and action taken against the union.

#### **9. May union members who do not strike be disciplined by their union?**

It is not lawful for a union to discipline or disadvantage a member for refusing to strike.

#### **10. Am I entitled to the names of strikers?**

A union does not have to give the names of members striking to an employer, only the category of worker being called out.

There is nothing unlawful in an employer asking members whether they will be striking, but not a legal requirement of union members to give that information.

If members of staff are absent on the day, it is legitimate to ascertain whether or not they were ill. If they claim to be ill to avoid the deduction of pay and are not, this is a disciplinary offence and action should be taken.

#### **11. What happens if the head/principal and/or the senior leadership team all go on strike?**

If the head/principal alone takes action, then the deputy head/vice principal takes over. Whether the head/principal can make a decision to close the school the day before taking action is open to question but if the danger to students were to be foreseeable it would probably be within his/her powers. If the head/principal and deputies are all out, then any assistant principal could be asked to deputise. It is a moot point as to whether the residual duty of care will compel an assistant principal to do so. If the entire leadership team takes action the governors would have the option of seeking another member of staff to take over responsibilities but would be well advised not to do so.

#### **12. If I employ staff as cover supervisors can I use them to cover striking colleagues?**

You should confirm this with your employer and HR advisers since any decision the employer makes may be subject to legal action. However, it is our view that (assuming the cover supervisors' unions are not striking) if a cover supervisors' contract says that they cover for absence, they can be directed to cover. If they refuse, they may be considered to be on strike and the employer may decide to take disciplinary action and/or deduct pay.

#### **13. Can a union call out staff who have joined after notice of a strike or other action and the numbers being called out have been given?**

Yes in most cases. The union is only required to make sure that 'The lists and figures or information supplied (are) as accurate as is reasonably practicable in the light of the information in the union's possession at the time when it complied with this requirement of the law'. While this has not been explored in the courts, it is likely that the union will be given a reasonable margin in complying. It may be that the union would be expected to let the employer know of an influx of members so large that it completely defeats the purpose of this provision of the law: to enable the employer to anticipate the consequences of the action and act accordingly. In a school situation, where health and safety of children are at stake, the courts may take that into account.