Industrial action: performance and pay

ANDREW BURNS QC and ALICE CARSE, Devereux Chambers

As new employment legislation looms, the industrial temperature is set to rise. A major tactical issue already troubling the courts is how much pay an employer may deduct when workers strike or take industrial action short of strike.

When can pay be deducted for industrial action?

Industrial action does not have to be all or nothing. A common alternative is 'action short of a strike' – a trade union may call on workers to attend work but participate in limited duties or a work-to-rule. This can be equally disruptive, but workers are sometimes reassured that their pay will not be docked. However, in order to claim for her wages an employee must demonstrate that she is ready and willing to perform her part of the contract (*Wiluszynski*).

ela PRO BONO INITIATIVE: The 100 Days' Project

The 100 Days' Project was launched in spring 2010. We are delighted with the response to the project, but we are always looking for more ELA members to pledge a day (or more) of pro bono assistance, either via a day's advocacy or a day's casework. The aim of the ELA 100 Days project is to match those ELA members who would like to get advocacy and more hands-on ET experience with deserving cases for unrepresented parties, often struggling with a lack of knowledge and expertise. Our selected list of pro bono agencies refer suitable cases to ELA which we then send out to our 100 Days 'pledgees'. We aim to complete 100 days of pro bono work per year through the project and filled 151 days in its first two years.

Please email 100days@elaweb.org.uk if you would like to be added to our database of 'pledgers' for the 100 Days Project.

If the employer makes it clear that part-performance is not accepted, then industrial action short of a strike will normally be regarded as a failure to perform the contract of employment. The employee then has little prospect of establishing that she is ready and willing to perform her contract of employment. This approach was taken in *Ticehurst*, where the Court of Appeal held that an employer was entitled to refuse to allow its employees to remain at work where they were engaged in concerted action to 'gum up the works' of the employer in breach of the implied term of faithful service. The employees failed in an action to recover wages for the period as BT was entitled to refuse to accept part-performance.

It was also followed recently in *McDonald*, where the county court rejected a pay claim by airport staff who attended for only part of their daily shift during industrial action. It was also applied in the British Airways cabin crew strike, where the airline deducted pay for the full duration of the disrupted flight trips even if the workers returned to work part way through their 'shift'.

This 'all or nothing' approach to pay derives from the House of Lords' decision in *Miles* as explained in *Wiluszynski*. However, two of the law lords suggested that an employee who participates in industrial action short of a strike is entitled to be paid on a *quantum meruit* basis for the amount and value of the reduced work which she has performed and which her employer has accepted.

The *quantum meruit* point is not open to an employer who rejects part performance (*Spackman*) and was not advanced in *Wiluszynski*. However the difficulty in calculating the value of the work performed and the divisiveness of the different value provided by each employee may make this argument singularly unattractive to a trade union, particularly where there are hundreds of employees participating in industrial action.

Elias LJ explained in *Hartley* that there was another route by which an employer can argue that he is entitled to withhold

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pay from a striking worker. This is by way of equitable set-off, ie that the employer is entitled to damages for the employee's breach of contract in refusing to work and is entitled to withhold a sum equivalent to the damages to which he is entitled (*Sim*). Given that the recent cases have focused only on the part-performance argument, it seems that the equitable remedy route has fallen out of fashion.

Hartley: deducting for strike action

The main point of dispute in *Hartley* was how much an employer could deduct for a one-day strike. Three striking teachers disputed the deduction by the school of 1/260th of their annual salary for each strike day. They argued that the correct deduction was 1/365th, relying on s.2 of the Apportionment Act 1870, which provides that 'All ... periodical payments in the nature of income ... shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.'

Elias LJ, considering *Cooper*, determined that the Act did apply where there was partial performance of an entire contract. While for most periodic payments this would mean that payments would accrue by regular and equal increments, it did not dictate such an outcome. However, the Act should be construed to mean that although pay accrues at a daily rate, it does not necessarily accrue at an equal rate each day. Determining the accrual rate is done by taking into account the principle of daily accrual in s.2 and the terms of the relevant contract.

Applying this to the facts Elias LJ rejected the teachers' argument that the correct deduction was 1/260th. Although teachers might work 'undirected time' outside of normal term time hours on preparation and administrative tasks, there was a close link between the 'directed time' when teachers are required to be at school and their pay. Just because the teachers might engage in undirected time on any day of the year, this did not mean that their pay accrued at a rate of 1/365 per day. The teachers had 195 days of directed time a year and the undirected time spent working contributed to the value of their directed time. Further, supply teachers were paid at the rate of 1/195th per day, as were teachers who agreed to work an extra day. It followed that the logical conclusion was that the pay deductible for a strike day was 1/195th (in fact, a greater deduction than that actually made by the school).

Practical tips for calculating remuneration in strikes

There are a number of points for employers and employees to consider. First is the issue of whether the employer has accepted or rejected part-performance. Secondly, the parties should look to the contract to see whether a daily rate of pay can be ascertained from its terms. Paid holidays should not normally be used to increase this proportion (*Cooper*). The parties should also consider if there are any other relevant factors such as the proportion of a month's or year's pay which is paid to temporary workers doing the same job, or how much workers are paid for additional work done. Only if the contract is silent does pay accrue on a daily rate of 1/365th under the Act.

The unexpected consequence of the appeal in *Hartley* is that it may encourage employers to take a more robust approach to deductions from pay. As well as greater ballot thresholds imposed by legislation, employees may also see higher pay deductions imposed for taking industrial action.

KEY:

Wiluszynski	*Wiluszynski v London Borough of Tower Hamlets* [1989] ICR 493, CA
Ticehurst	*British Telecom v Ticehurst* [1992] ICR 383
McDonald	*McDonald v Servisair Liverpool CC*, unreported, 28 March 2014
Miles	*Miles v Wakefield Metropolitan and District Council* [1987] 1 AC 539, HL
Spackman	*Spackman v London Metropolitan University* [2007] IRLR 744
Hartley	*Hartley & ors v King Edward VI College* [2015] EWCA Civ 455
Sim	*Sim v Rotherham MBC* [1986] ICR 897, CA
Cooper	*Cooper v Isle of Wight College* [2008] IRLR 124