

Last week saw the UK's biggest rail strike in 30 years, with some newspapers suggesting this is just the start of a "Summer of Discontent," as staff in other sectors across the UK, from airline staff to doctors and even barristers, threaten industrial action.

While not all businesses are facing the prospect of strike action, we are seeing a significant increase in queries from companies on how to progress pay negotiations with trade unions in the current febrile economic climate. We are hearing about pay negotiations that have stalled due to the inability of the parties to reach agreement or trade unions seeking to reopen closed pay deals in light of the newly challenging economic situation and the soaring cost of living.

We offer the following practical steps to help companies with collective bargaining:

- Procedure** – What does your collective agreement say? It is important that both parties comply with any procedure that has been set out for negotiating pay, including any dispute resolution procedure. While collective agreements are rarely legally enforceable, employers should be very careful about seeking to circumvent any agreed process, in particular making any offer directly to employees where collective bargaining has stalled or where they want to ensure that employees receive an increase in base pay or a one-off payment because of the increased cost of living. Last year, in *Kostal UK Ltd v Dunkley & Ors*, the Supreme Court held that the employer had unlawfully induced workers to opt out of collective bargaining when it made a one-off pay offer to employees while the collective bargaining process was still notionally ongoing. See our previous alert [here](#). *Kostal* was ordered to pay £418,000 in compensation, the fixed amount at that time of £3,800 for each unlawful inducement offer – the current mandatory amount is £4,554 per unlawful inducement. A subsequent decision of the Employment Appeal Tribunal found that even unilaterally applying a pay increase that had not been accepted through collective bargaining could also amount to an unlawful inducement.
- Changes to terms and conditions** – Many employers are looking to change historical terms that provide enhancements to employees. They need to be very cautious about any "fire and rehire" process. This is clearly in the cross-hairs of the courts, which recently granted an injunction restraining this process, and the government is due to issue a new statutory Code of Practice this summer following the well-publicised issues with P&O. Acas has already issued some guidance on the topic, as discussed [here](#), which discourages the practice except as a last resort.
- Communication** – Ensure you keep the lines of communication open, with both employees and the union. It should then become clearer if any proposal is likely to be viewed by the union as over-stepping the mark. However, companies should not be afraid of communicating directly with employees about any proposed pay deal, in particular with the union or in response to any threatened industrial action. At the same time, employers should be careful what they put in writing, as all that correspondence may end up in Tribunal at some stage.
- Contingency planning** – Have a clear strategy on what you will do next if the negotiations are unsuccessful. Who does the bargaining unit cover and how will you cover any industrial action?
- Training** – It may have been a while since your managers have had to hold such difficult conversations with their trade union counterparts on collective issues. Do they need some training to give them greater confidence in handling negotiations?

**Forthcoming changes** – Last week, the government [announced](#) it will be legislating to remove Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, which prohibits employment businesses from supplying temporary workers to cover (i) the duties normally performed by an employee who is taking part in a strike or other industrial action; or (ii) the work of an employee who is covering the duties of an employee taking part in a strike or other industrial action. The government's stated aim is to give employers greater flexibility to fill duties of employees who are participating in strike action.

This is not the first time the government has proposed such a step. It consulted about doing the same back in 2015 as part of a package of trade union reform measures, but ultimately decided on that occasion not to proceed with this particular change.

The proposal does not have the support of the Recruitment & Employment Confederation (REC), which has called on the government to abandon its plans. In a [joint press release](#) with the Trades Union Congress, the REC is concerned that agencies will be "pressured by clients into supplying staff in hostile and potentially dangerous situations".

The government also proposes to raise the statutory cap on the amount of damages that can be awarded against a trade union for organising unlawful industrial action, which depends on the size of the trade union's membership. The current maximum amount that can be awarded against the biggest trade unions is £250,000, but the government intends to increase this to a headline-grabbing £1 million in a measure clearly far more aimed at political gain in a sticky patch for Downing Street than at any actual additional deterrence, for which you would think £250,000 is more than adequate.

**How we can help** – We have significant experience in advising and assisting companies on working with trade unions effectively. If you would like to discuss how we can support your business, please contact one of the following partners or your usual contact in the Labour & Employment team.

## Contacts



**Bryn Doyle**  
Partner, Manchester  
T +44 161 830 5375  
E bryn.doyle@quirepb.com



**Ramez Moussa**  
Partner, Birmingham  
T +44 121 222 3346  
E ramez.moussa@quirepb.com



**Charles Frost**  
Partner, Birmingham  
T +44 121 222 3224  
E charlie.frost@quirepb.com



**Caroline Noblet**  
Partner, London  
T +44 207 655 1473  
E caroline.noblet@quirepb.com



**Miriam Lampert**  
Partner, London  
T +44 207 655 1371  
E miriam.lampert@quirepb.com



**Alison Treliving**  
Partner, Manchester  
T +44 161 830 5327  
E alison.treliving@quirepb.com



**Matthew Lewis**  
Partner, Leeds  
T +44 113 284 7525  
E matthew.lewis@quirepb.com



**Andrew Stones**  
Partner, Leeds  
T +44 113 284 7375  
E andrew.stones@quirepb.com



**Janette Lucas**  
Partner, London  
T +44 207 655 1553  
E janette.lucas@quirepb.com



**David Whincup**  
Partner, London  
T +44 207 655 1132  
E david.whincup@quirepb.com



**Annabel Mace**  
Partner, London  
T +44 207 655 1487  
E annabel.mace@quirepb.com