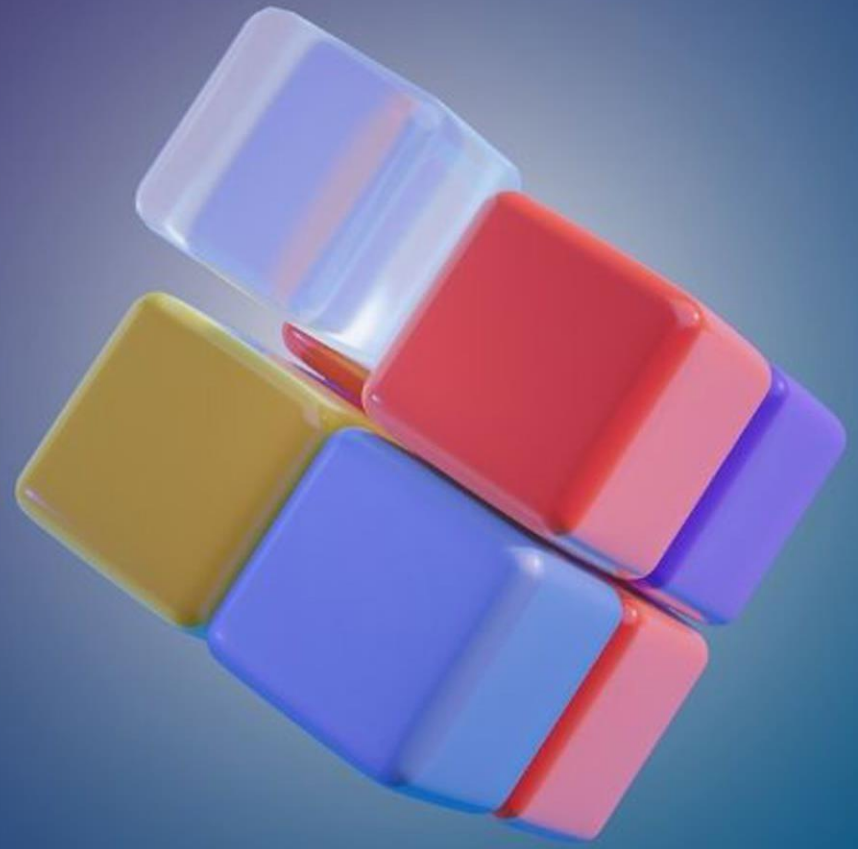
UHR Conference 2025

Online 13 - 15 May



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Industrial relations in a changing world

UHR Conference

14 May 2025

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What we will cover

- The new rules on industrial action ballots and their practical impact on contingency planning
- New protections against detriment for taking part in industrial action - could these be used to challenge existing sector approaches to withholding pay for action short of strike?
- The scope of "fire and rehire" laws – what are the ramifications for your ability to deliver organisational and contractual change?
- New rights for unions to access workplaces and reduced thresholds for statutory recognition – how could these affect existing recognition and facilities arrangements?

Industrial action – changes under the ERB

Repeal of Trade Union Act 2016 (those in bold take effect 2 months after Royal Assent)

- 50% ballot turnout threshold removed – back to simple majority voting in favour
- **"important public services" rules requiring 40% of eligible voters to vote "Yes" also removed**
- **Information a union must provide in ballot paper is reduced – no requirement for summary of dispute or details of ASOS or likely periods of IA**
- **Requirement to state number of members entitled to vote is removed**
- **Advance notice of industrial action reduced from 14 to 10 days**
- **Picketing union supervision provisions repealed**
- Minimum service levels also repealed immediately Act gets Royal Assent– never enacted in education sector
- **IA mandates will be effective for 12 months after ballot, up from 6 months**

Industrial action – changes under the ERB

Other changes made following consultation

- **Ballot notices**: unions must give lists of categories of employees entitled to vote, a list of their workplaces and the total number entitled to vote **BUT** will not be required to break this down in a matrix by category/workplace
- Plus no need to explain how the number was arrived at
- **Industrial action notices**: unions must give lists of categories of employees union expects to induce to take IA, a list of their workplaces and the total number expected to be induced to take IA, and the number who work at each workplace (but not the numbers in each category)
- The above changes take effect 2 months after Royal Assent
- Power to introduce electronic balloting for IA – further Regulations needed – "We will launch a working group with stakeholders in due course including cyber security experts, trade unions and business representatives, with the view of rollout following Royal Assent of the Employment Rights Bill."

Industrial action – changes under the ERB

Repeal of Trade Union Act 2016 - Implications

- Easier for unions to get a mandate for IA and mandate lasts for longer – though note removal of 50% threshold delayed to align as closely as possible with the introduction of e-balloting
- Less visibility at ballot stage of what shrike action/ASOS may involve (although usually this can be readily guessed)
- Shorter ballot periods? – because less pressure on unions to Get Out The Vote
- Shorter notice of IA means slightly less time to plan response
- Less granularity on who is being balloted/called out

Protection against detriment for those taking part in industrial action

- s146 of TULRCA 1992 includes protection against any detriment where sole or main purpose of employer is to prevent or deter the worker from taking part in TU activities at an appropriate time or penalise them for doing so
- This does **NOT** cover industrial action (Supreme Court, *Mercer*)
- ERB introduces new right, specifically covering protected industrial action (ie where lawful ballot)
- Will apply in relation to "prescribed detriments" – to be set out in Regulations
- Will not apply to dismissal (which is already protected in certain circumstances)
- Unions (including UCU) pressing Government to specifically provide that a "disproportionate" deduction of pay for taking part in ASOS is a detriment
- Will need further Regulations before this takes effect – Govt has said it will consult on what will be included

Fire and rehire

- Bill provides that dismissals will be **automatically unfair** if the principal reason for the dismissal is:
  - that the employer sought to vary the contract and the employee did not agree OR
  - to enable the employer to employ another person, or re-engage the employee, under a varied contract carrying out the same or substantially the same duties
- **Unless**:
  - the reason for varying the contract was to eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties which at the time of the dismissal were affecting, or were likely in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business; **and**
  - in all the circumstances the employer could not reasonably have avoided the need to make the variation
- Statutory cap on unfair dismissal award will apply
- Will come into force after further Regulations/consultation on Code of Practice

Fire and rehire

- The defence is therefore limited to severe (existential?) financial difficulties
- Govt has recently updated factsheet to say "This limited exemption accounts for situations where businesses need to restructure to remain viable, and to preserve jobs and the company where there is genuinely no alternative"
- Explanatory notes to the Bill say where employer does not operate on a going concern basis (for example certain public sector bodies) it would have demonstrate the reason for the variation was to eliminate, prevent, significantly reduce or significantly mitigate the effects of financial difficulties which, at the time of the dismissal, were affecting the employer's ability to carry on activities constituting the business – not clear how far this would extend
- If the defence is made out, fairness of the dismissal will depend on adequacy of consultation with employees and unions, what (if anything) was offered in exchange for the variation, and other factors to be set out in Regulations
- Note: proposals to introduce interim relief have been dropped
- Current Code of Practice on dismissal and re-engagement which came into force on 18 July 2024 remains in force – but to be reviewed/amended

Fire and rehire

What are the implications?

- Premium on being able to agree changes with unions
- But what is the union's incentive to agree?
- What incentives can you offer/afford?
- Are your industrial relations with unions conducive to getting agreement?
- Premium on effective flexibility clauses in contracts – do you have them?
- Note: employers are free to offer new recruits new terms and conditions – but will create two tier workforces? Are multi-tier workforces inevitable?

Union access rights under the ERB

New rights for unions for access/communication

- ERB gives unions new legal rights, under a new legal process, to request, negotiate and enforce rights to (a) access the physical workplace and (b) communicate with workers for the access purposes: subject to reasonableness
- Access purposes: For officials to meet, represent, recruit or organise workers (not just members) or to facilitate collective bargaining (but not for organising industrial action)
- Overseen and enforced by the Central Arbitration Committee (CAC)
- Note: these rights are not restricted to recognised unions – any union could seek access/communication rights (subject to rules to be developed eg about minimum level of membership)
- Will be brought in by subsequent Regulations

Union access rights under the ERB

Access principles and framework

- Union officials should be able to access a workplace or communicate with workers for any of the access purposes in any manner that does not unreasonably interfere with the employer's business
- Employer should take reasonable steps to facilitate access
- Employer can't refuse physical access just because it allows communication without access – and vice versa
- Access to be refused only where it is reasonable in all the circumstances to do so
- Regs may prescribe further terms on reasonableness (terms of an access agreement/reasons for refusal)
- The ERB sets a framework for access agreements to be reached between employer and listed trade unions
- The stated aim is not to impact existing voluntary access agreements

Union access rights under the ERB

Overview of process

- Union makes access request – in prescribed form
- Employer agrees or objects within set timeframe, which may include a negotiation period
- **If agreement reached and CAC notified jointly by employer and union, the agreement becomes enforceable**
- If no agreement, the CAC decides the request including access terms (if granted), subject to legislative provisions e.g. access principles
- Parties may complain to CAC about breach of an access agreement or 3rd party interference (eg by client of a contractor performing outsourced services)
- Outcomes include a declaration, order & financial penalty (repeated breaches)
- **Variation and revocation? - Only effective on joint notification to CAC**

Union access rights under the ERB

Implications

- Voluntary arrangements are key – statutory access arrangements appear "locked in" ie you can't change them or end them unless the TU agrees
- Recognised and non-recognised unions can request access/communication rights (subject to any restrictions in Regs)
- Threat of unrecognised/hostile unions disrupting existing IR relationships and union "turf wars"
- Unions will push for "virtual/digital" access via communication rights – eg all staff emails, page on intranet etc – expect creativity/pushing the boundaries

Trade union recognition – key points

- Vast majority of union recognition in education sector is voluntary
- "Recognition" means unions recognised for the purposes of collective bargaining – ie negotiation – over one or more of the topics listed in s178 TULRCA 1992
- Typically, recognition will include collective bargaining on terms and conditions of employment and pay - negotiations may be at local or national level
- Union has right to request information for the purposes of collective bargaining
- Union reps have right to reasonable time off for trade union duties and activities
- Union has right to appoint safety representatives
- Information and consultation via union
  - TUPE
  - Collective redundancies
  - Changes to occupational pension schemes

Trade union recognition – ERB changes

Thresholds for gaining statutory recognition will be lowered

Stage in process	Current requirement	Requirement under ERB (once brought into force by Regulations)
Application stage	Union must show CAC that: — at least 10% membership in the bargaining unit — a majority of the workers would be likely to favour recognition	Union must only show CAC that: — at least 10% membership in the bargaining unit — this could be changed to 2% to 10%
Ballot stage	Union has to obtain: — a simple majority of the workers voting in a recognition ballot — at least 40% support	Union has to obtain: — a simple majority of the workers voting in a recognition ballot

Trade union recognition – statutory recognition under ERB

Implications

- Changes make it much easier for unions to obtain statutory recognition
- Recognition can be obtained where union membership is low and potentially across wide bargaining units
- Are there parts of your workforce that are not currently covered by recognition? – eg higher grades/professorial roles in HE?
- Do you recognise unions in subsidiary companies?
- Unions may be in competition with each other to get in first with recognition requests – risk of recognition being gained by unions who would not be your first choice – should you be proactive in plugging gaps in recognition with preferred union partners?
- IR/ER problems where union is not representative of the bargaining unit?

Q&A

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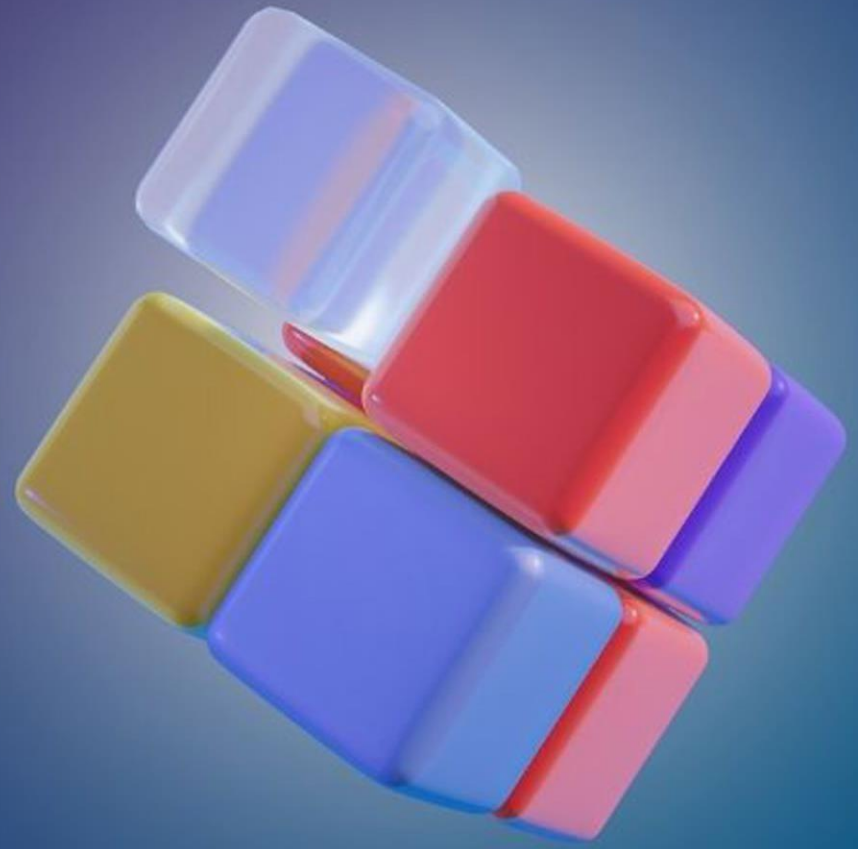

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