

White Paper Conference on Industrial Relations

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The question

Non-strike action

What - legally and practically - distinguishes a demo from a picket? How far can you push the boundaries? What are the legalities of "cyber-picketing", e.g. the *Rogers v Picturehouse Cinemas*?

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1. The *Oxford English Dictionary* defines pickets as: A person or group of people stationed outside a workplace during a strike to try to dissuade workers from entering; (in extended use) a person or group of people conducting a similar protest or demonstration outside any premises
2. Reference is made to the OED as picketing is not a defined term in law. It is a form of demonstration and thus the framework has to be right for citizens to demonstrate peacefully. This brings into play demonstrations by persons other than the workers who have an industrial dispute, such a sympathisers of the strikers: *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB), [2016] IRLR 695), Mr. Justice Warby, see below.
3. This is in the context of the protection afforded by the ECHR. In particular the right to peaceful assembly guaranteed by Article 11 of the Convention, which provides that every individual has the right of freedom of peaceful assembly and freedom of association with others including the right to form and join trade unions. Article 10 guarantees a right of freedom of expression. Subject to the restrictions which may be placed on those rights which "are necessary in a democratic society in the interests of

national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”. As noted this embraces a wider set of freedoms which may be engaged by citizens. There is an argument that freedom of assembly including the right to form and join trade unions affords the right to join an effective trade union which has the right to take collective action.

4. When addressing the legal and practical limits of how far one can push the boundaries of picketing it is necessary to consider a number of variables:
 - a. The extent of the protections afforded for the activity by TULR(C)A 1992 for the Union and those engaged in picketing, specifically S.220;
 - b. Whether the activity occasions civil or criminal liability for individuals involved beyond that protection for picketing;
 - c. Whether it occasions any liability for a trade union which has organised the picket.

S.220 TULR(C)A 1992

5. The statutory protection

"220 Peaceful picketing

(1) It is lawful for a person in contemplation or furtherance of a trade dispute to attend—

- (a) at or near his own place of work, or
- (b) if he is an official of a trade union, at or near the place of work of a member of the union whom he is accompanying and whom he represents, for the purpose only of obtaining or communicating information, or peacefully persuading any person to work or abstain from working."

(2) If a person works or normally works—

- (a) otherwise than at any one place, or
 - (b) at a place the location of which is such that attendance there for a purpose mentioned in subsection (1) is impracticable,
- his place of work for the purposes of that subsection shall be any premises of his employer from which he works or from which his work is administered.

(3) In the case of a worker not in employment where—

(a) his last employment was terminated in connection with a trade dispute, or

(b) the termination of his employment was one of the circumstances giving rise to a trade dispute,

in relation to that dispute his former place of work shall be treated for the purposes of subsection (1) as being his place of work.

(4) A person who is an official of a trade union by virtue only of having been elected or appointed to be a representative of some of the members of the union shall be regarded for the purposes of subsection (1) as representing only those members; but otherwise an official of a union shall be regarded for those purposes as representing all its members.

6. The section confers a right to be present at a specific location for the purpose of persuading, but does not make persuading of itself lawful. It is necessary to consider the protection from tortious liability in this respect under S.219.
7. It does not render it lawful to enter onto private land and thus actual place of work. Equally it does not authorise entry onto the land of a third party. Either of these acts would constitute trespass and could be restrained.
8. One is then concerned with the picket being on the Highway and the modern law, particularly as developed post the incorporation of the Convention into UK Law includes the right of reasonable and peaceful demonstration on the highway, DPP v Jones [1999] 2 AC 240, [1999] 2 All ER 257. It follows that a picket which constitutes a peaceful demonstration on the highway occasions no unlawful wrong, it does not amount to a Common Law nuisance and S.220 confers little extra in this respect. The right is any event limited by the right of the Police to prevent a breach of the Police.
9. The critical point of the protection is its relationship through the connection with S.219 in contemplation or furtherance of a trade dispute
10. S.219 providing that protection for economic torts

219 Protection from certain tort liabilities.

(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only—

(a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or

(b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.

(2) An agreement or combination by two or more persons to do or procure the doing of an act in contemplation or furtherance of a trade dispute is not actionable in tort if the act is one which if done without any such agreement or combination would not be actionable in tort.

(3) Nothing in subsections (1) and (2) prevents an act done in the course of picketing from being actionable in tort unless—

(a) it is done in the course of attendance declared lawful by section 220 (peaceful picketing), and

(b) in the case of picketing to which section 220A applies, the requirements in that section (union supervision of picketing) are complied with.

(4) Subsections (1) and (2) have effect subject to sections 222 to 225 (action excluded from protection) and to sections 226 (requirement of ballot before action by trade union) and 234A (requirement of notice to employer of industrial action); and in those sections “not protected” means excluded from the protection afforded by this section or, where the expression is used with reference to a particular person, excluded from that protection as respects that person.

11. Thus the limitation appears to be that if one engages in a peaceful picket, which must mean in the context to be a demonstration seeking to persuade people to break contracts in a manner which would be tortious, but which does not enjoy the protection of S.220 a person could be sued and subject to an injunction to restrain the action. A union could also be the subject of an injunction on the basis that it had authorised or endorsed the action through an official of the union, s.20, and it has not repudiated the action under S.21.

12. The activity must be peaceful and not involve physical intimidation or obstruction, but it could be noisy, *Gate Gourmet London Ltd v Transport and General Workers' Union* [2005] IRLR 881. The key issue is not really the use of the undefined word picket. The key point is that a demonstration which involves unlawful activity will be actionable whether related to a trade dispute or not if outside the scope of S.220.
13. There is additionally the limitation under S.224 on secondary action
14. Secondary action.
- (1) An act is not protected if one of the facts relied on for the purpose of establishing liability is that there has been secondary action **which is not lawful picketing.**
- (2) There is secondary action in relation to a trade dispute when, and only when, a person—
- (a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or
- (b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance, and the employer under the contract of employment is not the employer party to the dispute.
- (3) Lawful picketing means acts done in the course of such attendance as is declared lawful by section 220 (peaceful picketing)—**
- (a) by a worker employed (or, in the case of a worker not in employment, last employed) by the employer party to the dispute, or**
- (b) by a trade union official whose attendance is lawful by virtue of subsection (1)(b) of that section.**
- (4) For the purposes of this section an employer shall not be treated as party to a dispute between another employer and workers of that employer; and where more than one employer is in dispute with his workers, the dispute between each employer and his workers shall be treated as a separate dispute. In this subsection “worker” has the same meaning as in section 244 (meaning of “trade dispute”).
- (5) An act in contemplation or furtherance of a trade dispute which is primary action in relation to that dispute may not be relied on as secondary action in relation to another trade dispute.

Primary action means such action as is mentioned in paragraph (a) or (b) of subsection (2) where the employer under the contract of employment is the employer party to the dispute.

(6) In this section “contract of employment” includes any contract under which one person personally does work or performs services for another, and related expressions shall be construed accordingly.

15. There is now the further limitation on the protection offered by S.220 introduced by the Trade Union Act 2016. 220A(1) Section 220 does not make lawful any picketing that a trade union organises, or encourages its members to take part in, unless the requirements in subsections (2) to (8) are complied with.

16. Section 220A provides that the union must appointed a person to supervise the picketing (s 220A(2). The supervisor must be an official or other member of the union who is familiar with the provisions of the Code of Practice that deals with picketing (s 220A(3)). The section contains requirements that:

- a. the union must take reasonable steps to tell the police the supervisor’s name, where the picketing will take place and how to contact the supervisor (s 220A(4)).
- b. The supervisor must have been provided with a letter that states the picketing is approved by the union (s 220A(5)).
- c. The picketing supervisor must show the letter to an individual who is, or who is acting on behalf of, the employer as soon as reasonably after a request is made (s 220A(6)).
- d. Whilst picketing is taking place, the supervisor must be present where it is taking place or readily contactable by the union and the police and able to attend at short notice (s 22A(7)).
- e. The supervisor must wear something that readily identifies the picket supervisor as such (s 220A(8)).

17. The Code of Practice on Picketing was revised in March 2017. It notes at paragraph 60 that “the picket supervisor or the organiser (in the case of an unofficial picket) should maintain close contact with the police. Advance consultation with the police is always in the best interests of all concerned. In particular the picket supervisor or organiser and the pickets should seek directions from the police on the number of people who should be present on the picket line at any one time and on where they should stand in order to avoid obstructing the highway.” It should be noted that breach of the Code of Practice on Picketing does not of itself occasion actionable wrong.
18. Equally the provision in the Code that the number of pickets at any entrance or exit to the workplace should not exceed six does not impose any limit. The issue will be whether the numbers engaged are such that give rise to intimidation. These were factors considered by the Court in *Gate Gourmet London Ltd v Transport and General Workers' Union* [2005] IRLR 881 when considering whether to grant interim relief to control the activities of a picket.
19. As noted the activities may constitute an unlawful demonstration extending beyond a lawful picket. Thus Mr Justice Warby granted interim injunctive relief in the case of *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB), [2016] IRLR 695) at para 45

“A worker may demonstrate rather than picket. But the worker will have no statutory immunity if they do so. And not all protest or demonstration is lawful. Again, the Code provides some useful guidance. The creation of public disorder, putting people in fear, or harassment: all of these are unlawful means of protesting or demonstrating, whatever the legitimacy of the cause. In the course of argument Mr Powell [Counsel for the Union] was constrained to accept that if, in order to put pressure on the claimant to concede their demands, the union and Mr Elia were to whip up large numbers of third parties to attend outside Wood St, with the aim of physically preventing people getting to work there, or so harassing or intimidating them as to scare them away, they might be liable to be sued by the claimants unlawful means conspiracy. The

fact that the claimants may not have the proprietary or possessory rights necessary to ground an action in trespass, or nuisance, would be no obstacle.”

20. The Court concluded that there was evidence been placed before the Court upon which it could conclude that the Claimant would succeed at trial in showing a risk, justifying an injunction, that unless restrained the defendants would cause a protest or demonstration which was unlawful. Thus an interim order was granted which imposed a geographical restriction or “exclusion” zone for protest, defined by reference to streets around Wood St [the site of the dispute] and a map. Mr Justice Warby concluded that it was possible to frame an order of this kind which sets clear boundaries, without destroying the essence of the right to protest, which does not depend on location, and without interfering disproportionately with Article 10 and 11 rights. Protesters would have to respect a limit of ten metres from any Wood St entrance or exit. The order then sought to make clear that the exclusion would not prevent any present or former member of the Wood St cleaning staff or any union representative from attending at a Wood St entrance or exit for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working. Numbers would be limited to six at any one entrance or exit. Thus lawful “picketing” was preserved.

Lawful Demonstration

21. Conversely if the “picket” is a lawful demonstration, where ever it occurs, then the protection of S.220 is neither necessary nor engaged. Thus a demonstration as part of a leverage campaign that seeks persuade customers to make an elective choice not purchase the employer’s goods are perfectly lawful, as long as they remain within the constraints of a lawful demonstration.

Wider Restraints on Activity

22. This is a very broad topic beyond the specific scope of ‘picketing’ within S.220. This is concerned with the general civil and criminal law, a detailed consideration of this topic see Chapter 7 of The Law of Industrial Action and Trade Union Recognition (3rd

Ed 2019), OUP. I do not propose to focus on the criminal aspects of possible conduct, although the Act does create specific criminal offences, S.240 and 241.

23. There is the possibility that a demonstration (or a picket) constitute a trespass to the highway. However in broad terms on the basis of the Common Law and cases on the impact of ECHR the right to use the high includes not only a right to pass and repass, the mobile demonstration, but also to conduct a static demonstration.
24. Unreasonable use of the highway may amount to a private nuisance, that could be actionable by the occupiers of premises. This could be occasioned by unreasonable interference with the owner of a property's access to their property or that of their invitees. Peaceful picketing does not amount to the private nuisance, per *Ward Lock & Co Ltd v Operative Printers' Assistants' Society (1906) 22 TLR 327, CA*. The manner of the conduct of the picket, as any demonstration, may be so noisy, violent or intimidating so as to give rise to a private nuisance.
25. Equally a protest which cause substantial inconvenience or discomfort to the public at large constitutes a public nuisance, which is a criminal offence, but a there is a potential tortious claim for a person that suffers particular damage over and above that suffered by the general public.
26. There is the possibility of civil or criminal liability under the Protection from Harassment Act 1997 but this is a protection which extends to individuals and not corporate entities, although an employer's staff might potentially be harassed in a way that amounts to a criminal or civil wrong under the Act.

Cyber Picketing

27. The focus of the talk has been on physical activity but in the digital age activity may take a different form. Two decisions of the Employment Tribunal focus on this in connection with an industrial dispute between BECTU and Picturehouse Cinemas Ltd in connection with the payment of the London Living Wage, *Cowan and others v*

Picturehouse Cinemas Ltd Case No 2301537/2017 and Rogers v Picturehouse Cinemas Ltd Case No 2303478/2017. The latter case receiving more attention than the first. Both cases were concerned with claims for automatically unfair dismissal pursuant to S.152 of TULR(C)A 1992 and detriment contrary to S.146 for taking part in the “activities of an independent trade union”.

28. The central factual issue concerned industrial action which BECTU was taking and the possible implementation of a plan to cyber picket. In the particular case this involved individuals making block bookings of cinema tickers, which they didn't intend to purchase, thereby making them unavailable for other purchasers for up to an hour. In the event this was not a practise authorised or condoned by BECTU.
29. The individual cases concerned an email sent by Ms Rogers following a union meeting which referred to an intention to encourage this form of cyber picketing. The Respondent became aware of the threat of the activity and through solicitors addressed BECTU on he point who as a consequence instructed members not to take part in the activity.
30. Ms Rogers was suspended and subsequently dismissed. Her claims were based upon her assertion that her attendance at the meeting and the sending of the email were activities of the trade union.
31. It is interesting to note that the Tribunal in the Rogers case said as follows
“45(d) The Respondent’s case is that the email contained evidence that the Claimant intended to do something that was potentially damaging to its business and encourage others to do so. The method proposed by the Claimant was novel and not an activity that could be described as traditional trade union activity. The Tribunal put questions about this to the Respondent’s witnesses and during its deliberations discussed at length whether the method proposed was qualitatively different in its effect on the Respondent of traditional forms of trade union activity such as strikes, pickets and boycotts. The Claimant was suggesting only that the action took place on strike days. It would have inhibited

tickets sales on those days, but no more so in our view than the closing of a booking office because the cinema premises were closed because of a strike. It might be said that the activity was a response to the technological advances in the way that tickets are sold.”

32. Before the Tribunal it appears to have been accepted by the parties that the cyber picketing would have been unlawful. There appears to have been no analysis of what the illegality would have been. Indeed the Tribunal go on to note:

“..Respondent sought to persuade us that the proposal activity would have amounted to an unlawful means conspiracy. Ultimately we took the view that we did not need to make a definitive finding as to whether ‘cyber-picketing’ could constitute a legitimate form of trade union activity or was an illegitimate activity that amounted to unlawful means conspiracy or some other tortious act, although we saw the force of the Claimant’s suggestion that it was hard to distinguish its effect from forms of activity that are legitimate. What seemed to us important was the fact that the Claimant did not engage in cyber-picketing – she merely suggested it in an email summarising the discussion at a trade union meeting and then, having been told by the union that it was potentially unlawful and not condoned, she took no further steps to make it happen”

33. The Tribunal also did not find it necessary to consider whether the conduct fell within the scope of S.219.

34. From the perspective of protection afforded by S.152 the Tribunal found that Ms Rogers activities remained within the scope of the activities of an independent trade union and did not fall outside the scope of that protection so that they could be a distinct reason for the dismissal for acts which were 'wholly unreasonable, extraneous or malicious' per *Morris v Metrolink* [2018] IRLR 853. Ms Rogers succeeded in her claim that her dismissal was automatically unfair.

35. In the earlier case of *Cowan and others* a majority tribunal (2 to 1) appear to have come to a different conclusion, as to whether the activities in connection with the sending of the email constituted trade union activities, concluding that they were not.

The earlier Cowan decision does not appear to have been referred to in the Rogers decision.

36. For present purposes the focus needs to be on the cyber picketing if it had actually taken place. This raises the following questions:

- a. What exactly is the unlawful conduct. This is never fully explained. There does not appear to be any breach of contract or inducement to do so;
- b. What is the tort statutory or otherwise?
- c. If it is unlawful is it within the scope of S.219 (it does not appear to engaged any aspect of infusing a contract of employment to be within the S.220 exception)
- d. If it is unlawful then the action could be restrained, conspiracy to occasion could be actionable as an unlawful means conspiracy. The Union could have been vicariously liable for the actions if it had condoned or been party to the agreement to carry out such an unlawful conspiracy.

37. Thus when it comes to considering whether activities such as “cyber picketing” which are outside the narrow constraints of the protection afforded to traditional picketing the issue becomes identifying specifically whether unlawful conduct involved. If such unlawful conduct occurs either it is susceptible to being restrained or liability will attach to the conduct. Thus “cyber picketing” is perhaps a misnomer, it is not a picket in the sense contemplated by the legislation. The question is whether the activity contemplated is a lawful one, as with other leverage campaigns.

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