



Make Work Pay

Unite response to the DBT consultation on Protection from detriments for taking industrial action

Introduction

This response is made by Unite the Union. Unite is the UK's strongest trade union, representing over one million members across all sectors of the economy including manufacturing, financial services, transport, food and agriculture, construction, energy and utilities, information technology, service industries, hospitality, health, local government and the not-for-profit sector.

Unite warmly welcomes the introduction of new rights protecting workers from detriment for taking lawful industrial action, following the decision of the Supreme Court in the *Mercer* case¹. For too long in the UK workers have been vulnerable to victimisation by employers for exercising their fundamental human right to withdraw their labour in order to defend and improve their jobs, pay and conditions. The new rights introduced by the Employment Rights Act 2025 will help to ensure that workers are not disadvantaged for taking industrial action. It is important these protections are not limited to those categorised as employees but also extend to workers. We also strongly support the government's proposal to ensure all forms of detriment should be covered.

However, Unite is concerned that the new rights set out in section 246A of TULRCA 1992:

- Apply a "sole or main" test which will create evidential challenges. Unscrupulous employers will attempt to conceal the primary motive formulating other justifications for detriments to workers.
- Do not explicitly state that the protection afforded applies not only where an individual takes industrial action but also where they are preparing to take

¹ *Secretary of State for Business and Trade v Mercer* (2024) ICR 814

industrial action, for example, by encouraging fellow workers to vote for industrial action.

- May not prevent employers from making disproportionate deductions from pay, where an individual takes action short of strike action, or participates in industrial action for part of a day. It is very common for employers to refuse to accept part performance by an employee and to deduct a full day's pay.

Section 2 – Options for Secondary Legislation

Option A - Prohibit all detriments for taking industrial action

Question 1:

Do you support prohibiting all detriments for taking industrial action?

- **YES**

Unite strongly supports the government's proposal to prohibit all detriments for taking industrial action (Option A).

Victimising workers for taking or proposing to participate in lawful industrial action to defend or improve their jobs, pay and conditions, is pernicious and should not be tolerated in a modern economy. Exercising the right to strike is a fundamental democratic right which must be safeguarded.

Yet employers frequently implement or threaten action short of dismissal against workers before, during and after industrial action. For example:

- During the Birmingham bins disputes, bin men working through agencies have been threatened with blacklisting – i.e. the refusal of future work, if they participated in industrial action.
- It is not uncommon for employers to threaten or to cut workers' pay and benefits if they take industrial action, for example removing benefits in kind, holiday entitlement, rest breaks, or pay premia for unsocial hours. Union activists are often not given overtime even though other workers are.
- Union activists can be overlooked for promotion opportunities.
- Employers frequently make disproportionate deductions from pay or refuse to accept part performance where workers take action short of a strike or withdraw labour for part of a day. It is not uncommon for employers to deduct a full day's pay in such cases.
- Union activists can be disciplined for activities on picket lines.

Such practices can cause significant harm, including financial deprivation, to workers and their families and communities.

There are also legal reasons for supporting the government's proposal to prohibit all detriments for taking industrial action (Option A).

The European Court of Human Rights (ECtHR) has repeatedly concluded that the right to strike underpins the right for a trade union to represent their members and to engage in collective bargaining. As the Supreme Court acknowledged in the *Mercer* case², the “*core right to advocate for the interests of trade union members is devoid of substance if it not backed by the right to take strike action.*”³

An established line of Strasbourg case law, (*Karaçay v Turkey*⁴, reaffirmed in *Güler v Turkey*,⁵) finds that even minor sanctions that discourage or punish trade union members for taking part in lawful strike action amount to a breach of Article 11 of the European Convention on Human Rights. The adoption of Option A would reduce the risk of incompatibility with Article 11 rights.

International Labour Organisation (ILO) Conventions 87 and 98 and the European Social Charter (1961), all of which the UK government has ratified, require protection against any harmful consequence or prejudice to a worker by reason of trade union activities.

The ILO Committee on Freedom of Association had stated that “*no one should be penalized for carrying out or attempting to carry out a legitimate strike*” (with the exception of proportionate wage deductions corresponding to the strike period).⁶

Making it unlawful for employers to subject workers to detriment for preparing for and taking industrial action would therefore be consistent with the UK's international obligations.

Unite is firmly opposed to Option B. There is currently no precedent in UK employment law for limiting the definition of detriment to a prescribed list. The definition of detriment in section 146 of TULRCA 1992 is open-ended and not restricted. It is left to the courts and tribunals to determine what amounts to a detriment. The same approach should apply to the new protections.

² *Secretary of State for Business and Trade v Mercer* (2024) ICR 814

³ *Ibid*, para 70.

⁴ (App. No. 6615/03, 27 March 2007).

⁵ [2018] IRLR 880.

⁶ ILO (2018). *Freedom of association: compilation of decisions of the Committee on Freedom of Association*, 6th ed. paras 943 and 953.

Question 2:

What benefits might come from prohibiting all detriments for taking industrial action?

Prohibiting all forms of detriment for taking or preparing to take industrial action will have significant benefits for workers, industrial relations and for the UK's compliance with international human rights standards.

Protecting workers and their families and promoting good employment practices

A comprehensive prohibition on detriment would protect workers and their families from the harmful effects of employer victimisation.

It is not uncommon for employers to threaten workers with blacklisting, depriving them of future work and income if they plan to take industrial action. This can result in workers and their families being unable to pay their bills or even to lose their homes. Union activists are often overlooked for promotion, meaning they cannot fulfil their working potential and lose out on pay rises. It is not uncommon for employers to threaten or to cut workers' pay and benefits if they take industrial action, for example removing benefits in kind, holiday entitlement, rest breaks, or pay premia for unsocial hours. It is not uncommon for union activists to be singled out and denied overtime before or after a strike.

Such tactics can harm staff morale and motivation, often leading to staff looking for new work. It can damage employer's ability to retain and recruit staff.

A comprehensive prohibition on detriment would deter employers from adopting such practices and promote better employment practices.

Promoting good industrial relations

Employers' victimisation of workers before, during and after industrial action can undermine good industrial relations, leading to embittered and protracted disputes.

Too often employers resort to threatening and mistreating workers rather than returning to the bargaining table to negotiate a reasonable settlement.

Prohibiting employers from victimising workers should improve industrial relations and lead to the earlier resolution of disputes.

Compliance with Mercer and Article 11

In the *Mercer* case, the Supreme Court concluded that UK law is incompatible with Article 11 ECHR because it currently provides no protection against detriment short of dismissal for taking part in lawful industrial action.

Option A would be consistent with the Supreme Court's reasoning in the *Mercer* case and ensure that the government is complying fully with the Court's conclusions. It would also provide legal certainty and would reduce the risk of litigation over whether employer actions fall within a statutory list of detriments.

Consistency in treatment of private and public sector workers

Preventing all forms of detriment would help ensure that workers who take industrial action enjoy consistent and equal protections in the private and public sectors. Public authorities are bound by section 6 of the Human Rights Act 1998 to act compatibly with the ECHR, thereby limiting their ability to subject workers to detriment. For private employers, they do not hold the same obligation.

Future proofing protections

A general prohibition would prevent employers from trying to circumvent specified protections within the list and devising new or unforeseen forms of detriments to avoid the new legislation.

Option A would create a flexible, durable framework that can adapt to changes in employment practices, industrial relations, and employer behaviour. It would avoid the need for regular legislative updates and provide legal certainty. It would also create a level playing field for all employers, in the public and private sectors.

Keeping pace with international practice

Option A is consistent with the approach adopted in other European countries, such as France, Germany, Italy, Spain and Sweden, which typically prohibit all acts that harm or discriminate against workers.⁷

Question 3:

What concerns or challenges do you see from prohibiting all detriments for taking industrial action?

For the reasons outlined above, Unite takes the view that prohibiting all detriments for taking industrial action is the right approach and will protect workers, promote good practice and support good industrial relations.

Unite would however have serious concerns if the government adopted Option B, which would set a negative precedent. There is currently no other example in UK employment law where a limited definition of detriment is applied. The definition of detriment in section 146 of TULRCA 1992 is open-ended and not prescribed. It is left to the courts

⁷ Katsaroumpas I. *et al.* (2025). *Tackling hidden retaliation for strike participation. Examples of legal protection from detriments short of dismissal.* ETUI. pp.3-5.

and tribunals to determine what amounts to a detriment responding to changes in employment practices and employer tactics. A prescribed list of detriments would soon become outdated, with employers being incentivised to devise new practices which circumvent the protections. Option B would also lead to satellite litigation on whether specific actions amount to a detriment. The legislation would need to be frequently amended to reflect changes in employer practice.

Unite is also concerned by the framing of the protections in section 246A of TULRCA 1992. Firstly, the section applies a “sole or main” test. This test will create evidential challenges. Unscrupulous employers will attempt to conceal the primary motive formulating other justifications for detriments to workers.

It is worrying that the consultation document suggests that disciplinary measures against a worker for bringing the company into disrepute may not amount to a detriment. This justification for anti-union behaviour is common and has a serious chilling effect on workers being vocal about poor practice by their employer. In the *Mercer* case, the employer alleged that Fiona Mercer had spoken to the press during the industrial action in a way which conveyed confidential information and was considered likely to bring them into disrepute.⁸ This was used as part of the justification for her original suspension which triggered the legal challenge. The legislation should be amended removing the sole and main test.

Secondly, we are concerned the new rights will not prevent employers from making disproportionate deductions from pay. It is common practice for employers to make a substantial and disproportionate deductions from workers’ pay where an individual takes action short of strike action. Some employers will refuse to accept part performance by an employee and deduct a full day’s pay.

The legislation should be amended to confirm that employers are only permitted to make proportionate deductions from pay.

Question 4:

How might prohibiting all detriments for taking industrial action influence employers’ ability to manage workplace disputes and industrial action?

- **Positive impact**

Unite agrees with the foreword to the consultation document that states that protecting workers from detriment supports “*industrial relations conducted with integrity, fairness and mutual respect.*”⁹

⁸ *Mercer* [2024] at note 1. para. 26.

⁹ UK Government (2026). ‘*Make Work Pay: Protection from detriments for taking industrial action*’, p.2.

If employers impose detriments on workers, this is likely to create worker mistrust and entrenched disputes. It will harden positions on both sides and can prolong industrial action. Option A should encourage employers to return to the negotiating table and to resolve disputes earlier, rather than seeking to coerce or victimise workers and spending time seeking to circumvent the legislation.

Question 5:

Would this option have an impact on industrial relations?

- **Positive impact**

The victimisation of workers before, during and after industrial action can undermine industrial relations, leading to embittered and protracted disputes.

Too often employers resort to threatening tactics rather than focusing on resolving disputes and negotiating a reasonable settlement.

Avoiding the mistreatment of workers can help build trust and confidence with employees and will lead to enhanced staff morale and motivation. It can also assist employers to retain and recruit new staff.

Option B - Create a list of prohibited detriments

Question 6:

Do you support creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

- **NO**

Unite is firmly opposed to this option for the reasons set out in our responses to Questions 1 to 5 above. In summary:

- Option B would mean it would be lawful for employers to continue to victimise workers, albeit in a more limited range of circumstances.
- Option B would create a worrying precedent. There are currently no other examples in UK employment law where the definition of detriment is restricted to a prescribed list. The definition of detriment in section 146 of TULRCA 1992 is open-ended and not restricted.
- A prescribed list of detriments would soon become outdated, with employers being incentivised to devise new practices which circumvent the protections.
- Option B would also generate satellite litigation on whether specific actions amount to a detriment.

- The legislation would need to be frequently amended to reflect changes in employer practice.
- Option B could lead to more legal challenges for non-compliance with Article 11.

Question 7:

What benefits might come from creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

Unite is strongly opposed to the creation of a prescribed list of detriments for the reasons outlined in our responses to Questions 1 to 6 above.

Question 8:

What concerns or challenges do you see from creating a specific list of detriments that employers would be prohibited from imposing on workers for taking industrial action?

Unite is strongly opposed to the creation of a prescribed list of detriments for the reasons outlined in our responses to Questions 1 to 6 above.

Question 9:

Which types of detriments do you believe should be included in the prohibited list?

Unite is strongly opposed to the creation of a prescribed list of detriments for the reasons outlined in our responses to Questions 1 to 6 above.

We support the adoption of Option A.

Question 10:

Which types of detriments do you believe should not be included in the prohibited list?

Unite is strongly opposed to the creation of a prescribed list of detriments for the reasons outlined in our responses to Questions 1 to 6 above.

We support the adoption of Option A.

Question 11:

Would this option have an impact on workers' willingness to participate in industrial action?

- Negative impact

Option B could have a chilling effect on workers' willingness to participate in industrial action. Workers would be fearful that they could still be subjected to detriments without any legal protection.

Detriments such as pay cuts, loss of bonuses and missing out on promotion, could lead to genuine harm for workers, including the loss of income.

Question 12:

Would this option impact employers' ability to manage disputes and industrial action?

- **Negative impact**

If employers continue to impose detriments on workers, it is likely to create worker mistrust and entrench disputes. It will harden positions on both sides and can prolong industrial action.

Workers who are mistreated are more likely to look to leave their job, and employers will face difficulties retaining or recruiting staff.

The mistreatment of workers can also damage company reputation.

Section 3 – Awards for failing to comply With Acas Code of Practice

Question 13:

Should claims made under Section 236A of TULRCA be added to Schedule A2, meaning that an employment tribunal can adjust an award by up to 25% where the employer or employee unreasonably failed to follow the Acas Code of Practice on Disciplinary and Grievance Procedures?

YES

Claims made under Section 236A of TULRCA should be added to Schedule A2.

Victimising workers for taking or proposing to participate in lawful industrial action to defend or improve their jobs, pay and conditions, is pernicious and can cause harm to workers and their families.

Exercising the right to strike is a fundamental democratic right. Victimising a worker for striking is a serious breach of human rights.

It is therefore appropriate and proportionate for employers to be required to pay an uplift in compensation where they breach good employment practice, as defined in an Acas Code of Practice.

Question 14:

Is there anything else on this subject that the government should consider?

The government should consider additional measures to strengthen the proposed new rights.

Section 246A of TULRCA 1992 should be amended to:

- Remove the “sole or main” test. This test will create evidential challenges and allow unscrupulous employers to conceal the primary motive formulating other justifications for detriments to workers. It will weaken the new right.
- Clarify that workers will be protected from detriment not only where they take industrial action but also where they are preparing to take industrial action, for example by encouraging fellow workers to vote for industrial action.
- Confirm that employers can only make proportionate deductions from pay where a worker takes industrial action, i.e. basic rates of pay for the period of time when work is not undertaken. It should be unlawful for employers to deduct bonuses or refuse workers overtime pay when taking industrial action. It should also be unlawful for employers to refuse to accept part-performance and not to pay workers for work undertaken.