# Employment Law Brief

*with*

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One of the most controversial employment law reforms introduced in recent years was the Trade Union Act 2016. Among other measures, it required industrial action ballots to achieve a turnout of at least 50 per cent in order to be valid. In addition, where the industrial action concerned important public services at least 40 per cent of those entitled to vote would need to vote yes for industrial action to be lawful.

The Government's rationale for the measure was the worry that workers were being pressured into taking part in industrial action that did not have a proper democratic mandate. Turnout for ballots was often low with the result that a small number of workers voting in support of action could sway the result.

That all changed once the new law was introduced. Knowing that a large turnout is required, unions now campaign hard to encourage their members to vote. If that was the intention behind the Act then the recent strike ballot among rail workers can therefore be taken as a sign of success. The turnout was 71% with 89% voting in favour of strike action. That means that strike action was supported by 63% of those entitled to vote – a mandate that any Government can only dream of.

Rather than be pleased that the Trade Union Act has achieved its aims, however, the Government seems to be unhappy about the outcome and is threatening to introduce legislation limiting the scope for industrial action in essential public services. The Transport Secretary Grant Schapps has indicated that a pledge in the 2019 Conservative manifesto to require a minimum level of service to be maintained during transport strikes may still be implemented.

Since no employment bill was announced in the Queen's Speech it seems unlikely that anything will happen soon. What is more, a measure like that would be highly controversial and would be challenged in the European Court of Human Rights as an undue interference with the right to strike. International law does allow for some restrictions on industrial action in essential public services, but this is strictly limited to cases where a strike could threaten the health or safety of the population. Preventing inconvenience to commuters is not going to meet that threshold.

Meanwhile the Education Secretary came up with an interesting proposal for undermining the power of trade unions among teachers. The Telegraph has

reported[1] that Nadhim Zahawi is considering proposals to widen the right of teachers to be accompanied at disciplinary and grievance hearings to cover not just fellow workers and trade union officials but also 'external lawyers or a representative of a body other than a union'. A Government spokesperson told the Telegraph that the rationale for the move was that many teachers joining a trade union 'simply to protect themselves in case they face allegations of abuse'.

In fact the Government's ideas do not seem to run so far. The written parliamentary answer to which the Telegraph refers actually makes no reference to lawyers - merely to other professional associations. It goes so far as to name one – Edapt – which is a subscription-

[https://www.telegraph.co.uk/politics/2022/05/21/tories-poised-torpedo-unions-threat-bring-country-standstill/](https://www.telegraph.co.uk/politics/2022/05/21/tories-poised-torpedo-unions-threat-bring-country-standstill/)

based advice service for teachers that aims to offer some of the services of a trade union – without the wider employment relations role. But since Edapt is not a trade union, teachers are not currently entitled to be accompanied by its representatives in grievance and disciplinary hearings.

Would it be a good idea to extend the right to be accompanied beyond the current provision for trade union officials and fellow employees? Absolutely not. It would be a serious mistake to let the Government's issue with trade unions obscure the important role of a trade union representative in disciplinary and grievance hearings. Yes, they are there to ensure that the interests of the individual are protected. But they also have a relationship with the employer and are able to appreciate the wider context. I have encountered many trade union representatives in hearings over the years and in the overwhelming majority of cases they help the process run smoothly. They can explain what is going on to the employee concerned and help them appreciate the wider context. If something is wrong with the process, they can point that out at an early stage – allowing the employer to address concerns promptly rather than argue about them at a subsequent Tribunal. Their ongoing relationship with the employer helps them to do this and helps the employer take their concerns seriously.

I am sure that Edapt is a fine organisation, but any legislation extending the right to be accompanied will inevitably create a market for less professional or less responsible representatives to get in on the act. Paid representatives with no continuing relationship with the employer or wider concern for the workforce would not be a welcome addition to the process. Even worse, it is difficult to see how you could prevent law firms from setting up representative services of their own. If employees have legal representation in disciplinary and grievance hearings, then

employers will want to bring their lawyers into the room too. Surely no employer would want to go down that road?

The Government should be careful not to fall into the trap of thinking that any change that undermines trade unions will help employers. Unions have a legitimate role to play in the relationship between employers and employees – particularly in the public sector. As the experience of the Trade Union Act shows, attempts to legislate in this area can have unintended consequences. The minimum balloting thresholds have not prevented industrial action but merely encouraged higher turnouts, giving strikes greater legitimacy. Widening the right to be accompanied would result in unwarranted outside interference in procedures that should be handled internally. If and when the Government does eventually get around to bringing forward its proposals for employment law reform it would be wise to stick to its manifesto pledges on flexible working, carers leave and protecting new parents from redundancy. The right to be accompanied is not broken and does not need fixing.