



Trade Union and Labour Relations (Consolidation) Act 1992

1992 CHAPTER 52

PART V

INDUSTRIAL ACTION

Loss of unfair dismissal protection

[^{F1}238A Participation in official industrial action.

- (1) For the purposes of this section an employee takes protected industrial action if he commits an act which, or a series of acts each of which, he is induced to commit by an act which by virtue of section 219 is not actionable in tort.
- (2) An employee who is dismissed shall be regarded for the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) as unfairly dismissed if—
 - (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee took protected industrial action, ^{F2}...
[where the protected industrial action was a strike relating to the provision of ^{F3}(aa) a relevant service, the employee—
 - (i) was not an identified worker in relation to that strike, or
 - (ii) was an identified worker in relation to that strike and did not take part in the strike except to an extent that complied with the work notice, and]
 - (b) subsection (3), (4) or (5) applies to the dismissal.
- (3) This subsection applies to a dismissal if [^{F4}the date of the dismissal is][^{F5}within the protected period].
- (4) This subsection applies to a dismissal if—
 - (a) [^{F6}the date of the dismissal is] after the end of that period, and

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- (b) the employee had stopped taking protected industrial action before the end of that period.
- (5) This subsection applies to a dismissal if—
- (a) [^{F7}the date of the dismissal is] after the end of that period,
 - (b) the employee had not stopped taking protected industrial action before the end of that period, and
 - (c) the employer had not taken such procedural steps as would have been reasonable for the purposes of resolving the dispute to which the protected industrial action relates.
- (6) In determining whether an employer has taken those steps regard shall be had, in particular, to—
- (a) whether the employer or a union had complied with procedures established by any applicable collective or other agreement;
 - (b) whether the employer or a union offered or agreed to commence or resume negotiations after the start of the protected industrial action;
 - (c) whether the employer or a union unreasonably refused, after the start of the protected industrial action, a request that conciliation services be used;
 - (d) whether the employer or a union unreasonably refused, after the start of the protected industrial action, a request that mediation services be used in relation to procedures to be adopted for the purposes of resolving the dispute.
 - ^{F8}(e) [where there was agreement to use either of the services mentioned in paragraphs (c) and (d), the matters specified in section 238B.]
- (7) In determining whether an employer has taken those steps no regard shall be had to the merits of the dispute.
- [For the purposes of this section “the protected period”, in relation to the dismissal of
- ^{F9}(7A) an employee, is the sum of the basic period and any extension period in relation to that employee.
- (7B) The basic period is twelve weeks beginning with the first day of protected industrial action.
- (7C) An extension period in relation to an employee is a period equal to the number of days falling on or after the first day of protected industrial action (but before the protected period ends) during the whole or any part of which the employee is locked out by his employer.
- (7D) In subsections (7B) and (7C), the “first day of protected industrial action” means the day on which the employee starts to take protected industrial action (even if on that day he is locked out by his employer).]
- (8) For the purposes of this section no account shall be taken of the repudiation of any act by a trade union as mentioned in section 21 in relation to anything which occurs before the end of the next working day (within the meaning of section 237) after the day on which the repudiation takes place.
- ^{F10}(9) In this section—
- “date of dismissal” has the meaning given by section 238(5);
 - “identified worker”, in relation to a strike relating to the provision of a relevant service, means a person who—

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- (a) is identified in a work notice given in accordance with section 234C relating to the strike, and
 - (b) before any day on which the work notice requires the person to work, is given by the employer—
 - (i) notice in writing of the work specified in the work notice as required to be carried out by the person on that day, and
 - (ii) a statement that, under this section, the person is an identified worker in relation to the strike and must comply with the work notice;
- “strike” has the same meaning as in section 234C (see section 234G(2)).]]

Textual Amendments

- F1** S. 238A inserted (24.4.2000) by 1999 c. 26, s. 16, **Sch. 5 para. 3**; S.I. 2000/875, **art. 3**
- F2** Word in s. 238A(2)(a) omitted (20.7.2023) by virtue of Strikes (Minimum Service Levels) Act 2023 (c. 39), s. 5, **Sch. para. 8(2)(a)**
- F3** S. 238A(2)(aa) inserted (20.7.2023) by Strikes (Minimum Service Levels) Act 2023 (c. 39), s. 5, **Sch. para. 8(2)(b)**
- F4** Words in s. 238A(3) substituted (6.4.2005) by Employment Relations Act 2004 (c. 24), **ss. 27(2)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with arts. 6-21)
- F5** Words in s. 238A(3) substituted (6.4.2005) by Employment Relations Act 2004 (c. 24), **ss. 26(2)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with arts. 6-21)
- F6** Words in s. 238A(4)(a) substituted (6.4.2005) by Employment Relations Act 2004 (c. 24), **ss. 27(3)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with arts. 6-21)
- F7** Words in s. 238A(5)(a) substituted (6.4.2005) by Employment Relations Act 2004 (c. 24), **ss. 27(4)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with arts. 6-21)
- F8** S. 238A(6)(e) inserted (6.4.2005) by Employment Relations Act 2004 (c. 24), **ss. 28(1)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with arts. 6-21)
- F9** S. 238A(7A)-(7D) inserted (6.4.2005) by Employment Relations Act 2004 (c. 24), **ss. 26(3)**, 59(2)-(4); S.I. 2005/872, **art. 4**, Sch. (with arts. 6-21)
- F10** S. 238A(9) substituted (20.7.2023) by Strikes (Minimum Service Levels) Act 2023 (c. 39), s. 5, **Sch. para. 8(3)**

Changes to legislation:

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Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 212A(1)(zb) inserted by [2023 c. 46 Sch. para. 1](#)