
EUROPEAN DEVELOPMENTS

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'We Planned a Dispute by Blackberry': The Impact of Restrictions of the Use of Social Media in Industrial Action in the Light of the British Airways Dispute 2009–11

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1. INTRODUCTION

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The *Trade Union Bill 2015–16* was expected to receive royal assent in April 2016. The legislation enshrines the Conservative Government's plans to reform trade unions and 'to protect essential public services against strikes'.¹ Central features are the proposed changes to thresholds for industrial action in strike ballots, to the notice period for strike action, to the time limit in which industrial action can be taken, to union check-off arrangements and to the operation of union political funds. In parallel with the introduction of the Bill, the Government published an eight-week public consultation which asked whether statutory measures should be taken to tackle the intimidation of non-striking workers during industrial disputes.² In the Consultation, the Government stated its intention to reform and modernise the rules relating to picketing, including the possible extension of the Code on picketing to protests linked to industrial action which may encompass the use of social media. The Consultation found little support for Government proposals and in particular the suggestion that unions give two weeks' notice of plans for picketing and protests, including the intended use of social media and this proposal was subsequently dropped. However, the government has stated that it will update the Code of Practice on Picketing to include guidance on the use of social media.³

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This paper draws on our research on the 2009–11 British Airways strikes to consider the Government's aspiration to widen the definition of industrial action to

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¹<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7295> (accessed 14 December 2015).

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²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445439/BIS-15-415-tackling-intimidation-of-non-striking-workers.pdf.

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³<https://www.gov.uk/government/consultations/tackling-intimidation-of-non-striking-workers>.

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include protests away from the workplace, particularly organised by, or involving, social media. It will demonstrate the reality of the use of social media during the industrial action at British Airways (BA), where it became another site of conflict between the union and employer, and speculate upon possible consequences of its inclusion in the Code of Practice.

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2. BACKGROUND

The Independent Review of the Law Governing Industrial Disputes,⁴ delivered by Bruce Carr QC in 2014, prepared the ground for the Government's consultation on tackling intimidation of non-striking workers. BIS commissioned the Carr Review following the dispute at Grangemouth Chemicals between INEOS and Unite the Union in October 2013 during which there was alleged use of 'inappropriate' and 'intimidatory' tactics by the union.⁵

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The Government's subsequent consultation document focused upon, what Carr had identified as, the increased use of 'leverage tactics', namely, industrial action that goes beyond the 'traditional picket'. It noted that 'any form of demonstration in relation to an industrial dispute that takes place away from the workplace, is classified as a protest regardless of its size or whether or not it is intended to encourage workers to go on strike'.⁶ The consultation accepted that the extent to which leverage is promoted by trade unions or arose locally during protests might be unclear. However, it stated that changes to the *Code of Practice on Picketing* might mean that 'the various laws which address unacceptable behaviour linked to industrial disputes could include misuse of social media in this context'.

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Despite inviting evidence of intimidatory behaviour, the Government Response to the Consultation⁷ produced no appetite for any change to the law or to police powers. Of the 177 responses, only 4 (2%) came from business organisations and overall under half (45%) of all responses reported incidents of intimidatory behaviour either while on the picket line or more generally as a result of strike action and responses included intimidation by employers. Examples of intimidatory behaviour towards non-striking workers included 'unwelcome banter' and 'verbal taunts, strained relationships, whispering campaigns, aloofness, withholding cooperation, unfriendly body language', along with e-mails to 'instruct' non-striking voters to strike.

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The Government response claimed that responses demonstrated a 'clear concern' about 'the growing use of social media as a modern tool which enables striking workers

2.39 ⁴<https://carr-review.independent.gov.uk/key-documents/carr-report/>.

⁵Ibid., p 3.

⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445439/BIS-15-415-tackling-intimidation-of-non-striking-workers.pdf, p 10.

⁷<https://www.gov.uk/government/consultations/tackling-intimidation-of-non-striking-workers>.

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to show their feelings towards their non-striking colleagues! There were 16 reports of the use of social media mainly to put pressure on non-striking workers and management, but also against trade union members and activists (examples being the posting of photos on social media with comment). Yet only 15% of respondents expressed a view that the Code should include advice on social media use during industrial disputes. Interestingly, in the light of the BA dispute, one law firm reported that their employer clients had taken disciplinary action against employees for remarks made on social media. The majority of respondents to the consultation (79%) did not support Government suggestions that unions publish plans for picketing and protest during industrial disputes including prior notification of the use of social media ('specifically Facebook, Twitter, blogs, setting up websites and what those blogs and websites will set out'⁸). The difficulties of distinguishing between social media use by unions and individual members were highlighted as well as concerns about rights to freedom of expression. 3.5

The outcome of the Consultation was amendments to the Trade Union Bill (clause 9) to clarify that the entitlement to see the letter of authorisation on a picket applies to the employer or 'his' agent and the letter of authorisation to the picketing activity does not require the picket supervisor's name. While the Government conceded that there are existing legal protections against the misuse of social media as set out in the Communication Act 2003 and the Malicious Communications Act 1998, it remains concerned about 'the prevalence of intimidation online'. The Code of Practice on Picketing will be updated 'to set out the rights and responsibilities of parties involved in, or affected by industrial disputes, including on the use of social media and protests linked to industrial disputes'. Evidence from the BA dispute bears out the key role that social media can play in industrial action, but also demonstrates the way that its use became the basis of disciplinary action by the company against union members to undermine the strike. This research allows for some speculation over how a revised Code of Practice on picketing, and wider protest, might impact on its future use. 3.10

3. SOCIAL MEDIA IN THE BA DISPUTE

Members of BASSA (part of Unite and representing British Airways cabin crew) took 21 days of strike action in response to BA's attempt to override existing collective agreements and to introduce a new contract for cabin crew on inferior terms and conditions. In-depth interviews with more than 60 BA cabin crew, who had taken part in the 2009–11 dispute, demonstrated the central role of social media, which was particularly important because cabin crew are geographically dispersed and lack a fixed workplace.⁹ One of the strikers stated graphically, 'Across the world 3.20

⁸Ibid., p 11.

⁹P. Taylor and S. Moore, 'Cabin Crew Collectivism: Labour Process and the Roots of Mobilisation in the British Airways Dispute 2009–11' (2015) 29 *Work, Employment and Society* 79–98. 3.25

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4.5 we planned a dispute by Blackberry—unbelievable—the whole thing was done by phone and our laptops'. A key element in union organisation was electronic communication, including blogs, Facebook, texting and, in particular, two online forums. The BASSA Forum was set up by the union and the Crew Forum was established independently. Social media contributed to the organisation of picketing on strike days, but also wider action in particular the union's rallies at Bedfont, the football club near Heathrow that it used as a base, and lobbies of Parliament and shareholder meetings—all are presumably covered by the revised Code of Practice.

4.10 Social media became an additional site of conflict between employer and union. Cabin crew distrust of the employer meant that many had refused to give BA their email addresses, but they readily volunteered them to BASSA, enabling it to email members on a daily basis. Although used sparingly because it was costly, texting was also effective. BASSA would message members every night before strike days to encourage participation. The Branch Secretary wrote a daily blog which the research noted was widely read by members.

4.15 The research suggests that online forums were hugely important for BASSA members, as a source of information countering BA propaganda, as a platform for debate and as a means of organising strikes. Both forums were active before the first strike ballot as members discussed the consequences of the proposals contained in BA's internal document, Operation Columbus dated September 2008, which articulated
4.20 BA's strategy to transform working arrangements through the introduction of a new 'mixed' fleet at Heathrow. However, the forums' importance was heightened during the dispute. BASSA members could not discuss the dispute at work fearing disciplinary action; they reported that managers were quick to support non-striking employees who alleged intimidation against those who had taken strike action and how
4.25 this resulted in suspensions. Yet, if they were silenced when working, strikers could release their frustrations and emotions online; continuous interaction between members reduced isolation, built confidence, fostered activism and offered emotional support. One of the Crew Forum moderators explained how 'the forum broke the fear'.

4.30 Crew Forum was started by a BASSA member in 2007 as an independent forum open to all BA cabin crew and not just BASSA members. By the time of the dispute, Crew Forum had 5,000 active registered members. It strongly supported the union, evidenced by the fact that following log-on subscribers first had to navigate a BASSA news page, and its moderators worked closely with union reps, who also posted (with sensitivity) on the site. It is unclear whether the posting or copying of BASSA messages on the independent Crew Forum would have brought it within the remit of the revised Code of Practice on Picketing, even though it was not an official union site, or
4.35 whether it will be posts by individual union members that are regulated.

4.39 The union's use of social media was an important pretext for BA when it took action against BASSA reps and activists in its strategy of 'decapitation'¹⁰; more than

¹⁰K. Ewing, *Fighting Back: Resisting Union Busting and Strike-Breaking in the BA Dispute* (London: Institute of Employment Rights, 2011).

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80 BASSA members were suspended and 13 sacked during the dispute. Of these, 13 cabin crew were suspended for alleged defamation of character following the disclosure on Facebook of a list of pilots who were prepared to be trained to cover for striking cabin crew. While both forums refused to release the names of the Facebook 13, BASSA decided to close its Forum to avoid litigation, suggesting the impact that fear of the law can play. The suspension of the Facebook 13 followed an apparent leak of posts to management. BASSA members' anxieties about employer surveillance were seemingly confirmed by the experience of one dismissed activist whose case was upheld at Employment Tribunal when the individual reported: 'As time went on everything I ever wrote on the BASSA forum was produced at some time in my disciplinary hearing'. BASSA activists reported that their email and Forum accounts had been hacked into and that their phone conversations were tapped. The illegal surveillance of individual crew members was subsequently confirmed through legal action by Unite.¹¹

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4. CONCLUSIONS

It is unclear how far revisions to the Code of Practice to cover wider protest linked to industrial action and the use of social media will inhibit the organisation of collective action. However, it appears to be an attempt to control union member's behaviour and expression. As the case of BA illustrates, social media may already be in use prior to official action and uncertainty arises over whether any Code of Practice would be restricted to formal trade union sites or could extend to the independent social media initiatives of individual union members. However, legislation on industrial action must be seen in the wider context of increased employer action against the online activities of employees, with online comments increasingly the subject of disciplinary action and legitimated by the case of the British Waterways Board v Smith,¹² where an Employment Tribunal upheld the dismissal of an employee for comments made on his Facebook page, which he claimed were 'banter' aimed at friends.

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A revised Code and this wider context could result in possible self-censorship in social media, undermining its effectiveness and removing the power of 'spontaneous' informal activity. While much may be up to the discretion of a newly empowered Certification Officer, the possible regulation of social media threatens its very essence, the spontaneity and immediacy of posts and discussion and in particular its ability to respond to employer propaganda and activity.

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Above all, the BA dispute shows how social media can become contested territory, between a union seeking to organise and to harness collective activity and an

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¹¹ *The Independent*, 27 February 2015.

¹² *The British Waterways Board, Trading as Scottish Canals v Smith* UKEATS/0004/15/SM.

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6.5 employer embarking on a strategy of ‘decapitation’ or counter-mobilisation. In this industrial conflict, it was the civil rights of individual union members that needed protection from employer suppression. Subjecting unions’ social media activity to further government scrutiny would manifestly further erode those rights. The revised Code of Practice does nothing to provide striking workers with protection and may even encourage employer incursion onto their employee’s social media and promote action against union members expressing frustration or anger in the highly charged atmosphere of an industrial dispute. As with the Trade Union Bill in its entirety, government legislation fails to address the imbalance of power integral to employment relations, or if it does so, in the words of Amnesty International, Liberty and the British Institute of Human Rights, it will ‘shift even more power from the employee to the employer’.¹³

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¹³<https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/trade-union-bill-represents-major-attack-civil-liberties-uk> (accessed 14 December 2015).