

NAHT and NUT ballots relating to key stage 2 tests.

The results of these ballots mean that in many schools head teachers and other members of schools' leadership groups in membership of NAHT and NUT may decide not to make arrangements for these tests which are due to be held in the week 10 – 13 May 2010. If this action is taken, the tests will not go ahead in schools affected by this action.

We sent an email to local authorities on 11 March 2010 drawing their attention to advice issued by LGE's Employment Relations Unit which set out the range of considerations for employers in responding to industrial action, whether that takes the form of days of strike action or refusal to undertake the full range of responsibilities set out in contracts of employment.

That advice is applicable to the current action likely to be taken by a number of teachers in respect of key stage 2 tests.

Responsibilities of local authorities and governing bodies

One of the factors that local authorities need to take into account, in respect of community schools, is the respective role of authorities and of governing bodies when it comes to responding to industrial action, including action short of a strike. Local authorities are the employers of staff in community schools but, under the School Staffing (England) Regulations 2009 or, in Wales, the Staffing of Maintained Schools (Wales) (Amendment) Regulations 2009, many key duties are with governing bodies.

The responsibility for responding to industrial action as a breach of contract has not been removed directly from authorities since they have an over-riding fiduciary responsibility. However, there are a number of legal opinions which would suggest a different view.

Looking at governing bodies' control of their delegated budgets and their responsibilities for disciplining staff, making appointments and dismissing staff leads to the conclusion that governing bodies should be responsible for responding to industrial action and we therefore offer the following advice.

Who is the dispute with and what legitimate response can governing bodies make?

Clearly, in respect of the current likely action, the NAHT and the NUT are in dispute with the government. However, any action which individuals take as a result of this dispute will result in them failing to fulfil the terms of their contracts of employment and therefore governing bodies can respond to this.

With strike action, including action short of a strike, governing bodies are entitled to withhold pay for work not done. However, the governing body who wishes to withhold pay will need to consider how much pay can be withheld in response to the "partial performance" being offered by teachers. Where an employee is not ready and willing to perform **all** duties, this is a clear breach of contract and this is what provides the employer with the entitlement to withhold pay, but crucially the employer must choose

whether or not to accept the breach and make this clear to their employees in both their words and actions. In the current situation we would advise that governing bodies should not accept the breach and should therefore inform teachers who take action that, in the governing body's view, a breach has occurred and that the intention is to deduct pay.

In this context, it will be important not to expect, or arrange for, alternative work to be undertaken by teachers in substitution for the work they would have undertaken in connection with the key stage 2 tests, because this would automatically lead to the conclusion that no breach of contract has in fact occurred.

For partial performance of duties under a work to rule or go-slow, an employer can send the employee home and withhold all pay depending on the extent/impact of partial performance on the core purpose of the job. This was established in [BT v Ticehurst](#) and [Miles v Wakefield MBC](#). These cases made it clear that the employer is entitled to assume a duty of implied faithfulness and loyalty from employees. The higher the seniority or professional impact of the job then the more right the employer has to insist that, where the inaction goes to the heart of the professionalism of the job and damages the employer's business, the employee is in breach of contract and all pay can be withheld.

In the circumstances of the current dispute, however, this may not be an appropriate response and we would advise that the more measured approach would be to withhold a proportion of pay to reflect the work that is not being undertaken.

[Wilnszynski v Tower Hamlets LBC](#) established that where there is limited industrial action (e.g. the actual task that is not being done does not go to the heart of the job in terms of responsibility or time or impact on the effectiveness of the business), the employer must not withhold all pay, it can only withhold the pay for the work not done. Any work that the employee does in substitution of the work they were supposed to do is then being done voluntarily and does not merit pay. So, if teachers involved in the current dispute say that, instead of making arrangements for the tests, they will undertake other work, this does not mean that they should be paid for this other work - the governing body is entitled to withhold pay for the fact that the tests are not being done.

There is an argument that a deduction has to reflect the employer's loss, but this clearly will not apply to local authorities and governing bodies in the same way as it would to a company engaged in commercial activity. Inconvenience to parents and pupils or the employer could, however, be regarded as a loss, since the lack of the provision of a particular service by someone taking industrial action (in this case, the lack of providing key stage 2 tests) is in itself damage to the employer and the value of that loss will always be at least equal to a proportion of the salary payable for the employee's services, as established in [Sim v Rotherham MBC](#).

Making alternative arrangements to run the tests

It is unlikely that other teachers who are not members of NAHT or NUT will be prepared to help to make arrangements to run the tests in schools where they are being boycotted. Neither is it permissible under current legislation for governing bodies to engage the services of agencies to run the tests which teachers in the school are refusing to arrange. Regulation 7 of the Conduct of Employment Agencies and Employment Business Regulations 2003 makes it unlawful for agencies to supply or introduce work seekers to replace employees who are undertaking industrial action. They are also restricted from supplying temporary labour to replace employees who are covering for employees undertaking industrial action.

Summary

Local authorities will want to advise governing bodies of:

- the need to deter any further industrial action by advising head teachers and teachers that any refusal to make arrangements in relation to the key stage 2 tests is regarded as a breach of contract;
- the consequent requirement to advise head teachers and teachers that a deduction from wages will be made;
- the potential for challenges in the courts and from auditors if no deduction is made, thus appearing to condone industrial action which is in breach of a statutory duty;
- that any inconsistency in response is likely to be seen to be strengthening the unions' case.

Voluntary aided and foundation schools

In voluntary aided schools and foundation schools, of course, the responsibility for deciding responses to industrial action lies with the governing bodies, although they may want to take into account the advice above relating to community schools.

Further information

For more information on employer responses to industrial action, visit LGE's [website](http://www.lge.gov.uk/lge/core/page.do?pageId=119717).
<http://www.lge.gov.uk/lge/core/page.do?pageId=119717>.