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***The Trade Union Act 2016:* what has its impact been so far?**

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**Introduction**

The main provisions of the *Trade Union Act 2016*, concerning new, tougher balloting thresholds, came into force on 1 March 2017. On the basis of previous experience and the first few months of operation of the Act, this paper looks at the possible scenarios that might emerge as unions and employers respond to the new regulatory environment. It begins by setting out some of the background to how the situation of 1 March 2017 was arrived at. It then looks at estimates of the expected change in behaviour with regard to strikes and industrial action. This establishes the basis for laying out twenty different scenarios as a result of the *Trade Union Act 2016*. Union responses and developments in industrial since 1 March 2017 are then examined. It concludes with a number of suggestions for how unions can best adapt to the new situation.

**Regulating strikes**

Strikes and industrial action remain one of the most contentious issues in politics and public affairs, even though the level of strike activity in the 2000s is at an historical low. Indeed, by days not worked, the figure for 2015 was the second lowest annual total since records began in 1891 (see ONS 2016). Moreover, there have never been more than 200 strikes per annum since 2001. However, the concentration of extant strike action in a small number of sectors has meant that many are of a high profile nature and have a high, immediate and widespread impact. The most obvious instances are those found in air and rail transport as well as within schools. Concerned about the perceived economic disruption of such strikes, a number of forces and groups within the business community (like the Confederation of British Industry (CBI) and Institute of Directors (IOD)) and on the right of the political spectrum (like then the London Mayor, Boris Johnson, and the Policy Exchange) raised idea of further regulation. Their proposals commonly focussed upon raising the ballot mandate thresholds needed for strikes and industrial action to attain immunity in tort. Their argument was that many strikes did not have widespread support amongst union members judged by the low turnouts in the ballot results.

The Conservative Party warmed to these ideas but did not include a proposal in its 2010 general election manifesto, saying only that: ‘We are proud of the last Conservative government’s industrial relations reforms, which helped bring about our economic revival in the 1980s, and we will always be prepared to build on them if necessary’ (Conservative Party 2010:20). Pressure was applied on the Conservative Party and Conservative-dominated coalition government but in order to maintain its working parliamentary majority with its junior partner, the Liberal Democrats, the dominant Conservative did not move on these proposals. However, when fighting the 2015 general election and seeking to form a majority government itself after the experience of the coalition, the Conservative Party did move on the matter. Thus, under the sub-heading ‘We will protect you from disruptive and undemocratic strike action’, the 2015 Conservative Party manifesto read:

*Strikes should only ever be the result of a clear, positive decision based on a ballot in which at least half the workforce has voted. This turnout threshold will be an important and fair step to rebalance the interests of employers, employees, the public and the rights of trade unions. We will, in addition, tackle the disproportionate impact of strikes in essential public services by introducing a tougher threshold in health, education, fire and transport. Industrial action in these essential services would require the support of at least 40 per cent of all those entitled to take part in strike ballots – as well as a majority of those who actually turn out to vote. We will also ... ensure strikes cannot be called on the basis of ballots conducted years before.* (Conservative Party 2015:18-19)

After making an announcement within the Queen’s Speech on 27 May 2015, the new Conservative government, the *Trade Union Bill* was laid before Parliament on 15 July 2015. Although undergoing significant change in its overall composition and complexion, the key components regarding the further regulation of strike and industrial action remained intact. The *Trade Union Act 2016* became law on 4 May 2016 and its provisions on the regulation of strike and industrial action ballots came into force on 1 March 2017. These concern i) revised statutory balloting mandates requirements for industrial action; ii) reduced length of validity of mandates, and; iii) increased notification periods to employers of industrial action. The Trades Union Congress (TUC) characterised the key provisions on balloting as effectively outlawing the right to strike, saying ‘The Conservative Party is not just proposing a few more bureaucratic obstacles that will make life a bit more difficult for trade unions. Taken together, they would effectively ban strikes by the back door’ (press release 7 September 2014) and ‘The government’s proposals on union ballots will make legal strikes close to impossible. Union negotiators will be left with no more power than Oliver Twist when he asked for more’ (press release, 12 May 2015). Darlington and Dobson (2015:1) echoed this assessment, arguing that the *Trade Union Act 2016* represented ‘the most sweeping and radical tightening of the rules on industrial action seen since the Thatcher era of the 1980s with new voting thresholds in trade union strike ballots’ (see also Williams *et al.* 2016:262). Ewing and Hendy (2016) and Ford and Novitz (2015) made equally unequivocal statements from the perspective of human rights and labour law.

There is then a robust basis upon which to suggest that the *Trade Union Act 2016* represents the biggest singular reform of the law governing industrial action since the *Trade Union Reform and Employment Rights Act 1993*, if not, indeed, the *Trade Union Act 1984* (which originally established for the requirement for mandatory balloting for industrial action). Moreover, the *Trade Union Act 2016* represents a further breaching of international labour standards (especially International Labour Organisation (ILO) conventions) on workers’ rights to organise.

In terms of balloting, the *Trade Union Act 2016*’s two key provisions are that a) at least half of eligible union members are required to vote so a minimum turnout is established and b) in a selection of important public services, there will also be the requirement that at least 40% of all those entitled to vote must vote for action (meaning non-voters are treated as ‘no’ voters). The *Trade Union Act 2016*'s other measures concerning industrial action are reducing mandates’ validity from being open ended to six months (unless extended to nine months with the agreement of the affected employer) and increasing the period of notice to employers of action from 7 days to 14 days. A government consultation review of the feasibility of using e-balloting is being conducted and its conclusion and recommendation will be published towards the end of 2017 (BEIS 2017:18).

Those parts comprising the important public services of health, education, fire, transport, nuclear are now specified as: i) ambulance, accident and emergency, intensive care, psychiatric, obstetric and midwifery services; ii) schools and educational services to those aged under 17; iii) the fire and rescue; iv) border security; v) London bus services, passenger railway services, civil air traffic control services, airport and port security services; and iv) the decommissioning and management of radioactive waste and spent fuel.

**Likely extent of change**

For unions seeking to maintain or augment their leverage over employers through gaining mandates for industrial action and the taking of the action itself, the scale of the challenges is indicated by a number of estimates of the projected impact of the balloting provisions. The major one comes from an independent piece of research by Darlington and Dobson (2015) which attempted to calculate the likely impact of the new thresholds by using historic data. Firstly, through a number of means including direct approaches to unions, web searches and approaches to approved balloting organisations (like ERS), Darlington and Dobson (2015:24-26) were only able to collate full data on ballot results, critically including turnout figures, on 158 strike ballots across a range of 28 unions between 1997 and 2015 when the total number of industrial action ballots taking place between 2002 and 2015 was 10,879, and of which 10,348 concerned strike action. Although union recording systems are often poor and data from balloting organisations was unhelpfully aggregated on a monthly basis, it is unlikely this can fully explain the dearth of publicly available data on balloting results or the unwillingness-cum-inability of unions to have provided full data when requested. Rather, and supported by the tendency of union press releases to not give turnout figures, it is highly likely that unions have been unwilling to publicise turnout figures because they are generally below 50%. Secondly, of the 158 ballots (of which vast majority voted for strike action) only 85 (54%) passed the required 50% turnout (Darlington and Dobson 2015:27). Darlington and Dobson (2015:27) calculate this would have allowed only 444,000 workers out of 3.75m workers to have taken lawful strike action (where the new threshold was applied retrospectively). Thirdly, of the aforementioned 158 strike ballots, 90 were located within the categories of important public services covered by the additional threshold requirement. Of these, only 61% would have passed the threshold of more than 40% of all those entitled to vote voting for action (Darlington and Dobson 2015:29).

The sixth *Workplace Employment Relations Survey* (WERS6), conducted in 2011, asked managers for information on ballot turnout in disputes they had been involved in over the previous 12 months (Van Wanrooy *et al.* 2013). It suggested across the whole economy, 38% of ballots in the period studied achieved a turnout of less than 50%. Similar findings to those of Darlington and Dobson (2015) are contained within a *Trade Union Act 2016* impact assessment by BEIS government department. Of 75 ballots held in the education, transport, health and fire sectors and the Border Force between August 2010 and December 2015, BEIS (2016:27) found ‘that for important public services the data shows that the 50% threshold would result in a reduction in work stoppages of 59%’. Overall, BEIS (2016:28) estimated ‘a reduction of work stoppages of around 35% when the 50% turnout threshold is applied’. (Similar findings were provided in a BIS (2016:24) impact assessment of the Bill for the *Trade Union Act 2016* although it added that ‘the 40% threshold would lead to an additional 8 percentage points reduction in working days lost’ (BIS 2016:29) even though the BEIS (2016:27) impact assessment declined to make such a calculation because the parts of important public services had not yet then been specified). This figures appeared then to be used by the Conservative government when it stated the measures will ‘reduce strikes in important public services by 35%’ (press release, 1 March 2017). An earlier impact assessment by the Regulatory Policy Committee (2016:2) suggested the *Trade Union Act 2016*’s provisions on important public services will reduce the annual number of strikes by 5.4%. Based upon a smaller sample of ballots (n=59) for industrial action short of a strike (IASOS) for the same aforementioned period, BEIS (2016:36) found ‘around 61% would not have passed the 50% threshold based’. No assessments have been made so far of the impact of the increased period notification or the reduced period a mandate exists for.

**Scenarios**

These aforementioned projections provide the platform from which to establish a number of likely scenarios in order to lay out the probable impact of the stipulated provisions upon the attitudes and behaviour of workers, their unions and employers.

The contending scenarios (S) are:

S1: There will be fewer strikes and cases of IASoS because many balloted bargaining groups of members cannot attain the new thresholds. This is despite an anticipated rise in the proportion of ballots – compared to the historic levels - which attain the new thresholds because union either put more resources into campaigning and/or are more selective in running ballots (see BEIS 2017, BIS 2016).

S2: Some unions will attain the new thresholds because of tighter organisation, higher levels of occupational and union identity and greater campaigning resources (Gall 2015a). Amongst these include train drivers and postal workers.

S3: Unions will only select members with strategic power (revenue collection, just-in-time systems) in ‘smart strikes’ (see Gall 2011, 2012).

S4: Unions will only ballot their strongest members so that ballots will be won but the extent and degree of leverage generated will be less than before (Gall 2015a).

S5: Public sector strikes – essentially political and not economic strikes - will cease to generate political leverage as they are no longer national strikes as national ballots are unlikely to be won (Gall 2015a).

S6: Unions will organise more ballots than before in order to avoid calling single national ballots. Here, they will ballot areas and regions of membership more selectively so that the risk of losing is lessened.

S7: Unions will call more action and in truncated periods because of the reduced mandate length so one-day strikes will no longer predominate. This means they will ‘front load’ action so that dispute escalate more rapidly.

S8: Workers denied the ability to ballot by their union or not attaining the new thresholds will display an increased propensity to take unofficial action (see Gall and Cohen 2013, Darlington and Dobbins 2015).

S9: Aggrieved workers, especially nominally self- employed workers, will increasingly act outside the union movement by maintaining non-membership in order to avoid being bound by the *Trade Union Act* in regard of the balloting, notification and mandate provisions.

S10: The frequency of IASoS to strikes will increase as sacrifices in earnings are less, helping increase the chances of gaining a mandate for action.

S11: Other action like pickets, protests and social media campaigns will grow when industrial action is not possible due to inability to meet the new thresholds.

S12: Employers will wait to see ballot results before being prepared to negotiate (Gall 2015a), thus extending the length of some disputes. The threat to ballot will no longer hold such influence. However, ballots results will provide more leverage than before because they will have attained a new legitimacy.

S13: Ballots which produce mandates which just exceed the new thresholds will be more subject to applications for injunctions by employers, especially within certain sectors like the railways, for the opportunity arises to show that errors and mistakes may have materially affected the outcome of the ballot.

S14: Employers will be able to undertake more effective counter-preparations given the two week period of notice so that the effectiveness of strike and IASOS will decline.

S15: Owing to differing political complexions and distribution of powers, there will be significant regional variations given employment law is devolved to Northern Ireland (where the *Trade Union Act* does not apply), that the Welsh Assembly Government has begun moves to exempt public services in Wales from being covered by the *Trade Union Act 2016* and the Scottish Government has indicated it will not seek to apply the new thresholds where it is the employer. Some Labour-controlled local authorities may also not seek to have the need thresholds abided by.

S16: Longer resolution and non-resolution of disputes will have deleterious consequences for morale, productivity and staff turnover as a result of lingering malcontent amongst workers.

S17: Quicker resolution through enhanced ballot legitimacy and front-loaded action will have positive consequences for morale, productivity and staff turnover as result of the ending of malcontent.

S18: Some unions will engage in more concession bargaining and partnership working because their weakened position means they cannot generate sufficient bargaining power from their reduced ability to take either any industrial action or sufficiently widespread industrial action (Gall 2015a).

S19: Some sectors of the economy will be little affected by the new thresholds as a result of a low propensity to take industrial action as a result of the prevalence of partnership agreements (such as in the NHS, energy and water supply and the financial services sector).

S20: The availability of electronic balloting will increase unions’ ability to pass the new thresholds.

Some of these scenarios are complimentary, some contradictory and some neutral in relation to others. Some are consequent upon others in a manner of ‘cause and effect’. Collectively, they span the gamut of probable – rather than merely possible – outcomes as a result of the interaction of agency and environment with regard to unions, employers and the law.

**Union responses**

Whether different individual unions are prepared to act in one way or another will partly depend upon a number of temporal aspects in terms of how they have or have not begun to prepare for, and respond to, the enactment of the *Trade Union Act 2016* provisions after a series of escalating stages of certainty of the new thresholds and requirements. The first was the tabling of the Bill in Parliament (15 July 2015), the second the passing of the Bill (4 May 2016) and the third was the enactment of its provisions (1 March 2017). For unions, the tasks will have concerned formulating policy to guide what they deem to be their objectives and how to they respond to different scenarios. Employers are also likely to form views on whether ballot mandates will now have greater legitimacy and bargaining leverage, and do so in relation to the time limits on mandates and the enhanced notification period.

The UCU announced on 20 March 2017 that:

*Firstly we are of course taking steps to improve turnout and ensure that when members vote for action they are able to take it. We will be supporting branches to put in place detailed turnout plans, and they will no doubt enlist your help to ensure that everyone is aware of the need to vote. We will also be introducing an 'I've voted' button to every email we send you during a ballot. Once you have voted, please click this to let us know. This will enable us to focus our attention on members who have not yet voted and to keep a tally of how the ballot is progressing. Using this button will not tell us how you have voted, only that you have voted and I hope you can understand why we are doing it.*

As part of this it produced the ‘Get the Vote Out’ publication to act as a practical guide to how to secure industrial action mandates which exceed the new thresholds. Meanwhile, announced on 1 March 2017 that it had established regional dispute teams to provide ‘the rapid and expert support workers need when faced with trouble in the workplace’ (following its rule change to ensure that it can take action to defend members even if forced outside the law by the *Trade Union Act 2016*).

**What has happened since 1 March 2017?**

It is very early days at the moment and much industrial action that has taken place since 1 March 2017 has a lawful mandate from before 1 March 2017. Yet unions are still not in the habit of uniformly publishing their ballot returns in the public domain. This is somewhat surprising (compared to situations where they decide not to ballot because they are uncertain of the outcome or lose the ballot). Consequently, there is relatively little material to analyse. Indeed, the dearth on new post-1 March 2017 balloting results of any kind suggests that the number of ballots being held has fallen – but this must remain a point of speculation until annual data for 2017 is published in mid-2018. Similarly, it is not yet possible to discern the impact on the level of strikes. At the time of writing (end of May 2017), the only figure published by the Office of National Statistics (ONS) has been that in March 2017 there were 15,000 days not worked due to strike action. This compares to 35,000 days not worked in March 2016. It would be unwise to conclude anything from this at this stage, especially as the reasons for the difference might not be related to the *Trade Union Act*. There has also been a sense that much is below the radar screen for there has been no public discussion of where unions decide not to ballot and the reasons for this. Thus, looking at what has happened so far can at best sketch out some of the salient issues and see which of the twenty scenarios may - at this point - have more support than others.

1. *Thresholds reached*

Of the ballots conducted since 1 March 2017, for which full figures have been released:

* NUT members in two north London schools voted both by 100% on 86% and 90% turnouts.
* Unite’s British Airways ‘[mixed fleet](https://socialistworker.co.uk/art/24335/BA+cabin+crew+prepare+for+mass+meeting)’ cabin crew members voted by 91% on a 69% turnout for strike action.
* EIS FELA members voted by 96% for strike action on a 59% turnout.[[2]](#footnote-2)
* 3,500 Unite BMW members voted 93% for strike action and 97% for industrial action short of strike action on a 72% turnout.
* RMT London Underground Night Tube members – 97% for striking and 98% for IASOS on a 100% turnout.
* RMT London Underground London Bridge members – 92% for striking and 87% for IASOS on a 58% turnout.
* RMT Arriva Traincare members – 96% for striking and 98% for IASOS on a 61% turnout.
* Unite’s 1400 Argos members voted 85% voted for strike action on a 73% turnout.

Such few new ballots *may* reflect less balloting as a result of the choice to limit balloting due to the fear of losing ballots.

1. *Thresholds not reached*

Four ballots for strike action and IASOS have been lost:

* RMT London Underground Waterloo – 75% for striking and 94% for IASOS on a 48% turnout.
* RMT Stagecoach South West – 48% for striking and 65% for IASOS on a 48% turnout.
* UNISON’s ballot of Scottish local government workers resulted in a 63% vote in favour of industrial action on a 23% turnout.
* RMT London Underground – 3,743 members were balloted with an 80% vote for strike action and an 87% vote IASOS on a 34% turnout.

In the case of the RMT ballots, a combination of not meeting one or both of the new thresholds took place.

1. *Splitting up of balloting bargaining groups*

There are few cases (Unite - BMW, RMT - London Underground London Bridge/Waterloo) where ballots for bargaining groups have been split up into two or more groups for balloting. The latter case was on advice from lawyers. It remains unclear the rationale for such decisions.

1. *Front loading action*

Before and after 1 March 2017, there has been a noticeable tendency for a growing number of cases of unions to call many days of strikes over a much shorter period of time. Examples are EIS (Scottish colleges)[[3]](#footnote-3), Unite (Babcock Marine, DHL Doncaster, BMW, Woolwich Ferry, D B Glass, Newton Abbot Sierra Windows, Paignton, Bostik adhesives), PCS (EHRC, DWP Sheffield Eastern Avenue), and Atomic Weapons Establishment (GMB, Prospect, Unite). In the case of Unite members at Argos distribution centres, they engaged in a two week strike as their stage of first industrial action. There is no reason to suggest that – with the exception of the EIS which has deployed this tactic far in advance of 1 March 2017 in further education colleges - this is not a direct response to i) the longer periods of notice to employers which allow more counter-preparations; and ii) the reduced period of ballot mandates.

1. *Unofficial action*

Postal workers (Doncaster, Kilmarnock, Bedforshire/Buckinghamshire, Scarborough), lecturers (SOAS), nuclear power workers (Sellafield), electricians (Crossrail in London) and hospital workers (Royal London) undertook unofficial (unballoted, unsanctioned by their unions) strike action but it was unclear whether the nature of their action was influenced by the Trade Union Act or pre-existing regulation.

1. *Focus on the workplace*

The experience of some unions is that the wariness to engage in national disputes and strikes in the light of the *Trade Union Act* has helped them increase their focus upon workplace organising so that the locus of where they can contemplate taking industrial action has shifted to the more local level. Here, it is recognised that closer relationship of members to the national union can be achieved through a greater focus upon workplace organising.

1. *Ambiguity and caution*

Some reports about how unions are acting suggest both ambiguity in understanding and caution amongst unions about when the provisions of the *Trade Union Act* came into effect and how these relate to pre-existing regulations. Clearly, balloting processes (notification, balloting, ballot result notification) begun after the 1 March 2017 must adhere to the regulations of the *Trade Union Act* in order to retain immunity in tort as would any industrial action subsequently called on the basis of those ballots. However, the situation is not so clear with regard to i) action being called after 1 March 2017 on the basis of ballots conducted before 1 March; and ii) action being called after 1 March 2017 on the basis of ballots conducted before 1 March and which has been preceded by action before 1 March 2017. For example, *Socialist Worker* (7 March 2017) reported that UNISON social work members in Kirklees Council undertook a one hour strike to ‘keep their ballot live’ even though the ballot took place well before 1 March 2017. *Socialist Worker* (21 March 2017) then reported a strike ballot and a strike were delayed due to the new regulations. In the first case, this did appear to be due to the *Trade Union Act* but in the second case this was not quite so evident. Meanwhile, Unite’s BA’s mixed fleet members were reballoted (see above), it would appear, to retain a lawful mandate for action.

1. *Restrictions on actions associated with industrial action*

An RMT organiser was forced to hand the contents of his mobile phone to Northern Rail prior to a strike (*Morning Star* 1 May 2017) in an indication that employers are using the *Trade Union Act* to access the phones and computers of activists and full-time organisers. Employers can seek a court order instructing union members to reveal the contents of their electronic devices to employers to check whether they have organised unlawful ‘secondary action’. Elsewhere in terms of the related section of the *Trade Union Act 2017* on new picketing provisions, *Personnel Today* (31 May 2017) reported: ‘So far, there are no reported tests of the new rules’.

**Suggestions**

Based upon past experience and what has happened since 1 March 2017, the following suggestions are made:

* The relative sparseness of information at this point in time and for the foreseeable future reinforces the need for a central body to act as a ‘clearing house’ so that unions know about their own experience as well as that of other unions’ experiences (whether good or bad).
* Innovations in ‘best practice’ need to be shared across the union movement. These would include lessons about structuring balloting, tactics to increase turnout etc. The means for sharing would include seminars and newsletters. Case studies like those of the EIS-FELA dispute would be useful.
* A commitment from each union is needed to share both the successes and failures regarding balloting as well as the reasons for why balloting has been sanctioned and why balloting has not been sanctioned
* This role of being a ‘clearing house’ for information and disseminator could be undertaken by the TUC as it did with sharing knowledge and ‘best practice’ when the new union recognition law came into force on 6 June 2000.
* One of the examples of ‘best practice’ to test the water and to raise awareness is for unions to use consultative ballots on industrial action prior to moving to statutory ballots on industrial action.
* Contrasting the fortunes of the EIS (4,606 members across 20 colleges) and UNISON (67,728 members across 32 authorities in thousands of workplace) in Scotland provides some initial support for the suggestion that keeping the number of unions members in the bargaining group to relatively small numbers in relatively few number of locations is helpful.

Such suggestions are in step with the motion passed at the 2016 TUC congress which included the following: ‘Congress believes the General Council needs to convene an urgent conference of affiliates to provide a practical forum, including workshops, as to how to best coordinate our legal and industrial response to the Act in line with policy already set by Congress’ (RMT motion) and ‘Congress should discuss all options for challenging the new legislation. This should include stepping up the campaign to scrap the Act and other anti-union legislation as well as the practical steps to be taken to support any unions and groups of workers threatened by this anti-worker legislation’ (FBU amendment).

**Solidarity: an issue that remained unresolved**

Given the thrust of the FBU’s amendment and the frequent calls for solidarity action by other unions if one union is taken to court for disobeying and defying the *Trade Union Act*, it remains very unclear whether there is a serious prospect of this. The first part of assessing the prospects for any solidarity action necessarily concerns whether any union is willing to openly defy the new law by, for example, taking official industrial action after a ballot has been lost or without a ballot at all (see for example, *Socialist Worker* 6 June 2017). This may be influenced by the size of the bargaining group and the strategic power it wields as well as by the extent of intra-union solidarity. Without any union engaging in such defiance, the issue of solidarity action is entirely hypothetical. But, that said, the willingness of any union to engage in defiance will no doubt be influenced by its assessment of whether other unions will come to its support and what form of support will be given (other than merely statements of support). The most obvious forms of support are financial and industrial (strike action). The second part of assessing the prospects for any solidarity action concerns whether unions will give unconditional or conditional support (of any kind). Thus, will other unions pick and choose when and who to support based upon whether they think other unions have acted wisely or unwisely in their defiance. Of course, whether any unions will wish to contemplate overt industrial support for another union given this may be judged to be a ‘political’ dispute (which does not qualify for immunity in tort) or take any supportive action which itself breaks the Trade Union Act are further issues.

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2. The turnout for the strike ballot in 2016 to gain the pay deal was 93% for striking on a 64% turnout. The 2017 strike ballot was to force employers to honour the pay deal. [↑](#footnote-ref-2)
3. Scottish college lecturers in EIS-FELA have developed the tactic of announcing lengthy periods of strike action at the very beginning of their action. For example, in 2011, Telford College members announced a programme of 51 days of strikes. They took just one day of strike action, which gained the withdrawal of compulsory redundancies. [↑](#footnote-ref-3)