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Migrant workers and taking action

FAQs for migrant staff taking industrial action

The law and practice set out here in relation to indefinite leave to remain (ILR) and absence due to strike action is correct as at March 2022. It is important to note that immigration law changes frequently and UCU will keep this under regular review. Members should check the law before making applications for leave.

References to lawful industrial action include both strike action and action short of a strike (ASOS).

Impact of industrial action on ILR

Does taking lawful industrial action as a Tier 2 / skilled worker visa holder have any direct or indirect impact upon applications for ILR?

As part of the changes to the Immigration Rules announced in September 2019, Tier 2 / Skilled Worker migrants will not be penalised in applications for ILR if they are absent from work due to legal strike action. This includes not being refused ILR if such an absence causes their salary to fall below the required threshold.

What should someone do if they feel their ILR application has been turned down for reasons related to industrial action taken while employed on a Tier 2 / skilled worker visa?

Seek legal advice. An in-time application for further or indefinite leave to remain may attract a right of appeal on human rights grounds, provided that you have mentioned human rights in your application. The relevant human right is Article 8 of the European Convention on Human Rights (the right to respect for private and family life). If you are refused further or indefinite leave, you should take advice about lodging an appeal. The deadlines for lodging appeals are very strict so it is advisable to check these as soon as you receive the decision.

Do members applying for ILR need a letter or certificate from their employer to confirm that their absence was related to lawful industrial action, and are employers obliged to provide documentation to staff members to state they have undertaken lawful strike action?

An applicant cannot make a successful ILR application without a supporting letter from their current employer (ie their Sponsor) confirming the information described in the Immigration Rules, as follows:

1. that they still require the applicant for the employment in question for the foreseeable future
2. the gross annual salary paid by the Sponsor, and that this salary will be paid for the foreseeable future
3. if the applicant is currently absent from work for a reason referred to in paragraph 9.30.1 in Part 9 of these Rules, or has returned from such an absence within the calendar month immediately preceding the date of application
    - (aa) the date that the period of absence started and the date that it finished (or is expected to finish)
    - (bb) the applicant's salary immediately before the absence started, and
    - (cc) the applicant's salary from the date of their return, or expected return, to work

    and

4. if the applicant is paid hourly, the number of hours per week the salary in (2) or (3) is based on.

The Home Office's view is that it is difficult to see a situation whereby an employer provides a letter confirming the information in (1), (2) and (where applicable) (4) but refuses to provide the information in (3) (which relates to absence from work due to taking part in strike action as part of a legally organised industrial action). If this were to happen, it's a matter that would be considered on a case-by-case basis.

Tier 2 / skilled worker visa sponsors have a duty to maintain a record of all migrant absences and the reason for them as part of their sponsorship record-keeping duties (see, for example, Part 1, paragraph i, of Appendix D to the sponsor guidance). Sponsors must report if a migrant is absent without permission for 10 consecutive days or more, and are required to cease sponsorship of a migrant who is absent without pay for 4

weeks or more, unless the absence is for a reason covered by paragraph 9.30.1 of the Immigration Rules and section S4.13 of the Sponsorship Guidance for Skilled Worker and Temporary Workers. These absences include strike action - so it follows that a sponsor must at least have kept a record of the absence and the reason for it and be prepared to show that to a UKVI compliance officer if asked. Similar provisions exist for reductions in salary (para 9.31.3 of the Immigration Rules and para S4.16 of the sponsorship guidance).

In summary, even if an employer is not sympathetic to the idea of strike action, they must engage with it as part of their sponsor duties if any of their sponsored migrants have taken such action; and they must confirm that the migrant has taken industrial action if they wish to retain the services of the migrant by supporting their ILR application (or otherwise claim an exemption from the absence-without-pay or reduction-in-salary provisions).

Members are under no obligation to inform management in advance about whether they will be taking part in strike action or action short of a strike. However, for the purposes of visa compliance UCU believes it is in the interests of Tier 2/ skilled worker migrants to ensure their employer has an accurate record of any strike action taken. We would therefore encourage members to seek confirmation from their employer that any absence due to strike action is recorded appropriately.

UCU would be willing to issue statements to affected members confirming the dates of strike action for use as supplementary evidence.

Does docked pay as a result of legal industrial action have an impact upon any earnings requirements under ILR?

The purpose of the changes to the Immigration Rules (as set out in Statement of Changes HC 2631) is to ensure that Tier 2 / skilled worker migrants are not penalised if they are absent from work due to engaging in legal strike action. The changes mean, for example, that a Tier 2 / skilled worker migrant will not be refused ILR if, at the time of application, their salary is temporarily below the appropriate salary rate solely as a result of such an absence. The Rules already contained similar exemptions for migrants on maternity, paternity, shared parental, or adoption leave.

If pay is docked as a result of lawful industrial action, this should not have a negative impact when applying for ILR. The guidance for ILR applications states that the current employer is required to provide a letter/certificate stating that they still need the applicant for the job, the gross annual salary paid by the Sponsor, and that this salary

will be paid for the foreseeable future. Therefore there should be no issue if the employer is able to confirm that the applicant's normal salary meets the relevant minimum salary requirements for ILR.

What duty of care or other legal duty do employers have to migrant staff taking legal industrial action to ensure they are aware of their legal rights and responsibilities?

From a purely employment law perspective, there is no obligation on employers in the event of a strike or lawful industrial action to inform employees of their legal rights and responsibilities.

What other considerations should I be making in relation to evidence linked to participation in lawful strike action to support applications for further leave to remain?

It is important all visa holders are aware of the requirements of their particular route to extend and settle from when they are first granted permission to enter or stay. Each category has its own conditions and particular requirements to extend or settle.

Applicants from Tier 2/Skilled Worker, Tier 5 / Temporary worker and Tier 1 / Global Talent routes will all need to provide evidence when they come to extend their leave and apply for indefinite leave, including from employers. If the employer has properly recorded any reductions in salary due to legally organised industrial action, then for Skilled Workers no further evidence should be necessary, although it could be requested.

While the strict requirements in terms of absence from work/minimum salary thresholds do not apply in the other categories listed above, it would be sensible for those who those subject an earnings/financial requirement which will be impacted by legally organised industrial action to obtain evidence of their involvement.

T2/5 (skilled worker/temporary worker) visa holders

Is it correct that reductions in salary arising from industrial action that fall below the appropriate rate due to strike action do not trigger the employer's responsibility to make a report via SMS?

Paragraph S4.10 of the Sponsor Guidance for skilled/temporary workers states that migrants sponsored under these routes can take short periods of unpaid leave, but the sponsor has to stop sponsoring a migrant who is absent from work without pay for 4 weeks or more in any calendar year. However, one of the exceptions to this is taking part in strike action as part of a legally organised industrial action (see paragraph S4.13). The reduction in salary as a result of taking part in legally organised industrial action does need to be reported but is not a reason for the sponsor to stop sponsoring the employee (see paragraph S4.16).

What obligation does the employer have to report strike absences correctly?

Where absence is due to legal strike action, the sponsor employer will not have to report absence but does have to report any consequential salary cuts..

If you transfer jobs/change your sponsor while remaining on a tier 2/5 (skilled/temporary worker) visa, can a letter from the employer be requested to specify that you were on lawful strike action?

There is no obligation for employers to provide a letter specifying that an employee was on lawful strike action. There is also no general obligation (unless the contract of employment states otherwise) for an employer to provide employees with a reference. However, if an employer chooses to give a reference, it is under a duty to ensure that such a reference is factually accurate.

UCU would be willing to issue statements to affected members confirming the dates of strike action for use as supplementary evidence.

What obligation is there on the staff member to report that they took strike action in order that their absence can be properly allocated as authorised?

Skilled worker sponsors have a duty to maintain a record of all migrant absences and the reason for them as part of their sponsorship record-keeping duties. Sponsors are required to cease sponsorship of a migrant who is absent without pay for 4 weeks or more, unless the absence is for a reason covered by para 9.30.1 of the Immigration Rules. These absences include strike action - so it follows that a sponsor must at least have kept a record of the absence and the reason for it and be prepared to show that to

a UKVI compliance officer if asked. Similar provisions exist for reductions in salary (para 9.31.3 of the Immigration Rules).

The union can provide a document to members confirming that the industrial action was lawful and when it took place and that this was thus a permitted absence within the terms of the regulations.

For the purposes of visa compliance UCU believes it is in the interests of Tier 2 / skilled worker migrants to ensure their employer has an accurate record of any strike action taken. We would therefore encourage members to seek confirmation from their employer that any absence due to strike action is recorded appropriately.

Global talent visa holders and other visa categories

How are those on Global Talent (Tier 1) visas affected if they participate in lawful industrial action?

A person with leave under the Global Talent route must have an endorsement from a relevant body. It is a requirement for those who have been endorsed as a researcher, to actively participate in a relevant field in a university research institute or industry.

To extend stay, the applicant must have earned money in the UK during their last period of permission to stay and the earnings must be linked to expert field in which they were endorsed (or related to the subject matter of their prize if they applied under Prestigious Prizes sub-category). However, there is no fixed amount they must have earned. Therefore, if the applicant's salary is reduced due to participation in lawful industrial action, this will not impact on meeting this requirement as long as they can still show that the money was earned in the relevant field.

There is no specified evidence or minimum level of earnings/minimum salary threshold, but suggested evidence includes, amongst others, payslips or letters from employers confirming the earnings. Where the applicant is endorsed as a researcher and is funded by an institution, then suggested evidence includes a letter from the employer confirming the funding by the institution and that details of what the funding is for and that it relates to the relevant field.

The applicant does not need to reapply for an endorsement when extending or seeking indefinite leave, but to extend, the endorsement must not have been withdrawn by the endorsing body. The endorsing bodies are responsible for setting their own requirements for individuals to meet and those requirements are linked to the

individual's international standing in their chosen field. An endorsement can be withdrawn but that would be on the basis of the individual not meeting the requirements for an endorsement rather than on the basis of conduct, such as taking part in legally organised industrial action, in the UK.

Therefore if participating in legally organised industrial action, there is no impact through absence from employment as long as when the applicant comes to extend/settle they can show that they did participate in a relevant field in a UK research institute or industry and earn money in the UK for work linked to their expert field. This will need to be evidenced.

What about those on family visas?

There is no requirement that a person with leave under Appendix FM as a partner or parent is employed, therefore there are no specific exemptions/reductions if taking part in legally organised industrial action.

When seeking to extend leave or apply for indefinite leave to remain as a spouse/civil partner/unmarried partner/parent under Appendix FM there is, however, a financial requirement. This can be met in various ways, including but not exclusive to employment income, cash savings, pension income, rental income, and others. If relying on employment income to meet the requirement, then the applicant (and/or their partner) must earn a gross annual income of £18,600. This income can be joint income. The immigration rules and guidance do not provide for any reduction in this figure on the grounds of taking part in legally organised industrial action.

If relying on employment income, the evidence required and basis for calculating the income varies depending on how long the applicant has been with the employer:

- If the applicant/their partner has been with the same employer for at least six months at the date of application and earn £18,600 gross per annum or over they will need to provide payslips and their bank statements (amongst other evidence) for the preceding six months to evidence that they earn at/or above this level. They will also need to provide a letter from their employer who confirms their salary, amongst other matters, along with a letter from their employer who confirms their salary, amongst other matters. If their salary has varied over the last six months, the Home Office will take an average of their earnings over the preceding six months and multiply by 12 to check if it is equal to or in excess of £18,600.

- If the applicant has been with the employer for less than six months, they will need to provide evidence to show that the applicant and/or their partner has actually earned £18,600 gross per annum in the 12 months preceding the date of application. They will also need a letter from their employer confirming their salary

If the applicant's salary is significantly reduced in the six-month period before making an application, this could impact on the success of an application if they are not able to meet the financial requirement depending on the applicant's circumstances. It may be, however, their income combined with their partner's income or their partner's income alone would be sufficient to meet the test or that they can meet the financial requirement through other sources.

How are those with leave granted on humanitarian protection visas affected?

There is no requirement to work or meet a financial requirement if a person has been granted leave on protection grounds. As long as the action is lawful, there should be no impact on a humanitarian visa if a person takes part in legally organised industrial action.

Tier 4 / student visa absence

The guidance for Tier 4 / student sponsors makes it clear that absences due to industrial action do NOT count towards the 10 consecutive absences that students are allowed to have before they reported. What should students do in this situation to show that they were ready and available to attend classes that were strikebound?

The usual obligation on sponsoring educational institutions is to report a student who misses 10 consecutive expected contact points. However, this does not apply to those students who miss an expected contact point due to industrial action by lecturers. The rationale for this is that 'An expected contact point is one which the student would in principle have been able to attend. If a lecture, tutorial or other planned contact point with a student is cancelled due to industrial action, any missed contact points caused by the industrial action of lecturers should not be treated as unauthorised absences.'

Can T4 students skip lectures given by non-striking staff in order to show support for the strike without incurring an absence?

If a Tier 4 sponsored student skips lecture by non-striking staff in order to show support for the strike, this would be an unauthorised absence. A student who misses 10 consecutive expected contact points can expect to be reported by the educational institution.

What discretion do universities have in the way that they count such absences?

Universities have very little discretion over reporting absences. Student Sponsor Guidance, document 2: Sponsorship Duties sets out the situations when an educational institution has to report a student who missed 10 consecutive expected contact points. If the university does not comply with the sponsorship duties their sponsor rating can be downgraded or revoked entirely.

Can individual lecturers refuse to mark absences that took place on a strike day?

Where a lecturer is required to record the absence of students from lectures or seminars, this is likely to form part of their role which they are contractually obliged to fulfil. Deliberately failing to do so may, therefore, amount to a breach of contract, which may lead to disciplinary action against them. Further, if a lecturer falsifies records and/or misleads the University which employs them, such as knowingly failing to keep accurate records, the lecturer is at risk of breaching their contract of employment with the University.

Some Tier 4 PhD students are also employed by their host university to teach. What are their rights to strike?

There is no specific prohibition on Tier 4 students taking part in industrial action, nor any requirement for a sponsor to withdraw sponsorship on that basis.

Where a Tier 4/Student migrant is employed and is taking part in lawful strike action that prevents them working as normal, the restrictions on absence that relate to Tier 2/Skilled Worker migrants do not apply. In short, those on Tier 4 student visas should observe the visa requirements that relate to their role as a student.

Since Tier 4/Student leave does not usually count towards settlement, there is no equivalent of the Tier 2/Skilled Worker concern about periods with gaps in earnings not counting towards settlement.