The right to strike in Norwegian labour law

An insider-outsider perspective

PROFESSOR STEIN EVJU

The essay examines the right to strike – and other collective action – in the current environment of Norwegian labour law, explaining key features having regard also to foreign and international law conceptions and problems in this field.

STEIN EVJU, b. 1946, cand. jur. (LL.M.) 1975 (Oslo), is Professor of Labour Law in the Department of Private Law, Faculty of Law, University of Oslo.

1 Introductory observations

The right to strike is persistently vulnerable. It is recognized in domestic law and international law. Whenever exercised, however, it readily triggers debate on its expediency and legitimacy, often as regards the actual action and now and again and on a principled level. Still, the right to strike is firmly embedded in the Norwegian legal order and a foundational tenet of domestic labour law.

The object here is to offer an overview of strike law in the Norwegian context, however not strictly from the perspective of domestic law. Concepts and approaches which are deeply ingrained in domestic doctrine frequently do not correspond with those prevailing in other jurisdictions and are thus easily misconceived of by those with a different frame of reference. Hence, the intention in this essay is to add an outsider perspective to the view from within, implicitly or explicitly, as the case may be, thus placing the issues in a broader and slightly different context from that being traditional domestically.

Two prefatory remarks are pertinent before proceeding, however.

First, the notion of a “right” to strike is ambiguous. It is customary to approach strike law employing a distinction between recourse to strike action being recognised as of right, on the one hand, and as – merely – a freedom on the other hand. This distinction is however far from unequivocal. The problems stems from the conception of what is a right, properly speaking. The delimitation at the outset is negative; a freedom, or a power, is not a right. But obviously, this is not very helpful. One aspect often pointed to is that a right should be stated explicitly in constitutional or statutory law. Another and more important aspect is the substantive one, the essence of which is that a right presupposes protection. This implies that there are obligations on third parties not to infringe the right and recognition of a right to strike also presupposes certain immunity for workers and/or trade unions, against liability or sanctions when exercising the right. The
Norwegian situation, as we shall see, combines features from either side of the equation, and what is conventionally attributed to a freedom may well be put down as a right from a substantive point of view like that suggested above.

Second, speaking of a “right to strike” is simplistic and deceptive in yet another dimension. Strike is “industrial” action – or collective action – by workers. Whereas recourse by employers to the opposite measure – lock-out – is prohibited in some states and severely restricted in others,¹ this is not the case for Norway. Here the right to strike and the right to lock-out are essentially on an equal footing in law. This should be kept in mind as for reasons of simplicity, in the main we will refer solely to strikes in the following.

2 Legal foundations in Norwegian law
2.1 General
The Norwegian Constitution, originating from 1814, contains merely a minimal “bill of rights”. Characteristic of the times of its adoption it includes no provisions on or references to labour or industrial relations; and no amendments pertaining to collective labour law have been added since. Further, nor is a right to strike, or to collective action, as such stated explicitly in statutory law.

Thus from this point of view, recognition of a right to strike in Norwegian law is in the form of a freedom. The primary legislation in the field, the labour disputes acts, as a point of departure is based on that approach. The present acts are two: The Public Service Labour Disputes Act of 18 July 1958 No. 2, as amended (PSLDA), applies, essentially, to the state part of the public sector.² The Labour Disputes Act of 5 May 1927 No. 1, as amended (LDA), superseding the seminal and similar act of 1915, covers the rest of the labour market, including the municipal part of the public sector.³ Both acts are based on the principles of freedom of collective bargaining and possible recourse to industrial action in interest disputes, and they are, in the main, similar in structure and content in this regard.⁴

¹ Prohibitions obtain in Portugal (Constitution) and Greece (statutory law) and recourse to lock-out is very restricted in, e.g., France, Germany, and Italy.
² I.e., civil service and other state employees, including state-owned enterprises if not organized as joint stock companies under specific legislation. Previously, and on historical grounds, the act also applied to teaching personnel in schools run by municipal (local and regional) authorities, which predominates the Norwegian primary and secondary school system.
³ I.e., also public servants in local and regional municipal authorities, which now also are including teachers.
Notwithstanding the absence of a constitutional guarantee recourse to industrial action is considered a fundamental right, inherent in the legal order. Further, essential characteristics of this being a right in a narrow sense obtain. Criminal liability has long since been abolished. Liability in damages is restricted to unlawful collective action and subject, moreover, to specific provisions on preconditions for and modification of liability, laid down in the labour disputes acts. Enjoying no specific constitutional protection, the right may as a matter of principle be regulated by legislation (and by collective agreement). This, also, is a function of the two labour disputes acts, the LDA and the PSLDA; they govern the basic precepts of the scope and exercise of the right to industrial action.

2.2 Exceptions or exclusions?
Beyond the LDA and the PSLDA no permanent constitutional or statutory law exists which restricts the right to industrial action and moreover, there is no laws empowering a public body to impose restrictions (e.g., the Cabinet, a Ministry, a Minister, etc.). Self-evidently, this does not preclude the possibility that the legislator (Stortinget, i.e. the parliament) may enact intervening legislation, be that ad hoc or on a permanent basis. The former kind of legislative intervention has figured importantly in post-war Norwegian industrial relations (cf. in 8, infra). It is however essential not to confuse such measures with permanent legislation imposing restrictions or empowering forms of intervention, as can be found, e.g., in jurisdictions stipulating specific rules on «essential services» or the like. Any state may adopt new legislation, even if a right to strike enjoys constitutional recognition. The distinction between existing law and the hypothesis of adoption of new legislation is crucial, also in international law. Whereas the former is subject to assessment of compliance with public international law obligations, for obvious reasons the latter is precluded from such supervision.6

As for particular types of work («essential services» etc.; cf. in 4.2, infra), no special rules apply and there are no express statutory provisions excluding any group of employees from the right to strike.

However, it is common ground that senior civil servants appointed as embedsmenn7 can not go on strike (or be locked out). This is not based on the functions they perform, but on the formal rules on appointment and tenure applying to these posts. Similarly, military personnel (i.e., in the armed forces) is presupposed to not have a right to strike.

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7 A rather small group of senior government officials and also, e.g., judges and senior clergy in the Church of Norway. Special rules on the appointment and tenure of embedsmenn are laid down in the Constitution.
on grounds of the nature of their work. The PSLDA, according to the preparatory work to the act, is premised on these exceptions. They apply to ordinary, indeterminate, industrial action in interests disputes, are however not considered to preclude «political strikes» of a short duration (cf. in 3.12 and 3.14, infra).

A previous ban on industrial action by police officers was repealed, in full, with the adoption of the new Police Act of 4 August 1995 No. 53.

3 Basic features of content of the legal regulation

3.1 Starting points

3.11 Concepts

The concept of strike is defined in labour disputes legislation as «a total or partial stoppage of work brought about by employees acting in concert or collusion in order to force a resolution of a dispute between a trade union and an employer or an employers’ association» (LDA Sec. 1 para. 5, and similarly PSLDA Sec. 21 para. 1).

Two aspects of the definition may be noted at this point. The expression «total or partial» pertains to the number of employees – meaning either all or merely some of the employees in an undertaking etc. And «stoppage of work» means a cessation of all work by the employees concerned.

A distinction thus is made between strike in the technical legal sense and more limited forms of collective action such as, e.g., work to rule, go-slow, overtime bans. The latter kind of measures are encompassed by the concept other industrial action which is also employed, but not technically defined, in the acts concerned. The importance of the distinction lies primarily in relation to rules on procedures pertaining to calling and implementing industrial action. In conjunction with this it is however also of consequence with regard to the, quite particular, statutory provisions on «continued effect of collective agreements». In a comparative perspective it should be noted, also, that «other industrial action» is not per se unlawful as it is not a «strike» proper, as being an abuse of the right to strike, or on any such ground.

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8 On the situation under the old Police Act, 1936, see S. Evju, «Politiet og streikeretten. Om politilovens § 20», in N. Christie et al. (eds.), ... den urett som ikke rammer deg selv. Festskrift til Anders Bratholm, Oslo, 1990, 345-351.
9 Corresponding definitions of the concept of lock-out are given in LDA sec. 1 para. 6 and PSLDA sec. 21 para. 2, respectively.
10 LDA sec. 6 paras. 1 and 3, PSLDA sec. 20 paras. 1 - 4.
3.12 Peace obligation – a foundational concept

The notion of a peace obligation figures essentially in Norwegian labour law. It rests on a dual basis. First and foremost, a peace obligation ensues from collective agreement, expressly or tacitly, as a contractual obligation on those bound by the agreement. In addition, a peace obligation – originally of a public law nature – is prescribed by statute law (LDA sec. 6 paras. 1 and 3, PSLDA Sec. 20 paras. 1-4). Simply put, the peace obligation is an obligation to refrain from industrial action. Essentially, the scope in substance of the peace obligation according to general collective agreement based norms and that pursuant to the statute law provisions are concurrent.

The notion of a peace obligation is intrinsically linked with a distinction between forms of disputes - or, more broadly, the objectives of collective action. Just as the notion of a peace obligation is fundamental, so is its relativity. Norwegian collective labour law and labour disputes legislation is based also on a distinction – at the outset a dichotomy in law – between disputes of rights and disputes of interest.

From an international and comparative law perspective two general observations are appropriate.

The basic notion of a peace obligation is not a first conception of the legislator. It originates from the collective agreements regulating dispute resolution procedures, of 1902 and 1907 primarily, thus preceding the 1915 enactment of the first LDA. The act in turn was based, essentially albeit more narrowly, on the prevailing collective agreement regime. The latter was maintained and developed, through agreements and case law, leading in time to legislative amendments in 1966 (LDA) and 1969 (PSLDA) adapting the statutory provisions to essentially correspond with the prevailing norms of the contractual peace obligation.

Further, apart from rights disputes the statutory provisions do not in positive terms preclude any particular objective from being pursued by collective action. The pertinent provisions are, rather, coined in negative terms. Aside from procedural requirements the statutory «peace obligation» does not apply to matters concerning «the regulation of terms of employment or wages or other matters relating to employment which are not covered by a collective agreement» (LDA sec. 6 para. 3; emphasis added). Conversely, the scope of this peace obligation is confined to matters that are covered by the collective agreement by which a trade union, an employers’ association, and their members

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12 And, as a corollary, an obligation on collective agreement parties and certain members (organizations and individuals) to counteract violation of the peace obligation by members bound by the collective agreement.
13 Originally referring only to strike and lock-out strictu sensu the LDA provisions were amended in 1966 (and the PSLDA in 1969) to cover also 'other industrial action', with the express objective of rendering the scope in substance of the statutory peace obligation to coincide with that ensuing from collective agreement according to case law of long standing.
14 The relation between agreed and legislated peace obligation rules has turned out to be important in the case law of the European Social Charter (ESC) supervision machinery; see S. Evju, «Sosialpakt og arbeidskamp …», l.c. (fn. 6), 180-184.
are bound, during the tenure of the agreement. What is covered by an agreement is contingent on its stipulations and their construction. As a matter of principle, what is not covered may be pursued by collective action. It is this «negative» construction of the peace obligation that leaves open the possibility of recourse to collective action for other purposes, such as, e.g., «political strikes» (see further 3.14 infra).15

3.13 Rights disputes – a ban in general
In rights disputes, there is no right to strike. Recourse to any form of industrial action is banned. A rights dispute in this context is, at the outset, any dispute concerning the existence, validity, interpretation or application of a collective agreement and disputes pertaining to claims based on the agreement (cf. LDA sec. 6 para. 1, PSLDA sec. 20 para. 2). If a collective agreement applies, this prevailingly is deemed to encompass also legal disputes pertaining to individual employment contracts, e.g. dismissal disputes. This is based on the historical, pre-legislative, recognition in collective agreements of managerial decision-making rights within the bounds of the agreement and otherwise applicable law, which generally is held to apply as implicit to an agreement even if not explicitly stated; the latter form oc clauses have largely fallen into disuse. Hence, a dispute on whether managerial decisions are lawful thus is deemed to pertain to the collective agreement and is consequently subject to the peace obligation.16

3.14 Interest disputes – relativity and procedures
In interest disputes, on the other hand, the fundamental point of departure is that strike (industrial action) is a legitimate means to attain a desired result. An interest dispute is in this context one pertaining to the conclusion or revision of a collective agreement. The freedom to take recourse to industrial action here is restricted by two main elements, in part conjunctive, of peace obligation rules.

Firstly, during the tenure of a collective agreement industrial action is not permitted in disputes pertaining to matters that are regulated by that collective agreement (cf. in 2.12, supra). This applies only to those who are formally bound by the agreement (organizations and individual members).17

Secondly, procedural rules apply. If a strike (or lock-out) is called, notice must be given to the National Mediator and rules on time limits and a possible «cooling off» period come into play (cf. 5, infra). Industrial action can not be implemented until the expiry of the relevant time limits.

These procedural rules apply regardless of whether a prior collective agreement exists

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15 The issue of objectives of collective action also has been a topic in ESC case law; see S. Evju, ibid.
16 If no collective agreement is applicable, the issue may be seen as moot. It is however a basic tenet that force should not be used to resolve disputes in which there is recourse to courts.
17 The sole exception is an «extended peace obligation» under PSLDA sec. 20 para. 4 for state employees not members of a trade union capable of concluding collective agreements under that act; cf. in 4, infra.
between the parties to the interest dispute. If there is a prior collective agreement on the matters in dispute, the ordinary period of validity of that agreement must also have expired.18

It should further be noted that by virtue of statute law provisions a collective agreement has «continued effect». It does not lapse on the expiry of its ordinary period of validity but remains in force as a binding contract with full effect until the expiry of the time limits ensuing from the rules on notice and mediation mentioned above. This feature, which is rather exceptional to Norway seen in a comparative law perspective, stems from explicit provisions in the relevant legislation.19 Hence, recourse to «warning strikes» or other forms of industrial action in the intermediate period is precluded to the extent otherwise ensuing from the substantive peace obligation.20

Rather than the form of the action (strike or other measures) it is, in essence, the element of concerted action and its purpose that is decisive.21 As pointed out above (3.13), the peace obligation pertains to matters covered or being sought to be covered by collective agreement. Conversely, if the purpose or aim of collective action is detached from this, the action is as a point of departure not in contravention of the peace obligation.

In consequence, freedom to undertake sympathy («solidarity») action is recognized. Action in support of a party to a (lawful) «main dispute» (domestic or foreign) may be undertaken also by parties (and their members) bound by collective agreement during its tenure. When not relating to the collective agreement by which they themselves are bound, action in support of a party to another interest dispute does not run counter to the peace obligation, neither the statutory one nor that ensuing from general contractual peace obligation norms.

A sympathy strike is however a «strike» in the technical sense under the legal definitions of the labours disputes acts. Hence, the procedural rules on notices etc. (cf. in 5, infra) will apply, however only to the extent – in scope and time – that they are applicable to the main disputes. Further rules on procedures and preconditions may be, and frequently are, stipulated in collective agreements.22

Under the PSLDA, the starting point is different on this count. The right to sympathy action is restricted; pursuant to sec. 20 para. 5 the right to engage in sympathy action is contingent on collective agreement regulation. However, under the state sector «basic agreement» (now 2006-2008, sec. 45) the sole substantive restriction in these cases is one of prior negotiations between the trade union(s) concerned and the state.

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18 Cf. LDA sec. 6 para. 3, PSLDA sec. 20 para. 2.
19 Again, see LDA sec. 6 para. 3, PSLDA sec. 20 para. 2, their second subparagraphs.
20 Cf. supra with fn. 11.
21 Corresponding with the element «in order to force a resolution of a dispute» in the statutory definitions of strike and lock-out; cf. supra at fn. 9.
22 See, to this, the Labour Court decision ARD 1995, 214 [annotated by S. Evju], 15 International Labour Law Reports 3 (1997).
Norwegian law also recognizes a freedom of political strikes, i.e., strike action intended to express or impose an opinion on political issues of various kinds, whether related to economic policy of consequence to living and working conditions or not, and regardless of whether the issue concerned is a domestic or foreign one. Its purpose being detached from collective agreement, a «political strike» is not a «strike» in the technical sense, under the labour disputes acts, but the denotation is nonetheless in common use. Statutory procedural rules (cf. in 5, infra) do not apply. Collective agreement regulation on this form of action is virtually non-existent. According to well established case law it is, however, a precondition to not contravene the contractual peace obligation that political action is of a short duration only.23

Further, collective action may in principle be undertaken to resist performing work that presents grave danger to health or personal safety, and as a means to enforce performance of undisputed claims to back pay (as a form of lien). Again, such action is not «strike» in the statutory, technical sense. Collective agreement regulation is absent, and case law is very scarce, on issues of this kind.24

3.2 «Essential services»

There is no legal definition or embedded notion of «essential services» or the like in Norwegian labour law. Likewise, there is no special legislation or statute law regulations applying to certain types of services or work.25 Collective agreements may contain provisions on prior negotiations to safeguard «the technically safe and sound closing down and restarting of operations, and the necessary work to prevent hazards to life and health or substantial material damage»,26 but generally, no special procedures for the implementation of industrial action or the settlement of disputes are laid down in agreements.

The rules on procedures with regard to mediation under the PSLDA differ somewhat from those of the LDA; cf. in 4, infra. The PSLDA rules are however general to that act and are not based on the types of work or services concerned.

4 With who rests the right to call strikes?

Different from the situation in a number of other countries, in Norwegian law there are no requirements to the effect that industrial action must be called, led or approved

23 See further, e.g., the Labour Court decision ARD 1988, 61 [annotated by S. Evju]. 8 International Labour Law Reports 416 (1990). The requirement of «short duration» is emphatically confirmed in ARD 2001, 88, where it figured centrally in the Court’s reasoning finding a «political strike» unlawful, albeit the objective pursued by it was within acceptable bounds.

24 For an example on back pay issues, see the Labour Court decision ARD 1986, 13.

25 Except for «excluded groups», cf. 2.2 supra.

26 Quoted, as an illustration, from the LO - NHO «basic agreement»(2006-2009) sec. 3-3 para. 1.
by a trade union only (or by an employers’ association, as the case may be) and no prescriptions on balloting, quorum among the work-force, or similar requirements on decision-making.

This is attributable to the fact that in Norwegian law, there are no restrictions on the right to form trade unions (or employers’ associations) nor any formal requirements to obtain standing as a trade union for collective bargaining (or other) purposes. The basic rule is that any combination of employees (i.e., two or more) acting to attend to their common interests vis-à-vis their employer is considered to be a «trade union» in law (cf. LDA Sec. 1 para. 3). Accordingly, the freedom to undertake industrial actions rests with any and all trade unions or (not organized) combination of employees.

Under the PSLDA, bargaining rights on the employee side are reserved for certain trade unions/confederations (cf. in 5, infra). Hence, it is arguable that strike in an interest dispute on the conclusion or revision of a collective agreement can only be called by a union or confederation that has bargaining rights. The issue has not been raised or tested. As for other forms of collective action (e.g., political strikes) there is anyhow no specific basis for a requirement that action must be called by a trade union, nor is any such requirement applied in actual practice.

5 Procedures

A party calling a strike (or lock-out) in a dispute of interests within the meaning of the labour disputes acts is required to give notice in writing to the opposite party. The notice period for this «action notice» is, as a general rule, 14 days.

Under LDA sec. 28 notification must at the same time be given to the National Mediator. Industrial action can not lawfully be implemented until four days after such notification was given, at the earliest, and in no case until the notice period for the «action notice» is expired (LDA sec. 29 para. 1). The National Mediator may, within two days of receiving notification, impose a temporary ban on industrial action and summon the parties to compulsory mediation. This then, is a form of «cooling off period».

The aim and purpose of this «cooling off period» is to conduct mediation with a view to having the parties reach a «reasonable» voluntary settlement without resorting to implement industrial action. The Mediator is authorized, i.a., to table proposals to that end but has no power to compel parties to accept a proposal or to put it to a vote among their members (cf. LDA sec. 35). Ten days after a temporary ban is imposed, either party is entitled to require mediation to be terminated within four days (LDA sec. 36 para. 27 Stipulations to that effect may be found in collective agreements. That is, however, wholly exceptional in practice.

28 An exception would in any case have to be made for employees not members of a relevant trade union, under PSLDA sec. 20 para. 4 (cf. supra, fn. 17); they have the right to take industrial action to the same extent (in scope and in time) as those being members of relevant unions.

29 The procedures applicable in interest disputes are dealt with in some more detail in S. Evju, «Methods of settlement ...», l.c. (fn. 4).
1). Thus a temporary ban is effective, and mediation can be conducted, for no more
than 14 days, unless the parties agree to an extension of the time period by refraining
from requiring mediation to be terminated. The Mediator is not empowered to impose
a ban of longer duration, nor a longer mediation period or a new ban at a later stage
pertaining to the same interest dispute.\textsuperscript{30} If no settlement is reached by the termination
of the mediation period, industrial action may be implemented in accordance with the
preceding «action notice».

The PSLDA procedural rules essentially conform to the same pattern, but differ
on some points. Under that act, the state and trade unions have a legal right and duty
to bargain collectively. On the employee side, bargaining rights – and the capability to
conclude collective agreements – is reserved for trade unions satisfying certain require-
ments of membership size and representativeness. The requirements concerned are of an
objective nature and are laid down in PSLDA sec. 3. Bargaining rights are vested with
national trade unions and/or trade union confederations.\textsuperscript{31} If bargaining on the conclu-
sion or revision of a (general) collective agreement is unsuccessful, the National Mediator
must be notified immediately when the bargaining procedure is terminated. Mediation
is compulsory in all cases and shall be initiated within 14 days following notification.
Subsequently, 14 days after the start of mediation either party may require the procedure
to be terminated within 7 days. The minimum period thus is 21 days as opposed to 14
days under the LDA. No temporary ban by the Mediator is required. Industrial action
is expressly forbidden by the act itself pending the completion of the mediation proce-
dure. (Cf. PSLDA Chapters 4 and 5.) The Mediator may, also, require parties to put a
mediation proposal on ballot among members (PSLDA sec. 17).\textsuperscript{32} Otherwise, the rules
applicable correspond essentially to those of the LDA.\textsuperscript{33}

There are no rules requiring parties to submit the interest dispute to arbitration if
mediation fails, nor any permanent legislation empowering the imposition of compul-
sory arbitration.\textsuperscript{34} A permanent arbitration body exists, however: \textit{Rikslønnsnemnda} (the

\textsuperscript{30} See, e.g., the Labour Court decision ARD 1995, 214 [annotated by S. Evju], \textit{16 International Labour Law Reports}
3 (1997).

\textsuperscript{31} Currently there are four confederations with bargaining rights under the PSLDA. – Rights of bargaining at local
(establishment) level is derived from membership of a relevant national union/confederation. This is however
not important in our context.

\textsuperscript{32} It is not common practice to do that unless the party concerned accepts to have a proposal put forward.

\textsuperscript{33} Under PSLDA sec. 22 the notice period for «action notice» is 3 months - unless otherwise stipulated by collective
agreement. In the collective agreements applicable (the state sector «basic agreements»), the notice period is
set at 14 days, which is equal to the notice period applying within the remit of the LDA (cf. supra). Pursuant to
sec. 22 No. 2, second subparagraph, the 14 day notice period laid down by collective agreement applies also
to employees who are not members of trade unions with bargaining rights and thus not formally bound by the
agreements.

\textsuperscript{34} Cf. 1.2, supra. An exception applies for the groups of state employees mentioned there that do not have a
right to strike. For those groups, arbitration by an impartial, tri-partite body (\textit{Rikslønnsnemnda}, cf. infra at fn.
35) is provided for pursuant to PSLDA sec. 26 a.
National Wages Board is at the disposal of parties, at the outset for the possible voluntary submission of interests disputes to arbitration. Voluntary arbitration is however rarely used in practice.

6 Special features of scope and form of strikes
Further to what has been noted above it may be observed:

The LDA and PSLDA procedural rules apply only to strike (and lock-out) as defined by those acts. They do not apply to collective action that is not «strike» (or «lock-out») in the technical sense according to the statutory definitions. Consequently, at the outset there are no specific requirements on prior «action notice», notification, etc., for other forms of collective (industrial) action. E.g., as regards «political strikes», no set procedural rules of this kind exist. It is presupposed in case law that some form of prior notice is given to the employer, but there are no clear cut rules on time limits, form and content, etc.

Measures amounting to «other industrial action», in a technical sense, are generally precluded during the tenure of a collective agreement by the peace obligation rules. The requirement of «action notice» – to which I shall return shortly (under 7.2, infra) – as a precondition to bringing the contractual peace obligation to expire effectively functions as a bar on any use of collective action for purposes covered by the peace obligation as long as the collective agreement is in force. Hence, issues of notice requirements and subsequent procedures have not been brought to the fore. Case law has held, however, that in the absence of a contractual peace obligation the LDA rules apply «correspondingly» to industrial action measures falling short of a strike if being used for the purpose of resolving an interest dispute within the meaning of the act.

With regard to collective action for other purposes the issue is moot, at least in principle. There is no case law similar to that pertaining to «political strikes» on whether a form of «action notice» is required and, if so, under what terms.

It may be noted, also, that in Norwegian law a technical distinction is made between industrial action and boycott. The legality of boycotting is governed by separate legislation, i.e., the Boycotting Act of 5 December 1947 No. 1, which lays down substantive as well as procedural requirements. In simple terms, industrial action being implemented by one party to a labour dispute however can not be deemed to be a boycott in relation

35 Pursuant to the Arbitration in Labour Disputes Act of 19 December 1952. The Board is composed of three «neutrals» and two representatives of the parties to the dispute, having voting rights, plus two permanent members in a capacity of «expert representatives» of employee and employer interests but not having voting rights. The cost of arbitration by the Board is borne by the state.

36 Cf. supra with fn. 11 and 20 on the «continued effect» of collective agreements.


38 See the Labour Court decision ARD 1982, 134.

39 The Boycotting Act has a general scope and is not confined to labour or industrial relations matters.
to the opposite party. Action by «outsiders» may on the other hand be considered to be a boycott. That may be of consequence in relation to the use of secondary action, with the exception of straightforward sympathy strikes (or lock-outs).{40} In addition, measures directed against the opposite party by a party pressing to obtain a collective agreement when no industrial action is ongoing may be a boycott – e.g., if there is no strike because the party pressing for a collective agreement has no members in the enterprise.{41}

7 Exercise and effects of strikes

7.1 Forms of action during a lawful strike

A strike, being a «stoppage of work»,{42} implies at the outset only the cessation of work by the employees concerned. Within limits, this may be added to by active measures by or in support of strikers.

«Blocking» is a form of supporting action involving measures aimed at preventing an enterprise which is affected by industrial action from recruiting labour to fill jobs left by strikers.{43} Technically, blocking is a form of boycott. It is however exempted from the scope of the Boycotting Act and is lawful when performed in conjunction with a lawful strike (or lock-out).{44}

Picketing is one form of blocking. It is lawful as long as it is not carried out in violation of general rules of law relating to disturbing the peace and the use of violence or force. The same applies to secondary picketing.

Generally speaking, blocking action can not involve physical assault or physically obstructing the movement or performance of work by others not on strike. Blocking action beyond lawful limits may entail criminal sanctions and liability in damages (e.g., pursuant to the rules of the Boycotting Act).{45}

As the rules on blocking indicate, there is no legal ban on hiring employees to replace striking employees. To do so is however considered a gross transgression of industrial relations standards and it is virtually unheard of in modern practice. Nor are manpower agencies or the public employment service offices prohibited from sending employees to replace strikers. An unemployed person seeking work however has the right to refuse to accept a job which is vacant on grounds of lawful industrial action without losing entit-

40 See, e.g. the Supreme Court decision Rt. 1959, 1080 (an ITF related case).
41 See, for a pertinent illustration, the Supreme Court decision Rt. 1997, 334.
42 Cf. supra at fn. 9. – The same is true for a lock-out.
43 Or, in the case of a lock-out, to prevent workers on strike from obtaining other jobs.
45 These are not matters within the jurisdiction of the Labour Court; see, e.g., the Labour Court decision ARD 1993, 117.
Employees in an undertaking affected by industrial action who are not themselves on strike are obliged – and have the right – to continue performing their normal work. As a general rule, the employer is not entitled to order them to work normally performed by employees on strike, and non-striking employees have a legally enforceable right to refuse to do so without being subjected to disciplinary sanctions or dismissal.

A strike by a part of the workforce may warrant temporary suspension on grounds of «operational requirements» of all or some of the remaining employees of the enterprise, under the general rules on _permittering_.

### 7.2 Effects of a lawful strike on contracts of employment

During a lawful strike the employees concerned are entitled to cease working and they are not entitled to pay for days not worked – or for hours not worked, as the case may be (e.g., a «political strike» of short duration). This holds true regardless of whether a strike is lawful or not.

The LDA and PSLDA rules requiring an «action notice» as a prerequisite to a lawful strike (or lock-out) are based on the presupposition that notice is given in the form of notice to terminate the individual employment contracts in question. The underlying conception, historically based on the law of contracts, is that employees are not entitled to withhold any part of their work performance (nor may they be barred from work) so long as the individual employment contracts are in force. Hence, strike (and lock-out) in the terms of the labour disputes acts implies the termination of employment contracts.

This formal point of departure is however not consistently maintained in law.

The Holidays Act of 29 April 1988 No. 21 expressly stipulates, in sec. 11 para. 4, that the vacating of jobs by employees going on a lawful strike or lock-out in a dispute of interests is _not_ considered as termination of employment. Accrued holiday pay is to be paid by the employer on the date otherwise applicable. The rules on determining and taking holiday time also are unaffected and apply in the same way as for current employment relationships (sec. 9 para. 4 of the act).

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46 Previously, this was stated explicitly in the 1966 Social Insurance Act, sec. 4-2 para. 3 litra c. That provision, among others, was repealed by amendments enacted in 1996 aiming, i.a., to simplify the rules of the act. It was however stated explicitly in the preparatory work to the amendment act that no change in substance was intended. (Cf. Ot.prp. No. 35 (1995-96), 51). The relevant provision is now in sec. 4-20 of the consolidated Social Insurance Act of 28 February 1997 No. 19.


48 If wages are paid in advance for a time period in which a strike later occurs, the employer is entitled, under sec. 14-15 para. 2 litra f of the Working Environment, Working Time and Dismissal Protection, etc., Act of 17 June 2005 No. 6 (WPA), to deduct the corresponding part of wages from a subsequent wage payment.

49 Cf. the legal definition of «action notice» (arbeidsoppsigelse) in LDA sec. 1 para. 7, and PSLDA sec. 22; and see, for some further comments, e.g., the annotation to ARD 1994, 182, 14 _International Labour Law Reports_ 491, 499.
Similarly, in the WPA sec. 15-3 on dismissal notice periods, it is expressly stated in para. 5 that the «continuous employment» required in paras. 2 and 3 of sec. 15-3 is not interrupted by resignation pertaining to participation in lawful industrial action, «but the period for which the employee was absent shall not be included unless otherwise agreed when the labour dispute was settled». It is symptomatic that the expression being used in this provision is «temporary resignation» (or «temporary cessation of contract»). Notwithstanding the formal point of departure, resignation upon «action notice» is in effect presumed to imply merely a temporary suspension of employment contracts.  

This is in keeping with predominant industrial relations practice. When a labour dispute is terminated and on-going industrial action thereby is ended, employees are fully reinstated and previously acquired rights are not impaired. Explicit «reinstatement clauses» to this effect in collective agreements settling a dispute, previously in common use, are now no longer the common practice. Generally, it is considered an implicit presupposition on which a settlement is based – as a legally binding and enforceable norm of the agreement – that striking (or locked out) employees are to be fully reinstated immediately when the undertakings concerned resume their operations. It is a different matter that discussion may still be propounded on the point in time that reinstatement should be effective, on account of when it is reasonably practicable to resume production, etc.

Certain points are however still moot.

In 1984, a Court of Appeal held that when a lawful strike was brought to an end by a unilateral declaration by the employee side (the trade union), the one employee concerned did not have a right to reinstatement. The employer’s refusal to reinstate thus could not be deemed a dismissal under the WPA (its predecessor act) dismissal protection provisions. Even if an employer on the grounds of customary law could be considered to have an obligation to reinstate that could not, in the Court’s opinion, be held to apply without exception, and in the concrete circumstances it would be «obviously unreasonable» to oblige the employer to reinstate the employee. Even if the Court’s reasoning on certain points is clearly untenable, the decision stands. There is no subsequent case law on this particular problem. The issue can hardly be considered to be clearly resolved in law.

Another question is whether an employer during a lawful strike may dismiss employees, not on the grounds that they are on strike but for reasons capable of warranting dismissal under the WPA statutory dismissal protection rules (e.g., permanent closure or reorganization of operations). Conversely, may employees on strike (or lock-out) give notice to terminate their employment relationships so that they are free not to resume

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50 For a more comprehensive discussion of this, see H. Jakhelln, «Oppsigelse i anledning arbeidskamp – rettsvirk-ningser for de individuelle arbeidsavtaler», in M-L. Andreasen et al. (eds.), Septemberforliget 100 år, Copenhagen 1999, 133-192.

work – or a notice period is running – when the industrial is ended? Or may an employee, with no prior notice, refuse to resume work when industrial action ends without being held to be in breach of contract? Occasionally in debate, these issues have not been put to a test in case law.

Lawful collective action other than strike and lock-out in the above sense (e.g., a "political strike") implies merely a suspension of contract. It is, also, uncontested that participation in lawful collective action is not a grounds for warranting dismissal under the WPA (and similar statute law) rules. Prevailing opinion further holds that liability in damages (on grounds of breach of contract) can not be incurred.

7.3 Sanctions in case of breach of legal requirements
If the formal, procedural requirements on notices, etc., pursuant to the labour disputes acts – or collective agreement, as the case may be – are not complied with, the relevant applicable sanction is liability in damages. Organizations as well as individual members may incur liability. However, if industrial action is called by a trade union, individual employees acting in accordance with the union’s instruction presumably can not be made liable.52

8 Practice and perspectives
Strikes and other industrial action are not frequent occurrences in the Norwegian labour market. Wildcat strikes are not commonplace. In Norway, it is strikes related to collective bargaining interest disputes at the national or sectoral level that dominate. The number of strikes (and lock-outs, as the case may be) is comparatively low. However, when industrial action eventually is implemented in an interest dispute, it tends to cover a significant number of employees and last for some time. Research suggests that in terms of the number of employees involved and working days lost, Norway exhibits a medium volume compared with other Western European countries.53

Stated very briefly, Norwegian industrial relations are characterized by a considerable number of trade unions and, also, employer’s associations at the national level. Further, there are no strict demarcation lines between unions but, rather, a certain rivalry and competition. The number of collective agreement relationships up for revision, annually on wages and biannually in full, is quite significant. The large majority of interests dispute are settled by the parties’ reaching agreement through bargaining or, as is often the case, through mediation. Recourse to industrial action is taken in a comparatively small number of disputes.

52 See, more generally, on sanctions in the event of unlawful industrial action, S. Evju, «Norway», in A. Trebilcock (ed.), I.c. fn. 4.
In the latter event the State may intervene by way of adopting a special – a *ad hoc* – act prohibiting the implementation or continuation of industrial action and referring the dispute of interests to compulsory arbitration (by the National Wages Board). Such legislation may be adopted, pursuant to the Constitution, by *Stortinget*. This is a measure to which resort has been taken on a number of occasions over the years – however a limited number, compared with the total number of disputes involving industrial action.

It is, also, a practice that has drawn criticism on several occasions from the supervisory bodies of the ILO and, in some instances, by the supervisory bodies of the European Social Charter. In Norwegian law, domestic legislation nonetheless takes precedence.

Features of industrial relations – in particular the existence of rivalling unions pressing for competing collective agreements and the scope of the freedom to strike in that context, and in part also considerations relating to Norway’s obligations in international law – have given rise to calls for reform of labour disputes legislation. These are issues that have been topical for some time. In a «white paper» tabled in 1996 proposals on a reform of the LDA were put forward, essentially in the form of sketches of «principles» on which a revision of the act may build, suggesting the introduction of formalised bargaining rights implying restrictions on the freedom of collective bargaining and the effective freedom of industrial action for trade unions (including confederations) not satisfying a complex set of criteria on size, representativeness, etc. The proposals quickly proved to be highly controversial and were eventually shelved. A subsequent «white paper» tabled in 2001, resulting in minor legislative amendments in 2002, advised against far-reaching reforms of such a nature and counselled to largely maintain the existing legal framework. This also being the outcome, it still is the prevailing situation.

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54 Or, as the case may be under Art. 17 of the Constitution, by the Cabinet in Council when Stortinget is not sitting.


56 See, to this, *supra* in 2.1 and 2.2 and, in particular, the decisions referred to in fn. 5.
