

Our Ref:  
Date: 5 May 2015  
Enquiries to: Schools' HR Casework  
Tel: 03456 066 046 (option 3)  
Email: [hr@schoolschoice.org](mailto:hr@schoolschoice.org)

To: Heads of all Suffolk maintained schools and PRUs

<b>LMS Document</b> <b>No. 2015/15</b>
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Dear Colleague

**Re: NASUWT escalation of industrial action**

The NASUWT has written to the local authority to give notice of further action in furtherance of the national trade dispute.

The full text of the letter is set out in Appendix 1. The relevant part states:

“The form which this additional form of continuous action short of a strike will take is as follows:

*Members are instructed to refuse to comply with any marking and assessment policy which generates excessive workload and/or has not been agreed with the NASUWT.*

*Until such time as a policy agreed with the NASUWT is introduced, members will mark and assess pupils in a manner consistent with the principles set out in the Union's guidance.*

NASUWT members will commence this continuous action short of strike action on **Wednesday 6 May.**”

There is a statement on the NASUWT's [website](#) and also guidance titled [Initial guidance action short of strike action marking instruction \(England\)](#) dated 24 April 2015.

**What is action short of strike action?**

This is a form of industrial action in which employees adhere strictly to their contracts of employment / conditions of service and through this intend that the employer's business will be disrupted.

**The advice of the Local Government Association (LGA)**

The LGA's starting point in respect of this action is that the majority of school teachers should be and will be in receipt of their contractual entitlements and so will have no reason to seek to engage in the action. If there are examples of clear breaches of the School Teachers' Pay and Conditions Document then, quite clearly, the LGA would not endorse this. We would encourage employers to help head teachers clarify the issues and resolve the situation as soon as possible.

However, it is our view that the actions which the NASUWT is inducing its members to take are likely to constitute, in many cases, a breach of contract due to the action amounting to partial performance. This is because in many cases teachers will be refusing

to carry out particular duties unless the school meets certain demands where either the employer will already be meeting their obligations in respect of the contract (notwithstanding that the teacher may not agree) or, even where the employer may have failed to meet a term of the teacher's contract of employment, the action taken by the teacher is disproportionate in light of the teacher's implied duty of good faith.

Employers should bear in mind though, that refusing to carry out a duty that is specifically precluded within their contracts (e.g. refusing to carry out lunchtime supervision) is unlikely to be a breach a contract as it is not the same as refusing to carry out particular duties unless the school meets certain demands (e.g. a teacher refusing to teach because they have not received their full PPA entitlement), as outlined above.

Where a NASUWT member chooses to engage in this action it will be the head teacher who will need to make an initial judgement, based on the particular circumstances, about whether or not the teacher is in breach of contract and, if so, the extent of the breach.

### **The LA's advice**

Where one or more members of staff refuses to carry out certain duties, and claims that this is part of a 'work to rule', it will be necessary to consider whether those duties are genuinely outside the requirements of the contract of employment before determining what action to take. Schools will make their own responses – the following comments are intended to guide over what could be seen as reasonable responses.

Where schools are confident that the employee is in breach of their contract by refusing to undertake certain activities, the Governing Body should write to the employee making it clear that they do not accept partial performance of the employment contract.

**In keeping with the tenure of the LGA advice, it is not recommended in such cases that teachers are sent home or are regarded as working on a voluntary basis. However the Governing Body should consider making an appropriate deduction from salary.**

### **Salary deductions**

The LGA advice on this matter is as follows:

*"In principle, the deduction represents damages arising from the employee's breach of contract and the principle applied to pay deductions in these circumstances is one of 'equitable set-off'. In other words, the employee's breach of his or her contract gives the employer a claim in damages. Instead of having to take that claim separately to a county court, the employer can set it off against the employee's wages.*

*It is often difficult to make a pre-estimate of the damages caused by each individual employee's breach of contract. In practice, deductions are usually restricted to a proportion of pay that fairly recognises the fact that the employee is not performing their full contractual duties. Governing bodies that make a reasonable attempt to do this should withstand any legal challenge, and the cases below set out how the courts have approached deductions.*

*In Royle v Trafford Metropolitan Borough Council [1984] IRLR 184, a teacher refused, as part of a campaign of industrial action, to take classes different from those for which he had been previously responsible or to accept additional children into his classes. The High*

*Court held that a proportionate deduction of 5/36ths of the teacher's salary was a reasonable estimate of the damages incurred. This was based on the number of children excluded by the teacher from the class. The Court noted that no replacement teacher had been employed to teach the children excluded from the class, and that the authority had not been required to meet any claim from parents for failure to educate their children.*

*When communicating their response to teachers, governing bodies should ensure that it is made clear to them that deductions are made in lieu of damages for their breach of contract. Under no circumstances should deductions be viewed or presented as a penalty for taking industrial action."*

**What should schools do next?**

If you need further advice and support please contact your named HR caseworker, or the Duty Caseworker on 03456 066 046 (option 3) particularly if you feel the action is so serious that it affects your ability to manage your school successfully.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Libby Wragg', with a circular flourish at the end.

**Libby Wragg**  
Schools' HR Casework Service Manager

## **“NOTICE OF ESCALATION OF INDUSTRIAL ACTION**

### **Trade dispute over adverse changes to pensions, workload, conditions of service, including pay and pay progression and job loss**

I wrote to you in November 2011 to provide the results of the NASUWT's national ballot and gave notice, in accordance with the provisions of Section 234A of the Trade Union and Labour Relations (Consolidation) Act 1992 of industrial action. This action took the form of one day of discontinuous strike action on 30 November 2011 and continuous action short of strike action with effect from 1 December 2011. I wrote to you in September 2012 giving further notice of escalated action short of strike action which commenced on 26 September 2012. I wrote to you again on 1 May 2013 giving notice of the further escalation of action short of strike action with effect from 16 May 2013. I then wrote to you again on 11 September 2013 giving notice of one further day of discontinuous strike action that took place in October 2013.

The ballot was conducted under the relevant provisions of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 244(2) of this Act provides that a dispute between a Minister of the Crown and any workers shall, notwithstanding that the Minister is not the employer of the workers concerned, be treated as a dispute between those workers and their employer if the dispute relates to matters which cannot be settled without the Minister exercising a power conferred on him by or under an enactment. The failure of the Secretary of State for Education to address seriously the issues under dispute has left the NASUWT with no choice but to further escalate the action short of strike action. I therefore now write to give notice, in accordance with the above Act, of further action in furtherance of the national trade dispute.

The form which this additional form of continuous action short of strike action will take is as follows:

*Members are instructed to refuse to comply with any marking and assessment policy which generates excessive workload and/or has not been agreed with the NASUWT.*

*Until such time as a policy agreed with the NASUWT is introduced, members will mark and assess pupils in a manner consistent with the principles set out in the Union's guidance.*

NASUWT members will commence this continuous action short of strike action on Wednesday 6 May 2015. We intend to call all members employed by your organisation in the categories listed below to take this action. Lists of the categories to which affected employees belong, the numbers in each category, the workplaces of affected employees and the numbers at each workplace (and the total number of employees concerned) are set out below.

It is your responsibility as the employer to make all workplaces listed below aware of this notification. The lists and figures shown below have been arrived at by retrieving information from our membership database as to the categories and workplaces of members, the numbers in each category and the numbers in each workplace.

Prior to sending this notice, we asked our members to update their membership data and we updated our database on receipt of their responses. In addition, where we have

received any relevant information from employers, union officials or members, we have updated our membership database accordingly. We have also updated our membership database to include any new members.

There are some members for whom the Union does not hold current workplace details but who are nevertheless entitled by law to participate in the Union's industrial action. Unless they have notified us that they are working as supply teachers, our membership system shows these members' workplaces as being 'Unknown' and their default employer as being the local authority for the area in which they live (according to their postcode). In the event that a workplace representative advises the Union that a member has left the school but cannot identify the member's new workplace, the Union routinely writes to (and, if we have a current e-mail address, e-mails) the member requesting up-to-date membership details, including workplace details. In addition to these routine letters, the Union has e-mailed (or, where we have no current e-mail address, written) to all members whose workplace category is shown as 'Unknown' requesting up-to-date membership details, including workplace details.

For some members, our membership system records their workplace as being 'Supply' and their default employer as being the local authority for the area in which they live (according to their postcode). These are members who have told us they carry out supply work but have not given us any workplace details. The nature of the role of supply teachers is that they do not work from a single set of premises. Therefore, unless we have been informed otherwise, we have assumed that the workplace with which their employment is most closely connected is the premises of the local authority. We have asked members in this category to inform us if they are employed by a Teacher Supply Agency and, on receipt of responses, we have updated their employer record to the name of the Teacher Supply Agency.

The information provided is as accurate as is reasonably practicable in light of the information in the Union's possession. If there are any inaccuracies, these will have been caused by factors outside of our control, such as members not informing the Union of changes, despite repeated requests to do so.

For the avoidance of doubt, the continuous action short of strike action which commenced on 1 December 2011 and the escalated continuous action short of strike action which commenced on 26 September 2012 is ongoing and will continue. The action short of strike action instructions are available on the Union's website ([www.nasuw.org.uk](http://www.nasuw.org.uk))