

Can universities cut staff pay for the strike as they please? "No way", says the law.



Despite threats from various universities to deduct a high proportion of pay from staff over the recent strikes, it is very unlikely that such actions would be deemed legal, writes Ewan McGaughey. He explains the law when it comes to wage deductions, who is at fault for the strike, and why university management would be extremely ill-advised to engage in any punitive retaliation for the strikes.

University and pension governance needs long-term strategy, not 3-year short-termism and conflict. The strike over cutting university pension pay is creating a stunning movement for governance change. From [Aberdeen](#) to [Exeter](#), staff and students want this to never happen again. People want votes and transparency in their universities, [not a 'Die Quickly' pension](#). Last week, Oxford staff threatened to sack their Vice Chancellor if she did not follow the near-unanimous vote against cuts. Cambridge Vice Chancellor, Stephen Toope, publicly states universities should not assimilate to [a failed market model](#). Still, in the strike's fourth week Universities UK [proposed worse cuts still](#): cutting pension pay by about 11% (by cutting accrual rates from 1/75th to 1/85th), cutting Defined Benefit pension thresholds from £55,000 to £42,000, and so on. UUK say they must fund a deficit, which USS's conflicted fund managers project without any credible evidence ([there could be an £8.3bn surplus](#)). Worse, that proposal said 'strike action will lead to the loss of pay', while suggesting classes should be rescheduled. University staff said they would not capitulate.

But is the assumption of UUK accurate: can they cut staff pay for the strike as they please? The law's answer is 'no way', because the Supreme Court just changed the law. If universities retaliate against staff for a lawful strike, they risk a tsunami of legal action: liability of indeterminate amount, for an indeterminate time, to an indeterminate number of people.

What does the law say on wage deductions?

Many democratic countries do not allow employers to deduct pay for strikes, when lawful strikes are the employer's fault. In the UK, if you make a contract with someone but they break the deal, you can withhold your performance. The question is, who breaks the contract first? A leading case on the principles is [Liverpool City Council v Irwin](#). Here, tenants went on 'rent strike'. They said their landlord failed to keep the common parts properly cleaned. But there was nothing written in the contract about this. The House of Lords said a landlord has a duty to keep the common parts clean (it was an 'implied' contract term). If the landlord broke its duty, the tenants could refuse to pay.

The same principle for a rent strike goes for a real strike (the money just goes the other way). If workers unreasonably refuse to work, if workers are at fault, employers can withhold wages. But if employers unreasonably breach their duties, if the employers are at fault, then workers can withhold work.

Whose fault is the strike?

So, whose fault is the pension strike? The employers will say 'it's not our fault!' But this does not square with the fact that they have admitted their original position was wrong. UUK started by arguing that 'Defined Benefit' pensions should be scrapped completely, because it said a majority of university chiefs agreed. Then it emerged that Oxford and Cambridge Colleges [had been counted like 'universities'](#) in the UUK pension consultation. After it was pointed out that this is the real world, not a game of *University Challenge*, it also emerged that College bursars (e.g. at [King's College, Cambridge](#)) had no authority to represent their Colleges to UUK.

This means some colleges, and UUK, were acting unlawfully according to [their own internal rules](#). As UUK is a company limited by guarantee, and a charity, this means its representations to USS are voidable under the Companies Act 2006 [ss. 40-42](#). Member universities of UUK (who are not happy with this mess) could sue the directors of UUK for acting outside their authority ([s. 171](#)). Summary dismissal is probably also justified, though a director can circulate a statement of protest ([ss. 168-9](#)).

It gets worse for UUK. Quite aside from USS's own consultation, every employer has a duty to consult '[properly](#)' in good faith on any change to future workplace terms. That means a real '[obligation to negotiate](#)', not do some sham consultation and then ram through a pre-packed plan. Legal advice has already been [crowdfunded against USS](#), organised by Dr Ruth Stirton, [@ForPension](#). But also, UUK never consulted meaningfully with the representatives of staff at the University and College Union.

This is why there is a strike. UUK breached the reasonable expectations of staff to a meaningful consultation process. It broke the law and it even broke its own rules.

Why do universities think they can deduct wages for strikes?

So why do university managements think they can deduct wages for this strike? They have probably heard of a notorious case called *Miles v Wakefield MDC*, from the midst of the conflicts [in 1987](#). This allowed an employer to deduct pay from registrar employees, who struck on people's wedding days. Originally, universities said they'd deduct pay for every week-day on strike, or 1/260th of people's salary.

But in 2017, [Hartley v King Edward VI College](#) held that if any deductions for a strike happen at all, they must be proportionate. Here, school teachers were on strike. The school tried to deduct 1/260th of salary: for every work day. But the Supreme Court held only 1/365th of salary could be deducted. This case is probably why universities changed their mind to say 1/365th of wages would be deducted for strikes.

But there's more. The Supreme Court in *Hartley* made clear – [in paragraph 1 of a unanimous judgment](#) – their decision started from the fact that the union agreed to allow wage deductions in a collective agreement. No collective agreement enables universities to deduct staff pay for strikes. Individual contracts may have clauses authorising wage deductions, but these are photocopied for employees on a take-it-or-leave-it basis, without bargaining, and [do not represent 'true agreement'](#).

In this strike, some universities were saying they would deduct more pay than for strike time alone (they are changing their minds fast). If employers engage in such punitive behaviour, any employee or union can apply to court for an injunction and damages, and they will probably win. But what if employers deduct 1/365th of pay, for each strike day? Some employers, like at Cambridge, have already stated [there will be no deductions](#) if classes are redone, recognising this is largely the employers' fault. Should other universities persist in thinking the law is on their side?

The fact is there is no legal consensus. An employer would try to argue the law is the same as in 1987: no work, no pay. If this principle is absolute, it goes against the basic standard in contract law that one person cannot be made to suffer for another's breach. It also fails to distinguish between work on a specific task from jobs, like at university, where work is over a period of time and [cannot be chopped up](#). Employees would argue, with considerable force, that they lawfully withheld their labour in response to the employer's unlawful 'anticipatory' breach of their employment contract. This matters because the right to strike is a fundamental human right: in [international law](#), under the [European Convention](#), in [EU law](#), and recognised [at common law](#), [again](#), and [again](#), and [again](#).

And what would it mean if universities did deduct staff pay for strikes? Universities are not like shops that lose customers if a strike forces them to close. Universities are not planning to refund student tuitions for cancelled classes, [and students know it](#). No university management can show financial loss from the strike. Research output will be the same. They will keep student fees (and even if they don't, this doesn't erase their fault). This means universities deducting wages risk claims that they are unjustly enriched. They are better off settling the dispute and moving on.

Why should we care?

Now as you read this you might say, "sure Ewan, that's an interesting argument. But you're obviously biased. You're just trying to save money for yourself." This isn't completely wrong, but I worry most about younger people. I worry about people like me a few years ago, working on successive part-time, fixed-term contracts, as rent and fees rise faster than you can save. I worry about students who are looking towards careers where even the highest achievers face escalating working time, pay insecurity, less autonomy, a muted voice at work, in a stretching workplace hierarchy. I worry that the values of the Universal Declaration of Human Rights, which guarantees '[everyone](#)' the right to social security and justice in pay, are being forgotten.

Universities UK are fond of saying they want to be part of a '[global market for higher education](#)'. But staff and students don't want that. They want a global community, which sees that the purpose of education is higher: to enable everyone to develop their [character, capacity, potential](#), and [personality](#) to the fullest. It is as if UUK want to put prices on everything, but they see the value of nothing. This is why people who support democracy and justice in education will win.

Further reading:

- Z Adams, "Wage", 'Salary' and 'Remuneration': A Genealogical Exploration of Juridical Terms and Their Significance for the Employer's Power to Make Deductions from Wages (2018) [Industrial Law Journal](#) (on the historical distinction between work over time, and work on specific tasks)
- E McGaughey, 'Votes at work in Britain: Shareholder monopolisation and the 'single channel'' (2018) [47\(1\) Industrial Law Journal 76](#) (on democracy in universities, and companies, summary on the [LSE British Politics blog](#)).
- E McGaughey, 'Does Corporate Governance Exclude the Ultimate Investor?' (2016) [16\(1\) Journal of Corporate Law Studies 221](#) (on asset manager conflicts, summary on [Oxford Business Law Blog](#)).

About the Author



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