



## Advice on ASOS to EIS FELA members: 'Working to Rule' and 'Resulting Boycott' in Pursuit of the National Pay Dispute

February 2024

## **Background**

In practice, UK law allows trade unions to carry out lawful industrial action in furtherance of a trade dispute, albeit with several hurdles that allow employers to challenge or interdict industrial action ballots or industrial action. The EIS has obtained industrial action mandates for strike action and action short of strike action (ASOS), and issued notice for ASOS industrial action to start on 12<sup>th</sup> February 2024, as detailed below:

I hereby give notice that affected EIS members employed by [AAAAAA College] will be asked to undertake a programme of continuous industrial action short of strike action in pursuit of the dispute from 12<sup>th</sup> February 2024.

In accordance with the ballot, the industrial action short of a strike will take the following forms:

1. 'working to rule', where members perform their duties strictly to the letter of their contract i.e. refusing to take on any additional duties or attending voluntary or extracurricular meetings or events;
2. a resulting boycott, involving members withholding students' results

It is anticipated that the industrial action short of strike action will continue until 15<sup>th</sup> July 2024, though it will end earlier if a resolution is found.

## **EIS Advice**

**Action Short of Strike Action (ASOS) is a form of industrial action and your statutory ballot gave a mandate for the following ASOS action to be taken:**

1. 'working to rule', where members perform their duties strictly to the letter of their contract i.e. refusing to take on any additional duties or attending voluntary or extra-curricular meetings or events;
2. a resulting boycott, involving members withholding students' results

Both action 1 and 2 will commence on Monday 12<sup>th</sup> February 2024.

All members who work as lecturing staff in the colleges<sup>1</sup> balloted will be expected to engage with both the resulting boycott and work to contract from this date.

Each college has been informed of this, in line with the two-week notice period stipulated by the Trade Union Act (2016). Following wide-ranging engagement with members, the EIS-FELA Executive has decided to enact ASOS, in the forms outlined above, to leverage an acceptable conclusion to this pay dispute.

In order to complement and amplify the ASOS, a discontinuous programme of strike action will also be enacted. The first day of strike action has been notified for the 29<sup>th</sup> February 2024, and further days will be notified in due course.

### **What is a 'working to rule'?**

This means refusing to do work that is optional in your contract, for example refusing to take on any additional duties or attending voluntary or extra-curricular meetings or attend no meetings where such attendance is voluntary on the part of the member.

Members should work no more than their contracted hours of 35 hours per working week. If a member cannot complete all activities within their 35 hour working week then they should ask their line manager to prioritise their work.

Members should not carry out any additional activity that members may have previously done on a voluntary basis.

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<sup>1</sup> I.e. All colleges except Orkney College

## **What is a 'resulting boycott'?**

Members are advised:

1. This boycott covers all results from any assessed work; with members refusing to share, enter or record student assessment results with:
  - Any college systems.
  - Any colleagues,
  - Any third parties/awarding bodies/external verifiers (such as the SQA).
2. The boycott covers any assessed work that would be used for the purposes of recording marks and grades as part of unit or a course assessment. This boycott does not prevent lecturers from sharing results for work that provides feedback and support to students for work that does not contribute towards the assessment of any unit, module or course.
3. The resulting boycott covers student results but does not restrict or preclude the setting nor marking of assessment tasks or work to be assessed.
4. This should be made clear to students by individual members. A resulting boycott is aimed at putting pressure on employers not on students – as soon as the dispute is resolved then the marks withheld may be shared/submitted.
5. Members are advised to give students general feedback from assessments in the normal format but to not share, enter or record results with college systems or third parties as outlined above.
6. If the college requests a member to record or share specific student marks, the member is advised to explain that they are participating

in lawful industrial action and will not, therefore, enter nor share any results.

7. Members are advised not to record the marks/results on the actual piece of assessed work, in case the college asks for the assessed work, but to have a record of the marks separate.
8. This national industrial action covers all unpromoted and promoted lecturers who have their pay negotiated through the NJNC. In those colleges where senior lecturer pay is not within the scope of NJNC, promoted lecturers are not expected to undermine the industrial action of their lecturer colleagues who are undertaking strike action.
9. Members are further advised not to share any marks carried out as part of IV/EV procedures. Any work that members submit for IV/EV purposes should not include student marks.
10. The EIS has provided the necessary legal notice to every college employer necessary for you to carry out the industrial action. There is no requirement for you to advise the College in advance of any deadline that you will not be submitting marks. Legally, members have up to the date of the industrial action itself to decide whether they participate in it.
11. It is only after the industrial action has begun that – if you are asked - you need respond to your employer to state that you are/have taken industrial action. Any request before the industrial action begins should be met with a response that states that EIS has informed you that the legal notice has been given and that you are not required to set out further information about your intentions.

**As this action proceeds, there may be a range of practical questions that arise, which will vary from department to department dependant on local arrangements. Please discuss any issues arising with your local Branch Secretary - who may then seek further advice from EIS HQ**

## **FAQs**

**1. Do I need to tell the College that I will not be resulting students and working to contract or respond to requests as to whether I will be taking industrial action?**

No, the statutory notice given by the EIS to the college prior to the commencement of ASOS is the only notice legally required.

**2. How will this impact students?**

The EIS-FELA has sought to engage with NUS (National Union of Students) Scotland and has made it clear that the ongoing intransigence of your employers and the Scottish Government is a greater long term threat to student progress than this boycott.

**3. Can the College make salary deductions (i.e. "deem") against me for carrying out this ASOS?**

The industrial action mandate obtained by a successful statutory strike ballot of EIS-FELA members gives the EIS the right to call members out on industrial action. That industrial action – whatever form it takes – are breaches of contract, but members are protected from dismissal for a period of 12 weeks.

The College may tell you that it does not accept “partial performance”, if so, it may tell you that it will not pay you at all unless you fulfil your whole contract, and that you should not come to work.

Alternatively, the College may state that it will accept partial performance but only pay partial salary (i.e. make pay deductions). The College will need to explain to you, in writing, how it intends to make any pay deductions in advance in order for you to consider your options.

Unfortunately, whilst ‘deeming’ is a complex area of law, in general, the law favours employers and makes such deductions possible if an employer accepts partial performance, insofar that it is proportionate. There are, however, risks for colleges when they make salary deductions from staff.

The EIS will take robust action in response to any deeming of its members. This will include the declaration of a dispute on the matter locally and will likely lead to a local ballot for strike action in defence of members taking lawful industrial action, if employers continue any course of action in relation to deeming.

We will also take legal advice on any specific deeming carried out by any college. Given that “deeming” is a complex area of law, there may be grounds for members – with EIS support – to appeal any disproportionate or unlawful deduction by individual members by making legal claims. This cannot be done collectively, and could lead to employers dealing with hundreds of claims.

It is also likely that we will pivot our national industrial action in this campaign from ASOS to strike action.

#### **4. Can the EIS members take legal action regarding any pay that is deducted? (i.e. deemed)**

Yes, if the College makes its pay deductions in an unlawful manner then the EIS will take action to support members raising claims. It should be noted that the EIS may not be able to raise collective claims for a branch or group of members – as they may need to be lodged by individual members.

#### **5. What will happen if all colleges begin to systematically threaten to deem as a response to ASOS?**

One FE college 'deemed' a few EIS members in last year's ASOS industrial action. The EIS believes that the college bullied individuals with threats of salary deductions and systematically picked off individuals by telling them that their colleagues were secretly sharing results (when they were not). By repeating this cycle members felt vulnerable and isolated. The College then 'locked out' members without pay until they agreed to share marks.

Unsurprisingly, staff morale in that college remains badly affected to this day.

The only way that deeming can work for employers is to isolate members, and therefore the branch has to stick together. Members should not be undermined by claims that their colleagues have secretly shared results. Collective action only works if it is done collectively – i.e. members do it together – and trust each other.

It is also likely that we will pivot our national industrial action in this campaign from ASOS to rely on strike action to a greater degree.



## **6. Undermining collective industrial action**

ASOS works but it relies on all members not doing it. ASOS relies on members having faith that other members are doing it.

Some colleges wanted members to share results with the college in ruses that sought to assuage guilty feelings. Anecdotally, the most popular was to ask a member to put the marks on a piece of paper in a locked cupboard that a manager had a key...

A well-supported industrial action is necessary for EIS FELA to get a decent pay rise for 2022-23 and 2023-24; i.e. a pay rise that should have been given in August 2022.

Most promoted lecturers are EIS members and will also benefit from a NJNC cost of living pay rise. Branches must engage with all members in this programme of industrial action.

## **7. Will the EIS repay any pay that is deducted from my pay for carrying out ASOS?**

No trade union can afford to set the precedent of repaying members' lost wages during industrial action.

## **8. For how long should I carry out ASOS?**

You should proceed with both the resulting boycott and working to contract until notified by EIS nationally (i.e. if a resolution is found to the dispute).

## **9. What if my manager instructs me to enter students' results?**

This industrial action lawfully allows you to breach your employment contract by not entering, sharing the mark – even if you are instructed to do so.

If the College persists and issues a personalised written instruction for you to do so, then inform your Branch Secretary and Area Officer. They will contact HQ if necessary.

### **10. What if I am asked to carry out EV / IV related tasks?**

You should proceed with carrying out this work, however, your manager and the Verifier should be informed that as you are participating in lawful industrial action, you cannot share the student marks for an EV / IV task.

### **11. What is meant by 'third parties' included in the resulting boycott?**

Many FE qualifications involve certification by third party awarding bodies (e.g. the OU, other HE providers, City and Guilds, the SQA etc). Members are advised that results relating to such qualifications should also not be shared.

### **12. What do I do if my college asks me for marked papers?**

If a college asks you to hand over marked papers then contact your Branch Secretary immediately – who will raise the matter with your Area Officer or Organiser. Ultimately, staff must not refuse to hand over college property.

Most examination/awarding bodies require certification that submitted student marks are genuine and this may only be done by the lecturer marking the work. We will raise any irregular practice by any college with the appropriate examination or awarding body.

Ultimately, resulting boycotts are designed to help students as the results may immediately be shared upon resolution of the dispute. If the resulting boycott is undermined by colleges then future ASOS may change to a marking boycott – they lead to long delays of sharing the marks upon resolution of the dispute.

### **13. What do I do if I feel pressured or threatened by management regarding ASOS?**

Members of a trade union carrying out lawful industrial action should not, at any time, feel threatened or pressured to do so. If you feel at any point under pressure or that you are being threatened by management in relation to carrying out ASOS, please seek support from your Branch Secretary as soon as possible. Depending on the situation, your Branch Secretary may in turn seek advice and support from your Area Officer, or EIS HQ.