PIRC
WORKERS ● COMPANIES ■ INVESTORS
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WORK

We welcome feedback from workers and their unions, companies and investors.

EQUAL PAY FOR EQUAL WORK: "WE CAN'T UNDERESTIMATE THE IMPLICATIONS OF THIS CASE IF WON. IT IS CONFIRMATION OF WHAT WE'VE KNOWN ALL ALONG WOMEN ARE WORKING JOBS OF EQUAL VALUE TO MEN, BUT GET PAID LESS."

Susan Harris Director of Legal, GMB union.

This month PIRC hosted an investor webinar with two legal experts to discuss the equal pay claims at Asda and other retailers. The Asda case has now amassed over 45,000 claimants making it the largest private sector equal pay claim ever in the UK.

GMB has organized over 20,000 members to join and the union's law firm Leigh Day is now inviting workers in 5 other retailers (Co-op, Morrisons, Tesco, Sainsbury's, and Next) to join similar claims. Other law firms are pursuing cases elsewhere, including Boots. Across the board this amounts to hundreds of thousands of workers involved in the litigation – representing a possible £8 billion bill for the retail sector.

We reported on the claims in previous newsletters and have begun looking more in depth at the social, governance and financial implications.

The legal basis

"It's not for Asda, Morrisons or any company to decide who is the breadwinner and base their pay levels on that."

Ellie Pinnells, Partner, Fieldfisher

The female claimants working on the shopfloor are arguing that their work is of equal value to the work of the male warehouse workers. At Asda the warehouse workers earn around £2 per hour more including an unsociable hours bonus, which the shop workers don't get despite also working unsociable hours. The claimants argue that this is gender discrimination and that the pay gap is not based on any difference in skill or effort levels required for each role.

The case reached an important milestone in March when the Supreme Court ruled ▶

Get in touch:
alice.martin@pirc.co.uk
Labour Specialist at PIRC.

Equal work	Description	Examples decided by courts
"Like work"	Work that is the same or broadly similar	• Woman preparing lunches for directors and a man preparing breakfast for other employees
Work rated as equivalent	Work rated under a valid job evaluation scheme as being of equal value	• Work of occupational health nurse rated as equivalent to that of a production supervisor in accordance with a pay framework
Work of equal value	Entirely different types of jobs determined to be of equal value when independently analysed on basis effort, skills needed, decision making etc.	• Clerical assistants deemed equal to warehouse operatives • Canteen workers and cleaners deemed equal to surface mineworkers • A school nursery nurse deemed equal to local government architechtural technician • Retail shop floor workers & warehouse operatives...(TBC)

SOURCE: HTTPS://WWW.ACAS.ORG.UK/EQUAL-PAY

that Asda's shopfloor workers could indeed compare their work with their male counterparts in the warehouses, despite being in different physical workplaces. The next step is for an independent expert to assess whether the work is of "equal value" based on the various tasks required in each role (e.g. loading / unloading shelves, customer service, decision-making).

Breaking new ground

The table below outlines the 3 types of equal pay claims under UK law. The high-profile local authority equal pay cases won in recent years, such as those at Glasgow and Birmingham councils, were based on the second category "work rated as equivalent" which makes comparisons between roles in the same pay framework.

By contrast the retailer claims have opened up a new space, using the third category of "work of equal value" to argue for pay equality between men and women workers with different jobs and pay frameworks, who are split across different sites.

If successful, there could be implications for other sectors. Large outsourcing companies for example, which are labour-intensive and offer a range of services, could be exposed by virtue of the fact they have large numbers of women in low paid roles (e.g. as cleaners) and majority male workforces elsewhere (e.g. warehousing, building maintenance and guards). *PIRC is exploring UK gender pay disclosures with a view to identify companies and sectors that might be exposed.*

Get in touch if you would like to discuss this area.

How much will the companies pay out if they lose?

Estimates vary. During our webinar, Ellie Pinnells, lead solicitor on some of the claims, demonstrated the type of calculation the costs will be based on, which includes:

- Damages:
  - hourly pay difference (covering backpay of 6 years)
  - additional backpay for the duration of the court proceedings
  - piggyback claims i.e., from male shopfloor workers
- Statutory interest (8% from halfway point of claim)
- Legal fees

These factors mean that as time passes the potential cost of the claim can grow significantly. What's more, the longer the cases run on, the more claimants are likely to join as the profile of the issue is raised – as we are seeing with the supermarkets.

OVERVIEW

Retailer	No of claimants	No of workers eligible	Legal basis	Listed as contingent liability in annual report?	Cost estimate in public realm
Asda	45,000	unknown	UK Equality Act 2010 & Equal Pay Act 1970	Y - Walmart revealed in US regulatory filings (Jun 4 2021, SEC 10-k 2021) that it had indemnified the buyers of Asda (TDR Capital & the Issa brothers) "up to a contractually determined amount" against the financial settlement arising from the claims.	£500 million
Morrisons	unknown	80,000	UK Equality Act 2010 & Equal Pay Act 1970	N	£1 billion
Tesco	6,000	200,000	EU law (European Court of Justice ruled on 3rd June 2021 that it still applies in UK)	Y "Equal pay claim: Tesco Stores Limited has received claims from current and former store colleagues alleging that their work is of equal value to that of colleagues working in the Group's distribution centres and that differences in terms and conditions relating to pay are not objectively justifiable." (2020 Annual Report)	£4 billion
Sainsburys	8,400	unknown	UK Equality Act 2010 & Equal Pay Act 1970	Y "Along with other retailers, the Group is currently subject to claims from current and ex-employees in the Employment Tribunal for equal pay under the Equality Act 2010 and/or the Equal Pay Act 1970. (…) Given that the claims against the Group are still at a relatively early stage and the outcome of such claims is highly uncertain at this stage, the Group cannot make any assessment of the likelihood nor quantum of any outcome. No provision has therefore been recognised on the Group's balance sheet." (2020 Annual Report)	£15 million

Implications for investors

These cases demonstrate the financial materiality of employment practices. A lack of adherence to legal standards on equality is a symptom of a wider issue – companies pay what they feel they can get away with. To enable this, some minimise transparency and disclosure around their employment practices and deter meaningful involvement of workforces in pay setting, such as collective bargaining.

This approach could prove costly for companies and their shareholders down the line who are left exposed to legal challenge. The increasing potential cost of settling the longer they continue provides a financial incentive for boards and investors to act, and a risk if left unaddressed.

To mitigate these risks investors can play a role in setting expectations for:

- **Equalities and labour rights:**
  - Do companies have large numbers of women workers in low paid roles? Do they have a credible explanation for the gap between the pay of women in the company and that of men, including across different roles and workplaces?
  - Are there other discriminatory practices at play, for example discrepancies between pay of roles carried out by migrant and non-migrant workforces, or between workforces with different ethnic make ups? (Equal pay claims based on nationality and/or ethnicity are harder to bring about in the UK as they use different legislation to gender

equality, but this should not be grounds for complacency.)
    - Does the company enable its workforces to join unions and collectively bargain for fair pay? Does the company adequately represent workforce issues at board level?
    - Does the company pay above the Living Wage? Are there adequate progression and training opportunities for lower paid groups?
- **Disclosure:**
    - Are companies disclosing data on workforce composition and remuneration?
    - Are members of the workforce able to access data on pay and discuss discrepancies without retaliation?
- **Financial due diligence:**
    - Are companies citing employment claims as risks and/or contingent liabilities? If not, why not?
    - Do companies recognise the risk of increased costs as time passes? Settling early could save on costs and limit reputational harm.

PAY TRANSPARENCY – an antidote for pay inequity?

Transparent pay structures may neutralise the risk of pay discrepancies developing overtime, and of discrimination cases occurring. However, according to a 2017 report by the Institute for Women's Policy Research only 17% of private companies practice pay transparency. 41% discourage the practice and 25% explicitly prohibit discussion of salary information between colleagues.

The "pay secrecy" approach is becoming harder to maintain. Websites like Breakroom, GlassDoor and PayScale allow employees to share salaries anonymously and determine the market rate for their job and are now widely used. Some US states, such as California, Delaware and Colorado have gone further and passed laws banning employers for penalising workers for discussing their salary or inquiring about colleagues' compensation.

Labour shortages – 3 in 4 companies report a risk

As part of PIRC's workforce data gathering we are analysing what labour-related risks FTSE 350 companies are reporting on. From an initial sample study we can see that as many as three quarters of UK companies, across a range of sectors, reported labour shortages and/or staff retention as a principal risk in 2020.

For some companies this stems from the acute shortage of HGV drivers. Food retailers have been hit particularly hard. We spoke to an officer representing drivers for Unite the Union who pointed out that XPO Logistics, a major provider of stock transport services to retailers, is struggling to recruit and retain enough drivers:

> **"XPO have tried offering a £1.75 per hour subsistence allowance to drivers but that caused tension with warehouse staff where they also have shortages […] It is a mess; they are missing deliveries and must be losing business over it."**

We've previously reported that XPO was the company in receipt of the highest number of HSE safety notices over the last five years for the carriage of dangerous goods. Labour shortages could well be posing additional risks to driver safety and the safety of the general public.

Can wage hikes draw in more drivers? Logistics contracts are often locked in for 10+ years meaning wage depreciation is effectively built in and increasing labour costs midway through means taking a hit to profit margins. In the US, rather than upping wages XPO are reportedly running a lottery to incentivise overtime among drivers: the more hours you take on, the greater your change of winning a bonus. The Teamsters union reports however that the policy is having little impact and the shortages persist.

Policy changes on S of ESG disclosure & accountability

As of last year the Securities and Exchange Commission (SEC) required public companies to describe any 'human capital' metrics they use. There are no specific metrics, rather a requirement to describe human capital resources that are material to the business. This has left companies to determine their own reporting, resulting in patchy disclosures and little comparable data so far. **But under new direction the SEC is going further with plans to make certain ESG metrics, including on workforce issues like diversity and turnover, mandatory**. Credit to Human Capital Management Coalition for their advocacy and lobbying to get the changes through.

Feedback from the Department for Work and Pensions (DWP) consultation on pension fund management of social risk will soon be published. PIRC submitted evidence on the limitations of company disclosures on workforce matters, and difficulties using the public datasets that do exist due to the way the data is provided. Some funds called for a social version of TCFDs and whilst it is unlikely the DWP will make any big moves off the back of this consultation, it signals the start of a process. **PIRC is compiling a new workforce data-feed on FTSE 350 companies, get in touch if you'd like to know more.**

Self-employed workers are being brought into UK PPE regulations following a successful legal case led by IWGB union. The HSE is currently consulting on proposed changes to its Personal Protective Equipment at Work legislation (1992) to include limb (b) workers (those registered as self-employed, sometimes called "dependent contractors"), alongside direct employees. The IWGB led the case in 2020 in support of gig economy workers who they argued had been left without protection during the pandemic. The High Court found that the UK Government had indeed failed to adequately transpose aspects of two EU Directives into domestic law. These are now being amended.

A socio-economic diversity in the boardroom taskforce has been set up by HM Treasury & BEIS to be conducted by City of London Corporation.

A law has been passed in Germany requiring large and medium-sized businesses (those with over 3,000 employees) ensure due diligence in combating human rights violations along their supply chain with regards to labor exploitation. Failure to implement such procedures or act on violations may result in fines up to 2% of the company's international revenue and a public procurement ban.

WDI has launched its 2021 survey and continues to push the conversation on workforce data on. See their webinar on data on racial disparities at work – some findings:

- Whilst 75% WDI respondents in 2020 provided data on gender make up of workforce, only 36% disclose ethnicity data.
- Only 4% of WDI respondents (8 companies) could report on the ethnicity pay gap (most of these were US based).
- Starbucks was highlighted as showing willingness to take on the challenges that come with data collection and action on racial equity.

Investor activities

- A €3.6trn just transition coalition has been launched by French investors includes Amundi, AXA and Aviva France and is led by Finance for Tomorrow. The concept of a just transition, action to address the impact that decarbonisation will have on workers and communities in carbon-intensive sectors, is steadily climbing up the financial agenda.
- CWC is shining a spotlight on infrastructure investor Macquarie looking for opportunities to embed labour rights in investment stewardship practices. The report highlights the company's growing exposure to Australian commercial real estate as an opportunity for applying the Cleaning Accountability Framework, a union-backed, worker driven social responsibility initiative.
- PIRC continues to take part in a series of collaborative care sector engagements coordinated by Uni Global and involving investors such as BMO and Aviva. In Q3 we will be focussing on REITs where there is an operator/building owner split which can complicate questions of ESG risk and responsibility.
- FAIRR continues its collaborative engagements on working conditions in the meat supply chain – targeting JBS, WH Group Ltd, Cranswick, Marfrig Global Foods, Tyson Foods, BRF SA. PIRC is participating on behalf of a number of clients.
- SEIU and SOC Investment Group (formerly CtW Investment Group) are pursuing racial equity audits. BlackRock has taken up the challenge, but other major banks like JP Morgan and Wells Fargo attempt to swerve them.

Working conditions & health

Given weaknesses in the disclosures companies make about the social impacts of their business, investors and analysts are required to be open minded and exploratory about metrics.

- **SHP reported last month that suicide rates for construction workers are over three times the national average.** Whilst statistics like these do not necessarily tell us anything about what the drivers and contributing factors are, they can provide a route into conversations on the connection between workforce health outcomes, work cultures and employment practices. For example, are high suicide rates in any way attributable to in-work insecurity or other employment pressures?
- **Construction is notorious for its use of the 'fake' self-employment model where workers are made to use umbrella companies to sidestep certain taxes and regulations.** The model has been criticised for providing income insecurity and unpredictability for workers. It has also meant that the employer is subject to fewer regulations on health and safety, for example use of PPE (though as reported above, on this latter issue, changes are a foot).

Antitrust and labour

Aside from seeking to move forward on direct labour market interventions, another interesting feature of the Biden administration is its commitment to reinvigorating antitrust enforcement. President Biden has successfully installed Lina Khan as chair of the Federal Commission. In addition, early this month the White House also issued an extensive Executive Order spelling out its plans. Big tech firms might be in the firing line and there are interesting links to labour.

The quest for more competitive markets might not appear at first to have an obvious link to workplace practices, but in practice there are number of overlaps. It is notable, for example, the Executive Order refers to monopsony (a market with a dominant buyer) as well as monopoly. In a labour market a dominant employer has even greater bargaining power than usual.

And the power that derives from concentrated markets can be greater than might be inferred from national statistics. For example, a firm that employs only a minority of workers in a given sector nationwide might account for a far greater share at regional or local level. This is confirmed by Research by the Bureau of Investigative Journalists that found that at peak demand Amazon accounted for more than a third of job vacancies posted in some local authorities.

It's also interesting to note that organized labour is increasingly raising competition-related concerns about dominant employers. **Earlier this month Unite the Union submitted a formal complaint against Amazon to the UK's Competition & Markets Authority for abuse of its market position in relation to price gouging at the height of the Covid 19 pandemic. US unions raised similar concerns about Amazon's dominance in 2020.**

There's an investor angle here too. At Amazon's AGM this year one of the shareholder resolutions filed requested a report on competition strategy and risk. It received a vote of 33% in favour – a very strong result for a first-time resolution. It was filed by SOC Investment Group.

No-one expects Big Tech will just roll over. Already both Amazon and Facebook have lobbied for Khan to be recused from any cases involving them due to previous criticisms she has made in relation to competition. The battle lines are drawn.

Competition policy is an issue PIRC is devoting attention to. In addition to holding a webinar early in 2021, we recently issued a briefing to clients and have begun engagements on the topic. Get in touch for more details.

New research: How do asset managers vote on worker's rights?

Last month PIRC published Endowing Labour: Using Foundation Sector Capital to Improve the Rights of Workers. See articles on the findings here: Institute of Employment Rights, Responsible Investor and Alliance Magazine.

We analysed voting data of a handful of managers on pro-labour rights resolutions filed at US, UK, Canadian and Australian listed companies. As the charts and table below show, we found a lot of opposition.

With the exception of the 2019 resolution at Amazon to end inequitable employment practices (which was supported by all eight managers in the study), there were other seemingly innocuous resolutions – such as one in support of the Living Wage filed at Canadian retailer Dollarama – which were opposed by the majority of managers. The same managers voted against a resolution at Australian supermarket Coles for the increased involvement of workforces in supply chain auditing processes.

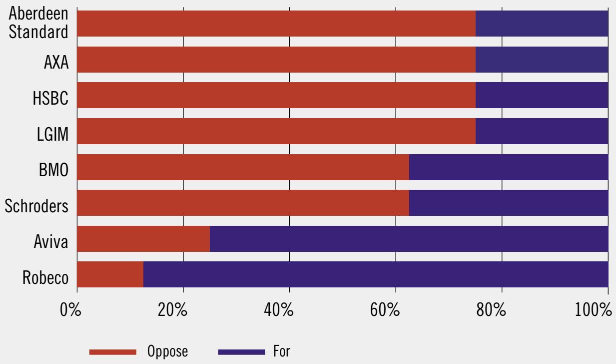
We also looked specifically at how managers voted on two resolutions filed directly by workforces in the respective companies in 2020, with support from their union.

These were:

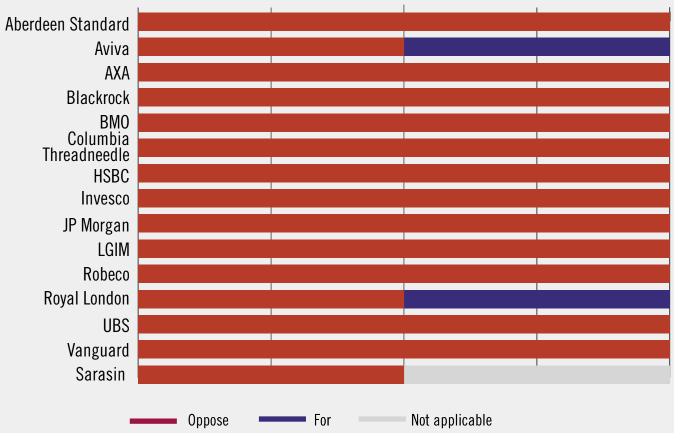
1) A resolution filed at HSBC by employees supported by Unite requesting employee pensions are protected from the claw back of funds, a practice that penalises the lowest paid, mostly female workforce.
2) A resolution filed with support from employees at US industrials company Dupont De Nemours requesting the provision of a board seat for regular employees.

Both resolutions faced strong opposition from most of the 15 managers reviewed.

Spread of opposition for employment-related resolutions reviewed



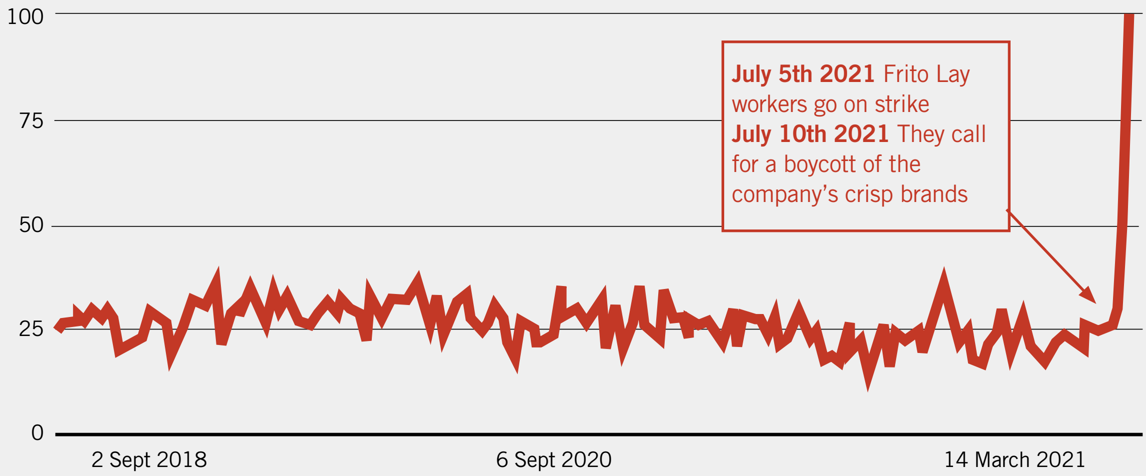
Asset manager votes on two resolutions filed directly by employees



Asset manager voting on employment-related resolutions

Company	Country	Sector	Year	Proposal	Aberdeen Standard	Aviva	AXA	BMO	HSBC	LGIM	Robeco	Schroders
Coles Group	AU	Retail	2019	Worker driven social responsibility in supply chain practices	Oppose	For	Oppose	Oppose	Oppose	Oppose	For	Oppose
Dollarama Inc	CA	Retail	2019	Adoption of a Living Wage Policy	Oppose	For	Oppose	Oppose	Oppose	Oppose	For	Oppose
Alphabet	US	Tech	2019	End inequitable employment practices	Oppose	For	For	For	For	For	For	For
Amazon	US	Tech	2019	End inequitable employment practices	For	For	For	For	For	For	For	For
HSBC	UK	Financials	2020	Remove pension clawback	Oppose	Oppose	Oppose	Oppose	Oppose	Oppose	Oppose	Oppose
Alimentation Couch-Tard	CA	Retail	2020	Adoption of a Living Wage Policy	For	For	Oppose	For	Oppose	Oppose	For	For
Microsoft	US	Tech	2020	Elect an employee representative to the board	Oppose	Oppose	Oppose	Oppose	Oppose	Oppose	For	Oppose
Alphabet	US	Tech	2020	Elect an employee representative to the board	Oppose	For	Oppose	Oppose	Oppose	Oppose	For	Oppose

Google searches for "Frito Lay" spike globally following striking workers call for boycott



SOURCE: PIRC ANALYSIS OF GOOGLE TRENDS DATA, 22 JULY 2021.

No such thing as bad press? Crisps, Google and a walk-out

Over 500 workers from a Kansas Fritoy Lay plant, a subsidiary of Pepsico, have entered a third week of strike action citing poor working conditions and the "suicide shifts" that make up a 84-hour work week. They are calling on consumers to boycott the crisp brands which they produce: Lays, Doritos, Cheetos and others.

The effectiveness of customer boycotts as a way to improve standards in companies can be mixed. Often they get little traction. And sometimes they are not advised at all – during certain actions by UK Deliveroo riders, unions stressed they wanted customers to keep ordering so they don't lose work. Amazon workers have argued the same.

With Frito Lay however it appears the action may be having an impact. Whilst it is too early to tell if people have actually stopped buying the crisps in solidarity with the factory workers, there has been a huge spike in Google searches for "Frito Lay" – putting the brand on the map for all the wrong reasons.

The problem is, Frito Lay is just one brand among many owned by food giant Pepsico – one of the largest companies in the world in terms of market value and an employer of almost 300,000 people.

We carried out similar analysis looking at search rates for "Pepsico" (which the striking workers also asked customers to avoid), but by contrast, found no spike at all. It appears that using multiple subsidiaries to mitigate risk of brand toxicity has worked for Pepsico this time. Socially-conscious investors will however join the dots.

Labour Risks Watch List

Company	Issue	Detail
Walmart	Litigation	On 29 June 2021, Walmart agreed to pay $10 million to as many as 21,677 current and former Illinois store employees for collecting personal data without consent. The company used biometric palm scanning devices that violated their privacy rights, by collecting and storing biometric data without meeting the written consent requirements of Illinois law. The Illinois Biometric Information Privacy Act requires companies to get permission to collect biometric data, and publicly state the length of time data will be held.
Amazon	Health and safety	Amazon warehouses more dangerous than others in US. Serious injury incidents more common at Amazon warehouses than at competing companies, despite drop in 2020. The Post analyzed facility-level injury records from OSHA to arrive at these figures. The Post found that 5,411 facilities used for warehousing and storage — 638 of them owned by Amazon and its subsidiaries — sent reports to OSHA in 2020.
Cargill, Nestle	Supply chain due diligence, child slavery	Following a 15 year legal case, on 22 June 2021, cocoa giants Nestle and Cargill were let off the hook for the use of forced child labor in supply chains. The US Supreme Court ruled the former child labourers had no legal standing to sue the companies because the abuse happened outside of the US. A recent study commissioned by the US Department of Labor shows an estimated 1.56 million children still work in cocoa production in Cote D'Ivoire and Ghana alone.
Melrose Industries / GKN	Redundancies	Planned redundancies at GKN have vindicated concerns expressed by workers at the time of the company's controversial hostile takeover by Melrose Industries in 2018. Workers in both the UK and Italy face losing jobs, and noise around the cuts is increasing.
General Electric	Pensions, industrial action	Unite has argued that General Electric is using the pandemic to slash the retirement incomes of about 2,600 employees to the tune of thousands of pounds a year. The company's proposals to switch the pension scheme from final salary (defined benefit) to a defined contribution one leaves employees at the mercy of fluctuations in world stock markets. Unite said a ballot for industrial action, including strikes, this summer would be considered. The sites that could be affected by possible strike action include GE sites in Cardiff, Cheltenham, GE Caledonian (Prestwick) and Rugby, as well as Dowty Propellers in Gloucestershire.

RESEARCH ENGAGEMENT ADVICE VOTING PIRC

Pensions & Investment Research Consultants Limited
Exchange Tower
2 Harbour Exchange Square
London E14 9GE
Telephone +44 (0)207 247 2323
Email info@pirc.co.uk
www.pirc.co.uk