

Strike Action Alistair McGregor QC

INTRODUCTION

1. In the last twelve months there have been a number of important decisions in relation to Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). In date order, these decisions are: Metrobus Ltd v Unite the Union 2010 ICR 173 (July 31st 2009); EDF Energy Powerlink Ltd v National Union of Rail Maritime and Transport Workers [2009] EWHC 2852 (QB) (October 23rd 2009); British Airways plc v Unite the Union [2010 IRLR 423] (17th December 2009); Network Rail Infrastructure Limited v The National Union of Rail Maritime and Transport Workers [2010] EWHC 1084 (QB) (1st April 2010); British Airways plc v Unite the Union [2010] EWCA Civ 669 (20th May 2010); Milford Haven Port Authority v Unite [2010] EWCA Civ 400 (18th February 2010).
2. These cases illustrate the difficulties both of construction and of application of the complex provisions of TULRCA relating to strikes (and other forms of industrial action) and the differences of judicial opinion that result from those difficulties. Moreover, although an assault launched on these provisions on the basis that they impeded the exercise of the rights of association conferred by article 11 of the European Convention on Human Rights (and were disproportionate) was successfully resisted in the Metrobus case, the Court of Appeal's judgment in that case may not be the final word on that aspect of the legislation.

STRIKE ACTION: THE LEGISLATIVE STRUCTURE

3. Before considering the recent cases it is important to have in mind the structure of the relevant legislation. The starting point is Section 219 TURCA which provides immunity from suit in respect of certain specified torts if a person acts in contemplation or furtherance of a trade dispute. (A trade dispute is widely defined in Section 244). The relevant provisions of Section 219 are as follows:

“(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only – (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance ...

(2) An agreement of combination of two or more persons to do or procure the doing of an act in contemplation or furtherance of a trade dispute is not actionable in tort if the act is one which if done without any such agreement or combination would not be actionable in tort.

(3) ...

(4) Subsections (1) and (2) have effect subject to sections 222 and 225 (action excluded from protection) and to sections 226 (requirement of ballot before action by trade union) and 234A (requirement of notice to employer of industrial action); and in those sections “not protected” means excluded from the protection afforded by this section or, where the expression is used with reference to a particular person, excluded from that protection as respects that person.”
4. The immunity provided by Section 219(1) and (2) is therefore removed if, notwithstanding that action is taken in contemplation or furtherance of a trade dispute, such action is “not protected” unless a number of statutory requirements are complied with. Section 226 provides:

“(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action – (a) is not protected unless the industrial action has the support of a ballot, and (b) where section 226A falls to be complied with in relation to the person’s employer, is not protected as respects the employer unless the trade union has complied with section 226A in relation to him. In this section “the relevant time”, in relation to an act by a trade union to induce a person to take part, or continue to take part, in industrial action, means the time at which proceedings are commenced in respect of the act.

(2) Industrial action shall be regarded as having the support of a ballot only if – (a) the union has held a ballot in respect of the action – (i) in relation to which the requirements of section 226B so far as applicable before and during the holding of the ballot were satisfied, (ii) in relation to which the requirements of sections 227 to 231 were satisfied, and (iii) in which the majority voting in the ballot answered “Yes” to the question applicable in accordance with section 229(2) to industrial action of the kind to which the act of inducement relates; (b) such of the requirements of the following sections as have fallen to be satisfied at the relevant time have been satisfied, namely – (i) section 226B so far as applicable after the holding of the ballot, and (ii) section 231B; (bb) section 232A does not prevent the industrial action from being regarded as having the support of the ballot; and (c) the requirements of section 233 (calling of industrial action with support of ballot) are satisfied. Any reference in this subsection to a requirement of a provision which is disapplied or modified by section 232 has effect subject to that section.

(3) Where separate workplace ballots are held by virtue of section 228(1) – (a) industrial action shall be regarded as having the support of a ballot if the conditions specified in subsection (2) are satisfied, and (b) the trade union shall be taken to have complied with, in relation to the ballot for the place of work of the person induced to take part, or continue to take part, in the industrial action.

(3A) If the requirements of section 231A fall to be satisfied in relation to an employer, as respects that employer industrial action shall not be regarded as having the support of a ballot unless those requirements are satisfied in relation to that employer.

(4) For the purposes of this section an inducement, in relation to a person, includes an inducement which is or would be ineffective, whether because of his unwillingness to be influenced by it or for any other reason.”

Thus, there must be a ballot, notice of the ballot must be given to any relevant employer under section 226A and the requirements of section 226B (concerning scrutineers) must be complied with as must the provisions of sections 227 to 231 about the ballot.

5. Section 226a is the first of the “Notice” provisions that must be complied with.

“(1) The trade union must take such steps as are reasonable necessary to ensure that – (a) not later than the seventh day before the opening day of the ballot, the notice specified in subsection (2), and (b) not later than the third day before the opening of the ballot, the sample voting paper specified in subsection (2F), is received by every person who it is reasonable for the union to believe (at the latest time when steps could be taken to comply with paragraph (a)) will be the employer of persons who will be entitled to vote in the ballot.

(2) The notice referred to in paragraph (a) of subsection (1) is a notice in writing – (a) stating that the union intends to hold the ballot, (b) specifying the date which the union reasonably believes will be the opening day of the ballot, and (c) containing – (i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at, or (ii) where some or all of the employees concerned are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation or the information mentioned in subsection (2C).

(2A) The lists are – (a) a list of the categories of employee to which the employees concerned belong, and (b) a list of the workplaces at which the employees concerned work.

(2B) The figures are – (a) the total number of employees concerned, (b) the number of the employees concerned in each of the categories in the list mentioned in subsection (2A)(a), and (c) the number of the employees concerned who work at each workplace in the list mentioned in subsection (2A)(b).

(2C) The information referred to in subsection (2)(c)(ii) is such information as will enable the employer readily to deduce – (a) the total number of employees concerned, (b) the categories of employee to which the employees concerned belong and the number of the employees concerned in each of those categories, and (c) the workplaces at which the employees concerned work and the number of them who work at each of those workplaces.

(2D) The lists and figures supplied under this section, or the information mentioned in subsection (2C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies with subsection (1)(a).

(2E) For the purposes of subsection (2D) information is in the possession of the union if it is held, for union purposes – (a) in a document, whether in electronic form or any other form, and (b) in the possession or under the control of an officer or employee of the union.

(2F) The sample voting paper referred to in paragraph (b) of subsection (1) is – (a) a sample of the form of voting paper which is to be sent to the employees concerned, or (b) where the employees concerned are not all to be sent the same form of voting paper, a sample of each form of voting paper which is to be sent to any of them.

(2G) Nothing in this section requires a union to supply an employer with the names of the employees concerned.

(2H) In this section references to the “employees concerned” are references to those employees of the employer in question who the union reasonably believes will be entitled to vote in the ballot.

(2I) For the purposes of this section, the workplace at which an employee works is – (a) in relation to an employee who works at or from a single set of premises, those premises, and (b) in relation to any other employee, the premises with which his employment has the closest connection.

(4) In this section references to the opening day of the ballot are references to the first day when a voting paper is sent to any person entitled to vote in the ballot.”

6. Section 226B requires the trade union, before the ballot is held, to appoint a qualified person as scrutineer (except in the case of small ballots with no more than 50 members entitled to vote). The scrutineer does not have to conduct the ballot. But it is common for scrutineers like the Electoral Reform Services Ltd to do so. The statutory obligations are to make a report to the union, as required by section 231B, as soon as reasonably practicable after the date of the ballot, and in any event no later than four weeks after that date, and to take such steps as appear appropriate in order to enable that report to be made. The union is required to ensure that the scrutineer duly carries out his statutory functions, and must also ensure “that there is no interference with the carrying out of those functions from the union or any of its members, officials or employees”: section 226B(3).

7. Section 227 deals with entitlement to vote. Sections 228 and 228A deal with separate workplace ballots. Section 229 contains requirements as to the form of the voting paper. Section 230 deals with the conduct of the ballot. Section 230(4) states:

“A ballot shall be conducted so as to secure that – (a) so far as is reasonably practicable, those voting do so in secret, and (b) the votes given in the ballot are fairly and accurately counted. For the purposes of paragraph (b) an inaccuracy in counting shall be disregarded if it is accidental and on a scale which could not affect the result of the ballot.”

8. Section 231 is as follows:

“As soon as is reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that all persons entitled

to vote in the ballot are informed of the number of – (a) votes cast in the ballot, (b) individuals answering “yes” to the question, or as the case may be, to each question, (c) individuals answering “no” to the question, or, as the case may be, to each question, and (d) spoiled voting papers.”

9. Originally, members were to be given this information, but employers were not. The requirement to tell employers was added by amendment in 1993, see section 231A, subsection (1):

“As soon as reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that every relevant employer is informed of the matters mentioned in section 231.”

10. Section 231B prescribes the contents of the scrutineer’s report, and gives a right to a copy of the report to (a) any person entitled to vote in the ballot and (b) the employer of any such person, on request made at any time within six months from the date of the ballot.

11. Section 232B [inserted by paragraphs 1 and 9 of Schedule 3 to the Employment Relations Act 1999 and amended by section 24(1) of the Employment Relations Act 2004] is as follows:

“(1) If – (a) in relation to a ballot there is a failure (or there are failures) to comply with a provision mentioned in subsection (2) or with more than one of those provisions, and (b) the failure is accidental and on a scale which is unlikely to affect the result of the ballot or, as the case may be, the failures are accidental and taken together are on a scale which is unlikely to affect the result of the ballot, the failure (or failures) shall be disregarded for all purposes (including, in particular, those of section 232A(c)).

(2) The provisions are section 227(1), section 230(2) and section 230(2B).”

12. Of those provisions mentioned in section 232B(2), section 227(1) deals with according an equal right to vote to the relevant members of the union, and to no others; and section 230(2) and (2B) deal with the supply of a voting paper and the provision of a convenient opportunity to vote to those entitled to vote and as a special case to merchant seamen.

13. Section 233 deals with calling the industrial action, and section 234 defines the period after which the ballot ceases to be effective, which is normally four weeks, but can be extended by agreement between the union and the employer, or in certain other circumstances.

14. Section 234A deals with notice of a strike call, and mirrors closely section 226A as regards notice of a ballot. The main difference is that, whereas that section refers to “employees concerned” who are those expected to be entitled to vote in the ballot, section 234A refers to “affected employees” namely those employees who it is believed will be induced to take part in the industrial action, not limited to members who had been entitled to vote, or indeed to members of the union. The relevant provisions of section 234A are:

“(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action is not protected as respects his employer unless the union has taken or takes such steps as are reasonably necessary to ensure that the employer receives within the appropriate period a relevant notice covering the act.

(2) Subsection (1) imposes a requirement on the case of an employer only if it is reasonable for the union to believe, at the latest time when steps could be taken to ensure that he receives such a notice, that he is the employer of persons who will be or have been induced to take part, or continue to take part, in the industrial action.

(3) For the purposes of this section a relevant notice is a notice in writing which – (a) contains – (i) the lists mentioned in subsection (3A) and the figures mentioned in

subsection (3B), together with an explanation of how those figures were arrived at, or (ii) where some or all of the affected employees are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation, or the information mentioned in subsection (3C), and (b) states whether industrial action is intended to be continuous or discontinuous and specifies – (i) where it is to be continuous, the intended date for any of the affected employees to begin to take part in the action, (ii) where it is to be discontinuous, the intended dates for any of the affected employees to take part in the action ...

(3A) The lists referred to in subsection (3)(a) are – (a) a list of the categories of employee to which the affected employees belong, and (b) a list of the workplaces at which the affected employees work.

(3B) The figures referred to subsection (3)(a) are – (a) the total number of the affected employees, (b) the number of the affected employees in each of the categories in the list mentioned in subsection (3A)(a) , and (c) the number of the affected employees who work at each workplace in the list mentioned in subsection (3A)(b).

(3C) The information referred to in subsection (3)(a)(ii) is such information as will enable the employer readily to deduce – (a) the total number of the affected employees, (b) the categories of employee to which the affected employees belong and the number of the affected employees in each of those categories, and (c) the workplaces at which the affected employees work and the number of them who work at each of those workplaces.

(3D) The lists and figures supplied under this section, or the information mentioned in subsection (3C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies with subsection (1).

(3E) For the purposes of subsection (3D) information is in the possession of the union if it is held, for union purposes – (a) in a document, whether in electronic form or any other form, and (b) in the possession or under the control of an officer or employee of the union.

(3F) Nothing in this section requires a union to supply an employer with the names of the affected employees.

(4) For the purposes of subsection (1) the appropriate period is the period – (a) beginning with the day when the union satisfies the requirement of section 231A in relation to the ballot in respect of the industrial action, and (b) ending with the seventh day before the day, or before the first of the days, specified in the relevant notice.”

MISCELLANEOUS PROVISIONS

15. The provisions set out above may be regulated as “core” provisions but a number of other provisions in TULRCA are important to the “structure” of the statute:
- (a) Section 203 (the power of the secretary of state to issue Codes of Practice for the purpose of promoting desirable practices in relation to the conduct by trade unions of ballots ...
 - (b) Section 207(3). Any such code will be “admissible in evidence” and any provision of a code which appears “to the Court ... to be relevant to any questions arising in the proceedings” “shall be take into account in determining that question”.
 - (c) Section 22. In any proceedings in tort (other than those specified in section 22(a) the amount which may be awarded against the union by way of damages shall not exceed the following limit:

Number of Members of Unions	Maximum Amount of Damages
Less than 5,000	£10,000
5,000 or more but less than 25,000	£50,000
25,000 or more but less than 100,000	£125,000
100,000 or more	£250.000

- (d) Section 221 which contains restrictions on the grant of injunctions where a party is claiming or is likely to claim that he or it was acting in furtherance of a trade dispute.
16. The current code in relation to industrial action is the “Code of Practice on Industrial Action Ballots and Notice to Employers” which came into effect on 1st October 2005.

THE METROBUS CASE

17. In this case a strike ballot was held following the failure of the union to secure for its bus driver members improved pay and conditions. There was a 90% vote in favour of strike action and the union gave notice of a twenty-four hour strike to take place on 12th September 2008. The strike duly went ahead. The employer remained recalcitrant and the union gave notice of a further twenty-four hour strike to take place on the 10th October 2008. On the 9th October 2008 Metrobus applied for and obtained from King J an interim injunction restraining the union from calling the 10th October strike. King J held that there were fatal defects in the notice of the ballot and in the two strike notices, and that the union had failed to notify the employer sufficiently promptly of the outcome of the original ballot. The judge also rejected the union’s argument that injunctive relief should be denied given the employer’s delay in taking the points.
18. The Court of Appeal did not hear the appeal until July 2009 (the notice of appeal having been filed on the 11th December 2008 and leave granted on the 27th March 2009). The result was that the Court of Appeal unanimously held that section 231A TULRCA imposed an obligation on a union to inform an employer of the outcome of a ballot for industrial action so soon as reasonably practicable whether or not the union had decided to initiate that action. The union could have taken steps to obtain from the scrutineer the result on the day it concluded (1st September 2008) and passed it onto the employer promptly. Instead the union waited until the 3rd September (the day following the day it received the result). Accordingly the strike was not protected action.
19. By a majority of 2 to 1, the Court of Appeal also held that the union had failed in both the notice of ballot and the two strike notices to provide an explanation of how the figures for non-check off members were arrived at.
20. The Court of Appeal unanimously rejected a finding by the judge below that an error of ten in the numbers of check-off members contained in the two strike notices vitiated these notices.
21. The Court of Appeal unanimously held that none of the restrictions imposed by Sections 231A, 226A(2)(a) and 234A(3)9a) of TULRCA were so difficult or onerous as to be disproportionate for the purposes of the rights of association conferred by article 11 of the European Convention on Human Rights.
22. Accordingly, it was held that the judge had been right to grant the injunction.

THE EDF CASE

23. This concerned a failure by a trade union in its notice of a ballot to provide to the employer the requisite information about the members who were to be balloted (in this case, identifying the categories of workers involved). The union members were not “check-off” employees. The significant elements in this case were:
- (a) The judge was prepared to grant an injunction restraining the union from “calling a strike notice [sic] on the basis of the ballot even though the ballot had not been concluded at that stage”, and
 - (b) The judge did not consider that any “right to strike” was absolute but could be “defined” [sic] according to UK domestic law, and
 - (c) The judge held that a union could not escape the responsibility to provide an employer with information by maintaining records with minimal information. If it was

practicable for the union to find the information out, then it was required to do so whatever records it kept.

THE FIRST BRITISH AIRWAYS CASE

24. In this case a ballot for strike action opened on the 16th November 2009 and closed on the 14th December 2009 on which date the employer was notified of the result which was an overwhelming majority in favour of strike action (on an 80% turnout, i.e. 10,286 members, 92.49% voted for strike action). However ballot papers were issued to several hundred employees who had opted to take voluntary redundancy in November/December 2009 and would not, therefore, be involved in the proposed strike action and were not, therefore, eligible to vote. On the 14th December 2009 the union gave notice of strike action to commence on the 22nd December 2009 and to end on the 2nd January 2010. The employer applied for an interim injunction to restrain the union from proceeding with the strike. On 17th December 2009 Cox J granted the injunction on the basis:
- (a) the trade union had failed to comply with the requirements of sections 226A, 234A and 227 of TULRCA and the union had not established any “reasonable practicality defence in relation to 226A and 234A”, and
 - (b) so far as the failure to comply with section 227 was concerned, the evidence did not establish an “accidental failure” under section 232B.

These failures were not simply technical failures, they were breaches of technical requirements. Notwithstanding the overwhelming support for industrial action demonstrated by the union’s membership, there were procedural requirements contained in an Act of Parliament which unions had currently to comply with to render a call for industrial action lawful and in respect of which the union was to have immunity from suit.

25. However there was a sting in the tail of Cox J’s judgment at paragraph 27. She accepted that the Metrobus decision was binding on her but went on to say:

“Sooner or later, the extent to which the current statutory regime is in compliance with [the UK’s international obligations to recognise the right to strike] and with relevant international jurisprudence will fall to be carefully reconsidered.”

THE NETWORK RAIL CASE

26. In this case the union balloted 4,556 members who were signallers employed by Network Rail for strike action. The result was very close. 3,199 votes were cast: 1,705 voted “yes”, 1,481 voted “no” with thirteen spoilt papers. The majority was therefore 223 votes so that 113 votes cast differently would have altered the outcome. On the 30th March 2010 (following a letter of complaint sent by the employer), the union gave notice to Network Rail of strike action. This notice replicated a number of errors the subject of Network Rail’s complaint. In essence the employer complained that the statutory notification of ballot and of strike action did not contain the required information, that the union did not properly establish the constituency for the ballot and that the union did not give the required prompt notification of the ballot result to its members pursuant to section 231. In the event, Network Rail conceded in respect of all of its grounds of complaint and the judge, Mrs Justice Sharp, issued an injunction to prevent strike action being called by the defendant trade union.
27. Given that the union’s record keeping was manifestly wholly inadequate, the result on the first two grounds advanced is unsurprising. Of significance, however, was the judge’s conclusion on section 231 that the union was required to take “active steps” to provide to its members the information required about the ballot result “for good policy reasons”.

28. It is also worth observing that the judge was prepared to grant the injunction on ordinary American Cyanamid principles as well as on the section 221 TULRCA basis.

THE SECOND BRITISH AIRWAYS CASE

29. Following the first case (see above), the union re-balloted its members for strike action between 25th January and 22nd February 2010. Again there was overwhelming support for a strike (total votes cast 9,282, i.e. turnout 79.39%, 7,482 in favour, 1,789 against and eleven spoilt ballot papers). The ballot was conducted "impeccably in accordance with the statutory requirements" (per the Lord Chief Justice paragraph 8). A notice of strike action was given to BA on the 12th March and strike action took place between the 20th and 22nd March, and again between the 27th and 30th March 2010 causing an estimated loss of forty to forty-five million pounds to BA. No proceedings were taken to prevent either strike. On 10th May notice was given of further strike action starting on 18th May 2010. This finally produced a response from BA that the union had failed to comply with the requirements of section 231 (notification of the ballot results to its members). The union responded to that complaint. On the 17th May 2010 BA applied to McCombe J for an interim injunction restraining the union from taking strike action. The injunction was granted on the basis that the union had not complied with section 231.
30. On appeal the Court of Appeal held by a majority (the Master of the Rolls dissenting) that the union had complied with its section 231 obligations and allowed the unions appeal on the 20th May 2010 discharging the injunction. This case will be a focus for discussion at the conference but suffice it to say that it demonstrates more clearly than any other how judges can reach diametrically opposed views on the operation of the TULRCA statutory requirements and exposes the difficulties confronting lawyers attempting to advise clients in this complex and difficult area. It may also be that it reverses the trend apparent in the other cases discussed of the rigid formalism with which those judges approached the TULRCA provisions. Were the majority of the Court of Appeal judges in this case pulling back from the brink to avoid a major confrontation with European jurisprudence on the right to strike?

THE MILFORD HAVEN CASE

31. In this case the Court of Appeal held that a notice under Section 234A(3)(b) could include both notice of continuous and discontinuous industrial action. Separate notices for the two kinds of action were not needed. However, the Court of Appeal declined to decide an issue arising on the particular wording of the notice which gave rise to confusion as to the dates upon which the continuous and discontinuous actions were to commence.

November 2010.