

Strikes and Industrial Action

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1. The recent upsurge in reported cases on strikes and industrial action may well serve as a barometer of the current economic and political climate. The level of legal activity in this area over the last year or so has perhaps been greater than at any time since the statutory balloting procedures were first introduced in the 1980s. Those procedures have become more complex through subsequent amendment, in particular since 1992, thereby guaranteeing a fertile stream of novel points to be determined by the courts in times of industrial strife.

The basic principles

2. There is no formal “right to strike” as such in English law. As Maurice Kay LJ noted in ***Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 [2010] ICR 173** at [118], “*In this country, the right to strike has never been much more than a slogan or a legal metaphor*”¹. However, for over a century, since the Trade Disputes Act 1906, legislation has provided trade unions with limited immunity from liability for committing the so-called “economic torts”, most obviously the tort of inducing breach of contract. As Elias LJ put it in ***National Union of Rail, Maritime & Transport Workers v Serco Ltd* [2011] EWCA Civ 226 [2011] IRLR 399** at [2], “*the legislation ... secures a freedom rather than conferring a right as such*”.
3. The immunity is now contained in section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“**the 1992 Act**”), which provides:
 - “(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 or combination by 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 ...
 - (4) Subsections (1) and (3) have effect subject to sections 222 to 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) ...”
4. It is to be noted that the statutory immunity does not extend to breaches of contract by the individual striking workers: see ***Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 [2010] ICR 173** per Maurice Kay LJ at [118].

¹ Although Lloyd LJ stated at [37] that, “*English law does of course recognise a right to strike and exempts trade unions from the tortious liability that they would otherwise be under for calling a strike*”.

5. Historically much of the litigation in this area has focussed on the question of whether a particular act is "*in contemplation or furtherance of a trade dispute*". This was often contentious, particularly where there was a large political component to the dispute. The recent case law, by contrast, has focussed on whether the trade unions have complied with the requirement to ballot their members before taking industrial action contained in section 226 of the 1992 Act, and the requirement to notify the employer in advance of industrial action contained in section 234A. Section 226 itself requires that the procedural and notification provisions of sections 226A to 233 must also have been complied with.
6. The key requirements² as to balloting and notice are as follows:
 - 6.1. The union must take "*such steps as are reasonably necessary*" to ensure that a notice of intention to hold a ballot and a sample voting paper are received by any relevant employer (section 226A);
 - 6.2. Entitlement to vote in the ballot must be accorded equally to all the members of the trade union "*who it is reasonable at the time of the ballot for the union to believe will be induced by the union to take part*" in the industrial action (section 227);
 - 6.3. Every person entitled to vote in the ballot must "*so far as reasonably practicable*" have a voting paper sent to him and be given a convenient opportunity to vote by post. The ballot shall, so far as reasonably practicable, ensure that voting is in secret, and the votes must be fairly and accurately counted. However, an inaccuracy in counting falls to be disregarded "*if it is accidental and on a scale which could not affect the result of the ballot*" (section 230);
 - 6.4. As soon as reasonably practicable after the holding of the ballot, the 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 votes cast, the numbers voting "yes" and "no", and the number of spoiled voting papers (section 231);
 - 6.5. As soon as reasonably practicable after the holding of the ballot, the union shall also take "*such steps as are reasonably necessary*" to ensure that the employer is informed of those matters (section 231A).
 - 6.6. Industrial action will not be regarded as having the support of a ballot if any member of the union at the time of the ballot whom it was reasonable for the union to believe would be induced to take part was not accorded entitlement to vote, and was induced to take part in the industrial action (section 232A);
 - 6.7. Any failure to comply with the requirements regarding entitlement to vote in the ballot, and to participate by postal voting, contained in sections 227 and 230 of the 1992 Act, shall be disregarded if it is "*accidental and on a scale which is unlikely to affect the result of the ballot*" (section 232B);
 - 6.8. The union must take "*such steps as are reasonably necessary*" to ensure that the employer receives a relevant notice of industrial action at least seven days before that action is due to begin (section 234A).
7. The balloting procedures were ostensibly introduced to provide protection to trade union members against the undemocratic actions of their leaders. In practice, however, they have become

² This summary is somewhat simplified. For the full details, see section 226 to 234A of the 1992 Act

primarily a tool in the hands of employers in seeking to restrain industrial action, often on highly technical grounds.

8. The notification requirements contained in sections 226A and 234A, however, are even on their face there to provide protection to employers against whom industrial action may be brought. As Lloyd LJ noted in ***Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 [2010] ICR 173** at [40], “*the legislation does take account of the legitimate interests of employers*”. Sections 226A and 234A respectively require the union to notify the employer of the ballot and of the proposed industrial action, and are in materially similar terms. Their key, and most controversial, provisions are as follows:

- 8.1. In relation to employees of the employer who the union “*reasonably believes*”, as the case may be, will be entitled to vote in the ballot or will be induced to take part in industrial action (see subsections 226A(2H) and 234A(5C)), the union must give notice to the employer either containing lists of the relevant categories of employee and their workplaces and the total number of employees concerned and the numbers within each of these categories and workplaces, with an explanation of how those figures were arrived at, or, where some of the relevant employees have their union subscriptions deducted from their wages, containing information which will enable the employer readily to deduce the numbers, categories and workplaces (and the numbers within each category and workplace) of relevant employees (see subsections 226A(2)-(2C) and 234A(3)-(3C));

- 8.2. The lists and figures or, as the case may be, information provided in the notice “*must be as accurate as is reasonably practicable in the light of the information in the possession of the union*” (see subsections 226A(2D) and 234A(3D));

- 8.3. For this purpose, information is deemed to be in the possession of the union if it is held for union purposes in a document (whether in electronic or any other form) or in the possession or under the control of an officer or employee of the union (see subsections 226A(2E) and 234A(3E));

- 8.4. However, the union is not required to supply an employer with the names of the relevant employees: see subsection 226A(2G) and 234A(3F).

9. By section 207 of the 1992 Act, the courts may take into account any relevant codes of practice approved by the Secretary of State under section 203. The currently relevant code is the Code of Practice of Industrial Action Ballots and Notice to Employers (2005).

Metrobus Ltd v Unite the Union [2009] EWCA Civ 829 [2010] ICR 173

10. The stringency of the balloting and notification provisions is well illustrated by the Court of Appeal’s decision in ***Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829 [2010] ICR 173**.

11. The dispute concerned the terms and conditions of bus drivers in the London area. Following the rejection of a claim from the union for improved terms and conditions, the union balloted its members for industrial action. Over 90% of those balloted voted in favour. Although an initial strike went ahead, when the union gave notice of further strike action the employer applied to the court for an interim injunction, which was granted by King J on the grounds that there were fatal defects in the notice of the ballot, in the strike notices, and in the failure of Unite to notify Metrobus sufficiently promptly of the result of the ballot.

Giving notice to the employer the result of the ballot

12. As to the allegation that Unite had not acted sufficiently promptly, the chronology was as follows:
 - 12.1. The ballot closed at noon on 1st September 2008;
 - 12.2. A copy of the scrutineer's report was apparently faxed to Unite at 12.36pm on 1st September 2008, but for some reason it went missing or was not received;
 - 12.3. Unite received a copy of the scrutineer's report at 3.15pm on 2nd September 2008;
 - 12.4. Just before 5pm on 2nd September 2008 Unite's General Secretary authorised the relevant officer to proceed, but because he had left for the day he did not receive the email until at 9.30am on the following morning, 3rd September 2008;
 - 12.5. The employer was notified of the result by fax and email soon after 11am on 3rd September 2008.
13. Lloyd LJ rejected (at [73]) Unite's argument that the obligation to inform the employer of the result of the ballot arose only if and when it decided to call for industrial action.
14. He also accepted that it was incumbent on the Union to chase the scrutineer for the outcome of the ballot (at [80]). In any event, it should have passed on the information on the afternoon of 2nd September 2008, when it had it. It was no defence that the union had decided internally that authorisation was needed from the General Secretary (see Lloyd LJ at [82]). Accordingly, Unite had failed to comply with its obligations under section 231A of the 1992 Act.

Lack of explanation in the ballot notice and strike notices

15. A majority of the Court of Appeal rejected Unite's argument that, where some but not all of the relevant employees paid their union dues through the check off, it was open to the union to provide only the information specified in relation to members who so paid their dues (see Lloyd LJ at [86]-[87] and Sir Mark Potter P at [128]).
16. Accordingly, the notices were defective, because, in respect of those employees who did not pay their subscriptions through the check-off, Unite had provided the requisite lists and figures, but had not provided the information as to how those figures were arrived at, as required, respectively, by section 226A(2)(c) and section 234A(3)(a) of the 1992 Act (see Lloyd LJ at [94]).
17. Maurice Kay LJ dissented on this point (at [121]-[123]), concluding that unions are entitled to elect whether to provide the lists, figures and explanation (on the one hand) or the information (on the other), provided some of the workers have their union subscriptions deducted through the check-off.

The inaccuracy of the figures

18. However, the Court of Appeal rejected the argument that the strike notices were invalid because the number of check-off employees was wrongly stated in the first notice as 766, when the correct figure was 776, and wrongly stated in the second notice as 788, when the correct figure was 778.
19. As to the first notice, Unite had chosen to provide information which enabled Metrobus to deduce the relevant number of employees. It was accordingly not obliged to provide a figure at all, and so that could not be a fatal defect (see Lloyd LJ at [98]). The same argument applied also to the second notice, even though in that case the incorrect statement of the number of check-off

employees had entailed that the total figure of relevant employees was similarly 10 out (see Lloyd LJ at [99]).

Article 11 of the ECHR

20. Unite argued that the provisions of the 1992 Act in regard to industrial action are so onerous and complex that they prevent the right to strike from being effectively exercised. As such, it contended that those provisions gave rise to a breach of the right to freedom of association contained in Article 11 of the European Convention on Human Rights. In ***Demir and Baykara v Turkey* (2009) 48 EHRR 54** the Grand Chamber of the European Court of Human Rights considered the essential elements of the right to freedom of association contained in Article 11, and defined them (non-exhaustively) (at [145]) as including:

20.1. The right to form and join a trade union;

20.2. The prohibition of the closed shop; and

20.3. The right of a trade union to seek to persuade the employer to hear what it has to say on behalf of its members.

21. Having considered the various provisions highlighted by Unite, Lloyd LJ rejected at [112] the argument that sections 226A and 234A impose obligations which are unreasonable, excessively onerous or disproportionate. It followed that the provisions did not amount to disproportionate restrictions on the right to freedom of association under Article 11 of the Convention (see [113]).

EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers [2009] EWHC 2852 (QB) [2010] IRLR 114

22. The RMT balloted members employed by EDF Energy to work as technicians in the installations that supply electrical power to the London Underground. In its notice of ballot, the RMT identified a single category of member who were employed at a particular site, namely “engineer/technician”. EDF Energy objected that the workers at the site in question included fitters, jointers, test room inspectors, day testers, shift testers and OLBI fitters.

23. In granting the interim injunction on the basis of the inadequacy of the notice, Blake J noted (at [18]) that EDF Energy was not seeking a detailed job description of the relevant members. Furthermore, it would have made a material difference to the employer if it had known which categories of employee were to be balloted and potentially called out on strike. The way in which the union categorises its members may be relevant, but it is not decisive (as is made clear by paragraph 15 of the statutory Code of Conduct on Industrial Action Ballots and Notice to Employers). Indeed, if the union’s method of categorising its members was decisive, there would be a temptation for the unions to record minimal information in order to diminish the content of the duty to supply categories to the employer. Given the relatively small size of the workplace, it would not have been unduly onerous or unreasonable to have supplied a more detailed breakdown of the categories of worker. It followed that the RMT had failed to comply with the notice provisions under section 226A of the 1992 Act.

24. Unusually, the injunction was sought by EDF Energy before the ballot had been concluded. However, Blake J (at [6]) rejected the argument that the application was for that reason premature. The prospect of an unlawful strike was sufficiently imminent to justify the grant of *quia timet* relief.

British Airways plc v Unite the Union [2009] EWHC 3541 [2010] IRLR 423

25. In this long-running saga (which continues at the time of writing), Unite has been in dispute with BA, in particular, over BA's decision to reduce to crew complements on aircraft operated by its Heathrow fleets. Unite balloted its members over strike action, which was to take place over 12 days during the Christmas period.
26. BA sought an interim injunction to retrain the strike, principally on the basis that Unite had erroneously included in the ballot notification, and then erroneously balloted, several hundred of its members who it knew would not be involved in the proposed strike action because a large number of them would have taken voluntary redundancy before the scheduled strike. Unite accepted that these mistakes had been made. However, it argued that it could rely on the defence that the information provided was "*as accurate as ... reasonably practicable*" for the purposes of sections 226A(2D) and 234A(3D) of the 1992 Act, and, in respect of section 227, the defence relating to accidental failures contained in section 232B.
27. BA argued that Unite could not reasonably have believed the figures provided to be accurate in circumstances where it knew that hundreds of members would be leaving on voluntary redundancy terms. Cox J found (at [27]) that Unite either was aware, or ought to have been aware, that the figures provided to BA in the ballot notice included a substantial number of those who were shortly to leave in this way, and therefore included members who the union could not reasonably have believed would be entitled to vote in the ballot.
28. Following ***EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers [2009] EWHC 2852 (QB) [2010] IRLR 114***, she pointed out (at [63]) that the union cannot just sit on its hands and make no effort to obtain plainly relevant information. There was no evidence that Unite had tried to find out which members were leaving, nor that it had ever issued clear instructions that those who were leaving were not entitled to vote in the ballot. Indeed, the opposite advice was given by Unite on its website.
29. In relation to section 227, there was no evidence that Unite held a reasonable belief in the entitlement to vote of all members balloted (see [78]). Nor could the failure be characterised as "accidental" for the purposes of section 232B. An unintentional failure is not necessarily "accidental".
30. Accordingly, the injunction was granted, and, for many, Christmas was saved. Tellingly, Cox J specifically took into account (at [83]) that the timing of the strike would be fundamentally more damaging to BA, and to the wider public, than a strike taking place at almost any other time of year. The balance of convenience lay firmly in favour of granting relief.

Milford Haven Port Authority v Unite [2010] EWCA Civ 400

31. The Court of Appeal's decision in ***Milford Haven Port Authority v Unite [2010] EWCA Civ 400*** concerned industrial action proposed by port workers, who were in dispute with the Port Authority as to their pension rights.
32. Following a ballot in favour of industrial action, the union sent strike notices to the employer. The question at issue was whether these notices complied with the requirements of section 234A of the 1992 Act. The notices stated that the proposed industrial action was to be both continuous and discontinuous, essentially combining a work to rule with a complete stoppage. The Port

Authority argued that section 234A(3) required that a notice, in order to be valid, must specify either continuous action or discontinuous action, but not both.

33. Leveson LJ, with whom the other members of the Court agreed, reached the conclusion that it was permissible to notify both continuous and discontinuous action within the same notice, provided it was made clear in relation to each type of industrial action referred to whether it was to be continuous or discontinuous.

Network Rail Infrastructure Ltd v National Union of Rail, Maritime and Transport Workers [2010] EWHC 1084 (QB)

34. In ***Network Rail Infrastructure Ltd v National Union of Rail, Maritime and Transport Workers [2010] EWHC 1084 (QB)*** the application for interim relief related to a proposed national strike by railway signallers which would have prevented about 80% of rail services in the UK from running. As Sharp J noted, this would in turn cause immense harm to the economy, business and the travelling public (at [2]).
35. Network Rail's main complaint was that the RMT's ballot notice contained a large number of incorrect or missing workplaces. Indeed, the information was incorrect or missing for some 13-16% of the relevant workplaces.

The adequacy of the information in the ballot and strike notices

36. The key issue was whether, notwithstanding these inaccuracies, the ballot notice was "*as accurate as reasonably practicable*" within the meaning of section 226A(2D) of the 1992 Act.
37. Sharp J accepted (at [50]) the "*clear evidence*" relied upon by the employer that the RMT had not taken account of the information which was available to it dating from previous disputes as to the inaccuracy of its records as to the workplaces of its members. The fact that the RMT did take other extensive steps to seek to check the accuracy of the information which it held did not excuse the failure to take "*obvious and simple steps*" which were available to it to check the information which it had.
38. Moreover, there were 29 members whose workplaces were described in the notice as "*unknown*", yet there was no evidence that the RMT had taken any steps to find out this information by contacting the members in question. Sharp J therefore concluded at [53]:

"As was said by both Blake J in *EDF v National Union of Rail, Maritime and Transport Workers* [2010] IRLR 114 and Cox J in *BA v Unite* [2009] EWHC 3541 (QB), a union cannot just sit on its hands and say it does not have the necessary information, and then make no effort to obtain the information which is relevant to that which it has to provide."

39. She also accepted that there was no adequate explanation of how the RMT's figures were arrived at, as required by sections 226A(2C)(i) and 234A(3)(a)(i) of the 1992 Act (at [60]).

The identification of the ballot constituency

40. Network Rail further complained that, having conducted enquiries in relation to a number of workplaces, it had ascertained that 5 out of 21 (or 23) relevant staff had not received a ballot paper. Sharp J concluded that this was evidence of a breach of section 227 of the 1992 Act, and that it could not reasonably be argued that the breach was either accidental or on a scale which was unlikely to affect the ballot, within the meaning of section 232B (see [67]).

Notification of the ballot result to members

41. A final complaint was made that the RMT had breached section 231 of the 1992 Act by informing its members of the result of the ballot by text message, which referred them to the union's website for the full breakdown of the results. Sharp J held (at [71]) that this was insufficient to comply with the notification provisions. However, that part of her decision cannot stand with the subsequent decision of the majority of the Court of Appeal in ***British Airways plc v Unite the Union* [2010] EWCA Civ 669 [2010] ICR 1316**.

British Airways plc v Unite the Union [2010] EWCA Civ 669 [2010] ICR 1316

42. The Court of Appeal's decision in ***British Airways plc v Unite the Union* [2010] EWCA Civ 669 [2010] ICR 1316** marked the next chapter in the ongoing industrial dispute between BA and Unite the Union, which had previously led to Cox J granting an injunction to retrain strike action over Christmas 2009.
43. There was no dispute that the ballot itself had complied fully with the requirements of the 1992 Act. It had been overwhelmingly in favour of strike action. The issue in this case was whether Unite had complied with the requirement in section 231 of the 1992 Act to take "*such steps as were necessary*" to ensure that all persons entitled to vote in the ballot were informed of the numbers of votes cast, the numbers answering "yes" and "no" and the number of spoiled voting papers.
44. At first instance, McCombe J granted BA an injunction. The majority of the Court of Appeal (Lord Judge CJ and Smith LJ) overturned the judge's order (with Lord Neuberger MR dissenting). Lord Judge CJ took the view (at [31]) that section 231 could not realistically require that the union must prove that every single eligible member was personally sent his or her own individual report of the full results.
45. Unite took steps to inform its members of the results of the ballot by posting it on its websites, distributing leaflets and posting the results on notice boards at the airports concerned. It did not in every case specify each of the four figures specified in section 231. Lord Judge CJ noted (at [39]) that these methods needed to be seen against the background of the union being in regular communication with its members, particularly in the context of the ongoing industrial dispute. The union used its websites as its principal means of communication with the affected members. The notice boards used were in prominent places, and adjacent to notice boards used by BA for mandatory notices. Whilst the union could have done more, what they did was sufficient to comply section 231 (see Lord Judge CJ at [58]).
46. Smith LJ concluded (at [133]) that the requirement to "inform" did not necessitate a personal communication to each member. It was sufficient for the union to disseminate information by its website provided it knows that it is dealing with members who are computer literate and have access to the internet. She went on to say (at [152]):

"I consider that the policy of this Part of the Act is not to create a series of traps or hurdles for the union to negotiate. It is to ensure fair dealing between employer and union and to ensure a fair, open and democratic ballot."
47. Lord Neuberger MR, dissenting, held that section 231 should be given its literal reading, and so notice should be given containing each of the four elements specified, and that each member should have been individually contacted by email, text or post. He was influenced (at [70]) by the fact that section 231 is not one of the sections in respect of which the exception contained in

section 232B for failures to comply with the balloting procedure which are “*accidental and on a scale which is unlikely to affect the result*” applies.

48. Together with the ***National Union of Rail, Maritime & Transport Workers v Serco Ltd [2011] EWCA Civ 226*** case referred to below, this case sees the Court of Appeal seeking to ameliorate the harshness of the stringent balloting and notice requirements of the 1992 Act. The Court of Appeal was clearly influenced by the fact that BA had not raised any complaint about compliance with section 231 in relation to the previous ballot, even though the same methods of communication had been used. It would appear that the courts are becoming less sympathetic to what are perceived to be opportunistic challenges by employers.

London Underground Ltd v Associated Society of Locomotive Engineers and Firemen [2011] EWHC 7 (QB)

49. The decision of Holroyde J in ***London Underground Ltd v Associated Society of Locomotive Engineers and Firemen [2011] EWHC 7 (QB)*** arose out of another holiday-related dispute. A dispute arose between London Underground and its drivers, represented by ASLEF, as to Boxing Day pay. ASLEF balloted its members, who were in favour of industrial action, and planned a strike for Boxing Day 2010. London Underground sought an injunction on the basis that the ballot and strike notices failed to comply with sections 226A and 234A respectively of the 1992 Act.
50. The central question was whether the notices had provided the required “*explanation*” for how the figures given were arrived at: see sections 226A(2)(c)(i) and 234A(3)(a)(i). The notices had referred to ASLEF’s membership database, and to the fact that it had been audited and updated so as to ensure accuracy. London Underground complained that this told them nothing about how the database had been compiled, maintained or updated. On balance, Holroyde J concluded that the information provided probably sufficed, albeit more information could undoubtedly have been given (see [43]). However, he stressed that the sufficiency of the explanation depends on all the surrounding circumstances, and so no particular form of words can be said to be adequate or inadequate for the purposes of the notice requirements in the abstract (see [45]). Accordingly, the application for an injunction was refused.

National Union of Rail, Maritime & Transport Workers v Serco Ltd [2011] EWCA Civ 226 [2011] IRLR 399

51. The last word on the balloting and notice provisions for the time being is the Court of Appeal’s decision in ***National Union of Rail, Maritime & Transport Workers v Serco Ltd [2011] EWCA Civ 226 [2011] IRLR 399***. The case concerned two railway strikes, one planned by train drivers belonging to ASLEF employed by the London and Birmingham Midland Railway, and the other by RMT members employed on the London Docklands Railway. The employers sought to restrain strike action on the basis of a number of alleged defects in the balloting and notice provisions.
52. Elias LJ, giving the lead judgment, considered in general terms the role and effect of the procedures contained in the 1992 Act, and his survey provides an illuminating overview of the history and purpose of the legislation.
53. First, he rejected the employers’ argument that, because the unions were seeking to rely on an immunity from liability, the legislation should be construed strictly against them. There should be no presumption that Parliament intended that the employers’ interests should hold sway unless the legislation clearly dictates otherwise, and the legislation should simply be construed in the

normal way (at [9]). He also emphasised the principle contained in section 221 of the 1992 Act, namely that, where the union is seeking to rely on the statutory immunity, the court must have regard to the likelihood of it establishing that defence at trial: see [12]. The injunction should not be determined simply on the balance of convenience.

Accidental errors in balloting

54. The employers argued that, because the opportunity to vote was given to some employees to whom it ought not have been given, the union had breached section 227 of the 1992 Act, and that breach could not be ignored because it had not been “*accidental*”. As a preliminary matter, Elias LJ concluded that the relevant breach here was of section 230(2), in that the material concern was that the employees had been given the opportunity to vote when they should not have been, not that they had been afforded an entitlement to vote.
55. However, more substantively, the judge had erred in saying that in order for an error to be “*accidental*” within the meaning of section 232B of the 1992 Act it had to be both unintentional and unavoidable (see [56]):

“Here the union believed that it was balloting the relevant drivers and no-one else. Because of human errors and failings, it did not achieve that objective but extended the vote to two members not entitled to it. In my judgment section 232B was designed to cater for precisely this kind of case ...”

Accuracy of the ballot notice

56. As to the notification requirements, Elias LJ pointed out that section 226A does not impose any obligation either to keep accurate records, or to acquire further information if the information held by the union is not as accurate as reasonably practicable. The only record which a union is expressly obliged to keep is the register of members’ names and addresses pursuant to section 24 of the 1992 Act. It followed that it was essential, in determining whether the figures given in the notice were “*as accurate as reasonably practicable in the light of the information in the possession of the union*”, to focus on the information actually in the hands of the union at the time when it sought to comply with its obligations (see [69]-[70]). Whilst he recognised the risk (referred to by Blake J in ***EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers* [2009] EWHC 2852 (QB) [2010] IRLR 114**) that, without some duty to acquire information, the union might deliberately sit on its hands and thereby frustrate the object of the statute, he considered this risk to be exaggerated (see [72]). Unions do not hold their information primarily with a view to taking strike action.
57. It followed that it was wrong for the judge in the ASLEF case to conclude that the union was under an obligation by virtue of section 226A to obtain further information or set up systems to improve its record keeping (see [75]).
58. Elias LJ went on to endorse the more general *de minimis* principle, which had been applied by the Court of Appeal in ***British Railways Board v National Union of Railwaymen* [1989] IRLR 349**, to the effect that trifling errors ought not to be allowed to form the basis for invalidating the ballot. The fact that the exception contained in section 232B of the 1992 for failures which are “*accidental*” and “*unlikely to affect the result of the ballot*” does not apply to all parts of the legislation (and in particular does not apply to the notice provisions) does not entail that the general *de minimis* principle had been cut back by that section. It should in general continue to be available to unions (see [87]).

How detailed and accurate must the explanation be?

59. The next question was as to whether the explanation provided in the ballot notice required by section 226A(2)(c)(i) for how the union had arrived at its figures was adequate. Elias LJ took the view that this duty was not an onerous one, which would be satisfied by complying with paragraph 16 of the statutory Code of Practice on Industrial Action Ballots and Notice to Employers (2005). That requires merely that unions should consider describing the sources of the data used and, where the union's data is known to be incomplete or to contain other inaccuracies, describing the main deficiencies.
60. In the ASLEF case, it was sufficient that the union had identified the fact that the information had been derived from the union's database, and given some indication of when and for what purpose the records had been updated. There was no further obligation to identify how the updating procedures had been carried out (see [99]). Nor was the explanation invalidated by the fact that the updating process had been described as an "audit". The updating process itself was a rudimentary kind of audit (see [104]).
61. Accordingly, the appeals were allowed. Elias LJ went on to note that:
- 61.1. The judge in the RMT case had been wrong to assume that the purpose of the notice provisions was to enable the employer to decide whether to take legal proceedings or not (at [118]); and
- 61.2. There was no obligation in a ballot notice to use the job categories used by the employer for pay purposes (at [124]). The union had acted permissibly in stating categories by reference to the jobs named by the employees.

Conclusion

62. Overall, the decisions of the Court of Appeal in ***British Airways plc v Unite the Union* [2010] EWCA Civ 669 [2010] ICR 1316** and ***National Union of Rail, Maritime & Transport Workers v Serco Ltd* [2011] EWCA Civ 226 [2011] IRLR 399** represent something of a retreat from the formalistic rigours of ***Metrobis Ltd v Unite the Union* [2009] EWCA Civ 829 [2010] ICR 173**. In general, whilst holding the unions to certain basic standards of compliance, the courts are anxious not to require an unrealistically exacting approach. However, a stringent approach is more likely to be met when the timing of the strike appears to be calculated to cause maximum disruption, particularly to the general public.

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