

Briefing Paper: Lawful Industrial Action (Minor Errors) Bill 2010

John Hendy QC

Introduction:

John McDonnell's **Lawful Industrial Action (Minor Errors) Bill** was introduced in Parliament on 30th June and will have its second reading on 22nd October 2010. The Bill develops one aspect of the Trade Union Rights and Freedom Bill (ballots and notices) in an attempt to remove some of the most restrictive and damaging burdens facing trade unions today. This Briefing offers arguments and examples of why the law needs amending.

Background:

Individuals who go on strike are in breach of contract and liable to dismissal. Trade unions organising strikes can be accused of inducing a breach of contract or other torts and pursued for damages or prevented from taking action via a court injunction. Acts of Parliament since 1906 have granted immunity from such liabilities but from 1980 onwards, the scope of those immunities was greatly reduced and legislation introduced complex procedural requirements, most notably on ballots and notices. The relevant legislation today is the Trade Union and Labour Relations (Consolidation Act) 1992 as amended (TULCRA).

The current duties on trade unions to provide employers with notice of ballots and industrial action place onerous, costly and excessively complicated duties on unions. Despite amendments to the law in 1999 and 2004 Acts, the law still requires unions to provide exact numbers, workplaces and categories of those to be balloted and to keep meticulous records of their members' addresses, jobs, and workplaces – a task made more onerous by privatisation, contracting out and outsourcing of departments within individual companies.

Increasingly unions are being prevented from implementing the democratic decisions of their members by employers applying and winning court injunctions based on minor technical errors, errors that would have no impact on the overall result of the ballot. The complexity of UK law has been repeatedly criticised by international supervisory bodies.

International Criticisms:

"In light of the observations that it has been making for many years ...the Committee requests the Government to review the TULRA and consider appropriate measures for the protection of workers and their organizations to engage in industrial

action"

ILO Committee of Experts, 2010

"The Committee concludes that the situation in the United Kingdom is not in conformity with ... the Charter on the following grounds:

- the scope for workers to defend their interests through lawful collective action is excessively circumscribed;*
- the requirement to give notice to an employer of a ballot on industrial action is excessive;*
- the protection of workers against dismissal when taking industrial action is insufficient."*

The European Social Rights Committee of the Council of Europe, Conclusions XVIII

Within TULCRA, section 232B states that "accidental" errors, made "on a scale unlikely to affect the result of the ballot" should be disregarded. However, recent judicial decisions have queried the meaning of "accidental" and declared that notices are not included in the protection. Such judicial decisions undermine the intentions of the legislation and bring further uncertainty to an already over-complicated area of UK law.

In the BA dispute, one judge argued that the purpose of the legislation "is not to create a series of traps or hurdles for the union to negotiate.... [but] to ensure a fair, open and democratic ballot". The effect of the legislation is, however, exactly that of creating traps and hurdles almost impossible to avoid.

Therefore the aims of the Bill are threefold: to remove some of the traps and hurdles; to reduce the scope for exploiting legal uncertainties in the legislation; and to simplify the law relating to ballots and notices.

Examples:

Johnston Press v NUJ: In May 2010 the NUJ had to abandon a strike of journalists when the employer claimed to "employ no journalists", despite the fact that the Johnston Press website states the company employs 1,900 journalists. The NUJ are pursuing their case to the European Court of Human Rights.

Network Rail v RMT: In April 2010 a High Court injunction was granted to Network Rail citing failures to comply with the ballot and notice provisions.

Metrobis v Unite: In August 2009 the Court of Appeal overturned a 90% UNITE ballot vote in favour of strike action. The Court claimed first, that the union "had not acted as soon as reasonably practicable" in giving bosses the ballot result even though the union received the result on 2nd August and informed Metrobis on 3rd. Second, that the pre-ballot notice failed to give the "explanation" that the number of members to be balloted were taken from its central computer.

EDF Energy v RMT: In 2009 the RMT issued formal strike notice to EDF. The union identified 65 members working in three workplaces but EDF won an injunction because the notice described them as engineers/technicians but did not give their precise job descriptions.

BA v UNITE: In December 2009 BA Cabin Crew voted to strike by a margin of 92.5% on a ballot turnout of 80% of 12,000. The Court granted BA an injunction on the basis that the ballot included an unknown number of members amongst 811 crew who had since taken redundancy despite the fact that, even if the 811 had all been members and had all voted for strike action and should all have been excluded, the vote would still have been 91.5% in favour of action.

BA v BALPA: BALPA had to abandon a high court battle when BA claimed the ballot did not meet European law, suggesting BALPA would be liable for a bill of £1.25 million. BALPA complained to the ILO and in March 2010 the ILO recommended that UK laws be "reviewed" and appropriate measures considered to protect the right to take industrial action.

The Lawful Industrial Action (Minor Errors) Bill:

The Bill amends TULCRA by extending the protections offered by section 232B relating to small, accidental errors.

The Bill introduces 5 main improvements:

- Small accidental failures in ballots will be disregarded
- Small accidental failures in notices will be disregarded
- Minor errors in the information about the result of the ballot will be disregarded
- Forensic examination of procedures will end and be replaced with the concept of "substantial compliance".
- The burden of proof in injunctions will shift so that evidence will be required that "substantial compliance" has not taken place.

More information:

The Institute of Employment Rights is a network of leading labour law academics, lawyers and trade unionists who work to provide the labour movement with the information and history needed to develop an alternative and more equitable framework of labour law.

Contact: office@ier.org.uk or **0151 207 5265** or visit www.ier.org.uk for more information.

The United Campaign to Repeal the Anti-Trade Union Laws is a cross-union campaign comprised of 25 national unions and 100s of branches and individual supporters who fight for the introduction of new, positive laws enshrining the rights of workers.

Contact: info@unitedcampaign.org.uk or **0151 207 5264** visit www.unitedcampaign.org.uk for more information.

Conclusions:

The Bill aims to reduce burdens on unions. Reducing burdens on unions would allow them to carry out their fundamental purpose, defined by statute as "the regulation of relations between workers and employers". That role is vital if we are to fight poverty, reduce inequality and ensure that the burden of economic restraint does not fall disproportionately on hardworking families.

The Bill aims to restore a democratic voice for workers. In 1984, a Conservative Government introduced statutory balloting procedures claiming: "There is evidence that union members increasingly wish and expect to be consulted by voting in secret before they are called out on strike. The need and the scope for unions to respond to that pressure from their members is clear". Today unions are increasingly prevented from responding to the democratic decisions of their members by the Courts relying on insignificant technical non-compliances.

The Bill aims to extend existing principles of UK law. In electoral law the outcome of an election cannot be challenged if the election has been conducted substantially in accordance with the law and the omission did not affect the result. Similarly, the Human Rights Act provides helpful constraints on the use of interim injunctions relating to media publication that could be incorporated into collective labour law.

The Bill aims to bring UK law in line with international obligations: UK laws have been continually criticised by international supervisory bodies. In 2008 the European Court of Human Rights declared that restrictions on the right to strike could violate Article 11 of the Human Rights Convention. Unions are already pursuing this point through the Strasbourg Court.

THE
INSTITUTE
OF
EMPLOYMENT
RIGHTS

RECLAIM
OUR
RIGHTS!
UNITED
CAMPAIGN

Lawful Industrial Action (Minor Errors) Bill 2010

IER—UC Briefing Paper: