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# *Lawful Industrial Action (Minor Errors) Bill*

## Bill No 4 of 2010/12

**RESEARCH PAPER 10/61** 7 October 2010

This is a Private Members Bill introduced by John McDonnell MP who came first in the ballot, due for Second Reading on 22 October 2010. The Bill proposes reducing regulatory burdens on trade unions in relation to the balloting and notice requirements for lawful industrial action. It extends the provision for small accidental errors contained in section 232B of the *Trade Union and Labour Relations (Consolidation) Act 1992*. The burden of proof in applications by an employer to restrain strike action by injunction will be changed. The employer will have to show that the union has failed to achieve "substantial compliance" with the ballot and notice requirements.

Vincent Keter

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**Research Paper 10/61**

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ISSN 1368-8456

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## Summary

During the previous three Parliaments, the emphasis of industrial relations law and policy has been on collective bargaining and the assumption of low levels of industrial conflict, often referred to as "social partnership". However, in the current context of recession and planned public spending reductions this appears to be changing. There have been a number of recent cases of industrial action which have generated litigation and there is a pending application to the European Court of Human Rights on the question of trade union rights to strike.

A central issue concerns the law on the right to strike in the UK, particularly in the context of legislative requirements falling on trade unions that wish to organise industrial action. The development of the law on industrial action has a long history. Prior to 1906 the common law prevailed, under which workers who went on strike were in breach of their contracts of employment and subject to dismissal. Trade unions were liable to claims for damages by employers for inducing breach of contract,[1] as well as statutory liabilities for civil conspiracy.[2] The *Trade Disputes Act 1906* granted a set of immunities from these liabilities if the action was 'in contemplation or furtherance of a trade dispute'.[3] Legislation passed by Conservative governments, beginning in 1980, increasingly regulated industrial action by making the immunities subject to various requirements, most notably strike ballots and strike notices. The current law is governed by the *Trade Union and Labour Relations (Consolidation) Act 1992*, as amended. The Labour Government made some changes in 1999 and 2004, but did not alter the fundamental structure of the law.[4]

There have been recent cases where employers have obtained injunctions restraining strike action, notwithstanding that proposed strikes have had the support of the strike ballot and notice had been given to the employer. These cases have generated concern among trade unions who argue that the legal requirements on ballots and notices are unprincipled, place undue regulatory burdens on them and contravene Article 11 of the European Convention on Human Rights. Opponents of this view, such as the CBI, Policy Exchange and the Mayor of London argue that the balance of power between trade unions and employers has shifted towards unions and call for greater regulation of industrial action. The Government has no plans to change existing law.

The relevant provisions of the *Trade Union and Labour Relations (Consolidation) Act 1992* do allow courts to disregard small accidental failures by trade unions in the conduct of ballots, but this allowance does not extend to notice requirements. The Bill proposes a more general disregard for small accidental failures and introduces a principle of "substantial compliance" as a threshold for litigation by employers claiming damages or seeking injunctions to restrain strike action.

Details of trade union membership statistics; and contrary proposals from employer interests to increase regulation of industrial action are covered in Appendices to this paper.

Current and subsequent versions of the Bill and explanatory notes can be downloaded from the Parliament website which also gives links to debates, proceedings and transcripts of evidence: http://services.parliament.uk/bills/2010-11/lawfulindustrialactionminorerrors.html

The following briefing paper has also been published in support of the Bill: Institute of Employment Rights, United Campaign, *Briefing paper: Lawful Industrial Action (Minor Errors) Bill 2010*, 23 September 2010

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1 *Taff Vale Railway v. Amalgamated Society of Railway Servants [1901] AC 426*
2 *Conspiracy and Protection of Property Act 1875*
3 6 Edward VII, c 47
4 *Employment Relations Act 1999*; and *Employment Relations Act 2004*

# 1 The structure of UK law on industrial action

The Bill was announced in a Labour Representation Committee press release on 30 June 2010. John McDonnell made the following comments in support of it:

> We have seen in the current BA Cabin Crew dispute and many other recent disputes, employers have been able to exploit loopholes in the existing law by using minor technical errors in a trade union ballot to thwart trade unionists from taking strike action.
>
> This resort to the courts by some ruthless employers is bringing current employment law into disrepute and undermining industrial relations in this country. This cannot be right and in the interests of good industrial relations needs to be addressed.[5]

The common law position is that an individual who goes on strike is almost invariably in breach of their contract of employment, and, therefore, liable to dismissal under contract law. Trade unions that organise a strike will almost certainly commit a "tort" or "civil wrong" such as inducement of breach of contract or interference in performance of the terms of a contract. The remedies for torts are primarily damages and injunctions. Insofar as there is any "right to strike" in British law, it has been conferred by a series of Acts of Parliament starting in 1906 which granted trade unions and trade union officials immunity from liability for these torts. There is therefore a freedom to strike in cases for which immunity is granted rather than any individual or collective right to strike.

The Conservative Government's trade union legislation, mainly passed in the 1980's, introduced increasingly deep and detailed restrictions and regulations which reduced the scope of these immunities. Amongst other things, it removed immunity from secondary action and political strikes, and introduced procedural requirements involving secret postal ballots and seven-day strike notice which had to be complied with if immunity was to be preserved. It is only strikes for which a trade union has immunity that are "lawful". The subsequent Labour Government made some changes to these reforms but left the basic structure unchanged.[6]

## 1.1 Ballots and notices

The relevant provisions on industrial action ballots and notices are contained in TULRCA, sections 226 to 235. The *Employment Relations Act 1999* introduced a number of changes, among them sections 226A and 234A which deal with notices which unions must give employers. For the union to be protected from the liability for inducement to breach of contract they must conduct a secret ballot of those they are likely to induce to take part in a strike. They must also give the employer notice of both the ballot and the strike. The "ballot notice" must describe which employees the union believes will be entitled to vote in the ballot, and the "industrial action notice" must describe which employees the union intends to induce to take part in the industrial action.

There is no requirement to ballot workers that the union does not propose calling upon to take part in a strike (for example other workers in the organisation who are not members of the trade union). Where trade union membership density is low within a particular employer organisation the ability to conduct effective strike action will clearly be limited by the number of employees that the union will be able to call upon to participate in industrial action.

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5 Labour Representation Committee press release, *John McDonnell launches Bill to restore the right to strike*, 30 June 2010

6 See Library standard Note SN/BT/596 *Trade Union Legislation: Labour's changes to the Conservative reforms*

### 1.2 Key cases on strike notices and balloting

A recent series of cases where employers have applied for injunctions to prevent strikes have focussed on technical errors made by trade unions in ballots and notices. In many judgements the courts have held that such errors leave unions without the necessary immunities provided by the legislation that would make strike action lawful. The trade unions have complained that strike ballots showing support from a substantial majority of their members should not be overturned where minor technical errors or omissions have been made. Many strike ballots are conducted by independent service providers such as Electoral Reform Services Ltd. The following line of cases contains the main recent developments in the case law on this issue:

*NURMT v London Underground [2001] EWCA Civ 211,* (16 February 2001)

*Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829*,* (31 July 2009)

*EDF Energy Powerlink LTD v National Union of Rail Maritime and Transport Workers (NURMTW)* [2009] EWHC 2852 (QB) (23 October 2009)

*British Airways Plc v Unite the Union [2009] EWHC 3541 (QB)* (17 December 2009)

*British Airways Plc v Unite the Union [2010] EWHC B4 (QB)* (High Court 17 May 2010)

*British Airways Plc v Unite the Union [2010] EWCA Civ 669* (Court of Appeal 20 May 2010)

### 1.3 British Airways dispute

The court judgements in the BA dispute are part of unfolding developments in case law on the balloting and notice requirements in the *Trade Union Labour Relations (Consolidation) Act 1992* (TULCRA) and the right to strike which unions argue is protected under Article 11 of the *European Convention on Human Rights* (ECHR). The lawyers acting for Unite have argued that in light of human rights law the technical requirements in TULCRA are effectively too restrictive; or have been interpreted by UK courts too restrictively. The UK courts have so far refrained from relying on judgements of the European Court of Human Rights (ECtHR) as regards the right to strike. The Rail Maritime and Transport Workers Union (RMT) has lodged a case which is pending before the ECtHR seeking further clarification on this point.

A recent article in the New Law Journal gives a useful summary of the BA dispute and the relevant legal issues that have arisen, including the cases listed above:

> The most recent legal flare-up between British Airways and Unite (representing BA cabin crew) has dominated the headlines and for once it was not just labour lawyers debating whether there was a right to strike in the UK. In the High Court, BA got its injunction on the basis of what looked like a technicality: a failure to notify individual members of eleven spoiled ballot papers. Could the democratic will of BA cabin crew be overridden by such a failure on the part of the union? Ultimately the Court of Appeal (by a majority) held not. In so doing, the court seemed to acknowledge the need to recognise a "right to strike" without pronouncing on the legal basis of such a right.[7]

### 1.4 Human rights: Article 11(2) ECHR

Article 11 of the ECHR reads as follows:

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[7] Jennifer Eady QC & Nadia Motraghi, *United action*, New Law Journal, Vol 160, Issue 7423, 25 June 2010

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

As can be seen, Article 11 ECHR does not explicitly recognise either a right to collective bargaining or a right to take industrial action. Long-standing decisions of the ECtHR have recognised that collective bargaining and strike action are important means by which an individual's rights under Article 11 may be protected, but for some time there was no formal recognition by the ECtHR that either collective bargaining or strike action were essential elements of the Article 11 right.

The trade unions have argued that the right to strike has been recognised as explicitly protected under the ECHR. Two key cases are referred to:

- *Demir and Baykara v Turkey App No 34503/97* – which established that the right to collective bargaining is an essential element in the article 11 right
- *Enerji Yapi-Yol sen v Turkey (App No 68959/01)* – in which the right to strike was at stake and the ECtHR held that there had been disproportionate interference in the applicant union's rights deriving from Article 11.

The Court of Appeal responded to these arguments in *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, (31 July 2009). It did not accept that the correct interpretation of the ECtHR's decision in *Enerji Yapi-Yol sen v Turkey* was that right to strike was explicitly protected by Article 11. Lord Justice Lloyd at paragraph 35 said:

> On the face of it, therefore, this is a decision to the effect that action to prevent participation in a strike, or to impose sanctions for such participation is an interference with the right to freedom of association under article 11, for which justification has to be shown in accordance with article 11 paragraph 2. The contrast between the full and explicit judgment of the Grand Chamber in Demir and Baykara on the one hand, and the more summary discussion of the point in Enerji Yapi-Yol Sen on the other hand is quite noticeable. It does not seem to me that it would be prudent to proceed on the basis that the less fully articulated judgment in the later case has developed the Court's case-law by the discrete further stage of recognising a right to take industrial action as an essential element in the rights afforded by article 11.

This issue may be the subject of further judgement following an application by the RMT union earlier this year to the ECtHR touching on the question of the right to strike in UK law. An RMT press release announced this as follows:

> TRANSPORT UNION RMT announced today that it is launching an unprecedented challenge to the UK's anti-trade union laws in the European Court of Human Rights.
>
> Papers on behalf of RMT will be lodged with the European Court today by the union and its solicitors. RMT will argue on behalf of its members that its ability to organise industrial action to protect its members is restricted by UK law in a breach of Article 11 of the European Convention on Human Rights and Fundamental Freedoms. The union

> will be represented in the Court by RMT's standing counsel John Hendy QC and Marcus Pilgerstorfer, instructed by Thompsons Solicitors.
>
> The cases that RMT are challenging at European level are the EDF Energy court challenge and Hydrex dispute. These involved two groups of RMT members who balloted for industrial action last autumn – details of the cases in the editors notes below.
>
> The RMT is putting forward arguments about two restrictions imposed by UK legislation in respect of the EDF and Hydrex cases which it says are incompatible with Article 11 of the European Convention on Human Rights and Fundamental Freedoms. They are as follows:
>
> 1. the statutory requirement for the union to serve on an employer a notice which must fulfil onerous conditions such as providing the identification of the specific job descriptions of the intended voters; and
>
> 2. the absolute prohibition on unions organising solidarity industrial action (even where the secondary employer is closely associated with the primary employer in dispute).[8]

# 2 The right to strike

## 2.1 Summary

The right to strike in UK law is not structured as a positive right. As outlined above, it exists as a set of statutory immunities from common law liabilities which would otherwise effectively restrict industrial action. Outside the scope of these immunities workers who strike are in breach of their employment contracts and may be dismissed, although there is a 12 week period of employment protection for striking workers (or possibly longer in lock-out situations – see Appendix 3 below). Trade unions may face claims from employers for damages for having induced employees to break contractual obligations. The immunities are subject to detailed conditions intended to ensure:

- internal democracy in trade unions through strike ballots and notices; and
- that employers are notified of the details regarding proposed industrial action.

Employers may apply to a court for an injunction preventing strike action where the formal requirements of the legislation have not been met by unions, rendering a proposed strike potentially unlawful.

As outlined above, trade unions have expressed concerns about the approach UK courts have taken to a series of recent injunction applications by employers. They maintain that the requirements are being interpreted too strictly, suggesting that the right to strike was being effectively curtailed by the courts. The most recent decision in this line of case law came in the BA cabin crew dispute. The appeal court overturned an injunction that had been granted to the employer on the grounds that the requirements for strike ballots had been interpreted too narrowly.

These cases have arisen mainly in areas of the private sector which were formerly public and where union density remains above the national average. In the recession, private sector employment has experienced greater decline relative to public sector employment.[9] Similar

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8 RMT Press Release, *RMT launches challenge to UK anti-trade union laws in European Court of Human Rights*, 24 May 2010

9 See Library Research Paper 10/34 *Unemployment by constituency May 2010*, 12 May 2010

cases could arise in the public sector given the likely impacts for public sector workers of government deficit reduction plans. However, it is not clear whether public sector employers would take the same approach and seek to prevent strikes by means of court orders. It is also unclear what the response of courts would be if such an approach were to become the norm. The right to strike exists in a positive (although not absolute) form in European Community law and human rights jurisprudence.

Some Conservative commentators believe that the notice and balloting requirements are inherently more favourable to unions organising strikes in the public sector in comparison to the private sector. These arguments, and proposals on aggregate balloting which may effectively further restrict public sector strikes, are discussed below.

The issue of the right to strike has clearly gained considerable significance for trade unions. This is only partly due to the current law on strike ballots. It has been further amplified by a different line of recent European Court of Justice case law applicable to disputes involving transnational subcontracting in the EU (such as the recent Lindsey Oil Refinery disputes) and the Posting of Workers Directive. These judgements are widely seen as having placed further restrictions on industrial action and other wage protection measures across the EU. These issues are complex and have arisen predominantly in relation to private sector employment in particular the construction sector. Further information is available in the following standard note:

*SNB/BT/301 Posted Workers*

### 2.2 Strikes in essential services

There is no general law banning strikes in essential services in the UK, although it is a criminal offence for the police or armed forces to strike. Industrial action by prison officers is also circumscribed by legislation. The possibility of introducing a general law banning strikes in essential services is regularly raised when important public services are disrupted by national strike action. When concrete proposals have been made for such legislation they have always foundered on the difficulty of defining an essential service and fears that they would prove counter-productive. The Chartered Institute of Personnel and Development (CIPD) has recently raise the "high stakes" option of strike bans in emergency services.[10]

#### *Emergency services: UK law*

The main groups subject to a prohibition on industrial action or a no-strike agreement (enforceable by injunction) are police; prison officers; and armed forces. In some circumstances merchant seamen and firefighters may be prevented from taking industrial action where this would endanger members of the public. There are also residual provisions against aliens (Bolsheviks) fomenting strike action which date back to 1919.

Section 127 of the *Criminal Justice and Public Order Act 1994* (which has since been disapplied for many prison officers but is still in force for some) makes it unlawful to induce prison officers to go on strike. Prison Officers are currently covered by a voluntary agreement and the section has been partially disapplied. After a number of unofficial strikes in the prison services the former Labour Government took a statutory power to reapply the ban on strikes in the prison service.

The ban on police membership of trade unions in section 64 of the *Police Act 1996* covers various positions within the police forces:

- Police Officers

[10] BBC News, *Essential services strike ban 'may need to be option'*, 6 August 2010

- Police Cadets
- Employees and constables of the member of the staff of the National Policing Improvement Agency
- Director General of the Scottish Crime and Drug Enforcement Agency
- Deputy Director General of that Agency, and
- A police member of that Agency appointed by virtue of paragraph 7 of schedule 2 to the Police, Public Order and Criminal Justice (Scotland) Act 2006

### *Utilities*

Under the *Industrial Relations Act 1971* the Secretary of State for Employment was given the power to apply to the National Industrial Relations Court for an order directing a statutory cooling off period in any industry (including the supply of gas, water and electricity) for up to a maximum of 60 days if the industrial action was likely to be "gravely injurious to the national economy to imperil national security or to endanger the lives of a substantial number of persons". These provisions were used only once and were repealed in 1974.

### *Injury to persons or property*

Section 240 of the *Trade Union and Labour Relations (Consolidation) Act 1992* has the effect of restricting strike action in certain confined circumstances insofar as this might involve injury to persons or property. Similar provisions cover merchant seamen while at sea. Section 240 provides:

> **240 Breach of contract involving injury to persons or property**
>
> (1) A person commits an offence who wilfully and maliciously breaks a contract of service or hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be—
>
> (a) to endanger human life or cause serious bodily injury, or
>
> (b) to expose valuable property, whether real or personal, to destruction or serious injury.
>
> (2) Subsection (1) applies equally whether the offence is committed from malice conceived against the person endangered or injured or, as the case may be, the owner of the property destroyed or injured, or otherwise.
>
> (3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 2 on the standard scale or both.
>
> (4) This section does not apply to seamen.

Section 240 (1) dates back to the *Conspiracy and Protection of Property Act 1875*, section 5.

It would appear that, in practice, the section is not used. All the legal textbooks agree that despite its obvious relevance to strikes in essential services, there is no record of its use. For example, *Harvey's Encyclopedia of Industrial Relations and Employment Law* comments:

> The offence is committed only where a person *breaks* his contract, so that liability can easily be avoided by expressly giving due notice to terminate the contract by way of strike action: but unions rarely do that. The offence has obvious implications for essential service industries. In theory it could well be committed by firemen, dustmen, hospital workers and many others who take industrial action. And, since the substantive offence is punishable by imprisonment, a trade union officer who organizes

> such industrial action could find himself facing a charge of criminal conspiracy based upon it …
>
> Whatever the theory, the offence, so far as is known, is not in practice charged.[11]

Deakin and Morris say:

> The 1875 Act marked the retreat of the criminal law from the area of industrial action. Since 1875, wartime apart, its role in this context has been largely confined to picketing. For some groups of workers criminal liability remains potentially a threat. The 1875 Act made it an offence for a person to "willfully and maliciously" to break a contract of service or hiring, knowing or having reasonable cause to believe that the probable consequences either alone or in combination with others will be to endanger human life, cause serious bodily injury , or expose valuable property to destruction or serious injury. This offence is still on the statute book, although there is no record that it has ever been enforced despite many disputes where it could have been.[12]

And Smith and Thomas write:

> This provision is potentially of great significance in industrial disputes particularly in the context of industrial action by workers in the essential services such as nurses, doctors, firemen and ambulancemen. The penalty is small, and there appears to be no record of any prosecution under it …[13]

### 2.3 The right to strike in European law

***Sources of European law***

There are a number of interrelated sources of European law on the issue of the right of workers and trade unions to take industrial action, emanating from different international institutions:

- **European Union**
  - Case law of the European Court of Justice
  - EU Charter of Fundamental Rights and Freedoms
- **Council of Europe**
  - The European Social Charter
  - The European Convention on Human Rights
- **United Nations**
  - The International Labour Organisation Conventions 87 and 98

It is important to note that the above represent distinct sources of law and different international institutions. At the same time they often cross-refer. The following is a brief description of these sources.

The **European Court of Justice** (officially the Court of Justice of the European Communities), is the highest court in the European Union in matters of European Union law.

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11 *Harvey on Industrial Relations and Employment Law,* N 1877-1878
12 Deakin and Morris, *Labour Law*, third edition, 2001, p 885
13 Smith and Thomas, *Industrial Law*, seventh edition, 2000, p 683

It is tasked with interpreting EU law and ensuring its equal application across all EU member states. The Court was established in 1952 and is based in Luxembourg.

The **European Union Charter of Fundamental Rights and Freedoms** agreed in December 2000, sets out in a range of civil, political, economic and social rights of European citizens and all persons resident in the EU, based, in particular, on the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties. The issue of the Charter's legal status has been the subject of ongoing discussion.

The **Council of Europe** (CoE), based in Strasbourg (France), has 47 European member countries. Founded on 5 May 1949 by 10 countries, the organisation seeks to develop common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.

The **European Social Charter** guarantees social and economic human rights. It was adopted by the CoE in 1961 and revised in 1996. The European Committee of Social Rights (ECSR) is the body responsible for monitoring compliance in states that are signatories to the Charter. The UK ratified the Charter in 1962.

The **European Convention on Human Rights** (ECHR - entitled *The Convention for the Protection of Human Rights and Fundamental Freedoms*) was adopted under the auspices of the CoE in 1950 to protect human rights and fundamental freedoms in Europe. All CoE member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. The Convention established the **European Court of Human Rights**. Any individual who feels his or her rights have been violated under the Convention by a state party can take a case to the Court. The decisions of the Court are not automatically legally binding, but the Court does have the power to award damages. This right of individual petition is not common for international conventions on human rights, Normally only states are able to take cases in international law. States can also take cases against other state parties under ECHR, although this is rare. Article 11 of the ECHR governing freedom of association does not expressly set out a right to strike, although the European Court of Human Rights has held that the right to strike is “one of the most important means” by which states may secure the freedom of its citizens to join an effective union to protect their interests, although not the only one.[14]

Significant attention has focussed on a judgement of the European Court of Human Rights, *Demir and Baykara v Turkey*, (Application 34503/97, 12 November 2008) which trade union lawyers believe taken together with a subsequent case establishes that the right to strike is clearly recognised by Article 11 of the ECHR. The judgement held that the right to collective bargaining is ‘an essential element’ of the right to freedom of association in Article 11 of the ECHR and recognised the jurisprudence of the International Labour Organisation and the European Social Charter into that right.[15]

The **International Labour Organisation** (ILO) was founded in 1919, in the wake of the First World War, and became the first specialized agency of the UN in 1946. It is the global body responsible for drawing up and overseeing international labour standards, working with its Member States to promote labour standards as set out in the ILO Conventions. The ILO is the only 'tripartite' United Nations agency bringing together representatives of governments,

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[14] *Associated Newspapers Ltd. v Wilson; Associated British Ports v Palmer* [1995] 2 AC 454

[15] KD Ewing and John Hendy QC, *Implications of Demir and Baykara*, Industrial Law Journal Volume 39, No. 1, March 2010

employers and workers to jointly shape policies and programmes. ILO Conventions 87 and 98 contain various provisions relevant to trade union rights and freedoms. Complaints may be made to the ILO Freedom of Association Committee.

***Case law of the European Court of Justice***

Recent judgements of the European Court of Justice have raised various questions and issues that relate to industrial action in the context of labour mobility in the EU. The main cases are: *Viking-Line* (C-438/05), *Laval* (C-341/05), *Rüffert* (C-346/06) and *The Commission v Luxembourg* (C-319/06).

The ECJ case law raises some complex issues on the interface between:

- Worker's rights to take industrial action in cases where foreign workers undercut wages and terms of domestic workers following transnational subcontracting.
- The companies' right to exercise their fundamental freedom to provide cross-border services in accordance with Article 49 of the EC Treaty.
- The operation of the *Posting of Workers Directive* in relation to concerns about the possibility of "social dumping".

These have become the focus of concern for trade unions. The general effect of these judgements has been:

- Trade unions wanting to organise strike action in these contexts face increased litigation risks from companies who suffer losses as a result of a strike.
- Domestic legislation, beyond minimum employment rights set out in the Directive, must establish "public policy" derogations, such that a serious threat to a fundamental interest of society is involved.
- Public sector procurement rules may be set aside if they interfere with Treaty freedoms

The ECJ cases relevant to rights to strike are *Viking* and *Laval*.[16] These two decisions are widely seen as imposing new restrictions on the lawfulness of industrial action. Following these cases, UK courts must adopt a new approach to granting injunctions halting strikes in circumstances where there is a direct international element. Trade unions worry that they could also apply where there is very little or even no direct international element, and believe that the cases have provided employers with a potent new weapon with which to oppose industrial action.[17]

Across the EU, unions have been faced by cases of transnational wage undercutting and have tried to organise industrial action, sometimes with co-ordination among their affiliated unions within the EU. But the ECJ in the *Viking* and *Laval* cases ruled that this involves a balancing of interests with Treaty rights on freedom of establishment. This leaves unions facing increased litigation risks if they organise strike action in these cases, hence the *unofficial* strike action in the case of the Lindsey oil refinery dispute, possibly encouraged, but not directly organised, by Unite.

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16 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet & ors* Case C-341/05*; International Transport Workers' Federation & anor v Viking Line ABP & anor* Case C-438/05

17 Amicus, Daniel Ornstein, Herbert Smith, *Laval*, *Viking and the Limited Right to Strike*, 1 November 2008

The *Viking* case related to a Finnish shipping company (Viking Line) which operated a passenger ferry between Helsinki and Tallinn in Estonia under the Finnish flag. Viking Line wanted to reflag the ferry to Estonia so they could use an Estonian crew on lower wages. The Finnish Seamen's Union called upon the International Transport Federation (ITF) based in London to support them in accordance with their policy against "flags of convenience". The ITF sent a circular to affiliates and as a result industrial action was successful in preventing the reflagging of the ferry. In August 2004, after Estonia's accession to the EU, Viking Line took legal action in London against the unions to preventing further industrial action against the company re-registering the ferry as they had tried to do before. Their case was based on right of establishment under Article 43 of the Treaty of the EU, and also that strike action placed unlawful restrictions on freedom to provide services under Article 49 EC (and even that it constituted a restriction on freedom of movement for workers under Article 39 EC).

In the latter case a Latvian construction company, Laval, posted Latvian workers to Sweden having won a public tender in Sweden to renovate a school near Stockholm. The posted workers are thought to have earned around 40% less than their Swedish counterparts. Swedish construction workers unions were concerned about the posting of cheaper labour to Sweden. They took collective action to force Laval to abide by the local terms and conditions of employment laid down in a collective agreement.

The ECJ in these two cases held that a company can recover losses from a trade union or federation as a result of actual or threatened strike action that infringed rights guaranteeing freedom to provide cross border services – unless the collective action was justified, proportionate and necessary. The ECJ recognised the right to take collective action but said this has to be balanced against the company's freedom of movement.

### *Charter of Fundamental Rights and Freedoms*

The Charter of Rights formed Part II of the 2004 EU Constitution which failed ratification. However, in the Lisbon Treaty its rights are "recognised" in amended Article 6 TEU, which states that it "shall have the same legal value as the Treaties". The Charter will thus have legally binding value, although it is not reproduced in the Treaties.

One of the important issues surrounding the negotiations on the Lisbon Treaty was the question as to what status the *Charter of Fundamental Rights and Freedoms* will have in EU and domestic law. Chapter IV of the Charter contains provisions on the right to strike which UK trade unions hope, and UK employers fear, could be used to effectively overturn the Thatcherite reforms of trade union law if they became directly effective in UK law. Some consider that the Charter, agreed in 2000, may acquire legal force in all Member States through a reference to it in the Lisbon Treaty. It is not at all clear whether Lisbon will have that effect. The EU has arguably no power to adopt laws on the regulation of the right to strike. Article III-210(6) of the Constitution and paragraph 5 of Lisbon Article 137 EC state that the EC's social policy powers as set out in that Article "shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs". There is accordingly no EC legislation regulating such aspects of trade union activity.

In the Lisbon treaty, subparagraph (2) of amended Article 6 states that the Union will accede to the Council of Europe's *European Convention on Human Rights* (the European Convention). The new text specifies that the EU's accession to the European Convention must be agreed unanimously, and with national ratification, whereas the Constitution had provided for a qualified majority vote on this issue. Current Article 6(2) states that the Union "shall respect fundamental rights, as guaranteed by the European Convention …, but does not provide for accession". The ECJ ruled out EC accession in 1994 on the grounds that the Community lacked competence to become a party to the European Convention.

Although they duplicate each other in some respects, the Charter and the European Convention have different enforcement mechanisms and different jurisdictions. The rights set out in the Charter could not be applied universally, but only in relation to Union law or action taken under the Treaty. The Convention, on the other hand, has no direct relation to Union law, although there may be an overlap in the subject matter of complaints.[18] The Charter provides that, insofar as it contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the Convention which drew it up. This should help to avoid conflicting interpretations of the two texts. The ECJ would rule in cases of alleged breach of the Charter, including, presumably, in cases where the complaint would also be admissible under the Convention. However, as some commentators have observed, there is scope for duplication and confusion as to which would be the relevant Court.

There has been some friction between the two Courts in recent years. The Council of Europe (CoE) body has been concerned about the expansion of EU activities into areas once in its preserve. A Memorandum of Understanding (MoU) signed on 11 and 23 May 2007 by the EU and the CoE sought to mend fences by agreeing common purposes and principles of cooperation, shared priorities, focal areas and arrangements for cooperation, better communication with the public and an evaluation of the implementation of the MoU.

The Labour Government had some doubts about accession, noting in the July 2007 White Paper on the Reform Treaty that "There are complex legal issues involved in EU accession to the ECHR. These problems would have to be resolved before the Government could support it".[19]

## 3 The *Trade Union Rights and Freedoms Bill 2006-07*

The ballot for Private Members' Bills for the session of Parliament 2006-07 took place on Thursday 23 November 2006. John McDonnell MP came 16 out of the 20 members successful in the ballot. He sponsored the *Trade Union Rights and Freedoms Bill 2006-07*. The Bill was introduced on 13 December 2006 and then tabled for debate on 2 March 2007 but failed to get sufficient parliamentary time for second reading and so fell.

The *Trade Union Rights and Freedoms Bill* was accompanied by an EDM on 18 December 2006:

> EDM 532 TRADE UNION FREEDOM BILL CAMPAIGN
>
> McDonnell, John
>
> That this House recognises that free and independent trade unions are a force for good in UK society around the world and are vital to democracy; welcomes the positive role modern unions play in providing protection for working people and winning fairness at work; notes the 1906 Trades Disputes Act granted unions the legal freedom to take industrial action; regrets that successive anti-union legislation has meant that trade union rights are now weaker than those introduced by the 1906 Trades Disputes Act; therefore welcomes and supports the TUC campaign for a Trade Union Freedom Bill whose principles include better protection for workers, such as those sacked by Gate Gourmet in 2005, the simplification of ballot procedures and to allow limited

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18 There have been conflicts of jurisdiction. In the case of *Matthews v UK*, in which the European Court of Human Rights found the UK in breach of the ECHR, but in remedying this situation the UK found itself in breach of an EC obligation, which it then had to rectify.

19 White Paper on the Reform Treaty, July 2007

> supportive action, following a ballot, in specific circumstances; and therefore urges the Government to bring forward legislation to address these proposals.[20]

The *Trade Union Rights and Freedoms Bill 2006-07* was part of the campaign by unions following the TUC 2005 Congress which passed a motion calling for a "trade union freedom bill", in the wake of the dispute between Gate Gourmet and its catering staff at Heathrow airport.[21] The prohibition on secondary strike action was seen as being particularly unfair in the context of this dispute.[22] The TUC website gave the following summary of its main provisions:

- Improved protection from dismissal and more effective remedies for workers taking part in official industrial action;
- Simplification of the complex regulations on notices and ballots which restrict the ability of unions to organise industrial action where a clear majority of members have voted in support; and
- Modernisation of what constitutes a trade dispute, enabling limited forms of supportive action, thereby ensuring that UK industrial action laws reflect changes in UK labour market, including increased contracting out and enabling unions to respond where employers take steps to outsource work during the course of a dispute with a view to breaking a strike.[23]

The TUC prepared explanatory notes on the draft bill which set out the main aims of the proposals in more detail.[24]

# 4 The Bill

## 4.1 Small accidental failures

### *The Bill*

Clauses 1(2) and 1(4) of the Bill extend the current allowance for small accidental failures by trade unions to cover strike notices as well as ballots.

### *Background*

The relevant provisions on industrial action ballots and notices are contained in the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA) sections 226 to 235. As outlined above, the issue of failures by unions to comply with the notice requirements has arisen in a number of applications by employers for injunctions to prevent strike action.

Currently there are limited provisions on the face of the statute allowing courts to disregard small accidental failures in section 232B:

> **232B Small accidental failures to be disregarded**
>
> (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

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20 EDM 532 of 2006-07 signed by 133 Members
21 Full text of the TUC draft Bill: http://www.tuc.org.uk/extras/TUFB.pdf
22 TUC 2005 Congress: Organising and rights at work [on 14 July 2008]
23 TUC, Trade Union Freedom Bill, March 2006 [on 14 July 2008]
24 TUC, *Notes on draft Trade Union Freedom Bill*, January 2007

> (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).

The relevant requirements where this disregard applies all concern ballots:

> **227 Entitlement to vote in ballot**
>
> (1) 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 or, as the case may be, to continue to take part in the industrial action in question, and to no others.

[...]

> **230 Conduct of ballot**
>
> [...]
>
> (2) Except as regards persons falling within subsection (2A), so far as is reasonably practicable, every person who is entitled to vote in the ballot must—
>
> (a) have a voting paper sent to him by post at his home address or any other address which he has requested the trade union in writing to treat as his postal address; and
>
> (b) be given a convenient opportunity to vote by post.
>
> [...]
>
> (2B) Where this subsection applies to a merchant seaman he shall, if it is reasonably practicable—
>
> (a) have a voting paper made available to him while on the ship or while at a place where the ship is, and
>
> (b) be given an opportunity to vote while on the ship or while at a place where the ship is.

Minor changes were made in the *Employment Relations Act 2004* intended to simplify the law on industrial action ballots. In consultation it was proposed to extend the ability of Courts to disregard small accidental failures to follow the rules in the notice requirements, but these proposals did not find their way into the final legislation.[25] The notice requirements are contained in TULRCA sections 226A, 231, 231A and 234A. These proposals first appeared in the Department of Trade and Industry, *Review of the Employment Relations Act 1999*,

[25] The issue of small accidental failures and the changes that were made by the *Employment Relations Act 2004* was mentioned *obiter* by Lord Justice Lloyd in an important recent case on this subject, *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, (31 July 2009) paragraphs 53-54

February 2003. The reasons why the proposals were not taken forward into the Bill were set out in the government response published on 3 December 2003, at pages 46-7:[26]

> **Disregarding Small Accidental Failures**
>
> 3.28 The Government sought comments on a proposal to extend the ability of the courts to disregard small accidental failures to comply with all the technical requirements of the law. In the light of the courts' consideration of the P v NASUWT[27] judgment, the consultation document suggested that a new disregard should be applied to provisions relating to the union's inducement of its members to take industrial action. It also suggested applying a new disregard to the provisions on notices.
>
> 3.29 Union respondents welcomed the proposals. The T&G stated that wrangles over details during a dispute were damaging and distracting. Prospect expressed uncertainty as to what it would mean in practice. GMB supported the proposed disregards, claiming that some employers deliberately harass unions on these issues.
>
> 3.30 Generally, employer groups were cautious about creating new disregards. For example, the IoD stated that employers should have the right to prevent unions from inducing those members who were not balloted, even if this is down to a mistake. The EEF [manufacturers' organisation] stated it had particular problems accepting the proposal. However, London Borough of Camden Personnel Services suggested it was not too concerned with small accidental failures, as during a strike it was more interested in big issues.
>
> 3.31 The Law Society and Thompsons supported these ideas, a view that was provisionally shared by Eversheds. The ELA [Employment Lawyers Association] asked whether reform was needed given that the P v NASUWT case seemed to have provided a precedent.
>
> **3.32 Since the consultation document was published the House of Lords has given its judgment on the P v NASUWT appeal. The Government has studied the views expressed by the House of Lords and the other courts in this important case. It considers that it would be useful to embed these judgments in law by making it clear that unions can induce members to take action to whom it failed to accord an entitlement to vote, as long as that failure was small and accidental. The Government believes that, with this change, the law on inducement should be sufficiently flexible to deal with minor failures by unions. In view of the proposed changes to the law on notices described above, unions should find it easier to meet the requirements of that law. The Government does not therefore propose introducing a disregard covering the notice provisions.**

## 4.2 Substantial compliance

Clause 1(3) of the Bill introduces the concept of 'substantial compliance' against which failures to comply with ballot and notice requirements are to be assessed. This replaces the current threshold which disregards the failure if it 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'.

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[26] Department of Trade and Industry, *Review of the Employment Relations Act 1999: Government response to the public consultation*, 3 December 2003

[27] *P v NASUWT* [2003] UKHL 8

### 4.3 Burden of proof

Clause 1(5) clarifies that the burden of proof will be on the employer to show that there has not been substantial compliance with the ballot and notice requirements. This burden of proof will operate in applications for an injunction to restrain strike action, or any other proceedings where the union places reliance on the disregard for small accidental failures.

## Appendix 1: Trade union membership in the UK

Trade union membership, particularly in the private sector, has experienced a decline over past decades.[28] Trade union membership in the private sector is currently 15.1% as compared with 56.6% in the public sector. The most recent survey of trade union density summarised the position and trends in membership:

> **1. Trade union membership: National trends**
>
> • The rate of union membership (union density) in the UK was unchanged at 27.4 per cent in 2009 compared with 2008. This is largely due to trade union membership falling at broadly the same rate as total employment over the last year. Amongst all those in employment, including self-employed, in the UK, union density fell from 24.9 per cent in 2008 to 24.7 per cent in 2009.
>
> • Trade union membership levels for UK employees fell by 2.4 per cent (163 thousand) to 6.7 million compared with 2008. Membership for those in employment fell by 2.3 per cent (165 thousand) to 7.1 million, in the same period.
>
> • Union density among female employees in the UK rose by 0.2 percentage points to 29.5 per cent in 2009 but amongst male employees it fell by 0.4 percentage points to 25.2 per cent. This was the eighth consecutive year where female union density was higher than males and the gap widened by a further 0.6 percentage points compared with 2008.
>
> • Private and public sector union densities fell by around half a percentage point each to 15.1 and 56.6 per cent respectively in 2009.[29]

[28] BIS, Trade Union Membership Statistics
[29] BIS, *Trade Union Membership 2009, URN 10/P77*, April 2010

## Appendix 2: Proposals to tighten industrial action law

There have been a number of calls for more restrictive regulation of industrial action in light of fears about union response to public spending reductions, as well as in response to specific strike action. For example, Boris Johnson recently criticised the strike on the London Underground called by the RMT and called for "a law insisting on a minimum 50 per cent participation in a strike ballot".[30]

### *Chartered Institute of Personnel and Development (CIPD)*

The CIPD has produced a policy document outlining possible measures to restrict industrial action in public services, in particular strike bans in essential services.[31] The content of the report is summarised as follows:

> As spending cuts bite, government will be keen to avoid strike action among workers in the public sector. Ultimately, however, a lasting difference can only be achieved by a focus on developing strong management and leadership skills.
>
> Developing positive employee relations, Part 3 of the CIPD's 'Building productive sector workplaces' series, also highlights the higher stakes policy options the government should be considering to protect public services if there is an upsurge in industrial unrest.[32]

The report sets out a range of options for such restrictions:

> Nevertheless, if the Government is to be able to implement a strategy for cutting public spending, some form of targeted action may need to be considered at some stage. A number of alternative responses are possible:
>
> • legislate to outlaw strikes in essential services
>
> • legislate to require the parties in public service disputes to accept arbitration
>
> • change the balloting requirements for industrial action so as to require votes to be counted separately for each employer
>
> • replace national machinery with local pay determination.
>
> Outlaw strikes in essential services?
>
> It would not make sense to focus legislation limiting the right to strike only on the public sector. Industries such as the supply of electricity, gas and water would clearly qualify as 'essential services' but are no longer in the public sector. Moreover, it is not at all clear where the public sector begins and ends, bearing in mind for example the increased reliance on private sector contractors to deliver public services and the injection of public funds into a number of major banks. Industrial action in the public sector could infect the private sector too, as the same unions may have members doing similar jobs in both sectors.

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30 Boris Johnson, "There should be a law against these Tube strike militants wrecking your lives", *Telegraph*, 5 October 2010

31 CIPD, *CIPD urges government to bolster employee engagement in order to avoid mass strike action, despite swingeing cuts to public services*, 5 August 2010

32 CIPD, *Building productive public sector workplaces Part 3: Developing positive employee relations*, August 2010

Although the private sector is much less affected by industrial action, transport and utilities such as gas, electricity and water are particularly vulnerable to disruption because:

• competitive pressures in these sectors are weak

• threatened by industrial action, the public may look to the Government for help

• there is a history of public ownership, and the Government may be seen as 'banker'.

Together with many parts of the public sector, these public services are often classified as 'essential services' – a concept which, although lacking in clear definition, is significantly wider than the police, fire and ambulance 'emergency services'. Existing restrictions on the right to strike are strictly limited: for example, police officers are forbidden from striking by the Police Act 1964, though this has been challenged in recent years by the Police Federation.

In 1996, the then Conservative Government issued a green paper proposing to make unlawful industrial action that had 'excessive or disproportionate effects'. This wording was chosen partly because of the difficulty in defining 'essential services', but was itself criticised as unworkable. In any case the scope of any such legislation would potentially be very wide. In recent years, trains, London Underground and air transport have all been significantly affected by industrial action.[33]

### *Policy Exchange*

A Policy Exchange document called for the following restrictions on strike action:

**Proposals and reforms within the current framework**

1) The ballot paper should contain more information concerning the nature, frequency and length of industrial action to be authorised, including identifying a specific grievance. At present it need not do so, and material is often circulated alongside the ballot which refers to a whole range of grievances and authorizes a range of unexpected industrial action options. In some recent actions union members have been shocked to discover, after the ballot, that strike action has been scheduled at unexpected times.

2) Require that a majority of employees in the balloted workplace vote. This is already the case in Slovakia and Poland. This would avoid strikes being triggered where only very small numbers of workers are members of a union. A variant of this option, which might either replace or supplement it, would be to require that a minimum of 40% of the trade unionised workforce vote in favour of strike action, in addition to a majority of the votes cast. This would avoid strikes based on very low percentage turnouts.

3) Employers should be permitted to use agency staff to carry out the duties which striking employees would otherwise have performed. This would undo restrictions introduced in 2004. There are considerable uncertainties in the law as it stands at present. Some have argued that this reform shifted the law from protecting individuals' right to withdraw their labour to creating ownership of jobs and a right to damage a business.

4) Reduce the period of protection from unfair dismissal during a strike, for example from twelve back to eight weeks, as per the Employment Relations Act 1999. This

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[33] CIPD, *Building productive public sector workplaces Part 3: Developing positive employee relations*, August 2010, page 7

would undo changes made by the Employment Relations Act 2004. This protection should be limited to selective dismissal, as before 1999.

5) The standard period of notice needed for strike action should be lengthened to 14 days. This might provide a sufficient last chance for a negotiated settlement, allow additional time for information to be given to employees on what they will be striking about and give the employer sufficient notice to help plan for the impact of a strike. (The "Overriding Principles" of the Rules of the Court on litigation require the avoiding of unnecessary disputes, saving costs and having no surprises). Alternatively, or perhaps in addition, we could vary the period of notice needed for strike action depending on the form of the dispute — perhaps lengthening it for collective bargaining disputes, and shortening it for other forms of action.

6) Create different rules for "essential" goods and services where there is a lack of alternatives available. Organisations could apply for judicial review to revoke statutory immunities for strike action if a reasonable person would assume it would cause significant economic damage or imperil the safety of the general public. The courts could grant this "essential" status, based on a set of criteria (e.g. a limited choice of alternatives or evidence of significant market power by a regulatory or competition authority). Similar criteria already exist in Poland, Slovakia, Slovenia and Hungary, where strike action is banned where it would be detrimental to life and health or threaten state security.

7) We should require that trade union recognition must always be determined by secret ballot of the workforce, regardless of the evidence of union membership. This would involve removing the automatic recognition that currently flows if it can be established that more than 50% of the workforce are union members, and ensure that recognition was always the free and fair choice of the workers concerned.

8) Require that a trade union has a minimum percentage of membership in the relevant workforce, before a ballot can be called. If that were put at 10%, this, combined with the second proposal in (2), above, would reflect and be consistent with the initial balloting requirements for an application to the CAC for trade union recognition, in Schedule 1 of TULR(C)A.

9) Amend TULR(C)A section 145B to permit some limited communication between employers and employees under particular designated circumstances.

10) An annual audit of union membership could be conducted jointly by the employer and the union providing relevant information to an authorised third party under cover of confidentiality. This would help unions to ensure that only eligible workers are balloted on action – and prevent the frustrating situation where strikes are struck down as the result of unions balloting "ghost" members. This would avoid unnecessary litigation along with complaints of "anti-union" legislation when the problem is not the legislation but simply one of poor "housekeeping" by unions.

11) Accept no universal right to strike, instead limiting the "permission to strike" (i.e. statutory immunities etc.) to cases where there are high transactions costs in individual bargaining or advantages to offsetting monopsony power and such advantages of permitting strikes are not more than- offset by disadvantages such as the goods and services provided by the firm being essential and without alternatives.

12) Use competition law and competition policy to identify cases of monopsony power in respect of labour purchasing. Act specifically against monopsony power in some cases (this should in general be assumed to be a superior path to the use of union power); in others where monopsony power is designated, an alternative consequence

might be that the monopsonist concerned would be compelled to allow collective bargaining potentially backed by strike action.

13) Individual strike ballots should be held for each legal public sector employer. In the private sector people generally only strike against their own employer – they cannot take "secondary action" to support strikes against other employers. In the public sector quasi-secondary action through national strike balloting is still commonplace, but the rules could be made equivalent.

14) Investigate whether there is sufficient competition in the supply of union services. Where unions are in a monopoly position versus workers, action could be taken through competition law and/or competition policy.[34]

### *Aggregate balloting*

On the question of strikes in the public sector and the way that balloting requirements operate in that context, an article in October 2009 by Tim Leunig writing in the *Financial Times* made the following proposals:

> The Conservative party has announced a pay freeze for all public sector workers earning more than £18,000, apart from armed forces personnel on active service. This would begin immediately where pay deals are not already in place; and at the conclusion of multi-year pay deals where those are under way.
>
> Philip Hammond, shadow chief secretary to the Treasury, told the Financial Times he would be "very surprised" if this led to industrial action.
>
> But the unions say otherwise. Mark Serotka, leader of the Public and Commercial Services Union, Britain's fifth largest union, described Conservative plans as "outrageous" and said that there was a "very strong likelihood of industrial action" if the Tories carried out their plans.
>
> Mr Hammond dismisses this as "sabre-rattling" and insists his party's relations with trade unions are "cordial". Yet in a month in which Chris Keates, head of the largest teachers' union, claimed that shadow schools secretary Michael Gove's party conference speech "completes the Conservative party's blueprint for dismantling state education", and Dave Prentis, head of the Unison public sector union, declared that "the Tories want to use the economic recession as a stick to beat ordinary hard-working people" this is simply naive.
>
> Public sector workers strike far more often than those in the private sector. Since 2000, the number of days lost to strikes, per worker, has been 30 times higher in the public than in the private sector, even though public sector earnings have risen faster. Given public sector workers' propensity to strike, a pay freeze will lead to industrial action unless something is done. The Tories need a plan.
>
> The Employment Act 1982 states that strikes must be about a dispute between "workers and their employer". Since British Rail was broken up, a dispute between workers and their employer can only lead to a strike of those who work for a particular train operating company. One side effect of rail privatisation is that it is now much harder to call a national strike. In contrast, strike ballots for public sector workers are usually national, even though very few staff are employed by national organisations. The legal employer of most hospital doctors and nurses is the hospital itself, while GPs are employed by the local primary care trust. Teachers are employed by the local

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[34] Policy Exchange, *Modernising Industrial Relations*, September 2010

> authority, and academy staff by the school itself. University faculty are employed by their university, civil servants by their department, and so on.
>
> In effect, we still have sector-wide strike ballots in the public sector, not employer-wide strike ballots as in the private sector, and as the law clearly intends. If the Conservative party is serious about providing Britain with public services in which public sector unions do not have the right to hold the British taxpayer to ransom, then it needs to make sure that the ability to strike - which is an important right - is equal in both public and private sectors.
>
> It needs to ensure that when a union ballots all its members simultaneously about a strike, ballots are counted separately - for each employer. This would have quite radical effects. Even if a majority of workers across Britain voted Yes, it is very unlikely that a majority of workers of each employer would vote Yes. So what would have been a national strike would instead be only a partial strike, with fewer days lost.
>
> In addition, a partial strike would be likely to draw less public support. It is hard to see parents supporting striking teachers if those teachers cannot even persuade other teachers of the case for strike action. This, in turn, would make union members less likely to vote for a strike.
>
> Finally, and most importantly, unions would be less likely to ballot their members on strike action in the first place. At the moment they can call a national strike if they get a simple majority. But to get a majority among the staff of each employer would be much harder, and calling a national ballot that resulted in only a partial strike would make a union look weak and demonstrate the limits to its support. That is something many unions would want to avoid, dramatically cutting the number of strike ballots.
>
> The right to strike is an important one, but it is not one that should be unfettered. The public and private sectors should be treated equally.[35]

These suggestions were criticised in an article on the political blog *Left Foot Forward* by Richard Arthur of Thompsons Solicitors:

> Tim Leunig's strategy for how the Tories can curb public sector strikes is simply wrong as a matter of law. The right to strike is almost universally recognised, in numerous international treaties and instruments, as a fundamental human right.
>
> Most recently, it has been recognised by the European Court of Human Rights as a component of the freedom of association protected by Article 11 of the European Convention on Human Rights and Fundamental Freedoms.
>
> The law on industrial action in the United Kingdom is set out in the Trade Union and Labour Relations (Consolidation) Act 1992, not the Employment Act 1982.
>
> The restrictions on a union's ability to organise industrial action in the United Kingdom are amongst the most onerous in Europe. They have consistently been found to be too restrictive by the Committee of Experts of the Council of Europe and the supervisory bodies of the International Labour Organisation.
>
> It is simply wrong to say that there is a different right to strike in the public and private sectors. The law on strikes makes no distinction.
>
> Industrial action has to be "in contemplation or furtherance of a trade dispute". A trade dispute has to be between workers and their employer (except, sometimes, where the

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35 "How the Tories can curb public sector strikes", *Financial Times*, 28 October 2009

> dispute involves the decision-making of a Minister). Separate notices of ballot and notices of industrial action must be given to separate employers.
>
> The starting point is that ballots have to be conducted workplace by workplace. But a union is permitted to aggregate a ballot across a number of workplaces, and a number of different employers, in closely defined circumstances. These requirements are identical in the public and private sectors.
>
> Suggesting that there should be a Tory "plan" to re-write the law on industrial action to impose more restrictions on trade unions fails to recognise that the restrictions as they stand have been condemned as too onerous on numerous occasions by international supervisory bodies, including the International Labour Organisation.
>
> If the Tories are to have a strategy for curbing strikes, it would be more productive to engage with the reasons for worker dissatisfaction which lead them to contemplate strike action in the first place, rather than the means by which that dissatisfaction is expressed.[36]

The general principle set out in section 228 TULRCA is that there should be separate ballots for each workplace. This position is qualified by section 228A which allows a trade union to hold a single ballot for two or more workplaces in specified circumstances. Where there are separate ballots for each workplace then lawful industrial action will depend on a majority in each of those workplaces and strike action will only be lawful in those workplaces where a majority is achieved. Where an aggregate ballot is held an overall majority permits lawful strike action in all of the aggregated workplaces.

In summary, aggregate ballots are allowed in the following circumstances:

- If the union reasonably believes that the voters have the same workplace
- If different workplaces are affected by a common dispute
- If all its members belong to a common occupational category
- If all its members share a common employer

The relevant provisions read as follows:

> **228 Separate workplace ballots**
>
> (1) Subject to subsection (2), this section applies if the members entitled to vote in a ballot by virtue of section 227 do not all have the same workplace.
>
> (2) This section does not apply if the union reasonably believes that all those members have the same workplace.
>
> (3) Subject to section 228A, a separate ballot shall be held for each workplace; and entitlement to vote in each ballot shall be accorded equally to, and restricted to, members of the union who—
>
> (a) are entitled to vote by virtue of section 227, and
>
> (b) have that workplace.

---

[36] Left Foot Forward, *Tories cannot curb public sector strikes. Fact*, 16 November 2009

(4) In this section and section 228A "workplace" in relation to a person who is employed means—

(a) if the person works at or from a single set of premises, those premises, and

(b) in any other case, the premises with which the person's employment has the closest connection.

**228A Separate workplaces: single and aggregate ballots**

(1) Where section 228(3) would require separate ballots to be held for each workplace, a ballot may be held in place of some or all of the separate ballots if one of subsections (2) to (4) is satisfied in relation to it.

(2) This subsection is satisfied in relation to a ballot if the workplace of each member entitled to vote in the ballot is the workplace of at least one member of the union who is affected by the dispute.

(3) This subsection is satisfied in relation to a ballot if entitlement to vote is accorded to, and limited to, all the members of the union who—

(a) according to the union's reasonable belief have an occupation of a particular kind or have any of a number of particular kinds of occupation, and

(b) are employed by a particular employer, or by any of a number of particular employers, with whom the union is in dispute.

(4) This subsection is satisfied in relation to a ballot if entitlement to vote is accorded to, and limited to, all the members of the union who are employed by a particular employer, or by any of a number of particular employers, with whom the union is in dispute.

(5) For the purposes of subsection (2) the following are members of the union affected by a dispute—

(a) if the dispute relates (wholly or partly) to a decision which the union reasonably believes the employer has made or will make concerning a matter specified in subsection (1)(a), (b) or (c) of section 244 (meaning of "trade dispute"), members whom the decision directly affects,

(b) if the dispute relates (wholly or partly) to a matter specified in subsection (1)(d) of that section, members whom the matter directly affects,

(c) if the dispute relates (wholly or partly) to a matter specified in subsection (1)(e) of that section, persons whose membership or non-membership is in dispute,

(d) if the dispute relates (wholly or partly) to a matter specified in subsection (1)(f) of that section, officials of the union who have used or would use the facilities concerned in the dispute.

Aggregate ballots are an option open to unions which may meet the conditions for them but nevertheless still opt for ballots in each separate workplace or combinations where some workplaces are aggregated and others separate for balloting.

### *CBI proposals*

The CBI has published a policy document that calls for greater restrictions on industrial action. This contains the following proposals:

> Employers to be able to use agency temps to cover for striking workers.
>
> The notice period for industrial action to increase from seven to 14 days after the ballot takes place to give the public and businesses more time to prepare for strikes.
>
> Ballot mandates to be limited to the original dispute, not extended to other matters. The law should state that strikes can only go ahead based on the ballot relating to the original dispute and consequential matters should be subject to a fresh ballot.
>
> People to have the right to decide whether they want to be represented by a union. Ballots should always be held on union recognition – it should never be automatic.
>
> Strikes to be the result of a clear, positive decision by the workforce concerned. The test for a legitimate strike should be that 40% of balloted members support it as well as a simple majority of those voting.
>
> Only paid-up union members should be able to vote – there should be a single legal definition of a union member.
>
> Unions to keep records up to date. They should conduct an annual audit of their membership and make all reasonable endeavours to keep records accurate throughout the year.
>
> Union members to hear both sides of the argument before voting in a strike ballot. Employers and unions should each be allowed to send concise statements with the ballot papers, setting out the scope, nature and reason for the dispute.
>
> Union members need to understand the implications of striking for them personally. Ballot papers should include a notice warning that pay and non-contractual benefits can be withdrawn if an employee goes on strike.
>
> Steps to curb wildcat strikes to be strengthened. The Certification Officer – the unions' regulator – should be empowered to enforce the law more effectively.
>
> Unions should face realistic sanctions for failing to observe the law. The cap on compensation should be increased for the first time since 1982 and damages should be awarded per day of strike action.[37]

The TUC response was as follows:

> Commenting on CBI calls today (Monday) for changes in UK industrial relations law, TUC General Secretary Brendan Barber said:
>
> 'The UK has some of the toughest legal restrictions on the right to strike in the advanced world. Already the courts regularly strike down democratic ballots that clearly show majority support for action. The CBI proposals are a fundamental attack on basic rights at work that are recognised in every human rights charter, and will be dismissed by any government with a commitment to civil liberties.

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[37] CBI News release, *CBI unveils package of measures to avoid strikes*, 4 October 2010

> 'It is particularly disappointing for the CBI to take such a one-dimensional view of industrial relations in which strikes are always the fault of unions, and never that of management. Strikes are always a last resort as union members lose their pay.
>
> 'While strikes can inconvenience the public, fundamentally shifting the balance of power at work even further towards managers would be worse as it would encourage bad bosses and end up reducing standards across UK workplaces.
>
> 'No one welcomes the odd day's disruption, but it is a price worth paying for a fundamental right that helps deliver decent standards at work for millions each and every day.'[38]

### *Government position*

The Government has indicated that there are no current plans to alter existing law on industrial action.[39]

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[38] TUC press release, *TUC dismisses CBI calls for changes in strike laws*, 4 October 2010
[39] BBC, *Government shuns call to change strike laws*, 21 June 2010

## Appendix 3: Unfair dismissal protection of striking workers

As regards the position of individual employees who go on strike, statute law first entered the equation in 1971 when the *Industrial Relations Act 1971* introduced a right to take a claim for unfair dismissal to an industrial tribunal. Section 26 of that Act excluded strikers from the right to claim unfair dismissal unless they could show that their employer had been selective in his dismissal or re-engagement of those on strike, and that those dismissed or not re-engaged had been selected because of their union membership or activities. Some modifications were made by the *Employment Protection Act 1975*, but the general principle that dismissal of strikers was only unfair if it was selective was retained. The *Employment Act 1990* made it possible for employers to dismiss unofficial strikers selectively without giving them a right to claim unfair dismissal.

Section 16 and Schedule 5, paragraphs 1 and 3 of the *Employment Relations Act 1999* inserted a new section 238A into the *Trade Union and Labour Relations (Consolidation) Act 1992.* It came into force on 24 April 2000 and provided a regime of protection from unfair dismissal for workers taking part in official industrial action. The section extends the underlying law on unfair dismissal contained in the *Employment Rights Act 1996*. It outlines a set of circumstances which, if proven, categorically render a dismissal unfair.

The first requirement (s*ubsection(2)(a)*) is that the reason for dismissal must be that the employee took industrial action which is protected by the section. This must be coupled with one of the following circumstances; either:

- The dismissal takes place within a set period beginning with the first day industrial action begins (s*ubsection (3)*). Initially this was set 8 weeks, but later became 12 weeks under the *Employment Relations Act 2004*.

- The dismissal takes place after the end of the [12 week] period and the employee had stopped taking action before the period was over (s*ubsection (4)*).

- The dismissal takes place after the end of the set period; and the industrial action continued past then; and the employer did not take reasonable procedural steps to resolve the dispute (s*ubsection (5)*). Examples are given in *subsection 6(a) to (d).*

The easiest to prove of the above three circumstances is where an employee is protected under subsection 3. Nevertheless, subsection 4 grants indefinite protection if the industrial action ends within the 12 weeks. If the industrial action continues past 12 weeks the protection falls subject to a condition that the employer failed to take necessary procedural steps to resolve the dispute.

Prior to the extension to 12 weeks this protection was initially known as the “eight week rule”. The case which brought the eight week rule into the foreground of political attention was the Friction Dynamics dispute. It was argued that this was a case where the provisions allowed an employer to simply wait eight weeks and then dismiss employees by locking them out because they were taking industrial action.

The *Employment Relations Act 2004* extended the 8 weeks to 12 and made changes to the scope of the rule so that any period of time when workers are locked out will be disregarded in determining the length of the period. This is formulated in terms of a “basic period” of eight weeks to which is added an “extension period” amounting to one day for every day the worker was locked out (during either the basic period or any extension period). This means that the period of protection could be extended indefinitely if the workers remain locked out.