

Pre-Strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?

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Abstract

Our aim in this article is to analyse the provisions of the Trade Union Act 2016 that deal with pre-strike ballots and picketing. We also consider Government proposals to legislate in respect of protests associated with industrial action ('leverage action'), which were abandoned in favour of plans to amend the Code of Practice on Picketing. We note the suggestion made by several commentators and Opposition politicians that the Government might have intended with these changes to make it significantly more difficult for trade unions and workers to exercise their right to take industrial action and to engage in forms of protest associated with industrial action. Examining the stated policy aims of Government, and available evidence which speaks to those policy aims and to the likely impact of the new rules, we argue that the freedom of workers and trade unions to participate in and organise industrial action has indeed been narrowed very considerably by this Act; further, that the case for amending the existing legal framework was not at all well made.

1. Introduction

The focus of this article lies with the provisions of the Trade Union Act 2016 that deal with pre-strike ballots and picketing. In consulting upon these provisions, and as the Bill made its way through Parliament, the Government explained its policy objectives with reference to its concern about a lack of 'fairness' and 'democracy', and about the intimidation of non-striking workers.¹ It was 'undemocratic', the Government suggested, that under the current legislation, industrial action could take place on the basis of 'low ballot turnouts', with the support of only 'a small proportion of union members'.² It was 'unfair' that members of the public should be inconvenienced by a disruption of public services caused by industrial

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¹ See eg Department for Business, Innovation and Skills, *Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services* (July 2015) [BIS/15/418]

² BIS/15/418, 3-4

action. Though an existing Code of Practice sought to ensure that picketing was lawful and peaceful, there had been a number of high-profile allegations, in recent years, of the rules being flouted, or proving difficult to enforce.³ Under the terms of the new Act, changes to the law were made accordingly: raising the turnout and voting thresholds that trade unions must meet when balloting members, increasing information burdens, extending notice periods, and placing a number of significant restrictions on the right to picket. Estimating the likely effect of these amendments on the freedom of action of trade unions to be severe, some commentators raised the question whether the Government might have intended therewith to ‘ban strikes by the back door’.⁴

Our aim in what follows is to analyse the relevant provisions and their underlying policy objectives, stated or unstated. In doing so, we take it as given that the rights to strike and to picket are human rights, guaranteed *inter alia* under Article 6 of the European Social Charter, Articles 10 and 11 of the European Convention of Human Rights, and ILO Convention 87.⁵ Recognition of this informs our critique of the 2016 Act, providing a normative dimension to the analysis. Our concern is not, however, to give detailed consideration of the ways in which the terms of the Act may breach human rights and international law.⁶ Instead, we wish, first, to understand the new rules with reference to earlier instantiations of the relevant legal framework, and to current policy debates, and, second, to assess the likely impact of the new rules on workers’ freedom to participate in industrial action. To what extent, and in which circumstances, are the rules likely to prevent trade unions from winning the necessary support of the membership in pre-strike ballots? To what extent will they hinder trade unions in the organisation of pickets and other forms of protest? Do they appear to create new opportunities for employers to seek injunctions, prohibiting industrial action even in cases where a union has won, or was set to win, the support of the necessary majority of members?

We begin the article by outlining the legal framework that regulates the right to strike and to picket in the UK, paying particular attention to the ability of employers to halt industrial

³ Department for Business, Innovation and Skills, *Trade Union Bill: Consultation on Tackling Intimidation of Non-Striking Workers* (July 2015) [BIS/15/415]

⁴ Frances O’Grady: BBC News, 7 Sept 2014 cited R Darlington and J Dobson, *The Conservative Government’s Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (IER 2015), 2. Stephen Doughty in House of Commons Committee, 20.10.2015, column 180-181. KD Ewing and J Hendy, *Protect the Right to Strike: Kill the Bill* (IER 2015), 2

⁵ House of Lords House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: Trade Union Bill* (First Report Session 2015-16)

⁶ See Ewing and Hendy, this issue.

action by means of interim injunctions.⁷ In parts 3 and 4, we focus on the balloting and notice, and the picketing and protest provisions respectively. Part 5 concludes by addressing the question, whether the Act can rightfully be regarded as banning industrial action by the back door. We argue here that one, at least, of the Government's main aims in introducing this legislation appears to have been to make it harder for trade unions to organise industrial action, and thereby to weaken their ability to protest or resist measures taken by employers, especially in the public sector. Available evidence suggests that the Act will have precisely that effect; moreover, alternative justifications of the new rules offered by Government fail to convince.

2. Immunities and Injunctions

Under UK law, the statutory provisions which permit the organisation of industrial action are framed in terms of immunities from liability in tort for any losses caused by reason of the action to the employer or third parties.⁸ Where the so-called 'statutory immunities' apply, individual workers participating in the industrial action are also protected to a limited extent against dismissal.⁹ In order to benefit from the immunities, a trade union must comply with two sets of requirements, substantive and procedural. Stated very broadly, the general rule is that a trade union will not be liable in tort for industrial action taken in contemplation or furtherance of a trade dispute, provided that certain procedural steps have been taken. The procedural requirements involve two sets of obligations. First, a trade union which is planning industrial action must hold a ballot of the relevant workers, and the planned action must be supported by a stipulated proportion of those workers. Second, the union must provide the employer(s) of the relevant workers, and the workers themselves, with specified information and notice relating to the ballot and to the pursuant industrial action.

The provisions regulating the trade unions' obligation to ballot the membership and to provide notice and information are contained in Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 [hereinafter 'TULRCA']. A Code of Practice on

⁷ We refer throughout to 'injunctions'. The equivalent remedy in Scotland is the (interim) interdict.

⁸ We refer throughout to 'UK law' for ease of expression. The relevant provisions of the TULRCA 1992 and Trade Union Act 2016 apply across England, Wales and Scotland. In Northern Ireland, industrial action is regulated in the Trade Union and Labour Relations (Northern Ireland) Order 1995 (NI 12), accompanied by a separate Code of Practice.

⁹ TULRCA, s. 238A

Industrial Action Ballots and Notice to Employers accompanies the legislation.¹⁰ In 1999 and 2004, efforts were made to simplify and clarify particular aspects of the law.¹¹

Notwithstanding these efforts, the balloting and notice provisions remain remarkably complicated, so that the exact nature of the steps which trade unions must take is not always clear.¹² Members of the judiciary routinely disagree as to extent of the unions' obligations, even in the upper courts.¹³

Picketing is addressed directly in the TULRCA by a provision which renders it 'lawful' for a person (i) in contemplation or furtherance of a trade dispute (ii) to attend at or near his own place of work for the purpose of 'peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working'.¹⁴ A Code of Practice on Picketing limits the number of pickets who may attend at any single entrance to 6 – in the eyes of the Courts, a larger number may constitute evidence that the workers had a purpose other than peaceful communication or persuasion, bringing their actions outside of the definition of such picketing as is deemed 'lawful'.¹⁵ Only picketing which falls within the terms of that same definition may benefit from the statutory immunities from liability in tort referred to above.¹⁶

Where workers engage in forms of protest in connection with an industrial dispute, which do not fall within the statutory definition of lawful picketing (for example because they are not at or near their own place of work), their actions may be found to constitute a wide variety of civil and criminal wrongs.¹⁷ If they breach their contracts of employment, the tort of inducing breach of contract may apply to those who have organised the action. Private nuisance will apply where there is undue interference with a person's enjoyment of his or her property, and

¹⁰ Codes of Practice are not legally binding: TULRCA s. 207

¹¹ The relevant amendments were: Employment Relations Act 1999, s 4, Schedule 3; Employment Relations Act 2004, ss. 22, 25; for discussion see B. Simpson, 'Strike Ballots and the Law: Round Six' (2005) 34 ILJ 331

¹² The provisions are described as 'extremely detailed' by Elias LJ in *RMT v Serco* [2011] EWCA Civ 226 and as 'labyrinthine' by Singh J in *ISS Mediclean Ltd v GMB* [2015] IRLR 96.

¹³ See eg the Court of Appeal decision in *Metrobus Ltd v. Unite the Union* [2009] EWCA Civ 829, in which there was disagreement among the three Lord Justices regarding the correct interpretation of section 226A(2)(c) TULRCA

¹⁴ TULRCA s. 220

¹⁵ Code of Practice on Picketing. *Thomas v. NUM (South Wales Area)* [1985] ICR 887. See, however, the more recent decisions of *Gate Gourmet v TGWU* [2005] IRLR 881, *Kuznetsov v Russia* [2008] ECHR 1170, which cast doubt on the continued authoritativeness of *Thomas*.

¹⁶ TULRCA s. 219(3)

¹⁷ BIS/15/415, para 7 and Box 1

other torts, such as assault, may apply to serious intimidation.¹⁸ As far as criminal liability is concerned, there is what Ford and Novitz describe as a ‘bewildering array of criminal offences regulating public protest in the UK’, so that a wide range of behaviour is caught, and offences often overlap.¹⁹ In addition, police have powers to give directions to protestors and others, and to arrest those who fail to comply.²⁰

Injunctions

As aptly noted by Ewing, the ‘first aim of the employer in a dispute may be to prevent industrial action from taking place, and for this purpose an injunction may be sought’.²¹ It is well accepted that injunctions ‘in practice, ... tend to be determinative of the dispute’,²² and ‘that the requirements for obtaining an interim injunction are not onerous’.²³ Evidence shows that where interim injunctions are sought, they are granted much more often than not.²⁴ Where an interim injunction has been granted, the trade union will not usually re-ballot.²⁵

The ability of employers to succeed in their intent of stemming industrial action at its outset is typically the function of three distinct, but inevitably interlinked, factors. Firstly, it will depend on the ability of employers, and their counsel, to argue successfully that, should the contemplated industrial action go ahead, they would be the victims of a legal wrong. It is here that the statutory immunities assume practical importance, together with the legislative circumscription of the substantive and procedural requirements with which a union must comply in order to benefit from them. The greater in number and the more stringent these requirements, and the narrower the concept of ‘protected’ action, the higher the likelihood that the employers will be able to argue that one or more breaches will occur, resulting in the

¹⁸ M Ford and T Novitz, ‘An Absence of Fairness... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44(4) *Industrial Law Journal* 522-50, 547, citing *Hunter v Canary Wharf Ltd* [1997] AC 655, *Thomas v NUM* [1985] ICR 886

¹⁹ Ford and Novitz, 546 citing eg the Public Order Act 1986, especially ss 4A and 5; s 137 of the Highways Act; s 68 of the Criminal Justice and Public Order Act 1994; and s 241 of TULRCA

²⁰ Ford and Novitz, 546 citing eg Public Order Act 1986, s 12; the Criminal Justice and Police Act 2001, s 42; and Part 3 of the Anti-Social Behaviour, Crime and Policing Act 2014

²¹ H Collins, KD Ewing, A McColgan, *Labour Law* (Cambridge 2012), 713.

²² ACL Davies, *Employment Law* (Pearson, 2015), 490.

²³ *Ibid.*

²⁴ G Gall, ‘Research Note: Injunctions as a Legal Weapon in Industrial Disputes in Britain 1995-2005’ (2006) 44(2) *British Journal of Industrial Relations* 327-49, 332

²⁵ Gall 2006, 338-9

action not being protected, and thus giving rise to a legal wrong and, possibly, an injunction.²⁶

Secondly, although this point is controversial, it will often depend on the ability of employers to convince the courts that, unless interim relief is granted pending the full trial, the wrong they are deemed to suffer will result in a loss that they would struggle to recover in a satisfactory way at trial. In effect, this ‘involves a consideration of the losses which would be incurred on either side’,²⁷ and a reintroduction of the ‘balance of convenience’ element of the *American Cyanamid* test by means of judicial intervention,²⁸ after Parliament had replaced it with the more attuned test currently contained in TULRCA, s. 221(2).²⁹ On paper, this statutory test exclusively requires that where a union against whom an injunction is sought claims to act in contemplation or furtherance of a trade dispute, ‘the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party’s succeeding at the trial of the action in establishing any matter which would afford a defence to the action under section 219 (protection from certain tort liabilities) or section 220 (peaceful picketing)’, *without* any reference to a consideration of the economic losses the parties may suffer. In this sense, the judicial reintroduction of a ‘balance of convenience’ test is particularly problematic: ‘[o]nce the debate is deflected away from law onto extraneous matters of this kind, the union’s arguments are never likely to prevail’.³⁰ Typically, businesses, especially larger ones, are far more likely to be able to demonstrate substantial losses as a direct consequence of the withdrawal of their workers’ labour. Even ‘where there are strong arguments either way the balance of convenience may still lead to an injunction being granted’.³¹

In recent years, key judgments such as those in *RMT v Serco*³² and *Balfour Beatty*³³ have robustly reasserted that ‘it is unjust to trade unions to determine the question’³⁴ by reference

²⁶ Section 232B TULR(C)A 1992 seeks to protect industrial action from the consequences of ‘small accidental failures’ made at specified stages of the balloting process.

²⁷ *British Telecommunications Plc v Communication Workers Union* [2004] IRLR 58 (QB), 62.

²⁸ For a historical analysis of the emergence and decline of this test in the industrial action context, see Collins, Ewing, McColgan, 713-717. For a critical account of the case-law in the period between 2000 and 2009 see N Countouris and M Freedland, ‘Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK’ (2010) *European Labour Law Journal*, 489.

²⁹ Originally section 17 of the Trade Unions and Labour Relations 1974 Act as amended by the Employment Protection Act 1975.

³⁰ Collins, Ewing, McColgan, 719.

³¹ S. Deakin and G. Morris, *Labour Law* (6th ed, 2012), 1094.

³² [2011] EWCA Civ 226

to *American Cyanamid* and the ‘balance of convenience’ test, which ‘almost always lies in favour of granting the injunction pending trial’.³⁵ A correct application of s. 221 ‘involves considering whether the union would be likely to be able to establish at trial that the immunities are applicable’ or not.³⁶ But in spite of these important clarifications, the ‘balance of convenience’ test has retained an important, and arguably undeserved, presence in at least three important scenarios.³⁷ Under one interpretation of s. 221(2) TULR(C)A 1992, its more lenient provisions only apply when the action falls within the definition of action protected under s. 219 and peaceful picketing under s. 220 TULR(C)A. When this is not the case, for instance ‘because there has been no ballot . . . , nor is the matter in contemplation or furtherance of a trade dispute as referred to in those sections [the courts] have to ask the questions which arise under traditional *American Cyanamid* principles’.³⁸ These principles will also be deployed when the strike is anticipated to fall outside the immunities because some of the stringent procedural requirements have been performed in an imperfect way, and appears to be vitiated by failures.³⁹ Secondly, it is clear that courts will fall back on *American Cyanamid* whenever ‘the applicant suggests heads of liability which are not within the scope of the immunities, such as a breach of statutory duty’.⁴⁰ Finally, it is becoming increasingly clear that courts may adopt an *American Cyanamid* based ‘balance of convenience’ test where they judge that action which may, more likely than not, be designated at trial as protected action taken in relation to a valid trade dispute, would nevertheless cause a severe disruption causing very serious harm to the public interest. The point was expressed very clearly by Lord Diplock in *NWL v Woods*,⁴¹ and more recently by Kerr J in a request by the Secretary of State for Education for an ‘interim declaration’ against strike action called by NUT against Sixth Form Colleges.⁴² Even though this judgment noted that s. 221(2) TULRCA was the appropriate test under which the declaration ought to be considered, and even though the judge was satisfied that ‘the “more likely than not” result at any trial of the

³³ *Balfour Beatty Engineering Services Ltd v Unite the Union* [2012] EWHC 267 (QB)

³⁴ *RMT v Serco* [2011] EWCA Civ 226, para?? 11, per Elias LJ.

³⁵ *Ibid.*

³⁶ *Ibid.* p. 12.

³⁷ Deakin and Morris, 1093-1094.

³⁸ *Govia Thameslink Railway Limited v The Associated Society of Locomotive Engineers and Firemen* [2016] EWHC 985 (QB), paras 5-6, per Langstaff J.

³⁹ Cf. the case law discussed in Countouris and Freedland , 493-498, and the more recent *Network Rail Infrastructure Limited v The National Union of Rail, Maritime and Transport Worker* [2010] EWHC 1084 (QB), although note that the judgment in *RMT v Serco* should have contributed significantly in restoring the importance of s.232B TULRCA [2011] EWCA Civ 226, paras 47-57.

⁴⁰ Deakin and Morris, 1093. See the decision in *Associated British Ports v Transport and General Workers' Union Mersey Docks and Harbour Co. v Same Port of London Authority v Same* [1989] 3 All E.R. 822.

⁴¹ [1979] ICR 867 (HL), pp. 881–2 (Lord Diplock).

⁴² *SS for Education v NUT* [2016] EWHC 812 (QB).

issue would be that the NUT's strategy is to protect its members' jobs and conditions',⁴³ the decision still assessed the 'severe disruption to the education of students, to their parents, to the governing bodies of the sixth form colleges and to the work of the non-teaching staff employed'.⁴⁴ While Kerr J ultimately refused to issue a declaration, conceding that if 'wrongly granted now [it] would probably in practice defeat the exercise of such rights as the NUT has to call a strike without infringing the law',⁴⁵ the fact remains that courts will assess the impact of industrial action on the public interest, and presumably draw consequences from it in a way that puts a problematic gloss on the letter of s.221(2), even where action is called well within the narrow parameters of legality provided by Parliament.

This last point about the growing importance of 'public interest' considerations in the award of injunctions against strikes is arguably emerging as the third main factor shaping the ability of employers to stop industrial action in its tracks. It is clear, as noted above, that 'public interest' will be an important factor to consider even where the anticipated industrial action is deemed to be otherwise lawful. Various obiter dicta suggest that judges would apply a relatively high threshold, and look for consequences that would be particularly 'disastrous',⁴⁶ causing 'immediate serious danger to public safety or health',⁴⁷ or 'endangers the nation or puts at risk such fundamental rights as the right of the public to be informed and the freedom of the press'.⁴⁸ But cases such as that involving the BA cabin crew dispute of 2009 suggest that – especially where there are doubts regarding the ability of the union to vindicate the lawfulness of its actions at trial – nothing as draconian is necessary. A court can grant an injunction on the basis that the action, among other things, is believed to be 'fundamentally more damaging' because it is 'taking place ... over twelve days of the Christmas period',⁴⁹ and even because of 'the very serious inconvenience that the proposed action is likely to cause the travelling public'.⁵⁰ Judicial reference to the public interest in this context is therefore proceeding down a highly problematic slippery slope, especially when we consider that UK law, until the adoption by Parliament of the Trade Union Act 2016, had *not* expressly

⁴³ Para 69.

⁴⁴ Para 80.

⁴⁵ Para 84.

⁴⁶ *NWL v Woods* [1979] ICR 867 (HL), 881–2 (Lord Diplock).

⁴⁷ *Duport Steels Ltd v Sirs* [1980] ICR 161, 187 (Lord Fraser).

⁴⁸ *Express Newspapers Ltd v. McShane* [1980] ICR 42 (HL), 65.

⁴⁹ *British Airways Plc v Unite the Union* [2009] EWHC 3541 (QB), para 83.

⁵⁰ *Metroline Travel Ltd, Arriva the Shires Ltd, London General Transport Ltd v Unite the Union* [2012] EWHC 1778 (QB), para 67.

sought to draw a distinction between general, and essential or ‘important’, services in the context of industrial action.

3. Pre-Strike Ballots

In respect of the requirement to ballot members in advance of taking industrial action, the effect of the amendments contained within the 2016 Act is to increase the threshold turnout and percentage of the vote that a trade union must secure if it is to benefit from the statutory immunities. Prior to the Act coming into force, planned industrial action had only to win the support of a simple majority of the relevant workers, regardless of the size of the turnout. Under the new rules, in all ballots for industrial action, at least 50% of the union members entitled to vote must take part in the ballot in order for it to be valid.⁵¹ For example, in a ballot affecting 200 union members, at least 100 of those members would have to vote in order for it to be valid, and a simple majority of those voting would have to vote in favour of taking industrial action. Furthermore, when industrial action is planned in ‘important public services’, trade unions must meet the additional requirement that 40% of all those entitled to vote should vote yes.⁵² So, in a ballot affecting 200 union members, at least 100 of those members would have to vote, and at least 80 would have to vote in support of the industrial action.

According to the terms of section 3 of the Act, the higher threshold defined therein will apply wherever the majority of those entitled to vote in the ballot are ‘normally engaged’ in the provision of important public services. (An additional reference in the Bill to those normally engaged in the provision of services ‘ancillary’ to important public services was removed by Government after consultation highlighted the difficulties that would be involved in its application.⁵³) Section 3 goes on to provide that ‘important public services’ are to be defined in due course by the Secretary of State, ‘who may specify only services that fall within any of the following’: health services; education of those aged under 17; fire services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; border security. As is confirmed by the terms of draft regulations issued in January 2016, the application of the section thus extends far beyond *essential* services, which are

⁵¹ TU Act, s. 2 amending s. 226 TULRCA

⁵² TU Act, s. 3 amending s. 226 TULRCA

⁵³ Department of Business, Innovation and Skills, *Government Response to Consultation on Thresholds* (January 2016) [BIS/16/15], paras 64-67, 77

defined rather narrowly in international law as services the interruption of which would ‘endanger the life, personal safety or health of the whole or part of the population’.⁵⁴ There has been significant slippage, here, since the publication of the Conservative Party’s Manifesto in April 2015 and the Queen’s Speech the following month, both of which referred to the introduction of new higher thresholds in ‘essential’ public services.

Since 1993, the TULRCA has stipulated that pre-strike ballots must be conducted by way of a postal vote, administered in accordance with detailed rules under the supervision of an independent scrutineer.⁵⁵ The Trade Union Act does not yet relax these rules, but paves the way for change, providing in section 4 for an independent review on the delivery of secure methods of electronic balloting, and for the use of pilot schemes. The section stipulates that the review shall be commissioned within 6 months of the passing of the Act. It directs the Secretary of State to consider the report, and in preparing his or her response (to be published and laid before each House of Parliament) to ‘consult relevant organisations including professionals from expert associations to seek their advice and recommendations’.⁵⁶ It does not commit the Government to introduce e-balloting; however, in the House of Commons, Business Minister Nick Boles gave a ‘verbal guarantee’ that e-balloting would be rolled-out provided that the review found it to be safe.⁵⁷

Sections 5 to 9 of the 2016 Act significantly augment the obligations placed on trade unions to provide notice and information in connection with the ballot and ensuing industrial action. Of particular note is the rule contained in section 5, that in addition to the existing requirement that unions ask members, on the ballot paper, whether they wish to participate in a strike or action short of a strike, they must now also include ‘a summary of the matter or matters in issue in the trade dispute’; specify, in the case of action short of a strike, the type or types of industrial action to be taken; *and* indicate the time period during which it is expected that the action will take place.⁵⁸ Further provisions extend the period of notice that must be given to the employer of the commencement of industrial action from 7 to 14 days, and replace the current requirement that there must be some industrial action within a period

⁵⁴ *ILO Digest on Freedom of Association*, 5th revised edition (ILO 2006), para. 583. [Draft] Industrial Action (Important Public Services) Regulations 2016: BIS/16/15, Annex B

⁵⁵ Except in cases where only 50 or fewer members are entitled to vote: TULRCA ss226-234 as amended by TURERA 1993. The Trade Union Act 1984, Part II had provided for postal ballots *or* workplace ballots.

⁵⁶ TU Act, s. 4(5)

⁵⁷ Hansard 27 April, 2016

⁵⁸ TU Act, s. 5 amending s. 229 TULRCA

of 4 to 8 weeks in order for the mandate to remain valid with a provision that the members' agreement to a union's proposed industrial action will *automatically expire* after six months.⁵⁹ When informing the relevant workers of the result of the ballot, as it is already required to do, a union must now include a statement of whether at least 50% of those entitled to vote did so, and, in the case of important public services, whether at least 40% of those entitled to vote voted yes.⁶⁰ Where a union fails to meet any of these new obligations, the statutory immunities will not apply.⁶¹ Failure to meet an additional new requirement – to inform the Certification Officer annually of any industrial action taken in the previous 12 months – could result in the imposition by the Certification Officer of a financial penalty of between £200 and £20,000.⁶²

Explaining the changes

In seeking to explain the policy objectives underlying the changes to the balloting thresholds, the Government referred, as we have seen, to the need to ensure 'fairness' and 'democracy' in the organisation of industrial action.⁶³ The picture presented – by members of the Conservative Party, Government Ministers, and representatives of the CBI alike – was one of aggressive, even violent, union leaders, who, in pursuit of radically left-wing objectives, intimidated or 'bullied' members into taking part in industrial action despite their better judgment.⁶⁴ Some sympathy was extended to the 'bullied' union members and, much more so, to the disappointed would-be consumers of the public services affected by the industrial action. The conclusion drawn was that tougher legislative controls of industrial action were desirable – in order to subject union leaders to the 'democratic' control of members, and to limit the occasions on which consumers might be inconvenienced by industrial action. The main features of this narrative were thus neatly encapsulated in the headline attached to a *Daily Telegraph* article written by Boris Johnson in 2010: 'There should be a law against

⁵⁹ TU Act ss. 8 and 9 amending ss.234A and 234 TULRCA respectively. In the unlikely event of trade union and employer agreement to do so, the 6 month period may be extended to 9 months: TU Act s. 9

⁶⁰ TU Act, s. 6 amending s. 231 TULRCA

⁶¹ TULRCA s. 226 as amended. The question of a union's compliance or non-compliance with these provisions should be judged subject to the de minimis principle: *RMT v Serco* [2011] EWCA Civ 226. The s. 232B TULRCA rule that small, accidental failures ought to be regarded does not apply here.

⁶² The precise sum to be fixed by statutory instrument. TU Act ss. 6 and 16 inserting a new s.32ZA, s. 256D and Schedule 4 into TULRCA

⁶³ BIS/15/418, 3. For evidence of strong continuities here with the rhetoric of the Thatcher Governments see S Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24-44

⁶⁴ See eg Boris Johnson, *Daily Telegraph*, 4 October 2010; Katja Hall, deputy director-general of the CBI, *Daily Telegraph* 13 May 2015

these Tube strike militants wrecking your lives'.⁶⁵ In Parliament, and in the policy documents published by the Department for Business Innovation and Skills, the language was somewhat more measured, but the message essentially the same. The Government's primary aim was to ensure that there was always 'clear and ongoing' support for industrial action.⁶⁶ A second objective, in cases where industrial action was likely to impact on the provision of 'important public services', was to make it more difficult for workers to strike, without going so far as to prohibit them from doing so.⁶⁷

In explaining the amendments to the information and notice provisions, the Government again referred to its wish to ensure 'fairness', 'democracy' and, also, 'transparency'.⁶⁸ In Committee in the House of Commons, the aim behind the rule in section 5, requiring unions to provide voters with a summary of the matter(s) at issue, was defended on the basis that it would ensure that unions were 'absolutely clear with members about what they were being asked to vote for'.⁶⁹ The section 7 obligation to report industrial action to the Certification Officer would serve 'transparency in the public interest', it was explained.⁷⁰ The increase of the required period of notice of the commencement of industrial action from 7 to 14 days was intended to allow the employer and trade union more time to resolve their dispute without the need for industrial action.⁷¹ The new 'sunset' rule in section 9, that the mandate won in a ballot automatically expires after 6 months, was directed at ensuring that there was 'ongoing' support for industrial action.⁷²

As justification for the rules introduced by the 2016 Act, the Government's depiction of politically motivated union leaders organising industrial action against the wishes of a majority of the membership, and of industrial action in the public sector as routinely breaching the rights of consumers of 'important public services', may be objected to on a number of grounds. The first is the way in which it overlooks or obscures important elements

⁶⁵ 4 October, 2010.

⁶⁶ 'We've seen ... strike action that took place where perhaps only 10 per cent to 15 per cent of the members ... actually voted for it, and that's not right, it's unfair'. Sajid Javid, Business Secretary, *Financial Times* 10 January, 2015

⁶⁷ See eg Sajid Javid on BBC News 12 May 2015, cited Darlington and Dobson, 5: 'by increasing the thresholds it will certainly increase the hurdles that need to be crossed'. 'None of these changes are about banning strikes' BIS/15/418, 4.

⁶⁸ See eg Nick Boles, Minister for Skills and Equalities, in Committee in the House of Lords, 20 October 2015.

⁶⁹ Nick Boles, 20 October 2015, column 248

⁷⁰ Nick Boles, 20 October 2015, column 259

⁷¹ Nick Boles, 20 October 2015, column 262

⁷² Nick Boles, 20 October 2015, column 266. The Bill provided originally that the mandate would expire after 4 rather than 6 months.

of the already highly restrictive legal framework governing trade union organisation and industrial action. For example, it seems not to take account of the rule prohibiting trade unions from disciplining members who refuse to participate in, or to support, industrial action, regardless of the level of support shown for the action in the pre-strike ballot.⁷³ This of course places very significant limits on the kind of steps that union leaders may take in an effort to ‘force’ reluctant members to come out. Similarly, the Government’s representation of intra-union relations seems to disregard the existence of detailed provisions requiring that trade union leaders be elected by members by way of a postal vote.⁷⁴ Finally, it obscures the fact that the (therefore democratically accountable) leaders are prohibited from using industrial action lawfully as a means of pursuing political objectives of their own (or anybody else’s), by reason of the golden formula.⁷⁵ That the right to strike is an essential element of *collective bargaining*, that industrial action may often be organised as part of efforts to secure pay deals or defend pension rights, and that the pressure for it may come from the members and not the leadership, is barely admitted by the Government’s portrayal of supposedly common practice.

A second related criticism of the Government’s justification of the amendments is its lack of a solid evidentiary basis. In support of the claim that the existing rules on pre-strike ballots were undemocratic because they allowed small numbers of yes voters to force or coerce a silent majority into taking part in industrial action against its better judgement, for example, the Government provided evidence of low turn-outs in some pre-strike ballots, but no evidence that abstainers in those ballots opposed industrial action, or were coerced into taking part.⁷⁶ In debates in the House of Commons, Ministers often referred to specific examples of behaviour which they sought to present as typical or common, without providing evidence that those examples were in fact representative.⁷⁷ As it consulted on the Bill, the Government produced an Impact Assessment on Ballot Thresholds in Important Public Services that was roundly criticised by the Regulatory Policy Committee (RPC) for its lack of evidence, limited scope, and failure to explain the rationale for the proposals in a ‘straightforward and logical’

⁷³ TULRCA ss 64, 65

⁷⁴ TULRCA ss 46-61

⁷⁵ TULRCA ss 219, 244

⁷⁶ eg Sajid Javid, Business Secretary, *Financial Times* 10 January, 2015; Nick Boles 20.10.2015 column 194

⁷⁷ eg Sajid Javid 14.9.2015 column 765; Nick Boles 20.10.2015 columns 194-5, columns 195-6

way.⁷⁸ Neither the Government's identification of the problem to be addressed nor its preferred solution were supported, in the RPC's opinion, by sufficient evidence. A particular weakness of the Assessment, identified by the RPC, was its failure to discuss possible alternatives to the introduction of thresholds, including e-balloting.

The Consultation on Ballot Thresholds itself did not contain any additional evidence to give credence to the Government's proposals.⁷⁹ It presented the introduction of new higher thresholds as a done deal, defining its purpose extremely narrowly as 'to help define who within the fire, health, education, transport, border security and nuclear decommissioning sectors is subject to the 40% important public services threshold'.⁸⁰ In line with that purpose, it invited comment only in respect of the 'important public services' threshold, and even here only in a remarkably circumscribed way. In the event, it did not uncover a wealth of support for the new threshold.⁸¹ In response, as we have seen, it deleted from the Bill the reference to those engaged in the provision of services 'ancillary' to important public services, thereby narrowing the scope of the threshold. But it did not make any changes to its definition of such services. The much more restrictive definition of 'essential services', adhered to for several decades now by the ILO's Committee on Freedom of Association was dismissed by the Government as 'non-binding': merely, 'guidelines ... suggested by some of the ILO's supervisory bodies [which] fulfil an informal advisory role'.⁸²

The rules contained within sections 5-9 of the Act – dealing with trade union obligations to provide notice and information in connection with ballots and ensuing industrial action – were not consulted upon at all by Government. From the record of committee debates in the House of Commons, we may conclude that, again, neither the identification of the problems to be addressed by these rules, nor the proposed solutions, were supported with sufficient evidence.⁸³ In respect of section 5, for example, no evidence whatever was produced in

⁷⁸ RPC15-BIS-2402. The RPC is an independent advisory non-departmental public body which aims to ensure that decisions are made on the basis of a robust, evidence-based policy making process:

<https://www.gov.uk/government/organisations/regulatory-policy-committee>

⁷⁹ BIS/15/415, 5-6

⁸⁰ BIS/15/415, 4

⁸¹ Department of Business, Innovation and Skills, Government Response to Consultation on Tackling Intimidation of Non-Striking Workers (November 2015) [BIS/15/621], 7

⁸² BIS/15/16, 10. The decisions of the CFA, like those of the CEACR, are of course better understood as a form of soft law and, as such, a part of international law. See further C La Hovary, 'The ILO's supervisory bodies' 'soft law jurisprudence' in A Blackett and A Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar 2015)

⁸³ Public Bill Committee, 22 October 2015, columns 245-268

support of the Government's claim that, as things stood, union members did not always understand the nature of the dispute giving rise to the ballot.⁸⁴ Similarly, no evidence was provided to show that extending the notice period in section 234A TULRCA from 7 to 14 days would likely result in more negotiated settlements of disputes.⁸⁵ The claim that the sunset rule introduced by section 9 was necessary to ensure that industrial action was always 'based on a current mandate', was also unsupported.⁸⁶

A third line of objection to the Government's explanation of the desirability of the legislation lies with the lack of fit between the professed policy objective of ensuring ongoing and clear support for industrial action, and the chosen method of achieving that aim. As several commentators have pointed out, to require that a particular percentage of an electorate take part in an election – in addition to requiring a majority vote in favour – is to confer a special status on abstentions.⁸⁷ Imagine a case where 100 individuals are entitled to vote, and the rules require a turn-out of at least 50%, and of those voting, a simple majority in favour. In scenario 1, 50 votes are cast, 49 for and 1 against, and the ballot is won. In scenario 2, 49 of the electorate again vote yes, but the no-voter chooses to abstain with the result that the threshold of 50% is not met and the ballot is lost. As is thus illustrated, the imposition of participation thresholds means that a small number of abstentions – potentially even a single one – may frustrate or trump a much higher number of yes votes. Active opponents of strike action will therefore do well to abstain rather than voting no – so that far from encouraging higher participation rates in pre-election ballots, as the Government apparently intended, the imposition of participation thresholds may provide a reason not to. It may also be noted here that the provision made in s. 4 of the Act for a review of secure methods of electronic balloting and the use of pilot schemes did not form part of the Bill as originally drafted. From the outset, trade unions and others argued that the aim of improving participation rates could be met more easily by permitting electronic balloting, for instance by email and/or text

⁸⁴ Jo Stevens, 22 Oct 2015, column 247. Nick Boles produced a small number of ballot papers with what he described as 'vague, short descriptions' of the dispute – but no evidence that these descriptions had been regarded as insufficient by union members: 22 Oct 2015, column 249

⁸⁵ Nick Boles 22 Oct 2015, column 262

⁸⁶ Nick Boles 22 Oct 2015, columns 266-7

⁸⁷ Darlington and Dobson, 8-9

message.⁸⁸ The agreement of Government to include section 4 came very late in the day, in part acceptance of an amendment tabled in the House of Lords.⁸⁹

Likely Impact of the New Rules?

The likely impact of the new rules on the ability of trade unions and workers lawfully to organise and participate in industrial action may be assessed through consideration of (a) available evidence of ballot turnouts and results to date, and (b) judicial approaches to the interpretation of the legislation and the consideration of applications for injunctions.⁹⁰

Focusing on the new ballot thresholds, and applying these retrospectively to past ballots, Darlington and Dobson concluded that the impact of the new thresholds is likely to be significant.⁹¹ Of a sample of 158 strike ballots held by 28 trade unions between 1997 and 2015, only around half met the 50% turnout threshold, and only 55 of 90 met the 40% support threshold. Importantly, very few of the large public sector unions which held one-day strikes in June and November 2011 met either threshold. Given the large numbers of workers involved in these public sector strikes, this meant that, had the new thresholds been in force, they would have prevented 3.3 million workers from exercising the right to strike. Analysing their findings further, Darlington and Dobson highlighted that it is national ballots, in particular, that will be difficult to win under the new rules: workplace, area and single employer ballots routinely attract higher turnouts.⁹² Unions with members who have close occupational identities will likely find it easier to meet the thresholds than more general unions.⁹³

In addition to making it more difficult to win ballots, the rules contained in sections 2-9 of the Act would also appear to provide fertile ground for future applications for injunctions.⁹⁴

⁸⁸ See eg Frances O'Grady, *Independent*, 21 March 2015; Mark Serwotka BBC News, 19 May 2015; both cited Darlington and Dobson, 12

⁸⁹ Nick Boles 27 April 2016. Some speculated that a set of amendments, including this one, was conceded by Government in return for trade union support for the campaign to remain in the EU. See eg Rowena Mason, 'Euroscptics question motives for trade union bill climbdown' *The Guardian*, 27 April, 2016

⁹⁰ The latter is discussed above in the section entitled *Injunctions*.

⁹¹ Darlington and Dobson, chapter 6.

⁹² Darlington and Dobson, chapter 7

⁹³ *Ibid.*

⁹⁴ Originally clauses 2-8 of the Bill.

Section 3, for example, presents unions with the practically difficult task of discerning whether a majority of those entitled to vote are ‘at the relevant time normally engaged in the provision of important public services’. At a minimum, this seems likely to require trade unions to keep up-to-date records of detailed job descriptions of their members – and, of course, to bear the potentially considerable cost of doing so.⁹⁵ Even when in possession of the most up-to-date and detailed of records, however, a trade union may struggle to identify those who are ‘normally engaged’ in the provision of relevant services. Draft regulations published by the Government go some way to clarifying the scope of such services, but give little indication of how the matter of engagement in their provision ought to be judged.⁹⁶ Is a hospital cleaner normally engaged in the provision of ‘accident and emergency services’, for example, if he works to keep the A&E department clean? Is the worker who sells snacks from a catering trolley on a train normally engaged in ‘passenger railway services’? In partial recognition of the difficulties involved, the Bill was amended to include a proviso: ‘unless at that time the union reasonably believes this not to be the case’. How the courts will judge the question of ‘reasonable belief’ remains to be seen, but past experience would suggest that trade unions proceed here with caution.⁹⁷ Similarly, the requirement in section 5 that unions include in the ballot paper a summary of the matter(s) at issue would appear to throw the door open wide to applications for injunctions on the grounds that the union has not provided sufficient, or the right kind of, detail.⁹⁸ The obligation, contained in the same section, to specify types of industrial action short of a strike is potentially problematic because concepts like ‘overtime ban’ or ‘go-slow’ are not terms of art.⁹⁹

Taken together, the rules in section 5 bind the union to carry out a course of action devised at the time of the ballot, thereby preventing it from developing its strategy in line with changing circumstances and priorities.¹⁰⁰ The extension in section 8 of the period of notice that must be given to an employer of the commencement of industrial action from 7 to 14 days provides an employer with additional time to hire replacement agency workers, as it may in the future be

⁹⁵ BIS/16/15, paras 74, 81

⁹⁶ [Draft] Industrial Action (Important Public Services) Regulations 2016: BIS/16/15, Annex B

⁹⁷ See eg *British Railways Board v NUR* [1989] IRLR 348, *P v NASUWT* [2003] UKHL 8, and *RMT v Serco* [2011] EWCA Civ 226, for discussions of what is ‘reasonably practicable’ in various contexts and therefore required of the trade unions.

⁹⁸ As originally drafted, the Bill required a ‘reasonably detailed statement of the matter’

⁹⁹ Jo Stevens MP, 22 Oct 2015, column 247-8

¹⁰⁰ TU Act, s 5

permitted to do.¹⁰¹ The sunset rule contained in section 9, meanwhile, might cause a union to have to repeat the whole lengthy and costly balloting process when the six month mandate comes to an end. Pointing at committee stage to the marked lack of evidence provided by the Government to show that these provisions would meet their stated policy objectives of greater transparency and accountability, Opposition politicians suggested that the true intention was to tie the unions up in ‘blue tape’ (as opposed to red tape) to the point where their rights and those of workers had become ‘illusory’.¹⁰² In the absence of evidence to the contrary, this strikes us as persuasive.

4. Picketing and Protest

In respect of picketing, the Trade Union Act introduces seven new conditions that must be met if picketing is to be deemed ‘lawful’ under section 220 TULRCA. Under the terms of a new section 220A, the union must (i) appoint a person to supervise the picket, who is (ii) either an official or a member of the union, and in either case familiar with the relevant provisions of the *Code of Practice*. The union must (iii) take reasonable steps to tell the police the picket supervisor’s name, where the picketing will be taking place, and how to contact the picket supervisor. And it must (iv) provide the ‘picket supervisor’ with a letter stating that the picketing is approved by the union. The picket supervisor must (v) on request, show that letter to the employer and/or to any individual acting on behalf of the employer. She must (vi) at all times be either present at the picket, or readily contactable by the union and the police, and able to attend at short notice. Whenever present, she must (vii) wear something (eg a badge or armband) that readily identifies her as the picket supervisor. Failure to comply with any one of these conditions will mean that the picketing in question is not deemed lawful by the Act, regardless of whether or not the failure has prejudiced the employer in any way.¹⁰³ As a result, the statutory immunities from liability in tort will not apply; workers will lose their protection from unfair dismissal.¹⁰⁴

In respect of forms of protest organised in connection with an industrial dispute other than peaceful picketing, a second Consultation associated with the Bill (on *Tackling Intimidation*

¹⁰¹ Stephen Doughty 22 Oct 2015, column 261. See draft regulations annexed to the Consultation Paper, *Hiring Agency Staff During Strike Action* (July 2015) [BIS/15/416]

¹⁰² eg Stephen Doughty, 22 Oct 2015, column 244, column 245, column 261

¹⁰³ s. 220A TULRCA, inserted by s. 10 TU Act

¹⁰⁴ s. 219 TULRCA as amended by s. 10 TU Act, s. 238A TULRCA

of Non-Striking Workers) contained several proposals including: new laws to require trade unions to publish a plan of intended action in advance of a protest, and to publish an annual report to the Certification Officer of picketing and associated protest activity; the creation of a new criminal offence of intimidation on the picketing line; and the reform and modernization of existing rules so as to ensure that they covered social media.¹⁰⁵ In light of the responses received to that Consultation, which again offered very little by way of support for the proposals, the Government decided not to implement any of these within the Act, but instead only to amend the accompanying Code of Practice on Picketing.¹⁰⁶ In particular, it intends to amend the Code so as:

- to clarify the range of legal protections which already exist to protect striking and non-striking workers, whether union members or not
- to set out clearly the existing legal protections against the misuse of social media and to provide guidance for those people who wish to seek redress where they have suffered online intimidation as a result of industrial disputes
- to set out additional advice regarding the ‘transparency’ of trade unions
- to clarify the rights and responsibilities of all those involved in or impacted upon by protests linked to industrial disputes.¹⁰⁷

Protecting non-striking workers from intimidation?

Since the publication of its Manifesto in 2015, the Government has justified the changes to the law on picketing consistently with reference to the need to ‘protect non-striking workers from intimidation’,¹⁰⁸ stating that ‘[w]hile this Government recognises that picketing is a lawful activity, we are equally clear that it should never be used as an opportunity to intimidate others’.¹⁰⁹ In the Consultation, it explained that the primary means chosen to achieve this aim would involve giving legal force to existing parts of the Code of Practice – those that were ‘consistent with well organised industrial action’.¹¹⁰ ‘As most unions already observe the guidelines of the Code, these new requirements should have little impact on responsible picketing but will encourage more responsible behaviour from those unions

¹⁰⁵ BIS/15/415, Summary of Consultation

¹⁰⁶ BIS/15/621, Foreword

¹⁰⁷ BIS/15/621, esp. paras 24-5, 58, 62-3

¹⁰⁸ Manifesto; BIS/15/415

¹⁰⁹ BIS/15/621, Foreword

¹¹⁰ BIS/15/415, para 19

whose picketing activities ignore the guidelines with the intent to intimidate for the furtherance of industrial disputes.’¹¹¹

In respect of protests associated with picketing, the potential victims of intimidation and other forms of ‘unacceptable’ behaviour were identified more widely by the Consultation than they had been in the Manifesto to include representatives of management, and members of the public, as well as non-striking workers.¹¹² One key problem to be addressed, it was said in the Consultation, was the development in recent years of forms of leverage protest which were not caught by the terms of the TULRCA and other legislation.¹¹³ Action was needed to prevent ‘unacceptable conduct’ in the future and, where it could not be prevented, to allow for the enforcement of strong remedies.¹¹⁴ In its own Response to the Consultation, the Government emphasised, in particular, its concern about ‘intimidation online’ and in social media.¹¹⁵ Recognising now, however, that there were in fact ‘no significant gaps in the legal framework’, it suggested instead that there was a need to, ‘raise awareness of existing protections and ensure that they are used to maximum effect’.¹¹⁶

As justification for the changes to the rules on picketing contained in the 2016 Act, and the proposed amendments to the Code of Practice, the principal criticism that can be made of the Government’s statements lies, again, with their lack of a solid evidentiary basis. Certain of the claims made in the Consultation – for example that the rules in section 220A will have ‘little impact on responsible picketing’ because the relevant parts of the Code are already respected by most unions – were supported by no empirical evidence whatever.¹¹⁷ Elsewhere, there was frequent and lengthy reference to the ‘evidence’ submitted to the Carr Review. This was a Review commissioned by the Government in 2013 from the barrister Bruce Carr QC into the alleged use of extreme tactics in industrial action, including leverage tactics.¹¹⁸ As Mr Carr took pains to emphasise, however, the ‘evidence’ that the Review collated was, in truth, little more than a set of allegations.¹¹⁹ Specifically, it was ‘substantially unchallenged and untested either by contrary evidence being submitted by those on the other side of the

¹¹¹ BIS/15/415, para 18

¹¹² BIS/15/415, BIS/15/621

¹¹³ BIS/15/415, paras 5-6

¹¹⁴ BIS/15/415, para 7

¹¹⁵ BIS/15/621, para 25

¹¹⁶ BIS/15/621, para 31, our emphasis

¹¹⁷ BIS/15/415, para 18

¹¹⁸ The review was led by Bruce Carr QC, who reported in 2014

¹¹⁹ Bruce Carr QC, *The Carr Report* (October 2014), 1.11

industrial fence or by any form of inquisitorial process at oral hearings'. And it was 'largely one-sided', coming 'overwhelmingly from employers or those acting on behalf of them'. For these reasons, Mr Carr chose not to seek to make findings of fact in his Report.¹²⁰ In its Consultation, in contrast, the Government was not particularly careful to distinguish between allegations and matters of fact. It acknowledged in a single footnote that 'all events mentioned [in the Report] remain alleged',¹²¹ but elsewhere made statements of purported fact that were supported only by reference to some or all of those same events.¹²² In addition, it referred to 'evidence' supplied to Carr by the Association of Chief Police Officers (ACPO) of reports of intimidatory tactics that had been used during industrial disputes,¹²³ without mentioning the fact that the ACPO had described the current legal framework as generally effective.¹²⁴ The ACPO had not asked for an extension of its powers, but rather only better guidance for the police.

In common with the Consultation on Balloting Thresholds, this second Consultation was notable for the way in which it presented itself as an evidence-gathering exercise, seeking to find support for decisions already made. First and foremost, it sought, it said, to collect evidence of intimidatory behaviour experienced during picketing and protests linked to industrial disputes. It also sought evidence on whether further provisions of the Code of Practice ought to be made legally binding, in addition to those already identified. As the Government later went some way to admitting, the Consultation in the event revealed little in the way of evidence of intimidation and little by way of support for its legislative proposals. Only 177 responses were received. Of those, a clear majority indicated that they had neither experienced nor observed incidents of intimidatory behaviour during industrial disputes.¹²⁵ In partial contradiction, perhaps, of the Government's claim that the use of social media was a 'clear and prominent concern throughout most of the responses', only 16 responses cited use of social media as an example of intimidatory behaviour.¹²⁶ Only very small minorities wrote in favour of the proposals to create a new criminal offence, to require trade unions to publish

¹²⁰ Carr Report, 1.11

¹²¹ BIS/15/415, para 4, fn 1

¹²² Eg 'in recent years a range of problems have arisen despite [the existing] framework. While most unions adhere to the guidelines of the Code, there have been a number of high-profile allegations of the rules on picketing being flouted, or proving difficult to enforce.'

¹²³ BIS/15/415, 4-5

¹²⁴ Carr Report, 92-4

¹²⁵ BIS/15/621, para 12

¹²⁶ BIS/15/621, para 19

plans of protests, and to report annually to the Certification Officer regarding picketing and protest activity.¹²⁷

As with the introduction of the balloting thresholds, it may also be doubted whether the new rules on picketing supervisors are the best means of achieving the policy aims described by the Government. As Ford and Novitz have emphasised, criminal law already provides protection against intimidation on the picket line.¹²⁸ Moreover, the kinds of ‘intimidatory’ behaviour listed in the Consultation would already fall outside the definition of ‘lawful picketing’ in section 220 TULRCA, and might also constitute torts such as public nuisance.¹²⁹ The question arises then why, if the aim is to prevent intimidatory behaviour, conditions should be imposed upon those who are picketing *peacefully*, as s 220 already requires? Why should the consequence of failure to meet those conditions (even for those who are picketing peacefully) be forfeiture of the protection of the statutory immunities and, for individual workers, protection from unfair dismissal? The Government’s claim to recognise that ‘picketing is a lawful activity’,¹³⁰ is difficult indeed to reconcile with the steps it has taken so dramatically to narrow the circumscription of the forms of picketing that are deemed ‘lawful’ by the Act.

What is left of the right to picket?

Notwithstanding the Government’s assertion that section 10 enacts a set of rules that are anyway adhered to by ‘most unions’, it is easy to imagine circumstances in which one or two of the new requirements may be practically very difficult to comply with.¹³¹ Where an industrial dispute involves many workers employed at a large number of workplaces, an equally large number of ‘picket supervisors’ may have to be appointed by the union if it is to satisfy the terms of the Act. Where this number exceeds the number of trade union officials available, as well it might, the union will have to rely on volunteer members – *if such can be found*. Volunteers will have to be trained (‘familiar with any provisions of [the] Code of Practice’). They will have to be available throughout, either present at the picket, or readily

¹²⁷ BIS/15/621, para 29, 44, 51

¹²⁸ Ford and Novitz 544

¹²⁹ Ford and Novitz 544

¹³⁰ See eg BIS/15/621, Foreword

¹³¹ BIS/15/415, para 18

contactable by the union and the police, and able to attend at short notice.¹³² And they will have to be willing to draw attention to themselves as ‘active’ union members, by having their name reported to the police, and by making themselves easily identifiable. For these reasons, members may well be reluctant to step forward.

What is the likely impact of the rules, then, on trade union practices? In his research into the frequency, nature and context of the use of injunctions in industrial disputes, Gregor Gall has noted the very low incidence of applications for injunctions which apply to picketing.¹³³ He explains this with reference to the already highly restrictive legal framework, and the consequent steep decline in attempts by unions to use picketing ‘effectively’ ie to prevent the movement of workers and goods into and out of a workplace. In other words, so ineffective are most pickets, that employers have little to gain by preventing them by means of an injunction from continuing. If Gall is right – and as we have seen, the Government produced scant evidence to suggest otherwise – then the new, even more restrictive rules seem unlikely to result in a sharp increase in applications for injunctions to prevent picketing, even if, on paper, they appear to create several opportunities for litigation as to the precise nature of the obligations imposed.¹³⁴ A more plausible scenario, perhaps, is that finding it increasingly difficult to picket lawfully, unions may make greater use of precisely the types of leverage action which the Government claimed in its Consultation to wish to put a stop to.¹³⁵

5. Conclusion

¹³² Trade Union Act 2016, s. 10 introducing new s. 220A TULRCA. A requirement originally contained in the Bill that the union provide the picket supervisor with a letter authorising her to act as such, and that she show that letter to ‘any person who reasonable asks to see it’ was amended following the receipt by Government of responses to the Consultation which pointed out the potential breach of Data Protection law: BIS/15/621, paras 37-9

¹³³ According to Gall’s figures, in the period 1995-2005, only 7 such applications were made, out of a total 82 applications for injunctions in industrial disputes in the same period: Gall 2006. In 2005-2014, Gall uncovered only 5 applications for injunctions made in connection with picketing: G Gall, ‘Injunctions as a Legal Weapon in Collective Industrial Disputes in Britain, 2005-2014’ (2016) *British Journal of Industrial Relations*, forthcoming

¹³⁴ It should be noted here that the new requirements have not been accompanied by an invitation to the courts to disregard ‘small accidental failure’, as in the case of s. 232B TULRCA. For a recent example of a case involving an application for an injunction to prevent picketing see: *Thames Cleaning and Support Services Ltd v United Voices of the World* [2016] EWHC 1310 (QB)

¹³⁵ Ford and Novitz 545; L McCluskey, ‘Can Unions Stay Within the Law Any Longer?’ (2015) 44 ILJ 439; B Carr, ‘Will the Trade Union Bill help or hinder industrial relations?’ 12th February, 2016: http://www.devereuxchambers.co.uk/assets/docs/news/trade_union_bill_bc_1222016.pdf

Introducing the Trade Union Bill at its second reading, the Secretary of State stated the following:

[T]his Bill is not a declaration of war on the trade union movement. It is not an attempt to ban industrial action. It is not an attack on the rights of working people... It is simply the latest stage in the long journey of modernisation and reform. It will put power in the hands of the mass membership; bring much-needed sunlight to dark corners of the movement; and protect the rights of everyone in this country—those who are union members and those who are not, and those hard-working men and women who are hit hardest by industrial action.¹³⁶

Notwithstanding the protestations of the Minister, it is difficult to resist the conclusion that one, at least, of the Government's main aims with this legislation was to make it harder for trade unions to organise industrial action, and thereby to weaken their ability to protest or resist measures taken by employers, especially in the public sector. Indeed, with respect to industrial action in 'important public services', this was quite explicitly the objective.¹³⁷

The narrative provided by Government was of trade unions dominated by militant, bullying leaders acting in disregard of the wishes of the membership and, even more so, the general public. Trade unions needed to be reined in, held to account, have greater light shone upon their shady dealings. While this account may have possessed a measure of internal logic (if unions were *in fact* dominated by militant, bullying leaders then it would indeed be important to introduce stronger elements of democratic control), it was almost wholly unsupported by evidence.¹³⁸ Nor were the measures contained within the Act, and the Bill as originally drafted, always shown to constitute the most effective means of addressing the 'problems' identified by Government, had such problems existed.

Research suggests that, as a result of the introduction of the new measures, it will become markedly more difficult for unions to secure the required threshold levels of support in per-strike ballots, especially national (predominantly public sector) ballots, and those organised by large 'generalist' trade unions. In some circumstances, it will be near impossible to organise pickets so that they fall within the now astoundingly narrow definition of what is

¹³⁶ Sajid Javid Hansard, 14 September 2014, Column 761

¹³⁷ See eg Sajid Javid on BBC News 12 May 2015, cited Darlington and Dobson, 5: 'by increasing the thresholds it will certainly increase the hurdles that need to be crossed'. BIS/15/418, 4.

¹³⁸ Hepple identified a failure to rely upon hard evidence when making policy as a defining feature of both the 2010-15 Coalition Government, and the Thatcher Governments of the 1980s: BA Hepple, 'Back to the Future: Employment Law under the Coalition Government' 42(3) *Industrial Law Journal* 203-23

lawful in that context. Perhaps the most significant feature of the Act is the number of opportunities it appears likely to create for employers to raise actions for interim relief. In light of the narrative offered by Government in support of the Act, and especially its highly reductive definition of the public interest as essentially coincident with the interests of consumers and businesses, we fear that it might propel members of the judiciary further down the slippery slope identified above: granting interim injunctions to prevent industrial action that is judged more likely than not to be found at trial to be protected action taken in relation to a valid industrial dispute, but likely nonetheless to damage the public interest.

We conclude this analysis of the Trade Union Act 2016 by noting that if the same turnout and support requirements contained in sections 2-3 of the Act had been applied to the United Kingdom European Union membership referendum of 23 June 2016, the 51.89 per cent of votes in favour of leaving the EU, coupled with a 72.2 per cent turnout, would have resulted in the United Kingdom remaining a full member of the European project.¹³⁹

¹³⁹ According to the Electoral Commission 17,410,742 voters out of 46,500,001 registered electors cast their vote in favour of Leaving the European Union, which translates in a 37.44 per cent of those entitled to vote.