INDUSTRIAL ACTION INJUNCTIONS: AN UPDATE

Introduction

1. The ability of workers and the unions to advocate and take industrial action tends to shift both with the political position and judicial decisions.

2. With an era of austerity measures being introduced, cuts in public sector funding, unemployment rising to 2.57 million (in August 2011) and inflation (CPI) for September 2011 at 5.2%, 5.6 % if mortgage costs are included, it is perhaps apposite to consider the current legal and political approach to industrial action.

3. UK unemployment rose by 114,000 between June and August 2011 to 2.57 million - a 17-year high, according to official figures. The office for national statistics put unemployment at 8.1%. The unemployment total for 16-24 year olds hit a record high of 991,000 in the quarter, a jobless rate of 21.3%. The number of people out of work and claiming benefits, rose 17,500 to 1.6 million in September 2011. There has been a record cut, of 175,000, in the number of part-time workers and a record cut, of 74,000, in the number of over-65s in employment. In Greece workers are on a 48 hour general strike, called by two unions that cover public and private sector workers, in respect of the austerity measures proposed there. The Parliament will vote over the next 2 days on two bills that include cuts to the pay and pensions of public sector workers, higher taxes and the suspension of collective labour agreements

4. Here the NUT among others has called a mass lobby of Parliament on 26 October 2011 in respect of the proposed increases to public sector pensions. On 30 November 2011 there will be a co-ordinated day of industrial action, called by the TUC, in respect of the cuts in public sector pensions. In February 2011 a survey, conducted by totaljobs.com, showed that more than half of the public sector workers surveyed would consider strike action in the face of job cuts changes to pensions.

5. In early 2011 the Institute of Directors called an end to collective bargaining in the NHS and Education sector. In 2010 the CIPD suggested that the government should consider a ban on strikes in essential services. Although it also said that such measures should not be taken lightly.

6. In January 2011, in a BBC interview, George Osborne said that he was prepared to consider changes to strike laws as a last resort to assist push through the austerity measures. He added that he "*hoped we would never get there"*. In March 2011 Brendan Barber General Secretary of the TUC said "*The UK already has some of the toughest laws on strike action in the developed world and there is no need to further restrict this basic human right*". Before any strike action can be taken, trades unions must follow complex and time-consuming procedural rules - most of which are specifically designed to dissuade workers from withdrawing their labour. The effect is to stall the industrial action (in most cases for at least 6 weeks from the date on which the dispute first arose) until the union has jumped through all of the eligibility, ballot and notice 'hoops' required for lawful action to begin. Even then, industrial action may be further delayed while the High Court considers whether to grant an injunction preventing the strike from going ahead.

7. In June 2011 the CBI suggested that a minimum turnout rule should be introduced so that a minimum of 40% of the eligible workforce should vote and a majority of that minimum be in favour of strike action before a strike may be approved. Boris Johnson was reported in July 2011 as supporting such a move and as having discussed it with the Transport Secretary, Philip Hammond.

8. David Cameron has resisted threatening legislation in respect of industrial action. However, on 5 October 2011 at the conservative party conference he said "*So to the unions planning to strike over public sector pensions I say this. You have every right to protest. But our population is ageing. Our public sector pensions system is unaffordable. The only way to give public sector workers a decent, sustainable pensions system, and do right by the taxpayer, is to ask public servants to work a little longer and contribute a little more. That is fair. What is not fair, what is not right, is going on strikes that will hurt the very people who help pay for your pensions.*"

The Legal Position

9. Despite the Government's apparent position in respect of industrial action and the potential for future restrictive legislation recent decisions of the Court of Appeal may actually show a shift in one aspect of the judicial tide, in favour of a less restrictive application of the legislation.

10. In British Airways plc v Unite (No 2) [2010] ICR 1316 and RMT v Serco Ltd; ASLEF v London Midland [2011] ICR 848, it is (perhaps) possible to detect a more liberal approach to the assessment of whether a trade union has complied sufficiently with the detailed balloting and notification requirements in Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A') than that which has traditionally been adopted until even very recently, for instance in the Court of Appeal's other major recent decision in Metrobus Ltd v Unite [2010] ICR 173.

11. This paper therefore focuses on that triumvirate of recent Court of Appeal decisions and examines the extent to which the apparent change in approach is more than a mere shift in emphasis and genuinely represents an ebbing of the tide of restriction.

The legal structure: a shift in the interpretive presumption

12. The first area where there appears to be a shift in approach is in the significance which is attached to the underlying legal and legislative structure. It is well known that the *'common law's focus on the protection of property and contractual rights is necessarily antithetical to any form of industrial action'*[1] and that, consequently, at common law workers who strike will almost certainly be acting in breach of their contracts of employment and trade unions who organise a strike will almost certainly be committing the tort of inducing breach of contract, and sometimes other economic torts as well.

13. Accordingly, the legal structure under which strike action receives any form of protection at all under domestic law has been by way of immunities conferred by statute. Such immunities have existed in varying form since the Trade Disputes Act 1906.

[1] RMT v Serco, para 9 *per* Elias LJ

14. That legal context has traditionally influenced the courts to adopt a narrow construction and strict application of the statutory immunities: the argument ran that, since a trade union would be seeking to take advantage of a statutory immunity in order to avoid an otherwise unanswerable liability, such immunity should be construed narrowly against it (see e.g. McShane v Express Newspapers Ltd [1979] IRLR 79, CA, para 15 *per* Lord Denning MR).

15. True, there were dicta to the effect that the statutory provisions should be given a *'likely and workable construction'*[2] so as *'to enable workers and employers to conduct their affairs in a sensible and efficient way'*[3]. But in practice, the reasoning of the courts has often reflected the underlying theoretical structure – starting with the premise that the action is unlawful and, provided the statutory requirements are at least practicable and workable, construing them narrowly so that the immunity is only conferred through strict compliance (see for example Milford Haven Port Authority v Unite [2010] EWCA Civ 400, para 17 *per* Leveson LJ).

16. That traditional approach was still very apparent in the approach of the Court of Appeal in Metrobus. For example, Maurice Kay LJ set the scene by reference to the underlying legal context in the following terms:

    'In this country, the right to strike has never been much more than a slogan or a legal metaphor. Such a right has not been bestowed by statute. What has happened is that, since the Trade Disputes Act 1906, legislation has provided limited immunities from liability in tort. At times the immunities have been widened, at other times narrowed. Outside the scope of the immunities, the rigour of the common law applies in the form of breach of contract on the part of the strikers and the economic torts as regards the organisers and their union. Indeed, even now the conventional analysis at common law is that by going on strike employees commit repudiatory breaches of their contracts of employment… It helps to keep this history and conceptual framework in mind when construing and applying the details provisions of the statute.' (para 118)

17. Despite recognising that *'on any view, the ballot provisions are detailed and legalistic'* and that a union may, despite the best of intentions, easily fall foul of them, Maurice Kay LJ went on to agree with Lloyd LJ that, because the requirements are, individually, not especially difficult to comply with, any breach of them may justify the grant of an injunction restraining the strike action. Thus, for example, since the union *could*, as a matter of practicality, have obtained and communicated the result of the ballot to the employer more quickly than it did in that case, that was sufficient to breach the *'hard temporal burden'* under TULR(C)A, s231, to inform the employer of the result of the ballot as soon as reasonably practicable, and that in turn was sufficient by itself to justify the grant of an injunction, regardless of whether the delay had actually caused any prejudice or detriment to the employer (Metrobus, paras 73-83 *per* Lloyd LJ; paras 119-120 *per* Maurice Kay LJ). That approach would seem to reflect the traditional approach of beginning from the common law perspective that the strike action is unlawful and construing and applying the immunities narrowly and strictly.

18. By contrast, in both BA v Unite (No 2) and ASLEF v London Midland, a shift away from the traditional common law perspective may be detected. In BA v Unite (No 2), Smith LJ in

[2] P v National Association of Schoolmasters/Union of Women Teachers [2003] IRLR 307, HL, para 7 *per* Lord Bingham
[3] Westminster City Council v Unison [2001] ICR 1046, CA, para 79 *per* Buxton LJ

particular placed emphasis on the importance of union members having an *'effective right to withhold their labour'*[4] and stressed that it is *'important to recognise that [the statutory provisions] are not designed to prevent unions from organising strikes, or even to make it so difficult that it will be impracticable for them to do so'* (para 113). (Lord Neuberger MR, by contrast, adopted a more traditional tone, but was in the minority: see paras 72-74).

19. If Smith LJ's reasoning in BA v Unite (No 2) reflected an implicit change of emphasis, in RMT v Serco, Elias LJ made that change express:

    '… Mr Béar QC, counsel for the employers, submitted that since the unions were seeking to take advantage of an immunity, the legislation should be construed strictly against them… But I do not think that it is a sustainable argument today. The common law's focus on the protection of property and contractual rights is necessarily antithetical to any form of industrial action since the purpose of the action is to interfere with the employer' rights. The statutory immunities are simply the form which the law in this country takes to carve out the ability for unions to take lawful strike action. It is for Parliament to determine how the conflicting interests of employers and unions should be reconciled in the field of industrial relations. But if one starts from the premise that the legislation should be strictly construed against those seeking the benefit of the immunities, the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should always hold sway unless the legislation clearly dictates otherwise. I do not think this is now a legitimate approach, if it ever was. In my judgment the legislation should simply be construed in the normal way, without presumptions one way or the other. Indeed, as far as the 1992 Act is concerned, the starting point is that it should be given a "likely and workable construction"…' (para 9)

20. It is now clear, therefore, that although the underlying legal theory has not changed, the fact that protection for strike action under English law takes the form of statutory immunity from liability at common law should not affect the way in which those immunities are construed. In particular, there is no presumption that they are to be construed narrowly against the trade union seeking to take advantage of them, and at least equal weight is to be given to the importance to workers of having an effective right to withhold their labour.

21. However, it is one thing to say that there has been a shift in tone, emphasis and the underlying presumptions but it does not necessarily follow that that will translate into a meaningful and substantial change to the interpretation and application of the specific legislative requirements.

22. Whilst in their detail those requirements are characterised by *'inordinate complexity'*[5], in their basic structure, they fall into essentially three categories:

    (a) Substantive requirements, in particular that the industrial action must be in contemplation or furtherance of a trade dispute and that it is not secondary action (TULR(C)A, ss219 & 224);

    (b) Requirements to ensure the conduct of a fair ballot which provides a democratic mandate for the strike action (TULR(C)A, ss219(4), 226, 226B-230, 231B-232B);

[4] Para 109 and see also para 153

[5] British Airways plc v Unite (No 1) [2010] IRLR 423, QB, para 64 *per* Cox J

(c) Information and notification requirements to give notice in particular form of the ballot and industrial action and to provide defined information to the employer and to members about the ballot results (TULR(C)A, ss226A, 231-231A & 234A).

23. The recent Court of Appeal authorities do not consider the first of those categories, but do consider some specific provisions within the second two. To what extent, then, can a change in substance be detected alongside the change in emphasis identified above?

Conduct of the ballot: entitlement and opportunity to vote

24. One of the grounds on which Ramsey J originally granted an injunction in ASLEF v London Midland was that two workers were allowed to vote who ought not to have been. One was a driver who was in fact employed by a different company but had been mistakenly identified as an employee of London Midland within the union's records. The other was a driver who had been promoted to managerial rank but had not notified the union and the error had not been picked up.

25. Pursuant to TULR(C)A, s227(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 … in the industrial action in question, and to no others.'

26. Section 230(2) then provides that, so far as is reasonably practicable, every person who is entitled to vote in the ballot must be sent a voting paper by post and given a convenient opportunity to vote.

27. Pursuant to s232B, a failure to comply with either s227(1) or 230(2) (or s230(2B), which deals with merchant seamen and is not relevant here) shall be disregarded if it is 'accidental and on a scale which is unlikely to affect the result of the ballot'.

28. Ramsey J held that the union had given the two workers in question an entitlement to vote contrary to s227(1) and that the failure was not accidental for the purposes of s232B. He held that in order to be accidental the failure had to be unintentional and unavoidable and something which could not, with reasonable and practicable steps, have been ascertained. He held that the error was avoidable because if reasonable and practical steps for identifying the relevant employees had been adopted, the error would not have occurred.

29. The Court of Appeal held, firstly, that the judge had been wrong to categorise the error as falling within 227(1): the union had not given the two workers an *entitlement* to vote because it had no intention to afford such entitlement to people in their positions; what the union had done was mistakenly given those individuals an *opportunity* to vote under s230(2) to two individuals who had no entitlement to do so (ASLEF v London Midland, paras 48-53 *per* Elias LJ).

30. Secondly, the Court of Appeal held that the definition of 'accidental' which the judge had applied would emasculate s232B. By definition, where there has been a breach of s230(2) the union will have failed to do what is reasonably practicable to afford those entitled to vote an opportunity to do so and/or to prevent those not entitled from doing so. Therefore, to apply a definition of 'accidental' which required the error to be both unintentional and unavoidable would mean that such a failure could never be disregarded under s232B. By contrast, the Court of Appeal held that

s232B was designed to cater for precisely this kind of case, where the union believed it was balloting the correct group and the error was caused by *'human errors and failings'* (ASLEF v London Midland, para 56 *per* Elias LJ).

31. On this issue, the Court of Appeal's judgment is not, perhaps, particularly remarkable or significant in terms of a more general shift in the attitude and approach of the courts. The judge's construction of s232B plainly restricted its scope so far that it became meaningless and the Court of Appeal's correction of that error was conventional and not dependent on any underlying change in attitude or approach.

32. Indeed, in upholding the appeal on the facts of this case, Elias LJ affirmed the correctness of another recent first instance decision in British Airways Ltd v Unite (No 1) [2010] IRLR 423, QB. In that case, the union had balloted nearly 13,000 cabin crew, of whom it knew or ought to have known approximately 800 were shortly to leave on voluntary redundancy and so would not participate in any strike action because they would no longer be employed at the time of the proposed strike. It did not know their identities, but it would have been reasonable and practicable for the union to ask its members whether they were due to leave. However, Cox J expressly rejected the employer's contention that the inclusion of those members in the ballot was deliberate (para 51) and it is to be noted that the inclusion of those members had no material bearing on the result of the ballot (in which 9,514 of 10,286 valid votes were in favour of strike action). Nevertheless, Cox J held that the failure to exclude those members from the ballot could not be characterised as 'accidental' (para 78) and in the ASLEF case, Elias LJ expressed agreement with that conclusion (para 56).

33. Therefore, on this issue, it cannot sensibly be said that the particular result in ASLEF v London Midland signifies a real turn of the tide on the substantive application of the balloting requirements. It does establish a more sensible and workable construction of s232B than the one which Ramsey J had adopted, but it hardly represents a significant relaxation of the stringent requirements on unions. In particular, as the affirmation of the result in BA v Unite (No 1) indicates, even a non-deliberate error which has no material impact on the result of the ballot may still be sufficient to deprive the union of protection.

Information and notification: ballot and strike notification requirements

34. Pursuant to TULR(C)A, s226A, no later than the seventh day before the ballot is due to open, the union must take such steps as are reasonably necessary to provide the employer with a sample ballot paper and with notice of the ballot, including certain specified information about the employees whom the union reasonably believes will be entitled to vote (the 'employees concerned').

35. In Metrobus, there was a technical argument about the information that the union is required to provide where some employees pay their union subscriptions by 'check-off' and some do not. That technical issue is not of significance for the purposes of the themes under discussion in this paper and has now been resolved by the majority decision in Metrobus. The information about the employees concerned which the union must provide is as follows:

    (a) Where no employees pay their union subscriptions via 'check-off', the union must provide:

(i) Lists of the categories of worker to which the employees concerned belong and the workplaces at which they work (s226A(2A));

(ii) Figures of the total number of employees concerned, and the numbers in each category and at each workplace respectively (s226A(2B)); and

(iii) An explanation of how those figures were arrived at (s226A(2)(c)(i)).

(b) Where all employees pay their union subscriptions via 'check-off', the union has a choice of whether to provide the same information as above, or to provide such information as will enable the employer readily to deduce the total number of employees concerned, the relevant categories and workplaces and the numbers in each category and workplace respectively (s226A(2)(c)(ii) & (2C)). In such a case, it will often be simpler for the union merely to state that it proposes to ballot all employees, or all employees in particular categories and/or at particular workplaces, who pay subscriptions by 'check-off' and that will generally be sufficient to enable the employer readily to deduce the relevant information by reference to its payroll records.

(c) Where some employees pay their union subscriptions via 'check-off' and some do not, the union must provide all the information identified in (a) above, including the explanation, in respect of those who do not pay via 'check-off', and again has the same choice in respect of those who do (see Metrobus, para 94 *per* Lloyd LJ[6]).

36. Section 226(2D) requires that the information which the union provides must be as accurate as is reasonably practicable in light of the information in its possession at the time. Information in the union's possession is defined by subsection (2E) as being information in documentary (including electronic) form and in the possession or under the control of an officer[7] or employee of the union.

37. Section 234A imposes requirements on the union to give notice to the employer containing information about the employees who the union reasonably believes will be induced to take part in the industrial action which essentially mirror the requirements in relation to notification of the ballot[8].

38. In Metrobus, some of the employees concerned paid their subscriptions by 'check-off' and some did not. In respect of the 'check-off' employees, the union opted to provide information which enabled the employer to identify them. In respect of the non-check-off employees, the union provided information about the category, workplace and numbers, but did not provide any explanation of how those figures had been arrived at.

[6] Sir Mark Potter P agreed with Lloyd LJ (paras 126-128); Maurice Kay LJ dissented on this issue (paras 121-123).

[7] 'Officer 'includes any member of the governing body of the union and any trustee of any fund applicable for the purposes of the union and is different from 'official', which includes branch or elected representatives (TULR(C)A, s119).

[8] Although it should be noted that the 'affected employees' who will be induced to take part in the industrial action for the purposes of s234A may not be the same as the 'employees concerned' who are to be balloted for the purposes of s226A.

39. The Court of Appeal considered the scope of the explanation required under s226A(2)(c)(i) (and s234A(3)(a)(i)) and accepted that it was the least important of the information requirements and could be in *'fairly anodyne terms'* and *'formulaic'*, simply referring to having started with the union's membership records kept at the relevant level, together with a brief statement of what checking/updating had been done[9]. There was no suggestion that the actual figures given for non-check-off employees were incorrect or that the employer had actually been prejudiced by the absence of the *'anodyne'* and *'formulaic'* explanation required by the statute. Nevertheless, the majority (Lloyd LJ and Sir Mark Potter P[10]) held that the absence of such an explanation rendered the notices given to the employer deficient, removed the union's immunity from liability and justified the grant of an injunction.

40. Lloyd LJ considered what purpose the provision of such an explanation may service (if any), given that in order to comply with the statute it need only be *'in standard and not very informative terms'* (para 109). He suggested that it may enable the employer *'to understand something about the degree of reliability of the data supplied'* (para 110). However, it is difficult to see how an explanation in the form contemplated could do even that: the employer will have no means of assessing the reliability of the union's own records, or its methods of checking those records and so a *'formulaic'* explanation which merely references those matters will provide no meaningful indication of the degree of reliability of the data supplied.

41. Therefore, Metrobus certainly reflects the traditional strict construction and application of the statutory requirements: failure to comply strictly with one of them (the obligation to provide an explanation for how figures have been arrived at) will justify the grant of an injunction restraining the strike, regardless of the actual degree of prejudice (or lack thereof) caused to the employer. Do subsequent developments on this issue reflect any substantive shift away from this position?

42. In ASLEF v London Midland, the requirement to provide an explanation again arose for consideration. In that case, the union had provided an explanation in the following terms:

> 'The lists and figures accompanying this notice were arrived at by retrieving information from the union's membership database and workplaces of members and the numbers in and at each, the database having been audited and updated for the purpose of the statutory notification and balloting requirements to ensure accuracy.'

43. At first instance, the judge held that the purpose of the explanation was to enable the employer to assess the reliability of the figures and that this explanation failed to do so. On appeal, the employer submitted that the explanation should include who did what and when in terms of updating the records. The Court of Appeal rejected that submission and held that to require the union to state which particular officer obtained the information, on which particular day and by what particular means would provide nothing of assistance to the employer and would *'simply be to set traps or hurdles for the union which have no legitimate purpose or function'* (para 94 *per* Elias LJ).

[9] See para 93 *per* Lloyd LJ and para 124 *per* Maurice Kay LJ

[10] Maurice Kay's dissent was on the grounds that, properly construed, the statute did not require an explanation where some of the employees were 'check-off' employees, not on the ground that if an explanation was required it was nevertheless possible to disregard its absence if it caused no prejudice.

44. The Court held that the duty is not an onerous one, that the explanation may be in formulaic or standard terms and that the duty will be met by identifying the source(s) of data used, indicating whether they are national or local, and highlighting any known or perceived inaccuracies or deficiencies (paras 91-95 *per* Elias LJ and see also the *Code of Practice on Industrial Action Ballots and Notice to Employers* (2005), para 16). In this instance, the union's explanation met those standards.

45. That conclusion is consistent with the underlying approach of Elias LJ: the immunity is not to be construed so strictly that it sets pointless traps and hurdles for the union. But it cannot be said to represent any real departure: Elias LJ expressly relied on the dicta of Lloyd and Maurice Kay LJJ from Metrobus in support of his conclusion that the explanation may be in standard or formulaic terms. There is certainly not any suggestion that the consequence of a failure to provide an explanation in at least those terms should be re-visited. Nor could there be: Metrobus remains binding on that issue. That is so even though Elias LJ recognised that the limited explanation required by the statute is likely to be *'of limited benefit to the employer'* (ASLEF v London Midland, para 95 *per* Elias LJ). Nevertheless, failure to provide such an explanation will continue to justify the grant of an injunction restraining the strike action.

46. However, on two other issues relating to the information required in the ballot and strike notices, the substantive conclusions reached by the Court of Appeal in ASLEF v London Midland do perhaps reflect the shift in emphasis feeding through into the substantive conclusions:

    (a) The judge had also concluded that the explanation provided by the union was inaccurate in its own terms because it described the records as having be 'audited' for the purposes of the balloting notification and balloting requirements; whereas in fact what had occurred was a check of the records by the branch secretaries in addition to regular monthly checks and, the judge held, it was misleading to describe that as an 'audit'. Elias LJ accepted that the description was *'infelicitous'*, but held that was not sufficient to warrant taking *'the draconian step of invalidating the ballot, thereby rendering the strike unlawful'*. He held that the description of the process had to be *'positively and materially misleading before the explanation could be said to fall short of the statutory requirement'* and in this instance the judge had been too rigorous in his interpretation of the union's explanation (paras 103-104). Arguably, it is possible to detect in the reasoning of Elias LJ on this issue the influence of the underlying shift in emphasis: instead of construing the immunity strictly against the union, the implicit premise is that invalidating the ballot so as to render the strike unlawful is a *'draconian step'* which should only be taken if the statutory provisions clearly require it.

    (b) The judge had further found that the union was in breach of its obligation to provide figures that were as accurate as reasonably practicable (s226A(2D)). This finding was again based on the two members who had been wrongly included in the ballot (see paragraph 16 above). The judge held that, had proper systems been in place or further investigations made, the errors in relation to those two individuals could have been corrected and, consequently, the union had not provided figures that were as accurate as reasonably practicable. In the Court of Appeal, Elias LJ noted that the assumption underlying this conclusion is that s226A imposes an obligation on the union either to keep accurate records or alternatively to acquire further information if the information in its records is not accurate (para 58). However, there is no separate duty on a union to maintain records other than a register of its members' names and addresses and the assumption implicit in the judge's approach failed to give any weight to the

express limit on the duty to ensure accuracy under s226A(2D) *'in light of the information in the possession of the union at the time when it [gives the notice]'* (paras 59 &70). Accordingly, the Court of Appeal held that the judge had erred in his approach. This was something of a departure from earlier authority (albeit at first instance). In EDF Energy Powerlink Ltd v RMT [2010 IRLR 114, QB, Blake J held that the fact that the union does not have particular information in its possession will not necessarily be decisive in favour of concluding that it did not have a duty to obtain further information in order to provide it to the employer because otherwise that may provide an incentive for trade unions' record keeping to be minimal (para 18(7)). In ASLEF v London Midland, Elias LJ doubted the force of the suggestion that unions might be encouraged towards minimal record-keeping if they had no obligation to look beyond their existing records: unions do not generally conduct their affairs in contemplation of strike action and will generally want accurate and up-to-date records of where their members work and what jobs they do for the purposes of more common union activities representing their members individually and collectively (para 72 *per* Elias LJ). Again, therefore, it is arguably possible to detect in Elias LJ's conclusion on this issue the influence of his underlying shift in the emphasis of interpretation. In particular, he placed weight on the legislative history, which showed a general intention to relax earlier more stringent requirements on trade, unions and thus arrived at a construction which departed from that of Blake J in the EDF case and which, rather than reflecting an assumption that Parliament intended the immunity provided to trade unions to be as narrow as possible, reflected and more balanced approach to construction of the legislation.

47. Therefore, it is arguably possible to detect an influence of the change in emphasis on some of the substantive conclusions in ASLEF v London Midland, which have moved the law in a new direction compared with earlier (albeit first instance) authority. On the other hand, those conclusions can hardly be described as radical. If they do signal a substantive shift in direction, it is marginal rather than fundamental.

Information and notification: notification of ballot results to employer and members

48. An area in which the trend set by the two more recent cases (BA v Unite (No 2) and ASLEF v London Midland) may be of more substantive significance is the approach adopted in relation to the requirement to notify the employer and members of the outcome of the ballot.

49. TULR(C)A, s231 provides as follows:

> 'As soon as is reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed of the number of –
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> (a) votes cast in the ballot,
>
> (b) individuals answering "Yes" to the question, or, as the case may be, to each question,
>
> (c) individuals answering "No" to the question or, as the case may be, to each question, and
>
> (d) spoiled voting papers.'

50. Section 231A imposes a requirement in the same terms to inform the employer of the same information.

51. As already noted at paragraph 17 above, in Metrobus, an issue arose as to whether the union had complied with its duty to notify the employer of the ballot results *'as soon as is reasonably practicable'*. The relevant facts were that the ballot closed on 1 September 2008. The scrutineers who had conducted the ballot had the result at 12.36pm that day and faxed it to the union, but the fax was never received. No one within the union contacted the scrutineers to chase the results, but a copy was eventually received at the central office at about 3.15pm on 2 September and at the branch office by the regional organiser at about 3.30pm that day. The regional organiser then (in accordance with the union's rules) waited for the general secretary to give him authority to pass on the result of the ballot. Such authority was given in writing just before 5pm on 2 September, by which time the regional secretary and his secretary had left work for the day. He saw the authority at about 9.30am on 3 September and sent the relevant information to the employer shortly after 11am that morning. The strike was due to commence at 3am on 12 September, meaning that the employer had nearly 9 full days between receiving the result of the ballot and the strike. It was not suggested that the delay between 1 and 3 September in communicating the results of the ballot caused any detriment to the employer.

52. Nevertheless, the Court of Appeal held that the union had not communicated the result as soon as was reasonably practicable: the union could have done more to chase the result from the scrutineers and, in any event, having received that result at 3.15pm on 2 September it could then have sent it to the employer that evening (and the requirement under its own rules and procedures for the regional organiser to obtain authority from the general secretary did not constitute a valid reason for not so doing) (paras 80-83 *per* Lloyd LJ; para 120 *per* Maurice Kay LJ). In reaching the conclusion that the 'reasonably practicable' test is to be construed as imposing a *'hard temporal burden'*, the traditional perspective of the common law – approaching the construction of the statute from the starting point that the action is lawful and that the union wishes to take advantage of narrow statutory immunities – can be seen to have influenced the Court, in particular Maurice Kay LJ (see the passage from his judgment cited at para 8 above).

53. By contrast, a different approach – leading to a contrasting substantive conclusion – is apparent in the judgments of the majority of the Court of Appeal in BA v Unite (No 2), which was concerned with another aspect of the requirements to provide notification of the ballot result.

54. In BA v Unite (No 2) the issue was whether the union had done what was 'reasonably necessary' to ensure that its members who were entitled to vote had been informed of the four required pieces of information. The action which it took to disseminate the required information to its members included posting them on both its public access website and its members-only website for the relevant members (which the evidence indicated were regularly accessed by members), posting the results on the union noticeboards at the relevant workplaces and distributing hard copies in the form of local news sheets at the workplaces and union offices. In addition, the union also communicated the headline percentage results of the ballot via email and text message to those members who had signed up for those services, but did not include the four specific pieces of statutory information in those communications.

55. The Court of Appeal held that the requirement to take such steps as were *'reasonably necessary'* to inform members of the four pieces of statutory information imposed a lesser requirement than

necessity and one which enables the court to have regard to the practical realities. The question is whether the union has done what a reasonable and prudent union would do in the circumstances (paras 22-23 *per* Lord Judge CJ; paras 75-77 *per* Lord Neuberger MR[11]; paras 129-131 *per* Smith LJ). In a departure from earlier first instance authority[12], the majority (Lord Judge CJ and Smith LJ) held that this does not require active steps to be taken to provide an individual communication to each member provided that the information is readily accessible; where the workforce in question is known to be computer-literate and to have ready access to computers, there is no reason why they should not have to take a few simple steps at a keyboard in order to access a website to obtain the required information (paras 30-31 *per* Lord Judge CJ; paras 135-139 *per* Smith LJ).

56. The majority therefore held that, although it was clear the union *could* have done more – for instance, by including the four pieces of statutory information in the texts and emails which it sent to members – it had done *enough* to comply with the statute by making the required information readily available on its websites (paras 53 & 58 *per* Lord Judge CJ; paras 144-145 *per* Smith LJ).

57. It has already been noted (paragraph 18 above) that the reasoning of the majority, in particular of Smith LJ, showed a greater emphasis being placed on the importance of workers retaining an effective right to withhold their labour (see in particular paras 109-110 and 153 *per* Smith LJ). That emphasis is reflected in the result: rather than construing the requirement to 'ensure' that all relevant members were informed of the four pieces of information strictly, the majority applied a more pragmatic and flexible test which allowed the union a degree of latitude provided the essential purpose of the requirement – to make the required information about the ballot result readily available to members – was met. That may be contrasted with the more conventional approach of the minority member of the court, Lord Neuberger MR, who was *'of the view that in order for the projected strike ... to be lawful, the union must have strictly complied with the requirements of section 231 and that those provisions mean what they say'* (para 74), and who consequently reached the contrary conclusion to the majority.

58. Here, then, is an example of the change of emphasis feeding into the interpretation and application of the substantive statutory requirements. This does suggest a direction of travel away from Metrobus in substance as well as in emphasis.

59. Furthermore, in one respect the judgments of the majority in BA v Unite (No 2), in particular that of Smith LJ, may point towards one way in which the courts might, in future, develop a wider degree of flexibility for unions seeking to comply with the detailed and complex statutory balloting, information and notification requirements.

Possible future developments: *de minimis*, substantial compliance and Art 11 ECHR

60. In BA v Unite (No 2), Smith LJ considered, *obiter*, whether – if there had been a technical breach of section 231 – nevertheless a *de minimis* breach could be disregarded. It will be noted that the express statutory exception for small, accidental errors in TULR(C)A, s232B does not apply to the information and notification requirements including s231. Nevertheless, Smith LJ noted that it would be surprising if Parliament had been content to disregard small accidental errors in the

[11] Lord Neuberger dissented in the result and other parts of his reasoning, but on this central test, all three members of the Court of Appeal were in agreement.

[12] Network Rail Infrastructure Ltd v RMT [2010] EWHC 1084, QB, para 71 *per* Sharp J

(more important) balloting process and yet intended that similar infringements of the (less important) information and notification provisions should invalidate the ballot (para 151). She commented that *'the policy of this Part of the Act is not to create a series of traps or hurdles for the union to negotiate'* but *'to ensure fair dealing between employer and union and to ensure a fair, open and democratic ballot'* (para 152). Accordingly, Smith LJ held that, where there is an infringement which affects some aspect of those policy requirements, the ballot must be invalidated, but that a minor infringement *'which has had no adverse effect on anyone's rights or interests'* will not invalidate the ballot and, in such circumstances, *'substantial compliance'* by the union will be sufficient (para 153).

61. Lord Judge CJ was not as clear and did not go as far as Smith LJ, but some comments in his judgment reflect some of the same considerations referred to by Smith LJ (see in particular paras 25-26).

62. However, Smith LJ's *obiter* remarks were picked up – again *obiter* – by Elias LJ in ASLEF v London Midland (paras 79-87). He noted that there was authority that the defence of *de minimis* was available for immaterial and unintentional errors before the introduction of s232B (see RJB Mining (UK) Ltd v NUM [1997] IRLR 261, para 17 *per* Maurice Kay J). Like Smith LJ, he also noted that the balloting requirements dealing with the opportunity to vote – which are covered by the express provisions of s232B – are more fundamental than the information and notification requirements. It would be *'absurd'* and would largely emasculate the express statutory defence if a small, accidental failure to afford some members the opportunity to vote could be disregarded, but not the corresponding failure to include them in the ballot notice, even though both mistakes would stem from the same basic error. Therefore, Elias LJ held that the *de minimis* defence remains available in respect of immaterial and accidental breaches of the information and notification requirements, as well as in respect of the balloting requirements that are expressly covered by s232B.

63. Interestingly, Elias LJ also commented that the *'concept of substantial compliance'*, to which Smith LJ had referred in BA v Unite (No 2), may be *'wider in scope'* than the *de minimis* principle and may *'rest on assumed Parliamentary intention'* (ASLEF v London Midland, para 87). The Court of Appeal had heard no argument on the issue in that case and Elias LJ did not explore it further and was content simply to confirm that *'the doctrine of de minimis at least is available to the union'*. However, Elias LJ's reflection that the 'substantial compliance' concept might be wider in scope than the *de minimis* principle may be an important pointer to future developments.

64. The *'assumed Parliamentary intention'* upon which Smith LJ based her concept of 'substantial compliance' was, as already noted, that *'the policy of this Part of the Act is not to create a series of traps or hurdles for the union to negotiate'* but *'to ensure fair dealing between employer and union and to ensure a fair, open and democratic ballot'*. Furthermore, the 'substantial compliance' concept which she described was based on the contrast between an infringement which *'affects some aspect of those important policy requirements'* – which will invalidate the ballot – and a *'minor infringement which has had no adverse effect on anyone's rights or interests'*.

65. Therefore, it does appear – as recognised by Elias LJ in ASLEF v London Midland – that the concept of 'substantial compliance' developed by Smith LJ in BA v Unite (No 2) is wider than

the doctrine of *de minimis*. Rather than being based simply on the fact that an error is minor and inconsequential, the 'substantial compliance' doctrine is based, at least in part, on a contrast between those errors which actually affect the rights and interests and others or undermine the policy requirements of the statute and those which do not. This does suggest that there may be 'substantial compliance' in Smith LJ's terms even where the breach is more significant than the conventional *de minimis* doctrine would allow – provided it is *relatively* minor and does not have an adverse effect on the rights and interests of others which it is the policy of the statute to protect.

66. It will be apparent that, if that is what the concept of 'substantial compliance' means, the approach shares important characteristics with the balancing exercise that the courts carry out when assessing whether a restriction on the right to freedom of association under ECHR, Art 11(1) is justified under Art 11(2) – i.e. an assessment is carried out as to whether the restriction is proportionate and necessary for the protection of the rights and freedoms of others.

67. In Metrobus, the Court of Appeal considered whether the right to strike is an essential element of the right to freedom of association under Art 11(1) and whether the detailed balloting, information and notification requirements under TULR(C)A infringe any such right. Lloyd LJ reviewed much of the case law of the ECtHR on the issue and concluded that, although the right to strike is *an* important means by which the state may enable trade unions to carry out the essential right to take action to protect their members' interests and there may be a movement in the direction of recognising the right to strike as an essential aspect of Art 11(1), it would not yet be *'prudent to proceed on the basis that ... the court's case law [has developed] by the discrete further stage of recognising a right to take industrial action as an essential element in the rights afforded by article 11'* (para 35).

68. Nevertheless, Lloyd LJ went on to consider whether the requirements in TULR(C)A would be justified under Art 11(2) *as if* the right to strike were guaranteed under Art 11(1) (see paras 37 & 101). What is striking about Lloyd LJ's analysis in that regard is that there is very little, if any, consideration of proportionality and the *balance* between the scope of the restrictions and the interests which they are designed to protect: the focus is on the fact that, in Lloyd LJ's view, the requirements are ones with which it is practicable and not particularly onerous for trade unions to comply (see paras 105-113). On that basis, Lloyd LJ held that the requirements of TULR(C)A generally (or at least those with which the court was concerned in Metrobus) are justified under Art 11(2) (even assuming that the right to strike is guaranteed under Art 11(1)).

69. But in the course of this paper, a number of instances have been identified where the statutory requirements have been (and would, notwithstanding the change of emphasis under discussion, continue to be) applied so strictly that they have removed the union's immunity from liability – and hence the right to strike – even where there is no discernible prejudice to any other party. For example:

   (a) In Metrobus, avoidable delay in informing the employer of the results of the ballot rendered the strike unlawful even though there was no suggestion of prejudice or detriment to the employer as a result (see paragraphs 17 and 51-52 above). That continues to be the position as a matter of domestic law.

   (b) In British Airways v Unite (No 1), inclusion in the ballot of a number of members whom the union should have known were due to leave before the strike took place breached the

requirement to ensure, so far as reasonably practicable, that only those entitled to vote were afforded the opportunity to do so – even though the numbers in question were mathematically insignificant in terms of the numbers who voted and the result (see paragraphs 30-31 above). Again, the same result would still follow: ASLEF v London Midland, para 56 *per* Elias LJ).

(c) Breach of the requirement to provide an explanation of how the figures for non-check-off members provided in the ballot and strike notices were arrived at will continue to render the strike unlawful, even though the courts expressly recognise that the required explanation is likely to be of little practical benefit to the employer (see paragraphs 39-40 and 45 above).

(d) Finally, although on the facts of BA v Unite (No 2) the union had complied with its duty to take such steps as were reasonably practicable to notify the relevant members of the ballot results, the Court of Appeal noted (with some disquiet) that breach of that obligation would render the strike unlawful and entitle the employer to an injunction, *even though* the provision in question is designed to protect the workers' interests and not those of the employer and *even though* there was no complaint by any worker, nor any evidence of any prejudice to any worker (see BA v Unite (No 2), paras 20 & 62 *per* Lord Judge CJ; para 103 *per* Lord Neuberger MR).

70. Arguably, therefore, Lloyd LJ's conclusion in Metrobus that the current statutory regime is compliant with Art 11 fails to take account of the fact that, in the way the requirements have conventionally been strictly interpreted and applied, it has failed to allow for a genuine balancing of interests in an individual case in order to assess (as is required under Art 11(2)) whether the *particular* restriction is proportionate in order to protect the rights and freedoms of others (usually the employer) *in that case*.

71. For the moment, Metrobus remains binding on the Art 11 issues (see ASLEF v London Midland, para 8 *per* Elias LJ). However, an application is pending before the ECtHR in RMT v UK[13] in which the Court will be expressly asked to consider, firstly, whether the right to strike is an essential element of the rights guaranteed under Art 11(1) and, secondly, whether the current statutory regime under TULR(C)A is compatible, or whether the restrictions which it imposes are not proportionate under Art 11(2). The specific issues relate to the ballot notice requirements in TULR(C)A, s226A and also to the absolute prohibition on secondary action.

72. Depending on the outcome in that application to the ECtHR, therefore, it is possible that the domestic courts may be required to revisit the decision on Art 11 in Metrobus. If the ECtHR should rule in favour of the RMT, thus necessitating a more flexible approach than has conventionally been adopted when applying the requirements of TULR(C)A, then it may be that the concept of 'substantial compliance' as discussed above could provide the vehicle by which the courts may achieve a more nuanced and flexible balancing of relevant interests in individual cases.

73. In any event, it may be that that is the direction in which the courts are moving: without expressly departing from Metrobus, the Court of Appeal in both BA v Unite (No 2) and ASLEF v London Midland has adopted something of the Art 11 approach by placing specific weight on the right to

[13] In part this application arises from the judgment of the High Court in EDF Energy Powerlink Ltd v RMT [2010] IRLR 114 – although query whether this would now be decided the same way in any event, following ASLEF v London Midland (see paragraph 38(b) above).

strike as a key relevant factor when construing and applying the specific requirements under TULR(C)A, and by seeking to weigh that against the underlying policy intentions of the relevant statutory requirements.

Conclusions

74. It would be premature to conclude that there has been a meaningful and permanent change of direction in the approach to construing and applying the balloting, information and notification provisions under TULR(C)A. As the law currently stands, Metrobus remains binding to the effect that those requirements are compliant with Art 11. And the conventional approach – that any breach which is not *de minimis* will render the strike unlawful and entitle the employer to obtain an injunction, even if the breach does not cause any detriment or prejudice to the employer – still holds sway.

75. However, the reasoning and results in BA v Unite (No 2) and ASLEF v London Midland do at least signal a change in emphasis, and it is possible that they may have a more substantive significance. In particular, if the courts were to develop further the 'substantial compliance' principle described by Smith LJ in BA v Unite (No 2), that could lead to a significantly more flexible approach in the future.

76. The pending application before the ECtHR in RMT v UK may provide further impetus for such a development – the Court's judgment in that application (when it eventually arrives) is likely to be critical to the future direction of the domestic jurisprudence as well as potentially addressing, at the European level, the question of whether the right to strike is indeed an essential element of the rights guaranteed by Art 11.

77. For the present, however, it will still be in employers' interests closely to scrutinise the union's compliance at each stage of the process and it remains essential for unions to follow the requirements closely: substantial breaches (regardless of the degree of actual prejudice caused) will continue for the moment to provide grounds for employers to obtain injunctive relief.

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October 2011

(Part of this lecture was given and contributed to by Ben Cooper OSC September 2011)