Autumn of discontent

Andrew Burns asks whether the courts will be able to stop public sector workers going on a general strike in protest at government cuts

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The news in 2010 was often dominated by strikes across parts of the transport industry. Cabin crew opposed cuts by British Airways during the global downturn, the RMT union called for action on the London Underground and various railways, while tanker drivers threatened action over terms and conditions. As the autumn and winter of 2011 approaches, the political agenda is topped by cuts to public services and pensions and the resulting threat of industrial action by civil servants and other public sector workers. A day of action has already been taken by some teachers and Public and Commercial Services union members, but there is now talk of coordinating a form of general strike across the public sector in protest against the government's policy.

Legal background

The approach of both employers and unions in recent years has been to call on their lawyers at an early stage of an industrial dispute. A union's call for employees to strike (therefore breaching their contracts of employment) is an actionable tort, but a trade union can seek protection from a damages claim under the provisions of Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). Essentially, the price of protection, of exercising what the unions say is a fundamental human right to strike, is compliance with a balloting and notification procedure to ensure that the strike is backed by a properly democratic vote among union members and proper advance notice to the employer so that it can make preparations. However, the statutory provisions governing a ballot are complex and detailed, and have been amended over the years so that Part V of TULRCA could be described as a minefield for the unwary.

For this reason, and particularly since the Court of Appeal's decision in *Metrobus v Unite* [2010], employers have turned to their lawyers to scrutinise all the steps that the union takes in calling and running the ballot, in particular putting the union's ballot and strike notices under the legal microscope. Metrobus held that the requirements of Part V are proportionate and compliant with the European Convention on Human Rights, reflecting the fact that the legislation is not only about ensuring democracy within unions, but also about protecting employers' rights. A union gains immunity from committing torts if it can satisfy the democratic requirements set out in TULRCA.

The first part of this 'golden formula' is that, to be protected under TULRCA, the action must be 'in furtherance of a trade dispute'. Employers have brought relatively few recent challenges on this basis because of the width of the definition of 'in furtherance of a trade dispute', but, as David Gallagher and Peter Holt argue in their article on p4, this may be about to change. Such a dispute must be with the employer and is normally over terms and conditions (or a matter related to the workers' employment). A trade dispute cannot be over government policy or political policies (unless it is predominately a dispute over government-imposed terms of employment). A general strike opposing public sector cuts on a more general political basis would be in danger of falling outside the protection of TULRCA.

Recent case law

The courts have been kept busy analysing whether the unions have complied strictly with the statutory balloting and notice requirements. TULRCA only gives the union protection where it has complied with these requirements, and so it has been a rich seam for employers to mine to expose deficiencies in the notices served or the ballots held. Unions must not ballot members who will not be called out on strike, but they are permitted any small and accidental failures. The memorable '12 days of Christmas' strike called by British Airways cabin crew was halted by Cox J, who noted that the union had deliberately balloted hundreds of employees whom it knew were leaving BA before the strike got underway (*British Airways plc v Unite the Union* [2009]). Blake J stopped a strike intended to close the London Underground because the list of workers provided was categorised by the union in an unhelpfully broad way, even though it had given more specific categories in an earlier strike (*EDF Energy Powerlink Ltd v National Union of Rail Maritime and Transport Workers* [2009]). He found that the categories form part of the information required to be notified and therefore fall within the overall requirement to be as accurate as reasonably practicable in the light of information held by the union. Employers started obtaining anti-strike injunctions based on ever-more technical and insubstantial breaches of the detailed sub-sections of TULRCA. It seemed to some as if any breach would be enough to stop a strike, and the unions cried foul saying that their members' 'right to strike' was being infringed by the technicalities of the legislation.

The tide turns

However, the tide has seemed to turn recently in the two latest Court of Appeal cases. The first concerned an injunction obtained by British Airways based on the union's failure to send details of the results of the ballot to its members after an overwhelming vote in favour of a strike. The Court of Appeal (by a majority) in *British Airways plc v Unite the Union* [2010] said that the judge had gone too far, pointing out that there had been no democratic deficit in the ballot and the employer had not been prejudiced. It was permissible for the union to post its ballot results on the internet. Lord Judge LCJ took the stance that TULRCA did not require strict compliance by the union showing that it had actively informed all its members; it was sufficient to comply by passively expecting members to find information readily available on the website. This was seen by some commentators as a relaxation of the strict approach to TULRCA's requirements, with a new emphasis on the merits behind the breaches of the legislative scheme.

Then, in *National Union of Rail, Maritime & Transport Workers v Serco Ltd (t/a Serco Docklands)* [2011], the Court of Appeal went further, suggesting that minimal failures alone were not enough to stop strikes and that the duty on the union to provide information in its statutory notices was not an onerous one. The union could rely on its membership database even if it contained errors and only needed to give general job categories to the employer in its notices. Permission to appeal was granted but the cases settled before getting to the Supreme Court.

The Court of Appeal's ruling (the leading judgment given by Elias LJ) may encourage unions to give a very limited explanation of how the figures in ballot and strike notices are arrived at, since the court approved the finding in Metrobus that explanations provided in 'not very informative', 'formulaic or anodyne' terms will still comply with TULRCA. It will be difficult to obtain injunctions if the union has been merely negligent or inaccurate, but, as the court emphasised, a union cannot give 'positively misleading' information in the statutory notices. However, unions may allow their databases to become out of date, as Elias LJ held that the obligation to ballot accurately is governed by what is reasonably practicable, so that there is no duty on a union to ensure its database information is reasonably accurate or up to date as long as it is not misleading. Certainly, one future battleground for trade dispute injunction applications will be over whether any error is *de minimis* and whether the union has substantially complied with the statute, particularly in the light of Elias LJ's refusal to construe the gateways in Part V of TULRCA strictly and in the light of his observations on the 'right to strike'.

A shift in emphasis

The legal landscape now seems to be one in which an employer facing a strike should not turn quickly to the courts on a 'mere technicality'. Lawyers will be looking at strike notices this autumn to see whether the unions have committed some serious failure or done something that undermines the democratic validity of the ballot. They will also want see if a union is trying to lead the employer astray when it provides information about who is likely to be on strike. The emphasis of legal advice may switch more to coping strategies for employers: what can be lawfully done to dissuade workers from joining the strike or to reorganise things to minimise the strike's impact? The shift from decisions based on technicalities to resorting to legal action only where there are failures of substance is perhaps one to be welcomed on both sides of the industrial divide. ■

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British Airways plc v Unite the Union
[2009] EWHC 3541 (QB);
[2010] EWCA Civ 669

EDF Energy Powerlink Ltd v National Union of Rail Maritime and Transport Workers
[2009] EWHC 2852

Metrobus v Unite the Union
[2009] EWCA Civ 829

National Union of Rail, Maritime & Transport Workers v Serco Ltd (t/a Serco Docklands)
[2011] EWCA Civ 226