By Bruce Carr QC
12th February 2016

# Will the Trade Union Bill help or hinder industrial relations?

With the Trade Union Bill at the select committee stage in the House of Lords and the government facing a major industrial relations problem as it seeks to impose contractual changes on junior doctors, it is a good time at which to consider what impact the proposed trade union legislation will have on relationships between employers, employees and those who represent them.

The Bill has been described in trade union circles as an exercise in 'settling old scores'. That perception is perhaps understandable given the far reaching range of measures proposed. The Bill covers a number of diverse aspects from strike ballots to picketing to union funding to the role of the Certification Officer. It is not an unreasonable observation that the Bill contains nothing at all that can be viewed as positive from the perspective of those sitting in Congress House, home of the TUC. And all this arises against the background of an extended period of historically low levels of industrial action, even after nearly six years of austerity and much anguish within the ranks of, in particular, public sector workers following an extended period of significant pay restraint. In its briefing on the Bill for its second reading in the House of Commons, Liberty stated that:

> *"…this relatively short Bill has the potential to cause significant damage to fair and effective industrial relations in this country and would set a dangerous precedent for the wider curtailment of freedom of assembly and association."*

When one looks at the collective effects of the legislation, it is understandable that Liberty should have reached this conclusion.

### Changes to balloting and notification

Consider first the changes to industrial action balloting – if a trade union wishes to avoid being sued for inducing a breach of contract by calling industrial action, there will have to be 50% turn-out of voters (clause 2, Trade Union Bill 2015/6) and a total of 40% of the electorate voting in favour of the action (clause 3) where the action relates to "important public services". However, the government has thus far refused – apparently for reasons

relating to security - to take steps aimed at increasing the turnout by allowing the ballot to be conducted with the use of electronic voting. This despite the fact that the balloting process (at least in relation to any ballot of over 50 members) is overseen by an independent scrutineer who is required under existing legislation to certify, amongst other things:

> *"that the arrangements made with respect to the production, storage, distribution, return or other handling of the voting papers used in the ballot, and the arrangements for the counting of votes, included all such security arrangements as were reasonably practicable for the purpose of minimising the risk that any unfairness or malpractice might occur" (section 231(1)(b) TULRA 1992)*

The government has suggested that the threshold/turn out requirements contained in the Bill are justified as a means of ensuring an effective democratic process is undertaken prior to any industrial action. But if the trade unions are correct that electronic voting would increase voter turnout, what could be the objection to it, assuming that any security concerns about the process could be met? Surely this would have the effect of extending the democratic process within the ranks of union members? In the foreword to "Secure Voting – A Guide to secure online voting in elections", the Conservative MP and Chair of the All-Party Parliamentary Group on Democratic Participation, Chloe Smith, eloquently make the case for electronic voting as follows:

> *"We shop, we bank, we date, we chat, we organise with ease [on line]. However, we vote entirely on paper. It's alien to young people, and indeed anyone who appreciates the capability of the internet. It's also ineffective: we communicate online with people all the time but we lack the final "one-click" to clinch the deal in democracy when the time comes."*

That reasoning would appear to be as applicable to voting in industrial action ballots as it is to voting in Parliamentary elections.

It is also proposed that union members – and the employer – be provided with a ballot paper which sets out what form the industrial action is intended to take and when it is to take place (Clause 4). On the basis that the ballot lasts an average of 3 weeks and the ballot paper is provided at least 3 days in advance of the opening day of the ballot, coupled with the new requirement that 14 days' notice is given of any industrial action (clause 7), the employer will have a minimum of roughly 5 ½ weeks in which to prepare for what is to come. In addition, it may soon be the case that the employer will no longer be prevented from bringing in agency workers to cover the consequences of the industrial action. (This issue has been the subject of consultation but the government has yet to confirm what its intentions are in relation to it.) All of this will of course mean that the possibility of strike action no longer carries anything like the threat that it once did and the balance of power in industrial relations terms is therefore significantly shifted in the direction of the employer.

**Compressed timetable for strike action**

Under the Bill, any action will need to be completed within 4 months of the date of the ballot, leaving the union with just 3 ½ months in which to take action, following which it will be required to re-ballot (clause 8). For a number of reasons, this is likely to have an adverse effect on industrial relations. First, a union, in order to allow itself the maximum room to manoeuvre in relation to proposed industrial action, will have to set its sights as high as possible and identify the extremities of what it plans to do and when. Having done so in the ballot paper, it will then be loath to shift its position for fear that the employer will take legal action on the basis of inaccurate information having been provided at the time of the ballot, and/or on the basis that the particular action no longer has the support of the ballot.

Second, faced with having to complete any industrial action within the effective period of 3 ½ months (allowing for 2 weeks' notice to be given to the employer), the union is likely to take the view that it should do as much as it can by way of strike action in advance of any re-ballot. Irrespective of the sensitivities of the industrial position, action would take place within the prescribed period where it might not have done had the window of opportunity not been closing. The fact that the union will have to re-ballot – with its attendant costs - if the dispute is not settled will mean that the union will want to maximise its leverage during the period of validity of the first ballot. Conversely, an employer watching the sands of time running out for the union in relation to its first ballot, may well take the view that it will delay, prevaricate or not shift its position, knowing that the union will be forced as a matter of statute to go back to its members after 4 months from the date of the first ballot. From the perspectives of both employer and unions, the industrial strife may not be resolved and may in fact be worsened as a consequence of requiring everything to take place within the prescribed period.

It is also likely to be the case that the requirement to provide a "reasonably detailed indication of the matter or matters in issue in the trade dispute" (clause 4) will prove to be yet another area for litigation as employers seek to argue that the description is either inaccurate or lacks clarity. Furthermore, if during the course of the dispute, one or more of the "matters in issue" is resolved, no doubt employers will seek to argue that the ballot mandate no longer has validity, leading in turn to litigation and/or yet more re-balloting.

**Lessons from the Junior Doctors' dispute**

The current junior doctors' dispute provides a useful template to illustrate of what might happen in the future. The ballot result was announced on 19 November 2015, with 98% voting for strike action based on a high turnout of 76%. A four month time limit would expire on 18 March 2016. There would be no incentive for the union to sit down and negotiate rather than take planned action knowing that as each strike day is cancelled, its opportunities for further action will be fast disappearing.

If having conducted some negotiations, it decided to add new dates in substitution for the originally planned dates, it would face the argument that the membership had not voted for this. Equally, employers would be able to comfort themselves with the knowledge that the mandate was soon to expire and the union forced to incur the significant expense of re-balloting its 37,000 junior doctors. Could it seriously be said that the 98% voting in favour of

the action in November 2015 could not be regarded as a proper mandate for action beyond that date if, as appears likely to be the case, the dispute is not settled before 18 March? Were the proposed legislation in place, the BMA would already have to be making preparations for a further ballot of its members.

**Changes to check off arrangements**

Any union operating in the public sector will also be facing the additional prospect of re-balloting in circumstances in which its funding has suffered a steep reduction as clause 14 of the Bill seeks to prevent any employers operating within the public sector from making deductions from salary for trade union subscriptions, irrespective of the wishes of the employer.

**Picketing**

There are new measures to be introduced in relation to picketing which will result in further costs and administration for unions. They will be required in relation to every location at which picketing is to take place, to provide a "picket supervisor", complete with badge or arm-band, who must be "familiar with any provisions of a Code of Practice issued under section 203 TULRA 1992 that deal with picketing". Again, using the doctors' strike as an example, this will mean that the union has to provide many hundreds of suitably qualified and 'badged' supervisors.

**Industrial consequences**

All of this, it seems to me, is likely to cause trade unions to look to alternative mechanisms in order to advance their case industrially. The Bill does nothing (and could not in any event do anything that would impact on the rights of freedom and expression and association contained within Articles 10 and 11 of the European Convention) about "leverage" campaigns which were at the centre of the rationale for the Review to which I was appointed in 2014. Such campaigns may involve the use of tactics outside the traditional model of industrial action and may include protests, lobbying of third parties in the supply line and forms of direct action involving managers or shareholders.

The irony of the present Bill is that if anything, it is likely to increase the use of leverage campaigns as unions seek to avoid what they see as the unfairness of a collection of measures which erode both the lawfulness and the impact of strike action as well as draining off substantial amounts of income through the changes to check off arrangements (at least in the public sector).

**Wider implications for trade unions and the Labour Party**

The sense of unfairness that pervades the union movement in relation to the current Bill will be reinforced by the concern that the prospects of a change of government at the next election will be reduced should clause 10 of the Bill become law. Under this provision, union members will be required to 'opt in' to making contributions to a union's political fund. The

view of the Electoral Reform Society is that “only a small minority are likely to ‘opt in’.” (As set out in their Briefing to the House of Lords Select Committee).

Their view is also that this could result in an annual reduction of £6 million in the Labour Party’s income. Whilst the authors of the Bill may have had the intention of simply modernising current arrangements and improving union democracy and accountability, the fact that the Labour party faces the prospect of such drastic financial consequences as a result of what is proposed, will serve to reinforce the union view that it is intended to be something more. The BBC Parliamentary Correspondent, Mark D’Arcy has recently made this observation:

> *“The bottom line is that for Labour the loss of millions of pounds in political funding as a result of the changes proposed in this bill could destroy its ability to compete with the Conservative Party; so whatever the rights and wrongs of opting into, rather than out of, a political levy, this will be a bare-knuckle battle for very high stakes.”*

The ‘bare knuckle fight’ is likely to be an industrial, as well as a political one. Based on the figures contained in the government’s own impact assessment, the TUC has estimated that the costs to trade unions as a result of the measures in the Bill will amount to £26 million over 5 years, not including any costs incurred as a result of the 4 month re-balloting requirement and not including an up-front implementation cost of £11million.

It should therefore come as no surprise that the fight in future may be carried on outside the framework of the 1992 Act. ‘Leverage’ may prove to be a more efficient and cost-effective way of advancing industrial disputes than going through balloting processes which may of themselves, serve only to worsen relationships between workers and employers as set out above.

The article also appeared on Jolyon Maugham QC’s blog waitingfortax.com.

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