

British Airways plc v Unite the Union

Alice Carse examines the Court of Appeal decision, which upheld Unite's appeal against British Airways' injunction restraining the union from taking industrial action

Background

S.231 of the Trade Union and Labour Relations Consolidation Act 1992 provides that '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 total number of votes and the number of yes, no votes and spoilt ballots.

Unite informed its members of the result of the ballot for strike action in text messages and emails containing percentages of votes cast. The s.231 TULRCA-compliant information was posted on Unite's website, its notice boards in onsite offices and it was published in news sheets.

British Airways obtained an injunction restraining Unite from taking industrial action on the basis that the union failed to comply with the s.231 TULRCA requirements; in particular, that in its personal communication to members by email and text message it failed to inform its members of the number of spoilt ballots.

The Court of Appeal's decision

The majority of the Court of Appeal upheld Unite's appeal. It held that compliance with s.231 TULRCA does not require personal communication with every member. Parliament intended, when it enacted s.231 TULRCA, that unions disseminate information so that members can access it if they want to. In this case Unite knew that cabin crew were computer literate, used its website often and had internet access at the start of every shift. Further, its notice boards were adjacent to BA's notice boards carrying notices to cabin crew. This was sufficient to constitute compliance.

The Master of the Rolls, Lord Neuberger, in the minority, took a different approach. His Lordship, dismissing Unite's appeal, considered that the text messages and emails sent to members containing the percentage result, in addition to the media coverage, would have discouraged members from visiting the website to find out the s.231 TULRCA-compliant information. The reasonable and prudent union would have complied with the strict requirements of s.231 TULRCA by including this information in text messages and emails sent to members.

In upholding the appeal, Smith LJ found that Unite took the steps that a reasonable and prudent trade union would consider necessary in the circumstances to inform its

members of the result of the ballot. The Lord Chief Justice, Lord Judge, emphasised that courts must be aware of the realities facing unions communicating ballot results and his Lordship was satisfied that Unite had taken a sensible and practical approach to compliance with s.231 TULRCA.

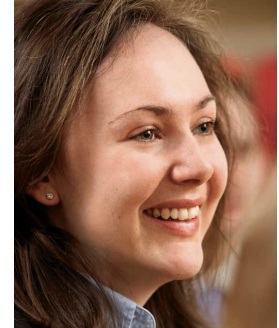
The majority drew a distinction between the s.231 TULRCA requirement to provide information on the result of a ballot and the provisions relating to the conduct of the ballot, also in Part V TULRCA. These provisions, which are phrased in mandatory terms, impose requirements on the conduct of a ballot. Failure by a union to comply with these requirements means that industrial action taken on the basis of such a ballot will not enjoy protection from tortious liabilities under s.219 TULRCA.

S.232B TULRCA however, provides that small accidental failures in the conduct of the ballot shall be disregarded. Not only is s.231 TULRCA not phrased in mandatory terms, it has no corresponding accidental failures provision. In the light of this contrast, Lord Judge CJ found that the requirements of s.231 TULRCA were less than absolute and Smith LJ agreed that s.231 TULRCA, which applies after the ballot has been held, was not a strict requirement.

Some 9,000 votes had been cast in the ballot, 11 of which were spoilt. Lord Judge CJ doubted whether s.231 TULRCA was intended to deal with situations where a union fails to inform its members of a tiny amount of spoilt ballots. Smith LJ also doubted, in the light of the non-mandatory nature of the requirements, whether a minor infringement of these requirements would invalidate the ballot.

Implications

The majority's decision was one which was based on the practicalities of Unite's situation. Smith LJ stated that Unite's own experience was that its website was the most efficient way of communicating with its members. This approach to compliance with s.231 TULRCA is not prescriptive and is one which gives weight to an union's judgment as to how to communicate with members. The most appropriate method of communication, based on the experience of an union, is likely to be that which courts will consider sufficient for compliance in future cases.



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In this case, as stated above, the failure to inform related to 11 spoilt ballots out of 9,000 cast and the majority noted that it was a tiny number that had no impact on the result of the ballot. This can be read, although it is unclear whether the majority intended it to be so, as an indication that should the result of a ballot be a small majority in support of or against taking industrial action and the number of spoilt ballots, had they been votes for or against, could have made a difference to the outcome, the requirement to inform members of the result could be more strict. For example, text messages could contain the s.231 TULRCA-compliant information. In such circumstances unions would be advised to error on the side of caution when informing their members of the result of the ballot.

It is worth considering whether this decision marks a move away from the strict approach to compliance with the requirements of Part V TULRCA, which has been seen in recent cases; in particular, the '12 days of Christmas strike' when BA obtained an injunction against Unite on the basis that it had balloted members who would not be employed by BA when the strike was called, even though the ballot was overwhelmingly in favour of strike action (*British Airways plc v Unite the Union* [2009]).

There are two reasons why any such assertion should be made cautiously. First, the majority clearly drew a distinction between the requirements of the balloting procedures and the steps taken to inform members of the outcome of a ballot. Smith LJ considered that the balloting requirements were at the heart of the provisions in Part V TULRCA, in contrast to s.231 TULRCA. There was no indication whatsoever that a less strict approach to the balloting requirements should be adopted. Secondly, Smith LJ and Lord Judge CJ noted that BA's injunction based on Unite's alleged non-compliance was brought on the basis of provisions intended to provide protection to union members, his Lordship stating that he saw this as a considerable irony, particularly when none of Unite's members had complained about a lack of information on the outcome of the ballot. Although an employer may obtain an injunction for failure to comply, the primary purpose of the provision is to protect members.

These two reasons demonstrate that the majority approach cannot be read as an indication that a less strict approach to Part V TULRCA as a whole is the one courts will take in the future. Strict requirements will persist in relation to the balloting procedures.

With regard to informing members of the result of the ballot, a union's method of doing so in order to comply with s.231 TULRCA, which must be based on its own experience of communicating with members, means that should a union choose to inform members of the result of a ballot in a way which it knows will not be efficient or practically effective – for example, where there is a small majority in favour of industrial action and a large number of spoilt ballots – it is unlikely to have complied and the employer may be able to obtain an injunction. This would be consistent with the aim of protecting the interests of members.

Unions should not take this decision as marking a move away from a strict approach to compliance, particularly with balloting procedures, and should continue to take every precaution to ensure they have complied.

It should be noted that the Court of Appeal did not address the human rights arguments made to them. Smith LJ concluded by referring to the right of workers to withdraw their labour in industrial disputes but did not refer to it as a human right or base it on Article 11 European Convention on Human Rights, as contended for by Unite.

The Court of Appeal's decision deliberately stops short of considering whether Part V TULRCA is a disproportionate interference with any human right to strike. It upholds what Smith LJ referred to as the democratic will of union members without recourse to European human rights law and on the basis of the provisions of Part V TULRCA.

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Cases referred to:

British Airways plc v Unite the Union [2009] EWHC 3541

British Airways plc v Unite the Union [2010] All ER (D) 189 (May)