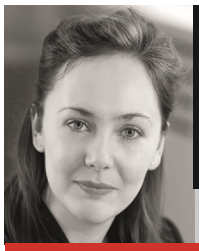

Balloting: what amounts to interference?

ALICE CARSE, Devereux Chambers

In Royal Mail, the Court of Appeal held that creating a de facto workplace ballot was an unlawful interference with the statutory requirement that a ballot be conducted by post.

In September and October 2019, the Communication Workers' Union balloted its members for industrial action in respect of proposed changes to terms and conditions and the closure of a pension scheme by their employer, Royal Mail Group Ltd. The turnout was 76%, with more than 90% of the votes being in favour of industrial action.

The members, as postal workers, were able to intercept and take their own mail directly from the sorting frames at local delivery offices. There was, Males LJ accepted, 'ample evidence' to show that, during the conduct of the ballot, CWU had devised and implemented a plan pursuant to which it told its members to intercept ballot papers at their place of work, open them immediately, vote at the workplace and take part in filmed 'mass posting' events.

Royal Mail contended that these actions were a breach of the requirements for conduct of the ballot under s.230 TULR(C)A, with the result that the CWU would not be entitled to immunity from tort under s.219 TULR(C)A in respect of any industrial action called on the basis of the ballot. It sought an interim injunction restraining any such industrial action.

In particular, Royal Mail alleged that the statutory intention of s.230 TULR(C)A was that voting should be by a postal ballot and a *de facto* workplace ballot was an interference with the ballot contrary to s.230(1) TULR(C)A. It also argued that this was contrary to s.230(2) TULR(C)A, which intended that ballot papers were to be distributed by post and a breach of the secrecy of the ballot contrary to s.230(4) TULR(C)A. An interim injunction was granted by Swift J. CWU appealed to the Court of Appeal.

The Court of Appeal

It is a requirement that, as far as reasonably practicable, every person entitled to vote in a ballot must have a voting paper sent to them by post at their home address and be given a convenient opportunity to vote by post (s.230(2) TULR(C)A). This provision was inserted by s.17 of the Trade Union Reform and Employment Rights Act 1993.

The Court of Appeal upheld the finding of Swift J that industrial action ballots should be postal; the premise being that a voter can decide how to cast their vote at home, away from the work environment. In deciding that CWU's actions had subverted the intention of Parliament, Males LJ found that 'interference' in s.230(1) TULR(C)A referred to conduct which has the effect of preventing or hindering the ordinary course of events with which the section is concerned, that is the process of voting in a ballot for industrial action. It was not necessary, as had been contemplated by Maurice Kay J in *RJB Mining*, to determine whether interference was improper. Rather, 'interference' should not be limited to conduct that amounted to intimidation, coercion, fraud or similar. Both Simler LJ and Sir Patrick Elias agreed with this interpretation and that 'interference' should be construed in the particular statutory context. CWU's argument that Article 11 ECHR required a more restrictive interpretation of 'interference' was rejected. Also, if where there had been 'interference', the ballot could not be saved by the *de minimis* or substantial compliance principle.

Males LJ cited the Court of Appeal's previous judgments in *Serco* and *British Airways* and stated that it was legitimate for the court to have regard to the terms in which Part V TULR(C)A was originally enacted in order to ascertain the purpose of legislative changes and the mischief at which they were aimed. Sir Patrick Elias emphasised the protection given to individuals by the statutory balloting provisions, stating that while they can choose whether to take advantage of the privacy and freedom from pressure that the postal voting system permits, the way the ballot had been conducted was 'fundamentally at odds' with the statutory scheme. It did not help CWU that none of its members had made complaints, indeed it was not surprising that no complaints had been made.

The Court of Appeal also held that CWU failed to comply with s.230(2) TULR(C)A, which entitles union members to receive a ballot by post at their home address and therefore contemplates that ballot papers will be delivered to home

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addresses in the ordinary course of post. It was unnecessary for the Court of Appeal to consider whether there was a failure to ensure secret voting contrary to s.230(4) TULR(C)A, although Males LJ doubted Swift J's conclusion that this requirement had been breached. This conclusion was based on a film of a small number of workers at one particular site and therefore this point was likely to be nothing more than *de minimis*.

The approach of the Court of Appeal in *Royal Mail*, taken together with its recent judgment given by Simler LJ in *British Airways* on notice of ballot under s.226A TULR(C)A, shows that when construing the balloting provisions in Part V TULR(C)A, the court will ascertain the intention of Parliament when enacting those provisions.

In *Royal Mail*, this approach fell in favour of the employer; in *British Airways*, it did not. This is because since the judgment in *Serco* the prevailing approach of the Court of Appeal to the application of the balloting requirements in Part V TULR(C)A is one that does not place an unduly heavy burden on trade unions. In *Serco*, which concerned s.226A, Elias LJ found that the *de minimis* rule applies to compliance with Part V TULR(C)A and that it may be enough for a trade union to show substantial compliance with the balloting provisions if challenged.

Conclusion

Post-*Serco* the position remains that applications for injunctions to restrain industrial action are unlikely to be granted where they are based primarily on a technical construction argument. In *Royal Mail*, the employer's main point succeeded where the *de minimis* rule did not apply and where the statutory provisions were drafted so as to require, in clear terms, a postal vote by delivery of ballots to home addresses. With such a prevailing approach, it may be necessary for employers to focus their resources on mitigating the impact of industrial action, rather than attempting to injunct the trade union calling its members to take industrial action.

KEY:

Royal Mail	*Royal Mail Group Ltd v Communication Workers' Union* [2019] EWCA Civ 2510
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act 1992
RJB Mining	*RJB Mining (UK) Ltd v National Union of Mineworkers* [1997] IRLR 62
Serco	*National Union of Rail, Maritime and Transport Workers v Serco Ltd* [2011] ICR 848
British Airways	*British Airways Plc v British Airline Pilots' Assoc* [2019] EWCA Civ 1633