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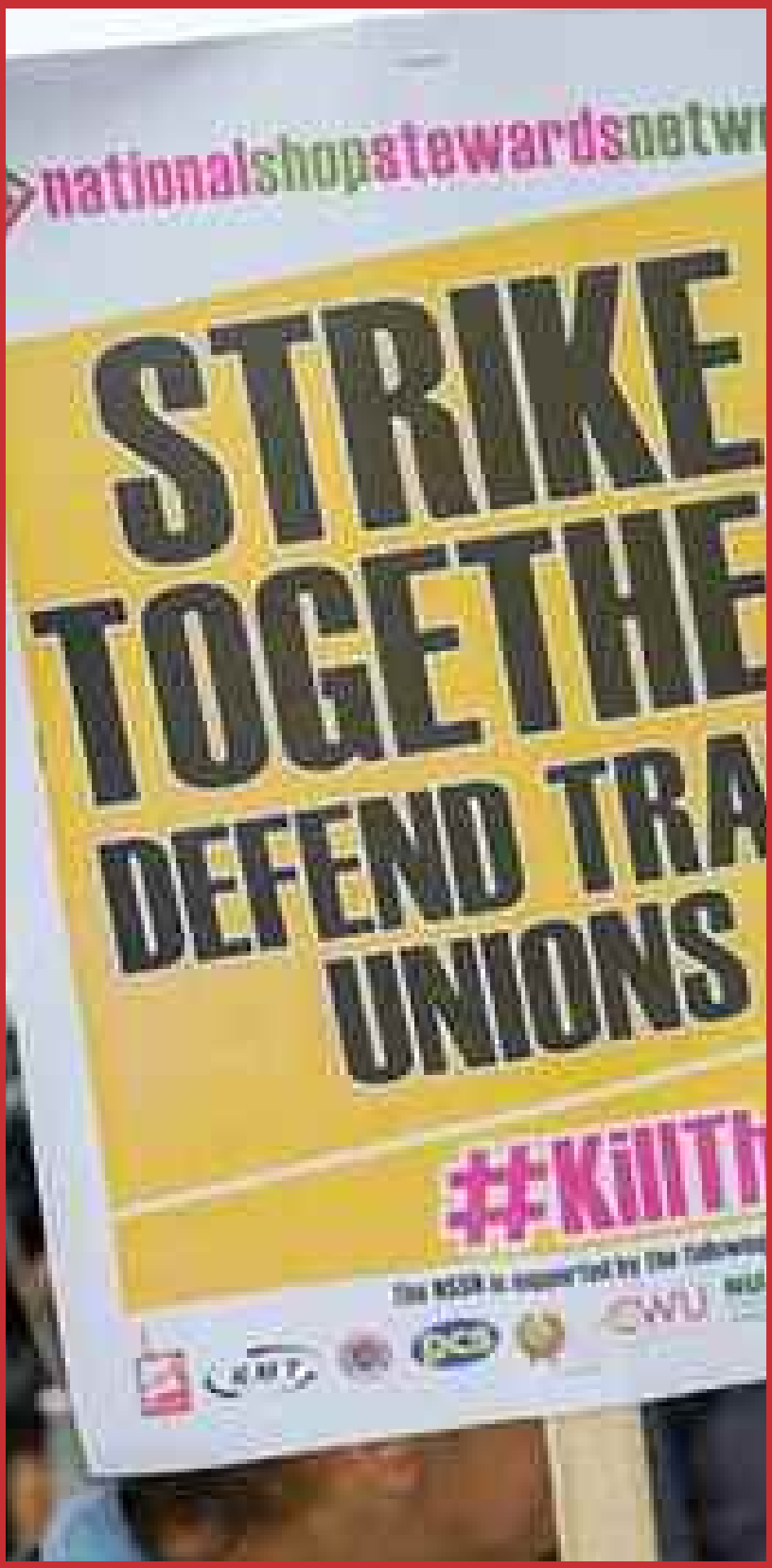

Focus on the Trade Union Act 2016

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Neil Todd considers the changes brought about by the Trade Union Act with regard to industrial action and picketing

Getting into the act

THE TRADE Union Act 2016, which received royal assent on 5 May, represents the most significant changes to the law on industrial action and picketing in a generation. It has received widespread criticism from opposition MPs, unions, civil liberties' groups, lawyers and academics.

In seeking to implement a number of Conservative manifesto pledges, it constitutes an unwarranted ideological attack on the internationally recognised rights of unions in the UK.

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Ballot thresholds

Before the Act was introduced, unions had to carry out a ballot of eligible union members in accordance with section 226 of the Trade Union and Labour Relations (Consolidation) Act 1992. For industrial action to be lawful,. a simple majority of those who cast their vote had to be in favour. This was the only threshold requirement but that will now change.

50 per cent turnout requirement

Section 2 of the Act provides that all industrial action ballots will be subject to the requirement that at least 50 per cent of those entitled to vote in the ballot do so.

This provision will apply to all ballots that open on or after the date on which the legislation comes into force, which is not yet known.

The alleged justification is that "undemocratic" industrial action should not be allowed to ensue and cause substantial disruption when it is only supported by a small mandate. However, as has been widely documented, many members of parliament have been elected on a much lower turnout.

Furthermore, the campaign group Liberty correctly pointed out that the turnout threshold "presumes that those who abstain from voting will always vote against a proposal when there is absolutely no basis for thinking that is the case".

The implications are self-evident. The problem will be particularly acute in large, diverse workforces, especially where the ballot is aggregated across a number of different employers.

The turnout threshold would have prevented the national day of action in the public sector over pensions in November 2011. The problem is likely to be compounded where the subject matter of the trade dispute is not of universal application across the workforce or in workplaces where the workforce is dispersed as, in these

situations, the numbers of those who turn out to vote in a ballot for industrial action is traditionally lower.

Additional 40 per cent support requirement

Section 3 of the Act provides that, in addition to the 50 per cent turnout requirement, all ballots for industrial action in "important public services" will be subject to an additional 40 per cent support requirement. This will require at least 40 per cent of those entitled to vote in the ballot to have voted in favour of the industrial action. It will apply to all ballots that open on or after the date on which the provisions come into force.

"Important public services" will be defined in secondary legislation (thus far only draft regulations have been produced), but will be within health services, education of those aged under 17, fire services, transport services, decommissioning of nuclear installations and management of nuclear waste and spent fuel, and border security.

The secondary legislation is also expected to address which roles within "important public services" are to be subject to the additional 40 per cent support threshold and the position of ballot constituencies where some roles are covered by the additional support threshold and some are not. The government had initially proposed to apply the threshold to those normally engaged in activities "ancillary" to the provision of important public services but that proposition was removed by an amendment in the House of Lords and it will now apply to those "normally engaged" in "important public services".

Most of the employers responsible for delivering these services will be public sector organisations but it will also impact on private sector employers contracted to provide those services.

There is no precedent for the term "important public services" in either international or UK law and the measures proposed do not accord with the UK's treaty obligations under the International Labour Organisation constitution or conventions. The impact, as with the 50 per cent turnout requirement, is likely to be significant, particularly in large, diverse workforces where the subject matter of the trade dispute is not of universal application.

Electronic balloting

One way unions could mitigate the consequences of the imposed threshold requirements would be through the introduction of electronic balloting. This was initially fiercely resisted by the government leading Caroline Lucas (Green MP) to ask the Secretary of State "If it really is about democracy and opening things up, why is he not lifting the ban on unions balloting online and in the ➲

➲ workplace, which would be precisely the way to make modern democracy work?"

Further criticism of the government's position ensued in the House of Lords, which has eventually led to the inclusion of section 4 of the Act. This introduces a requirement for the Secretary of State to commission an independent review of electronic balloting for all industrial action ballots within six months of royal assent.

The measures proposed appear not only to be ill-considered but also arguably in breach of UK international obligations

The Secretary of State is then obliged to consider this report and put before both the House of Commons and House of Lords a response to the report. Therefore, while the Act does not introduce electronic balloting, the issue has not gone away and the Secretary of State will be obliged to consult with relevant organisations, including trade unions, before preparing the response.

Additional information to be provided on the voting paper

Additional information will have to be included on the voting paper as follows:

- A "summary of the matter or matters in issue in the trade dispute".
- Where the voting paper contains a question about taking part in industrial action short of a strike, "the type or types of industrial action" will have to be specified (either in the question, or elsewhere in the voting paper).
- The "period or periods within which the industrial action or, as the case may be, each type of industrial action is expected to take place".

These requirements will undoubtedly make the procedural requirements for a union to conduct a lawful ballot even more fraught with difficulty than they already are. In addition, as the sample ballot paper has to be provided to the employer before the ballot begins it means the employer will know about the types of action they are likely to face and when that action will take place.

Additional information about the result of the ballot

The information to be provided to members and employers "as soon asreasonably practicable" after the close ofthe ballot will also have to include information as to:

- The number of individuals who were entitled to vote in the ballot.
- Whether or not the 50 per cent turnout threshold was satisfied in all ballots.
- In ballots involving members normally engaged in the provision of "important public services", whether or not the additional 40 per cent support threshold was satisfied.

This is in addition to the information already required by section 231 of the current legislation in relation to information on the result of the ballot. In ballots involving "important public services", this means that unions are going to need to be able to identify whether individual members are "normally engaged" in "important public services", as defined in regulations to be published.

Furthermore unions will be required to include details of any industrial action in the reporting period in its annual return to the Certification Officer.

This should include the nature of the trade dispute relating to the industrial action, the type of industrial action, when

the industrial action was taken, as well as confirmation about the number of individuals who were entitled to vote in the ballot, the number of votes cast, the number of those who voted yes, the number of those who voted no, the number of spoiled ballot papers, confirmation that the 50 per cent threshold was met, and if applicable, confirmation that the 40 per cent threshold was met.

Two weeks' notice of industrial action

The period of notice of industrial action the union must give is extended from seven to 14 days.

This increases the length of time from the opening of the ballot until the start of the action and will give employers more time to prepare their legal challenges. However unions will no longer be required to take some action within 28 days of the result of the ballot or within 56 days if the maximum extension has been agreed by the union and the employer.

Expiry of the ballot mandate after six months

The ability of unions to rely on the ballot as a mandate for industrial action will expire at the end of the period of six months beginning with the date of the close of the ballot. That period is capable of extension up to a maximum of nine months. After the expiry of this period, the union will need to re-ballot.

The implications are self-evident as to the timeframe within which a successful outcome will need to be achieved unless the union is to re-ballot. It may be possible to negotiate agreement on the extension of the maximum period of nine months in collective agreements, but this should be confirmed in relation to individual disputes.

Picketing

As well as the changes to provisions governing industrial action, section 10 of the Act also introduces new requirements in relation to picketing. Under this provision, a union must appoint an official or member to be a picket supervisor who has to be familiar with the code of practice on picketing.

The union must take reasonable steps to inform the police of the name and contact details of the supervisor and the location of the picket line. The picket supervisor must also be present at the picket line or be readily contactable and be in possession of a letter from their union stating that the picketing is approved. The employer, or the employer's agent, is entitled to see this letter as soon as reasonably practicable.

Furthermore, and probably most distastefully of all, the picket supervisor must wear something to make them readily identifiable.

It is highly unlikely any union could meet this demand through its full-time officials. A failure to comply with these requirements will mean that the picketing is unlawful and a union will not be protected from proceedings which claim that they have induced someone to break their contract or interfered with a person's performance of a contract.

Conclusion

The Act is, at heart, an outright attack on the trade union movement and its right to organise and induce lawful industrial action. The measures proposed appear not only to be ill-considered but also arguably in breach of UK international obligations, including those arising under the European Convention on Human Rights and those incumbent on the UK by virtue of its membership of the International Labour Organisation, which are not directly affected by a potential Brexit.

Once the Act is implemented unions will need to consider their industrial strategy carefully. As a union remains generally permitted to define the balloting constituency, it will need to do so in a way that both maximises the prospects of satisfying the 50 per cent threshold, and the additional 40 per cent requirement if applicable, and enables a dispute to be pursued in the most advantageous away.

This may involve the targeted balloting of specific workplaces or specific categories of employees, rather than balloting the workforce as a whole, or staggering the ballot so different categories of employees or different workplaces take action at different times.

Richard Arthur outlines the new powers of the Certification Officer following the changes in the Trade Union Act

A stranglehold on the unions?

THE CHANGES to the Certification Officer's role are the second instalment of a Conservative programme of using the role to maximise the opportunities for employers to challenge industrial action, while imposing the maximum possible administrative burden on trade unions and attempting to marginalise their influence in society.

The Lobbying and Transparency Act

The first instalment (and the first changes to the role since 1999) came in the Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014.

As well as imposing restrictions on trade unions' funding of political parties in election campaigns, it also imposed requirements in relation to the maintenance of unions' registers of members in the form of Membership Audit Certificates that have to be filed with the Certification Officer.

The Certification Officer has been given new investigative powers and the ability to exercise those powers without receiving a complaint from a member

The reason for this is that most challenges to industrial action turn on the sufficiency of the union's membership information. Compliance with these new requirements is to be supervised by the Certification Officer, who has been given new investigative powers and the ability to exercise those powers without receiving a complaint from a member.

The Trade Union Act adopts the devices used in the Lobbying and Transparency Act – powers of investigation and the ability to exercise powers without receiving a complaint from a member – and applies them across most of the types of claim the Certification Officer adjudicates on.

Additional enforcement powers have been added, as well as the power to impose financial penalties, with the Secretary of State having power to require the Certification Officer to impose a levy on trade unions.

Appointment and independence

While there are still no statutory criteria for the appointment of the Certification Officer (beyond consultation with Acas), the Act makes clear that they are not to be subject to directions from government ministers, a measure designed to protect against challenges of lack of impartiality.

Political expenditure and industrial action

Annual returns sent to the Certification Officer will also have to include additional information in relation to political expenditure and industrial action. The requirements in relation to political expenditure are dealt with in the section on Political Funds (p8).

Investigatory powers

Enhanced investigatory powers will apply to the requirements for ensuring that positions are not held by offenders, the requirements for elections for certain positions, compliance with rules about expenditure on

political objects, ballots on political resolutions and political funds, ballots on amalgamations and transfers and requirements imposed under conditional penalties (but they won't apply to the Certification Officer's general authority over breaches of specific types of rules).

If the Certification Officer "thinks there is good reason to do so" they will be able to require the production of relevant documents from a union, branch or section, or authorise their staff to require their production. They will be able to require explanations of the documents produced or to be told where they are.

The Certification Officer will be able to appoint inspectors – either from their staff or other persons. Inspectors will be able to require the production of documents, attendance in front of the investigator and the provision of "all assistance". The Certification Officer has also been given enforcement powers that can be exercised in the same way as a court order.

It is true that similar powers have existed since 1993 in relation to the financial affairs of a union, and those powers have been used as a template for the powers in the Trade Union Act, but it is quite another thing to extend those powers, which were essentially originally confined to matters of administration, across the bulk of the Certification Officer's areas of adjudication.

Powers without application

The Certification Officer will be able to exercise most of their powers without receiving a complaint from a member, meaning that they are going to be placed under enormous pressure to act at the behest of organisations like the Freedom Association and the Taxpayers Alliance.

Power to impose financial penalties

The Certification Officer will have power to impose financial penalties. The amount will be set by regulations and will be between £200 and £20,000.

Power to impose a levy

Trade unions themselves will have to pay for the privilege of having these additional administrative burdens heaped upon them.

The Secretary of State will have the power to require the Certification Officer to impose a levy on trade unions to cover their expenses. The Certification Officer will have to aim to ensure that the amount of the levy does not exceed their relevant expenses over a three-year period.

Conclusion

The government likens the role of the Certification Officer to that of a "regulator" such as the Pensions Regulator or the Groceries Code Adjudicator. Nobody can seriously contest that the current Certification Officer knows his onions when it comes to trade unions. But it misses the point that the Certification Officer is supposed to oversee restrictions on the internationally recognised freedom of association between unions and their members.

Even so, the invasiveness of, for example, the Certification Officer's enhanced powers of investigation, is not matched, for example, by that of the Financial Conduct Authority's investigatory powers.

The combined effect of the Lobbying and Transparency Act and the Trade Union Act is to place the Certification Officer centre-stage in terms of industrial action challenges, and to make the same investigatory and enforcement powers available across most of their areas of adjudication.

The role is transformed, without regard for international law, into that of investigator, prosecutor, adjudicator and sentencer in a way that leaves the Certification Officer vulnerable to the demands of those hostile to trade unions and compromises their impartiality.

In the words of Baroness Donaghy in the House of Lords, these measures are a "disproportionate response to an unidentified problem". The intentions behind them are to make it easier to challenge industrial action, and to make life as administratively difficult and expensive as possible for trade unions.

Richard Arthur explains the changes made to trade unions' political funds as part of the Trade Union Act

Reduced political powers

The imposition of the requirement to opt in to contributing to a union's political fund will cause a substantial reduction in the funds unions are able to give to political parties

TRADE UNIONS can only make payments for defined "political objects" from their political funds. "Political objects" on which expenditure is restricted in this way include not only contributing to or for political parties and candidates, holding meetings or conferences for political parties and producing material, but also payments in connection with the registration of electors and on material produced to persuade voters to vote for or against political parties.

Until the Trade Union Act (with the exception of Northern Ireland), members of a trade union with a political fund had to be given the right to opt out of making contributions to its political fund. The Trade Union Act reverses this into a requirement for members to opt in.

This is a government that doesn't like opposition, and, as I explained in my article on the Certification Officer, has pursued a two-stage programme to make it more difficult for its detractors to make their voices heard.

The first stage came in the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 under which the amounts trade unions and other organisations could spend on campaigning was restricted. The second stage is this requirement for members to opt in under the Trade Union Act 2016.

Opt-in notice

It will only be lawful to require a trade union member to make contributions to the union's political fund if the member has sent an opt-in notice. This can be delivered personally, by post, by email or other electronic means.

Notification of right to withdraw opt-in notice

A union with a political fund must notify all members contributing to it of their right to withdraw from contributing no later than eight weeks after sending its annual return to the Certification Officer. The notification can be given individually or by any other means that it is the practice of the union to use. A copy of the notification must be sent to the Certification Officer. A withdrawal notice takes effect one month after it has been sent.

Only applies to "new members"

Following significant concessions, the requirement to provide notice of opting in to contributing to the union's political fund will only apply to "new members" of a union with a political fund. These will be members who join the union after a transition period to be defined in regulations and which will be not less than 12 months after the date on which the

The House of Lords voted to appoint a Select Committee on Trade Union Political Funds and Political Party Funding

relevant provisions of the Trade Union Act come into force.

Trade unions' annual returns: political expenditure

Annual returns sent to the Certification Officer will also have to contain additional information concerning political expenditure.

Where the expenditure of a trade union from its political fund in any calendar year exceeds £2,000 in total, then its return will have to include itemised details such as amounts of expenditure including payments to or for political parties, payments in connection with the registration of electors and payments to or for candidates in elections.

The Certification Officer will also receive a copy of the notification and unions will have to take all reasonable steps to ensure it will be received by members notifying them of their right to withdraw from contributing to the union's political fund.

Conclusion

Significant concessions were achieved during the debate on the Bill in the House of Lords, which appointed a Select Committee on Trade Union Political Funds and Political Party Funding.

That Committee concluded that "the reintroduction of the opt-in process will have a sizeable negative effect on the number of trade union members participating in political funds".

The amendments contained in the original version of the Bill would not have been restricted to new members; unions would only have had a period of three months from the Act coming into force to get members to sign opt-in notices and members would not have been able to give notice of opting in electronically.

Nonetheless, coupled with the restrictions on non-party campaigning expenditure contained in the Lobbying and Transparency Act, and as recognised by the House of Lords Select Committee, the imposition of the requirement to opt in to contributing to a union's political fund will cause a substantial reduction in the funds unions are able to give to political parties, and therefore affect their ability to bring pressure to bear on the government.

Jo Seery looks at the government's efforts to reduce trade union membership by banning check-off and reducing facility time

Attacks on check-off and facility time

WHEN THE Trade Union Bill (now enacted) was first published in July 2015, the government included a provision to ban check-off across the public sector. Check-off is when workers' union subscriptions are deducted from their pay by their employer who then transfers the money to the union.

Thanks to some effective trade union lobbying, including evidence that removal of check-off would have the biggest impact on the poorest paid workers and employers would lose the financial benefits of check-off, the government was forced to abandon its plan. The fact that many public sector employers also opposed the change serves to show that it was nothing other than an ideological manoeuvre to reduce trade union membership.

Thanks to some effective trade union lobbying, the government was forced to abandon its plan

Two conditions

The Trade Union Act now provides that relevant public sector employers can deduct union subscriptions from workers' pay, subject to two conditions:

- That workers have the option to pay union subscriptions by some other means, such as direct debit
- That the union makes reasonable payments to the employer to cover the cost of making the deductions, something that many of them already do.

The provision applies to public authorities and bodies that provide functions of a public nature that are wholly or mainly funded from the public purse. The details are to be specified in regulations.

Further proposals

Further regulations will also amend existing legal entitlements containing contracts of employment.

Until then, it is notable that in two recent cases – **Hickey -v- Secretary of State for Communities and Local Government**; **Cavanagh and anor -v- Secretary of State for Work and Pensions** – the High Court held that the provision for check-off was incorporated into workers' contracts of employment and by unilaterally withdrawing it, the departments acted in breach of contract.

Importantly for unions, the High Court held in Cavanagh that the PCS union could thereby enforce check-off arrangements against the department. Whether the same applies in other cases will depend on the terms of individual workers' contracts of employment.

A cap on facility time

Union representatives have a statutory right to reasonable paid time off to carry out trade union duties, a right that is supplemented by the Acas Code of Practice "Time off for Trade Union Duties and Activities".

The provisions of the Trade Union Act were precipitated by attacks on trade union facility time from both the Taxpayers Alliance and Conservative MPs. In particular, the Trade Union Bill allowed the government to place a cap on facility time for public sector employers where this was deemed to be "necessary".

The Act contains two enabling provisions that will allow the government to make regulations to:

- require public sector employers to publish information about time off taken by trade union representatives to undertake trade union duties and activities
- limit the amount of paid time off (even if that means overriding statutory and contractual rights).

Information required to be published

The Act sets out the information that public sector employers would be required to publish including:

- the number of representatives by type (such as shop stewards, union learning reps, health and safety reps etc) n the amount employers spend on trade union duties and activities
- the percentage aggregate amount of facility time taken by union representatives within a specified period broken down by categories of duties or activities.

Provision limiting the amount of paid time off

This provision gives a minister "reserve powers" to make further regulations three years after the regulations relating to information on facility time come into force.

The powers include the ability to introduce a cap on facility time either as a percentage of trade union representatives' working time or as a percentage of the employer's pay bill, which represents facility time.

Application of provisions

The provisions will apply to a relevant public sector employer, defined as a public authority as specified in regulations, who has at least one employee who is a relevant union official.

The Act defines the relevant union official as a trade union official, a learning representative and a health and safety representative.

Conclusion

Given the new priorities for the government post Brexit, it is hoped that it will be some time before we see these provisions come into force.

LELR aims to give news and views on employment law developments as they affect trade unions and their members. This publication is not intended as legal advice on particular cases.

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To receive regular copies of LELR email **lelr@thompsons.law.co.uk**

Contributors to this edition: Richard Arthur, Jo Seery, Neil Todd
Editor: Alison Clarke
Design & production: www.rexclusive.co.uk