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THE MOST EXPERIENCED TRADE UNION FIRM IN THE UK

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Focus on Industrial Action

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Industrial action: step by step

Joe O'Hara, a consultant for Thompsons, provides a general overview of the steps that unions should follow when taking industrial action

AS VARIOUS UNIONS have discovered over the last few years, it's not easy staying on the right side of the law governing industrial action. But planning ahead will help to reduce the very real risk of a court restricting the right of workers in struggle from taking action to protect their interests.

Note: this step-by-step guide is not intended to replace unions' internal precedents.

Steps to follow

Step 1: Ensure your trade dispute falls within the statutory framework. Is your correspondence with the employer and other documentation consistent with your definition of the dispute? Do not define it too narrowly: for instance "to get the employer back to the negotiating table".

Step 2: Plan the action – will it be strike action, action short of a strike or both? This determines which question(s) appear on the ballot paper. Will the action be continuous (that is, your members take action on all days they can do so) or discontinuous (they don't)? When do you aim to start the action?

Step 3: Which members will you call upon to take part in the action? They must all work for the employer(s) in dispute, though they do not have to be directly affected by the dispute. In other words, Rachel can take action in support of Taj, who has been disciplined; craft workers can take action in support of the clerical workers' pay claim. Ballot only those members whom you intend to call out.

Step 4: Check your membership records – absolutely vital. Are your local officials sure that you have the names and current addresses of everyone who will be called out? For any who are not on check-off, do you know (a) their workplaces and (b) their work categories (for example: occupation, grade, pay band)? If not, allow time to update this information.

Step 5: Can you hold an aggregate ballot? The rules state that you must hold a separate ballot in each workplace unless (a) you ballot all your members working for the employer(s) in dispute (b) you ballot all your members with particular occupation(s) working for those employer(s) or (c) in every workplace in the ballot, there is at least one member who is "directly affected" by the dispute.

The rules for (c) are tricky, so take advice. If you fall within (a), (b) or (c), you can hold an "aggregate" ballot, otherwise you need one per workplace, even for the same employer.

> Are your officials sure that you have the names and addresses of everyone who will be called out?

Step 6: Appoint an independent scrutineer (IS) where there are 50 or more members in the ballot, and (when available) provide your members' names and addresses in time for the IS to print and mail the ballot materials.

Discuss the form of the ballot (aggregate or workplace), the ballot paper (for example, one or two questions), the timetable and when the IS will produce their formal report. If you want (confidential) reports on how particular groups of workers voted (for instance, by region), the IS may ask for your membership data to be separated or tagged accordingly.

Step 7: Plan your timetable. Allow time to update your records and for your IS to print the ballot packs – the larger the ballot, the more time needed. The Code of Practice says you must give a minimum voting period of seven days for first class post both ways (from IS to the member and back again) and 14 days for second class. Beware workplace closures that could affect your timetable.

Step 8: Prepare your literature to go to reps and members, either in the ballot packs or separately. Ensure that all literature is consistent – a court will treat it as part of the mandate your members give the union.

Step 9: A Notice of Ballot must reach each employer at least seven days before the ballot opens. When the first day your IS posts ballot packs is a Friday, the employer must receive the notice during working hours the previous Friday.

Don't serve a notice to arrive out of office hours or when the employer's enterprise will be closed (for instance, on a bank holiday, during a summer shut-down or when a school is closed for the holidays). It is advisable to build in a safety net – in other words, allow an extra day.

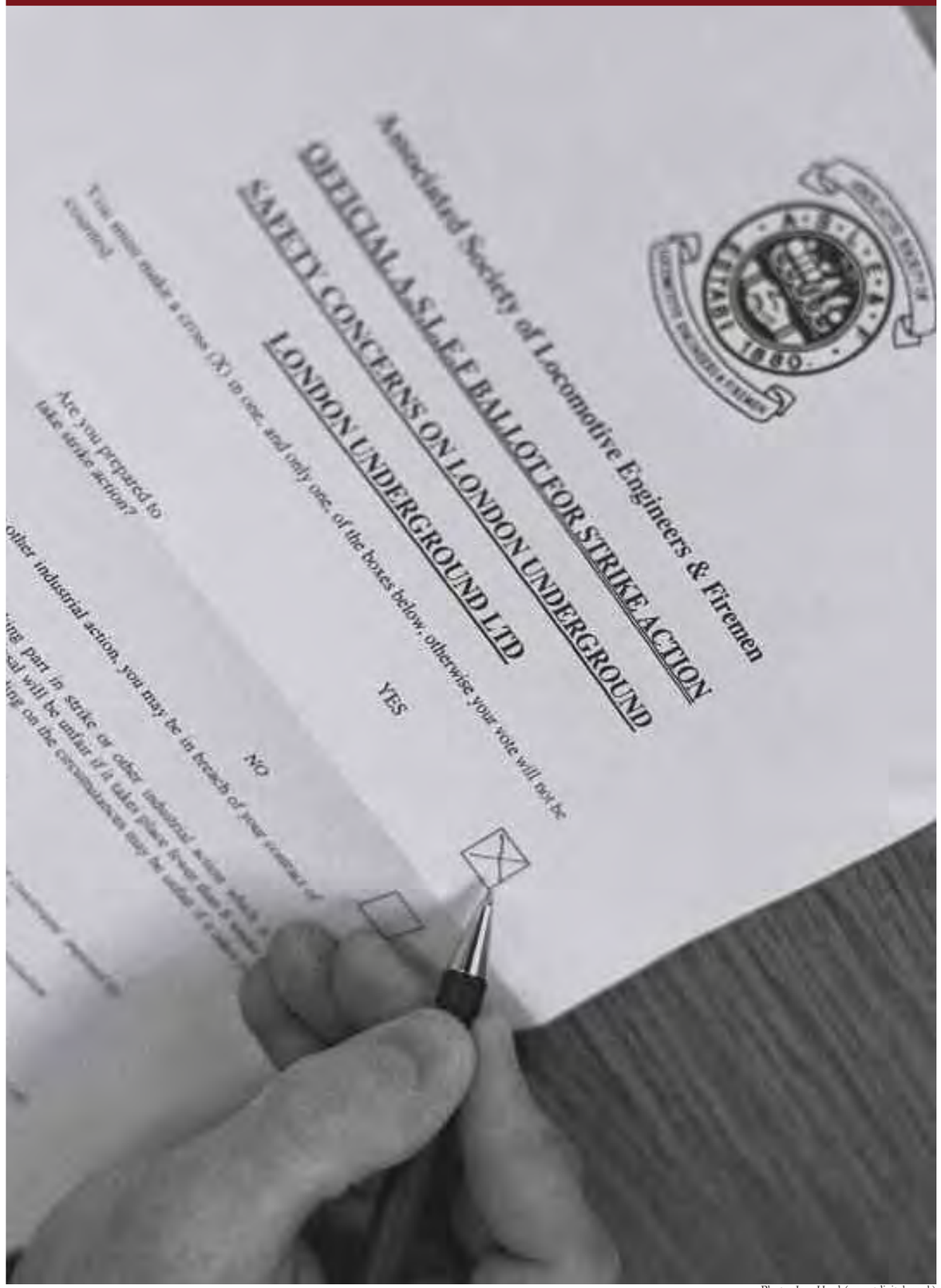

Photo: Jess Herd (reportdigital.co.uk)

Check and retain proof of delivery, such as a courier's signed receipt, email or fax confirmation. The notice must state the union's intention to hold the ballot; specify the intended opening date of the ballot; and identify the membership (see box over page).

Step 10: Sample ballot papers. Send a sample (of each) ballot paper to each employer at least three days before ballot opens. If using different ballot papers (for example, colour coding for each employer in an aggregate ballot), send each employer a copy of each paper. If the ballot opens on a Friday, the sample must reach each employer during working hours on the Tuesday of the same week. Some unions include the ballot paper(s) with the Notice of Ballot.

Step 11: Ballot packs not received. During the ballot, forward to the IS the names and addresses of any members who contact you saying they have not received their ballot pack. Keep doing so until the IS tells you it is too late.

Step 12: Ballot closure. On the day the ballot is due to close, check with your IS that all is in order and confirm when their report is likely to reach you. If it does not arrive on time, chase the IS.

After the ballot

Step 13: Results. As soon as you receive the formal IS report, send the results to each employer and to all the members in the ballot (for members, you may be able to use electronic or other methods of communication provided it reaches all your members in the ballot directly, not by word of mouth).

The "results" are the number of (a) the votes cast (b) the "yes" votes (for each question on the ballot paper) (c) the "no" votes (again, for each question) and (d) the spoiled voting papers. Do not delay doing this – do not wait for your strike committee to decide whether you are going to take action.

You do not have to send the full IS report unless someone asks for it within the next six months. Nor do you have to reveal any confidential reports you have asked the IS to provide, such as a breakdown of voting by area. In an aggregate ballot, you need send only each of the figures provided by the IS for the total ballot – some employers (wrongly) think they can demand the results for their own workforce.

Step 14: Industrial action. Decide whether to call industrial action. Subject to the union's rules, you need a simple majority of those voting on the question(s). Is the action to be continuous (and if it is, the start date) or discontinuous (in which case, the first set of dates). Will it be the same for all members?

Step 15: Seven days. Send a Notice of Action to each employer at least seven days before action starts, following the same procedure as for Notices of Ballot. The notice must state whether the action is to be continuous (in which case, give the start date) or discontinuous (give all the dates decided upon so far). It must also identify the membership to be induced to take action (see box).

Step 16: 28 days. Start the action within 28 days of the last day of voting in the ballot. So, if the last day was a Tuesday, the action must get under way before midnight on the Monday four weeks later (the seven days for the Notice of Action does not extend the 28 days). If the employer agrees, the 28 days can be extended by a further 28 days (in one or more instalments) but no further. Get confirmation in writing/email.

Step 17: Pickets. Your pickets can attend only at their own place of work although they can picket any worker of the employer in dispute except fellow members working for the same employer whom their union excluded from the ballot.

Step 18: Further seven days. If the action is discontinuous and you decide to add more dates, give a further seven day Notice of Action.

Step 19: Suspended action. Once the action has started within the 28 day (or extended) life of the ballot, you can suspend the action at any time to allow talks. In cases of continuous action, you can reach agreement with the employer on a suspension if you want to avoid serving a fresh seven day notice to restart the action.

You don't need this if you are happy to serve a restart notice for suspended continuous action or if the suspended action was and remains discontinuous (provided the dates after the restart were covered by an earlier Notice of Action).

Step 20: Requests for IS support. If within six months of the close of the ballot, a member entitled to vote in the ballot or any of their employers requests a copy of the formal IS report, you should provide a copy as soon as practicable.

Describing the membership in the statutory notices

The Notice of Ballot and the Notice of Action must describe the union's members in the ballot or to be induced to take action, as appropriate. The statutory requirements are described in more detail in the next section. Each union will use its own pro forma but in summary:

- **If your ballot/action covers all your members working for the employer and they are all on check-off, say so.**
- **If all your members are on check-off but not all are involved, describe those involved. For instance: "all our members in manual grades, all of whom pay union subs by check-off".**
- **If none of your members are on check-off, you must give the total number, plus lists of workplaces and categories (for example: occupation, grade or pay band) and the numbers in each. This is the only case in which you give the overall total number in the pre-ballot and pre-action notices.**
- **If some of your members are on check-off but some are not, you need to give the employer the total number of those not on check-off plus information from which it can readily deduce, for all affected members, workplaces and categories and the numbers in each. This usually entails giving (i) for those members not on check-off: the total number, the lists of workplaces and categories, and the numbers in each; and (ii) for those members on check-off, a reference to the most recent check-off records.**

Step by step guide

Photo: Jess Herd (reportdigital.co.uk)

The three main requirements

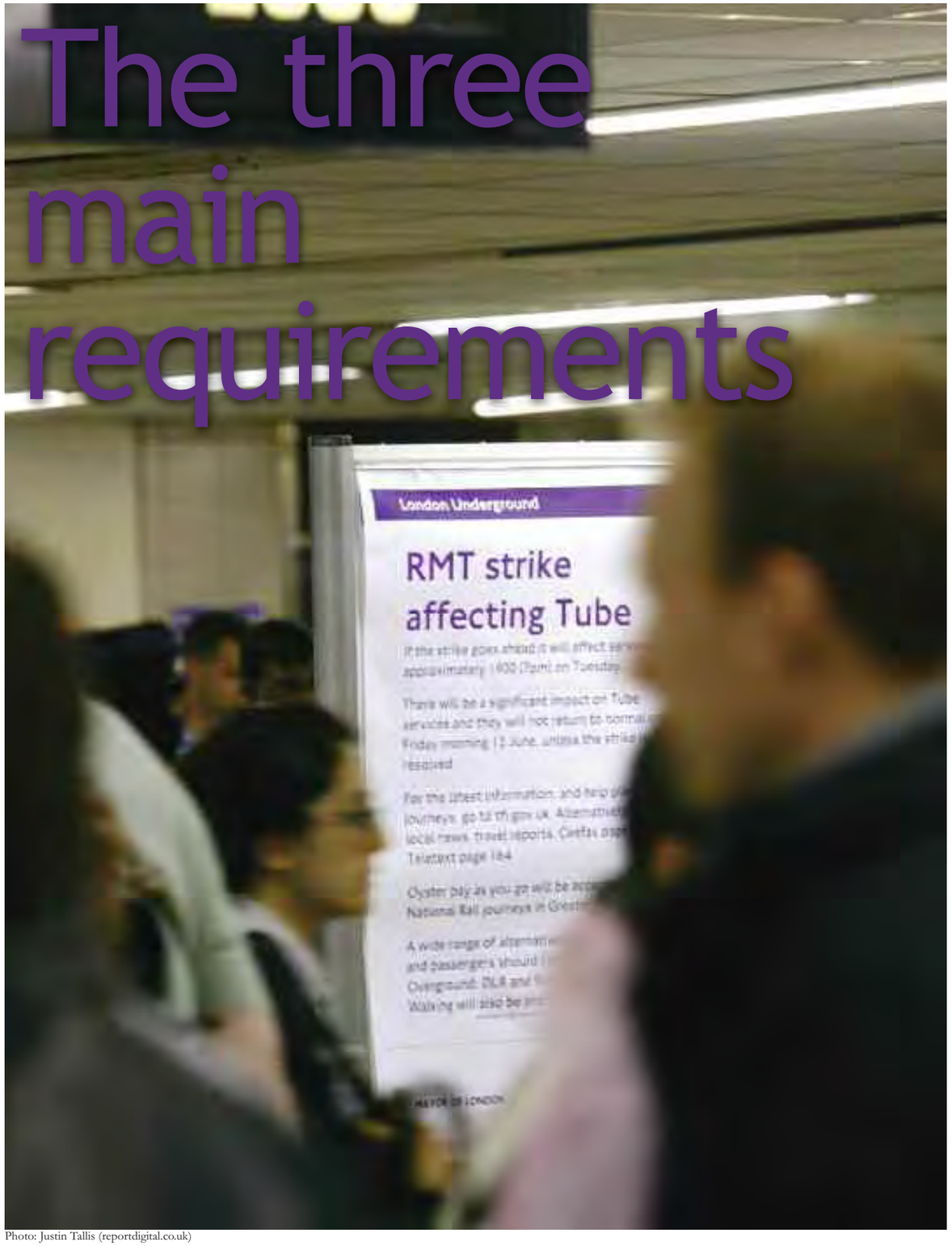

Photo: Justin Tallis (reportdigital.co.uk)

Richard Arthur, Thompsons National Coordinator for Trade Union Law, looks at three key obligations under industrial action law and how they have been interpreted by the courts over the last year

MOST LEGAL challenges mounted by employers to industrial action over the last year stem from three basic requirements under the current law.

These state that unions must:

- allow all (and only) those members who are to be called to take part in industrial action to vote in the ballot
- adhere to strict rules concerning the description of affected members in the Notice of Ballot and Notice of Action, and
- inform members of the result of the ballot "as soon as is reasonably practicable" after holding it.

Entitlement to vote in the ballot

Section 227 of the Trade Union and Labour Relations (Consolidation) Act (TULCRA) 1992 states that: "Entitlement to vote in the ballot must be accorded equally to all members of the trade union who it is reasonable at the time of the ballot for the union to believe will be induced to take part in the action... and to no others."

The "small accidental failures" saving, in section 232B TULRCA, is potentially available in relation to a defect in compliance, provided that the failure is accidental and is on a scale that is unlikely to affect the result of the ballot.

In the case of **British Airways -v- Unite**, the union had allowed about 700 members to vote who would have left BA before the industrial action started.

The High Court said that the union could not reasonably have believed that those members would be "induced to take part in the action" and that it was therefore in breach of section 227.

It could not fall back on the "small accidental failures" saving, because it had not been sufficiently proactive in trying to find out which of its members would have left their jobs by the time the industrial action started.

> EDF complained it was unable to tell which groups of employees would be affected

Information in the Notice of Ballot and Notice of Action

Section 226A(2)(c)(i) TULRCA requires the union to provide "lists" of the "categories" and "workplaces", as well as "figures" showing the total number of affected employees and the numbers in each category and at each workplace in its Notice of Ballot. The union is also required to provide "an explanation of how those figures have been arrived at" (section 226A(2)(c)(i) TULRCA).

For members who pay subscriptions via check-off, the union is allowed instead to provide "such information as will enable the employer to deduce" the information that would have been provided in those lists and figures. In other words, the union is entitled to refer the employer to its check-off records in the pre-ballot notice (section 226A(2C) TULRCA).

The union is also entitled to use this alternative formulation when only some of the affected members pay subscriptions via check-off. In that case, it is usual to give the "lists" and "figures" for non-check-off members and refer to the most recent records for check-off members.

The same requirements apply to the Notice of Action in respect of members who will be asked to participate in the action (sections 234A(3)(a) (i) and 234(3A) TULRCA).

In both notices, the "lists" and "figures" must be "as accurate as is reasonably practicable in the light of the information in the possession of the union..." (sections 226A(2D) and 234(3D) TULRCA).

Information will be regarded as "in the possession of the union" if it is held "for union purposes" in a "document" (whether electronic or otherwise); and by an "officer" or "employee" of the union (section 226A(2E) TULRCA).

For the purpose of the Notice of Ballot and the Notice of Action, "workplace" is defined as:

"(a) in relation to an employee who works at or from a single set of premises, those premises, and

(b) in relation to any other employee, the premises with which his employment has the closest connection"

(sections 226A(2I) and 234(5D) TULRCA).

As to which categories to list, paragraph 15 of the Code of Practice: Industrial Action Ballots and Notice to Employers (2005), which is not itself legally binding but which is admissible as evidence, provides that:

"... When deciding which categories it should list in the notice, the union should consider choosing a categorisation which relates to the nature of the employees' work. For example, the appropriate categorisations might be based on the occupation, grade or pay band of the employees involved. The decision might also be informed by the categorisations of the employees typically used by the employer in his dealings with the union. The availability of data to the union is also a legitimate factor in determining the union's choice."

EDF Energy Powerlink Ltd -v- RMT

In **EDF Energy Powerlink Ltd -v- RMT**, the union described the members to be balloted in its pre-ballot notice as "engineer/technican". That was the categorisation used on the union's membership database and it did not have any other information.

EDF complained that it was unable to tell which groups of employees would be affected and could not therefore make plans in response to any industrial action.

Granting an injunction, the High Court held that, although EDF was not entitled to a list of job descriptions, it was entitled to be told which "trades" were covered. It said that there were circumstances in which the union could not simply rely on the information already in its possession and had to seek further information from its members.

Network Rail Infrastructure Ltd -v- RMT

In **Network Rail Infrastructure Ltd -v- RMT**, Network Rail complained that, in the union's Notice of Ballot, a number of workplaces had been omitted, some non-existent workplaces

had been included, some workplaces had no union members, some workplaces were listed simply by geographical location and some workplaces were listed as "unknown".

Granting an injunction, the High Court reinforced the finding in the EDF case that the union was not necessarily entitled to rely on the information already in its possession.

Although the union had reconciled the contents of its membership database against information provided by Network Rail for the purposes of job evaluation, the court held that it had not paid sufficient regard to information provided by Network Rail in relation to previous legal challenges in 2004 and 2008.

The court also ruled that the union's explanation of how the "figures" had been arrived at was insufficient because it did not accurately reflect the steps the union had taken.

Informing members of the ballot result

As soon as is reasonably practicable after holding the ballot, the union is required to "take such steps as are reasonably necessary to ensure that everyone entitled to vote in the ballot is informed of the number of

(a) votes cast
(b) individuals answering 'yes'
(c) individuals answering 'no', and
(d) spoiled voting papers"

(section 231 TULRCA).

The union also has to inform affected employers of the result of the ballot (section 231A TULRCA).

In the Network Rail case, the union sent a text message that did not itself contain the statutory information to its members directing them to its website. The High Court held that this was not sufficient because it did not amount to taking "active steps" to inform members of the result.

In **British Airways -v- Unite (No.2)**, the Court of Appeal (by a majority of two to one) rejected the test of taking "active steps".

It found that, when the affected members all routinely used the internet on a daily basis, and when members had been told that the result would be published on the union's website, it was sufficient for the union to do just that.

In that case, the union had previously told members that the result would be published on its website (which it was), which was not password protected.

Conclusions

It is impossible to over-emphasise the importance of ensuring that unions comply with the statutory requirements under TULRCA. This will involve checking and rechecking the information that they must provide in the Notice of Ballot and Notice of Action. If they don't, they may face a claim for an injunction and/or damages, and affected members will lose their protection from unfair dismissal.

We have only dealt in this article with issues relating to the members to be balloted, the information to be provided in the Notice of Ballot and Notice of Action and informing members of the result of the ballot, as these are the areas that have been most heavily scrutinised by the courts over the last year. Their judgments show the level of scrutiny being applied and the hurdles that unions have to jump to comply with the legislation.

RMT -v- United Kingdom

Neil Todd, a member of Thompsons Trade Union Law Group, looks at the rationale behind the RMT claim that it is bringing in the European Court of Human Rights in Strasbourg against the UK government

EARLIER THIS year, the RMT union filed an application claiming that its right to freedom of association under Article 11 of the European Convention on Human Rights and Fundamental Freedoms was being infringed.

Outline of the RMT claim

An international treaty of the Council of Europe (with members from 47 European states), the convention has been ratified by the UK and is directly incorporated into UK law by the Human Rights Act 1998.

The first limb of the union's claim relates to the onerous obligations on unions under UK law to provide a Notice of Ballot.

The second limb relates to the outright prohibition on taking secondary or sympathy action in the UK, even when the secondary employer is closely associated with the primary employer in the dispute.

Both limbs of the claim arise out of two specific sets of facts: the first in relation to an injunction granted in favour of the French energy firm EDF; and the second in relation to circumstances when the RMT was prevented from taking secondary industrial action against a company known as Hydrex.

The EDF case and Notices of Ballot

In the previous feature, we explained that the Notice of Ballot given by the union to EDF described the category of members to be balloted as "engineer/technician". This was how the RMT categorised affected members on its database.

EDF claimed that it could not identify which groups of workers would be balloted and subsequently called on to take part in industrial action from this description.

It argued that the information given in the Notice of Ballot was not as "accurate as was reasonably practicable in the light of the information in the union's possession" as required by section 226A(2D) TULRCA.

Granting the injunction, the High Court held that EDF was entitled to have been told in the Notice of Ballot the "trades" to which the members belonged so that it could make plans in advance of the industrial action. The fact that the RMT did not know anything more itself did not absolve it of the responsibility to make further inquiries.

The RMT sought permission to appeal to the Court of Appeal, but was refused by both the High Court and the Court of Appeal. It had no other avenue of redress in UK courts and was therefore free to present its claim to the European Court of Human Rights.

The Hydrex dispute and secondary action

A number of RMT members employed by Fastline Limited, a subsidiary of Jarvis plc, transferred to Hydrex Equipment (UK) Ltd under TUPE. Following the transfer, Hydrex sought to worsen the terms and conditions of the transferred employees to harmonise them with those of its existing workforce.

> Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and to join trade unions

The RMT members employed by companies within the Jarvis group were sympathetic to the situation faced by their former colleagues. They were worried that they might be next in the drive to worsen collectively bargained terms and conditions.

Hydrex still had a close relationship with Jarvis, not least because it was dependent on the group for much of its work. The RMT realised that it would be much better able to defend the terms and conditions of its Hydrex members if it could involve the Jarvis group members in any industrial action.

But the RMT also realised that the trade dispute was only between the employees of Hydrex and their employer. It knew that it could not take industrial action against a party that was not the party to the trade dispute (section 224 TULRCA), meaning that it would be unlawful for the Jarvis group employees to take action.

The RMT could not therefore call for secondary, or sympathy, action.

Because the prohibition in section 224 TULRCA was absolutely clear and it had no domestic remedies to exhaust, the union was free to pursue its claim to the Strasbourg Court without starting court action first in the UK.

Article 11, European Convention on Human Rights

Article 11 of the convention provides that:

"1. Everyone has the right to freedom of peaceful assembly and freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the

Photo: Stefano Cagnoni (reportdigital.co.uk)

prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others..."

Until 2008, the Strasbourg Court had treated the right to collective bargaining and the right to strike as individual aspects of the freedom of association, allowing member states to choose how to achieve the objective set out in Article 11.

For example, in **Gustaffson -v- Sweden**, the court said that "Article 11 does not secure any particular treatment of trade unions... The State has a choice as to the means to be used".

Demir and Baykara -v- Turkey

That all changed in 2008 with the landmark case of **Demir and Baykara -v- Turkey**, which was about a Turkish municipality that had reneged on its obligations under a collective agreement.

When the Turkish courts ruled that the union of civil servants did not have authority to enter into collective agreements, members of the union complained to the Strasbourg Court saying that their rights under Article 11 had been infringed.

The court agreed, but it was the way it came to that conclusion that is important. It started by reviewing a number of international law instruments, including: International Labour Organisation (ILO) Convention numbers 87 and 98 on the Freedom of Association and Protection of the Right to Organise and the Right to Organise and Collective Bargaining, the International Covenant on Civil and Political Rights, the European Social Charter and the EU Charter. It also said that it was important to look at the practice in those states that were party to the European Convention.

The court then said that its previous case law should be "reconsidered" to "take account of the perceptible evolution in such matters, in both international and domestic legal systems". And it said that it now also had "to take into account the elements of international law other than the European Convention, the interpretation of such elements by competent organs, and the practice of European States" in defining the meaning of rights under the convention.

There is a mass of decisions and commentaries on trade union rights, and particularly the right to strike, from the supervisory bodies overseeing ILO Convention numbers 87 and 98.

The ILO's Committee of Experts has already condemned legal requirements such as threshold percentages for support in a ballot, the fact of industrial action amounting to a breach of the contract of employment and

Photo: Andrew Ward courtesy RMT

John Hendy QC, Neil Todd and team prepare for the RMT's European Court challenge

therefore grounds for dismissal and civil liability for the consequences of industrial action.

It has considered the UK's industrial action laws on a number of occasions and each time has found them to be in breach of ILO Convention number 87. For example, because of the complexity of the balloting notification requirements and the ban on secondary action.

The European Social Charter is supervised by the European Committee of Social Rights. In 2002, the committee said that the UK did not guarantee the right to strike in accordance with Article 6 of the charter, that the permitted scope and procedural requirements for industrial action were restrictive, that the consequences for unions when action was found to be unlawful were serious and that workers had inadequate protection from dismissal.

The committee made similar findings in relation to the UK in 2000, 2004 and 2006. The committee's 2006 report was then adopted by the Committee on Economic and Social Rights in its "Report on the UK's implementation of the International Covenant on Economic and Social Rights" in June 2008.

Although the **Demir and Baykara** case was about collective bargaining, the principles have been embedded and developed in a number of subsequent Strasbourg cases to do with industrial action.

The RMT is relying heavily on the the court's reasoning in that and subsequent cases.

The union has also filed a complaint covering the same ground with the Freedom of Association Committee of the ILO, the intention being to use its decision as part of the argument in Strasbourg.

The backlog of cases at the Strasbourg Court is historic and so it's unlikely that there will be any decision within two years. But the case has at least been filed and we now await the government's response with interest.

Industrial action advice from Thompsons

Thompsons specialist Trade Union Law Group, with members throughout the country, has particular expertise in the legal issues arising out of industrial action and has represented unions in all the significant cases over the last year.

The legal questions associated with industrial action are invariably complex. In this edition of LELR, we have sought to explain some of the issues that have been the focus of court cases over the last year.

These comments are not intended as a comprehensive statement of the law in relation to industrial action, nor as a substitute for legal advice in any particular situation.

Our Trade Union Law Group would, however, be pleased to assist in any way. But it is essential that we receive requests for advice and assistance in accordance with individual unions' specific arrangements with Thompsons.

Thompsons is the most experienced trade union firm in the UK with an unrivalled network of offices and formidable resources.

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This publication is not intended as legal advice on particular cases.

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