



How are unions and employers developing arguments to (i) defend, or (ii) attack, strike action?

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# The extreme position

*“If we can’t get a general election we should organise with our brothers and sisters in the trade unions to bring an end to this government with a general strike”*

- Dawn Smith PM for Crewe & Nantwich, 25 September 2018

*“She is a new MP and she was at a big fringe event - nothing to do with the party organisation - and I'm sure she got a little bit carried away.”*

- Tom Watson, Labour Party Deputy Leader, 26 September 2018

# The basic framework (1)

- Section 219 TULRCA – prima facie immunity in relation to the industrial torts
- Section 244 – act must be done in contemplation or furtherance of a trade dispute as defined
- Section 220 – peaceful picketing allowed
- Sections 222-225 – excluded forms of industrial action
- Section 226 – requirement of ballot

# The basic framework (2)

- Section 227 – entitlement to vote given to all those that union reasonably believes will be induced to take part in strike action
- Section 226A - notice of ballot and sample voting papers to be provided to employer along with numbers, categories and workplaces
- Section 228 – separate workplace ballots – subject to section 228A
- Sections 231 and 231A – notice of the result to be given to voters and employers respectively
- Section 234 – period of validity of the ballot
- Section 234A – notice of industrial action to be given to the employer

*“Making it harder for people to go on strike is not good for industrial relations. Unresolved disputes increase workforce tensions as well as damaging morale and productivity.”*

- Hannah Reed, Senior Employment Rights Officer, TUC

- Section 226(2)(iia) – requirement for 50% turnout (but includes spoilt or otherwise invalid ballot papers (section 297))
- Section 226(2C) – additional requirement of 40% “yes” vote “where majority of those who were entitled to vote are....normally engaged in the provision of important public services”
- Section 226(2E) – scope of IPS (to be brought in via regulations) – health, education for under 17’s, fire services, transport services, border security, (nuclear decommissioning)
- Section 229(2B) – ballot paper must include summary of matters in issue in the dispute

- Section 229(2C) – when balloting for action short of a strike, type or types of action must be specified
- Section 229(2D) – ballot paper must indicate period or periods within which action expected to take place
- Section 234(1) – ballot ceases to be effective after 6 months (unless longer period up to 9 months agreed with employer)
- Section 234A(4) – 14 days’ notice (unless employer and union agree 7 days)
- Section 220A – requirement for union supervision of picketing

# But is there really a problem?

- ONS statistics for 2017 (published on 30 May 2018)
  - 276,000 working days lost – 6<sup>th</sup> lowest since records began in 1891
  - Down from 322,000 in 2016. 187,000 of those from transport and storage
  - 79 stoppages – lowest since records began
  - 33,000 workers involved in labour disputes – lowest figure since records began in 1893
  - Down from 154,000 in 2016
  - 162.2 million working days lost in 1926
  - 29.5 million days lost in 1979 – the “winter of discontent”
  - 27.1 million days lost in 1984 – mainly due to the miners’ strike

# How are unions responding? (1)

- Not balloting at all – use of social media to organise unofficial or wildcat action
- Not balloting at all – going for an interim declaration to try to prevent the employer taking certain actions – *BALPA v BA City Flyer [2018] EWHC 1889*
- Not balloting because it is not industrial action – *MoJ v POA [2017] IRLR 625*.
  - Effect of section 127 Criminal Justice & Public Order Act 1994.
  - Claims by the union that walk out falls under section 44 ERA – leaving the workplace because of “serious and imminent” danger

# How are unions responding? (2)

- Fragmented balloting?
- Not much evidence of this so far
- Note the dramatic impact of the 50% turn out requirement in relation to the PCS ballot in July 2018
  - 142,673 entitled to vote
  - 59,285 voted – 12,051 short of the threshold
  - 50,726 voted ‘yes’ to industrial action – 85.6%
  - Note that the 40% IPS threshold (had it applied) would have been 57,069
  - Highest turnout and ‘yes’ vote in the union’s history
- Time to return to the ECHR and Article 11?

# How are unions responding? (3)

- Co-ordinated action?
  - Ryanair – strikes by pilots and cabin crew across a number of European countries
  - McDonalds, TGI Fridays and Wetherspoons co-ordinated strike in October – albeit only involving 9 branches in 9 different locations
  - Some evidence of co-ordination between Deliveroo and Uber Eats couriers, particularly after joint action in France (and against the background of possible acquisition of the former by the latter)
  - The ongoing DOO issue with various train operators

# How are employers responding?

- Limited and unsuccessful attempts to rely on the 2016 provisions as providing new gateways to prevent strike action
- *Thomas Cook v BALPA [2017] IRLR 1137* – unsuccessful attempt to use the “expected period or periods” of strike action to pin the union down to provide specific dates
- *Argos v UNITE [2017] IRLR 1959* – unsuccessful attempt to challenge ballot on the basis of inadequate summary of trade dispute/non-existence of trade dispute
- *Govia Thameslink v ASLEF [2017] IRLR 246* – unsuccessful attempt to extend the ambit of *Viking* and *Laval*
- *Royal Mail v CWU [2017] EWHC 2548* – reliance on mediation provisions in collective agreement to prevent strike action



Thank you

Any questions?

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