

Information to be Included on an Industrial Action Ballot Paper

Section 229 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) specifies that the voting paper must:^{1 2}

1. state the name of the independent scrutineer
2. clearly specify the address to which it is to be returned
3. clearly specify the date by which it is to be returned
4. be marked with one of a series of consecutive whole numbers every one of which is used in giving a different number in that series to each voting paper
5. contain at least one of the following questions—
 - (a) a question (however framed) which requires the person answering it to say, by answering “Yes” or “No”, whether he is prepared to take part or, as the case may be, to continue to take part in a strike;
 - (b) a question (however framed) which requires the person answering it to say, by answering “Yes” or “No”, whether he is prepared to take part or, as the case may be, to continue to take part in industrial action short of a strike.
- 6. include a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates.**
- 7. where the voting paper contains a question about taking part in industrial action short of a strike, the type or types of industrial action must be specified (either in the question itself or elsewhere on the voting paper).**
- 8. indicate 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.**
9. specify who, in the event of a vote in favour of industrial action, is authorised for the purposes of section 233 to call upon members to take part or continue to take part in the industrial action.
10. The following statement must (without being qualified or commented upon by anything else on the voting paper) appear on every voting paper—
'If you take part in a strike or other industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than twelve weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later'.

¹ Provisions in bold added by the Trade Union Act 2016.

² The full section wording is on page 7.

The method of voting in a ballot must be by the marking of a voting paper by the person voting.

(Although not required it is useful to say above the questions, "Please place an X in the box of your choice".)

All section numbers are of TULR(C)A.

Summarising the Matter(s) in Issue

The voting paper must include a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates.

Is there a dispute?

- there must be a disagreement, not just a demand/claim
- defining the dispute
- turning a demand into a dispute
- evidence
- has the employer agreed to part of the demand?
- if the employer agrees to part of the claim/to a small extent will the dispute as defined still exist?
- the effect of ongoing negotiations/changing circumstances;
 - before the ballot;
 - before the action is called
- has the dispute resolution procedure under any collective agreement been exhausted/ACAS collective conciliation/mediation/arbitration been considered?

Is it a trade dispute?

Trade dispute is defined section 244

- between workers and their (current) employer
- relating wholly or mainly to:
 - terms and conditions of employment, or the physical conditions in which any workers are required to work;
 - engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
 - allocation of work or the duties of employment between workers or groups of workers;
 - matters of discipline;
 - a worker's membership or non-membership of a trade union;

- facilities for officials of trade unions; and
- machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.
- What does the dispute relate to - not about the reasons why the parties are in dispute
- Political disputes
- Secondary action
- Irrelevant whether concerns well founded

Is this the dispute being balloted for?

- Ensuring the ballot is not primarily about any other disputes
- Secondary aims

Will this dispute still apply when the action is called?

- Under the amended section 234 the action no longer has to be called within 4 weeks of the ballot. Now it must start and end within 6 months of the last day of balloting (unless extended by agreement with the employer up to 9 months, or by application to court).
- Is the current dispute likely to broaden/narrow by the time the action is called?
- Is industrial action contemplated at the time of the ballot (ballot all who it is reasonable to believe will be called to take action - section 227)?

Who does this dispute apply to/affect?

- Who at the time of the ballot do you believe you will call?
 - The effect of the new thresholds for workers engaged at the relevant time (when action called section 226 (1)) in specified important public services
- Is that everyone who is affected?
- Categories of workers for the notice to the employer
- Effect on these questions of a lapse of possibly many months before the action is called
- Separate workplace ballots
- Might some numbers have dual membership with another union also calling action at the same time (but not at the same times)?
- Are there any overseas members – do you need to send declarations about where they expect to be during the ballot with the ballot paper?

How much detail about the dispute is needed on the ballot paper?

- 'Summary' (not 'reasonably detailed indication of the matter(s) in dispute')

- ‘sufficient to enable the union member who is voting to understand what issues remain unresolved’ (Explanatory Notes to the Trade Union Act 2016)
- Not enough just to say ‘pay’, ‘terms and conditions’ or ‘redundancies’
- Do not include matters that are not part of the trade dispute
- Do not include matters that are part of another trade dispute that it is not intended to call action about
- Enough information to give the detail required by section 229 but not so much that it might not cover part of the dispute as it develops
- Wide enough to cover the whole of the dispute but not so wide as to bring in other matters not part of this dispute
- Summary of matters in dispute found to be adequate by the *High Court in Argos Ltd v Unite the Union [2017] EWHC 1959 (QB)* were:
 - a guarantee on all existing terms and conditions including current bargaining arrangements
 - in the event of a transfer, any national forum site remained part of the national forum
 - a relocation package to be agreed
 - voluntary redundancy be available for those that cannot not or do not want to move site in the event of future site moves.
- Ways of adding detail:
 - The type(s) of trade dispute listed under section 244 of TULR(C)A that this dispute relates to
 - Description/grade of workers to whom the dispute relates
 - Sector of employer to which the dispute related
 - Geographical place where the dispute bites
- Avoid defining the dispute in such a way that the employer could remove the dispute by only moving a small way e.g. a dispute about the refusal to increase pay could be defeated by the employer increasing pay by 0.1%
- Possible acceptable examples? The proposed industrial action relates to a dispute about;
 - The refusal to agree to an immediate rise in basic pay for all staff of 5% without conditions?
 - The proposal to reduce working hours/overtime?
 - The proposal to reduce shift payments?
 - The proposal to change shift patterns?
 - The proposal to increase/decrease the weekly guaranteed compulsory working hours?

- Consistency with other communications

Specifying the Types of Industrial Action Short of a Strike

Where the voting paper contains a question about taking part in industrial action short of a strike, the type or types of industrial action must be specified (either in the question itself or elsewhere on the voting paper).

- If asking about both strike action and industrial action short of a strike separate questions must be asked
- An overtime ban and a call-out ban are both industrial action short of a strike (Section 229 (2A))
- Now need to specify the type of industrial action short of a strike either in the question or elsewhere on the ballot paper
- ‘to enable a member to make an informed decision about whether or not to support the proposed action when deciding how to vote’ (Explanatory Notes to the Trade Union Act 2016)
- ‘work to rule’, ‘overtime ban’ - examples of types (Explanatory Notes to the Trade Union Act 2016)
- How specific do you have to be?
 - e.g. would refusal to act up or refusal to take calls looking for volunteers for overtime outside of duty/on call hours be covered by ‘work to rule’?
- Different groups of workers taking different types of action at different times

Specifying the Expected Period(s) of Industrial Action

The voting paper must indicate 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

- The period within which the industrial action is ‘proposed’ or ‘expected’ *Thomas Cook Airlines Ltd v British Airline Pilots Association [2017] EWHC 2253 (QB)*
- Continuous/discontinuous
- ‘to enable a member to make an informed decision about whether or not to support the proposed action when deciding how to vote’ (Explanatory Notes to the Trade Union Act 2016)
- Are dates required? Not necessary to give specific dates on which the action is to be taken, according to the judge in *Thomas Cook Airlines Ltd v British Airline Pilots*. In that case the dates at the beginning and the end of the period were specified.
- How precise do you need to be?
- ‘November 2016’ ‘Late December 2016’ –examples (Explanatory Notes to the Trade Union Act 2016)

- Other examples;
 - Every Friday until further notice?
 - Two days a week for the next 6 months?
 - Late Winter to early Spring?
- Need to specify period(s) for each type of action
- Ballot paper must be sent to employer before the ballot (section 226A)
 - Either with the notice of ballot or no later than the 3rd day before the opening of the ballot
 - Effect on balance of power in industrial disputes as employer has more information earlier

Compliance

- Accidental non-compliance
 - The accidental failures disregard in section 232B does not apply to section 229 Voting Paper
- Weighing up the pros & cons of knowingly not complying
 - Limits on damages

The Consequences of Failing to Comply

- The call for action would not have the support of a ballot so section 219 immunity from industrial torts (inducing breach of contract etc.) lost so risk of
 - Injunction
 - Damages
 - Employees lose the right to claim automatic unfair dismissal under section 238A
- Reputation
- Distraction
- Complaints from members
 - Does the rule book say anything about compliance?
- Action by individuals

If you are trying to comply is it worth inviting the employer to let you know at this stage if they consider the ballot paper non-compliant when you send it under section 226A?

- Would a non-response assist in any later injunction proceedings on the ballot paper?
- See the similar suggestion in the ACAS Code on the ballot notice requirements and entitlement to vote (section 226A and section 227)

229 Voting paper

(1) The method of voting in a ballot must be by the marking of a voting paper by the person voting.

(1A) Each voting paper must—

- (a) state the name of the independent scrutineer,
- (b) clearly specify the address to which, and the date by which, it is to be returned,
- (c) be given one of a series of consecutive whole numbers every one of which is used in giving a different number in that series to each voting paper printed or otherwise produced for the purposes of the ballot, and
- (d) be marked with its number.

This subsection, in its application to a ballot in which merchant seamen to whom section 230(2A) applies are entitled to vote, shall have effect with the substitution, for the reference to the address to which the voting paper is to be returned, of a reference to the ship to which the seamen belong.

(2) The voting paper must contain at least one of the following questions—

- (a) a question (however framed) which requires the person answering it to say, by answering “Yes” or “No”, whether he is prepared to take part or, as the case may be, to continue to take part in a strike;
- (b) a question (however framed) which requires the person answering it to say, by answering “Yes” or “No”, whether he is prepared to take part or, as the case may be, to continue to take part in industrial action short of a strike.

(2A) For the purposes of subsection (2) an overtime ban and a call-out ban constitute industrial action short of a strike.

(2B) The voting paper must include a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates.

(2C) Where the voting paper contains a question about taking part in industrial action short of a strike, the type or types of industrial action must be specified (either in the question itself or elsewhere on the voting paper).

(2D) The voting paper must indicate 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.

(3) The voting paper must specify who, in the event of a vote in favour of industrial action, is authorised for the purposes of section 233 to call upon members to take part or continue to take part in the industrial action.

The person or description of persons so specified need not be authorised under the rules of the union but must be within section 20(2) (persons for whose acts the union is taken to be responsible).

(4) The following statement must (without being qualified or commented upon by anything else on the voting paper) appear on every voting paper—

'If you take part in a strike or other industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than [twelve] weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later.'