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White Paper Conference: Restrictions

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The Outline Structure

- Is there a tort committed; e.g. inducing breach of contract; interference with contract by unlawful means?
- Is there a trade dispute? Is it political?
- Is the action primary or secondary?
- Notice of ballot must be given
- Has an appropriate ballot been held? Separate workplace ballots
- Has notification been given of the ballot result? And of the action?
- What is the duration of the ballot?
- Has proper notice been given of the strike?
- Is an injunction appropriate? Serious issue to be tried; balance of convenience; but substantial merits to be considered; Look to likelihood of the unions having defence; **NWL v Woods** [1969] IRLR 478

A Minimal Set of Changes

- Original plan was to go much further in Trade Union Bill and attack check offs but Government backed down in return for support of unions on EU Referendum
- In particular, some of the Bill's most aggressive proposals to regulate picketing were dropped following consultation, including:
 - A requirement for trade unions to provide picket plans to the police and employers two weeks in advance of strike action
 - Restrictions on unions' use of social media
 - The creation of a new criminal offence of intimidation
- Royal Assent 5 May 2016; all provisions now in force.
- Now there is potential upsurge in strikes, some political in nature

Right to Strike?

- Art 11 ECHR as interpreted by Strasbourg
- **BA v UNITE** [2010] IRLR 809 para 19; Smith LJ must have effective right to withdraw labour
- **Serco** [2011] IRLR 399: Need practicable workable approach to the complex legislation
- **ISS Mediclean v GMB** [2015] IRLR 96; Law has labyrinthine code of detailed requirements with which unions have to comply. The courts should be loath to introduce by the backdoor implicitly what may be other further restrictions which are not in the legislation

How Should Act Be Interpreted?

- Should be given “likely and workable construction”; Lord Bingham in *P v NAS* [2003] IRLR 307 Para 7
- *Balfour Beatty v Unite* [2012] IRLR 452: sensitive issues of policy arise as to where the balance should be struck between striving for democratic legitimacy and imposing unrealistic burdens in unions and officers
- In the old days, because it was immunity it was seen as appropriate to construe the immunity strictly *Express Newspapers v McShane* [1979]; not a sustainable argument today

At Least 50% Turnout

- If not, likely to be injunction without more
- In RMT's dispute with Virgin, while 84 per cent of those who voted said 'yes', under the new rules the employer would be able to challenge the union in two circumstances:
 - If fewer than 900 members actually voted, so the union would not meet the 50 per cent threshold requirement
 - If fewer than 720 members voted in favour of strike action, so the ballot would not meet the 40 per cent threshold

Important Public Services

- This has been discussed for years, especially after a rail/tube strike
- Scope is to be defined by Secretary of State by regulations save on nuclear
- Limited to Health services; education of those aged under 17; fire services; transport services; nuclear installations; border security
- Could these be challenged under ECHR

Voting Paper Contents

- New s229(2B) “a summary of the matter(s) in issue in the trade dispute”; may be different perceptions of this
- New s229(2C) types of industrial action short of strike must be specified
- New s229(2D) the period(s) within which the industrial action is expected to take place
- Are minor variations to be met by injunction? These are generally things the unions should be able to specify with some degree of precision

Expiry of Mandate

- 6 months or longer duration as agreed rather than 4 weeks or up to 8 as agreed

Picketing Crackdown

- Is it much of an issue any more?
- Needs supervisor of picketing; tell police; must wear something which “readily identifies” him as supervisor
- Where picketing is allowed
- What is remedy? Zone injunction; ***Thames Cleaning and Support v United Voices of the World*** [2016]
IRLR 695

Changes in Types of Action and Claims

- Attendance at homes; leverage campaigns
- Are lock outs/sits ins a thing of past?
- Freedom of establishment; Art 49: ***Govia v ASLEF***
[2017] IRLR 246

- The freedom of employees to combine and to withdraw their labour is their fundamental safeguard against the inherent imbalance of power between the employer and the individual employee. This freedom has to be accepted as a hallmark of a free society.
- (Green Paper, *Trade Union Immunities* (Cmnd 8218, 1981))
- The right of trade unions to induce workers to support industrial action by withdrawing their labour is 'a right which was first conferred by Parliament in 1906, which has been enjoyed by trade unions ever since and which is recognized as encompassing a fundamental human right'.
- (Millett LJ in *London Underground v National Union of Railwaymen* [1996] ICR 170)

Article 11

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Freedom of assembly and association

- Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 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 prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.



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