

# Review

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## Industrial Action Balloting Procedures and the Right to Strike

**The European Convention on Human Rights, which is incorporated into UK law by the Human Rights Act, does not specifically recognise a right to take industrial action. It does provide, at Article 11, that everyone has a right to freedom of peaceful assembly and the freedom of association with others, including the right to form and join trade unions for the protection of his or her interests. The European Court of Human Rights has recognised the right to collectively bargain and the right to strike under Article 11, subject to certain restrictions relating to national security, public safety, the protection of health or morals and the rights and freedoms of others.**

In the UK when a union takes industrial action, affected employers may be able to bring a claim against the union for causing or encouraging the union members to breach their contracts of employment (for example, by refusing to work). As part of those proceedings the employer may be able to obtain an order from the court that the union should be prevented from taking industrial

action pending the trial, known as an interim injunction and/or that the union should pay compensation to the affected employer.

The Trade Union and Labour Relations (Consolidation) Act 1992 ('the Act') provides a union with immunity from such a claim, provided the union's actions of causing or encouraging the members to breach their contracts of employment occur in circumstances where:

- (i) The industrial action is in furtherance of a genuine trade dispute; and
- (ii) The union has authorised or endorsed the industrial action; and
- (iii) The union has met the requirements of the Act in organising the industrial action. In particular, the Act includes a requirement that industrial action is supported by a ballot and notice must be given to the employer of the ballot, the ballot result and of any industrial action. The notices of holding the ballot and industrial action must include information about the members being balloted and called out that is as

accurate as is reasonably practicable, given the information in the possession of the union at the time.

If the union fails to meet the procedural requirements of the Act, the union and their members taking part in the industrial action will be left without any immunity or other legal protection. If an employer tries to obtain a court order for an injunction because a union has not complied with the requirements of the Act in the way the ballot is performed, the union may be able to rely on the defence of 'accidental failure'.

To rely on this defence, a union must prove that the failure to comply with the procedural requirements of the Act was so small and accidental that it is unlikely to affect the result of the ballot. If this is proven, the relevant failure can be disregarded and the union may still proceed with industrial action.

It should be noted that this statutory defence only applies to who is given entitlement to vote and the sending out of ballot papers. It does not apply to the notice provisions.



## NURMT v Serco and ASLEF v London Midland [2011] IRLR 399

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**In these cases both unions had trade disputes with the employers concerned. Both unions balloted members on industrial action and there was a majority vote in favour of taking industrial action.**

In the ASLEF case, the union balloted its members and gave both a notice of holding a ballot and strike notice to the employer concerned. In order to comply with its obligations under the Act, the union attached to the strike notice and notice of holding a ballot lists of the numbers of relevant members in each of the various workplaces who had been balloted, who the union intended to call out and this explanation of how the figures had been arrived at: 'The lists and figures accompanying this notice were arrived at by retrieving information from the union's

membership database and workplaces of members and the numbers in and at each, the database having been audited and updated for the purpose of the statutory notification and balloting requirements to ensure accuracy.' It was later discovered that two people were mistakenly allowed to vote in the ballot that in fact were not eligible to vote. The two additional votes were then included in the figures given on the notice of holding a ballot and strike notice.

In the RMT case, the union balloted its members and gave both a notice of holding a ballot and strike notice to the employer concerned. In order to comply with its obligations under the Act, the union also attached to both notices lists of the numbers of relevant members in each of the various workplaces who

had been balloted, who the union intended to call out and explained how the figures had been arrived at in very similar wording to that given in the ASLEF case.

In both cases the employers concerned alleged the unions had failed to meet the requirements of the Act and applied to the court for an interim injunction to prevent the unions from proceeding with the intended industrial action. The unions defended these claims, arguing that the relevant provisions of the Act had been complied with. In the ASLEF case it was also argued that the union could rely on the defence of 'accidental failure' under the Act because the mistake of allowing two people to vote when they should not have been allowed to vote was so trivial that it did not affect the result of the ballot.

## The High Court decision

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At first instance, the court ruled in favour of the employers and granted the injunction in both cases. The court held that the explanation in both cases of how the union had arrived at the figures in both the notice of holding a ballot and the strike notices was not detailed enough and therefore was not sufficient to comply with the relevant obligations under the Act.

In particular, the Court held that not enough information was given in either notice to show which members were being balloted and called out or how the unions had arrived at the figures given to the employers.

It was also held that the notices were inaccurate. The court held that to have performed an 'audit' (as referred to in the notices) the unions would have had to perform a systematic verification of the information provided. In fact, the unions had simply updated their records in accordance with their normal practice. The judge held that this was not an 'audit' and the union had therefore provided inaccurate information in the strike notice and notice of holding a ballot.

In the ASLEF case, the court held that ASLEF could not rely on the defence of accidental failure.

Allowing two members to vote who were not eligible to vote was not 'accidental' within the definition of the Act because the error would have been avoided if reasonable and practical steps for identifying the relevant members had been taken by the union.

Even though the error was not obvious from looking at the union's records kept at the time, the judge decided that if the union had implemented proper procedures, it would have picked up the errors. The trivial effect of the error on the notice of holding a ballot was held to be irrelevant to the legal test under the Act.



## The Court of Appeal decision

Both unions appealed and the Court of Appeal allowed the appeals, lifting the injunctions in both cases and making the following observations:

- (i) The right to strike is an element of the right to freedom of association under Article 11(1) of the European Convention on Human Rights, which is incorporated into UK law by the Human Rights Act 1998. The court at first instance was wrong to start from the presumption that this legislation should be interpreted against the unions seeking the benefit of the immunity granted by the Act. The Act should be interpreted without any presumptions one way or the other.
- (ii) In order to rely on the defence of 'accidental failure' under the Act regarding mistakes in the way the ballot is performed, a union does not need to prove that the error was unintentional and unavoidable. However, if a union gives members the opportunity to vote where the union knows or must know those members would not take part in the strike, the union cannot rely on this defence.
- (iii) If a union makes a trivial error which is not relevant to the way the ballot is performed the union may have a defence following the legal doctrine of 'de minimis'. This would be a separate defence to the statutory defence of accidental failure, which only provides a defence to mistakes in the way the ballot is carried out. This observation did not form an essential part of the judgment and therefore, although persuasive, it is not strictly binding.

- (iv) A union has a duty under the Act to ensure that the information provided in the notice of holding a ballot to a relevant employer is as accurate as reasonably practicable given the information in its possession at the time when it complies with the obligation. The Act does not impose an obligation on unions to obtain more information than that which is already in its possession or to set up new systems to improve their record keeping. In practice many unions will already have sufficient systems in place to keep relevant information regarding members' job categories and workplaces up to date for union purposes or to comply with legal requirements separate from duties owed under the Act.
- (v) Unions have a duty to explain how the figures in the notice of holding a ballot were arrived at to the employer concerned, however this duty is not onerous. Unions should comply with paragraph 16 of the Code of Practice on Industrial Action Ballots and Notice to Employers (available from the Department for Business, Innovation and Skills at <http://www.bis.gov.uk/files/file18013.pdf>). In particular, unions should provide the following information:
  - a. identify any weaknesses in the records which the union believes exist,
  - b. highlight any potential inaccuracies in the information of which the union is aware,
  - c. state the source(s) of the data given,
  - d. state whether the information provided is drawn from union records or not,
  - e. state whether that information is national or local or state

whether the information has been obtained by the union in some other way.

- (vi) In order to breach the requirements of the Act, a union would have to give a description of the process undertaken that was positively and materially misleading.

Applying these rules to these two cases, the Court of Appeal held that;

- (i) ASLEF had believed at the time that it was only balloting members who were eligible to vote. The union's error in allowing two people to vote who were in fact not entitled to vote was a small and accidental error which was unlikely to affect the result of the ballot. Therefore the union could rely on the defence of accidental error under the Act.
- (ii) The information given by the unions in the notice of holding a ballot and strike notice was as accurate as was reasonably practicable given the information in their possession at the material time. Therefore they had properly complied with their duties under the Act.
- (iii) The explanations given in the strike notice and notice of holding a ballot were not inaccurate and had been sufficient for the purposes of the Act. The word 'audit' was not the most appropriate term on the facts provided, however using this term was not positively misleading.

The Court of Appeal held that the unions had complied with the relevant requirements under the Act and could still proceed with the proposed industrial action.

## Conclusion

The Court of Appeal's decision appears to indicate some relaxation in the previously strict approach that courts have taken towards unions trying to comply with the complicated balloting requirements imposed by the Act in the past.

Importantly, the court recognised the right to strike in UK law through Article 11 of the European Convention on Human Rights and the Human Rights Act.

Lord Justice Elias also observed that courts should take a more practical and careful approach when considering whether a union has complied with the Act in the future.

While this statement did not form a binding rule, it may be taken into account by courts in the future.



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