Employment

Never mind the ballots……. …..here's the Trade Union Act

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Finally, the wait is over. The Trade Union Act 2016 ("TUA"), which received royal assent as long ago as May last year, is brought substantially into force with effect from 1 March 2017. Why the wait? We don't know - but now it is upon us, it is a good point at which to remind ourselves of the key changes in relation to industrial action ballots.

The legal framework is well-known – in order to attract immunity from suit under section 219 the Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA"), a trade union has to comply with the balloting requirements contained in Part V of that Act. Many a mistake has been made in the past, leading to injunctions preventing or delaying strike action by discontented workers. So what changes with effect from 1 March? Before looking at the key provisions of the TUA, a quick reminder that, for the most part, they will apply only to ballots which have not opened by 28 February 2017.

First up – section 2, inserting a new section 226(2)(a)(iia) into TULRCA. The longstanding requirement for a majority 'yes' vote from those voting has been beefed up so that the ballot will only validate a call for industrial action if "at least 50% of those who were entitled to vote in the ballot did so". This is likely to prove to be a significant issue in large-scale ballots so expect, in future, to see a rise in single workplace or partly aggregated workplace ballots so that a low turnout at some workplaces will prevent strike action from being taken at those workplaces only rather that the low vote potentially having the effect of derailing the entire ballot process.

No less controversial, is the provision added by section 3 (again to section 226 of TULRCA). Where industrial action relates to "the provision of important public services" in the fire, health, education, transport, border security and nuclear decommissioning and waste sectors, 40% of those entitled to vote must vote 'yes' to the proposed action. As has been pointed out by the trade unions, the effect of this, in a case in which there was a turnout of 50%, is that 80% of the voters would have to vote in favour of action before it could lawfully proceed.

The government has published draft regulations and guidance setting out in relation to each sector what definition is to be applied to "important public services" ("IPS"). Of the original '6 pack' of public services set out in section 3 of TUA, only 5 survive as no regulations have (at present) been made in relation to nuclear decommissioning. There are a few crumbs of comfort for trade unions when one looks at the detail of the regulations and the definition in relation to each sector, of what falls within the definition IPS definition. So, in relation to health services, the definition only covers ambulance and accident and emergency services as well as high dependency, intensive care or other psychiatric or obstetric services where immediate intervention is required. Broadly speaking, non-emergency or routine medical services will not be caught by the added requirements for a 40% "yes" vote. In relation to transport services, this covers buses – but only in London - civil aviation and passenger railway services. However, expressly excluded from the scope of railway services are passenger services which start or terminate outside Great Britain. So, strikes on Eurostar will not be caught by the new threshold.

The 40% threshold will apply whenever "the majority of those who were entitled to vote in the ballot are at the relevant time are normally engaged in the provision of important public services, unless at the time the union reasonably believes this not to be the case" – see the newly inserted section 226(2B) TULRCA. Unlike the 50% turnout requirement which we believe will lead to fragmented balloting, the new 40% "yes" requirement for IPS may see unions trying to manoeuvre around these restrictions by aggregating ballots of IPS and non-IPS members to bring the level down the IPS voter

numbers to less than the majority of the electorate. This seems to be a clear possibility in relation to health services.

The TUA also makes some significant changes to the information to be included on the voting paper (inserted by section 5 of TUA). The new section 229(2B) TULRCA provides that the voting paper must include "a summary of the matter or matters in the trade dispute to which the proposed industrial action relates." While that section is likely to be relatively easy for unions to comply with at the outset, there is a possible trap for the unwary. If the ballot papers identifies say 3 matters which are in dispute, 2 of which are then resolved, does the industrial action still have the support of a ballot? After all, employers are likely to say, how can the union show that a majority of those voting 'yes' to industrial action, did so by reference to the one item which remains in dispute rather than the 2 that have been resolved? To avoid this trap, unions are likely to want to have 'single issue' ballots so that a mandate for industrial action cannot be impugned by the resolution of other matters listed on the voting paper.

Also inserted by section 5 TUA are new sections 229(2C) and (2D) TULRCA both of which may provide assistance and ammunition for employers. Under section 229(2C) TULRCA where the union ballots on the question of industrial action short of a strike, it will now have to spell out the type(s) of action proposed. In addition under section 229(2D), the union must indicate when each type of action (whether strike action or action short of a strike) is expected to take place. Thus, employers will, from a very early stage, have a pretty good idea of what is in store in terms of industrial action and be able to make contingency plans. Whilst it is said that this requirement is not intended to be prescriptive as to what action a union can actually call on its members to take in due course and when, we suspect that it will only be a matter of time before an employer challenges a union which calls for strike action which was not foreshadowed in the information provided with the ballot paper.

Not only will employers (and members) now have greater visibility in terms of what industrial action a union is likely to want to take and when, but they will also have longer notice of any actual calls for such action. Section 8 TUA inserts a new requirement into section 234A TULRCA for 14 days' notice of the "starting date" of any action. Interestingly, the TUA also allows for the possibility of only a 7 day notification "if the union and the employer so agree." We do not expect to see many agreements of this sort. The longer period obviously gives the parties a greater opportunity to resolve the dispute but it also gives the employer's lawyers a less frenetic timetable for any court action. Note also that this provision will affect ballots which have taken place before the TUA came into force – there is a limited transitional provision in section 8(2) which states that the 14 day requirement will not apply to section 234A notices received by the employer before the Act came into force. But if such a notice is served after 1 March in relation to a ballot which has taken place before that date, the 14 day notice period will apply.

Lastly on the subject of balloting, section 9 TUA amends section 234 TULRCA so as to provide a six month mandate period for industrial action following a ballot. Once that period expires, a union will face having to re-ballot its members unless it is able to persuade the employer to agree to a further period of up to 3 months as is provided by the new version of section 234(1)(b) TULRCA. As with agreements to provide less than 14 days' notice of industrial action under section 234A, we do not expect to see employers rushing to agree to a further 3 month period of ballot validity rather than leaving the union to face the problem of re-balloting its members.

There was one section of the TUA relating to balloting which was brought into force on 3 November 2016, 6 months after the Act was passed. Section 4 TUA required the Secretary of State to commission an independent review on the use of electronic voting for industrial action ballots and to do so within 6 months. The government has shown little enthusiasm for extending the methods of voting to include electronic options so we do not expect to see much movement on this in the near future. Once the report is completed it is to be placed before both Houses of Parliament and the Act provides for the use of pilot schemes before any electronic system is rolled out. We detect the presence of long grass.

Bruce Carr QC is an employment practitioner specialising in particular in high value discrimination cases, industrial action and change management (contractual) issues ranging from variation to terms and conditions to restrictive covenants and wrongful dismissal.

Talia Barsam has extensive experience in employment law, including all areas of discrimination law, whistleblowing, unfair dismissal, redundancy, equal pay, breach of contract, TUPE, Working Time Regulations, restrictive covenants and jurisdictional issues. She has particular expertise in complex disability discrimination claims and whistleblowing claims.