

Briefing Paper:

Please Support Workplace Justice – Amendments to the Employment Bill

November 2008

Prepared by:
John Hendy QC

**THE
INSTITUTE
OF
EMPLOYMENT
RIGHTS**

50-54 Mount Pleasant
Liverpool, L3 5SD
www.ier.org.uk
office@ier.org.uk

**RECLAIM
OUR
RIGHTS!
UNITED
CAMPAIGN**

39 Chalton Street
London, NW1 1JD
www.unitedcampaign.org.uk
info@unitedcampaign.org.uk

Introduction

The Employment Bill goes into Report Stage in the House of Commons on 4th November 2008. Three amendments have been tabled which aim to remove legislative burdens on unions (New Clauses 1,2 & 3). A fourth amendment (New Clause 6) would bring UK laws more in line with the decision of the European Court of Human Rights relating to trade union membership (**ASLEF v UK**).

This Briefing updates our October Briefing and focuses on those amendments aimed at reducing burdens on unions. Reducing burdens on unions would allow them to carry out their fundamental purpose, defined by statute as “*the regulation of relations between workers and employers*”. That role is vital if we are to fight poverty and reduce inequality.

We would urge you to support these amendments. To assist, we have listed a few recent examples of how the law has impinged on trade union activity and workers’ rights. The Clauses are listed in the order we expect them to be taken in the Report Stage debate. That order may change on the day of the debate.

New Clause 3: Preventing the use of agency workers to replace striking workers

The Conduct of Employment Agencies and Employment Businesses Regulations, 2003 currently bars the use of replacement labour: (i) to carry out duties normally performed by a worker undertaking lawful industrial action or lawful strike action; or (ii) to replace a worker who has been assigned to do the work normally performed by a worker undertaking lawful industrial action or lawful strike action.

However, there are three fundamental weaknesses in the Regulations which need attention.

First, the Regulations differentiate between an employment agency and an employment business. An Employment Agency “introduces workers to hirers for direct employment by the hirer” (which can include temporary contracts). An Employment Business, on the

other hand, supplies “temporary and casual workers to third party hirers”. The clause barring the provision of replacement labour during lawful strikes only applies to those hired through an Employment Businesses. If an employer hirers labour through an Agency rather than a Business, they can avoid liability for engaging casual labour during lawful strikes. ***The effect of the amendment would be to remove the anomaly between replacement labour supplied by employment businesses and replacement labour supplied by employment agencies.***

Living Example 1: Use of Replacement Labour. CWU dispute at Royal Mail

In a dispute between members of the Communication Workers Union (CWU) and Royal Mail in 2007, Royal Mail was repeatedly challenged by the union about the recruitment of casual agency labour during the dispute, with reference to the restrictions contained in the Conduct of Employment Agencies and Employment Businesses Regulations 2003. The union claimed that in Bristol alone, the use of casual staff had increased from 12 immediately prior to the dispute to over 250 during the dispute. Royal Mail insisted that they were “acting in accordance with the law”. Indeed so confident was Royal Mail that it could circumvent the intention of the legislation that it established a number of operations at various sites across the country to do the work of the striking workers – using casual labour. The use of such tactics to undermine the democratic decision of the staff to strike and the failure of the legislation to prevent such abuse by the employer led to additional action being taken by CWU members at those Royal Mail sites employing casual staff. In other words, far from resolving the industrial relations problems, the use of agency labour by Royal Mail intensified and extended the dispute.

Second, the bar on supplying replacement labour only applies if the supplier knows that the worker is replacing a worker taking industrial action. ***The effect of the amendment would be to clarify the Regulations so as to impose a duty on the hirer to inform the supplier about the industrial action and to make it unlawful for the hirer to hire replacement workers to carry out work normally done by workers involved in lawful industrial action.***

Third, the current Regulations relates to replacement labour being employed during periods of official industrial action. However, the legislation has proved ineffective in that it allows the employer to hire labour just prior to the industrial action, allowing bad employers to avoid the intent of the legislation. ***The effect of the amendment would***

be to ensure that replacement labour would not be used to do the work of those taking part or intending to take part in a lawful strike.

New Clause 2: Fairer industrial action balloting procedures

Living Example 2: Ballots. RMT dispute with South Eastern Trains

In September 2008, the RMT balloted its members for industrial action over the removal of 500 guards on high speed trains, which the union believed posed a health and safety threat to travelers and staff. The ballot returned a 72% majority in support of strike action. Three days before the strike action was due to commence, South Eastern Trains announced that they were seeking an injunction against the union on the basis that the ballot was invalid because the union had not included four drivers in those balloted. In fact, following extensive consultation with its shop stewards to update its membership records, the union had already established that there were four drivers who had not been included in the notice of the ballot. In response, they updated their records and duly sent the four drivers ballot papers. Nevertheless, despite the considerable time, expense and resources spent by the union and its shop stewards in seeking to carry out an accurate ballot, the action had to be called off because of the discrepancy, despite the fact it would have made no difference to the outcome of the ballot.

The duties on trade unions to provide employers with notice of ballots and industrial action place onerous, costly and excessively complicated duties on unions. Despite past amendments to the balloting laws in the 1999 and 2004 Acts, the current laws still require unions to provide the employer with the exact numbers, categories and workplaces of those to be balloted and still allow employers to apply for injunctions based on small technical errors.

The use of injunctions by employers to prevent industrial action taking place, even where a clear majority have voted in a ballot to support the action, is frustrating and undemocratic particularly if the technical error complained of could have no impact on the ballot result.

Living Example 3: Ballot notification: CWU and Royal Mail

In 2007 the CWU called a national dispute. They supplied details of all the workers in each category in each workplace. Royal Mail sought and obtained an injunction principally on the ground that the CWU had failed to provide a total across all the workplaces for each category of worker even though anyone with a calculator could add up all the workplace subtotals in a matter of minutes.

The law imposes a significant burden on unions to keep meticulous records of their members' addresses, jobs, and workplaces – a task made more onerous by the seemingly constant process of privatisation, contracting out and outsourcing of

departments within individual companies. The reality of life is that members often do not remember to notify their union when they change address, get promoted or change workplace or job. Union records are forever out of date to some extent.

Living Example 4: Complexity of ballots. UCATT in Local Government

In the 2008 Local Government Craft Pay negotiations, the main construction union, UCATT, found the very task of coordinating, monitoring and verifying ballots so impossible that it was forced to abandon its attempts. Given the structure of the current labour market, with jobs, departments and whole grades of workers privatised and outsourced, UCATT found itself having to conduct one ballot for in-house workers and over 100 ballots for those workers outsourced to smaller employers. On top of the time and expense of organising such ballots, UCATT was threatened with injunctions by one employer following every step in the procedure. Under the pressure of legal action and uncertain as to whether their information was 100% accurate, UCATT was forced to call off the proposed action, thereby denying their members their democratic right and fundamental freedom to take action in support of their pay claim.

The effect of the amendment would be to place a duty on employers to cooperate, when requested by the union, by supplying relevant information needed to enable the union to comply with notice and balloting requirements. This duty is similar to current duties in the statutory recognition scheme, where the employer is obliged to supply the CAC with information.

Living Example 5: Ballot Notification. UNITE TGWU Dispute on London buses

On 21st October 2008, UNITE the Union suspended a 24 hour strike of transport workers due to take place across a number of bus companies in London. The strike was in support of a claim for equal pay for equal work, a dispute prompted by the “pay mess inflicted on drivers” receiving different rates of pay working the same bus routes but for different privatised companies. Thousands of London bus drivers had voted for the action in a secret ballot, in most cases by around 90% in support. However, the action had to be called off when one of the bus companies won an injunction claiming that the union had taken too long to notify the employer of the result of the ballot. In reality the union had received the results just 36 hours earlier and was in the process of implementing their internal, democratically agreed notification procedure when they were enjoined. This injunction was followed by another when a second company complained that the union was not doing enough to notify the members of the result of the ballot, despite the fact that the union had implemented its agreed notification procedure fully in line with its internal and statutory responsibilities. A third injunction prevented the democratically supported action from taking place when one of the bus companies claimed that the number of drivers included in the notice to employers (all

those on the union's records as paying by check off plus all those listed as paying by direct debit) did not match the total number of bus drivers – a problem faced when members paying their union dues by direct debit change jobs but do not inform the union.

New Clause 1: Better protection for workers taking part in lawful industrial action

Victimisation and dismissal (or threats of both) against those exercising their fundamental right to withdraw their labour, have been long standing grounds for international condemnation of UK trade union laws. The Minister, Pat McFadden, quotes the changes introduced through the Employment Relations Acts of 1999 and 2004 as offering strikers greater protection than ever before. That may be so. However, according to the ILO, UN and Council of Europe's supervisory bodies, the changes implemented in both those Acts fail to adequately implement our international obligations and fail to provide effective dismissal protection for individual strikers.

The effect of the amendment would be to provide that dismissals in anticipation of, during or after lawful industrial action would be void and ineffective, unless the employer can show that the reason for the dismissal was not connected to the industrial action.

If such a dismissal was effective the amendment would make it automatically unfair. This will act as a powerful disincentive to employers from employing replacement staff and making strikers redundant.

Interim relief would be available in all unfair dismissal claims relating to lawful industrial action and employees who have been unfairly dismissed would be entitled to automatic reinstatement if they request it.

All workers would be protected from suffering detriment or for being sued for damages as a result of their taking part in industrial action, other than appropriate deductions from the worker's wages for work s/he did not do whilst taking industrial action.

Living Example 6: Victimisation or dismissal of striking workers

In December 2002, an Employment Tribunal in Liverpool announced that 86 workers dismissed by their former employer, Friction Dynamics Ltd, a car parts manufacturer, had won their claims for unfair dismissal. They were sacked for taking strike action to resist derecognition of their union (TGWU), as a precursor to imposing adverse changes to terms and conditions of employment. At the time, the strikers were protected by the 8 week rule, (now extended to 12 weeks). Yet the employer still dismissed the strikers, the strikers received limited compensation and none were reinstated. The implications of the case are clear; if you take strike action and are unfairly treated by your employer, UK laws will not protect you against unfair dismissal or victimisation.