
THE IMPACT OF INDUSTRIAL ACTION BALLOTS ON TRADE UNION PROCEDURES, PRACTICES AND BEHAVIOUR: THE BRITISH CONTEXT

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INTRODUCTION

There is an abundance of published literature which has attempted to assess the impact of Conservative industrial relations legislation on trade unions (for the most renowned see: Elias and Ewing 1985; Steele 1990; Brown and Wadhvani 1990; Elgar and Simpson 1993; Miller and Steele 1993; Dunn and Metcalf 1996; Undy *et al.* 1996; Brown, Deakin and Ryan 1997). As well as this research, the author draws on recent empirical work of his own. Using data derived from interviews with senior officials, national officials and shop stewards it will examine the impact of industrial action ballots on the procedures, practices and behaviour of trade unions and, more specifically, whether workers under the new balloting system seemed more inclined to vote to avoid confrontation with employers and, in so doing, took a less conflictual and more accommodating stance than would have been the case under the old legislative provisions.

The expectation was that the empowerment of the individual member would result in more moderate decision-making. This paper draws on empirical data gathered from an in-depth analysis of seven case study trade unions: Transport and General Workers Union (TGWU), Electrical, Electronic Telecommunications and Plumbing Union (EETPU, now part of AMICUS), Civil and Public Services Union (CPSA, now part of the Public and Commercial Services Union (PCSA)), Associated Society of Locomotive Engineers and Firemen (ASLEF), Rail and Maritime Trade Union (RMT), Bakers Food and Allied Trade Union (BFAWU) and National Association of Teachers in Further and Higher Education (NATFHE). The research also involved the execution of 101 interviews, which included trade union officials, members, the Commissioner for the Rights of Trade Union Members (CROTUM), the Certification Officer (CO) and the Deputy General Secretary of the Trades Union Congress (TUC).

THE LEGAL FRAMEWORK

Throughout the 1980s and early 1990s successive Conservative governments introduced legislation regulating the internal affairs of trade unions. Conservative trade union law constituted a fundamental change from previous strictures in relation to the scope and methods of legislative intervention in union government (Wedderburn 1991: 203; Fredman 1992: 25; Fosh *et al.* 1993: 22; Hendy 1993: 16; Miller and Steele 1993: 224; Martin *et al.* 1995: 146). The essence of the legislation was not novel, for traces of it are to be found in the Donovan Commission in 1966, Barbara Castle's 'In Place of Strife' January 1969, the Industrial Relations Act 1971 and the American Landrum-Griffin Act 1959. Nevertheless, this legislation was a significant development, because for the first time it sought to impose a prescriptive template outlining in detail how unions should conduct their affairs (Undy *et al.* 1996: 75). The legislation, which despite the election of two successive Labour governments since 1997 remains little changed, now intervenes in union affairs by prescribing secret ballots for elections, union political funds and industrial action. It also provides the individual member with an extensive array of rights, which they can enforce against their union. The legal changes sought to make trade union governance more responsive to the wishes of the membership and to limit the permissible range of industrial action (Democracy in Trade Unions 1983: 1, 17). The legal changes pertaining to industrial action introduced by successive British Conservative Governments 1979-1997 were consistent with the changes in broader neo-liberal shifts throughout many Anglo American regulatory frameworks. For many, the changes in Britain during the 1980s and early 1990s appear to be a harmonization with US, Canadian and perhaps Australian regulatory frameworks rather than European Union countries. The policy of Conservative governments towards trade unions was exceptional in a European context. No other country has regarded it as necessary to make such a significant legislative intrusion into internal union affairs. The cry for "union democracy" has developed special significance for the leading British political parties (Lynk 2002). New Labour's adoption of the Conservative model of stringent legislation governing trade unions has become a noteworthy feature of Labour policy. It has been remarked that powerful trade unions have no place in New Labour's vision of the labour market, the employment relationship or society (Smith and Morton 2006).

In the Employment Act 1980 the scope of lawful picketing was diminished, with picketing protected only at a striker's own place of work (section 12). The Act also removed many of the immunities for secondary action (section 17). The Employment Act 1982 removed the immunity of trade unions from liability in tort, established by the Trade Disputes Act 1906, allowing employers to proceed against unions, not merely individual union officers, in

relation to unlawful industrial action (section 15). The Act also extended the power of the employer to dismiss strikers or those taking part in industrial action (section 9).

The introduction of the Trade Union Act 1984 marked a significant stage in the Conservative government's attempts to hamper the ability of trade unions to engage in industrial action. The Act prescribed detailed requirements which had to be satisfied for lawful industrial action to be taken. First, it required the holding of a ballot prior to industrial action as a precondition for obtaining legal immunity from civil actions (section 10 (3)(a)). Secondly, the result of the ballot had to be a majority in favour of the industrial action (section 10 (3)(b)). The third requirement of a ballot was that the first authorisation or endorsement of the tortious act must have taken place after, but within four weeks of the ballot (section 10 (3)(c)). Where the ballot was held on more than one day, the date of the ballot was treated as being the last of those days (section 10(5)). Finally, a valid ballot needed to comply with a list of requirements contained in section 11. Section 11 (1) carefully defined the electorate as all those members it is reasonable for the union at the time of the ballot to believe will be called upon to take strike or other industrial action. No other persons were to be allowed to vote in the ballot (s.11 (1) (b)). The section also covered the balloting process. Section 11 (3) required that the manner of voting must be by the marking of a ballot paper; a show of hands at a branch meeting was not acceptable. The Act provided that the member must be given the opportunity to vote by post or at the workplace (section 11(6)). The ballot had to be conducted in secret (section 11(7)), members had to be allowed to vote without interference or constraint from the union (section 11(5)) and without incurring any direct costs to themselves (section 11(5)).

Section 11 (4) related to the wording of the ballot paper itself, which was to be drafted so as to encourage members to vote against industrial action, the so called 'industrial health warning'. The question required members to indicate whether they were prepared to take part in industrial action involving a breach of their employment contracts. Aside from having to obtain a 'yes or no' answer, the union was able to phrase the question how it pleased and the words 'breach of contract' did not need to appear on the ballot paper, though the union had to make clear that the action would constitute such a breach (Undy *et al.* 1996: 125).

Further changes in the law on industrial action balloting were subsequently made in the Employment Act 1988. Firstly, it introduced the right for a union member to restrain his/her union legally from unlawfully calling industrial action (section 1). Secondly, the form and content of the ballot paper were to be subject to more detailed regulation. In particular section 11 of the Trade Union Act 1984 was amended (schedule 3(8)(c)). The ballot paper had to contain the following prescribed statement which could not be qualified or commented upon by anything elsewhere on the ballot paper:

If you take part in strike or other industrial action, you may be in breach of your contract of employment.

Third, the 1988 Act required industrial action to be supported by a majority in a separate ballot in each separate workplace (section 17). The 1988 Act also made it 'unjustifiable' for unions to discipline members for refusing to take part in industrial action (section 3). The courts were empowered to award up to £30,000 to a union member for such infringements (section 5(8)).

The Employment Act 1990 included an array of provisions designed to curb industrial action: removing immunity for all forms of secondary action (section 4); widening the range of persons who could render a union liable in tort for illegal action (section 6); tightening the requirements for repudiation of illegal action, which could enable unions to escape liability section 6(5); permitting employers to dismiss selectively employees taking part in union action (section 9) and widening the extent to which a union could be vicariously liable for the acts of any groups, including an official of the union (section 6(3)). This raised the possibility that industrial action organised by a group acting outside the constitution of the union, but including an official of the union, could be held to be the action of the union.

The Conservatives were particularly concerned with the problem of illegal industrial action. The predominant view of the then Conservative government was that taking illegal action did not necessarily reflect the breakdown within trade unions of internal authority. They believed that although a strike might not be authorised by a union, it might nevertheless be in a union's interests. With little supporting evidence, they claimed that there had been cases where trade unions turned a blind eye to or had secretly encouraged illegal action (Unofficial Action and the Law, 1989, para. 1.13).

Trade Union Reform and Employment Rights Act 1993 introduced further amendments to the law pertaining to industrial action ballots, requiring all industrial action ballots to be fully postal, rather than workplace (section 17); requiring the appointment of an independent scrutineer to oversee industrial action ballots (section 20); an obligation on a union to give written notice to each employer being balloted (section 21); and giving individuals the right to bring 'cease and desist' applications, seeking an injunction to restrain unlawful industrial action which would affect the supply of goods or services to that individual (section 22). This cause of action would apply even if the members themselves for whom the democratic rule was introduced had no complaint. The Conservatives were convinced that if unions faced the prospect of unlimited fines and sequestration of their assets for contempt if injunctions were flouted, this would discourage them from engaging in militant trade union activity. The intent was to make union bureaucrats reluctant to step beyond the immunities and risk financial damage to the union Dunn and Metcalf (1996: 70).

CASE STUDY DISCUSSION

Table 1 compares the methods for calling industrial action used by each of the seven case-study unions before and after the Trade Union Act 1984 and Trade Union Reform and Employment Rights Act 1993.

Table 1: Changes in the Trigger for Industrial Action by Union

Union:	Trigger for Industrial Action		
	Pre 1984:	Post 1984:	Post 1993:
BFAWU	Secret postal ballot	Mixture of secret postal ballots and workplace ballots	Mixture of secret postal ballots and workplace ballots
ASLEF	NEC decision	Workplace ballots	Secret postal ballot
RMT	NEC decision	Workplace ballots	Secret postal ballot
TGWU	NEC decision and workplace votes using a show of hands	Workplace ballots	Secret postal ballot
EETPU	Secret postal ballot	Workplace ballot	Secret postal ballot
NATFHE	Branch ballot	Workplace ballot	Secret postal ballot
CPSA	Sectional ballot	Workplace ballot	Secret postal ballot

Prior to the introduction of Conservative legislation, each of the case-study unions had its own method for the calling of industrial action. This had been part of their respective constitutions for many years and could be located in the rule-book. Since the introduction of Conservative legislation all but the BFAWU have moved towards a system of strictly secret postal ballots. The Conservative legislation requiring the holding of secret ballots prior to engaging in industrial action resulted in some significant changes to the procedures of some trade unions.

Firstly, the legislation required fundamental changes in ASLEF, the RMT and the TGWU in order for these unions to successfully avoid litigation. In these three unions the power to call industrial action originally lay with the executive, there was no duty on the executive to consult the union membership before undertaking strike action. As we have seen, the RMT, TGWU and ASLEF all eventually took the necessary steps to bring their arrangements into line with legal requirements.

Secondly, some unions which did ballot their members were also required to make changes at various junctures in order to bring their procedures into line with the requirements of legislation. NATFHE, for example, traditionally held branch votes. When the Trade Union Act 1984 was introduced it moved to secret postal ballots. In respect of the CPSA, the union had traditionally held sectional ballots. On the introduction of Trade Union Act 1984 it also adopted secret postal ballots. In respect to the EETPU, the union traditionally used secret postal ballots. It moved to workplace ballots on the introduction of Trade Union Act 1984, but reverted to postal ballots on the introduction of Trade Union Reform and Employment Rights Act 1993. The BFAWU traditionally used secret postal ballots. However, since 1984 it has used a mixture of workplace and postal ballots, the workplace ballots now being held are in contravention of the legal requirements.

Third, the case-study unions encountered a number of challenges, relating to the holding of industrial action ballots and the law surrounding them. A major problem was the inflexible and technical nature of the balloting rules with which trade unions needed to comply. The complex legal requirements meant trade unions could easily fall foul of the law hampering their ability to call industrial action lawfully. This viewpoint was most prominently expressed by officials in ASLEF, the RMT, the TGWU, the EETPU and NATFHE. The complex nature of the law also provided opportunities for employers and dissident members to challenge the balloting process (Elgar and Simpson 1993).

The legislation resulted in all the case-study unions, with the exception of the BFAWU, laying down detailed procedures on the process of organising industrial action. Senior officials of trade unions sent out the message to lower-level officials and committees that if the advice was not followed, it was impossible to comply with the law and organise a lawful and effective campaign of industrial action. Due to the technical nature of the balloting process, shop stewards needed support and guidance from national officials and legal officers.

The informants from the case-study unions indicated that trade unions attempted to comply with the legal obligations surrounding industrial action. In particular, senior trade union officials tried to ensure that illegal action was not taken (Lockwood 2000). However, illegal action was prominent in disputes on the London Underground involving both ASLEF and RMT members. Moreover, survey evidence suggests that the Conservative legislation did not succeed in one of its primary targets, the eradication of illegal industrial action (Millward *et al.* 1992; Elgar and Simpson 1993; Elgar 1997; Brown, Deakin and Ryan 1997); however, it is apparent that the law has contributed to a significant decline in illegal action (see below, p.29).

The Conservative legislation relating to industrial action was also used by some trade union leaders to justify changes in union procedures that secured increased power for those in control of union affairs, at the expense of other

groups, committees or officials. The leadership of the TGWU and the EETPU used the law pertaining to industrial action to justify the introduction of procedures that centralised power within the unions, undermining the traditional autonomy of shop stewards. Shop stewards could not determine the timing of ballots, and they were required to confer with senior officials prior to taking a particular course of action.

The decision of the respective leaderships to centralise decision-making, taking authority away from shop stewards, was made despite the fact that the law demanded this only in exceptional circumstances. In the case of Tanks and Drums v TGWU 1992 ICR 1, the Court of Appeal acknowledged that the law allowed unions to leave the final decision about resort to industrial action to the union official involved. Moreover, the centralisation of decision-making was implemented in the 1980s, at a time when bargaining arrangements were becoming fragmented, placing more responsibility on local officials. It could therefore be argued that the leaderships of the TGWU and EETPU embarked on a process of centralisation at a time of countervailing tendencies, that is, during a period when the level of pay-bargaining became more decentralised, in response to employer-led policies.

The degree to which decision-making was devolved to lower-level officials in relation to industrial bargaining was an area of substantial difference between the trade unions. The BFAWU, ASLEF and the RMT decentralised bargaining, increasing the power of shop stewards. These developments can be explained by various contextual factors, including: internal reform of union government, leadership policies and changes in the arrangements for collective bargaining. In the cases of both ASLEF and the RMT, the changes have bolstered the position of local officials in respect of the bargaining process. A similar position is also detectable in the BFAWU, where bargaining has also become more devolved. In the BFAWU, the RMT and ASLEF there has been a much greater degree of decentralisation and autonomy for branches, as a result of the organisational change that has taken place. This contrasts with developments in the TGWU, EETPU and CPSA central control of bargaining strategy, tactics and sanctions by the national leadership was viewed as necessary in order to ensure consistency in representation amongst trade groups, to reduce the possibility of 'maverick' local officials embarking on a bargaining agenda of their own, and to ensure compliance with legal requirements in respect of balloting. The latter was regarded as important not only in a strict legal sense, but also to safeguard the financial position of the union, since balloting and legal sanctions could be costly. At a time when trade unions were faced with financial difficulties associated with membership decline this caused the leadership of the TGWU, EETPU and the CPSA to be very sensitive to the balloting legislation (Undy *et al.* 1996: 228). In respect of NATFHE, the position differed between sections of the union. In the FE sector the collective bargaining process became more devolved, while in

the HE sector it remained centralised. This was mainly due to employer policies in respect to collective bargaining. The centralisation that occurred might be regarded as somewhat surprising. This is because during the period under review the level of pay bargaining became more decentralized, in response to employer-led policies. The changes that occurred within the respective trade unions can therefore be explained by the fact that each union was starting from a different contextual base.

The technical nature of the balloting rules, the financial expense of the balloting procedure, the pressure management could place on employees not to engage in industrial action, and the ability and willingness of employers to challenge perceived breaches of the balloting process were emphasised as harmful consequences for trade unions of the requirement to ballot on industrial action (Brown and Wadhvani 1990; Elgar and Simpson 1993; Undy *et al.* 1996; Elgar 1997). These administrative and legal factors acted as centralising pressures, promoting oligarchy within some trade unions and subverting democracy. This was contrary to the Conservative rhetoric that the legal measures surrounding industrial action balloting were designed to increase democracy (Democracy in Trade Unions 1983).

CONCLUSION

However, overall, the case-study trade unions appeared to have coped with the legal, financial and administrative burdens surrounding industrial action ballots. An analysis of interviews, conference reports and NEC minutes revealed a significant shift in the attitude of ASLEF, the RMT and the TGWU towards the concept of balloting before industrial action. At the time legislation on industrial action ballots was introduced, and for several years after, the stance taken by officials and members in these unions was confrontational. Activists argued for the retention of the status quo and for refusal to comply with legislation.

This fighting stance has gradually ebbed away, to the extent that the principle of holding a secret postal ballot before industrial action is now taken for granted in all cases. Indeed, the following statement by John Monks (the then General Secretary of the Trades Union Congress), made at the ASLEF annual conference sums up the current position on the concept of industrial action ballots:

It must be recognised that such laws have proved popular. No union leader would dare go anywhere near a group of workers and say we are not having ballots before strikes. The fact is that prior to the introduction of the legislation many unions did not have them before; no one can take that away from what the law achieved (ASLEF Conference Proceedings 1999).

Despite the above it should be noted that as far as trade unions were concerned, Conservative legislation was considered to have had a damaging impact on union power, inhibiting trade union behaviour. However, it was asserted that the law alone was not responsible for this state of affairs, that the hostile economic conditions were important factors. The apparent success of the Conservative legislation could not be seen in isolation from the rise in unemployment and from changes to the structure of labour and product markets which occurred at this time, both in Britain and other western advanced capitalist economies.

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