Neutral Citation Number: [2009] EWCA Civ 829

Case No: A2 2008/3018

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE KING
HQ08X03948

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2009

Before:

THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE LLOYD

- -

Between:

METROBUS LIMITED	**Claimant** **Respondent**
- and -	
UNITE THE UNION	**Defendant** **Appellant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

- -

John Hendy Q.C. and Simon Gorton (instructed by **EAD solicitors LLP**) for the **Appellant**
Charles Béar Q.C. and Paul Gott (instructed by **Bircham Dyson Bell LLP**)
for the **Respondent**

Hearing dates: 1 and 2 July 2009

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Judgment

Lord Justice Lloyd:

1. This appeal is against an order of Mr Justice King made on 9 October 2008, by which he granted an interim injunction restraining the Defendant trade union (to which I will refer as UNITE) from calling a strike. The point of the appeal is not as to whether that strike should go ahead; there is no question of that. However, UNITE takes the view that the grounds on which the judge decided to grant the injunction constitute a serious impediment on its ability and that of any other trade union to call a strike. On that basis permission to appeal was granted by Sedley LJ on the main two grounds of appeal. He adjourned to the full hearing the application for permission to appeal in respect of a third ground, going to the judge's exercise of his discretion. Since then the ambit of the appeal has been widened by an amendment to the grounds of appeal to bring in article 11 of the ECHR. As a result we have been shown decisions of the European Court of Human Rights about article 11, one as recent as April this year, and also texts and materials from the International Labour Organisation, the European Social Charter, and other international bodies. We have also granted permission to UNITE to adduce evidence which was not before the judge because of the very short notice given of the application before him.

The facts in outline

2. UNITE represented bus drivers working for a number of different bus companies in and around London. It sought to improve the pay and conditions of all of them to a uniform level. To that end, it submitted a claim for improved terms to the Claimant, Metrobus, in 2008. Dissatisfied with Metrobus' response, on 8 August 2008 UNITE gave notice to Metrobus that it intended to hold a ballot for industrial action. The notice was given by a letter from Mr John Griffiths, who was the relevant Regional Industrial Organiser for UNITE, based at the union's Dagenham office, to Mr Alan Eatwell, Managing Director of Metrobus. That letter gives rise to the first of the points that we have to decide.

3. The ballot was held between 18 August and 1 September 2008. On 3 September Mr Griffiths wrote again to Mr Eatwell, informing him of the result of the ballot, enclosing the scrutineers' report (which showed a 90% vote in favour of action), and giving notice of industrial action to take place for 24 hours from 3am on Friday 12 September. Mr Griffiths' letter of 3 September gives rise to the other two main points that we have to consider.

4. The strike took place. However, Metrobus still proved intractable, from UNITE's point of view, and on 2 October 2008 Mr Griffiths wrote again to Mr Eatwell giving notice of a further strike, for 24 hours from 3am on Friday 10 October. On 3 October 2008 Mr Eatwell replied to that letter, as well as (in terms) to the earlier letters dated 8 August and 3 September. He said he had taken legal advice, and his long letter (9 pages) set out a number of legal issues about the ballot and the past and proposed strikes. He asked for confirmation by return that UNITE would not call any further action in reliance on the ballot and that the latest strike notice would be withdrawn. He asked to hear from Mr Griffiths as a matter of urgency, though he did not threaten proceedings as such. He copied his letter to Mr Tony Woodley, General Secretary of UNITE.

5. On 6 October Mr Griffiths acknowledged the letter by email and said he hoped to be able to respond by the next day. In fact he did not do so until 8 October, when he sought to meet each of the points which had been made. On the same day Mr Eatwell wrote again, to tell Mr Griffiths that Metrobus intended to apply to the High Court for an injunction, hoping to serve evidence later that day for a hearing the next day.

6. That is what happened. The judge heard the application on 9 October, on evidence consisting of a witness statement of Mr Eatwell to which he exhibited the documents to which I have referred, among others. Inevitably there was no evidence from UNITE, though the judge was told certain matters by Counsel on instructions.

7. In an admirably clear judgment delivered at once, the judge rejected a number of the grounds of complaint raised by Metrobus, but found that there were fatal defects in the notice of the ballot, in the two strike notices, and in the failure of UNITE to notify Metrobus sufficiently promptly of the result of the ballot. He rejected a point made for UNITE that Metrobus should be denied relief because of their delay in taking the points. He therefore granted the injunction, as a result of which the strike did not take place.

8. On the appeal, the primary question is whether he was right that there were the fatal defects which he identified. The secondary question, on which permission to appeal has not yet been granted, is whether he was right to exercise his discretion in the way he did. As I have said, he had to proceed without any evidence from UNITE, though with some information as to matters which would have been put in evidence. We have the advantage over him that we have seen evidence from UNITE.

The legislation

9. It is necessary to set out some of the relevant legislation, which is in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA), though most of it represents amendments made to that Act since 1992. The starting point is section 219, by which trade unions are given conditional exemption from civil liability for the economic torts for which they would otherwise be liable by calling on members and others to break their contracts of employment by refusing to work. The section (omitting sub-sections (2) and (3) as not relevant for present purposes) is as follows:

> "(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only—
>
> (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or
>
> (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance.
>
> …
>
> (4) Subsections (1) and (2) have effect subject to sections 222 to 225 (action excluded from protection) and to sections 226 (requirement

of ballot before action by trade union) and 234A (requirement of notice to employer of industrial action); and in those sections "not protected" means excluded from the protection afforded by this section or, where the expression is used with reference to a particular person, excluded from that protection as respects that person."

10. The judge held that UNITE's action was "not protected" because of failures to comply with the requirements laid down under section 226 and under section 234A. Section 226 is as follows:

> "(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action—
>
> (a) is not protected unless the industrial action has the support of a ballot, and
>
> (b) where section 226A falls to be complied with in relation to the person's employer, is not protected as respects the employer unless the trade union has complied with section 226A in relation to him.
>
> In this section "the relevant time", in relation to an act by a trade union to induce a person to take part, or continue to take part, in industrial action, means the time at which proceedings are commenced in respect of the act.
>
> (2) Industrial action shall be regarded as having the support of a ballot only if—
>
> (a) the union has held a ballot in respect of the action—
>
> (i) in relation to which the requirements of section 226B so far as applicable before and during the holding of the ballot were satisfied,
>
> (ii) in relation to which the requirements of sections 227 to 231 were satisfied, and
>
> (iii) in which the majority voting in the ballot answered "Yes" to the question applicable in accordance with section 229(2) to industrial action of the kind to which the act of inducement relates;
>
> (b) such of the requirements of the following sections as have fallen to be satisfied at the relevant time have been satisfied, namely—
>
> (i) section 226B so far as applicable after the holding of the ballot, and
>
> (ii) section 231B;
>
> (bb) section 232A does not prevent the industrial action from being regarded as having the support of the ballot; and

(c) the requirements of section 233 (calling of industrial action with support of ballot) are satisfied.

Any reference in this subsection to a requirement of a provision which is disapplied or modified by section 232 has effect subject to that section.

(3) Where separate workplace ballots are held by virtue of section 228(1)—

(a) industrial action shall be regarded as having the support of a ballot if the conditions specified in subsection (2) are satisfied, and

(b) the trade union shall be taken to have complied with the requirements relating to a ballot imposed by section 226A if those requirements are complied with,

in relation to the ballot for the place of work of the person induced to take part, or continue to take part, in the industrial action.

(3A) If the requirements of section 231A fall to be satisfied in relation to an employer, as respects that employer industrial action shall not be regarded as having the support of a ballot unless those requirements are satisfied in relation to that employer.

(4) For the purposes of this section an inducement, in relation to a person, includes an inducement which is or would be ineffective, whether because of his unwillingness to be influenced by it or for any other reason."

11. Thus, there must be a ballot, notice of the ballot must be given to any relevant employer under section 226A, and the requirements of section 226B (concerning scrutineers) must be complied with as must the provisions of sections 227 to 231 about the ballot. It is unnecessary to consider sections 232A or 233 for present purposes.

12. Section 226A is the first of the provisions on which the appeal turns. It is as follows:

"(1) The trade union must take such steps as are reasonably necessary to ensure that—

(a) not later than the seventh day before the opening day of the ballot, the notice specified in subsection (2), and

(b) not later than the third day before the opening day of the ballot, the sample voting paper specified in subsection (2F),

is received by every person who it is reasonable for the union to believe (at the latest time when steps could be taken to comply with paragraph (a)) will be the employer of persons who will be entitled to vote in the ballot.

(2) The notice referred to in paragraph (a) of subsection (1) is a notice in writing—

(a) stating that the union intends to hold the ballot,

(b) specifying the date which the union reasonably believes will be the opening day of the ballot, and

(c) containing—

(i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at, or

(ii) where some or all of the employees concerned are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation or the information mentioned in subsection (2C).

(2A) The lists are—

(a) a list of the categories of employee to which the employees concerned belong, and

(b) a list of the workplaces at which the employees concerned work.

(2B) The figures are—

(a) the total number of employees concerned,

(b) the number of the employees concerned in each of the categories in the list mentioned in subsection (2A)(a), and

(c) the number of the employees concerned who work at each workplace in the list mentioned in subsection (2A)(b).

(2C) The information referred to in subsection (2)(c)(ii) is such information as will enable the employer readily to deduce—

(a) the total number of employees concerned,

(b) the categories of employee to which the employees concerned belong and the number of the employees concerned in each of those categories, and

(c) the workplaces at which the employees concerned work and the number of them who work at each of those workplaces.

(2D) The lists and figures supplied under this section, or the information mentioned in subsection (2C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information

in the possession of the union at the time when it complies with subsection (1)(a).

(2E) For the purposes of subsection (2D) information is in the possession of the union if it is held, for union purposes—

(a) in a document, whether in electronic form or any other form, and

(b) in the possession or under the control of an officer or employee of the union.

(2F) The sample voting paper referred to in paragraph (b) of subsection (1) is—

(a) a sample of the form of voting paper which is to be sent to the employees concerned, or

(b) where the employees concerned are not all to be sent the same form of voting paper, a sample of each form of voting paper which is to be sent to any of them.

(2G) Nothing in this section requires a union to supply an employer with the names of the employees concerned.

(2H) In this section references to the "employees concerned" are references to those employees of the employer in question who the union reasonably believes will be entitled to vote in the ballot.

(2I) For the purposes of this section, the workplace at which an employee works is—

(a) in relation to an employee who works at or from a single set of premises, those premises, and

(b) in relation to any other employee, the premises with which his employment has the closest connection.

[(3), (3A) and (3B) have been repealed.]

(4) In this section references to the opening day of the ballot are references to the first day when a voting paper is sent to any person entitled to vote in the ballot.

[(5) is not relevant]"

13. Metrobus was the only relevant employer. Some but not all of the employees in question had their union contributions paid by deduction from their wages (a process known as "check-off"). Relevant employees worked at three different workplaces.

14. Section 226B requires the trade union, before the ballot is held, to appoint a qualified person as scrutineer (except in the case of small ballots with no more than 50

members entitled to vote). The scrutineer does not have to conduct the ballot, though in this case, as is no doubt common, the scrutineer (Electoral Reform Services Ltd, "ERS") did do so. The statutory obligations are to make a report to the union, as required by section 231B, as soon as reasonably practicable after the date of the ballot, and in any event no later than 4 weeks after that date, and to take such steps as appear appropriate in order to enable that report to be made. The union is required to ensure that the scrutineer duly carries out his statutory functions, and must also ensure "that there is no interference with the carrying out of those functions from the union or any of its members, officials or employees": section 226B(3).

15. Section 227 deals with entitlement to vote. Sections 228 and 228A deal with separate workplace ballots. Section 229 contains requirements as to the form of the voting paper. Section 230 deals with the conduct of the ballot. None of these calls for special attention on this appeal, though I should quote sub-section 230(4), as follows:

> "(4) A ballot shall be conducted so as to secure that—
>
> (a) so far as is reasonably practicable, those voting do so in secret, and
>
> (b) the votes given in the ballot are fairly and accurately counted.
>
> For the purposes of paragraph (b) an inaccuracy in counting shall be disregarded if it is accidental and on a scale which could not affect the result of the ballot."

16. The next provision directly at issue is section 231A, but it is necessary to note section 231 in order to understand it, which is as follows.

> "As soon as is reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed of the number of—
>
> (a) votes cast in the ballot,
>
> (b) individuals answering "Yes" to the question, or as the case may be, to each question,
>
> (c) individuals answering "No" to the question, or, as the case may be, to each question, and
>
> (d) spoiled voting papers."

17. Originally, members were to be given this information, but employers were not. The requirement to tell employers was added by amendment in 1993, as section 231A, of which only sub-section (1) is needed for this appeal:

> "(1) As soon as reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that every relevant employer is informed of the matters mentioned in section 231."

18. Section 231B prescribes the contents of the scrutineer's report, and gives a right to a copy of the report to (a) any person entitled to vote in the ballot and (b) the employer of any such person, on request made at any time within 6 months from the date of the ballot.

19. I do not need to take time with section 232 (balloting of overseas members) or section 232A. Some reference was made in argument to section 232B, introduced in 1999, which is as follows:

> "(1) If—
>
> (a) in relation to a ballot there is a failure (or there are failures) to comply with a provision mentioned in subsection (2) or with more than one of those provisions, and
>
> (b) the failure is accidental and on a scale which is unlikely to affect the result of the ballot or, as the case may be, the failures are accidental and taken together are on a scale which is unlikely to affect the result of the ballot,
>
> the failure (or failures) shall be disregarded for all purposes (including, in particular, those of section 232A(c)).
>
> (2) The provisions are section 227(1), section 230(2) and section 230(2B)."

20. Of those provisions mentioned in section 232B(2), section 227(1) deals with according an equal right to vote to the relevant members of the union, and to no others; and section 230(2) and (2B) deal with the supply of a voting paper and the provision of a convenient opportunity to vote to those entitled to vote and as a special case to merchant seamen.

21. Section 233 deals with calling the industrial action, and section 234 defines the period after which the ballot ceases to be effective, which is normally four weeks, but can be extended by agreement between the union and the employer, or in certain other circumstances.

22. Section 234A is the next directly relevant section. It deals with notice of a strike call, and mirrors closely section 226A as regards notice of a ballot. The main difference is that whereas that section refers to "employees concerned", who are those expected to be entitled to vote in the ballot, section 234A refers to "affected employees" namely those employees who it is believed will be induced to take part in the industrial action, not limited to members who had been entitled to vote, or indeed to members of the union. The section is as follows (sub-sections beyond (4) are not relevant, so I exclude them from the quotation):

> "(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action is not protected as respects his employer unless the union has taken or takes such steps as are reasonably necessary to ensure that the employer receives within the appropriate period a relevant notice covering the act.

(2) Subsection (1) imposes a requirement in the case of an employer only if it is reasonable for the union to believe, at the latest time when steps could be taken to ensure that he receives such a notice, that he is the employer of persons who will be or have been induced to take part, or continue to take part, in the industrial action.

(3) For the purposes of this section a relevant notice is a notice in writing which—

(a) contains—

(i) the lists mentioned in subsection (3A) and the figures mentioned in subsection (3B), together with an explanation of how those figures were arrived at, or

(ii) where some or all of the affected employees are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation or the information mentioned in subsection (3C), and

(b) states whether industrial action is intended to be continuous or discontinuous and specifies—

(i) where it is to be continuous, the intended date for any of the affected employees to begin to take part in the action,

(ii) where it is to be discontinuous, the intended dates for any of the affected employees to take part in the action,

…

(3A) The lists referred to in subsection (3)(a) are—

(a) a list of the categories of employee to which the affected employees belong, and

(b) a list of the workplaces at which the affected employees work.

(3B) The figures referred to in subsection (3)(a) are—

(a) the total number of the affected employees,

(b) the number of the affected employees in each of the categories in the list mentioned in subsection (3A)(a), and

(c) the number of the affected employees who work at each workplace in the list mentioned in subsection (3A)(b).

(3C) The information referred to in subsection (3)(a)(ii) is such information as will enable the employer readily to deduce—

(a) the total number of the affected employees,

(b) the categories of employee to which the affected employees belong and the number of the affected employees in each of those categories, and

(c) the workplaces at which the affected employees work and the number of them who work at each of those workplaces.

(3D) The lists and figures supplied under this section, or the information mentioned in subsection (3C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies with subsection (1).

(3E) For the purposes of subsection (3D) information is in the possession of the union if it is held, for union purposes—

(a) in a document, whether in electronic form or any other form, and

(b) in the possession or under the control of an officer or employee of the union.

(3F) Nothing in this section requires a union to supply an employer with the names of the affected employees.

(4) For the purposes of subsection (1) the appropriate period is the period-

(a) beginning with the day on which the union satisfies the requirement of s 231A in relation to the ballot in respect of the industrial action, and

(b) ending with the seventh day before the day, or the first of the days, specified in the relevant notice."

23. I should refer to one other section of the Act, namely section 207 under which courts can take into account codes of practice approved by the Secretary of State under section 203. There is one current and relevant code of practice, concerning Industrial Action Ballots and Notice to Employers, issued in 2005. It does not constitute law in itself, and must give way to the correct interpretation of the Act, but it seems to me that it is of some interest and value.

The European Convention on Human Rights, article 11

24. Mr Hendy Q.C. for UNITE submitted that the provisions of TULRA as regards industrial action are to be seen in the light of article 11 of the ECHR, and must be construed in such a way as to be consistent with the fundamental rights afforded by that article. Article 11 is as follows:

"1. 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.

> 2. 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."

25. The article does not recognise expressly either a right to collective bargaining or a right to take industrial action. Mr Hendy showed us that decisions of the European Court of Human Rights have for some time past recognised that collective bargaining and strike action are important means by which citizens' rights under this article may be protected, but without any formal recognition of either as an essential element of the right afforded by article 11.

26. Thus, in *Unison v UK* [2002] IRLR 497, the Court (Third Chamber) said:

> "The Court recalls that, while Article 11 paragraph 1 includes trade union freedom as a specific aspect of freedom of association, this provision does not secure any particular treatment of trade union members by the State. There is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining. At most, Article 11 may be regarded as safeguarding the freedom of trade unions to protect the occupational interests of their members. While the ability to strike represents one of the most important of the means by which trade unions can fulfil this function, there are others. Furthermore Contracting States are left a choice of means as to how the freedom of trade unions ought to be safeguarded (see the *Schmidt and Dahlström v Sweden* judgment of 6 February 1976, Series A no. 21, pp.15–16, paragraphs 34–36)."

27. Now, however, he submitted, in a decision of the Grand Chamber in November 2008, the Court has recognised that the right to collective bargaining is an essential element in the article 11 right: *Demir and Baykara v Turkey* Application 34503/97.

28. The case concerned civil servants in Turkey who formed a trade union, which entered into collective negotiation with a local authority resulting in an agreement, and members then sued the authority when it failed to comply with the terms of the agreement. The District Court found in favour of the members. The Court of Cassation first quashed the ruling, on the basis that, even though there was no legal bar preventing civil servants from forming unions, they were not, as the law stood, authorised to enter into collective agreements. The District Court then confirmed its earlier judgment on the basis that, despite the fact that the domestic statute contained no express provision affording unions formed by civil servants the right to enter into collective agreements, this omission had to be remedied in the light of international treaties such as the relevant Convention of the International Labour Organisation, which had already been ratified by Turkey. The Court of Cassation again quashed the judgment of the District Court. It ruled that, at the time the union was formed, the applicable law did not permit civil servants to form trade unions. The union could not rely on the international labour conventions that dealt with such matters as they had

not yet been incorporated into domestic law and no implementing legislation had been enacted. The Court of Cassation concluded that the union did not have legal personality or the capacity to enter into a collective agreement. As one consequence of the ruling, following an audit of the local authority's accounts by the Audit Court, the members of the union were required to reimburse the additional income they had purportedly received as a result of the defunct collective agreement.

29. In the judgment of the Grand Chamber, the Court reviewed the development of its interpretation of the requirements of article 11 as follows:

> "140. The development of the Court's case-law concerning the constituent elements of the right of association can be summarised as follows: the Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action, the conduct and development of which the Contracting States must both permit and make possible (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström v. Sweden*, 6 February 1976, § 36, Series A no. 21).
>
> 141. As to the substance of the right of association enshrined in Article 11 of the Convention, the Court has taken the view that paragraph 1 of that Article affords members of a trade union a right, in order to protect their interests, that the trade union should be heard, but has left each State a free choice of the means to be used towards this end. What the Convention requires, in the Court's view, is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests (see *National Union of Belgian Police*, cited above, § 39; *Swedish Engine Drivers' Union*, cited above, § 40; and *Schmidt and Dahlström*, cited above, § 36).
>
> 142. As regards the right to enter into collective agreements, the Court initially considered that Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements (see *Swedish Engine Drivers' Union*, cited above, § 39). It further stated that this right in no way constituted an element necessarily inherent in a right guaranteed by the Convention (see *Schmidt and Dahlström*, cited above, § 34).
>
> 143. Subsequently, in the case of *Wilson, National Union of Journalists and Others*, the Court considered that even if collective bargaining was not indispensable for the effective enjoyment of trade-union freedom, it might be one of the ways by which trade unions could be enabled to protect their members' interests. The union had to be free, in one way or another, to seek to persuade the employer to listen to what it had to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).
>
> 144. As a result of the foregoing, the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked

by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, whilst in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law.

145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union (see, as a recent authority, *Tüm Haber Sen and Çınar*, cited above), the prohibition of closed-shop agreements (see, for example, *Sørensen and Rasmussen*, cited above) and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members (*Wilson, National Union of Journalists and Others*, cited above, § 44).

146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights (see, *mutatis mutandis*, *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 100, ECHR 2003-II; and *Selmouni v. France* [GC], no. 25803/94, § 101, ECHR 1999-V)."

30. The Court did not have to, and did not, address in *Demir* the question of the right to strike. Mr Hendy also showed us a subsequent ruling of the third section of the Court, *Enerji Yapi-Yol Sen v Turkey*, application 68959/01, given on 21 April 2009, in which the right to strike was at stake. The applicant was a trade union of civil servants active in fields including energy, and a member of the Federation of Public Sector Trade Unions. That federation planned a day of strike action to secure a right to a collective agreement for civil servants. Members of the applicant union took part in the strike action, and were disciplined by their employers for doing so. The union took proceedings in court to challenge a circular issued before the strike which stated that those taking part would be subjected to sanctions. After the failure of the domestic proceedings, the union applied to the European Court.

31. The Court considered first whether rights under article 11 had been interfered with, and, as a preliminary question, whether the union was a victim and so entitled to bring proceedings itself. It decided that point in favour of the union, at paragraph 24, and

immediately proceeded to the question whether there was an interference with those rights. It said this:

> "The terms of the Convention require that the law should allow trade unions, in any manner not contrary to article 11, to act in defence of their members' interests … Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests … The Court also observed that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the Convention, see *Demir and Baykara*). It recalled that the European Social Charter also recognised the right to strike as a means of ensuring the effective exercise of the right to collective bargaining. As such the Court rejected the Government's preliminary objection."

32. The Court then proceeded at once, under the heading "Concerning the justification of the interference", to consider whether the Government's action was justified under article 11.2. Paragraph 25 starts: "Such interference violates article 11 of the Convention", unless it falls within article 11.2. Thus, although in terms the Court had, at the end of paragraph 24, only ruled on the Government's preliminary objection that the union was not a victim, and therefore not entitled to bring the proceedings at all, it treated the ruling as being not only that the union was a victim, but that article 11 rights had been interfered with.

33. At paragraph 32 the Court acknowledged that the right to strike was not absolute and could be subject to certain conditions and restrictions. Having examined the relevant considerations, it concluded:

> "that these sanctions were such as to discourage trade union members and other persons from acting upon a legitimate wish to take part in such a day of strike action or other forms of action aimed at defending their affiliates' interests."

34. It held that there had been disproportionate interference in the applicant union's rights deriving from article 11.

35. On the face of it, therefore, this is a decision to the effect that action to prevent participation in a strike, or to impose sanctions for such participation is an interference with the right to freedom of association under article 11, for which justification has to be shown in accordance with article 11 paragraph 2. The contrast between the full and explicit judgment of the Grand Chamber in *Demir and Baykara* on the one hand, and the more summary discussion of the point in *Enerji Yapi-Yol Sen* on the other hand is quite noticeable. It does not seem to me that it would be prudent to proceed on the basis that the less fully articulated judgment in the later case has developed the Court's case-law by the discrete further stage of recognising a right to take industrial action as an essential element in the rights afforded by article 11.

36. Mr Hendy also submitted that European Community law recognises the fundamental nature of the right to strike. He cited the decision of the ECJ in *International Transport Workers' Federation v Viking Line* Case C-438/05 [2008] IRLR 143.

> "43. In that regard, it must be recalled that the right to take collective action, including the right to strike, is recognised both by various international instruments which the member states have signed or cooperated in, such as the European Social Charter, signed at Turin on 18 October 1961 – to which, moreover, express reference is made in Article 136 EC – and Convention No.87 concerning Freedom of Association and Protection of the Right to Organise, adopted on 9 July 1948 by the International Labour Organisation – and by instruments developed by those member states at Community level or in the context of the European Union, such as the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, which is also referred to in Article 136 EC, and the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000.
>
> 44. Although the right to take collective action, including the right to strike, must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices. In addition, as is apparent from paragraph 5 of this judgment, under Finnish law the right to strike may not be relied on, in particular, where the strike is contra bonos mores or is prohibited under national law or Community law.
>
> 45. In that regard, the court has already held that the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods (see case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 74) or freedom to provide services (see case C-36/02 *Omega* [2004] ECR I-9609, paragraph 35).
>
> 46. However, in *Schmidberger* and *Omega*, the court held that the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty and considered that such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

> 47. It follows from the foregoing that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable to the collective action at issue in the main proceedings."

37. English law does of course recognise a right to strike, and exempts trade unions from the tortious liability that they would otherwise be under for calling a strike. The relevance of the jurisprudence of the ECHR, on Mr Hendy's submissions, is that the restrictions on the ability of a trade union to call a strike must stand up to scrutiny under paragraph 2 of article 11. They are, of course, prescribed by law, but are they necessary in a democratic society in the interests mentioned in the paragraph? In other words, are they proportionate?

38. Mr Hendy argued that restrictions on the ability of a trade union to call a lawful strike could be justified in the interests of members of the union, who are entitled to be protected against the calling of a strike which does not have the support of a majority of the relevant members. He denied that such restrictions could be a necessary protection for employers. In support of that he quoted Millett LJ in *London Underground Ltd v NURMT* [1995] IRLR 636, at paragraphs 27 and 32.

> "27. Parliament's object in introducing the democratic requirement of a secret ballot is not to make life more difficult for trade unions by putting further obstacles in their way before they can call for industrial action with impunity, but to ensure that such action should have the genuine support of the members who are called upon to take part. The requirement has not been imposed for the protection of the employer or the public, but for the protection of the union's own members. …
>
> 32. … It would be astonishing if a right which was first conferred by Parliament in 1906, which has been enjoyed by trade unions ever since and which is today recognised as encompassing a fundamental human right, should have been removed by Parliament by enacting a series of provisions intended to strengthen industrial democracy and governing the relations between a union and its own members."

39. In argument Mr Hendy recognised the possibility of a legitimate interest for employers in having some notice of the intended industrial action, but he submitted that the detailed prescription of the timing and content of the strike notice (and all the more of a pre-ballot notice) went far beyond what could be regarded as necessary in the circumstances for the protection of legitimate interests of the employer.

40. It seems to me that, appropriate as Millett LJ's comments may have been on the then state of the law, and in relation to the points then at issue, the legislation does take account of the legitimate interests of employers. That is plain from the form of section 226A(2)(c) as it was from 2000 to 2004, which included reference to enabling the employer to "make plans": see paragraph [52] below. The fact that this provision has been replaced with something more precise, if more elaborate, does not mean that the employer's interests are not taken into account by the legislation.

41. In answer to Mr Hendy's reliance on the 1999 litigation mentioned above, Mr Béar Q.C. for Metrobus showed us a later decision of the Court of Appeal in litigation

between the same parties: *NURMT v London Underground* [2001] IRLR 228. In the course of his judgment in that case Robert Walker LJ said:

> "45. … Under s.226A(2)(c) and s.234A(3)(a) in their original form, the clear legislative purpose was to enable an employer to know which part or parts of its workforce were being invited to take industrial action, in order that the employer could (first) try to dissuade them and (secondly, and so far as unsuccessful in its first aim) make plans to avoid or minimise disruption and continue to communicate with the relevant part or parts of the workforce. That required the employer to be able to ascertain (that is, identify) the relevant employees. …
>
> 46. After the concerns expressed by this court in the *Blackpool* [1994] IRLR 227 case, and no doubt for other reasons also, Parliament altered the legislation by the 1999 Act so as to make plain that a union could not be compelled to provide a list of names (although a union is still at liberty to do so if it thinks fit, and if RMT had done so it seems likely that LUL and the other claimants would have continued their previous practice of themselves annotating the list with grades and workplaces). But there was not any significant change in the legislative policy or in the purpose for which information was to be given to the employer. The change was a change of means, not of objective, in order to meet the concerns of those members of a union who objected to being included in a list of names. It was not intended to make it easier for a union to prepare notices under s.226A and s.234A, and indeed it is clear from the facts of this case that it may make the task more onerous. But that is not as surprising as Mr Hand has contended. It is the inevitable consequence of expressly enacting that a union is not bound to provide a list of names."

42. He also said this about article 11:

> "61. In relying on the Human Rights Act 1998, Mr Hand referred to *National Union of Belgian Police v Belgium* [1975] 1 EHRR 578, 591 for the proposition, which is not in dispute, that the right to form and join trade unions, conferred by Article 11(1) of the European Convention on Human Rights, entails that Contracting States must permit and make it possible for a trade union to take action for the protection of its members' interests. That is as far as the authorities go in recognising a right to strike, and the Commission's decision on inadmissibility in the *Blackpool* [1994] IRLR 227 case shows that the notice requirements as they then stood were not an infringement of union rights. See also *Schmidt v Sweden* [1976] 1 EHRR 632, 644:
>
> > 'The Court recalls that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. Article 11(1) nevertheless leaves each State a free choice of the means to be used towards this end. The grant of a

> right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain instances.'
>
> I would reject Mr Hand's submission that there is anything oppressive or disproportionate in the legislation as it now stands."

43. For my part, I also derive some assistance from another decision of the Court of Appeal in 2001 about section 226A in its then state, *Westminster City Council v Unison* [2001] IRLR 524, [2001] EWCA Civ 443 (another forensic battle between Mr Hendy and Mr Béar). There the relevant argument was about "categories", the employer arguing that this required the union to provide a great deal of detail, with distinctions between managers and other staff, and between staff in different sub-units. Buxton LJ, agreeing with Pill LJ who gave the main judgment, said at paragraph 79:

> "79. It is wholly artificial in those circumstances to say that the union should have given details of job descriptions and status of employees of the sort to which my Lord referred. It is much more reliable from an employer's point of view if, having been given the names, he himself, with his superior knowledge of the way in which his operation works, decides into what categories and into what sections those persons fall. When that point was put to Mr Béar in argument he was constrained to agree that that was indeed as a matter of common sense, but that approach, he said, was prevented by the wording of the statute. We should look with great caution at such an argument about a statute such as this, which is a statute directed to industrial relations, designed to enable workers and employers to conduct their affairs in a sensible and efficient way.

44. He added this, in conclusion, at paragraph 81:

> "81. But if I am wrong about that, the fact that the notice in this case provided, by a reference easily available to the employer, an actual nominal roll more than amply fulfilled any obligation placed upon the union by this statute. I would not want to be thought to be laying down any rule that goes outside the facts of this case, save to say that the obligations of the union must be assessed in the circumstances of the particular strike and in a commonsense way in the light of the policy of the legislation. In this case that objective was achieved and I would therefore allow the appeal on that ground also."

45. All the employees relevant in that case were on the check-off system. The legislation did not then make the specific reference to that system that was introduced in 2004, but reference to it was evidently regarded as a sensible and suitable way of complying with the union's obligations as regards information as they then stood. I do not quote these passages because of that aspect, however, but for the words at the end of each paragraph quoted as regards the interpretation of the obligations imposed on the union

by the statute, and the balance between the interests and concerns of workers and employers. Despite Mr Hendy's submissions and Millett LJ's comments, this is not legislation in which only the interests of unions and their members are relevant. It would be surprising if it were otherwise, given that a balance is in any event necessary between the rights afforded to workers by article 11, on the one hand, and the rights of the employer under article 1 of the First Protocol to the Convention on the other.

46. Mr Hendy also showed us a good deal of material concerning the ILO and the European Social Charter 1961 and some other international sources. Some of this material from these sources includes criticism of the state of UK legislation as regards limitations on the ability of a trade union to call a strike. It is recognised that the right to strike may be subject to restrictions and conditions, but the position is taken that such provisions must not be such as to make the exercise of the right very difficult or impossible in practice.

47. In *Demir and Baykara* the Grand Chamber discussed the relevance of other sources of international law in the context of describing the Court's approach to the interpretation of the ECHR. It said at paragraph 65 that it started from the Vienna Convention on the Law of Treaties. In the following three paragraphs it said this (I have omitted the supporting references):

> "66. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.
>
> 67. In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.
>
> 68. The Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions."

48. It concluded at paragraphs 85 and 86 that elements of international law other than the Convention could and should be taken into account, so long as the relevant international instruments "show, in a precise area, that there is common ground in modern societies".

> "The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases."

49. Having the benefit of the survey which Mr Hendy gave us of texts deriving from various international sources including the ILO and the European Social Charter, I will cite two passages which illustrate the relevant points.

i) In the General Survey under the aegis of the International Labour Office from the 81st session of the International Labour Conference in 1994, in Chapter V, about the right to strike, paragraph 170 and part of paragraph 172 are noteworthy:

> "170. In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different countries vary considerably and their compatibility with the Convention may also depend on factual elements such as the scattering or geographical isolation of work centres or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case by case basis. If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of votes cast, and that the required quorum and majority are fixed at a reasonable level.
>
> 172. In a large number of countries the law requires workers and their organizations to give notice of their intention to strike or gives the authorities the power to impose an additional cooling-off period. In so far as they are conceived as an additional stage in the bargaining process and designed to encourage the parties to engage in final negotiations before resorting to strike action – preferably with the assistance of a conciliator or a special mediator – such provisions may be seen as measures taken to encourage and promote the development of voluntary collective bargaining as provided for in article 4 of Convention No. 98. Again, however, the period of advance notice should not be an additional obstacle to bargaining, with workers in practice simply waiting for its expiry in order to be able to exercise their right to strike. …"

ii) In the Report of the Committee of Experts under the European Social Charter in 2002, a study of the legislation in the UK made a number of detailed points, on some of which the law has since been amended, and concluded in the following trenchant terms:

> "The Committee concludes that the United Kingdom does not guarantee the right to take collective action within the meaning of article 6.4 of the Charter: the notion of lawful industrial

> action is restrictive, the procedural requirements are onerous, the consequences for unions where industrial action is found not to be lawful are serious, and the workers have limited protection against dismissal when taking industrial action."

50. It seems to me that, interesting as this material is, it does not, for the purposes of this appeal, affect the substance of the points arising under the ECHR itself. To the extent that material from these and similar sources informed the decision of the Court in *Demir and Baykara*, it provides part of the context for that decision. I do not regard it as relevant in any more direct way to the present appeal. The ILO general survey confirms what one might expect, namely that member States have a widely differing variety of legislative provision on these points. The binding effect of article 11 of the ECHR does not restrict the scope for a wide variety of different legislative approaches, other than in a rather general way, at the extremes. Such variety is to be expected and is permitted by the margin of appreciation permitted to member States as regards conformity with the Convention.

51. In that respect, Mr Béar showed us something of the legislative evolution of section 226A. It was introduced for the first time by the Trade Union and Employment Rights Act 1993. At that stage subsection (2)(c) said no more than this:

> "describing (so that he can readily ascertain them) the employees who it is reasonable for the union to believe (at the time when the steps to comply with [paragraph (a) of subsection (1)] are taken) will be entitled to vote in the ballot."

52. The next stage was the result of amendments introduced by the Employment Relations Act 1999. Subsection (2)(c) came into this form:

> "containing such information in the union's possession as would help the employer to make plans and bring information to the attention of those of his employees who it is reasonable for the union to believe (at the time when the steps to comply with [paragraph (a) of subsection (1)] are taken) will be entitled to vote in the ballot."

53. The provision was brought into its present state, with a new paragraph (c) and new sub-sections (2A) to (2I), by the Employment Relations Act 2004. Before that Act was prepared, the Government published a consultation document in February 2003 inviting comments as to how the 1999 legislation was working, and what changes might be made. Among the stated reasons for some changes then proposed was the need to take account of a decision of the European Court of Human Rights given the previous year in *Wilson and others v UK* [2002] IRLR 568.

54. In a passage starting at paragraph 3.25, the paper addressed the subject of notices of industrial action. It noted that although the 1999 Act had reduced some of the burdens on unions, in other respects it had turned out to make their task more arduous, in particular as regards the need to supply more detailed information, and because of the uncertain scope of the phrase "to make plans" in the then section 226A(2)(c). The Government proposed to make changes on these points, to simplify the informational requirement and limit it to total numbers, categories and workplaces, and to replace the "make plans" provision with a more precise provision, and it

invited comments. It also referred to the existing provisions about disregarding small accidental failures, and stated an intention to extend the ability to disregard such failures in two areas. The second was stated as follows, in paragraph 3.32(b):

> "A new disregard relating to small failures to follow the law on pre-ballot and pre-strike notices could be introduced. The disregard would concern accidental errors on a scale which would not significantly reduce the practical help provided through the notices to the employer. This measure would reduce the scope for legal wrangling over minor technicalities in an area of the law where unions need to process a lot of information to meet the statutory requirement."

55. The Government invited comments as to the desirability of creating this new disregard. Presumably the comments received, together with its own further consideration, led it to the conclusion that such a provision was not desirable after all.

56. As Mr Béar submitted, the present state of the legislation is noteworthy in that it derives from provisions made first under a Conservative Government, but it has been amended twice under a Labour Government; in the respects relevant to this appeal the recent changes have been of important details but they have left the main structure of the legislation intact. It seems to me that this is an interesting example of the practical operation of a Member State within the scope of the margin of appreciation. I will address later Mr Hendy's submissions to the effect that the present state of the law makes provision which goes beyond the margin of appreciation, so that the Act should be read down in order to comply with the Convention. He did not press for a declaration of incompatibility, and the steps which are necessary if the court is to be asked to make such a declaration had not been taken.

The ballot and strike notices

57. Mr Griffiths' letter dated 8 August 2008 was, so far as material, as follows:

> "RE: OPERATING PAY NEGOTIATIONS – 2008
>
> This letter is to give you notice that this union intends to hold a ballot for industrial action. The ballot will open on 18 August 2008.
>
> Your employees who will be entitled to vote will be those who are members of the T & G Section of Unite the Union employed by you at Crawley, Croydon and Orpington depots in the following category, operating Staff (drivers).
>
> Those members in any of the above category who pay union subscriptions through check-off are known to you, including their individual categories and workplaces, and I believe that they number 776.
>
> A number of, I believe 69 members pay union subscriptions by means other than check-off.

The attached matrix provides such information as the union possesses about the numbers in particular categories of the non check-off members.

I believe that the total number of your employees who will be entitled to vote in the ballot (both check-off non check-off) is therefore 845.

The information set out in this notice is an accurate as possible in the light of the information in the possession of the union at the date this notice is given."

58. With it went a sample of the ballot paper, on which no point is taken, and a table setting out the "information in our possession of the breakdown of number of employees to be balloted who pay to union other than by check-off and entitled to vote in the ballot". This specified three workplaces: the depots at Crawley, Croydon and Orpington; one category of worker, namely operating staff (drivers); and gave the numbers as 8, 18 and 43 respectively at the three depots.

59. This letter is said not to have complied with the Act because it did not satisfy the obligation in section 226A(2)(c) to provide an explanation as to how the figures (for non-check-off employees) were arrived at.

60. The letter dated 3 September, giving notice of the first strike, was, so far as relevant, as follows:

"RE: INDUSTRIAL ACTION BALLOT

I am writing to you to inform you of the result of the ballot for industrial action held on 18 August 2008. I enclose a copy of the Independent Scrutineer's report, which provides you with the information you require.

I hereby give notice that your employees who are members of the T & G Section of Unite the Union employed by you at Crawley, Croydon and Orpington depots in the following category; Operating Staff (drivers) will be taking part in industrial action.

Those members in any of the above categories who pay union subscriptions through check-off are known to you, including their individual categories and workplaces, and I believe that they number 766.

A number of, I believe 69 members pay union subscriptions by means other than check-off. *Such information as the union possesses about the numbers and the categories covered is as follows:*

Workplace	Category	Number
Crawley Depot	Operating staff	8
Croydon Depot	(Drivers)	18
Orpington Depot		43

I confirm that the union does not possess information in any document or in electronic form as to numbers in each category.

I believe that the total number of all your employees who will be taking industrial action (both check-off and non-check off) is therefore 845. Please note however the new members listed below will also be taking part in industrial action. This will take the total therefore to 857."

61. It also specified the details of the strike action, on which nothing turns, and stated that "the information set out in this notice is as accurate as possible in the light of the information in possession of the union at the date this notice is given." It gave the names of 12 employees who had joined the union since the ballot, who were to be called out, identifying the relevant depot in each case. It was accompanied by the scrutineer's report, dated 1 September 2008, the ballot having closed at noon on that day; nothing turns on the report itself. The second strike notice was in similar form, though not accompanied by any notice about the ballot. It gave the number of check-off members who would be taking part as 778. As before it specified 69 members as paying otherwise than by check-off. It stated the total number of employees expected to be taking part as 847.

62. The first strike notice is said not to have complied with the Act in three respects. The first, which does not turn on the content of the document, is that the notice given to the employer thereby of the result of the ballot, was not given as soon as reasonably practicable: see section 231A. The second is the same defect as is relied on as regards the ballot notice: no explanation of how the figures were arrived at. The third is that the figures were wrong. The number of check-off members was mistyped as 766, instead of 776, though the total of 845, and 857 including new members, was correct.

63. The second strike notice is said not to have complied with the Act in the second and third of the respects relied on as regards the first strike notice. The explanation said to be needed was still missing. The figures were wrong: twelve new members had been added to the incorrect total of check-off employees, so that was given as 778 instead of 788, and the 69 non-check-off members were added to the incorrect total, giving 847 instead of 857.

Giving notice to Metrobus of the result of the ballot

64. As I have said, one of the points on which the judge decided against UNITE was that it had not acted as promptly as the Act requires in giving notice to the employer of the result of the ballot, under section 231A. We have more information than he did as to exactly what happened.

65. The ballot closed at noon on 1 September. 520 members had cast their votes. A copy exists of a fax from ERS to be sent to UNITE, timed at 12.36 on that day, accompanying the scrutineer's report. This appears to have been intended to be sent both to the union's central office and to its regional office for Region 1. What happened to it is a mystery. No copy arrived at either office of the union (according to UNITE's evidence) until one was received at the central office at about 3.15 in the afternoon on 2 September. Mr Griffiths received a copy at the Dagenham office at about 3.30, but without any authorisation from the General Secretary to proceed.

Such authorisation was given by an email from the General Secretary, sent to Mr Griffiths just before 5pm on 2 September. Unfortunately, by the time this was received, Mr Griffiths and his secretary, Sandra Evans, had left work for the day. They, therefore, only became aware of the email the following morning, by about 9.30. Mr Griffiths' letter dated 3 September was sent to Metrobus (by fax and email) soon after 11am that morning.

66. In a witness statement made for the purposes of the appeal Mr Griffiths explained that, as he put it, the correct procedure following the closing of the ballot is for ERS to notify the regional secretary of the union of the outcome, for the regional secretary to tell the general secretary, and for the general secretary to give to the regional organiser (a) the outcome of the ballot and (b) authority to proceed with the industrial action. He did not regard it as within his responsibility to pass on the result of the ballot until he had been authorised to do so by the general secretary.

67. This is consistent with the terms in which Mr Woodley did write to him late in the afternoon of 2 September, as follows:

> "AUTHORITY
>
> METROBUS LIMITED – CRAWLEY WEST SUSSEX
>
> (Operating Staff – Drivers – Crawley - Croydon & Orpington Depots)
>
> Further to previous correspondence, I have been informed by the ERS that the ballot result is affirmative and I, therefore, give authorisation for strike action to be taken to resolve the difficulty at the above company.
>
> If the members decide upon, or contemplate taking strike action, then the ballot result must be sent to the employer asap.
>
> If strike action does take place I also give authority for grants to be paid, equalling dispute benefit, to the members concerned if the action consists of three days or more. The Servicing Officer should ensure, when sending the ballot result to the employer, that he does not include ERS' cover sheet giving number of members balloted. This does not form part of ERS' report.
>
> The relevant action notice letter, set out in the latest Advice (Unite the Union) should be sent to the employer seven days in advance of any action and a copy forwarded to me at the same time it is sent to the employer.
>
> If I am not in receipt of this information within the respective time limit, the authority will not be valid."

68. Mr Griffiths also explained that he had expected to be told of the result on 1 September, and asked his secretary, Sandra Evans, who was experienced in these matters, to make sure he was told as soon as any information came in about the ballot. He had called a meeting of lay branch officers for 2 September, anticipating that by then he would know the result of the ballot, so that they could make all necessary

arrangements. He called the union's central office several times during the morning of 2 September to find out if the result of the ballot was known, and was told that it had not been received. He said he did not contact ERS himself because this would not have been the correct procedure. It might have been said that he was interfering with the ballot process, and he could not proceed without the general secretary's authority. We do not have evidence from anyone in the union's central office, but we can take it that no-one from that office or the regional office contacted ERS (or not until shortly before 3.15 on 2 September) to enquire about the report of the result of the ballot.

69. Sandra Evans also made a witness statement for the purposes of the appeal. Besides explaining her typing error as to the figure, and supporting Mr Griffiths' evidence as regards when the ERS report was received, and what was done both before and after that time, she gave a brief explanation in paragraphs 3 and 4 of the steps she had taken to prepare for the ballot:

> "3. With regard to the Metrobus postal ballot, approximately a month before the ballot commenced it was necessary for me to check membership details, so that members to be balloted could be identified. During this period numerous telephone calls were made between branches so that any queries with regard to the membership list could be dealt with. The membership list confirmed that 776 members paid by check-off and 69 members paid by other means.
>
> 4. Once the administration referred to in paragraph 3 above had been finalised, the postal ballot was held and it was successful. …"

Telling the employer the result of the ballot

70. Mr Hendy submitted at first that there was no need to inform the employer of the result of the ballot unless the union decided in favour of industrial action. This is because the need to comply with section 231A only arises in order that the union should be protected under section 219. I see the point of that argument, but I cannot accept it. It seems to me that, although of course the section does have to be satisfied if protection is to be afforded (if necessary) under section 219, the obligation is independent, as are also the obligations under sections 231 and 231B. By the end of his submissions Mr Hendy had drawn back from the argument that they were interdependent.

71. The judge said at paragraph 28 of his judgment that the union had misunderstood the obligation under section 231A, and had conflated it both with the obligation under section 231B to provide a copy of the scrutineer's report, and with "its quite separate task" of considering the result and deciding whether to take industrial action and then giving notice of that intention. He said:

> "The defendant was not entitled in my judgment to delay informing the employer of the result, even by one day, while it determined whether to give notice of industrial action based upon that result."

72. The judge had not seen the letter from the general secretary to Mr Griffiths, quoted above at paragraph [67]. That makes it plain that judge was right to infer that the

trade union did not consider it necessary to send the employer information as to the result of the ballot unless strike action was to be called.

73. It seems to me that, reading the Act on its own, the judge's conclusion is correct. I do not see that section 231 of the Act, requiring notice to those entitled to vote in the ballot, could be said to be dependent on there being a call for industrial action, and that seems also to be true of section 231B. Accordingly, I agree with the judge that section 231A imposes a free-standing obligation on the union, which must be performed even if the union does not initiate industrial action, and which is independent in its timing. As the judge said, the union can wait for the best part of three weeks before calling for industrial action. In the meantime, it must have informed the employer of the result of the ballot as soon as reasonably practicable, which is, self-evidently, a very different timescale.

74. One of the points in favour of that reading is that the timescale for compliance with section 231A runs from the closure of the ballot, whereas the timescale for compliance with section 234A runs from the day on which section 231A is complied with. That does not mean that the same document cannot comply with both obligations. But it does clearly indicate that, unless both notices are sent simultaneously and within the time allowed under section 231A, the notice of the result of the ballot comes first, and the notice of strike action comes second. The former cannot wait for the latter.

75. I will consider the impact of the Convention on this provision and its correct interpretation later, together with its impact on the other relevant provisions.

76. If, therefore, the section imposes a free-standing obligation to inform the employer as soon as reasonably practicable of the outcome of the ballot, regardless of the union's decision as to industrial action, what conclusion should the judge have come to as to the prospect of it being held that the union had complied with it, taking the benefit (which he did not have) of the additional evidence we have seen as to the precise course of events in the union's organisation?

77. Mr Béar submitted that "as soon as reasonably practicable" was by the end of 1 September. The ballot result was known by ERS within the hour from closure of the ballot. Given the absence of a prompt report from ERS, there would have been no reason why an appropriate officer of the union should not have enquired of ERS during the afternoon of 1 September, or at the latest in the morning of 2 September, whether the result was known and if not when it was likely to become known. Indeed, he submitted that there was every reason why such an enquiry should have been made. Since the union chose to rely on ERS to conduct the ballot as well as to report on it as scrutineer, the arrangements which it made with ERS for the purpose could and should have included obligations as to prompt reporting. A mere enquiry as to progress by a person at an appropriate level within the union would not, he submitted, have run any risk of being held to be interference with the scrutineer of the kind envisaged by section 226B(3). The right person to make the enquiry might have been someone within the central office or the relevant regional office of the union, rather than the Dagenham office, and possibly an assistant rather than a senior officer in person, but it was for the union to make the appropriate arrangements, internally and with ERS, so as to be able to comply with its statutory obligations, and it could

not rely on delays caused by internal or external factors which could reasonably practicably have been avoided.

78. Even if the delay beyond 1 September was not one which could and should have been avoided, he submitted that there was no reason for delay beyond the afternoon of Tuesday 2 September, by which time Mr Griffiths had the result of the ballot in a form in which it could be sent to Metrobus so as to satisfy the obligation under section 231A. Accepting that Mr Griffiths was the right person to pass the result on to Metrobus, he argued that UNITE could not rely on the further delay caused by Mr Griffiths' need (or perceived need) to wait for Mr Woodley's authorisation to proceed, because that was an additional and unnecessary obstacle created by the union itself.

79. Apart from his point about the interdependence of notification of the result of the ballot and notice of a call for industrial action, Mr Hendy's principal points on this aspect of the case were, first, that it was not for the union to chase the scrutineer for the result (at least, not in circumstances such as the present - it might be different if there were a much longer delay in receiving the result) and, secondly, that a delay between 3.15 on 2 September and 11.00 on 3 September did not show that the union had not given the employer the result of the ballot as soon as reasonably practicable.

80. On the first of those points, I am inclined to the view that Mr Béar is right and Mr Hendy wrong. I see a good deal of force in the argument that a union which uses a body such as ERS to conduct its ballot should, as part of its agreement with the scrutineer for the purpose, require a report to be provided promptly after the closure of the ballot, and should be entitled, if it is not forthcoming within the anticipated time, to enquire of the scrutineer as to the position. After all, it seems likely that, if the assistant to the general secretary or to the regional secretary of UNITE had called ERS on the afternoon of 1 September, it would have become apparent that a fax which ERS may well have thought had been transmitted before 1pm on that day had not been received, and a further copy would have been sent at once. Of course, the timescale will vary according to circumstances, and there could be a much bigger ballot than this one, involving many more workplaces over a much wider geographic area. We do not have any evidence as to the arrangements between UNITE and ERS, nor as to ERS' expectations, communicated to UNITE or not, as to how long it would take to process the result. However, it seems quite likely that ERS could have told UNITE that it expected to be able to declare the result in the present case (subject to unforeseeable events) within an hour or so after closure of the ballot. Allowing a margin of another hour or so beyond that time, I do not see that it would be anything other than proper and reasonable, in the absence of prior communication of the result, for UNITE to have asked ERS about progress before the end of the afternoon of 1 September.

81. On this point, the judge said that "it must have been reasonably practicable for the Union to have obtained the required information from the scrutineers and to have provided this information to the claimant well before the Wednesday. A phone call to the scrutineers' office on the Monday or the Tuesday at the latest, would have been sufficient in order to obtain the information." I agree, for the reasons which I have given above.

82. If that were not so, however, and UNITE came under no obligation to pass the information on until it actually received it from ERS, did it do so as soon as reasonably practicable? I cannot agree with Mr Hendy that it did. Accepting that the information must be given to the employer in writing, because of the amount of detail that has to be communicated, UNITE had the information by 3.15 on 2 September, and Mr Griffiths (the appropriate person to pass it on) had it by 3.30 that day. As a matter of practicality he could have sent it on to Metrobus there and then. He did not do so because he considered that he could not properly do so without authority from the general secretary. I assume that, in terms of his authority within the union, he was right about that. However, that is not a reason which the union can rely on for withholding the information from the employer. He was not given that authority until the general secretary authorised him to call a strike and to do everything necessary for the purpose including giving the employer the strike notice and the result of the ballot.

83. I therefore agree with the judge that UNITE did not comply with its obligation under section 231A. It could and should have obtained the result of the ballot from ERS by the end of Monday 1 September, and passed it on promptly after that. Even if it could properly wait until the result was received on the afternoon of 2 September, it could and should have passed it on by the end of that afternoon.

The lack of explanation in the ballot notice and the strike notices

84. This point affects all three notices, and it is the same in each case. I will use section 226A, as regards the ballot notice, for discussion of the point. Mr Hendy relies on section 226A(2)(c). The ballot notice must contain:

> "(i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at, or
>
> (ii) where some or all of the employees concerned are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation or the information mentioned in subsection (2C)."

85. Some of the employees were check-off employees, so paragraph (ii) was relevant and could be used. The lists required by subsection (2A) are of the workplaces and the categories of employees. That presents no problem. The figures required by subsection (2B) are (i) the total number of employees concerned, (ii) the total number working at each workplace and (iii) the total number in each category. If there were no check-off employees, so that subsection (2)(c)(i) applied, the union would have to provide the list, the figures, and an explanation of how the figures were arrived at. Mr Hendy submits that, if paragraph (ii) applies because there are check-off employees, it is not necessary to provide the lists, the figures or the explanation; the union can instead provide the information mentioned in subsection (2C).

86. That information is "such information as will enable the employer readily to deduce" the total number of employees concerned, their workplaces and the total number at each workplace, and their categories and the total number in each workplace. In the case of check-off employees, the employer can reasonably be expected to be able to ascertain from its payroll records, as a minimum, which of its employees are members

of the union, into which categories of worker they fall, and at which workplaces they are based. Thus, a union could tell the employer that it intends to ballot, and in due course to call out, "all of your employees who are our members and who pay contributions to the union by check-off". As regards all those employees, the employer could find out from its own records total numbers, and numbers according to category and workplace, without more information from the union. If the proposed ballot and industrial action affected only some of the employees, the union would have to be more specific about which, for example as to categories or workplaces or both. In the present case UNITE did adopt that approach for the check-off employees, though they did (unnecessarily) also state what they believed to be the total. They told Metrobus that the ballot and strike would be limited to operating staff drivers, thus excluding a separate category of drivers in the course of training.

87. As regards other employees, however, the employer cannot expect, or be expected, to be able to rely on its own records, and has to be told the position by the union, as best it can. Mr Hendy submitted that, in a case which does fall within paragraph (ii) of subsection (2)(c), the union has the option of choosing to give either lists, figures and an explanation, or the subsection (2C) information, in respect of all the employees concerned. Moreover, he argued that to tell the employer the total numbers, and the totals by workplace and category, was itself to give the employer the information from which it could readily deduce the necessary numbers, categories and workplaces. The point of that argument was that, if right, it enabled him to argue that the second alternative under subparagraph (ii) had been adopted and complied with for non-check-off employees as well as for check-off employees.

88. As regards the first of those propositions, while I agree that the union could give lists, figures and an explanation in respect of all the employees concerned, I do not accept that it can comply with the section by giving the sub-section (2C) information in respect of all the employees concerned, because only for check-off employees can the employer be expected "readily to deduce" the information it needs, rather than being supplied with it specifically. Equally I cannot accept the second argument, because the second alternative is directed at giving the employer the means of finding out the information, not giving it the information itself. If the alternative of giving the sub-section (2C) information could be met by supplying the lists and figures mentioned in sub-sections (2A) and (2B) but without any explanation, there would be an extraordinary inconsistency between paragraph (2)(c)(i) where an explanation would be required, if there were no check-off employees, and paragraph (2)(c)(ii) where exactly the same information would be needed but without any explanation if there were some check-off employees, however few. Unless it were possible to take the view that the statutory requirement for an explanation can be disregarded altogether (whether by reference to the Convention or otherwise), it does not seem to me that this can be the correct interpretation of the section.

89. Mr Hendy's purpose in presenting these arguments was to avoid a conclusion that the union had not complied with subsection (2)(c) because, though it had provided the means of getting the information for check-off employees, and the lists and figures for other employees, it had not provided an explanation of how the latter figures were arrived at. He accepted that there was no such explanation in any of the notices.

90. We were shown some passages from the Code of Practice which bear on this subject. At paragraph 14, after a summary of the statutory provisions, the Code says this:

> "Where only some of the employees concerned pay their union contributions by the "check off", the union's notice may include both types of information. That is, the lists, figures and explanations should be provided for those who do not pay their subscriptions through the check off whilst information relating to check off payments may suffice for those who do."

91. Mr Hendy submitted that this is not a correct reading of the statutory provisions, but I consider that it is correct. The Code also has some guidance or advice about explanations, at paragraph 16:

> "When providing an explanation of how the figures in the written notice were arrived at, unions should consider describing the sources of the data used (for example, membership lists held centrally or information held at regional offices, or data collected from surveys or other sources). It is not reasonable to expect union records to be perfectly accurate and to contain detailed information on all members. Where the union's data are known to be incomplete or to contain other inaccuracies, it is a desirable practice for unions to describe in their notices the main deficiencies. In some cases the figures will be estimates based on assumptions and the notice should therefore describe the main assumptions used when making estimates."

92. Mr Hendy also asked us to note the advice in paragraph 18 that, on the one hand, a union may wish to check that the employer accepts that the information provided does comply with the requirements of section 226A(2)(c), and that, on the other hand, an employer who believes that the notice does not contain sufficient information to comply with the section should raise that with the union promptly before pursuing the matter in court.

93. One question which arises is what is the point of the explanation, and what is achieved for the employer by providing it. It could, no doubt, be provided in fairly anodyne terms, referring to having started with the membership records kept at whatever is the relevant level in the union, and having arranged for the data to be checked locally for any recent changes. Mr Béar made two points on this. First, in general terms, he said that the requirement to provide an explanation is a discipline for the union, so as to ensure that it has gone through the necessary processes. Secondly, as regards the particular facts of this case, he relied on the passages from Sandra Evans' evidence to which I have referred (at paragraph [69] above) as indicating the steps in fact taken, which he submitted should have been described or summarised. More generally, the point of the information which has to be given to the employer is to enable it both to respond substantively to the proposed ballot and to an eventual strike call, if it wishes to do so, and to make preparations for the contingency of a number of its employees taking industrial action if there is a strike call. For the latter purpose, in particular, it needs to know as best it can what numbers of workers are likely to be affected, in what categories of employee and at which workplaces. For check-off employees it will have the necessary information but for others it will not, and it may be relevant for it to have some idea of how reliable the union's records are, so that it can allow for contingencies and variables in its preparations.

94. I agree with the judge that, for non-check-off employees, the union cannot avoid the obligation to provide an explanation of how the figures were arrived at, and that because none of them contained any explanation, all three notices were deficient in this respect.

The inaccuracy of the figures

95. The third point relied on successfully by Metrobus before the judge arises from the inaccuracy of the figures in the two strike notices. In the first, the number of check-off employees was wrongly stated at 766, instead of 776, though no other error appeared in the notice. In the second, that original error affected the totals given, as already explained. Because of section 234A(3D) the figures supplied must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it sends the strike notice. Mr Béar's short point is that it must be regarded as reasonably practicable for the union to convey accurately the figure which it knows or believes to be correct. The underlying figures may be wrong, so long as they are as accurate as is reasonably practicable, but once the union has concluded that the correct figure is 776, it is reasonably practicable for it to communicate that figure rather than some other, however close.

96. It is plain that an error of 10 in the context of a relevant workforce of about 850 is trivial and insignificant. It could have no impact on the employer's response to the strike notice or its preparations to cope with the strike. It is well within the category of "small accidental errors", though not itself within the ambit of section 232B. Mr Hendy showed us several cases in which trifling errors of number, as regards ballots, were said or held to be capable of being disregarded as *de minimis*. As an example, Maurice Kay J said this in *RJB Mining (UK) Ltd v NUM* [1997] IRLR 621 at paragraph 17:

> "It is well understood that a union is not expected to achieve 100% perfection in the conduct of ballots such as these. A union has the protection of the *de minimis* rule and the test of reasonable practicability: see *British Railways Board v National Union of Railwaymen* [1989] IRLR 349. There will always have been some recent toings and froings with which the best of paperwork or computer systems will not have caught up. It is all a matter of fact and degree in a particular case."

97. Of course, section 232B itself, which was introduced by amendment in 1999 and was therefore not available at the time of the *RJB Mining* case, covers that sort of problem with ballots, as a statutory formulation of a *de minimis* approach, though section 230(4), which also makes similar provision in a more limited way in the same area, was already there. Both of these are of a kind with provisions to be found in the constitutions of all well organised corporate bodies, and no doubt also unincorporated bodies, whereby minor accidental errors do not invalidate proceedings at a meeting or on a ballot: a very simple example in relation to meetings is article 39 in Table A setting out the default articles of association of a company incorporated under the Companies Act 1985.

98. For my part, on this point I respectfully disagree with the judge that this error was fatal. In the first strike notice the error was only as to the total number of the check-

off employees. As regards the check-off employees the notice did take the second option under section 234A(3)(a)(ii) - the equivalent for strike notices of section 226A(2)(c)(ii). The information provided did enable the employer readily to deduce what it has to be able to deduce under section 234A(3C). It was not necessary for the union to provide what it believed to be the total number of employees of this kind. It seems to me that an error in a figure which the union did not have to provide, and as regards which the union did (as required) give the employer all the information from which it could deduce the correct details, is not a fatal defect. It does not represent a failure by the union to comply with the requirements of the Act. There was no other error in the first strike notice.

99. In the case of the second strike notice, there was again an error as to the total of check-off employees. There were twelve new employees in this category, giving a total of 788, instead of 778 as stated. For the reasons given I consider that this was not fatal to the notice. The notice went on to state correctly the number of non-check-off employees and their workplaces and categories. That was then added to the incorrect total of check-off employees, to reach 847, instead of 857. Just as it is not necessary for the union to specify the total number of check-off employees, if it uses the second option in subsection 234A(3)(a)(ii), it seems to me that it must also follow that it does not have to state the total of check-off plus non-check-off employees. For that reason I do not regard either the single mistake in the first strike notice, or the two errors in the second strike notice, as affecting matters which it was within the union's statutory obligation to communicate to the employer. Accordingly an error as to those matters does not seem to me to vitiate the notice.

100. I do not need to express a view as to the effect of a trivial error as regards the non-check-off employees, either in total or as regards a category or a workplace. The argument might be that an obligation to state these figures as accurately as reasonably practicable is not broken by a trivial error produced by mistyping and not corrected on checking the notice. An employer might wish to rely, on the other hand, on the Government's evidently deliberate decision not to introduce a disregard for such small accidental errors in the 2004 Act, to which I have already referred at paragraph [55] above. The point does not arise and I say no more about it.

The effect of article 11 of the interpretation of the relevant sections

101. On the basis that conventional principles of construction under domestic law lead to the conclusions adverse to the union that I have identified, on the points under sections 231A, 226A(2)(c) and 234A(3)(a), the next question is whether the legislation needs to be read differently in order to comply with the Convention and with section 3(1) of the Human Rights Act 1998. The test is whether the restrictions on a trade union's ability to call a lawful strike which these provisions impose are disproportionate. They are imposed in an area in which a balance needs to be struck between the rights and interests of workers and their trade unions, on the one hand, and those of employers (including their rights under article 1 of the First Protocol) on the other. As has been seen, as they stand now they are the latest stage in a series of detailed changes within an overall legislative structure which has been in place for a considerable time.

102. Mr Hendy submitted that these and the other restrictions imposed by the legislation present obstacles so numerous and so complex that errors become almost inevitable

on the part of trade unions, and that for this reason the rights under article 11 are so constrained as not to be effectively exercisable in respect of industrial action. He prayed in aid of that argument the comments of the Committee of Experts under the European Social Charter to which I have referred at paragraph [49(ii)] above, and other passages in the texts which he showed us emanating from that source and other international sources including the ILO.

103. It seems to me that the task for this court requires that the present state of the legislation as a whole should be considered, so far as it is relevant to the restrictions imposed on trade unions and to the balance struck between the various interests affected, though of course the decision has to relate to the particular issues raised. Among other things, the Code of Practice published under the statute is relevant. I regard it as permissible, for this purpose, to take account of the process by which the present legislation has come into its present form, including not only the previous legislative history but also the Government's consultation process.

104. As Mr Béar submitted to us, the policy of the legislation imposes a number of different kinds of restrictions on the ability to call a strike. The only substantive restriction, so to speak, is that it must be in furtherance of a trade dispute, as defined. That aspect of the legislation is not at issue before us. The other restrictions are procedural. They may be divided, roughly, between those aimed at ensuring the democratic validity of the industrial action (the ballot requirements) and those which require the disclosure of information, in particular to the employer. Both of those types of restriction are, in themselves, legitimate. The question is whether they go too far because of their complexity, detail and rigidity, so as to attenuate excessively the exercise of this aspect of the article 11 rights.

105. We are not concerned directly with the democratic requirements, though the relevant information requirements arise, in part, from the democratic conditions. The first is the obligation under section 231A, to inform the employer as soon as reasonably practicable of the result of the ballot. It is not said that the detail required to be given (as specified in section 231) is a problem. It could be said that there are two different aspects of the timing issue. One is that an obligation to give the information "as soon as reasonably practicable" is too onerous. The other is that it should not be necessary to provide the information unless industrial action is to be called, and therefore it should be sufficient to supply it at the same time as notice is given of the intention to take industrial action.

106. I would find it difficult to suppose that an obligation to do as soon as is reasonably practicable something which is not in itself difficult is too onerous. The problem in the present case was not the wording of the obligation but the mistaken view that it need not be complied with unless and until the notice of industrial action was given. On the second point, not making it conditional on there being a call to industrial action, it seems to me that this is not in itself unreasonable or too onerous. It is a policy decision for the legislature. This obligation, as regards employers, was introduced in the 1993 amendments. If it presented a serious difficulty for trade unions I find it surprising that this does not seem to have emerged in the meantime, for example as a result of the consultation before the 2004 amendments. If it had been found to be a real problem, it would be surprising that neither of the two major opportunities that have arisen since then was taken to address it by amendment. It

seems to me that in this respect the obligation imposed on a trade union before it can call lawful industrial action is proportionate.

107. The other issue is as to the obligation to supply information under sections 226A(2)(c) and 234A(3)(a), in particular as regards non-check-off employees, and especially the obligation to provide an explanation as to how the figures were arrived at. Whereas section 231A has stood in the legislation since 1993, these provisions were new in 2004, as the third attempt at formulating the requirement on the union to provide information as to who will be balloted and who will be called out on strike. The problem with the first attempt was the objection to providing names; problems with the second attempt included a possible need to supply names, despite the change in the Act, and also the imprecise words about enabling the employer to make plans. The present text was produced after the consultation to which I have referred.

108. It seems that UNITE may have misunderstood the application of section 226A(2C)(ii), at any rate if its understanding of the paragraph corresponded with Mr Hendy's submissions as to its effect. If so, it ignored the assistance provided by the Code of Practice. Although of course that does not declare or make the law, it is there for the assistance of trade unions and employers alike, and it seems to me that in assessing the reasonableness of the legislation it is legitimate to take account of the fact that this Code is there to help in cases of doubt or difficulty. UNITE could have followed the advice of the Code, and provided lists, figures and an explanation for the non-check-off employees, while directing Metrobus to its payroll records for the others.

109. It does not seem to me that the requirement of an explanation is an onerous obligation, difficult to comply with when it is known to be necessary to do so. Perhaps the underlying point about this requirement is whether it really serves a useful purpose at all. It is possible that an explanation could be supplied in standard and not very informative terms which would comply with the Act but would not really help the employer much.

110. So far as that is concerned, it seems to me that, in principle, it is not unreasonable for a trade union, when supplying information derived from its own sources, to be obliged to say something about how the information supplied has been arrived at. The contrast with check-off employees, for whom the employer can refer to its own payroll records, is clear and legitimate. Paragraph 16 of the Code of Practice, quoted above, illustrates the fact that there may well be a need for some explanation in order that an employer should be able to understand something about the degree of reliability of the data supplied. It also gives advice as to what should be provided by way of an explanation.

111. It is relevant in this context that the 2004 amendments included provisions, at section 226A(2D) and (2E), and correspondingly in section 234A, which limit the obligation imposed on a union in this respect, by a reasonable practicability criterion and by defining restrictively the information which is deemed for this purpose to be in the possession of the union. The latter, in particular, bears on the obligation to provide an explanation, because it limits the process which has to be undertaken, and therefore has to be explained, to the information so defined, and makes it what might be called a reasonable endeavours process.

112. Assessing the requirement imposed by section 226A and 234A in this light, and with regard to the particular problem identified in this case, it does not seem to me that the obligation to provide an explanation of the figures, understood as I have explained it, can be said to be unreasonable, excessively onerous or disproportionate. It is not difficult to comply with. In the present case the process described by Sandra Evans in her witness statement is what should have been explained. There are legitimate reasons for requiring an explanation. On the one hand, the employer cannot rely on its own information for non-check-off employees, and can reasonably expect some description of the process undertaken by the trade union to get at the figures, especially given the sort of problems that may exist with union membership records that are alluded to in the Code of Practice. On the other hand, it is reasonable to require the trade union to explain itself, in order to reinforce the obligation to undertake the process properly in the first place.

113. For those reasons, in my judgment, the provisions with which this appeal is concerned are not disproportionate restrictions on rights under article 11, and do not, therefore, need to be interpreted differently from the readings which I have set out above, in order to comply with the Convention and with section 3 of the Human Rights Act 1998. Neither on that ground, therefore, nor applying ordinary domestic principles of interpretation, do I disagree with the judge's conclusions as regards section 231A or as regards the need for, and the effect of the lack of, an explanation under section 226A(2)(c)(ii) or section 234A(3)(a)(ii).

The judge's exercise of his discretion

114. Thus, although I disagree with the judge about the significance of the small errors as to the number of check-off employees, I agree with him on the other two points on which he held that UNITE had not shown that it was likely to succeed in showing that it was protected by the Act from tortious liability. It seems to me that he would not have decided differently if he had come to the same conclusion as I have about the error in the figures.

115. In any event, whether the judge's discretion was properly exercised is now of no relevance, and I would not grant permission to appeal on that point. It would be artificial, arbitrary and pointless for this court to consider how we would have exercised the discretion that the judge had, with the benefit of fuller evidence and fuller argument.

Disposition

116. During the hearing of the appeal we gave UNITE permission to adduce new evidence. I would dismiss the outstanding part of its application for permission to appeal. I would also dismiss the appeal.

Lord Justice Maurice Kay

117. I too would dismiss this appeal.

118. In this country, the right to strike has never been much more than a slogan or a legal metaphor. Such a right has not been bestowed by statute. What has happened is that, since the Trade Disputes Act 1906, legislation has provided limited immunities from

liability in tort. At times the immunities have been widened, at other times they have been narrowed. Outside the scope of the immunities, the rigour of the common law applies in the form of breach of contract on the part of the strikers and the economic torts as regards the organisers and their union. Indeed, even now the conventional analysis at common law is that by going on strike employees commit repudiatory breaches of their contracts of employment: *Simmons v Hoover Ltd* [1977] ICR 61; *Chitty on Contracts*, 29th edition, vol 2, paragraph 39-072. No statutory immunity attaches to such individual breaches, although those who induce them are protected and, since 1999, the dismissal of those taking part in official, but not unofficial, industrial action will in defined circumstances constitute unfair dismissal: Trade Union and Labour Relations (Consolidation) Act 1992, section 238A. It helps to keep this history and conceptual framework in mind when construing and applying the detailed provisions of the statute.

119. Essentially, the statutory immunities are predicated on two conditions. The first is substantive: the otherwise tortious act must have been done "in contemplation or furtherance of a trade dispute", as defined in Part V of TULRA. The second, which is of more recent origin, is procedural: to attract the immunities, the strike must be preceded by a ballot conducted in compliance with the provisions of Part V, which also require notice to be given to the employer. On any view, the ballot provisions are detailed and legalistic. This case is an illustration of how a union, notwithstanding the best of intentions, can fall foul of them, although in most respects I agree with Lloyd LJ that it is not especially difficult to comply.

120. The duty of the union to inform the employer of the section 231 matters "as soon as is reasonably practicable" after the holding of the ballot (section 231A) imposes a hard temporal burden. If the duty had been to inform "within a reasonable time", there would have been more elasticity. In particular, it would have been susceptible to an interpretation which embraced reasonableness in the context of the employer's need to know. However, the "as soon as is reasonably practicable" formula, on application, requires the identification of the earliest time by which the communication of the information is reasonably achievable. The purpose is clearly to maximise the time the employer has to plan and respond before the commencement of the strike. I agree that the Union did not comply with its obligation under section 231A. That, by itself, would have justified the grant of the injunction.

121. There is, however, one point upon which I respectfully disagree with Lloyd LJ. It relates to the giving of notice to the employer that the union intends to hold a ballot (section 226A) and, later, that industrial action is to ensue (section 234A). In paragraph 60, above, Lloyd LJ set out the material parts of the letter of 3 September which gave notice of the first strike. I shall concentrate on that, although the same reasoning applies at the earlier stage. It will be recalled that section 234A(3)(a) - which mirrors section 226A(2)(c) – requires that the notice contains <u>either</u> (i) lists and figures, together with an explanation of how those figures were arrived at <u>or</u> (ii)

> "where some or all of the employees concerned are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation or the information mentioned in subsection (3C)."

Section 234A(3C) defines the section 234A(3)(a)(ii) information as

numbers of employees, categories and workplaces. It does not require "an explanation".

122. It is clear from section 234A(3)(a)(ii) that it is dealing with two distinct situations – where only some of the employees concerned are check-off employees and where all of them are. In paragraph 87, above, Lloyd LJ has explained Mr Hendy's submissions and in paragraphs 88 – 94, he has given his reasons for rejecting them. I have come to the contrary conclusion – namely that, in a situation in which there are both check-off and non-check-off employees, the union has a choice under section 234A(3)(a)(ii) either to adopt the lists, figures and explanation model or to adopt the subsection (3C) approach (or, indeed, a combination of the two, distinguishing between check-off and non-check-off employees); that, in the present case, the union chose the subsection (3C) approach; and that the letter of 3 September complied with its obligations thereunder.

123. In reaching this conclusion, I part company with Lloyd LJ at three points. First, I do not accept that "only for check-off employees can the employer be expected 'readily to deduce' the information it needs, rather than being supplied with it specifically". It seems to me that, on a straightforward reading of the statute, provision is made in a "mixed" case for all the information to be in readily deducible form and without the need for an explanation. I concede that this may be productive of anomaly, for example where only a small minority are check-off employees, but the language expressly assimilates the two positions: "where some or all of the employees concerned …". I also accept that, on my construction, there is no obvious reason why the employer should have been denied "an explanation" of the lists and figures in respect of the non-check-off employees. However, there are oddities in relation to both constructions. Secondly, I do not consider that the union puts itself outside the reach of subsection (3C) if it provides the information, rather than merely the means of deducing it. It would be absurd if, having been given precise and comprehensive information about the total number of affected employees, the categories and the number within each category and the workplaces with numbers referable to each workplace, an employer could dispute the lawfulness of the notice simply by complaining that he ought to have been given the chance to deduce the information for himself. Whilst subsection (3C) permits the union to leave the employer with that task, in my judgment it would be an overzealous construction to say that it must do so. Indeed, it would be pointless. Thirdly, to the extent that the Code of Practice may be said to support the strict interpretation, I would adopt Mr Hendy's submission that it is based on a misunderstanding of the express words of the statute and should be disregarded for construction purposes.

124. On the basis of this analysis, I consider that the letter of 3 September was compliant with section 234. Having received it, the employer knew all that it needed to know (subject to the numerical errors which, I agree with Lloyd LJ, were of no consequence). Without more ado it knew what subsection (3C) intended that it should end up knowing and it ought not to be allowed to complain about the omission of "more ado". It is true that it was denied "an explanation" in relation to the non-check-off employees to which it would have been entitled if the Union had elected to go down the subsection (3)(a)(i) route. However, such an explanation is often permissibly formulaic or anodyne. It is the least important of the requirements. All

this seems to me to follow from the language, the context and the purpose of the statutory provisions, with no need to resort to Article 11 of the ECHR (about which I am in agreement with Lloyd LJ). I accept that the purpose embraces the protection of the employer, but I do not consider that that is significantly undermined by my conclusion. On this basis, and having regard to the detailed and complicated way in which strike action is procedurally circumscribed by the ballot provisions, I respectfully find Lloyd LJ's approach to this issue, too strict. However, I gratefully adopt everything else in his formidable judgment. I remain in agreement with him about the outcome of the appeal.

The President of the Family Division

125. I too would dismiss this appeal for the reasons given by Lloyd LJ in his full and careful judgment.

126. I agree with Maurice Kay LJ that, on a straightforward reading of the statute provision is made in section 234(A)(3)(a)(ii) for two distinct situations, i.e. where all of the employees concerned are check-off employees and where only some of them are and that the Union has a choice to adopt either the lists figures and explanation model or the sub-section (3C) approach or a combination of the two distinguishing between check-off and non check-off employees. I am also prepared to accept the proposition that in this case, the Union chose the sub-section (3C) approach. However, like Lloyd LJ, I do not accept that the letter of 3 September complied with the statutory obligations of the Union.

127. As already stated, the statutory scheme provides for two alternative methods of compliance, namely by the supply of lists figures and an explanation or, if, and to the extent, that course is not adopted, by the supply of information from which the employer can deduce the numbers for himself. In my view, it cannot be enough to avoid the need for an explanation of the lists and figures supplied under the first alternative by simply giving that information *without* an explanation under the second. The purpose of the explanation under the first alternative is to enable the employer to check for himself whether the lists and figures supplied by the Union are accurate and to make dispositions accordingly. The second alternative has the similar purpose of enabling the employer as accurately as possible to deduce for himself the numbers involved on the assumption that he has not been supplied with the information (*including* the explanation) under the first alternative. That was not the effect of what was done in this case. In respect of the non check-off employees, instead of supplying to the employer the information to deduce for himself the numbers involved, the Union simply supplied the figures with no explanation or other information from which the employer could deduce for himself whether those figures were accurate or not.

128. Bearing in mind the numbers involved in this case and the absence of suggestion that the figures supplied in respect of non check-off employees were materially inaccurate, I am in sympathy with the approach of Maurice Kay LJ, but I find myself unable to agree with it. Nor do I consider that the Code of Practice referred to paragraphs 90-91 above is based on a misunderstanding of the wording of the statute.