Case Nos: A2/2011/0180(A)

A2/2011/0180

and A2/2011/0083

Neutral Citation Number: [2011] EWCA Civ 226

IN THE HIGH COURT OF JUSTICE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE, QBD

THE HON MR JUSTICE RAMSEY

THE HON MR JUSTICE TUGENDHAT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 04/03/2011

Before :

LORD JUSTICE MUMMERY

LORD JUSTICE ETHERTON

and

LORD JUSTICE ELIAS

- -

Between :

THE NATIONAL UNION OF RAIL, MARITIME & TRANSPORT WORKERS (Appellant)

- and -

SERCO LIMITED t/a SERCO DOCKLANDS (Respondent)

AND

THE ASSOCIATED SOCIETY OF LOCOMOTIVE ENGINEERS & FIREMEN (Appellant)

- and -

LONDON & BIRMINGHAM RAILWAY LIMITED t/a LONDON MIDLAND (Respondent)

- -

Mr John Hendy QC and Mr Rohan Pirani (instructed by **Mann Thompson)** for the first Appellant

Mr John Hendy QC and Mr Oliver Segal (instructed by **Messrs Thompsons**) for the second Appellant

Mr Charles Béar QC and Mr Andrew Burns (instructed by **Bircham Dyson Bell LLP**) for the **Respondents**

Hearing dates : 9th & 10th February 2011

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Judgment

Lord Justice Elias :

1. This is an appeal against two decisions of the High Court in each of which the judge granted an interim injunction, the effect of which is to prevent the appellant trade union from calling upon its members to take industrial action. In*London and Birmingham Midland Railway v Associated Society of Locomotive and Firemen* ("the ASLEF case") the injunction was granted by Ramsey J to stop a strike of certain train drivers employed by the Railway due to take place on 23 December 2010. In *Serco Ltd v National Union of Rail, Maritime and Transport Union* ("the RMT case) the injunction was imposed by Tugendhat J and it prevented a strike of all the union members employed at the London Docklands Railway due to take place on 20-21 January 2011. The two cases raise issues of some difficulty concerning the balloting provisions now contained in the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").

The legal context.

2. The common law confers no right to strike in this country. Workers who take strike action will usually be acting in breach of their contracts of employment. Those who organise the strike will typically be liable for inducing a breach of contract, and sometimes other economic torts are committed during the course of a strike. Without some protection from these potential liabilities, virtually all industrial action would be

unlawful. Accordingly, ever since the Trade Disputes Act 1906 legislation has been in place to confer immunities on the organisers of strikes from certain tort liabilities provided, to put it broadly, that the purpose of the action is to advance an industrial rather than a political objective. This is achieved by a requirement that the industrial action must be "in contemplation or furtherance of a trade dispute". The current protection is afforded by section 219 of the 1992 Act. The legislation therefore secures a freedom rather than conferring a right as such.

3. More recent legislation has removed the immunities where the industrial action is designed to achieve what Parliament deems to be an improper purpose or if it involves secondary action (see sections 222-225 of the 1992 Act). If torts are committed for which no immunity is conferred, or if for some reason the immunity is inapplicable, then tort liability arises in the usual way. However, there is a cap on the damages that can be awarded against a trade union itself (s.22).

4. Ever since the Trade Union Act 1984 the law has also prescribed procedures which the union must comply with before it can claim the benefit of the immunities. The relevant provisions are now found in the 1992 Act and have been further amended since then. They apply to all forms of industrial action but hereafter I will only focus on strikes.

5. The purpose of the 1984 Act was to ensure that all the union members whom it is envisaged will participate in the proposed strike should vote in secret on whether they support the strike or not. In short, the strike must have a democratic mandate. Only if there is the appropriate majority (which currently is defined as a simple majority of those voting) following a lawful ballot will the immunities apply.

6. By an amendment made by the Trade Union Reform and Employment Rights Act 1993, the 1992 Act extended the union's procedural obligations by imposing a duty on the union to give certain defined information about the scope of the proposed ballot, the result, and any subsequent call to take strike action to all the employers affected by the strike. The original formulation of the duty has been subject to two further sets of amendments which I will consider below. Again, failure to comply with these statutory notification obligations removes the protection of the immunities.

7. There is no legal obligation to hold the ballot as such and a strike is not automatically illegal for that failure alone. However, virtually all strikes involve the workers taking strike action acting in breach of their contracts of employment. Accordingly, if a ballot is not held, or if it is held but in breach of the legislation, then the immunities are inapplicable and in practice the union will be liable in tort for inducing their members to strike in breach of their contracts of employment.

8. Although the common law recognises no right to strike, there are various international instruments that do: see for example Article 6 of the Council of Europe's Social Charter and ILO Conventions 98 and 151. Furthermore, the ECHR has in a number of cases confirmed that the right to strike is conferred as an element of the right to freedom of association conferred by Article 11(1) of the European Convention on Human Rights which in turn is given effect by the Human Rights Act. The right is not unlimited and may be justifiably restricted under Article 11(2). Mr Hendy QC, counsel for the two unions, contends that the detailed complexity of the balloting provisions, and their unnecessary intrusion into the union's processes, involves a disproportionate interference with the Article 11(1) right. He accepts, however, that as far as this court is concerned, the issue has been settled against him by the decision of the Court in*Metrobus v Unite the Union* [2010] ICR 173. Although there have been certain developments in the ECHR in particular since *Metrobus*, he accepts that following the observations of Lord Bingham of Cornhill in *Kay v Lambeth Borough Council* [2006] 2 AC 465, paras 42-43, it would not be appropriate to seek to revisit that question at this level. However, he reserves the right to challenge the *Metrobus* ruling should this case go further.

9. There is one respect, however, in which I think that the recognition of a right to strike does have a bearing on the issues before us. Mr Béar QC, counsel for the employers, submitted that since the unions were seeking to take advantage of an immunity, the legislation should be construed strictly against them. There is undoubtedly some authority to support that submission: see for example *Express Newspapers v McShane* [1979] 1 WLR 390, 395 per Lord Denning MR. But I do not think that it is a sustainable argument today. The common law's focus on the protection of property and contractual rights is necessarily antithetical to any form of industrial action since the purpose of the action is to interfere with the employer's rights. The statutory immunities are simply the form which the law in this country takes to carve out the ability for unions to take lawful strike action. It is for Parliament to determine how the conflicting interests of employers and unions should be reconciled in the field of industrial relations. But if one starts from the premise that the legislation should be strictly construed against those seeking the benefit of the immunities, the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should hold sway unless the legislation clearly dictates otherwise. I do not think this is now a legitimate approach, if it ever was. In my judgment the legislation should simply be construed in the normal way, without presumptions one way or the other. Indeed, as far as the 1992 Act is concerned, the starting point it that it should be given a "likely and workable construction", as Lord Bingham of Cornhill put it in *P v National Association of Schoolmasters/ Union of Women Teachers* [2003] ICR 386, para.7.

Injunctions

10. This appeal is directed at the granting of an interim injunction. Normally such an injunction is intended merely to hold the ring pending trial, and the test for determining whether it should be granted or not is the balance of convenience, provided at least that the claimant can show an arguable case. This is the well known Cyanamid case:*American Cyanamid v Ethicon* [1975] AC 396. It has long been recognised that in the context of proposed industrial action, it is unjust to trade unions to determine the question in that way.

11. The balance of convenience in strike cases almost always lies in favour of granting the injunction pending trial given in particular the difficulty of assessing the employer's loss, the fact that in any event there is a limit to the damages recoverable from the union, and the harm to the general public which most strikes cause. However, in practice because the trial will take place months after the proposed industrial action is to take place, the momentum for the strike will in most cases have been lost. The result is that the determination of the interlocutory issue is in practice likely to determine the entire action.

12. So the courts have recognised that in disputes of this nature it is incumbent on them to have regard to the underlying merits of the claim, and in practice that involves considering whether the union would be likely to be able to establish at trial that the immunities are applicable: see *NWL v Nelson and Laughton* [1979] ICR 867 (HL). Section 221 of the 1992 Act now encapsulates this principle. It provides that where a defendant claims that he was acting in contemplation of furtherance of a trade dispute, the court must have regard to the likelihood of his establishing that defence at trial. So if the appeals succeed, the injunctions ought to be discharged.

13. It does not follow that as a matter of law the interim injunction has to be refused if the court finds that it is more likely than not that the union will succeed at trial in showing that the immunities will apply. However, it will have to be a very exceptional case indeed for that not to be the consequence: see the *NWL* case and *Dimbleby and Sons Ltd v National Union of Journalists* [1984] ICR 386 (HL). It is not suggested that either of these cases falls into that exceptional category.

14. The role of this court on an appeal from the grant or refusal of an interim injunction is described by Lord Diplock in*Hadmor Productions Ltd v Hamilton* [1983] A.C. 191, 220. That case was concerned with the question whether in its discretion the court ought to have granted an injunction. Dillon J held that even if, contrary to his view, the union was not likely to establish a trade dispute defence, nonetheless there was no purpose in granting the injunction on the particular facts of that case. The Court of Appeal took a different view. Lord Diplock said that it was not for the Court of Appeal simply to substitute its view for that of the first instance judge. The function is one of review, and in the absence of further material evidence invalidating the exercise of discretion by the first instance judge, the Court of Appeal should only interfere where the judge had

misdirected himself or reached a conclusion which is unsustainable on the evidence before him. Mr Béar submits, and I accept, that this means that we should not interfere with the decision of the judge below unless we are satisfied that the judge's assessment of the likelihood of the trade dispute defence succeeding was plainly wrong.

The relevant balloting provisions.

15. The relevant balloting provisions are found in sections 226-235 of the 1992 Act. They are extremely detailed. The basic structure is that the immunities only apply if the strike has the support of the ballot which complies with the relevant rules. By section 226B the union must, save for small ballots involving fewer than 50 members, appoint an independent and duly qualified scrutineer who must report to the union as soon as reasonably practicable after the ballot stating whether he is satisfied that the statutory rules have been complied with. He must also state whether he is satisfied that proper steps have been taken to ensure that the arrangements for collecting and counting the votes have been secure and have minimised the risk of unfairness or malpractice. This report must be made available on request to any member entitled to vote in the ballot and their employer (section 231B). Plainly if the scrutineer produces an adverse report on the procedure, a union will be taking a heavy risk in carrying on to call the strike. No adverse report was produced with respect to either of these ballots.

The conduct of the ballot

16. Apart from the provisions relating to the independent scrutineer, the relevant provisions can usefully be considered under two main headings. First, there are the provisions which regulate the ballot itself, such as defining the relevant constituency, defining the information to be included in the ballot paper and the method of voting. Second, there are the rules imposing statutory obligations to give notices to the affected employers (and in the case of the ballot result, certain union members) detailing when it should be given and what the notice should cover. I will for the most part simply summarise the relevant highly complex legislation but will set out the principal sections in issue in these appeals.

17. The principal provisions relating to the balloting process itself are as follows. Section 227(1) confers the entitlement to vote:

> "Entitlement to vote in the ballot must be accorded to all the members of the union who it is reasonable at the time of the ballot for the union to believe will be induced by the union to take part….in the industrial action in question, and to no others"

This is an important provision. It defines the relevant constituency by reference both to those who must be balloted and those who must not.

18. Section 228 provides that, as a general principle, separate workplace ballots must be held if the members voting are employed at different workplaces. The members at a particular workplace can then only lawfully be called out if there is the requisite majority at that workplace. However, section 228B permits aggregate ballots across workplaces in certain defined circumstances. These include the situation where all the members falling into a particular job category or categories are employed by the particular employer (or any one of several employers) with whom the union is in dispute. In both of the cases under appeal, there were aggregate ballots.

19. Section 229 sets out information which must be included on the voting paper. For example, it specifies the form of the question and requires the paper to specify the name of the scrutineer. Section 230 is concerned with the conduct of the ballot and provides, inter alia, that every person entitled to vote must be allowed to vote without interference and, so far as is reasonably practicable, without any direct cost to himself. Section 230(2) is as follows:

> "Except as regards persons falling within subsection (2A) [which deals with merchant seamen], so far as is reasonably practicable, every person who is entitled to vote in the ballot must –"
>
> > (a) have a voting paper sent to him by post at his home address or at any other address which he has requested the trade union in writing to treat as his postal address; and
> >
> > (b) be given a convenient opportunity to vote by post.

20. Subsection (4)(b) provides that the votes must be carefully and accurately counted but adds the following proviso:

> "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."

21. Sections 233 then provides that any strike supported by a ballot must be called by an authorised person (who must be specified in the voting paper), and section 235 provides that it must be called within a specified time. The strike must be called to take effect within four weeks of the date of the ballot, although that may be extended to eight weeks with the agreement of the relevant employer. This may allow further time for negotiations.

22. Section 232A expressly provides that the industrial action shall not be taken to have the support of a ballot if a member was not entitled to take part in the ballot who should have been. However, the rigour of that provision, and indeed of some of the other provisions, is mitigated by section 232B, first introduced in 1999. This specifically provides that certain failures in the balloting process, including the failure to afford

someone the entitlement to vote who ought to have been, will not necessarily invalidate the ballot:

"(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)."

23. The provisions mentioned in section 232B(2) are set out above. Section 227(1) defines those entitled to vote, and section 230(2) deals with the supply of a voting paper to those persons. (Section 230(2B) is concerned with merchant seamen and is immaterial to these appeals.)

The information provisions

24. The balloting provisions are also reinforced by the obligation to give certain information at different stages to employers (and in some cases members) about the balloting process. First section 226A, a provision central to these appeals, requires that notice of the ballot and a sample voting paper must be sent to the employer within a certain prescribed period. If it is not, the call to strike action will not be protected. The information must include certain specified facts as follows:

(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, …..

(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).

By sub section 2H, the employees concerned are defined as those who the union reasonably believes will be entitled to vote in the ballot.

25. The duty to provide the lists, together with the break down of the numbers of members in each job category and workplace, is not an absolute one. It is qualified by sub section (2D) as follows:

(2D) The lists and figures supplied under this section….. 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).

Subsection (2E) then defines with some precision the information which is deemed to be in the possession of the union.

(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……

26. The term "officer of the union" referred to in subsection (2E)(b) is defined by section 119 as follows:

""officer" includes

(a) any member of the governing body of the union, and

(b) any trustee of any fund applicable for the purposes of the union."

This term is to be contrasted with the term "official", also defined in section 119, which includes branch or elected representatives of the members. Information in the possession of officials who are not also union officers will not therefore constitute information within the possession of the union.

27. By subsection 226A(2C), this obligation to provide the relevant lists is modified in circumstances where some of the members have their union dues collected by a check-off (i.e. the system whereby union members agree that their union subscriptions can be deducted directly from their pay by the employer and given to the union). If the employer is given information about which check-off members are subject to the ballot, there is no need to provide the detailed information about job categories or work places with respect to these members because the employer has the information available to deduce it for himself. In these appeals some of the members affected were subject to the check off and the unions identified them to the employers, so the detailed information did not have to be given with respect to them. But it still has to be provided with respect to the other members not covered by the check-off arrangement, as the Court of Appeal held (by a majority) in *Metrobus v Unite the Union* [2010] ICR 173. It should be noted that although there is nothing to stop the union from giving the names of the members to be balloted, section 226A(2G) specifically provides that nothing in the section requires that this should be done.

28. Section 231 imposes a second notification obligation. The union should promptly after holding the ballot ensure that all persons entitled to vote are given information about the result, including spoiled papers. Section 231A, added in 1993, provides that any employer of a person entitled to vote should also be given this information

29. Section 234A imposes the third notification obligation. It is also directly in issue in this case. It deals with notice of a strike call, and mirrors closely the language of section 226A which concerns notice of the ballot. Broadly it requires the same list of figures for workplaces and job categories, together with the information about how the figures were arrived at. Again the failure to comply will leave the strike call unprotected as far as the immunities are concerned. The main difference between the two provisions is that whereas section 226A refers to "employees concerned", defined as those who the union reasonably believes will be entitled to vote in the ballot, section 234A refers to "affected employees", defined as those employees who it is believed will be induced to take part in the industrial action. The latter concept is not in terms limited to members who had been entitled to vote, or indeed to members of the union (although in practice the union is unlikely to call out non-members).

30. Finally, by section 207 the court must take into account codes of practice approved by the Secretary of State under section 203 in any case where it thinks the code

relevant, The code relevant to strike ballots is entitled *Industrial Action Ballots and Notice to Employers,* issued in 2005. It is not a legal document and cannot affect the proper interpretation of the Act but rather is intended to provide practical guidance to trade unions and employers about how to cope with the legislation. I refer below to particular aspects of the Code where they are relevant.

The two appeals

31. There is a considerable overlap in the issues raised in the two cases. However, I will consider them separately, first taking the ASLEF case. In dealing with that case I will seek to identify the relevant legal principles which can then be applied to the facts in Serco.

The ASLEF appeal

32. The facts can be dealt with relatively briefly. For various historical reasons the terms and conditions of the train drivers now employed by London Midland have varied sometimes even from depot to depot. The parties are unable to agree on the basis of the terms and conditions which ought to be applied in the process of harmonisation.

33. The court is not, of course, concerned with the rights and wrongs of the dispute itself; it is concerned only to know that there is a trade dispute within the meaning of section 244 and that the proposed industrial action is in furtherance or contemplation of that dispute. There is no issue about that here. Negotiations broke down and the union balloted for strike action.

34. The ballot notice pursuant to section 226B was issued by ASLEF on the 9 November 2010. It identified the check-off members and attached lists of the relevant members in the various workplaces. It then explained how the figures had been arrived at as follows:

> "The lists and figures accompanying this notice were arrived at by retrieving information from the union's membership database and workplaces of members and the numbers in and at each , the database having been audited and updated for the purpose of the statutory notification and balloting requirements to ensure accuracy."

35. The ballot papers were sent out on 17 November 2010. The ballot closed on 6 December. At the time of the ballot 605 of the 614 drivers employed by London Midland were ASLEF members. The Electoral Reform Society, which was the independent scrutineer, counted the result and reported on that same day. In accordance with section 231(b) of the 1992 Act they noted that 472 ballot papers had been returned (a 78% turnout), and that 410, that is almost 87% of those voting, were in favour of strike action. The Electoral Reform Society stated that it had no reasonable

grounds to believe that there had been any contravention of any of the requirements imposed by the legislation in relation to the ballot. The ballot information was sent to the employers.

36. On 9 December London Midland received the strike notice from ASLEF. Again relevant lists and figures were provided. These differed from the earlier figures, but that would not be unusual because, for example, there may be changes in membership or of those members employed by the employer between the giving of the ballot notice and the strike notice. The explanation as to how the figures had been determined was in precisely the same terms as had been given with respect to the ballot notice. The notice informed the company that the strike had been called for 23 December, two weeks after the date of the notice. The planned industrial action involved train drivers not clocking on for shifts between the hours of 00.01 and 23.59 on Thursday 23 December.

37. London Midland had at various points raised concerns about the ballot. On 3 December 2010, more than three weeks after it had received the ballot notice, it alleged that the conduct of the ballot and the ballot notice itself were defective in certain respects. Some of these complaints anticipate the grounds on which the company has sought the interim injunction.

38. On 8 December, that is one day before issuing the strike notice, the union conceded that it may have balloted three more people than it ought to have done, but it submitted that this would not invalidate the ballot. There was further correspondence from London Midland's solicitors dated 14 December which the union's lawyers responded to on the 17 December and dismissed the points made by the employers in the correspondence as having no merit. Otherwise, the union's lawyers dismissed the points raised by the employers in the correspondence as having no merit.

39. The injunction application was made on 19 December, and it came speedily before the court, the case being heard on the 21 December, two days before the strike action was to take place.

The basis for the injunction

40. London Midland submitted before Ramsey J that the strike ballot procedures were contravened in four principal ways. They succeeded on three; the fourth is not the subject of a respondent's notice and I will say no more about it.

41. The three grounds on which they succeeded were these. First, the judge held that the ballot notification included neither an accurate nor an adequate explanation as to how the union had determined which members ought to be balloted and therefore the union was in breach of section 226A(2)(c). The union's statement did not adequately explain anything; it was more in the nature of a conclusion than an explanation. It was

in formulaic terms and told the employers very little about how they had arrived at the figures they did. The purpose of the explanation was to enable the employer to assess the reliability of the figures, and this explanation did not achieve that objective. The judge compared the explanation with the witness statement from a union officer in charge of organising the strike, Mr Whelan, which gave a much fuller explanation as to what was done. Furthermore, it was not accurate because it represented that there had been an audit of the union's membership list whereas in fact the evidence provided by Mr Whelan did not support that contention. An audit suggested some separate and systematic verification of the lists against underlying data, whereas in fact there merely appeared to have been no more than an updating of union records. The judge considered that this lack of accuracy carried less weight than the lack of a proper explanation, but taken together they made it unlikely that the statutory defence would be established.

42. Second, the figures were not as accurate as reasonably practicable as required by section 226A(2D). The employers originally identified what they thought were four errors but in fact on examination it transpired that there were two, both admitted by the union. First, there were 21 drivers on the ballot notice at Leamington Spa although the company only employed 20 drivers there; and there were 33 drivers on the Wolverhampton ballot paper, but only 32 drivers were employed in that depot. The union gave an explanation for these mistakes. In Wolverhampton a driver who was employed by Virgin Trains had been wrongly identified as a London Midland employee; the error was not evident on the face of the union record itself, and must have resulted from a false entry. In Leamington , a driver had been promoted to managerial rank but he had not notified the union of this and the error had not been picked up. Mr Whelan explained that unless the member himself or a fellow member spotted that the member was wrongly graded, the error could go on for years (as indeed it had in this case). Again, therefore, the error was not apparent from looking at the union's records. The union contended that notwithstanding these errors, they had complied with the statutory obligation; the information was indeed as accurate as reasonably practicable in the light of the information in their possession. Furthermore, they submitted that in any event these errors in the notification were de minimis since they affected only two members in over six hundred and should be ignored.

43. The judge rejected both submissions. He considered that had the union implemented proper procedures they would have picked up the errors, so that the information could not be said to be as accurate as reasonably practical. The assumption here, therefore, is that the union ought to have had this information in its possession even though it did not in fact do so. Also, the judge did not accept that that doctrine of de minimis had any role to play where the question was whether the information was as accurate as reasonably practicable. There was no express provision entitling the court to disregard such errors. Accordingly, he held that the notice was defective and therefore the ballot did not secure the protection of the immunities.

44. Third, London Midland contended that the two persons at Leamington and Wolverhampton were allowed to vote notwithstanding that it was not reasonable for the union to believe that they would be induced to strike. As I have said, this was admitted by the union, who explained how the problem had arisen. However, the union contended that section 232B applied and gave them a defence because the failures were accidental and did not affect the result. The latter requirement was plainly satisfied, but the judge did not accept that the failure was accidental. He held that in order to be characterised as accidental, the error would have to be unintentional and unavoidable. Here the judge thought it was plainly avoidable: if reasonable and practical steps for identifying the relevant employees had been adopted, the error would not have occurred.

45. For these various reasons, therefore, the judge concluded that the union would be unlikely to be able to show at trial that the ballot had been conducted in accordance with the statutory requirements and therefore the immunities would not apply. Not surprisingly, he was also satisfied that the balance of convenience favoured the employers, and that is not challenged.

The grounds of appeal

46. ASLEF challenges each of the judge's adverse findings. The grounds can be considered under five heads and I will set them out in the order in which I wish to consider them.

> (1) The judge was wrong to find that the error in balloting two members who ought not to have voted was not accidental. He ought to have found that it was accidental and that section 232B applied so that the failure could be disregarded.
>
> (2) The judge was wrong to have held that the figures provided by the union were not as accurate as reasonably practicable in the light of the information in the possession of the union.
>
> (3) Alternatively, even if there was a breach of the duty to provide accurate figures, the breach was de minimis and should have been ignored.
>
> (4) The judge erred in concluding that the explanation given for arriving at the figures was inadequate.
>
> (5) The judge was wrong to find that the explanation was inaccurate and misleading because of the claim that the union records had been audited.

Section 232B and accidental errors

47. The first ground is directed at the judge's conclusion that the breach of section 227 could not be saved by the application of section 232B. The judge considered that in order to be accidental, the errors had to be "unintentional and unavoidable and something which could not, with reasonable and practicable steps, have been ascertained."

48. In my judgment this part of the case is based on a false premise (although it is not material to the result.) The argument appears to have been advanced as follows: the two drivers were on the list of members given the opportunity to vote; therefore the union accorded them an entitlement to vote under section 227(1); it was not reasonable for them to have been so entitled because a reasonable system for checking the union's records would have spotted the error; and the error could not therefore be considered accidental within the meaning of section 232B.

49. A similar argument was considered by the House of Lords in *P v National Association of Schoolmasters* [2003] ICR 386. The teachers at a school took industrial action by refusing to teach a disruptive pupil who, against their wishes, had been reinstated in the school after initially being removed from the school following disciplinary proceedings. The requisite majority was obtained in a ballot in which two of the teachers were not sent the ballot paper and given an opportunity to vote. This was because they had not notified the union that they had become employed at the school. The child brought an action against the union, and a relevant issue was whether the immunities were applicable. It was argued that they were not on the grounds that section 232A in terms provides that if someone who ought to have been afforded entitlement was not given that entitlement and is thereafter induced to take part in the industrial action, the action will not be treated as having the support of the ballot. Since the defence afforded by section 232B does not apply to section 232A infringements, it was contended that the error was fatal and that the strike was necessarily unlawful.

50. The House of Lords disagreed. They drew a distinction between the entitlement to vote and the opportunity to vote. The fact that no ballot paper had been sent to the two teachers did not mean that they had been denied an entitlement to vote. The union's failure was that it did not afford them the opportunity to vote; it was not to deny them the entitlement. The significance of that analysis was that once section 230(2) was found to be the applicable section, section 232B was then applicable. Lord Hoffmann, with whose judgment Lords Bingham, Hobhouse, Scott and Walker agreed, summarised the position as follows:

> "Sections 228-230 contain the provisions which deal with the conduct of the ballot. In my opinion, compliance with these provisions in respect of the constituency identified by section 227(1) means that the members of that constituency have been accorded entitlement to vote. In the case of the distribution of ballot papers, section 230(2) makes those requirements subject

to the proviso of reasonable practicability and section 232B makes both sections 227(1) and 230(2) subject to the disregard of small accidental errors. If failure to send a ballot paper to a person within the constituency falls within either of these exceptions, he is not by reason of that failure to be treated as having not been accorded entitlement to vote."

51. Lord Walker made the important point that the list the union provides of those to whom it intends to send ballot papers is not the definitive statement of those entitled to vote. He said this:(para 66):

"In theory the union should have been able to produce from its computerised records a printout showing all its members at the B school. In practice it produced a list which was reasonably accurate but not wholly accurate: it included the names of five teachers who had by then moved on, and it omitted the names of two teachers who had joined the school staff, in each case without letting the union know about their moves. The inaccurate printout was in practice the source of the error in distributing ballot papers. But there is nothing in the statutory provisions, or in the way in which the union's head office seems to have acted, to indicate that the printout was intended to be definitive. Had either of the recently-joined teachers rung up the head office to protest at non-receipt of a ballot paper, the answer might have been, "It is too late to do anything about it" but it would not have been "You are not entitled to vote". The printout was not a definitive document like an electoral roll".

52. Here we have the converse of that situation. The opportunity to vote was given to two members when it ought not to have been. But it does not follow that they were given an entitlement to vote. Had they contacted the union and said that they were not employed by the company or were not in the relevant category of workers, the union would no doubt have told them that notwithstanding that they had been given the chance to vote, they were not eligible and should not do so.

53. In my view, therefore, as in *P*, the relevant statutory provision in issue is section 230(2). It is true that this simply provides that all those entitled to vote must be given the opportunity to do so and unlike section 227, for example, it does not in terms state that those not entitled to vote should not be given that opportunity. But I have no doubt that this should be implied. Accordingly, if a member who is not entitled to vote is wrongly given the opportunity to do so, that will be a breach of section 230(2) rather than 227(1). Strictly, however, nothing turns on this different analysis because the defence under section 232B applies whichever section was infringed.

54. Should that section have applied here? Mr Hendy submits that in concluding that the errors could not properly be described as accidental, the judge effectively set a

standard of perfection which wholly frustrated the purpose of the section. The judge was wrong to say that the error must be both unintentional and unavoidable; it emasculates the section to define accidental errors in that way.

55. Mr Béar submits that the judge properly construed the section. An error could not be treated as accidental simply because it was not deliberate. In order to be accidental it had to be inadvertent, and that could not be said of either of the two errors here. If reasonable steps had been taken to keep the records up to date, the errors could and would have been avoided, as the judge rightly said. This was not a case of an accidental failure to implement a system which had properly identified those eligible to vote; rather it was a systems failure that went beyond the inadvertent and failed properly to identify those entitled to vote.

56. I accept Mr Hendy's submissions. The premise of section 232B is that there is a breach of section 227 or section 230(2) as the case may be, otherwise the section would not come into play. Where, as here, section 230(2) is infringed, the premise is that the union has not done what is reasonably practicable to prevent those not entitled to vote from voting. The only question is why it has failed to prevent them voting? If it confers the opportunity to vote on those whom it knew or must have known would not subsequently be induced to take part in the strike then it cannot rely on the exception. That was the situation in *British Airways plc v Unite (no.1)* [2010] IRLR 423 where the union balloted a group of members whom it knew would be taking voluntary redundancy and therefore would not be employed at the time of the strike. Reasonable steps could have been taken to try to prevent this group of members from voting but they were not. Cox J held that the error could not be said to be accidental within the meaning of section 232B. I respectfully agree, but in my judgment, contrary to the submissions of Mr Béar and the analysis of Ramsey J, that is not this case. Here the union believed that it was balloting the relevant drivers and no-one else. Because of human errors and failings, it did not achieve that objective but extended the vote to two members not entitled to it. In my judgment section 232B was designed to cater for precisely this kind of case, and the judge was wrong not to apply the section.

57. Again, *P* provides support for this conclusion. In that case, as Lord Bingham recognised in terms (para.7), it was plainly not onerous for the union to discover precisely which of its members were employed at the school. No doubt it was reasonably practicable for the union to have adopted a more effective system to do that. However, section 232B was held to apply and save the ballot.

The failure to provide accurate information as required

58. The judge found that the union would be likely to fail to show that it had complied with this duty because the information given in the ballot notice was wrong, but had proper systems been in place, or further appropriate investigations made, it could have

been corrected. The assumption is that there is an obligation imposed by section 226A either to keep accurate records, or alternatively to acquire further information if the information which the union has is not as accurate as is reasonably practicable. In my judgment the issue arising with respect to this particular ground is whether the section does create such a duty. If it does not, and the only issue is whether the union gave information which accurately reflected what its records revealed, then there is no doubt that it did. Any union officer carefully drawing up the lists from the union's records would have included these two individuals.

59. The only records which a union is expressly obliged to keep is the register of members' names and addresses: see section 24 of the 1992 Act. The union is under an obligation, so far as is reasonably practicable, to ensure that the entries are accurate and kept up to date. Plainly maintaining accurate records will often be difficult. The Code of Practice recognises at para 16 that it is not reasonable to expect union records to be perfectly accurate and that will be so even with respect to the limited information which the union is required to keep. Members will frequently fail to inform the union of changes of address for example. But section 24 requires that steps will need to be taken to try to ensure that they do. There is, however, no separate statutory duty to keep a record of workplaces or job categories at all. Does this duty arise when the union is proposing strike action?

The legislative history of the notification requirements.

60. In my judgment the legislative history of the notification requirements sheds some light on the answer to this question. A union calling a strike ballot will know which members it intends to ballot and will have, with greater or lesser degrees of accuracy, their postal addresses. If it could give the employer the list of names, it would enable the employer to obtain a full picture as to the likely effect of any industrial action in much the same way as the employer is able to do with respect to the individuals notified as being subject to the check off. The original draft of this legislation did not quite require the disclosure of names but it came close to it. When the notification sections 226A and 234A were first introduced in 1993, they required the union to provide the employer with a notice (in subsection 226A(2)(c))

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

61. In *Blackpool and Fylde College v National Association of Teachers in Further and Higher Education* [1994] ICR 648 the Court of Appeal (Sir Thomas Bingham MR; Neill and Steyn LJJ) held that the imposition of this duty might in an appropriate case (and did in that case) require the union to reveal the identity of those members taking part

in the ballot. This was thought by some to be inappropriate since some union members wish to conceal their membership from their employer, in some cases for fear of intimidation or harassment.

62. Accordingly in 1999 a further amendment was made by the Employment Relations Act 1999 and the duty was framed in a different way. The new sub section 226A(2)(c) was drafted so as to require the union to provide in the notice:

> " such information in the union's possession as would help the employer to make plans and bring the 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 that paragraph are taken) will be entitled to vote in the ballot."

63. This formulation identified the purpose behind these statutory notices, and it accurately reflects the current rationale. It is so that the employer can make plans to minimise the effect of the strike, and contact employees to seek to persuade them not to heed the strike call.

64. At the same time the legislation specifically stated that the failure to name any employees would not be a ground for holding that the notice did not comply with requirement. To that extent it reversed the effect of *Blackpool and Fylde.* The union could not be compelled to reveal names, although as a matter of law nothing prevented them from doing. However, in lieu of any duty to reveal specific names, a further obligation was imposed by what was then section 226(3A). It provided that if the union possessed information as to the number, category or workplace of the employees concerned, the notice must at least contain that information. But it was limited to information actually in the union's possession: no duty to create information was created.

65. This new formulation itself posed difficulties. Some of these were considered by the Court of Appeal in*London Underground v National Union of Rail, Maritime and Transport Workers* [2001] ICR 647. In particular, there was no definition of information which was in the possession of the union, and the court had to identify what that was. Robert Walker LJ, as he then was, in a judgment with which Aldous and Dyson LJJ agreed, took the view that information was possessed by the union if it was possessed by any official who, in accordance with the union's rules and operating procedures, would be concerned with maintaining records. He also held that was not limited to information on a document or disc. He further held that the fact that the information was unreliable did not justify the union in concluding that they could refuse to give it on the grounds that it would be of no assistance to the employer. The effect of the judgment, therefore, was that the union had a duty to compile information from its records and from those individuals responsible for maintaining records. As Robert

Walker LJ pointed out, this made the task of the union more onerous than it is when it simply provides a list of names.

66. The 1992 Act was then further amended by the Employment Relations Act 2004 with effect from 1 October 2005, and those are the provisions currently in place. As we have seen, they do now contain a definition of information in the possession of the union and it is narrower than that proposed by the Court of Appeal both because it restricts the information to that held for union purposes in documents and discs, and in so far as it limits the range of persons who are deemed to be the union for these purposes.

67. There are two other material differences from the earlier 1999 provisions. First, there is now the duty imposed by section 226A (2E) to ensure that the information is as accurate as reasonably practicable "in the light of information in the possession of the union". Second, for the first time there is the obligation, both in section 226A and section 234A, to give an explanation of how the figures have been arrived at.

68. Mr Béar submits that construing the section in the light of its legislative history, it is clear that the obligation to provide information which is as accurate as reasonably practicable necessarily involves securing that officers and officials take steps to obtain the information from their members. Parliament has not simply stated, as in the past, that the information is limited to that in the possession of the union. It has deliberately departed from that formula and required lists to be provided which are to be as accurate as reasonably practicable. He relies upon the judgment of Mr Justice Blake in *EDF Energy Powerlink Ltd v National Union of Rail Maritime and Transport Workers* [2010] IRLR 114 para 18 who held that if the union was limited to deriving the information solely from existing documentary records already in its possession, this might encourage it to record minimal information so as to frustrate the purpose of the statute.

69. Mr Hendy submits that the judge erred in his approach to this issue. In particular, he failed to focus on the whole of the relevant provision. The law requires that the figures are "as accurate as reasonably practicable in the light of the information in the possession of the union at the time when it complies with [the obligation]". The judge merely asked himself whether the figures were "as accurate as reasonably practicable". The focus on the information actually in the hands of the union at the time when it complies with its obligation is, submits Mr Hendy, crucial. It is not information which the union ought to have had if it had kept proper records, or information which it could obtain, or which the union had in its possession at some other time. He relies in particular on the following obiter observations of Lloyd LJ in*Metrobus*:

> "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."

70. I agree with Mr Hendy's submissions for a number of reasons. First, in my judgment Mr Béar's argument simply fails to give any weight to the fact that the reasonably practicable duty is limited by reference to the information possessed by the union. Without that limitation I would agree that if it were reasonably practicable for the union to go out and acquire the information, it would have to do so. But these are important limiting words and Mr Béar's construction simply ignores them. In my judgment if the intention of Parliament had been to create a duty to create records not otherwise available to the union, it would have said so unambiguously. No such statutory obligation is created. Moreover, there would seem to be no point in formulating a detailed definition of information in the possession of the union if this were not intended in some way materially to restrict the nature of the duty cast on the union.

71. Furthermore, in my judgment the legislative history supports this approach. The changes made in the 2004 Act were intended at least in part to deal with the difficulties raised in the *London Underground* case. It would be surprising if they were intended to make the burdens on the union more onerous than they had been by creating a fresh duty to obtain information. I accept that there will be a duty on the union to obtain any relevant documents from union officers and employees and to collate and analyse that information to enable it to supply the relevant lists and figures to the employer as accurately as it reasonably can. Moreover, it would in my view be in breach of the duty to provide information drawn solely from documentary records when the union knew that the information was actually wrong. The duty is more than simply to replicate in a mechanical way the information in the union's possession. However, in my view what is required, as in the previous incarnations of this duty, is that the union should assist the employer by drawing upon information it already has. The fact that the information is defined as information held "for union purposes" supports this construction. It suggests that the information has been obtained in connection with some quite separate union purpose rather than simply for the specific purpose of complying with the statutory duty.

72. I recognise the force of the point referred to by Blake J in the *EDF* case and relied upon by Mr Béar that without some duty to acquire information, the union might deliberately sit on its hands and thereby frustrate the object of the statute. But I think that the concern is exaggerated, for the following reasons. First, in so far as this is a

risk, it was present under the earlier statutory incarnations when the information was limited in terms to that in the possession of the union. Yet Parliament did not find that limitation objectionable. Second, in practice many unions will have information about their members' job categories and workplaces either in local or central records, for the simple reason that the information will be in its possession "for union purposes", to use the language of the section. Generally the union will want to know where its members are employed and by whom. Unions do not typically run their operations with the possibility of strikes in the forefront of their minds, but for the more mundane business of representing their members in pursuing grievances and conducting negotiations. For that purpose it is plainly of assistance to know how many members are employed and in what jobs by each employer with whom they have dealings. It is information which is likely to have a bearing on the union's negotiating strategy.

73. Third, the union will sometimes be indirectly obliged for other statutory reasons to have information available on workplaces and job categories. For example, if it wishes to conduct a strike ballot and the nature of the strike is one where the union has to undertake separate workplace ballots pursuant to section 228, it will need to have records of which members are at which workplace in order to ensure that it can form a view as to the appropriate constituency as defined in section 227 and not risk significant over or under balloting. Similarly, many strikes will be directed against a particular employer, or to advance the interests of a particular group of workers who alone will be called out, and the union will need to know which of its members falls into the appropriate category in order to ensure that the appropriate constituency, and no others, is being balloted.

74. In the light of these considerations it would not perhaps be surprising if Parliament should have assumed that in most cases the restriction of the notification obligation by reference to information in the union's possession would not seriously undermine the effectiveness of the duty, and that in practice unions would be unlikely to structure their record keeping simply in order gain some small tactical advantage in conducting future possible strikes.

75. It follows that in my view the judge erred in law in holding that the union was under an obligation by virtue of the notification duty under section 226A to obtain further information or alternatively to set up systems to improve its record keeping. In my judgment the information given by the union in the ballot notification was as accurate as was reasonably practicable given the information in its possession at the material time.

76. Mr Béar then advanced a variation of this argument. He submitted that whatever the position with the ballot notice, by the time the strike notice was communicated to the employer, the employers had already alerted the union to the fact that there were persons on the list who should not have been. Having been alerted in this way, the

union ought not to have made the same mistake in the second notice, and yet the errors were not corrected.

77. In fact the union had only two days between receiving the employer's letter of the 3 December on the 7 December and sending the strike notice on the 9 December. It is clear that the union did explore the possibility that they had balloted too widely and agreed that to a very limited extent they had. But I do not think that it can fairly be said that they were in breach of the duty to provide information which was as accurate as reasonably practicable simply because they had not identified this problem before they sent out the strike notice.

The de minimis principle.

78. In view of my conclusion on the second ground, this issue does not strictly arise. However, I will briefly deal with it.

79. Mr Hendy submits that the de minimis principle is a well established principle in English law and that it would be unjust to invalidate the whole process merely because the union wrongly identified two out of more than six hundred members whom it understood to fall within the balloting constituency. He relied upon a number of authorities in support of his argument. First, in *RJB Mining (UK) Ltd v NUM* [1997] IRLR 261 para.17, Maurice Kay J, as he then was, said this (para 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."

80. In the *British Railways Board* case Lord Donaldson MR, with whose judgment Butler Sloss and Stuart-Smith agreed, said that by de minimis he meant "trifling errors which should not be allowed to form a basis for invalidating the ballot."

81. Mr Hendy also relies on the fact that in the *Metrobus* case Lloyd LJ observed in the context of that case, obiter, that an error in the information given to the employer about check-off employees when it was stated to be 788 rather than 778 would not have been fatal to the notice (although it is right to say that the error was with respect to information which strictly did not need to be supplied at all).

82. Mr Béar submits that the *RJB* case was before the amendments to the balloting provisions and in particular before the implementation of section 232B. Moreover, he emphasises that in a White Paper setting out the Government Response to Consultations about possible amendments to these provisions, the government stated in terms that it did not think it necessary to introduce the equivalent of a section 232B

defence (which the government termed a "disregard") with respect to the notification provisions.

83. Mr Béar also relies on certain observations of members of the Court of Appeal in *British Airways plc v Unite The Union* [2010] EWCA Civ 669. In that case the issue was whether the union had complied with the statutory obligation in section 231 of the Act to inform members of the result of the ballot in circumstances where they had not communicated directly with members but had instead placed the results on union websites and other union notice boards. The Court held by a majority (Lord Judge LCJ and Smith LJ; Lord Neuberger MR dissenting) that this constituted compliance with the section. One of the issues before the court was whether even if it had not been, the court could adopt a principle of substantial compliance or apply the de minimis principle and conclude on that basis that the ballot result should not be invalidated. The Lord Chief Justice gave a somewhat elliptical response (para 61), and the Master of the Rolls commented that whilst common sense might suggest that there should be a role for the de minimis principle, "that has its problems in light of the wording of section 231 and 232B." Lady Justice Smith however felt no difficulty in concluding that the principle was applicable (paras 149-153):

> "I would accept Mr Hendy's submission that, if there were failures, they were not of a serious nature. If the Union did not comply completely with section 231 it appears to me very likely that the judge at trial would hold that there had been substantial compliance.
>
> Is "substantial compliance" sufficient? Section 226(2)(a)(ii) provides that industrial action shall be regarded as having the support of a ballot if the various conditions are satisfied. One of the conditions is that the requirements of section 231 are satisfied. So, section 231 is a condition precedent to the validity of the balloting process.
>
> However, I have already said that the section requires the Union only to take such steps as a reasonable and prudent person would consider necessary to ensure that the information reached those entitled. I have already noted that minor and inconsequential infringements of the balloting requirements can be disregarded. I cannot believe that Parliament was content to disregard minor accidental infringements of the balloting provisions and yet intend that minor and inconsequential infringements of section 231 should have the effect of invalidating the ballot.
>
> I consider that the policy of this part of the Act is not to create a series of traps or hurdles for the Union to negotiate. It is to ensure fair dealing between employer and Union and to ensure a fair, open and democratic ballot.

> I can see that if there is an infringement which affects some aspect of those important policy requirements, the ballot must be held invalid. But in my view it cannot have been Parliament's intention to allow a minor infringement which has had no adverse effect on anyone's rights or interests to invalidate the ballot. In my view substantial compliance with section 231 will satisfy section 226(a)(ii). If it were not so, the rights of workers to withhold their labour would be seriously undermined."

84. In considering this question, I would start from the observation of Lord Bingham in *P* when he observed with respect to the facts of that case:

> "It would be absurd if an immaterial and accidental failure to send a ballot paper to a single member were to invalidate the ballot, so as to deprive the union of immunity, and this contingency is provided for by sections 230(2) and 232B. But it would be equally absurd if an immaterial and accidental failure to establish with accuracy who was entitled to vote were to invalidate the ballot so as to deprive the union of immunity."

85. Lord Bingham was dealing with failings in the ballot itself, but as Lady Justice Smith pointed out in the *BA* case, it would be even more absurd if accidentally depriving someone of the opportunity to vote could be remedied, but failing to include them in the relevant notice could not. It is the same error which lies at the root of both breaches. If that were to be the position, it would largely emasculate the defence which section 232B is intended to provide.

86. Are the courts compelled to accept that this is the consequence of section 232B being limited in the way it is? I do not accept that they are. The government may have been unwilling to introduce an equivalent to section 232B to deal with notification requirements. One can see why it is not altogether appropriate since a failure to notify will never have an adverse effect on the result. But I can see no justification for reading section 232B as being intended to cut back on such defences as the law would have allowed before it was implemented. It is providing a potentially wider defence than the exception for trifling errors would admit. I see no reason why the *British Railways Board* case should not continue to lay down the law in areas where there is no express statutory defence and every reason to suppose that Parliament would not have intended to affect such defences.

87. It may be that there is a distinction between the concept of substantive compliance referred to by Lady Justice Smith and the de minimis principle. The former may be wider in scope than the former and rest on assumed Parliamentary intention. But we heard no argument about that. Mr Hendy put his case on the de minimis exception, and that is as far as he needs to go. In my judgment whatever the justification for applying the principle of substantial compliance (and I find Lady Justice Smith's analysis very

persuasive), I am satisfied that the doctrine of de minimis at least is available to the union and would apply in the circumstances of this case. It follows that I consider that the judge erred in law in rejecting the application of that doctrine.

The explanation: was it adequate?

88. I turn to the appeal against the judge's finding that the explanation was inadequate. This raises the question: how detailed must the explanation be? Parliament provides no direct assistance in answering that question. The statutory obligation is expressed in economical terms. The starting point is that the union has to provide information about a fact, namely how it arrived at the figures it has provided to the employer. There is no express obligation to provide information about how it keeps its records, nor to state how reliable those records are, nor how frequently they are updated. The union has given the employer some figures, and it must explain how it got them.

89. No doubt in construing its meaning regard should be had to its purpose. But what is its purpose? That is not entirely clear although I think some indication can be gleaned from the legislative history of section 226A which I have set out above. Given that there is now no duty to provide the actual names of the proposed strikers (although they will be provided to the extent that they are subject to the check off), and given too that the information about the figures which the union does provide is limited by the sources of information within the union's own knowledge, it is perhaps understandable that Parliament should require the union to give at least some explanation of how it has arrived at the figures provided.

90. Mr Béar suggested that the purpose was twofold. First, it provides a discipline on the union to ensure that it has gone through the necessary processes. Second, it is to provide the employer with some idea of the reliability of the union's figures. I would not dissent from the latter formulation, but it leaves open the critical question of how much indication of reliability it is intended to provide. The explanation will never be adequate to guarantee reliability. Even if the union compiles the information from its records, whilst it might be supposed that the union would do its best to maintain accurate records, without knowing how reliable the records are, it is impossible to know how reliable the figures are. Yet the reliability of the records may depend principally on the care taken by the person or persons responsible for keeping them. I do not understand Mr Béar to be saying that some assessment of their skills is envisaged as part of the statutory explanation given by the union. Accordingly, any implied representation about the reliability of the figures provided by the explanation is in my view necessarily very limited. I respectfully agree with the observation of Lloyd LJ in the *Metrobus* case who said (para 111) that given the lack of information in some union records, "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." Something, but not necessarily very much.

91. In my judgment Para 16 of the Code of Practice is consistent with this analysis. It is as follows:

> "When providing the explanation of how the figures in the written notice were arrived at, unions should consider describing the sources of the data used (for example the 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 the 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 the estimates."

92. This somewhat guarded guidance suggests that the union should identify the weaknesses which they perceive to exist in their own records, and also highlight any potential inaccuracies in the information of which they are aware. Otherwise they should state what is the source or sources of the data they are providing.

93. Mr Béar submitted that since the purpose of the provision was to assist the employer to assess the reliability of the particular information, this in turn required that the union to disclose to the employer precisely who did what and when. This would require information in particular about the time when the records were last updated.

94. I do not accept that the information has to be so specific, or needs to go further than the ACAS code recommends. Nor in fact will the information which Mr Béar submits should be given generally assist the employer in assessing the reliability of the information. Nothing is achieved by stating which particular officer obtained the information, or on which particular day, or whether contacts with local officers were by email or phone or anything of that kind. This provides no relevant assistance of any kind to the employer. In my view, to require this would simply be to set traps or hurdles for the union which have no legitimate purpose or function. I accept that it is of some relevance whether the information is drawn from union records or not since the employer can at least assume the union will have an interest in keeping them up to date; and it is of some relevance whether that information is national or local. If the information has been obtained by the union in some other way, that should be disclosed, as the Code suggests. Beyond that, however, I do not think that the scope of the statutory duty should be further expanded by reference to some dimly perceived statutory objective.

95. In my judgment the duty on the union is not an onerous one, and it is met by complying with paragraph 16 of the Code. I accept that the explanation is on this

analysis of limited benefit to an employer. I am not alone in reaching that conclusion. In *Metrobus* Lloyd LJ (para 110) considered that the explanation could be provided in "standard and not very informative terms", and Maurice Kay LJ observed (para 124) that the explanation could be "permissibly formulaic or anodyne" and yet still be in compliance with the Act.

96. Mr Béar advanced some additional points. He relied on the description of Ramsey J, who in turn was following an earlier decision of Mrs Justice Sharp in *Network Rail Infrastructure Ltd v The National Union of Rail, Maritime and Transport Workers* [2010] EWHC 1084 (QB), when the judge said that the union in its explanation had stated a conclusion rather than given an explanation. This would in my view only be true if the union had simply given the figures without any explanation at all. The conclusion is reflected by the numbers in the lists. The union has plainly in its explanation said how it came to reach those numbers. I can understand the submission that the explanation is too cursory, but it is in my view a misuse of language simply to describe it as a conclusion.

97. Mr Béar also complains that ASLEF's approach to these issues is formulaic. They have provided the same words with respect to a large number of strike ballots. This demonstrates that they are not providing any proper explanation of how the particular figures in this particular strike are obtained. I do not think that follows. If in fact the union approaches the task of obtaining the information in the same way for each strike, the general description of what it has done to obtain the lists and figures will perforce be essentially the same on each occasion. Like Maurice Kay LJ in*Metrobus*, I do not accept that the formulaic response demonstrates a failure to comply with the statutory obligation.

98. I entirely accept that more information could have been provided. That will always be the case since an explanation is potentially open-ended. But the question is not whether the explanation might have been fuller but rather whether the explanation actually given was sufficient to meet the statutory standard.

99. In my judgment in this case it was. The explanation identifies the fact that the information has been derived from the union's database, and it provides some indication of when the records were updated, since it states that it was updated for the purpose of the statutory notification and balloting requirements. I think that on any fair reading it is in fact indicating that the records were specifically updated with the strike ballot in mind to ensure that accurate information was available. I accept that it has not identified how that updating procedure was carried out, but I do not agree that there was any obligation to do so or that a description of the process would have assisted the company. Even if the union had explained how the central office liaised with local officials for that purpose, it would not have enabled the employer to gain any greater insight into the reliability of the figures. I conclude therefore that the explanation,

although brief, was sufficient to satisfy the statute and that the judge misdirected himself as to the specificity required.

The explanation: was it inaccurate?

100. Mr Béar submits that a misleading or false explanation cannot constitute compliance with the statutory duty. The objection here is that the union gave an inaccurate explanation by claiming that it had audited the records whereas in fact it had done no such thing. Mr Béar emphasises the fact that in its explanation the union used the word "audited" in addition to the word "updated." They were intended therefore to mean separate things. The judge was right to say that an audit involves some form of systematic examination of a record against underlying data. Mr Béar accepts that to use the word "audit" would not necessarily, in this context at least, suggest that there had been an audit by someone independent of the union itself, but it is an assertion that some exercise has been undertaken over and above the usual updating of records. Ramsey J agreed, concluding that an audit required "more than merely writing to the branch secretaries and asking for updated material".

101. Mr Whelan, the union officer responsible for conducting the strike, explained in his witness statement what had been done. He explained how the membership database is generally kept up to date, and that this involves amongst other matters a monthly check made by branch secretaries to make sure that the members recorded as being linked to the branch are indeed still members. The extra step taken where a strike ballot is in the offing is that there is a further check specifically by reference to the ballot.

102. Mr Béar does not in these proceedings contend that the description was deliberately misleading, although he formally reserves the right to pursue that issue at trial. In my view there is very little prospect that he would establish any intention to mislead. As Mr Hendy pointed out, unions know that employers will often scrutinise the information very carefully specifically in order to determine if there may be defects sufficient to obtain an injunction. It is unrealistic to think that the union would knowingly mis-state the position and thereby open themselves up to the risk of legal challenge. So the question is whether the union has inadvertently misled the employer.

103. In assessing the accuracy of the explanation, it must be born in mind that the union officials providing it are not drafting a statute, and nor are they required to use undue precision or accuracy in their use of language. In my view the courts should not take the draconian step of invalidating the ballot, thereby rendering the strike unlawful, simply because the term used to describe a particular process is infelicitous. In my judgment the description of the process undertaken would have to be positively and materially misleading before the explanation could be said to fall short of the statutory requirement.

104. It is relevant to ask what an audit of the general data base could be. In practice it is difficult to see how it can be more than checking that the information provided on a register with respect to a member is still accurate. No doubt that check could be effected in a number of ways. It may be done by contacting the member or perhaps by checking the accuracy of the information with someone well placed to know whether it is true and accurate or not. This is what the union did here. The branch secretaries would be as well placed as anyone to know the current situation of members of their branch. I accept that by using the words "updating" and "audit" the union might have given the impression that in some way the audit was a different process to an update, whereas in fact it was essentially the same process albeit carried out as a distinct exercise over and above the standard updating process. But I do not accept that it was positively misleading to describe the process as an "audit", albeit that it was not the most appropriate term. The update itself is a rudimentary form of audit. In *London Underground Limited v ASLEF* [2011] EWHC 7 Holroyde J commented that where, as here, there was a ballot-specific review and updating of the ASLEF database in addition to the usual updating, the phrase "auditing and updating" was a fair description, albeit not the best description, of that process. I agree with that observation. The phrase was not so inapt or misleading as to justify the conclusion that it defeated the statutory purpose. In my view the judge adopted too rigorous an approach to the interpretation of the explanation.

105. In any event, even if I am wrong about that, I doubt whether the mis-description would invalidate the explanation. There is no statutory duty to provide an audit, or to update the figures, and therefore no obligation to state whether that has been done or not. There is only the obligation to explain how the lists and figures were reached. If a union explains that this was done by reference to its records but at the same time innocently gives inaccurate information which it is not obliged to give about the state of those records, I doubt whether that the error will put it in breach of its statutory obligation.

106. In my judgment, therefore, ASLEF's appeal should succeed and the injunction should be discharged.

The RMT appeal

107. This is an appeal against an interim injunction granted by Mr Justice Tugendhat, whose effect was to stop the strike amongst employees on the Docklands Light Railway. In view of the analysis in the ASLEF case, I can deal with this appeal very briefly.

108. The facts were that there was an industrial dispute when negotiations broke down. On 8 December 2010 the union provided the section 226A notice giving the figures of the number of its members in the different job categories and work places who it was proposing to ballot. It also provided an explanation of how it had arrived at

those figures. This explanation was in part cast in precisely the same terms as in the ASLEF case, but the union gave additional information as to how the updating of the relevant information had been secured. The full explanation was as follows:

> "The figures given above has/have been arrived at by retrieving information from the Union's database having been audited and updated for the purposes of the statutory notification and balloting requirements to ensure accuracy.
>
> This update has involved the following steps:
>
> i) The generation of membership lists from our database which have been sent to our company representatives who have responded with updated information as to out member's individual job categories and workplaces. This information has subsequently been inputted into our database.
>
> ii) Ensuring the input of all information for the relevant members in our database, which was received as a result of our annual mailing out of a letter to each member of the union with a breakdown of the Job Category and workplace information we have on our membership system. This letter requests each member confirms any changes to their details either by letter, by phone or through or through the member's section of our website. Indeed our website has permanent notice on its front page requesting members advise us of any changes to their employment details or home addresses.
>
> iii) Checking the union has used any other relevant information in the possession of any of its officers or employees, as to the accuracy of this information."

109. The ballot was 80% in favour and just under 50% of those entitled to vote actually voted. That result was sent to the employers on 11 January 2011. The notice of industrial action required by section 234A was sent on 13 January 2011 and it contained similar lists and figures to those given earlier, and the statutory explanation of how the figures were arrived at was in substantially identical terms. The only difference is that the words "audited and" were omitted. I surmise that this was because of the criticism that had been made of those words by Ramsey J in the *ASLEF* case.

110. On 17 January 2011 the respondent applied for an interim injunction and the injunction was imposed on 19 January by Tugendhat J. He gave two reasons why he considered that it was unlikely that the appellant would succeed in its defence that the action was pursuant to a lawful ballot and that it would therefore have the protection of the statutory immunities. They mirror two of the grounds on which Ramsay J granted the injunction.

111. First, he considered that the statutory explanation as to how the appellant had arrived at the stipulated figures, in both the ballot and the strike notices, was inadequate. It was too generic. It failed to show what had been done, when and by whom. The decision of Lloyd LJ in the *Metrobus* case supported the proposition that information of that nature was required. Further, in addition to the purposes identified by Ramsey J in the ASLEF case, there was in the judge's view an additional statutory purpose for the notification provisions, namely to enable the employer to assess the reliability of the figures so that it can consider whether or not to seek an injunction. The explanation given frustrated that objective. It left the respondent in doubt whether the figures could be relied on.

112. A particular feature of this case was that there had been earlier ballot notices in May and October in which the figures were in certain respects different, and Mr Béar submitted markedly different, to the figures given in the December notice. The judge indicated that, given the discrepancy between the figures in those notices, he was minded to conclude that the statutory explanation in the notices under appeal ought to have provided some explanation as to why the figures were so different from those given in May. He did not, however, decide the case on that basis.

113. The second ground was that the ballot notice was inaccurate because it purported to represent that the union had carried out an audit, but that was not true. The representation was that something more than systematic updating had occurred, but it had not. This was a material error vitiating the ballot.

114. A third ground was advanced but rejected by the judge, namely that the job categories used by the appellant in their notices were imprecise. This is the subject of a respondent's notice which SERCO need permission to advance, and I will discuss it at the end of this judgment.

The grounds of appeal.

115. Mr Hendy submits that the judge erred in law in both his criticisms of the explanation. He was wrong to conclude that the explanation in each of the ballot and strike notices was inadequate, and wrong to say that the reference to the audit in the ballot notice rendered that notice inaccurate.

116. The submissions with respect to each of these grounds were substantially the same as those advanced with respect to the ASLEF case. I do not find any material distinction between this case and ASLEF, and essentially for the reasons I have already given, I find that the judge did err in his analysis, and that the appeal should succeed.

117. I will say no more about the reason why I consider that the judge was wrong to say that the explanation was inaccurate. I will, however, deal briefly with three matters which were given greater prominence in Tugendhat J's judgment than they were in the

judgment of Ramsey J, and were material to the judge's analysis of whether the explanation was adequate.

118. The first is his finding that the purpose of the obligation to provide notices was to enable the employer to decide whether to take legal proceedings or not. No doubt that influenced the judge in his analysis of what the explanation required. However, I do not accept that this is properly characterised as a purpose which the notice provisions are designed to achieve. Parliament does not typically impose statutory obligations for that reason. Moreover, for reasons I have given, the information which the judge found ought to have been given –who did what and when - would in truth have done little to comfort the employer as to the reliability of the raw data the company were given.

119. The second feature is the weight which the judge placed on the decision of Lloyd LJ in *Metrobus*. In that case no statutory explanation at all was provided. However, in the course of his judgment, Lloyd LJ stated, obiter (para. 112), that the account given by Ms Evans, a union employee, in her witness statement about the steps she had taken to update the records was what the statutory explanation should have said. Ms Evans had said this:

> "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.
>
> Once the administration referred to in paragraph 3 above had been finalised, the postal ballot was held and it was successful. …"

Tugendhat J relied on the fact that this account states who did what and when. But I doubt whether Lloyd LJ was treating that as the necessary requirement. I suspect that he was merely indicating, consistently with his general assessment of the significance and value of the statutory explanation, that Ms Evans' account identified in a general way the sources of the information from which the union put together the figures. In truth, it was wholly irrelevant whether Ms Evans had one call or many, or whether she contacted branches by telephone or by letter. That information does not assist the employer in assessing the reliability of the information. Indeed, in my judgment the information given by Ms Evans provides less by way of explanation than the explanation given by the union in this case. It is true that in *Metrobus* the information tells the employer that the updating occurred approximately a month before the ballot commenced whereas here the explanation simply indicated that there was updating in anticipation of the ballot. But in each case it is obvious that the update was recent, and I do not consider that to be a material distinction.

120. The third feature specific to this case is the fact that earlier ballot notices had given markedly different figures. The judge accepted, plainly correctly, that there was no statutory obligation to provide information about earlier ballots. Sections 226A and 234A merely require an explanation as to how the figures provided in the lists sent pursuant to those sections have been arrived at. I can see no basis at all for saying that a discrepancy with earlier figures would alter the scope of that duty. Of course, if the union does not provide a satisfactory explanation when asked, that might encourage the employer to believe that the union might have balloted the wrong people and no doubt it will increase the risk of injunction proceedings being taken. So it would be prudent for the union to provide an explanation if asked. But however wise it may be for the union to respond to the employer's request for an explanation, that does not mean that it is statutorily obliged to do so in the statutory notices.

121. Accordingly, I would uphold the appeal in this case also and discharge the injunction.

The respondent's notice.

122. The complaint here was that the union in its statutory notices identified three categories of worker (out of a total of over fifty categories) which were not identified in the pay rate spreadsheet which the union and employer jointly used for determining pay rates. As I understood the point, Mr Béar's principal complaint was that the union had provided confusing information because some of the job categories reflected those found in the spread sheet (indeed, the vast majority) but some did not. It was therefore a hybrid list with no consistent underlying principle of categorisation. In fact the argument before the judge appears to have focused on a rather different point, namely that the union should have used the same job categories as had been used in the agreed list.

123. It appears that what the union in fact did was simply to ask the employees affected what were their jobs. For the most part their answers reflected the spread sheet categorisation, but not in all cases. Whether the employer was genuinely misled by this is a matter of dispute, but it is accepted that any difficulty in identifying the jobs related to at most a handful of staff.

124. There is no statutory obligation requiring the union to use any particular category of jobs, and therefore there is no obligation to adopt the categories used for pay purposes. Indeed, there is clear authority that the only obligation is to provide numbers by reference to general job categories: see *Westminster City Council v UNISON* [2001] IRLR 524, and these will not reflect the more sophisticated job breakdown typically used in pay negotiations. Furthermore, the approach adopted by the union was in my view perfectly sensible and did not infringe its statutory duty. The union did not seek to use a hybrid system. It notified the employer of the jobs identified by the workers

themselves. Whatever difficulties that might cause an employer in marginal cases, I am satisfied that it complies with the statutory obligation. I would therefore refuse permission for this ground to be pursued.

Disposal

125. It follows that the appeals in both cases succeed, and the injunctions are discharged.

Lord Justice Etherton:
126. I agree.

Lord Justice Mummery:
127. I also agree.