

*These notes refer to the Lawful Industrial Action (Minor Errors) Bill  
as introduced in the House of Commons on 30 June 2010 [Bill 4]*

# **LAWFUL INDUSTRIAL ACTION (MINOR ERRORS) BILL**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes relate to the Lawful Industrial Action (Minor Errors) Bill as introduced in the House of Commons on 30 June 2010. They have been prepared by John McDonnell, the Member in charge of the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause, or a part of a clause, does not seem to require any explanation or comment, none is given.

### **SUMMARY AND BACKGROUND**

3. Individuals and trade unions taking part in or organising industrial action risk incurring liability to employers, and potentially other parties, under the law of tort. That liability may be enforced by a claim for damages for loss alleged to have been caused by the action, or by an application for an injunction to prevent proposed action from taking place.

4. Section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 (c. 52) (the “1992 Act”) provides protection from liability for persons engaging in action “in contemplation or furtherance of a trade dispute”. Protection in similar form has existed since the Trade Disputes Act 1906. Protection under section 219 is subject to a number of limitations. By section 219(4) the protection is conditional on, among other things, compliance with detailed rules requiring approval of proposed industrial action in a ballot of those whom it is intended should take part. The rules are contained in sections 226 to 232A and 233 to 234A. They include detailed provision about participation in and conduct of ballots (sections 226B to 232A), and requiring notice to be given to an employer before a ballot is held (section 226A) and again before industrial action commences (section 234A).

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5. Section 232B of the 1992 Act provides a measure of relief for failure to comply with the requirements of sections 227(1) (entitlement to vote in ballot), 230(2) (relating to postal voting) and 230(2B) (relating to voting papers for merchant seafarers). By section 232B(1), a failure to comply with one or more of those provisions is to be disregarded — and thus the protection of section 219 is not lost — if “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”.

6. A number of recent judicial decisions have revealed a degree of uncertainty on the scope and application of section 232B — for example, in the meaning of “accidental” in subsection (1)(b). The cases have also highlighted, among other things, that the section does not apply to errors, however minor, in the giving of notice under section 226A or 234A. It remains unclear where the burden of proof lies in the event of a dispute as to whether an error involves loss of the protection of section 219.

7. In May 2010 an interim injunction was granted by McCombe J in *British Airways plc v. UNITE the Union* on the basis of alleged failure to comply with the provisions of section 231 of the 1992 Act regarding information about the result of a ballot. The Court of Appeal [2010] EWCA Civ 669 reversed that decision. Smith LJ stated that “it appears to me very likely that the judge at trial would hold that there had been substantial compliance” with the provisions (judgment, paragraph 149) and observed: “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” (judgment, paragraph 152). However, the other two members of the Court reached their decision on different grounds. Hence uncertainty remains as to the effect of insubstantial errors in operating the ballot and notice provisions.

8. The Bill amends section 232B by:

- a. extending the application of the section to the whole range of rules about the conduct of ballots and the giving of related notices and information;
- b. replacing the reference to an “accidental” error with the concept of “substantial compliance” with the requirements; and
- c. clarifying the incidence of the burden of proof.

9. At the end of these Explanatory Notes is the text of section 232B as it would read if the Bill were enacted as introduced.

## **TERRITORIAL EXTENT**

10. Section 301 of the 1992 Act applies most of the Act's provisions, including section 232B (and the associated provisions) to England and Wales and Scotland but not to Northern Ireland. Because the Bill simply amends section 232B, it effectively has the same extent as that section.

## **COMMENTARY**

### **Clause 1: Effect of errors in ballots and notices**

11. Clause 1 amends section 232B of the 1992 Act.

12. Clause 1(2) extends the scope of section 232B by amending subsection (1)(a) to include a notice as well as a ballot. That is a reference to the notices required by the sections of the 1992 Act to which, by virtue of Clause 1(4), the amended section 232B applies. Clause 1(4) additionally amends subsection (2) to make clear that "notice" also includes information about the result of a ballot which sections 231 and 231A require to be provided.

13. Clause 1(3) amends section 232B(1)(b) as follows:

- a. Substituting (in new subparagraph (i)) the term "accidental" with the concept of "substantial compliance", and
- b. Adding wording (in new subparagraph (ii)), about the effect of a failure in the case of a notice. This refers to a reasonable recipient's understanding of the effect of the notice.

14. Clause 1(4) extends the section to cover the whole range of provisions that impose requirements in relation to industrial action ballots, including those that require notice to be given. It also provides that "notice" in subsection (1) includes the information required by sections 231 and 231A.

15. Clause 1(5) inserts new subsection (3) into section 232B, dealing with the burden of proof in any proceedings in which reliance is placed on the section.

### **Clause 2: Short title and commencement**

16. Clause 2(1) provides for the short title. Clause 2(2) and (3) provide for the Bill's commencement (see below).

## **EUROPEAN CONVENTION ON HUMAN RIGHTS**

17. This is not a Government Bill so does not require a statement under section 19(1) of the Human Rights Act 1998. However, in the view of the Member in charge, the provisions of the Lawful Industrial Action (Minor Errors) Bill are compatible with the Convention rights. In particular the provisions, in the opinion of the Member in charge, would help fulfil the positive obligation to secure the effective enjoyment of the rights protected by Article 11 of the Convention (freedom of assembly and association).

## **COMMENCEMENT**

18. Clause 2(2) provides for commencement of the Bill one month after Royal Assent.

19. Clause 2(3) applies the amended section 232B prospectively rather than retrospectively, viz. to industrial action taking place, or proposed to take place, on or after the commencement date. Where a period of industrial action begins (or is proposed to begin) before the commencement date, the amendment will not apply to that portion of the action that precedes the commencement date.

*Proposed text of Section 232B of the 1992 Act as amended by the Bill:*

### **232B Small accidental failures to be disregarded**

(1) *If—*

- (a) *in relation to a ballot or notice 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, or the failures taken together are –*
  - (i) *such that there has been substantial compliance with the provision or provisions in question, and*
  - (ii) *on a scale which is unlikely to affect (in the case of a ballot) the result of the ballot or (in the case of a notice) a reasonable recipient's understanding of the effect of the notice,*

*the failure (or failures) shall be disregarded for all purposes (including, in particular, those of section 232A(c)).*

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- (2) *The provisions are sections 226 to 232A and 234A; and in subsection (1), “notice” includes information which sections 231 or 231A require to be provided.*
- (3) *In any proceedings in which reliance is placed on this section, any failure to comply with a provision mentioned in subsection (2) is to be treated as meeting the terms of subsection 1(b) unless the contrary is proved.*

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