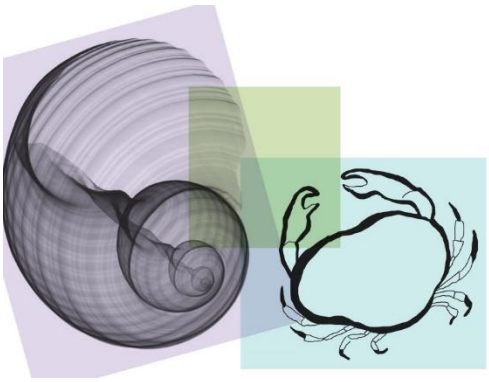

Briefing note for NHS employers

From time-to-time, trusts can receive notification from the NHS trade unions of an intention to conduct either an indicative or statutory ballot of their membership to assess the level of support for strike action and action short of full strike action.

When receiving any such communication, as well this confirming the position and intention of the trade union, it is important to understand the differences between the type of ballot (statutory ballot and/or indicative ballot) as well as the route through to any industrial action that can be lawfully taken.

1. **Statutory ballot**

   This will be formally communicating to trusts that the relevant trade union plans to conduct a ballot of their membership under section 226A of the Trade Union and Labour Relations (Consolidation) Act 1992 to assess the level of support for strike action and action short of full strike action.

   There are strict legal requirements regarding conducting this type of ballot, including the amount of notice the union must provide to the employer of those who are entitled to vote, the provision of a sample voting paper (including a summary of the matter(s) of issue in the trade dispute), information about the opening of the ballot and the categories of employees concerned (those who are entitled to vote) and their workplaces.

2. **Indicative ballots**

   When a trade union is proposing to conduct an indicative (or consultative) ballot, it is used to assess whether their membership would 'in principle' be prepared to take industrial action.

   It is important to note that there are no legislative requirements regarding conducting indicative or consultative ballots. The trade unions are not obliged to provide notice to employers in the same way as set out under the statutory ballot provisions.

   Importantly, after conducting any indicative ballot, a trade union would be required to then undertake a further statutory ballot in accordance with trade union and industrial action legislation before they could call for any form of lawful industrial action to be taken.

This guidance document and supporting FAQs have been produced to raise awareness for employers of industrial relations good practice in the conduct of trade union industrial action ballots.

The information contained in this note and the FAQs is for general guidance purposes only. It should not be relied upon as a substitute for legal advice on specific facts or matters and we recommend that you contact your legal advisors for detailed advice.

Frequently Asked Questions – Industrial Action

BALLOTS

1. Do we need to provide time off for union representatives in relation to this matter?

Trade union representatives are entitled to paid time off work under section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) where employers recognise the union for trade union duties, such as matters which the employer has agreed are the subject of collective bargaining, for example negotiating terms and conditions of employment.

Trade union members are entitled to unpaid time off to take part in the activities of the union and activities where the individual is acting as a representative of the union under section 170(3) of TULRCA. The amount of time and occasions which are taken by members must be reasonable in all the circumstances. It is likely that members will seek to take time off to take part in campaigning regarding the ballots or attending meetings. We recommend that employers and trade union representatives come to an agreement regarding what is "reasonable" time off work giving consideration to the workloads of the team in which a trade union member works and the needs of their colleagues and managers.

2. Where the Unions tell the employer that they will be balloting "all members employed by your organisation paying subscriptions by DOCAS" from which you will be able to deduce the numbers, categories and workplaces of the employees concerned, can they do this without providing anything more?

Yes. Section 226A(2)(b) provides that the unions can provide either the list of numbers, categories and workplaces of the employees, or simply refer employers to the information held by them from which they can readily deduce the information.

In the 2019 case of *BA plc v British Airline Pilots' Association,* the Court of Appeal (CA) dismissed a claim by BA that the pilots union (commonly known as BALPA) was in breach of its duty to notify BA of the categories of pilots it had balloted for strike action. In its ballot notice, BALPA provided a list of the ranks of pilots to be balloted. BA argued that this was not sufficient because, among other things, the notice did not state to which fleet the pilots were assigned. BA argued that without this information it was unable to plan to deal with the strike and therefore the ballot notice did not comply with requirements of section 226. The CA emphasised that the word "categories" is not defined in the legislation, but is a broad and flexible term. An employer will almost always be able to complain that more detailed information or a different method of categorisation could be used. The approach must be an objective rather than subjective one – was the information provided sufficient to meet the statutory requirements? In this case it was. In fact, the categorisation used by BALPA was the established way of referring to pilots used by BA and the pilots' contracts of employment did not specify the fleet to which they were assigned. The statutory requirements were met and BA's claim for an injunction failed.

3. Where the ballot notice includes a list of members described as "non-DOCAS membership" and there are anomalies or inaccuracies in that information (i.e. "workers who do not work at the organisation" or "unknown" categories of worker or workplaces) what should an employer do, and what are the factors a court will consider in granting an injunction?

The unions have to provide information which is as accurate as reasonably practicable.

Employers should consider what information the unions are likely to have in their possession and whether they feel that the unions could have provided more comprehensive information and what evidence the employer has to support this assertion. For example, what information does the employer provide periodically to the unions which would enable them to provide more accurate information?

The Code of Practice on Industrial Action Ballots and Notices to Employers recommends that it would be good industrial relations practice for an employer who believes the notice it has received does not contain sufficient information to comply with the statutory requirements, to raise this with the union promptly before pursuing the matter in the courts.

Employers should also be aware of s232B which deals with the effect of small or accidental failures in regard to the ballot itself and provides that any failures may be disregarded if it is, or if taken together they are, 'accidental and on a scale which is unlikely to affect the result of the ballot'.

In each case where a ballot notice has been served it will be important to assess the numbers of employees being balloted and the impact of the scale of error on the outcome of the ballot.

If an injunction is requested, the courts will look at whether the union's efforts in providing the information were reasonable or unreasonable.

Until the case of *London Midlands v Serco*, courts were prepared to intervene in such circumstances and there was little appetite to allow unions to hide behind an inaccurate database. However, following this case, if unions are doing the best they can to provide information, even where they have negligently or carelessly maintained data, doing the best they can is likely to be sufficient.

There is no duty on the union to keep an up to date database.

If the employer is being deliberately misled by the union where it is believed that they hold information, this position can be challenged more robustly. Employers should be aware that the threshold to show that the information is 'deliberately vague' is a high one which will require good quality evidence and for those reasons obtaining an injunction in these circumstances can be difficult.

4. We hold information which appears to be more accurate than the information in the union's possession – should we share this with the union and how should the organisation respond to a union's request for information?

NHS organisations should be clear that any sharing of information with the unions is likely to be in breach of data protection legislation, as assisting with a request from a union about its members does not fall within one of the categories set out in the Data Protection Act 2018 (DPA), i.e. it is not strictly necessary or to comply with any legal obligation.

There is nothing in any ACAS or other authoritative guidance which suggests that an employer ought to disclose the check off information it has to a union in connection with such a ballot.

Unless there is clear consent for this information to be released to the unions, consent needs to be obtained. In practice this should not be difficult for the employer to facilitate.

For a number of reasons, it may be better to ensure that the information in the union's possession, even where this requires the organisation to provide it, is better than the information which the union is holding.

Provided the employer can provide information in a way which does not disclose personal data, where the employer has better quality information and sends a document in electronic format which holds accurate information regarding workplaces and categories, and the union is provided with this following service of the ballot notice, the union should then go through this to update/correct the information in the strike notice, in the event of the ballot supporting strike action. If they do not carry out a further filtering process in readiness for service of the strike notice, the employer can argue that the union has not made reasonable attempts to make the strike notice as accurate as they could, even though the employer has provided the better quality data. This can put the employer in a stronger position to challenge the unions, initially in a letter before action which indicates the extent of the union's failures. If this does not receive an adequate response, employers may have grounds for an injunction and should obtain legal advice on their position.

Data protection issues aside, providing better information may help you to plan for industrial action. Where the union fails to ensure that strike notices are as accurate as the information which you have provided to them, you are likely to have better grounds for challenging a failure to meet the legal requirements.

5. How accurate do the Unions need to be in terms of who they send ballot papers to?

Under section 230(2), so far as is reasonably practicable every person entitled to vote in the ballot must have a voting paper sent to him/her and be given an opportunity to vote. In terms of the conduct of the ballot, so far as is reasonably practicable voting should be in secret and the votes fairly and accurately counted. Section 230(4) goes on to state that any inaccuracy in counting shall be disregarded if it is accidental and on a scale which could not affect the result of the ballot.

There have been a number of cases which have looked at whether unions have complied with their duties in organising a ballot.

In *British Airways v Unite*, Unite sent ballot papers to employees who were due to leave employment under a voluntary redundancy scheme. It was held that Unite had not taken reasonable steps to exclude these people from the ballot and therefore the ballot was defective and an injunction was granted.

In *Balfour Beatty Services Limited v Unite* the High Court found that the unions are not required to take all steps that are reasonably practicable to ensure the accuracy of the balloting constituency. Instead union officials can exercise their own judgement. In addition, in this case it was found that 'accidental' means no more than unintentional – it does not require the failure to be caused by some occurrence outside the union's control.

The current case law appears to seek to strike a balance with regard to small accidental errors. However, if there are defects in the balloting process which have a genuine and material impact on the outcome, the ballot could be open to challenge.

TRADE DISPUTE WITH EMPLOYER

6. What is a trade dispute?

Part V of TULRCA sets out the statutory provisions regarding industrial action. The legislation and the protection it provides refers to a "trade dispute" throughout. A trade dispute is a dispute between workers and their employer which relates wholly or mainly to one or more matters which are listed in the legislation including the terms and conditions of employment, which is relevant to the current issue regarding the pay award.

7. Can organisations resist industrial action on the basis that any dispute is not "with the employer" and is a political dispute with the Government?

There is a potential argument that disputes with NHS organisations which centre on the implementation of national policy are in fact with the Government and not with the individual employer. However, having considered the matter previously at the time of the industrial action over the government's proposed pension reforms, we do not consider that this is a strong point.

The unions could rely on section 244(2) which states that a dispute between a Minister of the Crown and any workers shall, notwithstanding that he is not the employer of those workers, be treated as a dispute between those workers and their employer if the dispute relates to matters which:

1. have been referred for consideration by a joint body on which, by virtue or provisions made by or under any enactment, he is represented or
2. cannot be settled without him exercising a power conferred on him by or under an enactment.

In ***Secretary of State for Education v National Union of Teachers [2016] EWHC 812 (QB)***, which involved similar circumstances, the union was able to rely on section 244(2) to say there was a 'trade dispute'.

8. How many union members need to have turned out to vote in the ballot, and how many need to have voted in favour of the industrial action before it can legally go ahead?

At least 50% of the members who are eligible to vote in the ballot must have done so ('turn out') (s 226(2)(a)(iia)).

In addition, for those engaged in 'important public services' (which includes those who work within the fire, health, transport, education of those under 17 and border security sectors), at least 40% of those entitled to vote must have voted in favour of the action (section 226 (2A) – (2F)). Each one of these services has accompanying regulations specifying the type(s) of employee who are covered – for example, Important Public Services (Health) Regulations 2017 (SI 2017/132). The government has also published non-statutory guidance on the Important Public Services Regulations 2017. This is intended to provide advice for unions on applying the 40% threshold in practice and suggests examples of workers who will be covered in each sector.

Balloting thresholds example:

Ballot of 1000 union members in affected 'bargaining unit' in an NHS Trust, 600 of them vote, with 450 voting in favour of industrial action

- *60% have voted (600 of 1,000), which exceeds the 50% threshold (500 members)*
- *45% of eligible members voted in favour (450 of 1000), which exceeds the 40% 'important public services' threshold*
- *75% of those who actually voted (450 of 600) voted in favour, which exceeds the 'simple majority' requirement*

If only 301 of the 600 who voted had voted in favour, any industrial action based on that ballot result would be unlawful, as although the simple majority requirement would have been met, the important public services threshold was not (of the 1,000 eligible, 400 would have had to vote in favour).

VOTES – AGGREGATING AND SEPARATE SITES

9. Is it possible to aggregate votes across the NHS in determining whether to strike and how would that work?

Under section 228, there should be separate ballots for those union members entitled to vote at each workplace. "Workplace" is defined in section 228(4)(a) as "the single set of premises at or from which the person works". Case law suggests that "premises" is wide enough to cover different units or departments that are contained in the same building or situated at the same location. It would not be wide enough to cover all of an organisation's sites within a particular area. When separate workplace ballots are held, the majority has to answer yes at each workplace to support industrial action.

However, s228A provides an extension of this principle and sets out that there can be a single ballot if:

- the workplace of each member entitled to vote in the ballot is the workplace of at least one member of the union who is affected by the dispute (228A(2));
- entitlement to vote is given to all union members at those sites who the union reasonably believes have a common occupation, and are employed by a particular employer or by any number of particular employers with whom the union is in dispute. For example, a union could ballot in one single ballot all porters or all nurses at NHS employers (228A(3)); or
- entitlement to vote is given to all members of the union who are employed by a particular employer or by any number of particular employers with whom the union is in dispute (but no others) (228A(4)).

The last exception will only apply where the union ballots all its members across the different employers. In terms of section 228A(3), if the union ballots its porter members at two or more employers but not at all of the employers where porter members are employed, a single ballot will need to be held at each employer. The aggregation of votes presents a risk nationally amongst the NHS given that the concentration of membership of the unions is considerably higher at certain employers than others. The thresholds set out at section 8 above could be reached more easily where unions effectively aggregate votes between all employers.

10. Can non-balloting unions also call their members out on strike in sympathy and gain immunity from inducing a breach of contract by relying on the fact that they have the same “trade dispute”?

No. They will effectively be inducing their members unlawfully to go out on strike, which means that they do not have immunity from breach of contract.

Tactically, employers will need to be alert to evidence of inducement (literature being circulated etc.) and this might prove difficult to obtain in advance of any day of strike. If members of non-balloting unions ask about their degree of protection and what their position is then the employer should advise them to talk to their unions about the lawfulness of the action.

Although employees who do spontaneously take strike action are running the risk of dismissal because their immunity protection is limited, dismissal for striking involves significant risk and should be approached very carefully. We suggest that organisations take legal advice before proceeding with a dismissal on these grounds.

It should be noted that TULRCA makes no distinction between union members who have been balloted and non-union members in terms of the protection given to those who participate in industrial action. A non-union member of staff will be protected if they take part in strike action and there are amongst those taking part in the strike action members of a trade union by which the action has been authorised or endorsed.

11. What happens if members at a particular site vote against the strike? Presumably that site will not be protected and they could not then come out in sympathy with those members who have voted for strike action at another site?

Where a vote has not been aggregated, this is correct as it would be secondary action.

In cases where a union has aggregated the vote across a number of workplaces in accordance with the legislation and the majority is in favour of industrial action, it is lawful for the union to organise industrial action in any such workplace even if members at a particular workplace have voted against strike action.

NOTICE OF RESULT OF BALLOT AND CALLING OUT

12. Does the union need to inform the employer of the result of a ballot notice and/or that the union is calling industrial action? How would this obligation be affected if the ballot notice is aggregated?

As soon as reasonably practicable after holding the ballot, the union must take such steps as are reasonably necessary to ensure that every relevant employer is informed of the result of the ballot, giving the same information as it is required to give under section 231 to the persons entitled to vote, i.e. the total number of votes cast, the numbers of "Yes" and "No" votes and the number of spoiled voting papers.

Our view is that publishing a statement on a union’s website that action will be taken is not sufficient to constitute notice to every relevant employer and instead each employer must be contacted individually.

The ballot ceases to be effective within six months of the close of the ballot (unless extended by agreement to nine months). Any action which is taken outside of this period will not be deemed as having the support of a ballot.

"Relevant employer" means any employer who it is reasonable for the union to believe was the employer of any persons entitled to vote at the time of the ballot (s231A(2)). Where a union ballots members employed by different employers, the union must supply the information to each of the employers concerned. If the union fails to do so, the industrial action will not be regarded as having the support of a ballot in relation to that particular employer. A union may, therefore, still call on its members to take action where the employer of those members was informed of the ballot result, even if other employers were not informed.

13. How much notice does a union need to give the employer, for it to be classed as legal industrial action – specifically in relation to notice to strike? What information does the union need to give the employer when calling employees out on strike?

Unions must take such steps as are reasonably necessary to ensure that any affected employer receives within the "appropriate period" a "relevant notice" covering the proposed industrial action.

"Appropriate period" is the period starting with the day on which the union informs the relevant employers of the ballot result, and ending with the fourteenth day before the (first) day of action (unless seven days is agreed). The notice must be received by any employer who it is reasonable for the union to believe is the employer of an affected employee (section 234A(2)).

A "relevant notice" must contain essentially the same information as in the ballot notice (under section 226A) regarding categories of employees and their workplaces, together with figures showing the total number of employees, the number of employees in each category, and the number in each workplace. However, the relevant notice differs from the ballot notice in that it must give this information in respect of the "affected employees", who are those who the union reasonably believes will be induced to take part in the action. Therefore, it is possible that a greater number of employees will need to be included in the relevant notice than in the ballot notice as there may well be employees who will be induced to take part in the strike who were not entitled to vote or who are not even union members.

One thing for employers to consider is whether there are differences between the ballot notice and relevant notice in terms of the personnel. If, for instance, a re-organisation has taken place which means that personnel were included in the ballot notice who are to be made redundant, the ballot procedures may be open to challenge.

Unions are only required to provide information in the relevant notice that is as accurate as reasonably practicable. There is no duty on a union to keep an up to date database of members. Section 234A(3)(a)(ii) allows unions to meet their obligations in relation to the relevant notice by referring to affected employees from whose wages the employer makes deductions from pay representing payments to the union ("check-off"). Such information must enable the employer readily to deduce the total number of affected employees, the categories to which they belong and the number of affected employees in each category, and the workplaces at which they work, together with the numbers of affected employees at each workplace. In the case of non check-off employees, case law has determined that a union must provide a list of the number of employees, the number in each workplace and category, with an explanation of how the figures were arrived at, as the employer will be unable to readily deduce that information itself.

Where a union fails to give fourteen days' notice of strike action, the action will be unprotected and an injunction could be sought by an employer preventing strike action.

14. Is there a long stop date for the effectiveness of a ballot? If unions want to call members out on dates in addition to those already given are they required to hold a new ballot? Does it make any difference whether the action is 'continuous' or 'discontinuous'?

Under section 234, a ballot is 'effective' for the periods specified – i.e. six months or nine months with the agreement of the employer (or the special provisions where there are intervening court proceedings) from the close of the ballot. Section 233(3)(b) states that the industrial action must begin within this effective period. However, there does not appear to be any long stop date for continuous or discontinuous action. The only requirement is that the employer is given at least fourteen days' notice of the action, so in the case of discontinuous action, either a full list of dates needs to be specified at the outset, or a separate fourteen days' notice is required for each date that was not originally specified.

If continuous industrial action is suspended by agreement between the employer and the unions and when the suspension date and the recommencement date are also agreed, no further notice is required to recommence the continuous action. In addition, no further notice is required if the action has been interrupted by a court order. However, in any other circumstances, a further period of notice must be given before the continuous action is resumed.

If additional dates for strike action are proposed, the main basis on which they could be challenged by employers is whether the industrial action is the "same industrial action". If different workers/workplaces are involved, or the dispute

has changed in some way from the original dispute, then a fresh ballot will be needed. The case of *Westminster Kingsway College v University and College Union* [2014] offers useful guidance on this point. There the union and employer were in negotiations regarding a pay increase for the year 2013/2014. When an agreement could not be reached, strike action was taken in December 2013. By February 2014 the negotiations had ended without resolution. When pay negotiations for the year 2014/2015 were opened and a strike was organised for October 2014, the union relying on the ballot for the December 2013 strike, the employer applied for an injunction. The court ordered an interim injunction preventing strike action on the basis that it was not supported by a valid ballot. The industrial action for 2013/2014 stopped in February 2014 and the ballot for that action did not authorise the strike for October 2014. This case is useful for employers where negotiations move quickly and disputes evolve over time. Where the dispute has changed employers can rely on this fact in refusing to allow a strike on the basis that a previous ballot does not validate new industrial action.