Neutral Citation Number: [2023] EWHC 3093 (KB)

Case No: KB-2023-004454

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2023

**Before** :

**THE HONOURABLE MRS JUSTICE EADY DBE**

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**Between :**

**WARRINGTON BOROUGH COUNCIL**

**Applicant/ Claimant**

**- and –**

**UNITE THE UNION**

**Respondent/ Defendant**

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**David Reade KC** and **Sophia Berry** (instructed by **Weightmans LLP**) for the **Applicant**
**Rebecca Tuck KC** and **Madeline Stanley** (instructed by **Thompsons Solicitors LLP**) for the **Respondent**

Hearing date: Tuesday 28 November 2023

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# Approved Judgment

This judgment was handed down remotely at 14:00 on 1 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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**The Honourable Mrs Justice Eady DBE:**

## Introduction

1. By application notice dated 22 November 2023, the claimant seeks interim injunctive relief to prevent the defendant from calling upon its employees to take discontinuous strike action, thereby acting in breach of their contracts of employment. An order is also sought that the defendant withdraws and revokes any instruction to the claimant's employees in this regard, taking all practicable steps to communicate this revocation.

2. The claimant is a local authority, providing various services, including the collection of waste, to the people of Warrington. The defendant is an independent trade union, which represents a number of the claimant's employees. Specifically, this application relates to employees of the claimant employed at its Woolston depot in Warrington, which is the base for the waste services operations carried out by the claimant.

3. In support of its application, the claimant relies on the witness statement of Mr Gareth Hopkins, Director of Workforce and Organisational Change in its Corporate Services Directorate, along with the bundle of documents exhibited to that statement. For its part, the defendant resists the application, relying on statements from Mr Brian Troake and Ms Samantha Marshall, Regional Officers in the North West Region; Mr Stefan Thorpe, Team Leader at the Woolston depot and a Branch Secretary for the defendant; and Mr Mark Douglas, Refuse Collector employed by the claimant at the Woolston depot. The defendant has also filed three exhibit bundles of additional documents referenced in those statements. The parties' statements and exhibits have been combined into one 691-page bundle for the purposes of this hearing.

4. The hearing was initially listed for one hour but, when it was apparent that the application was contested and the defendant was also seeking to rely on evidence in support of its case, this was subsequently extended to a longer listing. Given the amount of documentation filed, I indicated I would hand down judgment later on during the week. In now providing my ruling, I give thanks to all the lawyers involved for their hard work in preparing for this hearing and, in particular, to leading and junior counsel on both sides for their comprehensive, yet concise, submissions.

## The Background

*The NJC*

5. Terms and conditions for local government employees are subject to national negotiation, the relevant negotiating body being the National Joint Council for Local Government Services ("the NJC"). In order for the NJC to reach a formal collective agreement, its constitution requires a majority on each side to be in favour. Employer side representation is known as the "National Employers"; representation on the employee side is divided between UNISON, the GMB and the defendant, their voting strengths (determined by membership size) being split: UNISON 31, GMB 16, the defendant 11.

*The Relevant History*

6. On 30 January 2023, the three NJC unions put in a pay claim to the National Employers, comprising:

> ". An increase of 2% + RPI on all spinal column points
> In addition:
> . Consideration of a flat rate increase to hourly rates of pay in order to bring the minimum rate up to £15 per hour within two years
> . A review and improvement of NJC terms for family leave and pay
> . A review of job evaluation outcomes for school staff whose day to day work includes working on Special Educational Needs (SEN)
> . An additional day of annual leave for personal or well-being purposes
> . A homeworking allowance for staff for whom it is a requirement to work from home
> . A reduction in the working week by two hours
> . A review of the pay spine, including looking at the top end, and discussions about the link between how remuneration can be used to improve retention."

7. The National Employers made a final offer on 23 February 2023. The main element of this offer was a consolidated payment of £1,925 per employee or 3.88% for those above the top of the pay scales. It is not suggested that this offer met the claim that had been made by the NJC unions.

8. The defendant made clear its rejection of that offer, with a general mailing of 3 May 2023 stating it would "*now swiftly move to full industrial action ...*". On 13 June 2023, the defendant's regional officer (Mr Troake) wrote to the claimant's chief executive (Professor Broomhead) giving notice of an official industrial action ballot, stating the nature of the dispute in the following terms:

> "Unite is in dispute concerning the pay rates for 2023/2024 for all workers whose pay is based upon pay awards made by the [NJC] …
> …
> Unless and until your organisation agrees to a pay increase of RPI + 2% and the additional elements of Unite's pay claim for all such workers, payable from April 2023, a trade dispute subsists between your organisation and members of this union employed by it."

9. In June 2023, the defendant conducted disaggregated ballots across local authorities including the claimant. The ballot paper summarised the trade dispute in substantially the same terms as the letter of 13 June 2023:

> "The pay rates for 2023/2024 for all workers whose pay is based upon pay awards made by the [NJC] ... Unite seeks a pay increase of RPI + 2% and the additional elements of Unite's pay claims for all such workers, payable from April 2023."

10. In respect of those employed by the claimant, on 18 July 2023, the ballot results were set out by the independent scrutineers, as required by section 231B **Trade Union and Labour Relations Consolidation Act 1992** ("TULR(C)A") recording that, 52.05%

of those entitled to vote having done so, 76.32% had indicated they were prepared to take part in strike action.

11. On 12 September 2023, the defendant gave the claimant notice of its intention to call upon its members at the claimant's Woolston depot to take part in discontinuous strike action from 3 to 16 October 2023. The claimant does not suggest that any issue arises from the defendant's decision only to call out a subset of its members in this way. As Ms Marshall explains, this is not an unusual industrial action strategy; the Woolston depot is where the defendant has the highest numbers and density of membership and it was obvious that a strike in waste services would have an immediate impact (a point Mr Troake made in his email sent out to the defendant's membership at around this time).

12. On 18 September 2023, Mr Troake emailed Professor Broomhead seeking local negotiations. Professor Broomhead replied the same day, saying:

> "WBC understands that this dispute and the industrial action is in relation to the 2023 national pay situation/awards. We fully respect national pay bargaining arrangements and feel it is not appropriate to do anything outside of this -nor do we want to negotiate with one single trade union."

13. By further email to Professor Broomhead, of 4 October 2023, Mr Troake re-stated the defendant's views, referring to its:

> "…willingness to reach a negotiated settlement locally with Warrington Borough Council under [NJC] Part III provisions, ... Unite will not accept local authorities hiding behind the notion that employers must abide by the NJC negotiations, as Part III provisions clearly allow for local negotiations, combined with the fact that the NJC outlines the minimum terms and conditions, not the maximum."

14. Professor Broomhead replied the following day, stating:

> "I would just reconfirm that the reason for your industrial action as stated in documentation supplied to the Council in relation to the ballot was "the rates of pay for 2023/2024 for all workers whose pay is based upon pay awards made by the [NJC] …
> I am not aware of UNITE raising any local pay issues other than the national pay award with us as an employer, despite having a robust consultative framework in place, which includes a Joint Consultative Committee, consisting of Trade Unions and Elected Members, and which provides a forum for any such matters to be raised or escalated to
> … However, I am willing to take a call with … ACAS as you suggest, to hear how they may wish to assist. …."

15. Mr Troake responded, the same day, saying the defendant had not had the opportunity to raise its "*local employee concerns*" outside the NJC framework.

16. On 5 October 2023, Professor Broomhead had a telephone conversation with ACAS, during which (as recorded in Mr Hopkins' statement) he was informed that the defendant would be willing to end the strike action at the Woolston depot if agreement could be reached around one or all of the following areas: a one-off payment for waste staff; overtime rates; a laundry allowance; start and finish times for drivers.

17. On 10 October 2023, the defendant served a further notice of industrial action, for the period 24 October to 6 November 2023.

18. By letter of 12 October 2023, Professor Broomhead wrote to Mr Troake regarding this notice and referring to further contact from ACAS, noting:

> "… In addition to a laundry allowance, you also wish to discuss Agency workers, continuous employment for seasonal workers, Christmas working arrangements and the job evaluation process for staff.
> I note that none of these areas are items that were part of the collective national NJC pay claim for 2023, upon which you subsequently have decided to take strike action targeting waste services in Warrington.
> …
> All of that notwithstanding, the Council is willing to listen to you in more detail regarding the issues you have now put forward to ACAS. …."

19. Mr Troake responded by letter of 13 October 2023, explaining:

> "Regarding the items raised with you via ACAS, namely 'laundry allowance, Agency workers, continuous employment for seasonal workers, Christmas working arrangements and the job evaluation process for staff', this list was always non-exhaustive, and we would like to be able to freely discuss any item during the negotiations. If we are too prescriptive, we may leave ourselves unable to discuss other items that may be helpful to finding a mutually agreeable position. Other items that I have raised with ACAS include 'task and finish, additional holidays, non-consolidated lump sum payment'. This list is also non-exhaustive, but indicative of what Unite believe could be discussed to resolve this dispute."

20. On 17 October 2023 a meeting took place between the parties, with correspondence following, setting out their respective positions. For the defendant, by letter from Mr Troake of 19 October 2023, it was recorded that there had been discussion on the following: arrangements for the 2024 Christmas period (a point relevant only to workers at the claimant's waste depot); a potential laundry allowance (something that could benefit a wider range of the claimant's employees); a fresh job evaluation of the loader role (a position specific to waste services); an agency worker agreement for waste services; holiday accrual for the period of the strike action; a permanent increase in annual leave; a one-off payment for all staff (the latter two being matters the claimant had said it could not afford to offer). Mr Troake concluded objecting that none of the offers that the claimant had put forward: "*… actually guarantee an increase in member earnings*."

21. Further discussions between the parties took place on 20 October 2023, at which it was agreed that a meeting would be convened with the three NJC unions "*to discuss the potential 'qualifying criteria' of jobs associated with ... [the] proposed Laundry Allowance*". In the event, it seems that it proved difficult to organise such a meeting at that stage.

22. With effect from 23 October 2023, Mr Troake's role was taken up by Ms Marshall, although she was on annual leave until the beginning of November and Mr Troake continued to cover the position until then. In the handover note for Ms Marshall, prepared by Mr Troake, the dispute with the claimant was described as "*... part of the National Pay negotiations ...*", albeit going on to note that, if the National Employers' offer was accepted:

> "… this does not prevent Unite from continuing to deliver results under the Green Book Part III provisions which allow for local negotiations. That is what we are seeking to achieve currently. …"

As for the issues raised in those local negotiations, Mr Troake identified eight matters, all of which I understand to be specific to those working in waste services, save for: laundry allowance (albeit Mr Troake's note described this in terms of its potential benefit for refuse workers), an increase in holiday, and a non-consolidated lump-sum payment.

23. On 25 October 2023, the defendant served a further notice of industrial action, for the period 8 to 20 November 2023.

24. Meanwhile, at national level, the NJC negotiations had continued and, by letter of 1 November 2023, it was recorded that the joint pay claim for workers covered by the NJC had been the subject of a formal collective agreement, applicable from 1 April 2023, covering the period 1 April 2023 to 31 March 2024. The effect of this agreement under the NJC arrangements was that its terms were automatically incorporated into the individual terms and conditions of all relevant employees. The defendant did not, however, approve the agreement and was not included in the letter as one of the signatories.

25. On 1 November 2023, Professor Broomhead wrote to Mr Troake, referring to the claimant's previously stated position – that it would be willing to meet with the defendant and the other two NJC unions to talk about local issues – but now noting:

> "… the national pay award has been settled today. We will now be making arrangements to implement the pay award as soon as possible. Given that the basis for your strike action was "the rates of pay for 2023/24 for all workers whose pay is based upon pay awards made by the NJC for Local Government Services". Also, given the annual national pay award is now settled and that we have made a separate offer to discuss local issues, I am now calling on you to cancel your strike action that is due to commence on Wednesday 8 November, to prevent any further disruption to Warrington residents and businesses."

26. Mr Troake responded the following day, confirming that the defendant:

> "… **will not** cancel the strike action …, as we have not yet reached a satisfactory resolution to our dispute with Warrington Borough Council.
> I have been clear throughout this process and in my communication to-date, that it is Unite that are in dispute with Warrington Borough Council, and therefore it is only Unite and its members that can resolve this dispute. This point has been made repeatedly and I continue to make this point as clear and unambiguous as possible.
> **This dispute will not be resolved until Warrington Borough Council make an improved offer that is satisfactory to our members**."

27. To similar effect, on or about 2 November 2023, Ms Clare Keogh, the defendant's National Officer for the Local Authorities Sector, emailed out to all members, stating:

> "… Unite is clear that our campaign continues!
> Any members still in dispute with their local authority will continue to receive the full support of the union, until a fair settlement is agreed."

28. On 3 November 2023, Professor Broomhead wrote to Ms Marshall (now in post following her return from leave), setting out the claimant's position on the local issues "*that have been very recently raised … (although which do not form the basis of this strike action)*", ending by saying that the claimant:

> "… will now be taking legal advice in respect of the forthcoming industrial action and I once again urge you to recognise that the basis of your dispute as voted by your UNITE membership across the council in Warrington has now been settled by the NJC, and for you to immediately call off any further planned strike action."

29. On 7 November 2023, the defendant sent the claimant further notice of industrial action for the period 21 November to 4 December 2023.

30. A Joint Consultative Committee ("JCC") meeting took place on 8 November 2023. There is a dispute as to what was said during this meeting but it seems at least to be common ground that, during the course of the meeting, Professor Broomhead indicated that the claimant would look into the making of a £1,000 "*dispute resolution payment*" to the employees at the Woolston depot, with a view to ending the strike action. It also appears that there was some progress on other points. Certainly, shortly after the meeting, Ms Marshall sent a WhatsApp message to members at the Woolston depot, referring back to the eight negotiating points identified in Mr Troake's handover document, stating that there had been agreement on six of these issues (job evaluation; the agency worker agreement; laundry allowance; Christmas working arrangements; and a dispute resolution payment (subject to final confirmation)).

31. Later that day, Professor Broomhead and Ms Marshall wrote to each other setting out their respective understanding of the discussions. Considering Professor Broomhead's letter, however, Ms Marshall considered this did not properly represent their discussion at the meeting. In particular, she took issue with the suggestion that she had acknowledged that the 2023-4 pay process was "*now at an end*", and she did

not agree with Professor Broomhead's caveat that the dispute resolution payment would be subject to "*the views of the other Trade Unions*". In an email sent later that evening, Ms Marshall stated that, given the content of Professor Broomhead's letter, the defendant was no longer able to ballot its members on pausing the industrial action.

32. On 9 November 2023, there was a telephone conversation between Ms Marshall and Mr Hopkins, during which various issues were discussed relating to workers at Woolston depot, with Ms Marshall then emailing to record her understanding of their discussion, which included confirmation that the proposed dispute resolution payment would apply to grade 4, 5 and 6 workers at the depot. Subsequently, as Mr Hopkins records in his statement, it seems that the claimant was "*advised of the legal, industrial relations and other difficulties presented by this offer*" and, consequently, did not proceed to agree to make any one-off payments to the Woolston depot workers.

33. On 10 November 2023, the defendant issued a press release, blaming the continuation of strike action on the claimant's failure to provide written confirmation of its proposals for an agreement to resolve the dispute.

34. On 15 November 2023, solicitors for the claimant sent a letter before action to the defendant, contending that further strike action would be unlawful as the ballot relied on by the defendant related to a trade dispute (over pay claims for all workers whose pay is based upon pay awards made by the NJC) that had been resolved by the collective agreement reached on 1 November 2023. On 16 November 2023, the defendant's legal department responded, objecting that there continued to be a dispute between the claimant and its workers (the defendant's members) as regards their terms and conditions relating to pay; that position was not affected by the imposition of the NJC award. In particular, the defendant placed emphasis on the reference on the ballot paper to the dispute concerning "*a pay increase ... **and the additional elements** of Unite's pay claim*" (emphasis in original). Further correspondence then followed, with those acting for the parties re-stating their respective positions.

35. On 21 November 2023, the defendant sent the claimant a further notice of industrial action for the period 5 to 23 December 2023. The claimant made its application in these proceedings the following day.

*The effect of the strike action*

36. Mr Hopkins has explained in his statement that, having started on 3 October 2023, strike action at the Woolston depot has (with the exception of the period between 17 and 24 October 2023 and 7 November 2023) continued, during which time no green or blue bins have been collected by the claimant and only a small percentage of black bins have been collected from blocks of flats where storage space is tight and there has been the largest build-ups of uncollected waste. Within the documentation provided to me, there are newspaper reports describing "*mountains of rubbish"* and it is apparent that the claimant has received a number of complaints regarding this situation. Mr Hopkins says that Public Protection colleagues have also advised as to the potential public health risk arising from the accumulation of waste and there is an obvious impact on the environment in which residents are living.

37. Although residents have been advised to drive their waste to community recycling centres, this has led to increased costs for the claimant as a result of this additional use, which may increase yet further if the claimant has to open more recycling facilities and employ contractors to deal with the waste.

## The Relevant Legal Principles

*The approach I am to take on this application*

38. In the normal course, when considering an application for an interim injunction, the court is to apply the principles set out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396; namely (i) whether there is a serious issue to be tried; (ii) whether damages are an adequate remedy; and (iii) the balance of convenience. Section 221(2) of **TULR(C)A 1992**, however, provides that:

> "[w]here - (a) an application for an interlocutory injunction is made to a court pending the trial of an action, and (b) the party against whom it is sought claims that he acted in contemplation or furtherance of a trade dispute, the court shall, in exercising its discretion whether or not to grant the injunction, have regard to the likelihood of that party's succeeding at the trial of the action in establishing any matter which would afford a defence to the action under section 219 (protection from certain tort liabilities) …".

39. In **NWL Ltd v Woods** [1979] ICR 867, the House of Lords considered the relationship between the **American Cyanamid** test and (the predecessor to) section 221(2) of **TULR(C)A 1992**; holding (*per* Lord Diplock at p 881C-D):

> "Cases of this kind … bring into the balance of convenience an important additional element … in considering whether or not to grant an interim injunction the court should have regard to the likelihood of the defendant's succeeding in establishing that what he did or threatened was done and threatened in contemplation or furtherance of a trade dispute."

40. The test is thus one of likelihood; as Lord Diplock expressed it in **Hadmor Productions Ltd v Hamilton** [1982] ICR 114, HL, at p 121:

> "… the fact that the evidence before the court makes it more likely than not that if at the trial that evidence were neither supplemented nor contradicted, the defendant would succeed in establishing a statutory immunity …, this is a factor in favour of refusing to grant an interlocutory injunction which, although not necessarily conclusive, is a weighty factor: and the greater the likelihood the greater is the weight to be attached to it."

41. Thus, even if the defendant establishes that the action is likely to be protected, the court retains a discretion to grant an injunction, albeit that would be "*a very*

*exceptional case indeed*" (**RMT v Serco** [2011] ICR 848 per Elias LJ at paragraph 13).

42. Moreover, there is no presumption that the immunity from common liability provided to trade unions is to be narrowly construed (**RMT v Serco** paragraph 9); rather, the **TULR(C)A 1992** is to be given a "*likely and workable construction*" (**P (a minor) v NASUWT** [2003] ICR 386 per Lord Bingham at paragraph 7), and, in construing and applying the provisions, regard should be had to the fact that these provisions *"are not designed to prevent unions from organising strikes, or even to make it so difficult that it will be impracticable for them to do so*" (**BA v Unite (No. 2)** [2010] ICR 1316 per Smith LJ at paragraph 113).

*Statutory Immunity*

43. It is a tort for a trade union intentionally to persuade an employee to break his contract of employment unless there is sufficient justification for such persuasion (**Lumley v Gye** (1853) 2 E & B 216, CA, as explained in **Allen v Flood** [1898] AC 1, HL, and in **OBG Ltd v Allan** [2007] UKHL 21, [2008] 1 AC 1, HL). This will inevitably occur where a trade union induces a person to take part, or continue to take part, in industrial action. That tort is not however, actionable if it is done in furtherance of a trade dispute and is protected by section 219(1) of **TULR(C)A 1992**.

44. For these purposes, a "*trade dispute*" is defined by section 244 **TULR(C)A** as:

> "(1) … a dispute between workers and their employer which relates wholly or mainly to one of more of the following- (*a*) terms and conditions of employment, or the physical conditions in which any workers are required to work; …."

45. By section 219(1), it is provided that:

> "(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only— (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance."

46. Pursuant to section 219(4), however, section 219(1) **TULR(C)A** is stated to be subject to section 226, which requires that the industrial action has the support of a ballot satisfying (relevantly) the requirements of sections 227 to 237, otherwise the statutory immunity provided by section 219(1) is removed.

47. For present purposes, the requirements in issue are those provided by section 229 of **TULR(C)A 1992**. Relevantly, since 1 March 2017, by virtue of section 229(2B) (inserted by section 5(1) of the **Trade Union Act 2016**), it is required that the voting paper must include:

> "… a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates."

48. This provision was considered by Dingemans J (as he then was) in **Argos Ltd v Unite** [2017] EWHC 1959 (QB), when it was common ground that:

> "33. … the summary had to be a reasonable summary of the dispute but needed to be no more than that. The meaning of the summary was to be determined by reference to the hypothetical reasonable member of the union who receives a ballot, who might be compared to the hypothetical reader of a publication in **James v News Magazine** [2008] EWCA Civ 130 at paragraph 14, who will be reading the ballot paper against the factual matrix of any publications to him by Unite and Argos."

49. For the claimant, it is further urged that it is implicit in the legislation that the ballot must relate to the trade dispute, and that a ballot about one trade dispute could not authorise industrial action in support of a different dispute. In this regard, reliance is placed on two first instance decisions, both reached on applications for urgent interlocutory relief.

50. First, in **Westminster Kingsway College v University and College Union** [2014] EWHC 4409 (QB) (13 October 2014, unreported), it was held that the requirement under section 226 - that "*the union has held a ballot in respect of the action*" - must apply to both the action to be taken and the trade dispute in support of which it is to be taken. In that case, on the evidence available, Mitting J considering it was "*quite unrealistic*" for the union to contend that the "*principal target*" of the proposed industrial action was the outcome of the 2013/14 pay negotiations in respect of which strike action had been authorised by the ballot relied on. Rather, if the matter went to trial, it was most likely that:

> "11. … a judge would conclude that the strike action … had as its aim a number of targets … and only … the lingering grievance about the outcome of the 2013/14 pay round. Accordingly, on that factual premise, I would expect the outcome of the trial to be that in the words of Section 226, the inducement by the trade union to its members to take part in the strike tomorrow was not protected by a ballot held,
> "By ballots held "in respect of the action'.
> That phrase must apply both to the action to be taken and to the trade dispute in support of which it is to be taken. …"

In reaching his decision, Mitting J considered that the protection afforded by the legislation would not extend to "*a strike whose object includes, but is not limited to*" the particular dispute specified on the ballot. In apparent acknowledgement that his approach might be considered "*too radical*" (paragraph 11), Mitting J further went on to find that, on the facts of that case, the strike action that had been authorised by the ballot had effectively been discontinued (paragraphs 12-14).

51. Secondly, in **London Underground Ltd v National Union of Railwaymen** [1989] IRLR 341, QBD, Simon Brown J (as he then was) had to consider the likelihood of the union demonstrating that the proposed strike action fell within the scope of the immunity provided by statute when it was supported by a ballot that had identified four issues, of which (the court concluded) it was only likely that one would be found to constitute a trade dispute. Construing the statutory provisions as requiring that the

question asked on the ballot paper could not ask whether the member was prepared to participate in a strike "*by reference to issues other than trade disputes*" (see paragraph 8), Simon Brown J upheld the application for an injunction.

52. I accept the proposition that the ballot relied on for the purposes of section 226 must relate to the trade dispute; that, it seems to me, necessarily follows from the requirement that the union must have held a ballot "*in respect of the action*": if the action relates to a different trade dispute from that on which members have been asked to vote, it will not have the support of a ballot. As Dillon LJ explained the point in **Monsanto plc v TGWU** [1986] ICR 269 CA (albeit then concerned with the legislative pre-cursor to section 226 **TULR(C)A**), at p 278C-D:

> "An act is to be taken as having been done with the support of a ballot if, and only if, the union has held a ballot in respect of the industrial action in the course of which the breach or interference occurred. So the instruction to break the contract or interfere with its performance and the obedience to that instruction are industrial action and one has to consider whether the course of industrial action which then occurred was a course of industrial action in respect of which a ballot has been held. I look therefore to see what this ballot was about …"

53. In **LB Newham v NALGO** [1993] IRLR 84, the Court of Appeal similarly elucidated the necessary link between the trade dispute, the ballot, and any industrial action, as follows:

> "What the legislation does is to make a ballot a condition precedent to taking industrial action in furtherance of a trade dispute. The legislation requires the appropriate questions to be identified in the ballot paper …. If there has ceased to be a dispute over those questions but the industrial action continues, then the subsequent industrial action cannot be action which is supported by the ballot. The ballot has achieved its purpose and is exhausted." (see per Woolf LJ (as he then was) at paragraph 23)

54. In seeking to determine the nature of the dispute which is the subject matter of the ballot, I consider, however, that it would be wrong to adopt an overly technical approach to the way the question might have been posed on the voting paper. Although the existence of a trade dispute is a matter to be determined objectively (**Conway v Wade** [1909] AC 506), there may legitimately be different ways of describing that dispute. As Millett J (as he then was) observed in **ABP v TGWU** [1989] IRLR 292 (ChD):

> "83. Some argument was addressed to me on the question whether it is incumbent on the union to define or describe every issue with which the dispute is concerned in the information supplied to members taking part in the ballot. No express requirement to this effect is to be found in the statute, and I can see no reason to imply one. It is, of course, incumbent on a union which calls a strike to establish that the strike has the support of a ballot, and this may make it necessary to identify the strike which is called with the strike which was voted for. But this is a matter of evidence. In the present case there is not the slightest

> difficulty. The information sent to registered dock workers taking part in the ballot was clear and comprehensive and fairly described the dispute which the union perceived to exist. If the union calls a strike in furtherance of that dispute, it will have had the support of the ballot."

Although an appeal against Millett J's decision was allowed by the Court of Appeal (**ABP v TGWU** [1989] IRLR 305), this point was not challenged.

55. Moreover, although the voting paper must now include a summary of the matters in issue in the trade dispute (section 229(2B) **TULR(C)A**), it seems to me that the focus remains on the substance: the summary "*should be sufficient to enable the union member who is voting to understand what issues remain unresolved*" (**Trade Union Act 2016 Explanatory Notes**, paragraph 25).

56. I also consider that Ms Tuck KC is correct in her submission, to the effect that the court must see the wording of the ballot paper in the real world context in which trade disputes and industrial action inevitably play out. In **Thomas Cook Airlines Ltd v BALPA** [2017] IRLR 1137 (QB), Lavender J was called upon to construe subsection 229(2D) **TULR(C)A** (also introduced by the **2016 Act**), which requires that:

> "The voting paper must indicate the period or periods within which the industrial action, or as the case may be, each type of industrial action, is expected to take place."

It was common ground in that case that the paramount purpose of the subsection was "*that a trade union member should know what he is being asked to vote for*" (paragraph 13). Lavender J went on, however, to make clear that this was something that needed to be understood contextually:

> "17. It seems to me that the word 'expected' in the subsection has to be read in the context of all the uncertainties which are inherent in a trade dispute, some of which were explained by [the general secretary of the union] … when he said as follows:
> '… planning industrial action strategy is necessarily both a dynamic as well as a reactive process. It is one which is very much contingent upon (a), various factors which are either not known before the ballot papers are sent out to members and, (b) other variables which are entirely outside the control of the defendant, for example Thomas Cook's response to the ballot result …'
> 18. It became apparent in the course of argument that difficult and potentially insoluble conundrums could arise if the relevant expectation for the purpose of the subsection is taken to be the trade union's best guess as to how the trade dispute will end, rather than its proposals for the form of industrial action it seeks authority to take if the dispute continues."

57. For the claimant, Mr Reade KC observes that section 229(2D) **TULR(C)A** looks to the future, which will inevitably import greater uncertainty; the position was not the same when required to identify the trade dispute in respect of which the industrial action was proposed to be taken.

58. Accepting that Mr Reade sought to make this point by reference to what he contends to be the position in the present case (something to which I return below), in my judgement it is still necessary to have a practical sense of context to these issues. Although it will always be a question of fact, to be determined on a case by case basis, it seems to me that the nature of a trade dispute is such that it may evolve over time; that the parties have managed to resolve some of the issues between them need not mean there does not continue to be a trade dispute of substantially the same nature (a point illustrated by the facts of the **Monsanto** case, where an initial focus on the employment of temporary labour shifted after the temporary workers had been dismissed, albeit still relating to "*matters within the scope of the settlement of the original dispute*" per Dillon LJ at p 279B). In such circumstances, in determining whether a union has called for action on the basis of a continuing dispute when the employer contends that this has since been resolved, the question is whether that call has been made on the basis of an honest and genuine belief that this is the position; as the Court of Appeal explained in **LB Newham v NALGO**:

> "23. This raises the issue as to the position in law where one side to an industrial dispute considers that the disputes which were the subject of the ballot have been resolved but the other party to the dispute contends that this is not the case. [The employer] submits that in this situation it is for the court to determine, by applying an objective standard, whether the party who is contending that there is still a dispute is acting reasonably in so doing. Although this submission has its attractions, I cannot accept that it is correct. [The union] submits that for a dispute to continue it is sufficient if the side who still regards itself as being in dispute, honestly and genuinely believes this is the position. Modified by what I have to say hereafter, I would accept [that] general approach. What the legislation does is to make a ballot a condition precedent to taking industrial action in furtherance of a trade dispute. …. If there has ceased to be a dispute over [the questions identified on the ballot] … but the industrial action continues, then the subsequent industrial action cannot be action which is supported by the ballot. The ballot has achieved its purpose and is exhausted. This remains the situation where there is no longer any real or live dispute over the questions which were the subject of the ballot but one side of the dispute either deliberately or unintentionally or irrationally prolongs the appearance that the dispute continues. Examples of this include seeking to obtain protection of the ballot for some other dispute or other ulterior purpose or because of a conflict of personalities.
>
> 24. Adopting this approach, the question arises on this interlocutory appeal as to whether the borough can establish a triable case that the issues identified in the ballot paper had been resolved prior to the orders being made by the judge. …"

59. Although the ballot cannot be used as a Trojan horse, relied on to disguise the fact that the real reason for calling the action is some other dispute or ulterior purpose, there is no requirement that the trade dispute that is the subject of the ballot must be the union's only purpose. As Millett J noted in **ABP v TGWU** (and again this part of his judgment was not the subject of the subsequent challenge on appeal):

> "71. … There is no requirement that the union should be acting exclusively in furtherance of a trade dispute. It is sufficient if the furtherance of a trade dispute is one of its purposes. Moreover, purpose must not be confused with motive. What the union hopes to achieve by the strike must be distinguished from its motives in calling it. It is sufficient if the union calls the strike for the purpose of furthering the dispute and in the honest belief that it will do so. The presence of an improper motive is relevant only if it is so overriding that it negatives any genuine intention to promote or advance the dispute; ... To succeed on this issue, therefore, it is not enough for the plaintiffs to show that the union was not single-mindedly pursuing its industrial objectives; they must show that the union called the strike without any genuine intention of pursuing those objectives. ..."

## Argument, Analysis and Conclusions

*The Parties' Submissions*

60. For the claimant, it is contended that the industrial action taking place at the Woolston depot is being pursued in support of distinctly different issues from those articulated as the trade dispute on the ballot relied on by the defendant in its assertion of immunity from suit, and concerning only a subset of those balloted. It says that is made apparent from the following: only members at the Woolston depot have been called out (although the ballot included members employed at other workplaces); the defendant's demands have focused on waste workers and were not part of the joint NJC pay claim; the demands made at the JCC meeting on 8 November (and subsequently) related solely to waste workers; and the defendant's communication to members of 8 November was again specific to waste workers. Although the defendant had sought to emphasise the "*additional elements*" of the NJC pay claim, those had related to all NJC workers, as had been recognised on the ballot.

61. The claimant says there are close parallels between this case and the facts in **Westminster Kingsway**; the issues articulated by the defendant in the on-going dispute were never part of the joint NJC pay claim and cannot be characterised as a development in those earlier negotiations.

62. More generally, the claimant argues that the impact of the continuing action – the build-up of waste, particularly if extending over the holiday period, and the potential risk to public health – must favour the grant of an injunction for these reasons and because the defendant is unlikely to succeed at trial in establishing that section 219 **TULR(C)A** applies to this industrial action. The measure of damages would be substantial but difficult to quantify.

63. For the defendant, it is noted that the claimant was not saying (and could not say) that the conclusion of the NJC pay process would necessarily affect the existence of the trade dispute between the defendant's members (employed by the claimant) and the claimant. The fact that the defendant had only called out members at the Woolston depot was also not relevant: there need be no link between the subject matter of the dispute and the workers called out (**BT v CWU** [2004] IRLR 58) and there was no requirement to call out all workers balloted. It was for the court to consider the

defendant's intention in balloting and calling industrial action; its motive was not directly relevant.

64. No application to the court had been made in respect of the industrial action prior to 1 November 2023, but the agreement then reached had not met the claim that had been made and the defendant's members employed by the claimant remained in dispute; certainly, that was the honest and genuine belief of the defendant (attested by both Mr Troake and Ms Marshall; supported by Messrs Douglas and Thorpe). Members' pay had remained the defendant's priority, albeit that this was put in various ways in negotiations (e.g. the laundry allowance, which Mr Troake had calculated could equate to a 1.6% pay increase for a grade 4 employee). There was an obvious distinction between the dispute and the conduct of negotiations seeking to resolve that dispute. In the present case, the demands had not solely focused on waste workers and there was no basis for concluding that the dispute had ceased to be about pay. The strike action ongoing since 3 October 2023 was supported by a ballot held in respect of that action; section 226 **TULR(C)A** was satisfied and the defendant was likely to show this at trial. The claimant's case would require strike ballots to list every possible solution to the dispute that could arise in negotiations, or for fresh ballots to be conducted as/when a new solution was presented. This was obviously impracticable (see the approach adopted in **Thomas Cook v BALPA**).

*Analysis and Conclusions*

65. In considering the likelihood of the defendant establishing that its call for on-going industrial action is covered by the immunity provided by section 219(1) **TULR(C)A**, I have started by asking what the hypothetical reasonable member would have understood to be the dispute in respect of which they were being asked to vote on taking industrial action. The answer to that question I consider would have been that it was about the 2023/24 pay deal, with the understanding being that the defendant was pushing for a pay increase of RPI plus 2% together with other elements of the overall pay package for all in the relevant categories. I further consider that that would have been the answer of this hypothetical reasonable member whether the question was posed before or after 1 November 2023: the fact that an agreement had been reached as part of the national process (falling short of the claim that the unions had made) did not mean that members of the defendant were not still in dispute with individual employers (such as the claimant) regarding the 2023/24 pay deal (and I note that Mr Reade KC did not seek to suggest otherwise).

66. On its face therefore, a trade dispute continued, and continues, to exist between the claimant's workers (certainly those represented by the defendant) and their employer, relating wholly or mainly to terms and conditions of employment for the purposes of section 244(1) **TULR(C)A**.

67. For the claimant, however, it is said that the facts of this case do not bear out the contention that the dispute to which the industrial action relates is the same as that identified on the ballot: whether or not employees still feel aggrieved about the 2023/24 pay deal, the action that is being taken relates to localised disputes, predominantly concerned with waste workers (and not with *all* workers in the relevant categories), raising matters that were no part of the 2023/24 pay claim. The dispute described on the face of the ballot was being used as a Trojan horse to obtain support

for industrial action that was then taken for a different purpose and a different dispute (see **LB Newham v NALGO**).

68. In considering this contention, I bear in mind that negotiations between parties to a trade dispute will rarely proceed as if both sides were engaged on the drawing up of a commercial agreement, where the issues narrow down as time goes on; these are negotiations conducted in an industrial context, where those involved may well look for new and creative solutions in order to move beyond an impasse or to allow one side or the other to draw back from the brink without losing face. I also keep in mind the real-world context of this particular case. The industrial reality was that the other NJC unions would not be able to secure the necessary mandates to take industrial action in response to the National Employers' rejection of their pay claim. If the defendant's members in particular local authorities were to pursue their dispute over the 2023/24 pay deal, they would have to do so on a localised basis.

69. Looking then at the matters to which the industrial action related – as evidenced by the defendant's position in its negotiations with the claimant from the date of the ballot and following – it seems to me that many of these might most obviously be characterised as attempts to find creative ways to put more money into the pockets of the workers concerned as part of an overall pay deal. Thus, as Mr Troake had calculated, a laundry allowance might effect a 1.6% increase in pay for some of the low-paid staff concerned; although not expressly part of the NJC pay claim, it was a way of seeking to achieve something closer to the increase sought as part of the overall pay package. Just because a particular matter raised in negotiations had not been listed in the original NJC claim does not mean that it was not being raised as part of an attempt to resolve the dispute relating to that claim.

70. Other matters raised in the negotiations, however, fell more squarely within the terms of the NJC pay claim. Thus, in the discussions with ACAS in October, the defendant was seeking to include the issue of job evaluation (see the correspondence of 12 and 13 October 2023), which (as explained by Mr Troake) was (at least in part) related to the point raised in the NJC claim under the reference to a review of the pay spine. Similarly, the requests in respect of additional holiday and a non-consolidated lump sum (still identified to be in issue in Mr Troake's handover note at the end of October) can be seen as seeking to take forward – on a localised basis – claims for additional pay and benefits that had been sought in the NJC claim. Moreover, the claims made by the defendant in these respects (and in relation to laundry allowance) were sought in respect of *all* relevant workers, consistent with the objective identified on the face of the voting paper in the ballot.

71. It is, however, right to identify that other claims were made that were specific to the workers at the Woolston depot. As Mr Troake explains (at paragraph 34 of his witness statement):

> "… As a point of principle, if our members are on strike then we are in dispute with the employer and the only basis on which we will meet with the employer is for the purpose of resolving the dispute. This means if matters are going to be resolved they need to be resolved as part of the industrial dispute resolution process."

72. Again, that seems to me to reflect the industrial reality: once strike action has commenced, resolution of the trade dispute for which it has been called will generally necessitate resolving any issues that might relate to the taking of that action (e.g. lost pay, pension or holiday entitlement; protection of agency workers who refused to cross the picket line; etc). I do not consider that raising the question of holiday accrual for those involved in the strike action, or the issues relating to agency workers who did not cross the picket line at the depot, demonstrates that the defendant was in some way pursuing a different dispute. Equally, I do not see the narrowing down of the dispute resolution payment (from all workers, to only those who had been involved in the industrial action) to somehow signify that the defendant was pursuing a different dispute: this was again something sought in order to bring to an end the industrial action that had been taking place in relation to the continuing dispute about the 2023/24 pay deal. Certainly, I find that it is most likely that the defendant will establish at trial that it honestly and genuinely believed that these were all matters that related to the ongoing trade dispute that it had identified on the ballot.

73. In oral argument, I asked Mr Reade KC whether the claimant accepted that the industrial action taken prior to 1 November 2023 would be protected (or likely to be protected) by statutory immunity. Whilst reluctant to commit himself, Mr Reade conceded that the position before 1 November 2023 was (on his argument) "*not so clear*". The difficulty with even that limited concession, however, is that it suggests an acceptance that – notwithstanding that some aspects of the October negotiations related specifically to waste workers - the defendant would be likely to demonstrate that the strike action prior to that date was taken in relation to the dispute identified on the ballot. Moreover, once that is accepted, then it is very difficult to see how it would not be likely that the defendant would succeed in demonstrating that the on-going, post 1 November, strike was a continuation of the action taken in respect of that same dispute.

74. Ultimately that represents my conclusion in this matter. I find that it is most likely that, after a trial, the defendant would succeed in showing that it had called for industrial action in relation to the dispute identified on the ballot paper of June 2023. It was not required to call out all those balloted and it is entirely understandable why it would focus on the workplace where it had the highest number and density of members, with maximum impact. The negotiations it then entered into might not have precisely mirrored the NJC claim - although there were some points of overlap – but that is entirely explicable taken in the context of an attempt to resolve a trade dispute which has led to strike action.

75. The limited negotiations that have taken place since 1 November 2023 have to be seen against this background. To the degree that there is yet further focus on the particular workers who are currently on strike, that is understandable: both sides would wish to see an end to the industrial action; it does not mean that action has been taken for some other purpose. This is not a case where there was (or is) only a "*lingering grievance*" about the 2023/24 pay round (akin to **Westminster Kingsway**), or where the trade dispute identified on the ballot paper was in some way overridden by other issues (akin to the position in **LUL v NUR**), or where the ballot is being used to justify action for some other dispute or ulterior purpose. The claimant may consider the 2023/24 pay dispute has been brought to an end but that does not mean that there are no longer any live issues relating to that dispute, which the defendant honestly and

genuinely regards as continuing. Having considered all the material before me, I find that the defendant is most likely to succeed at trial in establishing that it has the protection provided under section 219(1) **TULR(C)A**.

76. At this stage I return to the question of the balance of convenience and whether, notwithstanding the conclusion I have reached, an injunction should be granted given the on-going problems faced by the claimant and the residents of Warrington arising from the non-collection of waste. In considering this issue, I recognise the impact that this must have on those living, working, and running businesses in Warrington. I also acknowledge the very real costs and difficulties faced by the claimant. At the same time, however, I must include in the balance the rights of the defendant and its members. Weighing the balance of convenience in the light of all these factors, I do not find that this is such an exceptional case as to warrant the grant of an injunction notwithstanding the likelihood of the defendant establishing its protection under section 219(1) **TULR(C)A**.

77. For all these reasons, I refuse this application. Counsel are asked to provide a draft minute of Order prior to the hand-down of this Judgment on 1 December 2023. If there are any outstanding issues that will need to be resolved before that Order can be finalised (including any issue relating to costs), the parties' competing contentions should be made clear and concise submissions provided (limited to two sides of A4) so these can be dealt with on the papers.