IN THE HIGH COURT OF JUSTICE 2005 Folio No HQ10X01825

QUEEN'S BENCH DIVISION

Court 23
The Royal Courts of Justice
The Strand
London WC2A 2LL
Monday, 17th May 2010

Before:
MR JUSTICE McCOMBE

BETWEEN:

BRITISH AIRWAYS PLC

Claimant

-v-

UNITE THE UNION

Defendant

MR D READE QC and **MR P GOTT** (instructed by Baker & McKenzie) appeared on behalf of the Claimant.

MR J HENDY QC and MR B COOPER (instructed by Thompsons) appeared on behalf of the Defendant.

Monday, 17th May 2010

APPROVED JUDGMENT

1. **MR JUSTICE McCOMBE:** Before proceeding to give the judgment, can I just make two observations; firstly, there is obviously a sense of sadness that it is necessary for the court to adjudicate upon this officially and a sense of responsibility in reaching a decision in the case.

2. Secondly, I would like to express my thanks to solicitors and counsel for their very careful preparation of this case, making the issues as clear as possible in very urgent circumstances.

3. This is an application for an interlocutory injunction for the following relief, appearing in a draft order that is in the bundle before me:

4. "The claimant seeks an injunction restraining the defendant from inducing, procuring or persuading employees of the claimant, and in particular employed by the claimant in the category of cabin crew [defined] to break their contracts of employment by strike or other industrial action or otherwise, failing and/or refusing to cooperate with the claimant in ensuring the full and unimpeded operation of the claimant's business between certain periods [that are named]; and (b) interfering with the trade or business of the claimant by introducing, procuring or persuading employees to break their contracts of employment in the same periods."

5. It then asks for an injunction for the defendants to take all reasonably practicable steps to revoke and cancel any call for strike or any other industrial action in the same periods.

6. The claimant in the action is British Airways Plc which in general I should call "the airline" and the defendant is a trade union called "Unite the Union".

7. At present the defendant trade union proposes to proceed with a strike by cabin crew members of the airline called for the periods of 18 to 22 May, 24 to 28 May and 30 May to 3 June. As will be seen, there are three periods defined with only one day's gap between each such period, with the effect, the evidence suggests, that the airline's activity may in effect be disrupted for a fairly lengthy continuous period.

8. The airline contends that the strike so-called will be unlawful because of a failure by the union to take the necessary steps required by statute in relation to the communication of the result of a ballot in circumstances which would entitle the union and its members to rely on protection from what would otherwise be an unlawful act under the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992. The ballot was a second ballot called in respect of intended industrial action by cabin crew members, the first such ballot having been held late last year.

9. By reason of potential breaches of the law in relation to the conduct of the ballots themselves, the first call for strike action was injuncted by an order of Mrs Justice Cox made on 19 December last year.

10. Thereafter a second ballot was held because of the previous legal decision, as I understand it. That ballot closed on 22 February of this year. The result of it, of which the airline itself was properly informed by the union, was as follows: the votes cast were 9,282; in favour of industrial action were 7,482; against it were 1,781. There were 11 spoilt ballot papers.

11. The airline submits that while it was properly informed of the ballot results, the union has arguably failed to comply with section 231 of the 1992 Act in respect of taking the required steps to notify those entitled to vote in the ballot. I say that the airline contends that the union arguably failed to comply, because this is an interim application brought within days of the commencement of the proceedings. It is not a trial of the action.

12. In reliance upon the ballot, the union and its members have already resorted to certain strike action in March of this year, when the issue that is now before me does not appear to have been ventilated. The legal background in which the application is brought is of significance.

13. As is well-known, at common law an inducement by A to B for B to break a contract with C is an actionable wrong, giving rights to C to bring an action against those committing it.

14. Thus, an inducement to break an employment contract by striking is unlawful at common law. However, that inducement is not unlawful if it is done in contemplation of a trade dispute. See section 219 of the 1992 Act.

15. By section 226, however, it is provided that:

16. "Action is only protected if it has the support of the relevant statutory ballot."

17. By section 226(2) it is provided that:

18. "Industrial action shall be regarded as having the support of a ballot only if (a) the union has held a ballot in respect of the action... (ii) in relation to which the requirements of sections 227 to 231 were satisfied."

19. Most importantly, section 231 then provides as follows:

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

21. Thus it can be seen that the obligation upon the union in order to qualify it and its members for the protection afforded for what would otherwise be an unlawful act are these: the union must, (i) as soon as reasonably practicable, (ii) take such steps as are reasonably necessary, (iii) to ensure, (iv) that all members are entitled to vote in the ballot, and (v) they are informed of (a) votes cast in the ballot, (b) individuals answering yes, (c) individuals answering no and (d) spoiled voting papers.

22. The airline argues that the union has failed to demonstrate that it has communicated the four required pieces of information required by the Act as soon as reasonably practicable to all those entitled to vote.

23. It is submitted that the measures taken by the unions do not show that the relevant steps have been taken to supply all the items of the information. It is conceded that the union took every step to communicate the result of the ballot, but not all the necessary items of the information required by the statute.

24. When this point was initially raised with the union, their response was given in a letter of -- during the course of last week in the following terms. A letter of 14 May -- that's last Friday -- to the relevant head of employment law at the airline with reference to the letter enquiring about the position, it said this:

25. "The scrutineer's report was provided to the union at 3.59 pm on 22 February. At approximately 4.45 pm the report was given to the union representatives who posted copies within half an hour on notice boards in all crew report centres and it was made available in the union offices and copies were provided on display stands outside those offices. Copies were also handed out to members in all report areas. The scrutineer's report gave all the information required by section 231 of the Act. A text message giving details of the result was also sent out to all BASSA members ..."

26. That's a section of the relevant members:

27. "... within one hour of receipt of the result by the representatives. In addition a press release giving details of the result was put out on the union's websites and emailed to members on 22 February and a video of the assistant general secretary announcing the result at the press conference was put on the website the same day. As you will also be aware, a communication was sent by your Mr Walsh to all staff on 22 February 2010 announcing the ballot results. As can be seen from the above, the union has complied with the requirements of section 231 of the Act. The action previously taken was lawful and the action that has now been called will also be lawful. Any proceedings brought by BA would be misconceived and vigorously defended."

28. I would say that I have omitted certain initial letters referring to the scrutineer's report in that quotation which would be difficult to explain and unnecessary for present purposes.

29. On the present application, it is accepted by Mr Hendy QC who appears for the union that the text and email communications referred to in that letter and the communications at the press conference did not in fact contain all the four items of statutory information provided for in section 231. The union insists, however, that all the information was contained in three sources of material that were available to its members: first on its websites, that is the union's site, and two discrete subsites, if I may call them that, available to union members, one called the UniteBA.com site and the BASSA site.

30. Secondly, on notice boards and places where members were likely to convene in attending work.

31. Thirdly, in news sheets distributed at suitable locations, and which would be, on the evidence, passed on from hand to hand by union members.

32. The union is not able to point to any direct communication to its members informing them of where the full statutory information was to be found. In a recent case on this provision of the Act, which came before Mrs Justice Sharp earlier in the year, the court was concerned with the adequacy of measures taken to inform members of a trade union of a statutory ballot result. The union had provided information in a text message, referring to "a solid vote for industrial action" and giving a link to the union's website. Of this step by way of communication and compliance with section 231 of the Act, Mrs Justice Sharp said this. (I should say the name of the case is Network Rail Infrastructure Limited v The National Union of Rail, Maritime and Transport Workers [2010] EWHC 1084 (QB):

33. "It is said on behalf of Network Rail that this cannot be sufficient for the purposes of section 231 giving the wording of the section. I can well understand why the information was given briefly by text and I can also understand why it was thought appropriate by the RMT to direct its members to a website which contained a detailed breakdown of information which it is required to provide by section 231. However, I certainly take the view that it is clearly arguable that the steps that were taken did not bring the RMT within the requirements of section 231. It seems to me that section 231 on the face of it requires active steps to be taken to provide information. I think there is a real distinction between taking active steps by sending information to the members concerned and identifying for them a place where they can go and get information if they wish to have it. It may be in this day and age, most people would be able to use a computer and have access to it but that cannot be assumed. It seems to me that for good policy reasons, it is important that members are given information which they are entitled to by section 231 actively, rather than merely being told where they can go and get it if they wish to have it. In my view, therefore, Network Rail has a strong case in relation to its complaint that the RMT did not take all steps that were reasonably necessary to ensure all its members were informed of the numbers following the ballot."

34. As Mr Reade accepted, that is not a decision that is binding upon me, but, unless obviously wrong, it is obviously a case to which I would pay great respect.

35. Mr Reade for the airlines submits that the steps taken here did not go even so far as those identified in the RMT case. Mr Hendy for the union, on the other hand, says that the union took in fact all steps necessary to communicate the required information by the means of communication adopted. He took me extensively to the evidence provided by the union as to its own view that these steps had in practice been the most effective methods of communication in the past, for a community or workforce whose presence at any particular place or location at any particular time is difficult to predict. He submits, for example, that communication by post is less effective even though of course this is the manner which is prescribed by the legislation itself for the conduct of the ballot.

36. Mr Hendy further submits that the effectiveness of the steps taken can be judged by the fact that the airline has produced no evidence from any employee, stating that he or she has not received any of the required material. He submits that this shows that the steps taken have in fact been effective.

37. Insofar as some communications have omitted relevant material required by statute, for example, to the votes cast and spoilt ballot papers, such omission, submits Mr Hendy, are **de minimis** (translated for these purposes perhaps as "immaterial") and that for any such failure to be visited by injunctive action is disproportionate to the aims of the statute which are, he says, to protect the members of the unions by ensuring that they have information about the ballots in which they were entitled to participate.

38. Mr Reade in reply submits that this is to confuse the effect of communication with the requirements of the statute. It glosses over, he says, the words of the statute. No doubt, says Mr Reade, as the evidence shows, the union was at pains to distribute and communicate the <u>result</u> of the ballot, ie in favour of industrial action. It was, however, he argues, less than scrupulous about strict compliance with what the Act itself requires.

39. Mr Reade points to the several question marks that he submits lie over the communications and the methods adopted in bringing the results to members, particularly in view of an apparent overwhelming wish to communicate the <u>result</u> in favour of industrial action as opposed to cold <u>information</u> required by the Act. He refers to the absence of any method to ensure that any individual source of full information was communicated to the members. In respect of the websites, he asks rhetorically (or through the evidence) "who accessed this?" As to the notice boards, "Who saw them?", having regard to the mobility of the relevant ballot participants. As to the news sheets, "What assurance was there that they would reach all concerned?"

40. Mr Reade submits that the requirement is to take the necessary steps to communicate the statutory information. Evidence that someone has not received it is predicated upon the fact that such a person has knowledge of

entitlement to receive it and an appreciation that he has not done so. The legality of the industrial action is dependent, he submits, upon the performance of the steps that lead to protection from what would otherwise be the consequences of a legal wrong.

41. Of course, considering these submissions, one has to be careful not to be carried away by emotional reactions in a case such as this. On the one side there has been predictably a submission that it is unfair that a union is prevented from taking industrial action sanctioned by a large majority in the ballot. On the employer's side, there is an insistence that there is compliance with every possible technicality. The court's task is to apply as best it can, the requirements of the law, remembering that this is an interim application brought at very short notice when only the outline facts of the case are presently known. I call to mind the principles applying to the grant of refusal of interim injunctions, which are well-known and which, at this time of the evening, cannot usefully be recited here. Those principles are tempered in the case of this type of case by the provisions of section 221 of the 1992 Act.

42. Section 221(2) provides:

43. "Where (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 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...)"

44. I omit irrelevant words and close the quotation. That subsection gives a greater relevance to the likelihood of success at trial in the case of the present type of case than in other types of applications for interlocutory injunctions. In other cases the court concentrates principally on factors affecting what is called "the balance of convenience", such as the adequacy or otherwise of the remedies in damages available to either side if, on the one hand, wrongly injuncted or if on the other hand, wrongfully refused an injunction.

45. The section that I have just quoted requires the court to have regard particularly to the likelihood of success at trial of the person relying upon section 219. That clearly is a relevant consideration. But to my mind not the only one. In a case such as the present, the court is also entitled to consider other considerations that will be relevant to the grant or refusal of the injunction, and I also bear in mind Mr Hendy's submission that one has to examine the requirements of section 231 in the light of the facts of the individual case. That undoubtedly is so.

46. No doubt if the likelihood of success at trial was overwhelming in a case such as this, it would be determinative. Mr Hendy submits, for the reasons that I have already endeavoured to summarise, that the merits at trial in this case are likely to be overwhelmingly in his client's favour. On the other hand Mr Reade points

to the evidence adduced of the potential severe economic and "reputational" damage, as he calls it, that is likely to be caused if his client is wrongly refused an injunction.

47. Before drawing these threads together, I should say a word about the human rights dimension of this case and the decision of the Court of Appeal in the case of Metrobus Limited against the same trade union, [2010] Industrial Cases Reports, at page 173.

48. That decision has been singularly briefly argued before me. Brief passages from the case have been cited out of context, and other passages have been helpfully drawn to my attention as having some relevance. Both counsel, I think, were inclined to accept that the broad thrust of the attack on the legislation in the light of the European Convention on Human Rights could not be satisfactorily maintained in court of first instance. That is a matter that now remains within the scope of the Court of Appeal or possibly the Supreme Court. In the light of the decision of the Court of Appeal in Metrobus, I would not be inclined to refuse an injunction on the basis that reliance on the statute by the airline was in some manner incompatible with the Convention.

49. In the end I consider the arguments as to whether the statute has been complied with give rise to properly arguable issues for trial. The matter is not so clear as Mr Hendy would in my view have it. I certainly cannot hold that the union's likelihood of success is overwhelming. I have regard to my assessment of the likelihood of success at trial, and at present I am inclined to think that the union may well have failed to put in place an adequately analysed system calculated to ensure that all reasonable steps were taken to communicate with relevant members as soon as reasonably practicable the relevant items of statutory information. The point to my mind is an arguable one.

50. Once one reaches that conclusion it is in my judgment inevitable that the balance of convenience comes down in favour the airline. I have sympathy indeed with the union and its members who voted in the matter in the proportions which I have indicated. However, to be entitled to protection from the consequences of otherwise unlawful conduct, it is necessary to demonstrate that the conditions of that statutory protection are satisfied. The conditions of such protection have consequences for employer and employee alike, and I am unable to say on the present material that it is sufficiently clear that the union took the steps required by law at the time at which they were required so as to outweigh the other factors. The balance of convenience in my judgment therefore requires the grant of the injunction sought by the airline.