Neutral Citation Number: [2019] EWHC 478 (QB)

Case No: QB2019000592

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION - QB

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 1 March 2019

Before:

Mr Justice Freedman

- -

Between:

BIRMINGHAM CITY COUNCIL

Claimant

- and –

(1) UNITE THE UNION

(2) UNISON

Defendant

Mr Andrew Burns QC, Ms Alice Carse and Ms Marianne Tutin (instructed by **Pinsent Masons LLP**) for the Claimant

Mr Oliver Segal QC and Mr Stuart Brittenden (instructed by **Thompsons**) for the Defendants

Hearing dates: 28 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE FREEDMAN

Mr Justice Freedman:

1. This is an application by the Claimant, Birmingham City Council ("BCC"), for an injunction to restrain two trade unions ("Unite" and "UNISON" respectively, and collectively "the Defendants") who represent members employed by BCC from calling industrial action and strike action amongst their members at various depots in the Birmingham area.

2. Unite members have been taking industrial action short of a strike since 29 December 2018, which has escalated to 24-hour stoppages starting on 19 February 2019 and 48-hour stoppages from 27 February 2019 (although Unite suspended its strike for 27 February 2019, but not for the next day). UNISON's members have been taking industrial action short of a strike since 25 January 2019. There is no issue about the effectiveness of the ballots pursuant to which such action has been taken. In the case of Unite, the ballot was between 30 November and 14 December 2018. In the case of UNISON, the ballot was between 17 December 2018 and 8 January 2019.

3. Unite and UNISON respectively have, following the ballots called on its members to take industrial action. It is not in issue that but for the statutory protection under the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), an action could be brought based on inducement to breach of contract. The primary issue is whether or not the protection under s.219 of TULRCA applies, and in particular whether the effect of s.222 of TULRCA is to remove the protection in this case.

4. The secondary issue is whether the effect of delay on the part of BCC in bringing the application for interim injunctions is such that it would be wrong to grant the relief sought.

5. The Court received the papers including the skeleton arguments in this case in the course of Wednesday 27 February 2019 and heard argument on Thursday 28 February 2019. The evidence comprises witness statements of Robert James for BCC dated 20 February 2019, Howard Beckett of Unite dated 26 February 2019, Mark New for UNISON dated 26 February 2019 and a supplemental statement of Robert James dated 27 February 2019. In view of the urgency of the matter, that is strike action on 1 March 2019, further action on Monday 4 March 2019 and further action thereafter, it has only been possible to adjourn for judgment for a short period, that is overnight so that this judgment could be given on Friday 1 March 2019.

The statutory protection

6. TULRCA provides as follows:

> *"219 Protection from certain tort liabilities.*
> *(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.*

(2) ...

(3) …

(4) Subsections (1) and (2) have effect subject to sections 222 to 225 (action excluded from protection) and to sections 226 (requirement of ballot before action by trade union) and 234A (requirement of notice to employer of industrial action); and in those sections "not protected" means excluded from the protection afforded by this section or, where the expression is used with reference to a particular person, excluded from that protection as respects that person.

221 Restrictions on grant of injunctions and interdicts.

(1) …
(2) 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'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) or section 220 (peaceful picketing).

Action excluded from protection

222 Action to enforce trade union membership.
(1) An act is not protected if the reason, or one of the reasons, for which it is done is the fact or belief that a particular employer—

(a)is employing, has employed or might employ a person who is not a member of a trade union, or

(b)is failing, has failed or might fail to discriminate against such a person.

(2) For the purposes of subsection (1)(b) an employer discriminates against a person if, but only if, he ensures that his conduct in relation to—

(a)persons, or persons of any description, employed by him, or who apply to be, or are, considered by him for employment, or

(b)the provision of employment for such persons,

is different, in some or all cases, according to whether or not they are members of a trade union, and is more favourable to those who are.

(3)…

(4)…

(5) References in this section to not being a member of a trade union are to not being a member of any trade union, of a particular trade union or of one of a number of particular trade unions."

244. Meaning of "trade dispute" in Part V.

(1) In this Part a "trade dispute" means a dispute between workers and their employer which relates wholly or mainly to one or more of the following—

(a)terms and conditions of employment…"

7. In summary, without the protection, the conduct of the unions in organising industrial action and strike days would be tortious including the tort of inducement to breach of contract. TULRCA gives protection from tort liabilities in limited circumstances. The act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort only on the ground that it falls within s.219(1)(a) or (b). It is not in issue in this case for the purpose of this interim application that the action was in contemplation or furtherance of a trade dispute since the case is about the refusal of BCC to make payments to employees and therefore relating to wholly or mainly to the terms and conditions of their employment: see *London Borough of Wandsworth v National Association of Schoolmasters/Union of Women Teachers* [1993] IRLR 344 and s.244 of TULRCA. It is not in issue that but for the protection, if it applies (and the effect of any delay), there could be an injunction for the actual or threatened economic torts (or one or more of them) referred to in s. 219.

8. The primary issue is whether the protection is removed in this dispute by s.222(1)(b) of TULRCA. It is necessary first to identify the act of Unite or UNISON respectively. It is then necessary to identify whether at least one of the reasons for which the act is done is the fact or belief that BCC is failing, has failed or might failed to discriminate against a person who is not a member of a trade union. In this case, not being a member of a trade union is either not being a member of Unite or UNISON.

9. The effect then is that if the protection is not removed by s.222(1)(b) of TULRCA, the acts of Unite or UNISON in inducing the industrial action or the strike action are in furtherance of a trade dispute and fall within the protection of s.219 of TULRCA. That is for the purpose of the interim injunction application.

10. In considering an application for an interim injunction for the economic torts referred to in s.219(1) of TULRCA, where the party against whom it is sought claims that he acted in contemplation or furtherance of a trade dispute, the court in exercising its discretion whether or not to grant an injunction shall have regard to the likelihood of success of the defendant in establishing the statutory protection: see s.221(2) of TULRCA. The effect is to adjust the *American Cyanamid* test in this context which concentrates on whether there is an arguable case and the Court then considers adequacy of damages, the balance of convenience and the justice of the case. In this context, if there is a prima facie case of the tort of inducement to breach of contract, the key question is then whether it is likely that the defendant trade union would establish the statutory defence. The Court is generally not concerned with the merits of the underlying dispute or the balance of convenience between the parties or the convenience of the public: see *London Underground Ltd v ASLEF* [2012] IRLR 196 per Eder J at paragraphs 12-13:

"12. In construing and applying the provisions of the 1992 Act, regard must be had to the importance of union members having an "effective right to withhold their

labour" and 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) , paras 109, 113, 153 per *Smith LJ). There is no presumption that the immunity from common law liability provided to trade unions is to be narrowly construed (RMT v Serco Ltd; ASLEF v London Midland [2011] ICR 848, CA , para 9* per *Elias LJ)."*

"13 For these reasons, it is important to emphasise that in considering the present application for an injunction the court is not concerned with the merits of the underlying dispute. Nor is the court concerned with the balance of convenience between the parties or the convenience of the public. That is not the function of this court. The reason lies in the statutory framework laid down by Parliament. Thus, although a union commits a prima facie *tort by inducing its members to act in breach of their contractual obligations to work for their employer when it calls on them to take industrial action, by s.219 of Act a union has immunity from such liability in tort if it acts "in furtherance of a trade dispute…"*

11. If it is more likely than not that the union will succeed at trial in establishing immunity for liability for inducement to breach of contract, it is only in a "very exceptional case" that an injunction should be granted: *RMT v Serco Ltd; ASLEF v London Midland* [2011] ICR 848 CA, para 13 per Elias LJ. It is common ground that this is not a very exceptional case. Thus, the tests of whether damages are an adequate remedy, balance of convenience and discretionary factors are subject to this overarching consideration of whether the immunity is likely to be established at trial.

The background

12. Before considering the primary issue of the application of s.222 and the secondary issue of delay, the background will be examined.

13. In 2017 BCC attempted to restructure its waste collection. This included deleting its Grade 3 Leading Hand role from waste collection crews. On 1 March 2017, BCC issued a notice to the trade unions of a proposal to dismiss as redundant all 109 Grade 3 Leading Hands in the Service: Mr Beckett's first witness statement ("Beckett WS1") para. 8. The majority of those were members of Unite, but others were members of UNISON and a smaller number of them were members of the GMB.

14. Unite was opposed to this redundancy proposal, and in the absence of willingness on the part of BCC to modify its proposals, registered a trade dispute. It balloted its members to take industrial action: see Beckett WS1 at para.10. In the summer of 2017, Unite organised discontinuous strike action in Birmingham over various dates with significant disruption: see Beckett WS1 at para. 14.

15. UNISON also registered a trade dispute with BCC and balloted its members. However, by reason of the threshold requirements introduced by the Trade Union Act 2016, it did not achieve sufficient turnout in the ballot to call for industrial action. UNISON, however, remained in dispute with BCC on much the same basis as Unite: see the witness statement of Mr New at paras. 9-11.

16. GMB, which had fewer members employed in the Waste Service, opposed some of the proposed changes, but did not support Unite's industrial action. Indeed, it agreed

to accept some of BCC's proposals. It accepted that the Grade 3 Leading Hand role would be deleted and downgraded to Grade 2 (with consequent reduction in salary), and also to the introduction of a 5-day working week: see Beckett WS1 at para. 11.

17. As a result of Unite's activities, the then Labour leader of BCC announced that he had agreed to reverse the decision to make the Grade 3 role redundant. There was an issue as to whether he had legal authority to do so. In the meantime, on the basis that he did not have authority, BCC issued 109 redundancy notices in respect of the Leading Hand roles. Unite regarded the conduct of BCC as reneging on an agreement reached with it to withdraw from the s.188 collective redundancy process and remove the threat of dismissal to the Grade 3 posts.

18. On 8 September 2017, Unite and a representative Grade 3 Leading Hand issued proceedings in the High Court seeking an interim injunction to restrain BCC from giving effect to those notices of dismissal. The basis of the application was that BCC had acted in breach of the agreement reached at ACAS on 15 August 2017. On 20 September 2017, the High Court granted the interim injunction pending a trial in November 2017 to consider whether or not the Councillor had authority or not: see Beckett WS1 para. 18. Unite called off strike action pending the trial.

19. Discussions took place between Unite and BCC to resolve the High Court litigation, and the underlying trade dispute. GMB was party to neither. On 24 November 2017 the dispute was settled by a collective agreement, known as the Memorandum of Understanding (the 'MOU') attached to a Tomlin Order: see Beckett WS1 para. 23. All Grade 3 Leading Hands were to be retained, and transitioned into a new WCRO role, retaining their levels of remuneration, and that all redundancy notices issued to the 109 Leading Hands would be rescinded: see Beckett WS1 para. 24.

20. It is said by BCC that Unite refused to participate in the collective talks that eventually resulted in the MOU unless GMB was excluded. BCC decided to exclude GMB. The MOU was a collective agreement agreed with Unite and UNISON (but not the excluded GMB) on 24 November 2017. It agreed to delete the redundant Grade 3 role but rescind the redundancy notices by redeploying Grade 3 workers in a new role and making other changes to the Waste Service. These changes were implemented between November 2017 and September 2018.

21. BCC agreed to retain the 109 Grade 3 Leading Hands who were facing redundancy with immediate effect. Additional duties for them were agreed in a new Waste Reduction and Collection Officer ('WRCO') role, which mostly relate to community engagement duties to increase recycling and reduce waste. This was implemented over the following months, along with a 5-day operating model.

22. Since October 2018, BCC has deployed mop up crews to collect dropped waste which Unite contends is a breach of the MOU. In February 2019, Unite brought a claim and application for interim injunctive relief in respect of the mop up claims, but the injunction was refused on 13 February 2019 by Mr Jason Coppel QC sitting as a Deputy Judge of the High Court. A speedy trial has been listed for May 2019 to consider whether final injunctions should be granted.

23. In the summer of 2018, rumours began to circulate that GMB members in Waste Management had received a separate payment from BCC which no one else received

(each GMB member apparently got in the region of £3,500 to £4,000) ('the Payments'). BCC admitted that the Payments were made, but says that GMB members were entitled to them as a consequence of BCC's failure to consult with them over proposals to rescind notices of redundancy for all Grade 3 Leading Hands, under s. 188 of the 1992 Act. Failure to consult pursuant to s.188 TULRCA can result in a claim for a protective award for each member under s.189 TULRCA. The complaint was intimated through ACAS on 26 January 2018 to give notice of early conciliation. Following negotiation, a COT3 ACAS approved settlement agreement was signed on 24 May 2018, whereby BCC agreed to pay sums to GMB claimants in full and final settlement of the claims for failure to consult.

24. According to the Defendants, BCC has been pressed repeatedly to explain the justification for making the Payments, particularly in circumstances where no GMB member had been dismissed, nor at the time of the payments was under any threat of dismissal. Mr Beckett of Unite has set out in some detail in his statement a legal argument that BCC was not in breach of s.188 of TULRCA because BCC was not (he says) under a duty to consult unions as it was not proposing or contemplating dismissals: see Beckett WS1 at paras. 27-32. The legal merits of the argument are a matter of contention between the parties, the Defendants contending that there was therefore nothing in the argument that there was a liability to compromise. They say that s.188 of TULRCA was not engaged as regards GMB or any of its members since it had agreed the proposals of BCC and so there was nothing outstanding about which it had to consult: see Beckett WS1 at para. 36. Further, its case is the resolution of the High Court proceedings on the MOU did not involve any proposal to dismiss employees following the rescission of the notices of dismissal: see Beckett WS1 at para. 38. It also said that the Employment Tribunal did not have jurisdiction to award a protective award, that is compensation to individual employees who at the time of the claim had not been dismissed or were not threatened with dismissal: see Beckett (1) para. 39 and see *Securicor Omega Express Ltd v GMB* [2004] IRLR 9 at paras. 57-58. Both of the Defendants therefore, have inferred that there must have been some other reason for the Payments to the GMB members who had been compliant in relation to BCC's proposals, and were not balloted to take industrial action.

25. BCC has sought to explain the Payments. It contends that the legal situation was complicated because redundancy dismissals under s.195 of TULRCA have a wider meaning than usual. It says that it was concerned about arguments available to GMB to the effect that the consultation was about mitigating redundancies and that there was a duty on BCC to consult even where there were no proposed job losses: see *GMB v Man Truck & Bus UK Ltd* [2000] IRLR 636, EAT. It refers to European Court of Justice law which confirms that consultation is required even where an employer is only proposing unilateral contractual changes: see *Socha v Szpital Specjalistyczny* (C-149/16) [2018] IRLR 72, ECJ. BCC says that it acted in mitigation of the claims and having received legal advice.

26. In their skeleton argument, Mr Burns QC, with Ms Carse and Ms Tutin, on behalf of BCC have set out in some detail at paragraphs 15-18 how the payments came to be made. They were not necessarily because the potential claims would succeed, but because they were arguable. It is said that the claims were not straightforward and significant legal costs would be incurred in defending the claims as well as incurring possible industrial discontent.

27. In the supplemental witness statement of Robert James for BCC, it is stated that Unite insisted in the collective negotiations that GMB be excluded, failing which they would end discussions with BCC: see James (2) paras. 3-5. In the context of the controversy of the Payments, Unite demanded payments be made to Unite members, not because they had any legal claim, but seeking to be treated equally with members of GMB. BCC refused since it said that Unite members were not in the same position as the claimants. In October 2018, Unite's solicitors threatened claims against BCC for trade union related detriment under s.146 TULRCA. BCC denied the claims but, at that stage, was limited in what it could say about the reason for the settlement payments by the confidentiality provisions in the COT3 settlement agreement.

28. On 8 November 2018 at a meeting between BCC, GMB and Unite, Mr Beckett was expressly told that the payments made to GMB were to settle the failure to consult claims. Unite rejected this explanation and the following day some of its members presented Employment Tribunal claims complaining that BCC refused to make additional payments to Unite members. Unite and UNISON have alleged that the real reason for the payments was a reward to GMB members for not taking part in strike action. On 27 November 2018, GMB posted a notice saying that this was not the case.

29. On 28 November 2018 the confidentiality provision in the COT3 was waived by agreement between GMB and BCC so as to reveal to Unite members the reason for the payments.

30. Unite did not accept the ostensible reason for the payments, and any such threatened claims were misconceived. On the contrary, in the words of Mr Beckett, absent any legal basis for the payments, *"as far as Unite is concerned, the payments look like what they in fact are: a reward to GMB members for being members of a more compliant union and/or for not wanting to take or taking industrial action."*: see Beckett (1) para. 41. It balloted its members for industrial action from 30 November to 14 December 2018. The vote was strongly in favour of industrial action and strike action based on Unite's characterisation of the payments. Unite called on its members to take industrial action short of a strike from 29 December 2019 – principally by refusing instructions to work normally: acting up in other roles when required and taking rest breaks and washing on the vehicles.

31. There were extended attempts to find a compromise including extended talks assisted by ACAS which took place in December after the ballot and continued into January. BCC offered significant settlement payments of up to £3,000 to Unite members.

32. Unite rejected that offer without consulting its members. In early February 2019, it was announced that action was being escalated to discontinuous strike action consisting of 24-hour stoppages from 19 February 2019 and 48-hour stoppages commencing on 27 February 2019. It attempted to put additional pressure on BCC by threatening new claims including for judicial review of BCC's contingency measures, defamation arising from BCC's cabinet reports and against BCC's decision to deny workers' annual leave applications on days of industrial action.

33. UNISON copied Unite and followed suit by making claims for additional payments for its members. When BCC refused to make payments to workers who were UNISON members, UNISON balloted for industrial action between 17 December

2018 and 8 January 2019. Having received a vote in favour of industrial action and because BCC was refusing to make additional payments, its members have been taking action short of a strike since 25 January 2019. Its dispute and the reasons for it mirror that of Unite.

The submissions as regards s.222

BCC's submissions

34. The parties emphasise the reference in s.222 to *"the reason or one of the reasons"* for which the act is done. Mr Burns QC for BCC says that the test was not by reference to a subjective test or an objective test. He said that the first question was to look for the reason of the trade union. It concerned the set of facts and beliefs in the mind of the person that caused him or her to act in the way in which it did. If it was a non-genuine reason, then that would not be the reason. However, if it was a genuine reason, albeit unreasonably held, that would be the reason. The statute did not contain a qualification about the reason having to be held reasonably. If the reason was genuine and reasonably held, then obviously it was the reason.

35. He made seven points of what must be proven to establish the application of s.222 and therefore the disapplication of the protection. First, it suffices if the offending reason was at least "one of the reasons" for the act: it does not have to be the sole reason. Second, the reason or a reason for which the act is done must be the fact or belief about the employer. It must be that BCC has failed to discriminate against a person who is not a member of Unite. (This is qualified by Mr Segal QC, in my judgment correctly, to say that it does not suffice that the BCC has failed to discriminate: it must be that the reason or a reason for the act is that the BCC has failed to discriminate). Fourth, the failure to discriminate must be in respect of an employee who was employed by BCC, but was not a member of either of the Defendant unions. Fifthly (and following a minor adjustment to accept a point of qualification made by Mr Segal QC), the discrimination focuses on the conduct of BCC towards the non-member or conduct towards the provisions of employment of the non-member. Sixthly, the protected characteristic is whether the people are members of a particular union or not, that is that they are not members of a given union or that they are members of some other union (in this case, the GMB). Seventhly, the question is whether the union is asking for more favourable treatment for persons who are its members.

36. Mr Burns QC went on to submit that the real question for the Court is whether the demand for payment for a Unite/UNISON member is a demand to treat that member more favourably than a GMB member. In other words, was it a demand so as to enable them to receive something which the GMB member would not receive? He reminded the Court that discrimination is in essence either treating two people in the same or a comparable way differently or treating two people in a different situation in the same or a comparable way.

37. In this case, Mr Burns QC submits that the main reason for the industrial action was the refusal of BCC to make payments to members of Unite and Unison, which payments were not to be made to members of GMB. He submits that by demanding payments to Unite in the same way as to GMB, they are ignoring the fact that the GMB employees have already received the payments for some other reason. The

demand is therefore to discriminate against GMB members by receiving an additional payment which is not to be paid to a GMB member. BCC submits further that the demands require BCC to treat a Unite or Unison member (A) more favourably (by getting a payment) than a worker who is not a union member (B – who gets no payment): see BCC's skeleton argument at para. 37, contending that this is the mischief at which s.222 is aimed.

The Defendants' submissions

38. In the submission of Mr Segal QC for the Defendants, the key issue in the case is whether the reasons of the Defendants for calling industrial action included that BCC was not discriminating against GMB. He said that for the purpose of s.222 of TULRCA, it does not matter whether the Defendants are on objective analysis being asked to discriminate against some members. What matters is the subjective reasons for the actions, not the objective reasons for or effect of the actions.

39. It is to be noted that s.222 is headed *"Action to enforce trade union membership"*. The provisions came into being through the Employment Act 1988. As was noted in argument, whilst a heading is of limited use in interpretation because of its necessarily brief nature being included in the Bill for ease of reference and not for debate. Nevertheless, they do provide some guidance, and ought to be "open to consideration as part of the enactment when it reaches the statute book": see *Bennion on Statutory Interpretation* 7th Ed. Para. 16.7 and *R v Montila* [2004] UKHL 50 at [31-37], the quotation being from [34].

40. Mr Segal QC also drew attention in his skeleton argument, written with Mr Brittenden, for the Defendants to the historical origin of s.222 which was first introduced by s.10 of the Employment Act 1988. At paragraph 29, he stated the following:

> *"There is no reported authority on s. 222. The provisions, colloquially known as the "closed shop" provisions, were introduced in order to prevent a trade union from effectively forcing employees to become members of that union by requiring their employer either (i) to refuse to employ people who are not members of that union; or (ii) to achieve the same result by employing people who are not members of that union on worse terms (i.e. by requiring their employer to "discriminate against" them). The paradigm case of the latter scenario would be where a union requires an employer to pay lower wages to those employees who are not members of that union, thus hugely increasing the prospects of persuading non-members to join the union."*

41. Mr Burns QC accepted that the origin of the provision was in respect of the closed shop. He said that this was the first time that the High Court had had to resolve the meaning of s.222 in recent times. He said that the case falls 'four-square' within the section despite the fact that it is far removed from the context of the closed shop situation. It could also be said that the reference to action taken by the union because the employer is employing a person who is not a member of any union shows that the section covers action taken in support of union membership generally, not just action taken to enforce a closed shop.

Discussion

42. In my judgment, Mr Segal QC is right to emphasise the importance of the words in s.222 "the reason, or one of the reasons, for which the act is done". He said that the rest of the section was subordinate to the reason. In this case, he advanced the argument that the reason for the actions in question was to bring about parity between the amounts to be received by the members of Unite and UNISON respectively and the members of the GMB. That is the opposite of a reason which is because BCC was failing to discriminate against the members of the GMB. On the evidence which I have seen, I regard that as being likely to be established at the trial of the action.

43. I accept the way in which the matter was expressed in the skeleton argument of the Defendants at paragraph 31.1 as follows:

> *"D was not asking C to discriminate against anyone not a member of those unions; on the contrary, D was asking C to treat members of those unions in the same way as it had treated their colleagues in the GMB. The industrial dispute is not about C "discriminating against" those who are not members of D ("such a person" within the meaning of s. 222(1)(b), "a person" within the meaning of s. 222(2)), but concerns C having discriminated against those who are members of D."*

44. This argument does not hark back to the historical reason for the implementation of the provision. It is simply to apply the natural and ordinary meaning of the reason for the decision.

45. An alternative argument of the Defendants is by reference to the heading of the action being to enforce trade union membership and the historical purpose of the section. This historical context has not been challenged, and is consistent with the heading of the section, subject to the stricture about the limitations on assistance to be derived from it. Whilst it is the case that the fact that a statutory provision has as its origin one purpose or one context does not necessarily mean that it is not on its terms capable of being used for a different purpose or in operating in a different context, the attempt of BCC to apply s.222 to the instant case is far removed from that original purpose or context.

46. This informs the additional or alternative argument of the Defendants at paragraph 31.2 of their skeleton as follows:

> *"If C had paid, or were now to pay, the sums demanded by D to their members, that would not make more likely (let alone "enforce") membership of those unions. The dispute is about righting a historical wrong; not about the "provision of employment" on "discriminat[ory]" terms."*

47. In my judgment, this reason too is well founded. BCC is attempting to apply the section to a context which is so far removed from its original context. It is not a natural or likely context in which to apply the same, and it is very far removed from the heading of *"An action to enforce trade union membership"*. It is also quite contrived. In *RMT v Serco Ltd; ASLEF v London Midland above , para 9* per *Elias*

LJ, it was stated that the starting point was that TULRCA should be given a *"likely and workable construction"*, referring to the words of Lord Bingham in *P (A Minor) v National Association of School of Masters/Union of Women Teachers* [2003] ICR 386 para. 7. A construction which confuses or equates reasons for action with consequences of actions does not seem likely. It also seems to be not easily workable in practice to have to consider not only reasons, but also consequences other than as an aid in order to establish what the reason for the action may have been.

48. There is a further dimension which is inconsistent with the case of BCC. BCC contends that s.222 applies because Unite and UNISON respectively are taking the action which they are doing because of a failure of BCC to discriminate in their favour by providing an additional payment to them. In addition to the matters set out above to negative discrimination which had taken place, there is a further feature. It has been clarified in recent correspondence that the Defendants' desire is not to have money paid only to members of Unite/UNISON, but that they are seeking parity for all workers whether members of a union or not: see the letter of Thompsons to Pinsent Masons dated 20 February 2019. This has been characterised in BCC's skeleton at paragraph 40 as an "attempted retreat" which is too late because it is the belief of the union at the time of the balloting and calling action which is crucial.

49. It is natural that a union will make demands for its own members, but it does not follow in this case that that is to say that the unions in this case wished to procure the equality of payments only for their own respective members. That is apparent from correspondence in at the time of the ballots or before the industrial action. By a letter of Howard Beckett, the Assistant General Secretary of Unite to Labour Councillors dated 13 December 2018 in which he stated *"very simply the Council* ***should treat all employees with parity****, should be transparent and should not discriminate against employees because of their choice of Trade Union nor because they have taken lawful industrial action."* [emphasis added]

50. Further, as is pointed out by Mr Segal QC, in this action, the fact that Unite and UNISON have combined shows that it is not the case that Unite or UNISON wish to have the additional payments for their own union members. They wish the payments to be made to each of the employees who have not received the same. All of this in any event adds force to the argument that the reason was to achieve parity, and not to take action because of a failure to discriminate against GMB members.

51. The Defendants' case is that every document has made clear that the reason for acting is not because BCC has failed to discriminate against the members of GMB, but because BCC in their estimation has discriminated against their members. This is evident in particular from the ballot papers which stated the following:

    (1) Unite: in the section headed summary of the issue in the trade dispute: *"The ballot is in relation to a trade dispute over C's refusal to pay remuneration to Unite members working in the refuse service, in the same terms as remuneration paid (directly or indirectly) to GMB member employees working on the same terms and conditions. Neither we nor our solicitors can see any proper legal basis for the Council paying that remuneration to GMB members and not to Unite members who continue to be employed on the same terms. Indeed, we take the view that the Council has, for its own reasons, chosen to reward the members of one trade*

union (GMB) and/or penalise members of another (Unite), because it has a different attitude to the membership of those two trade unions"

(2) UNISON: the sample ballot paper which summarised the trade dispute as *"over [BCC's] refusal to pay remuneration to UNISON members working in the refuse service, in the same terms as remuneration paid (directly or indirectly) to GMB member employees working on the same terms and conditions"*

52. From paragraphs 43, 44 and 46 of the first statement of Mr Beckett:

"43. The whole premise of the dispute therefore is to obtain equal treatment for Unite members', not detrimental treatment for workers not in Unite. I am unable to fathom why or on what basis Mr James suggests that the industrial action would discriminate against GMB members; after all, they have received preferential treatment. We only seek parity.

44. It is true that Unite has only sought the payments for its own members; but that is because it is a trade union who only has a mandate to do things on behalf of its own members. The key point is it does not object to members of Unison having this payment, members of other unions having this payment, or members of no union at all receiving this payment. However it only has the right to ballot its own members and to induce its own members to take industrial action in respect of the demand it is making….The Unite members are simply seeking equal treatment. Nothing more, nothing less.

…

46. Whether such sums are paid to members of other trade unions, or non-members of any union, is a matter entirely for C. I make it very clear that at no time has Unite ever suggested, let alone stipulated, that the same payments made to GMB members should be withheld from members of other trade unions, or non-members – and Mr James does not say otherwise…"

(2) To like effect, Mr New of UNISON has made a statement to like effect at paragraph 40 as follows:

"40 UNISON's campaign, on this issue, has been about protecting the interests of our members by ensuring that they receive the same level of remuneration as GMB members have received. However, UNISON has not sought and would not seek to prevent non- union members from also receiving the same level of remuneration as union members doing the same work."

53. It is said by BCC that the answer to this is that it is clear that Unite and/or UNISON knew that the payment made to the GMB members was by reference to a matter which could only apply to them and not to Unite/UNISON members. That was a claim which they had arising out of the failure on the part of BCC to consult over changes to contracts of employment pursuant to s. 188 of TULRCA, resulting in a claim for each member of the GMB under s. 189 of TULRCA

54. BCC goes on to say that Unite and UNISON respectively had knowledge of the reason for payments to GMB members and so they knew that these payments were not referable to employment rights comparable with their own members' rights, but related to something unique to them which was not in common with rights or

expectations of the members whom they represented: see the Defendants' skeleton argument at paragraphs 19-22. It is emphasised how the confidentiality provisions in the settlement have been waived, and yet still the allegations of Mr Beckett persist that the true reason for the payments was something else.

55. In answer to this, Mr Segal QC for the Defendants says primarily it is wrong to look at this analysis of the true reasons of the Defendants for acting as they did. There is a general principle of not being concerned with the merits of the underlying dispute: see *London Underground Ltd v ASLEF* above at paragraphs 12-13. More germanely, he also points to the evidence of Mr Beckett which can be summarised as follows. There was no breach of GMB's rights because GMB had not been a party to industrial action and therefore was not a party to settlement negotiations to resolve the industrial action: see the more extensive references above to the evidence of Mr Beckett where he sets out his reasons for believing that there was no entitlement to which the GMB members had to the payments which they received. For all these reasons, those who have given evidence for Unite and UNISON believe that there was nothing in the GMB claim (Beckett WS1 paras. 33-41), and they have inferred that that the real reason for the payment was to provide a reward to GMB members which was discriminatory to the members of Unite and UNISON: see the quotation above from para. 41 of Beckett WS1.

56. In my judgment, at this stage, the Court must consider the likelihood of what will be established at trial. It seems likely to me that it will be established that the officers of Unite and UNISON genuinely believed that the reasons given by BCC for making the payments to the GMB members were not for the reasons put forward by BCC. Further, on the material before the Court, it seems unlikely that BCC would be able to prove at trial that Mr Beckett's evidence and Mr New's evidence as to their beliefs was false. In my judgment, the likelihood is that they believed that Unite and UNISON were being discriminated against by the payments made to GMB employees. In the words of Mr Beckett, he sought at paragraph 43 of his WS1 "*to obtain equal treatment for Unite members', not detrimental treatment for workers not in Unite."* In other words, it is more likely than not that the witnesses for Unite and UNISON would not be shown to be creating a false and disingenuous case where their evidence to this Court supported by statements of truth is actual deliberately untrue and a lie.

57. In these circumstances, I infer that the likelihood is that their evidence would stand up at a trial to the effect that it represents the reasons for taking the actions which they have taken. Mr Burns QC has rightly accepted that the reasons which they took do not have to be reasonably held, because the statute does not say that.

58. For all of the above reasons, it is more likely than not that the exclusion from protection of s.222 of TULRCA will not apply. In my judgment, it is more likely than not that the Defendants will succeed at trial in showing that the statutory protection will apply. It is accepted by the parties and by BCC in particular that this is not what Elias LJ in *RMT v Serco Ltd; ASLEF v London Midland* [2011] ICR 848 CA at para. 13 described as "a very exceptional case". In those circumstances that it is more likely than not that the Defendants will succeed at the trial of the action in establishing that the protection in s.219 of TULRCA will apply. Accordingly, the application for an interim injunction is refused.

59. It follows in my judgment that under s.221(2) of TULRCA, the Court is bound to apply the protection to the application for an interim injunction. Thus, the tests of whether damages are an adequate remedy, balance of convenience and discretionary factors are subject to this overarching consideration. If these factors had come into play, there was much to say for BCC having regard to the fact that the industrial action has been affecting 360,000 households and the cost of contingency measures is said to be about £350,000 per week, increasing by £200,000 per week upon escalation in the nature of strike days: see also the first statement of Robert James at paras. 54-64.

Delay

60. The Court has been addressed at length in respect of delay as a discretionary bar to the application. It has been submitted by Mr Segal QC with some force that the position would be difficult for BCC to maintain in view of what he calls unprecedented delay. He says that in the cases on the subject, there has never been a case where an interim injunction has been sought after the industrial action has started. He places emphasis on the statutory periods for having a ballot and for giving 14 days' notice to the relevant employers before industrial action can begin. This would have provided the opportunity to have made a considered application for injunctive relief, and before resources of the Defendants were seeking to advance the position of their members through industrial action. He placed emphasis on an albeit rather different case in the context of disciplinary proceedings of *Dr A. Makhdum v Norfolk & Suffolk Foundation Trust* [2012] EWHC 4015, discouraging applications made at the very last minute ("the 59th minute of the 11th hour"). He says that in this case, it is later than because it is after weeks of industrial action and after the beginning of intermittent strike action.

61. Against this, it is submitted by Mr Burns QC on behalf of BCC that there have been protracted and generous attempts to settle the matter without resort to Court action. Further, it is said that the nature of the industrial action has escalated and that it is only comparatively recent that it has escalated to 24-hour strikes and intended 48-hour strikes. The residents of Birmingham might be expected to have borne some of the lesser industrial action, but the total cessation of work, albeit intermittent, required a change of tack and applications for injunctions. He says that it is inconsistent with the overriding objective to require that a person cannot seek to negotiate a settlement without fearing that he will thereby lose the possibility of injunctive protection. He says also that delay is a discretionary bar, and that it is to be seen in the round with other balance of convenience points including the cost referred to above to BCC.

62. These are powerful arguments on both sides. In the event, the Court does not have to resolve them because of the firm conclusion reached as regards s.222.

63. There is a further point almost by way of a footnote which has been revealed in the delay issue. It is that it was not until late January 2019 that the s.222 point was identified by BCC. The lateness of the point may be indicative that that the point is far from obvious. On analysis, when the point is seen in the light of the evidence as a whole, it is one which on proper analysis, at least at the interim stage, takes BCC's case no further.

Disposal

64. For all of the above reasons, the application of BCC for interim injunctions is dismissed. I shall now proceed to hear any consequential matters.

65. It remains for me to thank all Counsel for the high quality, conciseness and clarity of the written and oral submissions.