

ENGLAND AND WALES / JUDGMENT

ISS Mediclean Ltd v GMB

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Neutral Citation Number: [2014] EWHC 4208 (QB) IN THE HIGH COURT OF QUEEN'S BENCH
DIVISION JUSTICE Case No. 1HQ/14/0780 Royal Courts of Justice Date: Friday, 21st November
2014 Before: MR JUSTICE SINGH B E T W E E N :

- ----- ISS MEDICLEAN LIMITED Claimant
- and - GMB Defendant
- ----- Transcribed by BEVERLEY F. NUNNERY & CO. (a trading name of Opus 2 International Limited) Official Court Reporters and Audio Transcribers One Quality Court, Chancery Lane, London WC2A 1HR Tel: 020 7831 5627 Fax: 020 7831 7737 info@beverleynunnery.com
- ----- MR. A. SENDALL (Counsel) appeared on behalf of the Claimant/Applicant. MR. M. FORD QC and MR. D. CUNNINGTON (Counsel) appeared on behalf of the Defendant.
- ----- J U D G M E N T (As approved by the Judge) MR JUSTICE SINGH: 1 What is presently before the court is an application for an urgent interim injunction made by the claimant against the defendant trade union to restrain industrial action: that is a strike which is due to take place on Monday, 24th November until 26th November. The application is made today, the preceding Friday; that is 21st November. 3 5 As is common ground, in such cases, the court's grant of an interim injunction will often have the effect, in fact, of disposing of the litigation in its entirety. It is for that reason that s.221 of the Trade Union and Labour Relations (Consolidation) Act 1992 embodies the principle which was also already part of the law as a result of the decision of the House of Lords in *NWL v. Woods* [1979] ICR 67; that, in an application for an injunction to restrain industrial action, the court should have regard to the likelihood of the union establishing its defence at trial, that defence being, in a case such as this, that such industrial action has the protection of the statutory immunities which are conferred in industrial disputes, provided certain circumstances are present. In the present case, there has been a dispute going on for some months as between the claimant and the defendant union. I will come back later to consider the dispute between the parties, as to whether it amounts to a trade dispute within the meaning of the 1992 Act. A number of meetings have been held between the employers and the union representatives. There was a strike ballot conducted by the defendant union between the 4th and 22nd September. The first day of industrial action took place as the result of a positive vote in that ballot on 8th October. It is common

ground that the ballot itself complied with all the requirements of the legislation; for example, as to the mechanics of the process which has to be followed. It is also common ground that the first day of industrial action on 8th October took place within the four week time which the law requires it to commence. It is common ground before me that, in principle, there is nothing in law to prevent further bouts of industrial action to be taken, pursuant to the same ballot. There is no legislative requirement at least, for example, as to the time within which further industrial action needs to be taken for it to be covered by the initial ballot. There are two principal issues which, on behalf of the claimant, Mr. Sendall has raised, to which I will return in due course. Before I do so, I should set out as briefly as is convenient some of the material legislation. Section 219 of the 1992 act reproduces in contemporary form legislation conferring immunity from certain liabilities in tort, which go back at least to the Trade Disputes Act

1906. As is well-known, normally strike action, for example, will constitute a breach of the contract of employment. As is also well-known, if another person induces the employee to break the contract or interferes or induces another person to interfere with its performance, then such action may well constitute a tort of common law. As a consequence, Parliament has conferred the well-known immunity from tort liability, to which I have referred. On behalf of the defendant, Mr. Ford QC emphasises that, through this legal mechanism, the law of this country gives effect to the fundamental right to take industrial action which workers enjoy under international labour law. That is a right which they also enjoy, as is now confirmed by the jurisprudence of the European Court of Human Rights, by virtue of the right to freedom of association in Article 11 of the Convention on Human Rights. That right, of course, is also given effect in domestic law through Schedule 1 to the Human Rights Act 1998. The requirement that there should be a ballot before industrial action takes place in order to attract the statutory immunity to which I have made reference is now to be found in s.226 of the 1992 Act. So far as material, sub-section (2) provides that: "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". As Mr. Ford submits, the question for the court, therefore, becomes whether the industrial action concerned has "the support of a ballot". It is also important to refer to the well-known concept in industrial relations law of a trade dispute. In the 1992 Act, that is governed by s.244, which, so far as material, provides in sub-section (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 ..." Mr. Ford submits, as must be common ground, that there could be no more fundamental dispute as to terms and conditions of employment than the pay which workers demand that they should be paid. In this case, it would appear on the evidence which has been filed before the court by both parties that the dispute concerned has related to a number of matters. For example, my attention has been drawn to a letter dated 27th August 2014 sent by the regional organiser of the defendant union, Nadine

Houghton, to those representing the claimant employer giving notice under s.226(a) of the 1992 Act of its intention to hold a ballot for industrial action. By that notice, it was said that: “This industrial action ballot relates to imposing electronic payslips/failure to pay full agenda for change of pay and terms and conditions/failure to pay contractual sick pay to some staff and concerns around the handling of the sick pay policy/failure to backdate casual porters’ pay at time and a half for overtime/domestics night rate not being backdated to 2007 when changes were made to wages/health and safety/consistent failure to grant annual leave requests/failure to pay management grades London waiting, and attempts to impose weekend working on manager grades”. In due course, the ballot paper which was sent to the defendant union’s members to vote upon was headed “ISS Queen Elizabeth Hospital ballot paper”, and then read: “Re trade dispute with ISS (Queen Elizabeth Hospital) including all matters arising out of and in consequence of the dispute”. There were then some boxes marked “Yes” and “No”, asking a question about whether the individual concerned was prepared to take part in strike action, and a second question, whether he or she was prepared to take part in industrial action short of a strike. 11 Mr. Ford points out on behalf of the defendant union that that ballot paper, which he informs me is in common form, did not specify particular sub- categories of the dispute between the employer and the union; still less should it be construed, he submits, in a legalistic way as might be appropriate, for example, to formal pleadings in civil litigation. He also observes that, consistent with the approach which the courts of this country have adopted, a practical and workable approach to construction of the legislation in this context must be adopted. See, for example, *RMT v. Serco Limited* [2011] ICR 848, in particular, the judgment of Lord Justice Elias at para.9. See also the judgment of Lady Justice Smith in *British Airways v. Unite (No.2)* [2010] ICR 1316, at paras.109, 113 and 152. As Lady Justice Smith there observed: “Regard must be had to union members having an effective right to withhold their labour, and that the legislation in this context is 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”. 12 Mr. Ford also makes the submission, in my judgment well-founded, that this area of the law contains a labyrinthine code now of detailed requirements which trade unions have to comply with if they are to enjoy the statutory immunity which gives effect to the fundamental right to take industrial action. He submits, and I accept, that the courts should, in those circumstances, be loath to introduce by the backdoor implicitly what may be other further restrictions which are not in the legislation, as such. 13 On behalf of the claimant, Mr. Sendall makes, as I have mentioned, two fundamental submissions. The first is that all but one, he submits, of the matters which were in dispute have, in fact, been resolved. He has drawn my attention to a number of documents in evidence before the court in support of that submission. In particular, he has drawn attention to the minutes of a tripartite meeting held on 13th November 2014. Paragraph 3 of the agenda of that meeting, in effect, set out the specific matters in dispute raised by the defendant union. At para.4 of the minutes, there were then set out in subheadings each of those specific matters, and, in bold, it was noted either that an item was agreed and no outstanding action was needed or that there were things to be done, but certainly no dispute of substance remained. 14 There is one matter to which I will

have to return, about which that is not said on behalf of the claimant, and that relates to a topic which has become known as AFC or “Agenda for Change”. 15 There are several difficulties with this submission, in my judgment. The first is that the minutes of the meeting of 13th November have not been agreed by others, in particular, the representatives of the defendant union. I am informed that they were not, in fact, circulated to them until yesterday. That is not said by way of criticism. It is simply to underline the observation that they have not had the opportunity, and nor, in fact, have they agreed those minutes. 16 The second difficulty is that, on the evidence before this court filed on behalf of the defendant, in particular, the witness statement of Nadine Houghton, it is clear that, so far as the defendant union is concerned, many if not all of those matters are still in dispute. It is not accepted that they are agreed and have been resolved at all. See the second para.25 of her witness statement, and the subheadings set out there in more detail. In support of his submissions, Mr. Sendall drew my attention to the decision of the Court of Appeal in *Post Office v. Union of Communication Workers*

[1990] ICR 258, in particular, the judgment of Lord Donaldson MR at pp.266 to 267. I have that passage well in mind. But, as Lord Donaldson there said at p.267, ultimately, the question is one of fact and degree in each case. As he put it: “The question which the court has to ask itself is whether the average reasonable trade union member, looking at the matter at or shortly after any interruption in the industrial action would say to himself, ‘the industrial action has now come to an end’, even if he might also say, ‘the union may want to call us out again if the dispute continues’”. 18 There may be cases which fall on one side of the line, and others which fall on the other side of the line, as Lord Donaldson himself recognised when referring to the “suspension” case of *Monsanto Plc v. Transport and General Workers Union* [1987] ICR 269. On the facts of this case, I have come to the conclusion that the claimant’s submission in this regard must be rejected. 19 The other principal issue which the claimant raises is that the only matter still in dispute does not truly relate to a trade dispute at all. In this context, Mr. Sendall relies upon the decision of this court in *London Underground Limited v. National Union of Railwaymen* [1989] IRLR 341, a judgment of Mr. Justice Simon Brown, as he then was: in particular, at para.7, a submission by the union in that case was rejected. The submission had been that it is not fatal to the union’s right to invoke the statutory immunity if one issue is found to be a trade dispute, even if three other issues, for example, are not, on analysis, trade disputes at all. 20 As I understood him, Mr. Ford makes no such submission in the present case. Rather, he submits that the dispute, which, on any view, continues to subsist, in respect of the matter of Agenda for Change falls within the concept of a trade dispute within the meaning of the legislation which I have already cited. As I have already mentioned, he makes the submission that it is a dispute about pay, and there could be nothing more fundamental to the employment relationship than the question of pay. A dispute about pay, he submits, is quintessentially a trade dispute. 21 Mr. Sendall submits that the Agenda for Change concept is something which is the subject of a national collective agreement, to which indeed the defendant union has agreed. He submits further that this is simply

not a matter within the control of the claimant employer. Rather, it is a matter for National Health Service trusts. If, for example, a trust has not paid sufficient money to an employer to fund the pay increase which would be entailed, then he submits the dispute is with the trust and not with the employer. 22 Again, in my judgment, there are certain fundamental difficulties with that submission. The first is that collective agreements are not enforceable because they are not binding in law, unless they are expressly made so: see s.179 of the 1992 Act. Secondly, it seems to me that it is perfectly possible for there to be a dispute between an employer and its workforce about pay, even where the ultimate funding such a pay increase may have to come from some other source. Thirdly, on the evidence before this court, and again, I refer to the witness statement of Nadine Houghton, the workforce and, in particular, the defendant union in this case clearly do regard this issue and the differential, in particular, of pay rates as compared with those who are directly employed as being at the heart of their dispute with this employer. 23 Accordingly, I have come to the conclusion on this issue also that the submission advanced on behalf of the claimant must be rejected. For those reasons, I come to the conclusion that the defendant union is likely to be able to establish the statutory immunity which it would have pursuant to the 1992 Act in this case, and this application for an interim injunction is refused.

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