2019/39

Industrial action injunction refused where trade unions were seeking parity of treatment (UK)

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Summary

The High Court (HC) dismissed an application by an employer for an interim injunction to prevent strike action organised by two trade unions, who were demanding parity of treatment for their members as compared to members of another union. It was more likely than not that the two unions would succeed in establishing, at the full trial of the matter, that the statutory protection under UK law for industrial action applied.

Background

There is no express 'right to strike' in UK law, but the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides legal immunity for trade union officials organising industrial action if they are acting in contemplation and furtherance of a legitimate trade dispute. Without this immunity, a trade union authorising or endorsing industrial could be sued by the employer for committing torts (i.e. legal wrongs) such as inducing the workers concerned to breach their contracts of employment.

The TULRCA goes on to set out certain situations in which a trade union will lose its immunity, because it has authorised or endorsed industrial action for a 'prohibited reason'. One of these prohibited reasons (contained in Section 222 of the TULRCA) is where the reason for the action is that the employer is employing non-union members or failing to discriminate against non-members. The policy behind this, in essence, is to prevent unions from forcing employees to become union members. For example, a union will lose its legal immunity if it instigates industrial action to pressurise the employer into awarding a pay rise only to employees who are members of the union.

In this respect, the TULRCA reflects the right of freedom of assembly and association under Article 11 of the European Convention on Human Rights, which includes not only the right to form and join trade unions but also the converse right not to be coerced into joining a union.

When employers wish to challenge the legality of proposed industrial action in the UK, they normally issue urgent proceedings in the HC with a view to securing an interim (i.e. temporary) injunction to prevent the action pending a full trial. The HC will consider whether the trade union is likely ultimately to establish that the action is protected under TULRCA and, in which case, the HC will usually exercise its discretion to refuse the employer's application for an injunction. Because industrial action cases are generally very time-sensitive, the interim proceedings in most cases effectively resolve the matter – it is rare for such cases to proceed to a full trial.

Facts

Birmingham City Council (Birmingham) recognised three trade unions in respect of its waste management service: Unite, Unison and GMB. In 2017, Birmingham proposed to restructure the service involving potential job losses. It issued a formal notice to the unions, setting out a proposal to make 109 workers redundant. Unite and Unison (but not GMB) responded by balloting their members on taking strike action. The dispute was eventually resolved, with Birmingham entering into collective agreements with Unite and Unison and abandoning its restructuring plans.

In 2018, it transpired Birmingham had entered into settlement agreements with GMB members and paid each of them a compensation payment of around £4000. Birmingham maintained that the payments were in order to settle potential claims for failure to inform and consult under Section 188 of the TULRCA (the provision which implements the EU Collective Redundancies Directive 98/59/EC in UK law).

Unite and Unison contested Birmingham's suggestion that the £4,000 payments were made to compromise valid collective redundancy consultation claims, contending that they were in reality a reward to GMB members for not taking industrial action. When Bir-

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mingham refused to make equivalent payments to Unite and Unison members, the two unions held ballots in which the members voted in favour of strike action.
Birmingham applied to the HC for an interim injunction to restrain Unite and Unison from calling industrial action among their members employed across various waste management depots in the city.

Judgment

Birmingham's case was that the proposed strike was unlawful because it was for a prohibited reason under Section 222 of the TULCRA. It argued that Unite and Unison were taking action because they believed that Birmingham had failed to discriminate against non-members of those two unions – i.e. against members of GMB.
Rejecting this argument, the HC said that Birmingham was seeking to give a 'strained interpretation' to Section 222 and apply it to a situation that was very different from its original purpose – namely, to prevent a trade union from effectively forcing employees to become members. The HC ruled that provision should instead be given its ordinary and natural meaning. This was not a dispute about Birmingham discriminating against people who were not members of a particular union. Unite and Unison were arguing for parity of treatment for their members, rather than contending that Birmingham had failed to discriminate against GMB members. This was supported by evidence from Unite and Unison that the reason for the action was to achieve equal treatment for all workers, whether union members or not, which was supported by the wording of the ballot papers.
The HC therefore concluded that Unite and Unison would be likely to succeed at full trial in showing that they genuinely believed that the payments made to GMB members were not for the reasons put forward by Birmingham. The likelihood was that Unite and Unison believed their members were being discriminated against, and this represented their reason for taking industrial action. Accordingly, they were likely to show that the proposed strike action was lawful and Birmingham was unlikely to be able to show it was for a prohibited reason under Section 222. No exceptional circumstances existed to justify the grant of an interim injunction in any event, so the HC rejected Birmingham's application.

Commentary

The 'prohibited reason' for industrial action set out in Section 222 of the TULRCA has not previously been subject to scrutiny by the courts. The HC's judgment helpfully makes clear that a common-sense approach to construction should be adopted when considering the exceptions to immunity from liability in tort. Employers with different unions active in their workforce should be particularly mindful of this case. It suggests that where unions are merely demanding parity of treatment for their members (as opposed to more favourable treatment), they will retain their immunity under the TULRCA from liability for organising industrial action.

Comment from other jurisdiction

Austria (Erika Kovacs, Wirtschaftsuniversität Wien): The Austrian legal regime on industrial action is rather unique in a European context, because the right to strike is not regulated by law. The State has had a neutral approach to strike action for a long time, meaning that it has neither protected nor prohibited strikes (see: Marhold/Friedrich, *Österreichisches Arbeitsrecht3*, 2016, 531 ff.). Furthermore, there is barely any case law on strikes. Concerning the practice, strikes are very rarely called in Austria in order for a legal comparison to be made (see: https://www.etui.org/Services/Strikes-Map-of-Europe/Austria). In the last two decades, there were often years when there were no strikes at all. This is the result of the historical development of strong and influential social partners, who solve debates through negotiations, but not by strikes. Consequently, Austrian law on strikes is mainly found in legal commentary in books, but not law in action.
Until recently, the majority of Austrian authors were convinced that in Austria the right to strike shall not be accepted as a basic, fundamental right notwithstanding that Austria adopted Article 11 of the ECHR, which is recognized as part of the Austrian constitution. The legal approach has been fundamentally changed due to the judgments of the ECHR in *Enerji Yapi-Yol Sen – v – Turkey* ([2009] ECHR 2251) and *National Union of Rail, Maritime and Transport Workers – v – UK* ([2014] ECHR 366). Similar influence has been made by the adoption of Article 28 of the Charter of Fundamental Rights of the EU and the statements of the CJEU on the right to strike in the *Viking* (CJEU 11.12.2007, C-438/05) and *Laval* (CJEU 18.12.2008, C-341/05) cases. Recently, most Austrian labour lawyers agreed that employees have a constitutional right to strike (Felten, *Koalitionsfreiheit und Arbeitsverfassungsgesetz*, 2015, 192 f; Kohlbacher, *Streikrecht und Europarecht*, 2014, 196 f.). However, due to the lack of any legislation and case law on this issue, several legal questions on strike action still remain unclear.
It is very unlikely that a situation such as in the UK would happen in Austria, because there is no variety in relation to trade unions. The Austrian Federation of Trade Unions (ÖGB, *Österreichische Gewerkschaftsbund*) covers nearly all trade unions and therefore trade unions compete with each other extremely rarely.

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