The Right to Strike in the UK

The Court of Appeal decision – National Union of Rail, Maritime and Transport Workers v Serco Ltd and another

On Friday afternoon last week the Court of Appeal handed down the eagerly anticipated decision of National Union of Rail, Maritime and Transport Workers v Serco Ltd (and another); which considered, among other things, the unions' duty to maintain accurate membership data, and suggests (albeit obiter) that the '*de minimis*' rule can apply to excuse failures not covered by S.232B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A).

In this far-reaching judgment Lord Justice Elias rejected the argument that the legislation should be construed strictly against unions because they are seeking to take advantage of immunity.

I am often asked to give media comments on the right to strike, and from where this right originated. Lord Justice Elias gave an excellent précis of the legal position regarding strike action in the UK in his judgment, extracts of which I set out below:

"The common law confers no right to strike in this country. Workers who take strike action will usually be acting in breach of their contracts of employment. Those who organise the strike will typically be liable for inducing a breach of contract, and sometimes other economic torts are committed during the course of a strike. Without some protection from these potential liabilities, virtually all industrial action would be unlawful Accordingly, ever since the Trade Disputes Act 1906 legislation has been in place to confer immunities on the organisers of strikes from certain tort liabilities provided, to put it broadly, that the purpose of the action is to advance an industrial rather than a political objective. This is achieved by a requirement that the industrial action must be "in contemplation or furtherance of a trade dispute". The current protection is afforded by section 219 of the 1992 Act (ie TULCRA). *The legislation therefore secures a freedom rather than conferring a right as such"…*

"There is no legal obligation to hold the ballot as such and a strike is not automatically illegal for that failure alone. However, virtually all strikes involve the workers taking strike action acting in breach of their contracts of employment. Accordingly, if a ballot is not held, or if it is held but in breach of the legislation, then the immunities are inapplicable and in practice the union will be liable in tort for inducing their members to strike in breach of their contracts of employment. Although the common law recognises no right to strike, there are various international instruments that do: see for example Article 6 of the Council of Europe's Social Charter and ILO Conventions 98 and 151"

The Court of Appeal held that:

- The S.232B accidental failures defence does not require the errors to be unavoidable. However, if a union knows, or must have known, that it was in error it will not be able to rely on the exception;
- When assessing whether a union has complied with the S.226A(2D) duty to provide the employer with information that is 'as *accurate as is reasonably practicable*' about the numbers and categories of concerned employees, the focus

is on the information the union has at the time it notifies the employer, not information it ought to have or which it could obtain;

- Obiter – the '*de minimis*' defence continues to apply to '*trifling errors*' where there is no express statutory defence (ref to British Railways Board v National Union of Railwaymen);
- A sufficient explanation of the figures provided to the employer under S.226A is one that complies with paragraph 16 of the Code of Practice 'Industrial Action Ballots and Notice to Employers', issued in 2005;

This requires unions to describe the sources of their data and states that it is desirable to describe any known deficiencies. In order for an explanation under S.226A to be inaccurate, the description of the process by which the figures were arrived at would need to be '*positively and materially misleading*';

- It does not matter if the S.226A explanation is formulaic. If the union obtains the necessary information for each strike in the same way, the description of what it has done will be essentially the same.

Philip Henson, Partner and head of employment law @ Bargate Murray says: *"With threats of further industrial action on the horizon, and fears of a Spring of discontent, there may well be efforts for a further appeal to the Supreme Court"*.

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