More leeway for unions post-*Serco*

The courts are growing less willing to grant injunctions to employers to prevent strikes going ahead, explains Alice Carse

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'The courts will not interpret the balloting procedures strictly so as to disadvantage a trade union which has done its best to comply with the law. This is the case even when as much as a quarter of the voting constituency may have been excluded from the ballot.'

Two recent High Court decisions indicate that the courts are now taking a less stringent approach to determining whether a trade union has complied with the requirements of the procedures for balloting members on industrial action.

This is in line with the Court of Appeal's finding in *Serco Ltd v National Union of Rail, Maritime and Transport Workers* [2011] that the requirements in Part V of the Trade Union and Labour Relations Consolidation Act 1992 (TULRCA) are not meant to be unduly onerous for unions to comply with.

London Underground Ltd v ASLEF [2011]

The main issue in this case was whether the trade union had extended entitlement to vote in the ballot to members it could not reasonably have believed would take part in the industrial action. Section 227(1) TULRCA provides that:

> Entitlement to vote in the ballot must be accorded equally to all the members of the trade union who it is reasonable at the time of the ballot for the union to believe will be induced by the union to take part or, as the case may be, to continue to take part in the industrial action in question, and to no others.

The industrial action in this case was a strike scheduled to take place on 26 December 2011. ASLEF balloted 1950 members, 998 of whom voted but out of whom only 480 were scheduled to work on 26 December 2011. The remainder of those who voted were not rostered to work on that date, or the depots at which they worked were due to be closed. A small number were on long-term sick or maternity leave but these employees were disregarded for the purposes of the injunction application. London Underground sought an interim injunction restraining the industrial action on the basis that, contrary to s227 TULRCA, ASLEF could not reasonably have believed that members not due to attend work on 26 December 2011 would be induced to take part in the industrial action.

Eder J was not persuaded by this argument and gave three reasons for his conclusion. First, although his Lordship accepted that a strike should have a democratic mandate, he stated that it did not seem necessarily to follow that the people who should be balloted must be limited to those who would be on strike (ie withdrawing their labour in breach of contract) on a particular day. Secondly, the construction of the section, in particular the use of the words 'take part in' in s227, was held to be a very strong indication that the ballot is not restricted to those who will actually be on strike. Finally, this conclusion was based upon authority, namely the decision of the Employment Appeal Tribunal (EAT) in *Bolton Roadways Ltd v Edwards* [1987].

Bolton was a case about dismissals in connection with industrial action under what is now s238(1)(b) TULRCA. The case looked at the situation of employees who claim to have been unfairly dismissed when at the date

of the dismissal they were taking part in a strike or other industrial action. Eder J used *Bolton* as an interpretative aid.

Scott J stated that whether an employee's activity represents a breach of the obligation to attend work is relevant, but not essential, to determining whether they are taking part in a strike. Giving the example of an employee who was on holiday or absent due to sickness and who was not, therefore, in breach of contract by being absent from work, Scott J found that they could be held to have taken part in the strike if they attended at the picket line or took part in other activities by the strikers.

London Underground argued that *Bolton* was inconsistent with the earlier Court of Appeal authorities of *McCormick v Horsepower Ltd* [1981] and *Coates v Modern Methods & Materials Ltd* [1982], both of which concerned s238 TULRCA.

Whether an employee's activity represents a breach of the obligation to attend work is relevant, but not essential, to determining whether they are taking part in a strike.

In *McCormick*, an employee decided not to work because other employees were on strike and he did not wish to cross the picket line. He did not tell his employers that he was on strike and then voluntarily resumed work before the strike ended. He was held not to have taken part in the strike.

In *Coates*, an employee who was not on strike did not go into work because she did not want to be abused by the picketers. She stayed at the gate for an hour or two before going home and being signed off work sick. She was held not to have taken part in the strike.

Eder J did not accept that there was any inconsistency between these cases and *Bolton* and stated that *McCormick* and *Coates* dealt with very different questions.

Comment

Neither *McCormick* nor *Coates* were cited in argument in *Bolton*. However, setting aside any question of whether these two authorities dealt with the same questions as those raised in *Bolton*, the interpretation used in *Bolton* and now followed in *London Underground* undermines the principle of statutory interpretation whereby words and phrases should be defined so as to ensure internal consistency in a statute. This is an interpretation that is focused on the activity that a person is doing (joining a picket) rather than on what

a person is not doing (not attending work and therefore breaching his contractual obligation to attend work by striking). The words 'take part in' are given particular significance to support this construction.

The interpretation that is focused upon what an employee is not doing must be correct, however, because it is concerned with the purpose of the statute, namely providing statutory immunity from the tort of inducing breach of contract to trade unions which have called their members out on strike. Trade unions do not need immunity from suit for employees who are not rostered to work. This is based upon the principle, as argued by London Underground, that industrial action or a strike must be based upon a democratic mandate. If employees who are not rostered to work on a particular day can vote, and thereby call for others who are rostered to be working to strike or take industrial action (who may well lose a day's pay as a result), this raises serious concerns about democracy within a trade union.

Balfour Beatty Engineering Services v UNITE the Union [2012]

The issue in this case was simply whether all those union members entitled to vote in a ballot had received a voting paper in the post. Section 230(2) TULRCA provides that:

> ... so far as is reasonably practicable, every person who is entitled to vote in the ballot must:
> (a) have a voting paper sent to him by post...; and
> (b) be given a convenient opportunity to vote by post.

Balfour Beatty applied for an interim injunction on the basis that UNITE had not complied with s230(2) and therefore it would not be entitled, were the matter to go to trial, to a trade-dispute defence. UNITE argued that it had complied with its duty and drew the court's attention to the difficulty of keeping accurate records of union members in the construction industry. The number of union members who were thought not to have received a ballot paper was significant; Eady J found that he could not rule out the possibility that as many as 100 eligible union members were left out of the voting process. There were approximately 440 valid papers, with 313 votes in favour of industrial action short of a strike and 295 votes in favour of strike action.

Eady J held that, as far as reasonably practicable, all eligible members had a ballot paper sent to them and were afforded a convenient opportunity to vote by post. Following *Serco*, Eady J held that a trade union will not be expected to set up detailed inquiries and investigations into the information held about members before attempting to comply with the statutory balloting procedures. Generally, trade unions can proceed on the basis of the information in their possession without having to ensure that it is actually definitive. Although reasonable practicability is an objective test, it is not for courts to substitute their own judgment about the appropriate steps to take in a given situation. Trade unions' duty does not extend to requiring them to take every possible reasonably practicable step available. His Lordship stated that there had to be some leeway for trade union officers, who were familiar with their own union's particular record-keeping problems, to take their own course in making genuine attempts to achieve the statutory standard. An element of good faith is required on the part of trade union officials and therefore doing one's incompetent best to comply with the statutory procedure will not be enough to satisfy a court.

Comment

The reasoning in this case is consistent with that in *Serco*. That was a decision that emphasised that the statutory requirements are not supposed to be unduly onerous and that a trade union will most likely have done enough to comply if it duplicates the information in its possession and does not supply information which it knows to be incorrect.

This line of authority demonstrates that the courts will not interpret the balloting procedures strictly so as to disadvantage a trade union which has done its best to comply with the law. This is the case even when as much as a quarter of the voting constituency may have been excluded from the ballot. It is a thread of reasoning that recognises the degree of knowledge that trade union officials have of their own trade union's internal procedures. As long as they can provide an explanation of the process they have followed in determining the balloting constituency, and can demonstrate that they have carried out the statutory procedure in good faith, a court is likely to be satisfied.

Trade unions' duty does not extend to requiring them to take every possible reasonably practicable step available.

Time for new tactics

Both *London Underground* and *Balfour Beatty* are evidence of the retreat from the strict interpretation of the balloting provisions in Part V of TULRCA, which had developed prior to *Serco*. These decisions indicate that the courts are now less likely to grant injunctions to restrain industrial action. Employers may therefore be well advised to focus their energies on mitigating the impact of industrial action on the business rather than attempting to injunct the trade union which is calling employees out on strike. ■

Balfour Beatty Engineering Services v UNITE the Union
[2012] EWHC 267 (QB)

Bolton Roadways Ltd v Edwards & ors
[1987] IRLR 392

Coates v Modern Methods & Materials Ltd
[1982] ICR 76

London Underground Ltd v ASLEF
[2011] EWHC 3506 (QB)

McCormick v Horsepower Ltd
[1981] ICR 535

Serco Ltd v National Union of Rail, Maritime and Transport Workers
[2011] ICR 848