Neutral Citation Number: [2017] EWHC 2548 (QB)

Case No: HQ17X03683

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 October 2017

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

ROYAL MAIL GROUP LTD	**Claimant**
- and -	
COMMUNICATION WORKERS UNION	**Defendant**

- -
- -

Andrew Burns QC and Alice Carse (instructed by **DAC Beachcroft**) for the **Claimant**
John Hendy QC and Sarah Keogh
(instructed by **Penningtons Manches LLP**) for the **Defendant**

Hearing dates: 12 October 2017
Reasons for the decision given on 12 October, read out in open court on 13 October 2017

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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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THE HON. MR JUSTICE SUPPERSTONE

Mr Justice Supperstone :

Royal Mail Group Ltd v Communication Workers Union

1. This is an application by the Claimant for an injunction to restrain the Defendant from unlawfully calling strike action in locations across the UK. The Defendant is calling for its members to strike from 11.00am on 19 October to 11.00am on 21 October 2017.

2. At the conclusion of the hearing yesterday I granted injunctive relief and gave brief reasons for so doing. I now give fuller reasons for my decision.

3. The Claimant is the principal employer of all those who work within the Royal Mail. As it is well known, the Claimant is the national provider of a postal service across Great Britain and Northern Ireland. The Defendant is a trade union recognised by the Claimant for the purposes of collective bargaining. It is recognised for all non-managerial operational employees of whom there are over 130,000 working across the UK. Based on its notification of a ballot for strike action over 111,000 of those employees are CWU members.

4. A dispute has arisen between the Claimant and the Defendant. Mr Michael Newby, the Claimant's industrial relations/employee relations Director, in a witness statement in support of the application, describes it as a long-running trade dispute over pensions, pay, a shorter working week, continuation/extension of a national collective agreement between the parties titled "Agenda for Growth, Stability and Long Term Success" ("the Agreement"), and an extension of the Royal Mail delivery pipeline (specifically developing a 7am to 7pm delivery network).

5. The Defendant has called industrial action in furtherance of a trade dispute defined by the "summary of issues" in the voting papers of the members as is required since the Trade Union Act 2016 by the amended section 229(2B) of the Trade Union and Labour Relations (Consolidation) Act 1992. The summary states that the Defendant "has been pursuing a campaign under the heading 'The Four Pillars of Security' to secure an agreement that provides long-term benefits in respect of pensions and enhanced terms and conditions of employment for effective members in Royal Mail Group. Independent of the four pillars".

6. This court of course is not concerned with the merits of the dispute.

7. The collective agreement was negotiated over the course of several months in 2013. It contains a number of legally binding obligations. The contractually binding commitments are contained in the signed contract dated 27 May 2014 attached at Appendix A.

8. Clause 2.1 provides:

> "The Company and the CWU intend to enter this Agreement on the basis that it is a legally enforceable contract between the Company and the CWU. Accordingly the statutory presumption referred to in section 179(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 will not apply."

9. Mr John Hendy QC, who appears for the Defendant, accepts that the Agreement is legally enforceable and complies with the requirements of section 179 of the 1992 Act.

10. Mr Andrew Burns QC, who appears for the Claimant, does not suggest that the industrial action is tortious since it is protected by section 219 of the 1992 Act and there is no longer any challenge to the Claimant's compliance with the requirements of the Act.

11. The issue is whether the strike call was in breach of the Agreement.

12. The Introduction to the Agreement states:

> "This is a ground breaking agreement which for the first time in the UK incorporates unique legal elements into a collective agreement demonstrating our joint commitment to delivering long term success in the interests of customers, employees and the Company.
>
> The purpose of this agreement is to set out our strategy for growth, identify the key components of the growth agenda… and the actions required to deliver it."

13. Section 3 – Legal Protections contains in clause 2 legally binding undertakings by the Claimant to the Defendant. Clause 9 states that the content of section 3 is given legally binding effect in the legally binding agreement at Appendix A.

14. The introduction to Section 4 – Industrial Stability states:

> "An essential part of our Agenda for Growth is to create the right environment for business success by delivering on our commitments to radically improve industrial relations. By doing this, we will be better able to resolve all disputes at pace and in a way that is beneficial to employees and the business thus creating industrial stability."

It is said that this will be achieved through the implementation of a number of measures which includes external mediation. Clause 5.4 provides that external mediation will apply in the following circumstances:

- "If a local disagreement remains unresolved after Stage 3 of the IR Framework there will be seven days for national intervention, after which it will automatically be referred immediately for external mediation.

- Where the national parties fail to reach agreement on a point of principle relating to existing agreements that has been referred to them, it will be referred for external mediation after a period not exceeding one month from it being initially tabled by either party.

- Where there is a national disagreement relating to a matter that is not covered by existing collective agreements, it will be similarly referred if an agreed way forward is not found within one month.

- Where un-balloted industrial action continues beyond 48 hours."

15. Clause 7 of Section 4 states that:

> "The terms set out in the legally binding agreement represent a legally binding commitment to utilise and exhaust these new processes alongside the IR Framework without recourse to unilateral management action or CWU industrial action in accordance with the principles of the existing IR Framework."

16. Clause 3 of the legally binding contract in Appendix A, titled "Protections", sets out the undertakings given by the Claimant to the Defendant.

17. Clause 9, titled "Industrial Stability", provides, so far as is material:

> "9.1 the Company and the CWU shall at all times co-operate and work together in good faith in accordance with the current Agreements including the Agenda for Growth, Stability and Long Term Success and any other collective agreements reached between them during the term of this Agreement.
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> 9.2 The Company and the CWU shall:
>
> 9.2.1 subject to clause 8.3, deal with any disputes for resolution in accordance with the procedures as soon as reasonably practicable;
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> ...
>
> 9.4 If, at any time, either party believes that industrial stability is breaking down or the Procedures are not being adhered to by the other, that party may notify the other to initiate a formal review for a period of three months (unless the parties agree a longer period). During the review period the parties will use their reasonable endeavours to agree any remedial actions to resolve any issues, using External Mediators to assist where necessary."

18. Schedule 3 to the Agreement is titled "Dispute Resolution Procedures". Paragraph 1, the Introduction, states that

> "The purpose of the Procedures is to facilitate the process of reaching agreement and resolving any differences that arise between the parties in respect of any disputes. It shall always be the objective to reach agreement without undue delay at the appropriate level."

Paragraph 2 contains procedures for achieving local agreement which include time limits in which action is to be taken.

19. Paragraph 3 of Schedule 3 titled "Achieving National Agreement", which is applicable to national disputes, states:

> "3.1 Point of Principle
>
> If at any time it is identified that a disagreement has arisen between the Company and the CWU that relates to a point of principle of interpretation or clarification of a national collective agreement it shall, subject to clause 8.3 of this Agreement (which is not relevant for present purposes), be referred in writing to the relevant National Parties by the party for resolution within one month of the disagreement arising, unless both parties agree that the disagreement is likely to be resolved within a further agreed period.
>
> Where the disagreement is not resolved within that period, the matter will be referred for External Mediation in accordance with paragraph 4 below.
>
> 3.2 National Matters
>
> Where agreement cannot be reached in respect of a matter at national level that is not covered by an existing collective agreement within one month of discussions commencing, unless both parties agree that the disagreement is likely to be resolved within a further agreed period, either party may refer the matter for External Mediation in accordance with paragraph 4 below."

20. Paragraph 4 which is titled "External Mediation" states:

> "4.1 Any matter required to be referred for External Mediation pursuant to the Procedures, shall be referred by either of the relevant parties contacting their respective National Representative in the timeframe set out in those Procedures. The National Representatives will, no later than seven days after being contacted (the period for national intervention), jointly appoint an External Mediator or, where the parties cannot agree the appointment, an External Mediator will be appointed by the Chief Conciliator of ACAS.
>
> 4.2 The parties shall instruct the External Mediator to attempt to facilitate agreement between the parties on the issues in dispute and, in the event agreement cannot be reached within four weeks (or a longer period if the parties agree to extend this time limit) of his or her appointment, to issue a statement by the end of such period…"

which includes the external mediators recommended solution to the matter or matters of dispute or disagreement between the parties.

> "4.5 Although the recommendations from the external mediator are non-binding the expectation is that both parties will use the external mediator's recommendations to resolve their differences.
>
> ...
>
> 4.8 In the event that the process concludes without agreement, the parties will notify each other of their intentions in writing and the relevant dispute shall not be further subject to the Procedures."

21. Paragraph 5 is titled "Joint Commitment to the Procedures". Paragraph 5.1 states:

> "The Company and CWU commit to follow and exhaust the Procedures without recourse to unilateral management action or CWU industrial action as set out in paragraphs 5.2 to 5.6 below."

22. Paragraph 5.3 states:

> "Without prejudice to clause 10.4 of this Agreement, until the Procedures have been exhausted in respect of any dispute (including any dispute subject to the early warning/flashpoints procedure in paragraph 7 below), the CWU will not call on its members to take strike action or industrial action short of a strike in relation to that dispute."

23. The present dispute is a "matter at national level" in which agreement between the parties cannot be reached. Further it is not covered by any other dispute resolution procedures in any other collective agreement. Accordingly paragraph 3.2 of Schedule 3 to the Agreement is in play.

24. The Defendant carried out a postal ballot for industrial action which opened on 14 September 2017 and closed on 3 October. The result was notified to the Claimant on 3 October. Turnout was 73.7% with 89.1% voting in favour of strike action. On 5 October the Defendant issued a strike notice and called on its members to take strike action on 19-21 October.

25. It is the Claimant's case that the Defendant is in continuing breach of its contractual obligation not to call for strike action until the External Mediation process which was commenced on 5 October has been exhausted.

26. The Defendant's case, as summarised in Mr Hendy's written submissions (at para 5) is that it has not breached the Agreement, that the time for external mediation has passed, that the Claimant's purported reliance on it is opportunistic and not in good faith and that the Claimant has by its delay in purporting to invoke it obviated the stage which could involve external mediation.

27. Mr Hendy submits that the Defendant would be likely at a full trial to establish that the Claimant had exceeded the permissible time for making a reference to external mediation so that the Procedures have been exhausted and the constraint on the Defendant calling industrial action no longer subsists.

28. As for the test on this application Mr Hendy submits it is not a simple application of *American Cyanamid*. He accepts that the test in section 221 of the 1992 Act applies only where a trade dispute is invoked but he submits that an analogous approach should be adopted in the present case in order to avoid denying the union's fundamental right pursuant to Article 11 of the European Convention on Human Rights to call strike action. The court should therefore, he submits, weigh the merits and not confine its inquiry to whether the Claimant has shown a serious issue to be tried. Mr Burns agrees that in the circumstances I should consider the merits of the parties' contentions as to the proper construction of paragraph 3.2 of Schedule 3 to the Agreement. Mr Hendy and Mr Burns are agreed that the proper approach to applications for interim injunctions is as summarised in *Series 5 Software v Clarke* [1996] 1 All ER 853 where it was said that major factors the court can bear in mind include any clear view the court may reach as to the relevant strength of the parties' cases.

29. I have considered the merits of the parties' construction arguments on paragraph 3.2 of Schedule 3, as I have been invited to do.

30. Mr Hendy and Mr Burns are further agreed that the principles of contractual interpretation set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913 (recently re-endorsed by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24) are applicable in construing the contractual documents in the present case. They are:

> "(1) interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary

> life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments CO. Ltd v Eagle Star Life Assurance Co. Ltd* [1997] AC 749.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191, 201:
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> > 'If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.' "

31. In *Public Service Association and Professional Officers Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] 87 NSWLR 4, a case concerned with the construction of industrial awards drafted by the parties and approved and ordered by the industrial court, Walton J, President of the NSW Industrial Relations Commission, said at para 143 (after referring to *Autoclenz Ltd v Belcher* [2011] UKSC 41):

> "... As Kirby J put it, the construction should be one which contributes to a sensible industrial outcome, provided, as discussed below (and earlier in relation to the extrapolation of principle), such an interpretation may reasonably be available from the language used in the provision (that is, from the text of an award)."

32. Mr Hendy submits that one of the essential features of the procedure for the resolution of disputes under the Agreement is that time is of the essence. The agreement must be construed, he submits, so that a reference to external mediation, where not agreed by both parties, must be made as soon as reasonably practicable and in any event

without undue delay after the expiration of one month from the disagreement in relation to each item of the trade dispute.

33. Mr Hendy accepts that the requirement of acting as soon as reasonably practical is a contractual phrase and must be construed accordingly. However he invites me to take into account judicial consideration given to a similar phrase used in legislation in the context of industrial action. In *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, the Court of Appeal held that the delay of less than 48 hours in communicating the result of an industrial action ballot to the employer breached section 231A of the Act which requires that the result be communicated "as soon as is reasonably practicable". Kay LJ said at para 120:

> "The duty of the union to inform the employer of the section 231 matters 'as soon as is reasonably practicable' after the holding of the ballot (section 231A) imposes a hard temporal burden. If the duty had been to inform 'within a reasonable time', there would have been more elasticity. In particular, it would have been susceptible to an interpretation which embraced reasonableness in the context of the employer's need to know. However, the 'as soon as is reasonably practicable' formula, on application, requires the identification of the earliest time by which the communication of the information is reasonably achievable. The purpose is clearly to maximise the time the employer has to plan and respond before the commencement of the strike, I agree that the union did not comply with its obligation under section 231A. That, by itself, would have justified the grant of the injunction."

34. Further support for his contention that time is of the essence, Mr Hendy submits, is to be found in other language used in the Agreement. In particular Mr Hendy refers to the words "at pace" in the Introduction to section 4, "as soon as reasonably practicable" in clause 9.2.1 of Appendix A, "undue delay" in paragraph 1 of Schedule 3, and the specific time limits in paragraph 4 of Schedule 3 for the external mediation process.

35. Referring to the evidence of Mr Newby (for example at paras 47-51 of his statement) and to the witness statement of Mr Pullinger, the Defendant's Deputy General Secretary (Postal) who is the lead negotiator for the Defendant on all national collective issues related to pay and conditions of employment in the Claimant, Mr Hendy submits it is clear that the failure to agree the various issues in the trade dispute have subsisted for many months since the expiry of the one month of discussions after which reference may be made for external mediation.

36. At paragraph 26 of his skeleton argument Mr Hendy summarises the relevant chronology of the issues in the trade dispute (taken from the Summary) and what he describes as the dates of manifest disagreement. However the reference to external mediation was not made until 5 October 2017.

37. In relation to pensions, Mr Hendy says that when in July 2017 the Claimant broke off talks about pensions entirely, one month had long passed without agreement. In relation to the shorter working week, he says that a disagreement arose on 7 March

2017 when the Claimant said that any reduction would have to be offset by other savings and efficiencies, which proposals were unacceptable to the Defendant. Accordingly one month from that date expired on 7 April 2017. In relation to the Royal Mail pay claim, that claim was rejected by the Claimant by letter dated 7 April 2017 and one month expired on 7 May 2017.

38. Mr Hendy accepts that negotiations continued in relation to these issues and the two remaining "four pillars" issues of pipeline delivery and extension of legally binding agreements, however on 22 May 2017 the Claimant expressed the view that discussions had become circular and were not moving. Mr Hendy submits that there was clear disagreement at this point. One month expired on 20 June 2017.

39. There may well have been disagreement on various matters during the course of these complex and lengthy negotiations, however it is clear from the correspondence to which Mr Burns referred that negotiations between the parties continued up to and through August and September. For example, on 22 August 2017 Mr Pullinger sent Mr Newby suggested amendments for a draft agreement; and on 19 September Mr Pullinger wrote to Mr Newby in reply to Mr Newby's letter of 8 September and further to their ongoing discussions "around the Four Pillars and the Union's Pay Claim 2017". Mr Pullinger concluded by saying that he looked forward to receiving a revised offer.

40. In his oral submissions Mr Hendy did not pursue any argument based on the dates of disagreements and any alleged delay thereafter before the reference for external mediation was made, rather he focussed on the proper construction of paragraph 3.2 of Schedule 3.

41. I reject the Defendant's submissions as to the construction of paragraph 3.2 of Schedule 3. The wording of paragraph 3.2 is clear. Either party may refer the matter for External Mediation at any time after one month of discussions commencing unless both parties agree that the disagreement is likely to be resolved within a further agreed period.

42. There is no express requirement in paragraph 3.2 requiring a party referring a matter for external mediation to do so within a specified time.

43. Mr Hendy contends that what he describes as the "gap" in paragraph 3.2 should be dealt with by requiring the party wishing to refer a matter to do so as soon as reasonably practicable after the expiration of one month from the disagreement. The relevant factual matrix for construing this provision is that an essential part of this "ground breaking agreement" is the creation of an environment which it is intended will be better able to resolve disputes through the implementation of a number of measures which includes external mediation. It does not, in my view, make "business common sense" and is unlikely to contribute to "a sensible industrial outcome" for parties to a disagreement to be denied the opportunity to refer the matter to external mediation unless the reference is made immediately or very shortly after one month of the "discussions" commencing, unless both parties agree that the disagreement is likely to be resolved within a further agreed period.

44. National matters regularly, as in the present case, involve complex and lengthy negotiations. If reference has to be made after one month of discussions commencing

the likelihood is, as Mr Burns suggests, that either the opportunity to refer will be lost or many matters will be referred unnecessarily. That makes no sense. It is unlikely that after only one month of discussions that it can be known whether external mediation may assist if ultimately no agreement is reached in the negotiations. I consider that an important part of the Dispute Resolution Procedure will be undermined if the Defendant's contention were to succeed.

45. Whilst observing that the reference for external mediation was delayed until after the balloting procedure was commenced, the result published and notice of industrial action was served, Mr Hendy did not pursue any allegation that the Claimant had acted in bad faith.

46. I have reached the clear conclusion that the provisions of the agreement, and in particular paragraph 3.2 of Schedule 3 permitted the Claimant to refer the present dispute to external mediation pursuant to the Dispute Resolution Procedures at the time it did.

47. Accordingly I consider the strike call to be unlawful and that as at the time I made my order yesterday afternoon the Defendant was in continuing breach of its contractual obligation not to call for strike action until the External Mediation process has been exhausted.

48. I have no doubt that damages are not an adequate remedy in this case. Mr Newby explains in his witness statement the very damaging impact of the proposed stoppage on the Claimant and its customers. It will cause substantial delays in delivering services and lost business for the Claimant. No amount of contingency planning can manage the impact of a national strike. Just one day of strike action will cause millions of pounds in lost revenue. Further, the strike will jeopardise the Claimant's reputation in a highly competitive market where reliable service is essential to businesses. Mr Hendy does not argue to the contrary.

49. Given Mr Newby's evidence as to the financial and logistical consequences of a strike for the Claimant, I accept Mr Burns' submission that the balance of convenience is strongly in favour of the parties having the opportunity to resolve the dispute through external mediation in accordance with the contractual procedure. The order I am invited to make will result in little prejudice to the Defendant. The ballot in favour of strike action is valid for six months. The Defendant still has the opportunity to call its members out on strike if external mediation turns out to be unsuccessful. Again Mr Hendy does not argue to the contrary if I accept, which I do, his submission that the merits of the construction issue should be considered.

50. For the reasons I have given I granted the relief sought.