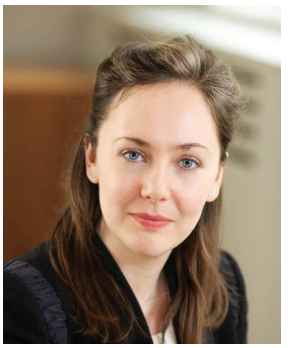
Industrial action: Serco approach prevails

Recent cases have demonstrated that whether industrial action can go ahead depends on the approach taken by the courts to interpreting and applying the balloting provisions in part V of the Trade Union and Labour Relations (Consolidation) Act 1992. The prevailing approach, following the decision of the Court of Appeal in *Serco Ltd v National Union of Rail, Maritime and Transport Workers,* is that balloting provisions should not place an unduly heavy burden on trade unions. Alice Carse reports on two recent cases that follow *Serco*



Carse: injunctions are less likely to be granted on technical arguments

London Underground Ltd v ASLEF

Almost half of the union members who voted in the ballot were not rostered to work or the depots at which they worked were closed on the day of the proposed strike. London Underground sought an interim injunction restraining the industrial action on the basis that, contrary to s.227 TULR(C)A, ASLEF could not reasonably have believed that union members not due to attend work on 26 December 2011, the day of the proposed strike, would be induced to take part in the industrial action.

S.227(1) TULR(C)A states:

> *'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.'*

To succeed on this argument London Underground needed to establish as a finding of fact that the proposed strike action was limited to 26 December 2011 alone and could not include further days beyond that date. Eder J considered that the likely conclusion at trial would be that the proposed strike action was not limited to this date, which was 'fatal' to the application for an interim injunction.

Legal argument

Eder J went on to consider the legal argument over the meaning of the phrase 'take part in the industrial action in question'. His Lordship stated that even if he was wrong about the dates of the proposed strike action, London Underground's application would be refused for three reasons.

First, although his Lordship accepted that a strike should have a democratic mandate, it did not seem necessarily to follow that the people who should be balloted must be limited to those who would be on strike on a particular day. Secondly, the construction of the section, in particular the use of the words 'take part in' in s.227, 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 Scott J sitting in the Employment Appeal Tribunal in *Bolton Roadways Ltd v Edwards & ors*.

Bolton, which Eder J used as an interpretative aid, was about dismissals in connection with industrial action under what is now s.238(1)(b) TULR(C)A. The case considered the situation of employees who claimed to have been unfairly dismissed when at the date of the dismissal they were taking part in a strike or other industrial action.

In *Bolton*, 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 such an employee could be held to have taken part in the strike if he or she attended at the picket line or took part in the strikers' activities.

London Underground argued that *Bolton* was inconsistent with the earlier Court of Appeal authorities of *McCormick v Horsepower Ltd* and *Coates v Modern Methods & Materials Ltd*, both of which concerned s.238 TULR(C)A and neither of which were cited in argument in *Bolton*.

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 employer 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 a couple of hours 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*, stating that *McCormick* and *Coates* dealt with very different questions. Setting this point aside, however, the interpretation deployed in *Bolton* and followed by Eder J in *London Underground* undermines

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internal consistency within a statute as a principle of statutory interpretation.

This is an interpretation that eschews the essence of striking, which is withdrawing one's labour in breach of the contractual obligation to attend work. Strikes and industrial action are based on the idea of employees 'not doing' something such as attending work or working overtime, but this interpretation allows the focus to stray towards employees who are 'doing' something extra such as joining a picket. The words 'take part in' are given particular significance to support this construction.

The purpose of Part V of TULR(C)A is to provide statutory immunity to trade unions from the tort of inducing breach of contract. The interpretation of s.227(1) TULR(C)A deployed in *London Underground* is one that is not focused on the mischief of the section but is unduly concerned with what employees, who are not in breach of contract, are doing.

Further, this allows employees who are not scheduled to work on a particular day, to effectively call out their colleagues who are scheduled to work on a particular day and accordingly forgo a day's pay. It is an interpretation which gives rise to concerns about a democratic deficit within trade unions.

Balfour Beatty Engineering Services v UNITE the Union

In this case, where 440 valid ballots were cast, approximately 100 eligible union members were thought not to have received ballot papers; there were 313 votes in favour of industrial action short of a strike and 295 votes in favour of strike action. Balfour Beatty applied for an interim injunction on the basis that UNITE had not complied with s.230(2) TULR(C)A, which provides:

> *'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.'*

Refusing the application for an interim injuntion, Eady J held that, as far as reasonably practicable, every eligible person had a ballot paper sent to him and was afforded a convenient opportunity to vote by post.

The decision in *Serco* emphasises 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 that it knows to be incorrect.

Eady J followed *Serco* and 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 what are the appropriate steps to take in a given situation. This duty does not extend to requiring trade unions to take every possible reasonably practicable step but will not be satisfied by doing one's incompetent best.

His Lordship stated that there had to be some leeway for trade union officers, who were familiar with their own union's particular problems of record keeping, to take their own course in making genuine attempts to achieve the statutory standard.

This reasoning recognises the degree of knowledge and expertise trade union officials have in 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.

Conclusion

The practical implications of these decisions, as well as the less stringent approach to statutory requirements which underpins them, is that injunctions to restrain industrial action are now less likely to be granted by the courts where such applications are based primarily on technical arguments.

Employers may be well advised to focus their energies on mitigating the impact of industrial action upon the business rather than attempting to injunct the trade union that is calling its employees out on strike.

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Cases referred to:

- *Serco Ltd v National Union of Rail, Maritime and Transport Workers* [2011] ICR 848
- *London Underground Ltd v ASLEF* [2011] EWHC 3506 (QB)
- *Bolton Roadways Ltd v Edwards & ors* [1987] IRLR 392
- *McCormick v Horsepower Ltd* [1981] ICR 535
- *Coates v Modern Methods & Materials Ltd* [1982] ICR 76
- *Balfour Beatty Engineering Services v UNITE the Union* [2012] EWHC 267 (QB)