PENNINGTONS MANCHES COOPER

INJUNCTIONS AND THE INDUSTRIAL LANDSCAPE

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Cross border disputes

- EU fundamental freedoms of provision of services – Article 56 – TFEU
- Freedom of establishment – Article 49 – TFEU
- CJEU decision in Viking Line and Laval
- Viking Line– Article 49 TFEU
- The industrial action was to prevent a Finnish shipping company from reflagging its vessel to Estonia where it would be able to crew it with less expensive Estonian crew

Cross border disputes

- Laval – an Article 56 TFEU case
- The aim of the action was intended to compel a building company to accept the terms of Swedish collective agreement rather than employing Latvian workers on cheaper terms and conditions
- In both cases the CJEU concluded that the industrial action was a disproportionate and unlawful interference with the fundamental freedoms enjoyed by the companies
- Where does this leave action under the 1992 Act involving cross border industries?

Govia GTR Railway Limited v ASLEF [2016] EWCA Civ 1309

- Govia sought to argue that there was unlawful interference with its right under Article 49 – based on the fact of its 35% French ownership and the right of itself
- Also sought to argue a claim under Article 56 that the passengers may seek to use its trains
- Elias LJ noted the critical issue is not the effect of the proposed industrial action but the effect on the employer if it had to accept the terms imposed by the Union

Govia GTR Railway Limited v ASLEF [2016] EWCA Civ 1309

- "*It is plain… that the measure which was likely to hinder or make less attractive the exercise of the freedom of establishment was not the mere fact that damage may result from the industrial action; it was the objective which the industrial action was seeking to achieve.*"

Govia GTR Railway Limited v ASLEF [2016] EWCA Civ 1309

- Similar reasoning was applied in relation to Article 56 - not the objective of the industrial action to prevent passengers on Govia trains exercising their Article 56 rights even if, to some extent, that was the effect of such action
- Court of Appeal's judgement is a rare case of also referencing the rights of the union and its members under Article 11 of the ECHR Convention

Govia GTR Railway Limited v ASLEF [2016] EWCA Civ 1309

- Judgment is likely to provide unions with a greater degree of protection in cross border industries.

- Unlike disputes under the 1992 Act, claims by employers based on the EU fundamental freedoms may not be subject to any cap on damages – unions would not want to run the risk of an award of unlimited damages.

Apportionment of pay

- What is the correct apportionment of pay for a deduction following a day of industrial action? The employer is not obliged to accept part performance of the contract on any given day on which industrial action is taken.
- In the context of an annual contract in which payment was monthly and given the wide variety of work that might be carried out (both directed and undirected) there will be no distinction between days on which work was carried and days on which work was not carried out.

Apportionment of pay

- The natural effect of the Apportionment Act 1870 in such a case would be that the pay was apportioned (in this case for teachers) on the day of the strike at the rate of 1/365 of the annual salary and not 1/260

- *Hartley v King Edward VI College [2017] UKSC 39*

Periods of industrial action

- TU Act 2016 introduced an additional requirement in section 229(2D) of the 1992 Act.
- Union must indicate in its ballot paper "*The period or periods within which the industrial action, or as the case may be, each type of industrial action, is expected to take place.*"
- BALPA ballot paper stated: "*It is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 8 September 2017 to 18 February 2018.*"

Periods of industrial action

- Thomas Cook challenged the wording as being imprecise and failing to comply with a statutory requirement
- BALPA argued it would be impracticable to require to provide specific dates, specific dates of strike action were very much dependant on other matters.
- For example, the size of the mandate provided as part of the ballot process and the process of any ongoing pay negotiations.

Periods of industrial action

- The judgment reiterates that the normal *American Cyanamid* principles would not apply in relation to interim injunctions. A different, more stringent test should be applied.
- The judgment summarised this as being: "*Is it more likely than not that the Defendant [ie the Union] failed to comply with section 229(2D)?"*
- The Judge rejected the application for the interim injunction as it was not likely that the court would conclude that more detail was required than BALPA had set out in its paper.

Periods of industrial action

- Any further detail risked the provision as being vague and/or unworkable.
- The decision reiterates that planning industrial action remains a dynamic and reactive process subject to the ongoing dispute resolution.
- The section also reiterates that a trade union is not required to give its best guess as to how and when a trade dispute will end.
  Thomas Cook Airlines Ltd v BALPA [2017] EWHC 2253 QB

Categories of employees

- BA challenged the union's ballot paper as it did not state the fleet to which the pilots were assigned
- Pilots are assigned to either short haul or long haul flights, different aircraft flown in each fleet and a pilot could not transfer to a different fleet without receiving training on how to fly those planes
- Court of Appeal considered legislative history and noted that section 226A in its current iteration removed the need to help an employer to plan for the industrial action

Categories of employees

- The guidance on the language was best served by considering the decision in the *National Union of Rail, Maritime and Transport Workers v Serco Ltd [2011] EWCA Civ 226.*
- Categories is not defined – it remains broad and flexible. The legislation left it for the union to determine what categories were to be specified, but the list had to be as accurate as was reasonably practical based on the information that the union possessess at the time.

Categories of employees

- The Employment Relations Act 2004 removed the uncertainty in section 226A and there was no longer the express purpose "*to help an employer to make a plan*."
- The Court of Appeal determined that there were two broad principles to be balanced:
- The purpose of the current statutory provisions meant that planning was no longer the yardstick by which the content of a notification obligation was to be judged; and

Categories of emploees

- There remained a rationale of a policy of giving fair contingency planing and this was to be balanced on a case by case basis.
- The union can use any particular category of jobs. This could include profession, trade, grade, occupation, pay band.
- The appropriateness of the categorisation was to be assessed in light of the twin policy objectives but it was no longer a requirement for a union to determine the information given by reference to what would help an employer plan.

Leverage campaigns

- Has the TU Act 2016 increased the use of leverage campaigns in conjunction with mandates for lawful industrial action?
- Peaceful demonstrations
- Publicity campaigns
- Social media campaigns
- All are subject to the applicable laws including defamation, civil actions and public order
- Unions recognising that their operations should be brought in line with current employment practices and the digital age?

Industrial action trends

- Has the TU Act 2016 led to a decrease in industrial action?
- If so, are there any other factors at play?

ONS analysis 2018

- 273,000 working days lost due to labour disputes – sixth lowest annual total since records began in 1891.
- Education sector accounted for 66% of all working days lost – due mainly to disputes involving employees of universities.
- Number of working days lost in the public sector (26,000) was the lowest since records for public sector strikes began in 1996.

ONS analysis 2018

- There were 39,000 workers involved with labour disputes – the second lowest figure since records for workers involved began in 1893.
- A lack of large scale national disputes in 2018?
- There were 81 stoppages – the second lowest figure since records for stoppages began in 1930.

ONS analysis

- The mean number of working days lost for stoppage has been broadly flat for the last three years – straddling the TU Act 2016.
- Causes of disputes has remained fairly stable following the last recession-pay has been the main cause of disputes in all years except for 2016 when the figures were skewed by the junior doctors' dispute over pattern of hours worked.
- Just over half of the total stoppages in 2018 lasted for five days or more.

ONS analysis

- Majority of working days lost are in the private sector
- 2016 - 243 days public/79 days private
- 2017 - 44 days public/232 days private
- 2018 - 26 days public/246 days private

Finally

- Questions?

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