When is a trade dispute a dispute

1. The so-called golden formula contained in s 219 of TULRCA applies a defence to a claim that a union's conduct in calling a strike is an actionable tort in the case where there is a 'trade dispute' between workers and their employer. But at what point does a trade dispute begin; is it a trade dispute; is what is being done in contemplation or furtherance of it; and may it have come to an end by the time of the proposed strike such that the statutory defence may evaporate?

2. There are perhaps three questions to consider:
   (i) is there is a dispute at all;
   (ii) is what is being done in contemplation or furtherance of that dispute; and
   (iii) is the dispute a 'trade dispute' as defined.

(i) Is there a dispute at all

3. The starting point is that the dispute must be between workers and *their* employer. This means that the defence will not inure for the benefit of a union in the case where the dispute concerns someone other than workers and their own employer. Hence this means that so called secondary action – going on strike in support of other workers who have a dispute with their separate employer – will not secure the protection of the golden formula.

4. This reflects a change introduced in the early 1980s to limit the application of the golden formula defence to the case of a dispute between workers and the employer. The aim was to prevent a union representing employees of employer A taking its members out on strike in support of a dispute between the employees of employer B and that employer. The plan was that, at a sweep, strike action by one union in support of another would not be immune from liability.

5. The dispute must involve current workers: where those in dispute are prospective employees, the defence is not engaged. So, for example, in

University College Hospital v Unison [1999] IRLR 31 where a dispute concerned the terms which someone other than the employer would apply and which would affect persons not yet employed by the employer, the statutory defence could not apply.

6. There is also an additional provision relevant to the public sector. There may be a trade dispute between a Minister of the Crown and any workers which relates to a matter which cannot be settled without the Minister exercising statutory powers. In Secretary of State for Education v NUT [2016] IRLR 512, a case where the teachers' union called a strike, the judge held that there was no dispute between the union (or the workers) and their employer, certain FE colleges. The union had not made demands of their employer, which could have given rise to a dispute with the employer, because the union recognised that the colleges' hands were tied by decisions as to funding made by the Secretary of State. Hence the judge said there was no trade dispute with the employer. But there was a dispute with the Secretary of State and that was enough potentially to bring the dispute within s 244. There remained the question of the subject matter of the dispute, considered below, which had to be resolved to decide whether this was a trade dispute properly so called.

7. In considering whether there there is a dispute, the strike itself is not the dispute. So to hold would be to assume that which needed to be proved. The union needs to show that there is a dispute in response to which the union decides to call a strike. Thus the strike must relate to or be intended to advance an underlying state of affairs which constitutes a dispute. Whether there is a dispute is something which must be objectively judged rather than a matter for the opinion of a decision maker: Express Newspapers v McShane [1980] AC 672. However, it may be that the views of the relevant actors will inform or be evidence relevant to the question whether objectively there is a dispute.

8. The starting point for a dispute will of necessity be some disagreement or grievance falling within the list of the types of thing which may constitute a trade dispute, such as disagreements about terms and conditions of employment.

9. It is obvious that whether there is a disagreement is likely to be informed by the views of the participants. If, for example, the union identifies a particular area of concern and says that, in its opinion, the employer is being intransigent, that statement of opinion would be likely to be powerful evidence establishing that there is a dispute.

10. Such a situation can easily arise and do so at an early stage. In Beetham v Trinidad Cement [1960] AC 132, Lord Denning held that a dispute arose whenever there was a difference between the parties and a difference could arise before the parties come to blows. It was enough that the parties were 'sparring for an opening'. It appears to follow that a dispute can arise when the parties have a difference of view about a matter even if nothing more has developed and nothing has been done in consequence. In Secretary of State for Education v NUT [2016] EWHC 812, it was said that all that was required was a 'disagreement about an issue', para 39. By way of example, in Beetham it was enough that the union had applied for recognition for collective bargaining and this request had been ignored. The employer did not have to have taken any step or expressed any view contrary to that of the union. The fact that the employer did not do as the union wished was enough to engender a dispute.

11. It is enough that the difference is between the union and the employer. Such a dispute will count as a dispute between workers and their employer because the union is taken to act for its members – the workers. This means that issues which arise at a union level rather than the individual level (such as recognition in Beetham) are capable of giving rise to trade disputes.

12. For how long does a dispute last? There is some authority which suggests that a dispute subsists as long as one side genuinely and reasonably believes that there is a dispute: London Borough of Newham v NALGO [1993] IRLR 83. It might be said that that is difficult to reconcile with the House of Lords judgment in McShane which said that whether there was a dispute was a matter to be determined objectively. Whilst the existence or otherwise of the dispute is a matter for objective determination, the fact that one party thought

that there was a difference of view could be a strong indicator that, objectively assessed, there was. So in this way the opinions of the parties can feed into the question whether there as a dispute.

13. A dispute will cease to exist when matters have been resolved. This, too, is a question of fact, no doubt to be objectively assessed. But where one party expresses the view that the dispute has not been resolved, that is likely to be influential in deciding whether or not it has been. In ISS Mediclean v GMB [2015] IRLR 96, the employer said that a dispute had been settled. In that case the employer relied on minutes of a meeting said to contain terms of settlement, but the judge observed that the minutes had not been signed on behalf of the union, indicating that it had not given its assent to the accuracy of the document and so casting doubt on whether there had been a settlement. The judge also relied in particular on the statement by a union official that matters had not been settled – applying the subjective approach in order to ascertain objective facts. That reflects the reality that a matter will only have been resolved when all parties to the dispute agree it has been. The Court of Appeal had held that the question is assessed by asking whether

> 'the average reasonable trade union member, looking at the matter at or shortly after any interruption in industrial action, would say to himself "the industrial action has now come to an end", even if he might also say, "the union may want to call us out again if the dispute continues".'

Post Office v Union of Communication Workers [1990] IRLR 143, cited in ISS Mediclean.

(ii) Contemplation or furtherance

14. As to the second issue, things done in contemplation or furtherance of a trade dispute, the answer is that this will often turn on the subjective view of the trade union. Whilst the question whether there is a dispute will be something which requires an objective assessment, whether something is done in contemplation or furtherance of that dispute is a subjective one. If a trade union honestly and genuinely thinks that an act will assist one of the parties to the dispute and that party does the act for that reason – that that is what is in

the party's mind in doing the act – then the act will be done in contemplation or furtherance of the dispute. It is enough that a person thinks that the action may help a particular cause. It is enough even if the party thinks that the advantage to flow from the action is minor: Express Newspapers v McShane [1980] AC 672, 686, 689-690, 691-2, 693-4. It is for the union official, not the court, to decide whether a proposed course of action will is likely to have an advantageous effect in the dispute. The trade union official must have the honest belief that the action is likely to advance a cause, but that belief does not have to be wise nor proportionate in the light of the consequences of the actions on third parties.

(iii) Trade Dispute

15. The third and likely most contentious issue is whether the dispute is a *trade* dispute as defined.

16. This may often be the most difficult area in a case: is the subject matter of the dispute something that falls within the definition or is it an extraneous matter. Such matters may often be of great importance to a union. There may be political differences, for example. But such differences will not necessarily mean that there is a trade dispute is defined.

17. An important point to note is that a trade dispute must be 'wholly or mainly' relating to one or more of the listed matters. That is a narrowing of the scope of the defence. The former defence required only that the dispute be 'connected with'; one or other matter. That meant that it could also be connected with a whole range of other matters and the fact that just one of them was a factor described in the golden formula was enough. The limit to that which wholly or mainly relates to one of those matters is intended to be different and to limit the scope of the defence. An example of the effect of the limitation is Mercury Communications v Scott-Garner [1984] Ch 37. A union was opposed to the privatisation of BT and introduction of competitors. The union called a strike which would have prevented a competitor being linked to BT's systems. Whilst there might have been an impact on workers, it was held that the dispute was not wholly or mainly about that. The Court of Appeal

relied heavily on what the union said to the employers: it had not mentioned job security so it was hard to say that that was what the dispute was mainly about.

18. Focus on how the union presented the dispute was relevant in another case where the employer said that the true dispute was political, Westminster City Council v Unison [2001] ICR 1046. The issue in that case was a proposal by the council to contract out functions to a private company. The union had misgivings about the policy about contracting out services. But the Court of Appeal held that the dispute was predominantly about a change in the identity of the employer which would affect current employees and that that was a trade dispute.

19. The matters to which the action must wholly or mainly relate are as follows:

> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
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> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
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> (c) allocation of work or the duties of employment between workers or groups of workers;
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> (d) matters of discipline;
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> (e) a worker's membership or non-membership of a trade union;
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> (f) facilities for officials of trade unions; and
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> (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.

20. In many cases whether the dispute is a trade dispute or a dispute about something else, such as politics, will depend on how the union expresses itself in its communications. In Westminster City Council v Unison, the judge at first instance held that there was not a trade dispute but a political dispute – a dispute about public policy which was being dressed up as a dispute about the

identity of the employer. The Court of Appeal disagreed, relying on contemporaneous documents, the evidence of union officials and the terms of the ballot paper (e.g. para 43 and 63).

21. In the NUT case, the government argued that the dispute with the Secretary of State was political as it concerned a dispute about the level of funding for FE colleges rather than one relating to employment. The Secretary of State relied on social media posts placed by the union in support of that argument. The judge held that the issue as to whether that was a trade dispute turned on its purpose. The judge accepted that there was a sufficient link between the concerns about funding and pay to mean that this was a trade dispute. Since the union was saying that the effect of the level of FE funding affected the pay of staff, that was enough to mean that there was a trade dispute.

22. It will often be important for both sides, therefore, to review what has been said by the union to its members in seeking to encourage a strike. The more that it can be shown that what has been expressed is matters such as political differences, the better the employer's chances of saying that, even if there are also employment issues, those were not what the action was wholly or mainly about. A well advised union will ensure that its publicity material invokes the language of whichever element of the golden formula is in play. The point made above in the context of the NUT case about reliance on the union's social media posts in support of an argument that the dispute was political rather than about matters connected with employment is telling in this regard.

23. The various headings of the subject matter for a dispute are given a wide interpretation. Therefore where a contract required teachers to comply with reasonable instructions given by the head teacher, a dispute about the instructions the head had given was a trade dispute even though it did not concern the terms of the employment but their application: P v NASUWT [2003] ICR 386. Further there may be a trade dispute even where that which is in dispute is not the terms of a contract.

24. The first limb is terms and conditions of employment. The NUT case gives a good example of the breadth of this concept. In that case, a dispute about funding for an overall sector was held to include a dispute about individual pay. Underlying the case was a claim to a particular pay rise which could only be awarded if additional funding were provided. The judge accepted that reduced public funding could lead to a loss of pay and jobs and more funding could lead to pay increases and protect jobs: para 62. The judge accepted the NUT's aim was to shore up its members jobs and conditions by securing enhanced funding for the sixth form sector rather than seeking to improve the position of the sixth form sector in itself.

25. It may be in another case there could be a question whether this satisfied the 'wholly or mainly' test, so this is a good example of how unions will need to explain their aims with care and how employers may seek to exploit gaps in the explanation.

26. In truth most strikes will be about terms and conditions of employment – pay, benefits, holidays etc.

27. It has also been held that there may a dispute about terms and conditions of employment arising from the obligation to comply with an employer's instructions where workers disagree with what they are being asked to do: P v NASUWT. There was a trade dispute if there was a dispute between the employer and employees about 'the job the employees are employed to do or the terms and conditions on which they are employed to do it'. Because in that case the dispute related to the job the teachers were employed to do, it fell within the definition.

28. It is not necessary for every employee called out on strike to be affected by the issue concerning terms and conditions. In BT v CWU [2004] IRLR 58. In that case, BT was introducing a 'self-motivation team working scheme' which would affect part of its operations only. The union rejected the scheme and later called for a strike. BT said that there was no trade dispute because some of those balloted would not be affected by the scheme. The court rejected this

noting that the statutory wording is 'terms and conditions of employment and that that is not preceded by 'their'. To say that the terms and conditions had to be applicable to those called out on strike would be contrary to the wording, later in the sub-section, 'physical conditions in which *any workers* are required to work'. Other headings such as 'matters of discipline' were not limited to disciplinary action against workers asked to strike. Perhaps most important, at the level of principle, unions carry out a representative function and that would be undermined if they could only call on affected employees to strike.

29. But some cases have tried to push the scope of this provision further and to include a wider range of contractual disputes. It has been held that terms between the employer and a third party do not count. So a dispute about whether an employer would contribute to a welfare fund maintained by a third party was not sufficient to establish a trade dispute: Universe Tankships v ITWF [1982] 2 All ER 67.

30. The second limb is termination of employment. This includes the engagement or non-engagement of employees and their suspension. It includes threatened redundancies, such as the case where employees fear that the use of third party providers may lead to job cuts: Hadmor Productions v Hamilton [1983] 1 AC 191. There was no requirement that redundancy notices should have been issued. It was enough that there was a fear that if the third party were used, employees might be dismissed; that there was a fear in relation to job security.

31. The third limb is allocation of work. This includes disputes concerning who carries out work. But the dispute can only arise in connection with the allocation of work by the employer amongst employees. This limb does not cover the case where the employer decides to use a third party to provide services: Dimbleby & Sons v NUJ [1984] ICR 386, 408-9. There might, however, be a dispute under the 'termination of employment' head if the use of a third party provider gave rise to the risk of redundancy.

32. The remaining heads are matters of discipline, workers' membership or non-membership of a trade union, facilities for officials of trade unions and

machinery for negotiation or consultation in relation to any of the above matters.

33. There has been little litigation about these heads, save that Beetham concerned a dispute about recognition. The Court of Appeal in Torquay Hotel v Cousins [1969] 2 Ch 106 held that a refusal by an employer to recognise a union clearly gave rise to a trade dispute (at p. 136). The courts have not, however, expressed a view about their scope of the other bases for the existence of a trade dispute.

34. It is relevant, in conclusion, to comment on various types of dispute which will not obtain the benefit of the protection of the golden formula.

35. As indicated above, there will in many cases be a question whether what is presented as a dispute falls within s 244 and so secures protection or falls outside it; and, as indicated, a key factor will be to look at how the union formulates the dispute, not just on the ballot paper but also in communications which precede it in order to ascertain the true reason for the dispute.

36. By looking at such reasoning one can also identify whether the dispute is of a type which will not fall to be protected.

37. As indicated, a political strike will not be protected. This most obviously arises in the public sector, of course, even if cases such as the NUT case in 2016 indicate that the courts will look to see whether it is possible to characterise that which might appear political as relating to terms and conditions. Much will depend on how the dispute is presented. Thus in that case the union could present as a dispute about terms and conditions one which had, at least as an element of the dispute, a concern about overall levels of funding in a particular sector.

38. Other cases indicate the ability of unions to argue that there is an employment aspect to a case which the employer says is political. So in London Borough of Wandsworth v NASUWT [1993] IRLR 344 a proposed boycott of assessing

children under the national curriculum could still be regarded as a trade dispute because it was regarded as concerning terms and conditions – in that case, working time. In that case, the union had tied the obligation on teachers to conduct assessments under the national curriculum to additional working hours, even though there were also other concerns.

39. But some cases will be obviously political, such as opposition to government policy or objection to publication of a particular article in a newspaper because of the line it takes (an example given by Lord Denning in BBC v Hearn [1977] ICR 685).

40. Another category of dispute which would not fall to be regarded as a trade dispute is a personal dispute or a desire to protect the union or its reputation. So action against companies because individuals within them express views antithetical to a union do not fall to be regarded as trade disputes: Torquay Hotel.

41. Thus in all these cases it is how the dispute comes to be presented which is important. That is a lesson both for unions, who can seek to advance their cases as allied to terms of employment, and employers who can seek to exploit the case where the union's explanation for action extends wider.

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