Strike Action

Can an employer *really* sack striking workers?

In an article in the Financial Times on 20 July 2012 entitled "Can I dismiss workforce for strike action?", the head of employment at Simpson Millar solicitors advised the employer that industrial action by a completely non-union workforce is unofficial and that an employer in that situation can dismiss workers taking part in the action, provided that they follow a fair and reasonable procedure.

We do not agree. The action would not be regarded as unofficial and the workers can seek a finding of automatic unfair dismissal where the dismissal is within the prescribed period. In any event an Employment Tribunal would still be able to hear the workers' claims for unfair dismissal if one or more of them was not dismissed, or was re-engaged within three months.
Here is our update to the law on industrial action.

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Taking Industrial Action

Since the national day of action in relation to public sector pensions on 30 November 2011, when there were no substantial legal challenges by employers,we have seen a constant stream of challenges in the courts.

Through our Trade Union Law Group, we were pleased to advise almost all unions taking action on 30 November, and we have been pleased to represent unions in all of the challenges which have reached the courts since then.

The legal backdrop to the recent stream of challenges is the ground-breaking decision in the ASLEF v London and Birmingham Railway /RMT v Serco Docklands case in March 2011.

In that case, the Court of Appeal accepted that the industrial action legislation had to be given a "likely and workable" meaning and that it should not be construed restrictively against trade unions.

Overleaf we summarise the industrial action cases which have reached the courts since December 2011.

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Industrial Action in the Courts Last Year

1. London Underground Limited v ASLEF (December 2011)

ASLEF balloted its London Underground members for strike action in relation to Boxing Day working arrangements. London Underground argued that the ballot was for industrial action on Boxing Day only, and that members not rostered to work on Boxing Day (or working at depots which would be closed on Boxing Day) should not therefore have been balloted.

We were able to persuade the Court that the intended dates for industrial action were not confined to Boxing Day. It was therefore legitimate for the union to have included in the ballot other members who would not be working on Boxing Day. There were no reasons to suppose that the union had misled its members as to the dates of intended action, nor that the independent scrutineer had failed to perform its duties. The injunction was refused.

2. Balfour Beatty Engineering Services Limited v Unite the Union (February 2012)

Unite balloted its members employed by Balfour Beatty for industrial action in relation to a dispute about the imposition of new terms and conditions, and the abolition of collective bargaining in the construction industry. Having been forced to abandon wide-ranging challenges as to the accuracy of Unite's "list" and "figures" in its ballot notice, Balfour Beatty argued that Unite had not taken sufficient steps to ensure that all members entitled to vote in the ballot were sent ballot papers by post.

We were able to persuade the Court that Unite had taken sufficient steps to ensure that members entitled to vote received ballot papers by post - even though the Court could not rule out the possibility that as many as 100 members had not been sent ballot papers, as compared to 444 voting papers validly counted. The Court securely rooted its judgment in the Court of Appeal's judgment in the ASLEF/RMT case, emphasising the need for a "workable" and even-handed construction to be given to the legislation. The Court commented that Unite had gone to "considerable lengths" (which may be thought to have exceeded what was required) to meet its obligations, and that its efforts have been "formidable". The injunction was refused. The employers' proposals in the construction industry were immediately withdrawn.

3. Sodexho Remote Sites BV v (1) Unite the Union and (2) RMT (May 2012- Scottish Outer Court of Session)

Unite and RMT balloted their members employed in the offshore catering industry in the North Sea in relation to a dispute over pay. Acting as a representative employer, Sodexho Remote Sites BV argued that the ballot notices should have been served on the actual employing companies in the ns.

Netherlands, rather than their Aberdeen-based agents, and that the "lists" and "figures" set out in the ballot notices should have been by reference to individual offshore installations.

We were able to persuade the Scottish Inner Court of Session that the applications for injunctions should be refused. In the circumstances, service of the notices on the Aberdeen-based agents of the employers was sufficient. Although individual offshore installations amounted to "premises" for the purpose of the industrial action legislation, the evidence was that the union's members worked at or from two or more installations and that the information in the union's possession showed the address of the Aberdeen-based agent as the workplace. The unions were therefore entitled to specify the workplace of the members to be balloted as the address of the Aberdeen-based agent.

4. Metroline Travel Line Limited v Unite the Union (June 2012)

Unite balloted its members employed by 22 bus companies in London in relation to the Olympic bonus payment dispute. The ballot notice specified that the members to be balloted were those "working on TfL contracts either on a full-time or part-time basis". The Court, granting the injunction in favour of three of the bus companies, ruled that this description was not sufficiently precise to enable the bus companies to identify which employees were included, and which were excluded, from the ballot. With the union's appeal and seven further injunction applications outstanding, the dispute was settled when the bus companies agreed to make the bonus payments.

5. UK Border Agency v PCS (July 2012)

PCS balloted its UK Border Agency members to take strike action commencing on the day before the Olympics started. The UK Border Agency sought an injunction arguing that PCS had failed to make it clear that it was only balloting UK based staff. We argued that it was clear from past ballots that the union only intended to call UK members and that the matter was so trivial that it should be disregarded anyway as PCS only had 12 members overseas in the relevant categories out of a ballot of 15,714 members.

On the morning of the hearing, PCS announced that it was calling off the action due to progress made in talks. We were able to resist the government's application for costs.

Conclusions

The ongoing profound impact of last year's decision of the Court of Appeal in the RMT/ASLEF case is clear. The Courts are tending towards slightly less restrictive interpretations of the industrial action legislation, with slightly more latitude being given to trade unions. This is reflected in the number of cases where it has been possible to resist applications for injunctions at first instance.

But these successes should not in any way be taken as a licence to let up on painstaking membership data checking procedures, and precision with the wording of ballot and action notices, and other balloting procedures. The UK's industrial action legislation, even with its more favourable interpretation after the RMT/ASLEF case, remains amongst the most restrictive in the western world and the obligations it imposes upon trade unions continue to be extremely onerous.

Whether those obligations imposed by the UK's industrial action legislation comply with the Freedom of Association protected by Article 11 of the European Convention on Human Rights is, of course, another matter. The RMT's challenge (to the notification requirements and the outright ban on secondary action), which was originally filed with the Court in Strasbourg in May 2010, has just passed through the Court's initial sifting process. The UK government is required to file its response to the RMT's claim by mid-January 2013.

Trade Union Law Group
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About Trade Union Law Group

Our Trade Union Law Group provides advice and representation to many trade unions on industrial action and other collective trade union matters.

The group comprises core national trade union lawyers and regional representatives.

For further information in relation to our Trade Union Law Group, please contact Richard Arthur at richardarthur@thompsons.law.co.uk.

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