Employment Law

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Review

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Industrial Action Balloting

COURTS FOLLOW A MORE FLEXIBLE APPROACH

The recent cases of Balfour Beatty Engineering Services Limited v Unite the Union [2012] EWHC 267 (QB) and London Underground Ltd v Associated Society of Locomotive Engineers and Firemen [2011] EWHC 3506 (QB) have reflected the decision reached in NURMT v Serco and ASLEF v London Midland [2011] IRLR 399, which was reported in our Winter 2012 Employment Law Review. Both cases indicate that courts are following a more flexible approach when considering industrial action balloting requirements than that followed by courts in the past.

CHECKS ON ACCURACY OF MEMBERSHIP RECORDS

Balfour Beatty Engineering Services Limited v Unite the Union [2012] EWHC 267 (QB).

Between 19th January - 2nd February 2012 Unite the Union ('Unite') balloted its members over strike action about an industrial dispute with Balfour Beatty Engineering Services Limited ('BBES'). As part of the balloting process, Unite did the following:

1. Contacted every member who was stated in the union records to be working for the BBES group
2. Alerted members generally about the ballot
3. Sent over 9000 questionnaires to members inviting them to update their details
4. Made additional enquiries to try and find out information if it was not recorded in the union system

Despite these efforts by Unite, some union members who were not entitled to vote were sent ballot papers, and some who were entitled to vote were not sent ballot papers.

BBES applied to the High Court for an interim injunction to prevent the Union from taking strike action. BBES alleged that Unite had failed to comply with s.230(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA 1992'), which states that, so far as is reasonably practicable, a union must send a ballot paper to all those members who are entitled to vote. BBES argued that, in addition to the actions that Unite had already done, Unite should have carried out additional checks on its membership lists to make them even more accurate, including asking BBES for further information.

The High Court rejected the application by BBES. By doing additional checks on its membership data before conducting the vote, Unite had done enough to prove that it had taken reasonable steps to ensure that only those entitled to vote in the ballot were sent ballot papers. The High Court followed the Court of Appeal's decision

in NURMT v Serco and ASLEF v London Midland [2011] IRLR 399 and stated that unions will not normally be expected to carry out detailed enquiries and investigations. When making similar decisions in future, courts should not analyse what the union should do but look at the steps that have been taken by the union and decide whether these are reasonable in all the circumstances.

The court also considered the wording of S. 232B TULRCA 1992. This states that if a union makes mistakes in the way the ballot is carried out that are 'accidental' and unlikely to affect the result of the ballot, these mistakes should be disregarded. The Court held that the word 'accidental' means 'unintentional' but it was not necessary for the failure to follow the statutory procedures when carrying out the ballot to be caused by something that was outside of the union's control. In this case, the accidental mistakes in the way the ballot was carried out were unintentional, however the court was not provided with enough evidence to decide whether these unintentional mistakes would have affected the overall result of the ballot.

MANDATE OF THE BALLOT AND WHAT IS PARTICIPATION IN STRIKE ACTION?

London Underground Ltd v Associated Society of Locomotive Engineers and Firemen [2011] EWHC 3506 (QB).

The Associated Society of Locomotive Engineers and Firemen ('ASLEF') had an industrial dispute with London Underground Ltd regarding payments to drivers working on Boxing Day. ASLEF planned to take strike action, with the first round of strikes to take place on Boxing Day.

ASLEF placed notices of the strike action on its website and in the union journal sent to all members. After this was done, ASLEF formally informed London Underground Ltd that all members at certain depots who were employees of London Underground Ltd and were Train or Instructor Operators who were also paying their membership subscriptions were going to be balloted.

ASLEF completed the ballot. The overwhelming majority of members voted in favour of taking strike action. The Executive Committee of ASLEF then resolved to call for strike action on 3 further days in addition to the Boxing Day strike.

London Underground Ltd applied to the High Court for an injunction preventing ASLEF from taking strike action on Boxing Day. London Underground Ltd argued that the balloting procedure followed by ASLEF was flawed because;

1. ASLEF had not consulted members regarding strike action on the three days of strike action in addition to the Boxing Day strike; and
2. A significant number of members had been balloted about strike action who ASLEF could not have reasonably believed would be called upon to take part in the strike as they were not rostered to work on Boxing Day. London Underground Ltd argued this was a breach of section 227(1) Trade Union and Labour Relations (Consolidation) Act ('TULRCA'), which states that the only members who should be balloted are those who the trade union believes at the time of the ballot will be induced to take part in the industrial action.

The High Court refused to grant the injunction. ASLEF provided a witness statement from its General Secretary stating that its publicity material on the website and trade journal was not intended to limit its potential strike action. The court accepted ASLEF's evidence that the strike action had not been limited to Boxing Day in that particular case.

Because the court had accepted that the strike was not limited to Boxing Day, those members who were not rostered to work on Boxing Day could have taken part in industrial action on other days. Additionally, even if the strike had been planned to only take place on Boxing Day, ASLEF had properly balloted those members who were entitled to vote. The court reasoned that those members not rostered to work would still be entitled to vote in the ballot and associate themselves with the strike, for example, by joining picket lines. Therefore the ballot did not breach the requirements of 227(1) TULRCA.

CONCLUSION

These decisions will prove useful for trade unions considering industrial action in the future. Both decisions have followed the recent case of NURMT v Serco and ASLEF v London Midland [2011] IRLR 399 by adopting a practical approach when considering whether unions have complied with complex balloting requirements and identifying those members entitled to vote in a ballot.

HAVE YOUR SAY

We are refreshing our design and content of the ELR to reflect your requirements. Email kimberley.shepherd@simpsonmillar.co.uk with your thoughts or feedback.

Cost Alone Found to Justify Indirect Age Discrimination

HM Land Registry v Benson and others UKEAT/0197/11

The recent case of HM Land Registry v Benson and others UKEAT/0197/11 has confirmed the comments made by the EAT in the case of Woodcock v Cumbria Primary Care NHS Trust UKEAT/0489/09, about costs justifying discrimination, which was reported in our Winter 2011 Employment Law Review.

HM Land Registry ('HMLR') offered employees a voluntary redundancy/early retirement scheme with enhanced benefits. HMLR allocated a budget of £12 million to the redundancies for this purpose. However more employees applied for the scheme than the budget allowed for. Therefore HMLR performed a selection exercise to choose which employees would be eligible for the voluntary redundancy/early retirement scheme.

The main selection criterion that HMLR used was to choose those employees who it would cost the least amount of money to HMLR if they took voluntary redundancy. Employees in the age range of 50 - 54 were entitled to early retirement on an unreduced pension and therefore the cost of allowing them to take early retirement / voluntary redundancy was higher. For this reason these employees were not allowed to take redundancy.

Benson and other employees made claims that they had suffered indirect age discrimination. The employment tribunal found that it would have cost HMLR an extra £19.7 million to allow employees aged 50 – 54 to take redundancy but that this was not 'unaffordable' for HMLR. Their claims for indirect age discrimination therefore succeeded. HMLR appealed the employment tribunal decision to the Employment Appeal Tribunal ('EAT').

The EAT held that HMLR's appeal should succeed. The employment tribunal had adopted the wrong approach. Firstly, it should be considered whether the employer had a legitimate aim. In this case, the aim of HMLR to save costs was legitimate. Secondly, it must be decided whether the means of allocating resources and setting a budget was a proportionate means of achieving that legitimate aim. In order to do this the legitimate aim should be balanced against the impact complained of by the employees. The EAT held that, if the tribunal had performed this analysis, it would have found that HMLR's way of achieving their legitimate aim was proportionate and therefore the claims for indirect age discrimination should not succeed.

Although in this case the EAT was only considering claims of indirect age discrimination, this decision will also be relevant in claims relating to other types of discrimination which are prohibited under the Equality Act 2010 where an employer may have indirectly discriminated against employees (who, for example, have the same gender or disability) but has taken this action because of the prohibitively high cost to the employer of taking an alternative course of action.

NOTIFYING EMPLOYEES ABOUT VOLUNTARY REDUNDANCY

In the same case of HM Land Registry v Benson and others UKEAT/0197/11, during the same voluntary redundancy exercise detailed above, a female employee was not allowed to take voluntary redundancy because she was on a career break at the relevant time and so it would not save any costs for HMLR for her to take voluntary redundancy. She had not been notified that employees in her position would be excluded from voluntary redundancy and made a claim for indirect sex discrimination.

The employment tribunal held that excluding employees on career breaks had a disproportionate impact on female employees and therefore could constitute indirect sex discrimination. In principle, this action could be justified by an employer; however in this case failing to notify the employee that she would be excluded from applying for voluntary redundancy was unreasonable and therefore disproportionate. The claim for indirect sex discrimination therefore succeeded.

HMLR also appealed this decision to the EAT however the EAT rejected HMLR's appeal.

STOP THE PRESS

Court Of Appeal Rules On Whether Cost Can Justify Discrimination.

Woodcock v Cumbria Primary Care Trust [2012] EWCA Civ 330

The Court of Appeal has just given its decision in the case of Woodcock v Cumbria Primary Care NHS Trust, which was first reported in our Winter 2011 Employment Law Review.

Mr. Woodcock was given notice of his dismissal before he turned 50 and before a redundancy consultation procedure was completed. The Trust did this in order to avoid the increased costs of enhanced redundancy terms that Mr. Woodcock was entitled to if he was made redundant after his 50th birthday.

The Court of Appeal held that the Trust dismissed Mr. Woodcock because he was redundant, which was a legitimate aim. It was also a legitimate part of that aim for the Trust to ensure it saved money. The court rejected an argument that cost alone would not provide the employer with a legitimate aim.

The court had to consider whether the treatment of Mr. Woodcock was a proportionate way of achieving that legitimate aim. The court considered that, in this case, the needs of the Trust outweighed the effect of the treatment on Mr. Woodcock. The court noted that the failure by the Trust to complete the consultation procedure did not deprive Mr. Woodcock of anything 'of value' because carrying out the consultation would not have achieved anything. The court confirmed the relevant test is whether the employer's actions are a proportionate means of achieving that aim, balancing any discriminatory effect on the employee against the cost to the employer.

This decision will make it easier for employers to argue that saving costs is a legitimate aim. In the future employees wishing to succeed in discrimination claims where an employer is arguing the reason for discrimination is because of cost savings should concentrate on proving that in all the circumstances the action of the employer was not a proportionate way of achieving that aim.