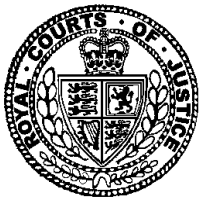

Neutral Citation Number: [2019] EWHC 3882 (QB)

Case No: QB-2019-002943

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 21st August 2019

Before:

MRS. JUSTICE LAMBERT

- -

Between:

RYANAIR DAC	**Applicant/ Claimant**
- and -	
BRITISH AIRLINE PILOTS' ASSOCIATION	**Respondent/ Defendant**

- -

MR. PAUL GOTT QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Applicant/Claimant**

MR. ANDREW BURNS QC and MR. STUART BRITTENDEN (instructed by **Farrer & Co. LLP**) for the **Respondent/Defendant**

- -

JUDGMENT

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS. JUSTICE LAMBERT:

1. Ryanair seeks an injunction preventing the British Airline Pilots' Association ("BALPA") from calling strike action amongst Ryanair's pilot employees who are members of BALPA. This strike action is due to start in around 8 hours' time, at one minute after midnight tonight. The application has come before me today as the vacation judge sitting in the interim applications court and the hearing has lasted the best part of the day. Given its exceptional urgency, this judgment is of necessity ex tempore and delivered in sufficient time for steps to be taken to appeal my decision before the strike action is due to start tonight. It follows that this judgment is abbreviated, recording only a brief history and background to the application, my decision and core reasons.

2. In these proceedings today, Ryanair is represented by Mr Gott QC and BALPA by Mr Burns QC and Mr Brittenden. The skeleton arguments which I received yesterday evening enabled me to get to grips with the background to the application and the issues its raises quickly. Both sets of oral submissions today have been focused and clear. I am grateful to all involved for their help.

3. The application for the injunction was made late. Only two days' notice was given, rather than the requisite three days' notice. No explanation is given for the late notice, save that I am told that decisions to challenge strike action through legal proceedings are not made lightly and are very much a last resort. Mr. Burns accepts that, in the event and notwithstanding the inconvenience to his client, it has been possible for both sides to present all of the arguments that they would wish to deploy today and for the court to accommodate the application. He does not invite therefore me to dispose of the application on the basis of lateness. That being the position, I need say no more about the timing of the application, save to record, with the encouragement of Mr. Burns, that this late application should not be regarded as a precedent and that, although it has been possible for the court to deal with the application, the hearing has not come about without difficulty and extra work for court staff who have, for example, had to make arrangements for alternative cover for the general Court 37 business.

Background

4. I can state the history leading up to the application briefly. Against a background of an industrial dispute arising from remuneration and terms and conditions, BALPA conducted a ballot of pilot members with contracts of employment with Ryanair between 24 July and 7 August 2019. The Independent Scrutineer was Miss Hock of Popularis, an experienced Scrutineer.

5. The Ballot Notice was issued on 17 July 2019. It recorded that, based on the information in the possession of BALPA at that time, BALPA reasonably believed that a total of 568 employees of Ryanair would be entitled to vote in the ballot. The Ballot Notice set out the 14 categories of employees concerned and the number of employees in each category.

6. The Result Notice was issued on 7 August 2019. It recorded that the number of individuals entitled to vote was 617; the number of votes cast was 445. The number of employees voting "Yes" to strike action was 353, which represented 79.5% of those

who had cast a vote. The number of individuals answering "No" to the required question specified in the ballot paper was 91, representing 20.5% of the voting cohort.

7. The Strike Notice, also issued on 7 August 2019, informed Ryanair that strike action would be taken between 00.01on 22 August and 23.59 on 23 August 2019, and between 00.01 on 2 September and 23.59 on 4 September 2019. The Strike Notice recorded that 629 employees would be called upon to take industrial action. The discrepancy of 12 employees between the Result notice (617) and the Strike Notice (629) (both issued on the same afternoon) was not explained in the Strike Notice.

The Application

8. Under s.219 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act"), a union has protection against liability for the economic tort of inducement of breach of contract. In order to gain this protection however, the impugned act must be done in contemplation or furtherance of a "*trade dispute*" which is defined in s.244. This immunity is also subject to the balloting and notification requirements of other sections in Part V of the Act including s.226 – 235: see ss.219(1) and (4). If the various requirements are met, then the union obtains the statutory immunity in respect of economic torts provided by s.219.

9. It is common ground that an interim injunction to prevent a strike going ahead is normally decided on the merits of the claim and that under s.221 of the Act, the court should have regard to the likelihood of the union establishing the s.219 defence at trial. It follows that the court does not apply the normal *American Cyanamid* test. Rather, the court is required to assess the strength of the union's defence to the claim for the economic tort and, if it is more likely than not that the union will succeed in establishing the defence at a full trial, it is only in a very exceptional case that an injunction should be granted.

10. The application for an injunction, supported by a witness statement of Mr. Hughes, raised a large number of issues. Multiple failures to comply with the requirements of Part V of the Act were cited as a result of any one of which, or any combination of them, rendered the threatened strike action unlawful, thus depriving BALPA of the statutory immunity. Mr Gott however cleared the decks of many of those allegations and focused his arguments upon four alleged failures by BALPA to conduct the ballot in compliance with various provisions in Part V of the Act. I address each in turn.

Ground One

11. The first, and central, ground advanced by Mr. Gott in his written and oral submissions, is an asserted breach of s.227 of the Act.

12. S.227 imposes a requirement to accord a vote equally to all members who it is reasonable at the time of the ballot for BALPA to believe would be induced to strike. He relies upon associated breaches of s.230(1) which imposes a requirement that every person entitled to vote must be allowed to do so without interference or constraint from the union and s.230(2), which requires that, so far as is reasonably practicable, every person entitled to vote must have a voting paper sent to his/her home address and a convenient opportunity to vote by post.

13. The particulars of breach upon which Mr Gott relies are as follows. The ballot was conducted between 24 July and 7 August. In conducting the ballot, BALPA, in conjunction with Miss Hock, imposed a cut-off (31 July 2019) seven days before the closure of the ballot. The effect of the cut-off was that new recruits to BALPA, that is, those who became members after 31 July 2019, were not sent voting papers. In the event, 12 new recruits to membership were not sent voting papers. This explains the difference in the figures of 617 and 629 recorded in the Result Notice and the Strike Notice, both sent on the 7 August 2019, a clarification which only emerged from BALPA's letter of response of 15 August 2019.

14. Mr Gott submits that, by imposing a cut off, BALPA made a deliberate, and unlawful, decision to exclude members in relevant categories from the ballot. S.232A (*Inducement of member denied entitlement to vote*) states that:

> "*Industrial action shall not be regarded as having the support of a ballot if the following conditions apply in the case of any person --*
>
> *(a) he was a member of the trade union at the time when the ballot was held,*
>
> *(b) it was reasonable at that time for the trade union to believe he would be induced to take part or, as the case may be, to continue to take part in the industrial action,*
>
> *(c) he was not accorded entitlement to vote in the ballot, and*
>
> *(d) he was induced by the trade union to take part, or as the case may be, to continue to take part in the industrial action*."

15. BALPA's failure to comply with s.227 has had, Mr Gott submits, the effect that the strike action should be deemed not to have the support of the ballot under s.232A of the Act: by reference to the statutory checklist in s.232A, Mr Gott has (as he puts it) "a full house". He submits that the entitlement to vote in s.227 is absolute: even if only a single member is not accorded the entitlement to vote in the ballot, then the industrial action should not be regarded as having the support of the ballot. His argument continues as follows: by imposing the cut-off, BALPA, has impermissibly set itself up as the arbiter of who is, or who is not, a member of the voting constituency; such an approach runs counter to the fundamental principle of industrial democracy according certain special privileges to a category of members, namely, those who are members before the cut-off, in comparison with those who became members of the union between 31 July and 7 August.

16. Mr Gott further submits that BALPA is not able to rely on s.232B, by which small "*accidental failures*" are to be disregarded because the decision to impose the cut-off and impermissibly exclude from the vote those members who joined the union after 1 July was not accidental but the product of a conscious decision to remove the entitlement to vote from late joiners.

17. The timing of the cut-off was judged by reference to the Code of Practice (Industrial Action Ballots and Notice to Employers: March 2017) which (relevantly) prescribes

that (a) the ballot must be a postal ballot and (b) the minimum time to conduct a ballot is seven days in order to allow for the sending of correspondence, filling the voting form out and receiving the voting form back from the voter. Given these requirements, I asked Mr. Gott what course he suggested BALPA ought to have taken, given that, on his case, the cut off was unlawful. He told me that the ballot should have been allowed to take its course. He acknowledged that there would be late joiners who would not receive the voting paper in time for it to be completed and returned to the Scrutineer but, in those circumstances, BALPA could have availed itself of the escape clause in s. 230(2) which provides that the requirement to send a voting paper to a member is subject to reasonable practicability. It was not for BALPA, in advance, to determine what is, or is not reasonably practicable. This should be a retrospective exercise undertaken, if necessary, by the court.

18. Alternatively, the ballot should have been allowed to take its course and the union avail itself, if permissible, of s.232B, the small accidental failures provision. He submitted that there is no question of a *de minimis* rule applying, nor a defence of substantial compliance. The entitlement to vote is an absolute one, and under s.232A, even if one member is deprived of the entitlement to vote and wrongly excluded from voting, then the industrial action does not have the support of the ballot.

19. His submission, therefore, is that the statutory defence set out in s.219 is doomed to failure. He submits that his argument is supported by authority. In the case of *P v National Association of School Masters Union of Women Teachers (NASUWT)* UKHL 8 Lord Hoffmann stated at [43] that the voting constituency must include all members whom it is reasonable for the union to believe will be induced to take strike action. He also relies upon the observation of Millett LJ, in *London Underground v NUR* [1996] ICR 170 at 178 D, where the Court observed that new union members must be included in the ballot.

Discussion/Conclusion: Ground One

20. I do not set out Mr. Burns' submissions separately on this point. They are woven into my decision as set out below.

21. I am against Mr Gott for the following main reasons.

22. I accept Mr. Burns' submission that s.227, which prescribes the entitlement to vote, must be considered in conjunction with other provisions in Part V, in particular, s.230(2). Viewed together, they create a distinction between members being entitled to vote (s.227) and members being given the opportunity to vote (s.230(2)). The entitlement to vote is absolute, but the opportunity to vote is subject to the test of reasonable practicability. The distinction was recognised by the Court in *P v The National Association of Schoolmasters* at [41] where Lord Hoffman noted that, if it was not reasonably practicable to send a ballot paper to a member, then the omission does not amount to a denial of the entitlement to vote – otherwise there would be no point in the qualifying words in s.230(2) "*so far as is reasonably practicable*." The distinction between entitlement to vote and opportunity to vote was also explicitly drawn by Lord Walker in *P* where at [69] he observed that the union would expect to be able to identify with precision the members in the voting constituency and give them all the opportunity to vote, but recognised that this objective may not be realisable. He gave examples of how the entitlement to vote may be frustrated,

including inaccurate records and movements into (and out of) the union during the ballot process. However, the fact that it had not been reasonably practicable for every person entitled to vote to receive a voting paper, does not invalidate the ballot.

23. Understanding that the s.227 entitlement to vote and the s.230(2) opportunity to vote are distinct elements provides an answer, if not the complete answer, to Mr Gott's argument. His submission that a single person deprived of the opportunity to vote would invalidate the ballot is not consistent with the opinions in *P*. However, I also have in the forefront of my mind that any contemporary construction of the Act should be informed by the observations of Elias LJ in *National Union of Rail, Maritime and Transport Workers v Serco Ltd* [2011] ICR 848., a decision which represented a "sea change" in the Court's approach to the Act's construction and that earlier authorities (including *London Underground v NUR* [1996] ICR 170, upon which Mr Gott placed reliance) must be considered and, if necessary, reconsidered in the light of the Court's observations in that case.

24. In *Serco,* Elias LJ stated that the legislation must be construed in the normal way, without presumptions in favour or against those taking industrial action; the construction of the legislation should be likely and workable; the days of pedantic and precise adherence to technicalities have gone and it was no part of the purpose of, or the policy underpinning, the Act to set out a series of traps and hurdles for a union to negotiate.

25. It is against this background that I consider whether Mr Gott's construction of the legislation is workable and practical. His solution to the problem of late members is that the ballot should simply run its course without cut-off, knowing that there would be new members who would be unable to vote because of their late recruitment to the voting cohort, followed by some retrospective court review of the process. I accept Mr Burns' submission that this would be wholly unpractical as the Union would not know until a very late stage whether the strike action was lawful and there would be no certainty in the union's position. Nor would, on Mr Gott's construction, the union be entitled to rely upon the small accidental failures provision in s.232B as the union would have sent out voting papers in the full knowledge that there was insufficient time for them to be returned to the Scrutineer and be counted as part of the ballot.

26. I therefore find that the decision to impose a cut-off was not unlawful. Seven days was a reasonable interval, given the terms of the Code and the requirement that the vote should be by postal ballot (indeed, Mr Gott had difficulty in identifying any other realistic shorter period given the need to allow time to send out, complete and then return the voting papers). The effect of the cut-off was that a small number of late recruits were not given the opportunity to vote, but that did not represent a breach of the s.227 entitlement to vote.

27. If, for any reason, I am wrong in the approach above, then I am satisfied that the failure to adhere to the provisions of Part V is *de minimis* and nonetheless lawful. I accept Mr. Burns' submission that the defence of *de minimis* defect is available, even where the accidental small failure defence is not available: see *Serco* at [83] where Elias LJ cited with approval the observations of Smith LJ in *British Airways plc v Unite the Union* [2010] ICR 1316, that the purpose of the Act is to ensure fair dealing between employer and union and that minor and inconsequential infringements of the balloting provisions should not result in the ballot being invalidated. Even if the 12

late recruits had voted against strike action, this would have influenced the final voting ratio by just over 1%. The votes would have had no material impact whatsoever upon the voting ratio which was the result of the ballot. I agree with Mr Burns that this is just the sort of trifling error or difference which Parliament intended should be ignored. Equally, I take into account the contents of the statement of Mr Brian Strutton, the fact that the imposition of a cut-off is the norm in conducting ballots and the lengths taken by BALPA to comply substantially with the legislative regime in Part V.

Other Grounds

28. I can move on therefore to consider grounds 2, 3 and 4. I find that I can do so relatively briefly.

29. Ground 2 asserts that the failure to explain the discrepancy between the figures in the Result Notice and the Strike Notice of 7 August 2019 constitutes a breach of s. 234A(3)(a)(i) which prescribes that a relevant notice of industrial action must contain not only the lists of categories of employees and list of workplaces but an explanation of how those figures had been arrived at. Mr. Gott submits that there is such a stark discrepancy between the two figures which demanded an explanation of that discrepancy. I am against Mr. Gott on this point. The section does not require the Notice to do more than provide an explanation of how the figures were arrived at (which the Notice does). It does not require a further explanation of discrepant figures as between one document and another.

30. Ground 3 presents, it seems to me, as no more than a tortuous and strained linguistic interpretation of the ballot paper. It is asserted that there was a lack of clarity in the ballot paper concerning the dates upon which strike action is contemplated. Mr Gott suggests that it is not clear whether the paper is saying that the strike action itself will take place during the week of 19 August or that there would be an announcement during that week of the dates upon which strike action would take place. I have no difficulty in rejecting this submission. The paper records that "*BALPA expects to organise the first period of discontinuous strike action to begin on date(s) to be announced in or around the week beginning Monday 19 August*." The previous sentence however refers to strike action taking place on dates to be announced from 22 August 2019 and 6 February 2020. Viewed in context, I see no ambiguity. As Mr Burns submits, if the second sentence is ambiguous, it is cleared up by the previous sentence. No reasonable reader of the paper could be in any doubt that strike action could take place as early as 22 August - because that is what the paper says.

31. Ground 4 asserts that the ballot paper failed to identify the material issues between the BALPA and Ryanair. Again, I am against Mr. Gott on the point. Only the headline points of material dispute between the parties were included in the ballot paper. However, headlines which nonetheless provide a reasonable summary are sufficient (see *Argos v Unite the Union* [2017] EWHC 1959 at [33]) given that the reasonable reader would be reading the ballot paper against the factual matrix of publications and additional material provided or available, including in this case the comprehensive pay proposal, the summary of the pay proposal, the news flashes and electronic links to those documents. I do not find that the reader would be misled by the inclusion in the ballot paper of the headline points only of material dispute between the parties.

Conclusion

32. I am satisfied that the s.219 defence is likely to succeed. Notwithstanding Mr Gott's skilful presentation of the arguments, I find that his allegations of technical breaches of the legislation are not made out. Given that conclusion I see no basis for my granting the application for an interim injunction. I dismiss the application.

- - - - - - - - -