

Appeal No. UKEAT/0352/12/KN

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 10 December 2012

Before

HIS HONOUR JUDGE McMULLEN QC

MR M CLANCY

MRS A GALLICO

NORTH ESSEX PARTNERSHIP NHS FOUNDATION TRUST

APPELLANT

MR E BONE

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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(of Counsel)
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For the Respondent

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SUMMARY

TRADE UNION RIGHTS – Action short of dismissal

In an appeal against a finding that an employee was subject to detriment for his trade union activities, the issue arose as to the union's independence. Appeal stayed: section 8(4) applied.

HIS HONOUR JUDGE McMULLEN QC

1. The Claimant in these proceedings, Mr Bone, is the beneficiary of an order of the Employment Tribunal sitting at Bury St Edmunds. On four occasions the Respondent, the North Essex Partnership NHS Foundation Trust, subjected him to detriment by its deliberate failure to act, for the main purpose of preventing or deterring him from taking part at an appropriate time in the activities of the Workers of England Trade Union. Against that decision the Respondent appeals. The Respondent has at all times been represented by Ms Rehana Azib of counsel. The Claimant at the Employment Tribunal, which sat for some ten days, was represented by Mr Maflin, a trade union representative; today by Mr Lakha of counsel. Reasons were sent to the parties on 1 March 2012 and the events with which the appeal is concerned took place in 2010.

2. The claims originally before the Employment Tribunal fall under section 146 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. They were accompanied by claims under the **Race Relations Act**; broadly speaking that the Claimant had been disadvantaged by the Respondent because of his Englishness. We appreciate there is more subtlety to the claims but those were dismissed and there is no appeal from those.

3. The central component of section 146 is that the protection applies in respect of a worker who has been prevented or deterred from taking part in the activities of an independent trade union at an appropriate time. Trade union is a statutory term. A trade union is an organisation of workers; it can be listed by the certification officer, Mr David Cockburn, as statutory officer responsible for these amongst other matters under Part 1 of the 1992 Act. The certification officer keeps a list. The trade union in this case, incorrectly named by the Tribunal, is the Workers of England Union, is on the list. Mr Bone is its leading light. Listing in England is evidence that the union is a trade union; see section 2(4). We understand that over a period of

18 months an application was pending before the certification officer for the union to go on the list and it succeeded.

4. The second stage in a mature trade union's life is its certification as an independent trade union. This means as follows:

“5 Meaning of ‘independent trade union’

In this Act an ‘independent trade union’ means a trade union which –

(a) is not under the domination or control of an employer or group of employers or of one of more employers’ associations, and

(b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control;

and references to ‘independence’, in relation to a trade union, shall be construed accordingly.”

5. The way in which independence is achieved is by a successful application for certification. It has the primary effect of being conclusive as to the independence of the trade union once the certificate is granted. Similarly, a refusal or withdrawal or cancellation of such a certificate once in place is conclusive that the trade union is not independent.

6. The default position occurs where there is no decision either way and this provided for by section 8(4) which says this:

“If any proceedings before a court, the Employment Appeal Tribunal, the Central Arbitration Committee, ACAS or an employment tribunal a question arises whether a trade union is independent and there is no certificate of independence in force and no refusal, withdrawal or cancellation of a certificate recorded in relation to that trade union –

(a) that question shall not be decided in those proceedings, and

(b) the proceedings shall instead be stayed or sisted until a certificate of independence has been issued or refused by the Certification Officer.

(5) The body before whom the proceedings are stayed or sisted may refer the question of the independence of the trade union to the Certification Officer who shall proceed in accordance with section 6 as on an application by that trade union.”

7. The issue of the independence of the union was not examined in any way at the Employment Tribunal in its ten days of sitting. No point was taken by Ms Azib for the Respondent and the Claimant did not present evidence of the union's independence. This is traditionally done in cases for example of interim relief by the presentation of a certified copy of the certificate of independence kept at the certification office.

8. Inexplicably, the issue simply did not arise at the Employment Tribunal, nor has it arisen in the Notice of Appeal, Respondent's Answer or skeleton argument here. But it occurred to us that there was an issue as to independence and it goes to jurisdiction, notwithstanding that the matter was not raised hitherto. Since the findings of the Tribunal are predicated upon the independence of the union that must be a primary finding. This case falls within section 8(4). There is no certificate and no refusal; that means that there can be no decision on this in these proceedings, nor could there have been at the Employment Tribunal, for the only person who can make that decision is the certification officer. The issue should have been spotted and the proceedings stayed. The only power we have is to stay, pending the application.

9. Mr Bone has told us through counsel that he will himself make the application; that will require some time. The alternative route within section 8(4) is for reference to be made judicially but that is not sought. It is common ground that this should be three months so that the parties can report back. This will be done under case management powers reserved to me if at all practicable and we will take the matter further once the issue is resolved or any further directions are given.

10. It is accepted by counsel before us that there may be issues arising even if a certificate of independence is given, as to when it is effective. In other words; does it have any effect from a

date before the certificate or does the certification officer have power to say when in time prior to the actual certificate the union was independent?

11. The second matter flagged up by Ms Azib and by Mr Lakha is as to the disposition of this appeal. If certification of independence comes to nought then it is possible that this appeal could be disposed of by consent. Both parties are represented properly and recognise the critical absence of the certificate of independence. It would be for them to decide whether to put a joint application before us under the Practice Direction to allow the appeal by consent, recognising the technical problem which has now arisen. That, of course, is a matter which will be discussed over the next three months during the stay.