Appeal No. UKEAT/0352/12/GE

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 September 2013

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

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APPEARANCES

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For the Respondent	MR SHABBIR LAKHA (of Counsel) Instructed by: Tilbrook's Solicitors Quires Green Willingale Ongar Essex CM5 0QP

SUMMARY

CERTIFICATION OFFICER

Does the certificate of independent of the trade union given on 27 June 2013, for which the EAT had by statute to stay the instant appeal, provide protection to the Claimant for his activities and membership on 5 May 2010? EAT held it did not have retrospective effect. Permission to appeal granted.

It was not necessary to deal with the substantive merits of the employer's appeal.

HIS HONOUR JUDGE McMULLEN QC

1. On 12 December 2012 we stayed this appeal pending the application of the Workers of England Union (WEU) to the Certification Officer for a certificate of independence. Following an agreed further stay the Certification Officer, Mr David Cockburn, has given his certificate to the union. It is an independent union, the certificate is dated 27 June 2013.

2. The issue which we foreshadowed in our first Judgment which should be read in conjunction with this has now arisen, which is as to the retrospective effect of the certificate. We recall that the approach of the Claimant at the hearing was that if the application came to nought these proceedings would likely be over and that is the consistent position of Mr Lakha today. He says the certificate is conclusive for all purposes; so if against the union that is an end of it and if in its favour it is entitled to prevail.

3. The reference to the conclusive nature comes from the 1992 Act section 8(1) which provides as follows:

> **"8 Conclusive effect of Certification Officer´s decision**
>
> **(1) A certificate of independence which is in force is conclusive evidence for all purposes that a trade union is independent; and a refusal, withdrawal or cancellation of a certificate of independence, entered on the record, is conclusive evidence for all purposes that a trade union is not independent."**

4. The timescale between our last hearing and today's has enabled both counsel to formulate clear written and oral arguments on the legal proposition and to cite to us a number of authorities. At the outset, a witness statement was produced by Mr Bone sent on 27 September 2013 by his solicitors by which he seeks to show the process which he, on behalf of his union, went through with the Certification Officer and his officers. We have decided this is not relevant to our considerations. The document is not supported by an application, nor does it

meet the criteria set out in his order by HHJ Serota QC for new evidence to be adduced, nor the provisions of the 2012 practice statement.

5. We have of course looked at the contents. Since there is no dispute as to the correctness of the CO's decision, the process by which he arrived at it is irrelevant. We have been shown for the first time the guide for trade unions wishing to apply for a certificate of independence issued by the certification office in a revised document of November 2011 which explains fully the statutory provisions and what happens when a trade union on the list of trade unions, as this one is, seeks to improve its status by obtaining a certificate of independence. This is what is the guidance says:

> **"12. A detailed investigation of each application is carried out. The investigation, may involve a visit usually carried out by a team of two, involving a visit to officials of the applicant union at its offices or at their place of work for detailed discussions. Before the visit, documents such as minutes of meetings of the union's Executive Committee and of joint negotiating meetings with management are requested from the applicant union and examined. During the visit enquiries are made in relation to any points of objections raised and further questions asked that have arisen as a result of the initial scrutiny. Where necessary, the investigating team pursues enquiries at branch as well as head office level and in the case of single company or single employer unions they normally talk separately with a representative of management in order to assess the employer's attitude."**

6. This follows the publication of the application in the London Gazette and on the CO's website and it is open to anyone to make representations and objections. Relevant in these proceedings is the fact that no objection was made by the Respondent to the union's application. Thus there is no basis for us admitting specific evidence about how the Certification Officer went about his decision simply because some hypothetical examples are given in argument before us. The Respondent has not had an opportunity to say anything about this. It may be uncontroversial but formally it is not relevant to the legal decision we have to make and we will not clutter up the decision making by the admission of this material.

7. The simple preliminary question in this case is: does the 2013 certificate of the CO affect the rights of the Claimant in respect of his activities in the WEU in 2010? The Tribunal, as we have said, was unaware of this issue but frequently on at least six occasions makes the decision that the Respondent deterred the Claimant from taking part in the activities *of an independent trade un*ion; see for example paragraph 50, 51, 52 and 63 which follow the Tribunal's self-direction under section 146(1) set out in paragraph 15 of its Judgment.

8. The authorities placed before us relate to a previous regime, they are **Blue Circle Staff Association v Certification Officer** [1977] 1 WLR 239, **Association of HSD Hatfield Employees v Certification Officer** [1978] ICR and one we drew to the attention of Counsel **General & Municipal Workers Union v Certification Officer** [1997] ICR 183. Those cases were challenges to the Certification Officer's grant or refusal to grant relevant certificates and the essential question is whether or not the union was under the domination or control of an employer or vulnerable to its influence.

9. These cases are understandable in their historical context where there was in the initial stages of the decade following the **Industrial Relations Act 1971** a system of registration of trade unions to which most of the unions in the TUC did not subscribe. There were strong feelings about the attempts, as the unions saw it, by the legislature to control the activities of the unions. There was a benefit to an employer in encouraging its own staff association so that it would deter its employees from joining an independent trade union which could properly assert the rights of the employees.

10. All of that is long in the past but what is put before us today is what is described as an organic approach for in **Blue Circle** the EAT, Cumming-Bruce J presiding said the following:

> **"The Certification Officer decided that the staff association was not thus independent. He gave his reasons in his decision letter and elaborated them in evidence before us. He was troubled by one of the rules in the new rule book, and by two of the provisions in the procedure agreement of February 23, 1976. But, more important (as the rules could be amended, and one of the clauses in the procedure agreement has already been amended), he doubted whether a transformation as dramatic as that which the staff association claimed had been demonstrated over as short a period as five months. After all, the history revealed an organisation which from its formation in 1971 until February 1976 had been little more than a sophisticated instrument of personnel control. So he thought that the traces of dependence which appear in the new rule book and procedure agreement are chiefly significant as illustrating the fact that it takes time for any create to slough off its old skin and grow a new one. In his view the association had taken steps towards independence but had not gone far enough along the road. He thought that it should establish some record for itself which he expected to take some time, though he would not predict how long. He was impressed by the degree to which this organisation had been dependent over the first five years of its life; and that history imposed upon him a duty to look scrupulously at all the facts in order to see if it was clear that over a few months the organisation had changed its character from almost total dependence on the employers to independence as defined in section 30(1). In response to a question from the tribunal the Certification Officer described his approach. He stated that he had found no nice clear yardstick which could be laid against each case, but that it was a case of looking at the factors and doing a balancing act. He then indicated certain criteria which he found useful. In view of the novelty and importance of the subject matter we set out these criteria as the witness described them, though we do not think it would give a fair impression of his evidence if we suggested that he presented them either as comprehensive, or of similar weight in any two cases."**

11. What follows is a set of criteria used by the Certification Officer including this passage:

> **"4. *History:* The recent history of a union, important in the case of Blue Circle Staff Association which before February 1976 was dominated by the employers, is considered. It was not unusual for a staff association to start as a "creature of management and grow into something independent." The staff association had started on this road but still had a way to travel."**

12. And the question is set out as follows at page 246 (e):

> **"On these facts, and after learning the way in which the Certification Officer approached the case in June, we had on November 9, to decide if we ourselves were satisfied that the certificate should be issued."**

13. The reason why that material was adduced was because in those days there was an appeal to the EAT on a question of fact from the Certification Officer and one can readily understand how the EAT went into that. Those criteria, which the Certification Officer of the day indicated he considered, now find their way into the guide. Under the heading of "History" which is the relevant passage relied upon there is this:

> **"18. Sometimes evidence is found that the union began with employer support and encouragement, or even as a creature of management. If that evidence relates to the recent**

> **past it is a powerful argument against the granting of a certificate. But experience indicates that over time some unions can and do evolve from a dependent to an independent state; and the decision must, of course, be based on the facts as they are at the time of the investigation and not as they were several years ago."**

14. We will return to this but it is worth noting that the focus here is on matters found at the time of the investigation. The account given by the EAT in **Blue Circle** indicates what was the impression of those experienced in industrial relations at the time that there can be an evolution from complete dependence to independence. This is what was noted in the **HSD** case where this is said by Kilner-Brown J presiding in an appeal against the refusal of the CO to acknowledge the independence of the staff association:

> **"B Initially, therefore, this large proportion of the work force failed completely to satisfy the stringent tests required for certification as an independent trade union.**
>
> **D However, we are all three of us satisfied that later there was a considerable change in the situation […] Nevertheless, we are satisfied from the evidence we have heard that they are now fiercely independent of management insofar as their existence as an organised body is concerned. Circumstances have compelled them to acquire a status which they had not previously reached. We are clear that it would be wrong to say that they are liable to interference and in consequence we concluded that the appeal should be allowed and direct that the Certification Officer issue the appropriate certificate."**

15. In addition to that the Judgment, in the **GMWU** case is that those who object to the grant of a certificate may not be heard on an appeal against it. Having heard the most persuasive arguments on behalf of the union, the EAT was unable to accept the final submission that disappointed contending independent trade union had a right to be heard: see page 186(d).

16. Separating those cases and **Akinosun** [2013] UKEAT/0180 relied upon by the Respondent, is a lifetime. It was a straightforward appeal under section 9(1) by the disappointed trade union against the refusal of the certification officer to enter it on the list of trade unions. There is a similar provision in relation to a union disappointed by a refusal to award a certificate of independence: see section 9(2). The reference in both of those is to an appealable question and this reflects a change in the law by the **Employment Relations Act 2004** section

51 to confine the questions appealable to questions of law and not questions of fact. In construing the relevant provisions the Langstaff P concentrated on the language. In paragraph 6 of his Judgment the President accepted that the point of construction was framed in the present tense. He said this:

> **"6 […] The "organisation is a trade union", are words which look not to what will be at some future date. They do not anticipate what it is contended, whether reasonably or not, will be the situation next week or next month, they to see [sic] whether as it now stands the organisation under consideration meets the definition in section 1. This point of construction seems to me clear from the tense but it is in any event supported by the structure and purpose of the Act. Certification is a serious act. The reason why the sections are as detailed as they are and provide for mandatory certification if a body is a trade union and do not give any power to certify a body which on the facts is not, is that important consequences follow from the fact of certification. There is an academic debate as to whether a body which is an organisation whose purposes include regulating relations between workers and employers is a trade union irrespective of whether it is certified. The better view may well be that it is, but that is a pointless debate in the context of certification: and the benefits which are conferred by certification are not conferred on any trade union, but only one whose name has been entered into the list."**

17. That is of assistance in the looking at the certificate which is given to the trade union in this case. The Certification Officer says that the union is independent. For the purposes of section 146 of the 1992 Act, the reference is to a certificate in force. The parallel provisions relied on as an aid to construction are the application for interim relief by a person who is claiming unfair dismissal for their activities at an appropriate time in an independent trade union (section 161). We noted in our earlier hearing that it is customary for the certificate of independence, a copy of it anyway, to be sent with the claim form but it is mandatory for an officer of the union to certify that the actions complained of fall within the section. In the standard case, it must say the Claimant was a member of the independent union "on the date of the dismissal". In other words, the employer has to know this union is independent. If the Claimant must demonstrate he was a member of the independent union on the date of dismissal for interim relief, it follows that the same test applies for the purpose of the full hearing of the unfair dismissal claim, and logically for section 146 detriments too.

18. We turn then to the two issues before this Tribunal. The first is the conclusive nature of the certificate. It is common ground that the union is today independent. Mr Lakha says the words "for all purposes" are plain and very wide but he accepts two derogations from that. The first is that where the certification officer withdraws the certificate in the future obviously the existing certificate is not for all purposes inclusive. It is until there is another certificate. Secondly, he accepts that it is not conclusive as to the past indefinitely. When a trade union has been refused a certificate, let us say, in 2010, that is conclusive for all times on his submission backwards and forwards but is trumped by a certificate, let us say, in 2013 which itself will be conclusive for all purposes.

19. So the proper construction of this is "for all purposes, except where there was in place a certificate either of refusal or of independence", thus the words are not absolute. Do they mean, however, that a certificate issued in 2013 can reach back in time to cover the torts said to have been committed in 2010. The relevant date in our case in respect of the four detriments found by the Tribunal to have been suffered by Mr Bone is 5 May 2010. The claim form was presented on 20 January 2011 and so on any account the certificate of independence is two or three years after these events.

20. The strongest point relied on by Mr Lakha is the stay which we ordered and we were obliged to order. As we indicated in our first judgment, what is the point of staying it if the Certification Officer comes back with a certificate that does not include any pre-dating? The Certification Officer is under no obligation to provide reasons for his decision but doing the best we can from the Guidance it is apparent that he pays attention to the history, to representations made to him, but clearly makes his decision on the evidence available to him on the date of the decision. That includes the fruit of the investigation which he or his officers have undertaken; see the passage cited from paragraph 18 above.

21. This is also reflects the use of the present tense as cited by Langstaff P in his Judgment for in paragraph 13 of the Guide there is this:

> **"13. The information collected in this way provides the factual basis on which the decision is taken. If the Certification Officer considers that the applicant union does not meet the requirements of the statutory definition, its application is refused; if he considers that it does, a certificate of independence is issued."**

22. Finally, the Guidance says this:

> **"26. No single factor listed above can be decisive by itself. It is necessary to look at the whole nature and circumstances of the union and then make a judgment about whether or not it satisfies the statutory definition. Because there is no convenient yardstick which can supply a ready-made answer there must often be a subjective element in the decision, especially where the arguments for and against independence are finely balanced.**
>
> **27. As a statutory authority, the Certification Officer has to work within the limits set by Parliament. It is no part of his function either to defend or to criticise the policy embodied in the legislation. His function is a quasi-judicial one; it is his duty to examine all applications impartially and objectively; if he refuses an application, he must give reasons for doing so; and those reasons must be firmly based on the concept of independence as defined in the legislation and be able to be tested on appeal."**

23. It is common ground that the Parliamentary intent of the stay was to keep the courts, Tribunals, ACAS and the EAT out of the fact sensitive decision making on the independence of the trade union and to reserve that to the officer appointed by statute for that purpose. We have considered most carefully what the effect of this stay has been. It has been to leave Mr Bone with the expectation that there might be a change in his position because what is the point of sending this case off to the CO if all that can happen is the CO can give a certificate of independence relating to the time of his investigation and the time of the certificate? What Mr Bone wanted was that the certificate should immunise his activities, give him protection, for what occurred in 2010. We consider that is a good point. It will no doubt leave Mr Bone disappointed that our answer to it remains somewhat inconclusive.

24. The plain fact is that the Certification Officer has made an unarguable decision on 27 June 2013 that the union is independent and that will remain in force for all purposes until another decision to the contrary is made, but it does not tell us what its status was in 2010. What Mr Lakha invites us to do is to find that it was independent in 2010, the very task which we must eschew by statute.

25. There simply is no answer to point of the stay except to perhaps give some consolation as to the future; Mr Bone is still employed and this may be some utility to him but if he had been dismissed for his activities it would hardly help him at all. There has been no direct evidence to describe the position of this trade union in 2010 when the activities took place and the requirement of the statute is that it must be an independent trade union. There is some practical justification for that as we pointed out in debate from the experience of the lay-members here. It would be very difficult for an employer to be subject to claims of the present nature where it did not know that the union was independent. We gave as an example the defence in a disability discrimination claim under the **Equality Act** that an employer did not know that the employee was disabled and so did not know what adjustments reasonably to make for the disability.

26. So there is a practical reason why there should be a prior determination of independence before the assertion of the statutory right and the statutory protection. For example a union might take five years to emerge from the cloak of the employer. Would that change the nature of the actions taken in those days?

27. That is a difficult question to answer given the different statutory purpose of the provisions. Where in the early authorities unions were considered not to be independent, it affected their rights to collectively bargain. But Mr Bone is relying on a different provision protecting those who take part in the activities of the union against the unlawful discrimination

of their employer. That protection has no context when the union is under the domination of that very employer who is not likely to challenge the activities of representatives of an organisation of its own creation. Yet the definition of independence serves both purposes.

28. The second practical matter is that there never has been any challenge to the independence of this union. No-one could doubt reading the Judgment, subject as it is to appeal, of the considerable acrimony by the employer to Mr Bone and his trade union actions. This is not likely to be under the domination or control or vulnerable to that of North East Essex Partnership NHS Foundation Trust, whereas that was the real fear of the staff associations and genuinely independent unions in the 1970s.

29. We acknowledge that the Tribunal has made on those several occasions a finding that he was engaged in the activities of an independent trade union. We note that the stay that must be imposed by a Tribunal arises only where independence is in issue and it was the EAT which put the independence in issue at the time of the first appeal because it seemed to be a statutory requirement to be independent. But the same would have happened at the Employment Tribunal had the point been taken by the Respondent and it would have been bound to stay the proceedings as we have been.

30. The proceedings were brought and relate to a time when the union did not have a certificate and we consider that is inimical to the construction urged upon us by Mr Lakha with great clarity. It is counter-intuitive to allow the kind of backdating for which he contends. A certificate given in June 2013 is unlikely to provide protection to actions taken in May 2010. One has to have very firm pointers in a statute for that to be the effect. There is nothing in this statute that does that. Applying common sense, particularly invested as this Judgment is with the experience of the lay members, it cannot have been the intention of Parliament to give after-

the-event protection to a trade unionist. The sequence is plain; get on the list of trade unions, then apply for independence; not difficult although perhaps time consuming but as we have seen in this case six months is what it took, during which time it seems to us there is not the protection afforded by section 146(1) to the membership or activities so described.

31. For those reasons we uphold the submissions of Ms Azib, preferring them to those of Mr Lakha. We canvassed with both counsel what should happen at the outset of today's proceedings and given the way we have decided, it is unnecessary for us to make a determination on the substance of the case and we decline to do so. The Employment Tribunal should not have got itself into the position of a 10-day hearing and a 38-page Judgment without first considering a stay and the arguments associated with it, but that is no reason for us to go into the merits. Having decided the procedural jurisdiction point we say nothing about them.

32. The appeal is allowed. Permission to appeal.