Case No: IHQ/2017/0219

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Neutral citation number: **2017] EWHC 1959 (QB)**

Royal Courts of Justice
Strand, London WC2A 2LL

Friday, 26 May 2017

BEFORE:

MR JUSTICE DINGEMANS

BETWEEN:

ARGOS LTD

Claimant

- and -

UNITE THE UNION

Defendant

MR SEAN JONES, QC (instructed by TLT LLP) appeared on behalf of the Claimant

MR BEN COOPER, QC (instructed by Thompsons solicitors) appeared on behalf of the Defendant

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JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

MR JUSTICE DINGEMANS:

Introduction

1. This is the hearing of a claim by the claimant, Argos Ltd, to restrain the defendant, Unite the Union ("Unite"), from inducing its members to continue taking part in industrial action in reliance on the outcome of a ballot of members conducted between 18 April and 2 May 2017. A previous hearing on 16 May 2017 was adjourned by King J because there had been a failure to give three days' notice to Unite. Delay is still an issue before me. The industrial action is continuing at the present and is scheduled to continue until 0559 hours on 31 May 2017.

2. I heard argument yesterday, and I should record immediately that I am very grateful to Mr Jones QC and Mr Cooper QC and their respective legal teams for the excellence of the submissions before me. I reserved my judgment at the conclusion yesterday because a number of documents were produced to me during the hearing which I needed time to consider, saying I would give this judgment this morning at 11 o'clock. I will hands to the parties a note to assist them in writing down the judgment, but the note is not comprehensive and should not be relied upon as a record of the judgment. However, as I will be handing down the note, I should (to avoid attempts to read towards the end of the note and then pass on the result) announce now my conclusion, which is that I will refuse to grant the injunction. This judgment records my reasons for doing so.

The evidence

3. The evidence before me is contained in three witness statements from Mr Philip Hull, distribution director of Argos based at head office in Milton Keynes, and two witness statements from Mr Matt Draper, the national officer for road transport, commercial logistics and retail distribution for Unite, and a further witness statement from Mr Parash Patel, another official of Unite. I should record in case anyone is trying to cross-reference matters that because Mr Hull's first witness statement in time was made before proceedings had been issued, it was exhibited to his second witness statement. This caused some confusion in references to the statement, but in the event nothing turned on the point.

4. By way of background, Argos sell and supply goods including by online sales. Argos operates a number of distribution centres across the country from which goods for online sales are distributed. Some of these distribution centres are operated by Argos and some by Wincanton. Argos recognises Unite as a union and it has in place a national forum which consists of a number of sites that have a seat on the forum. The relevant distribution sites are Wellington Parkway, Magna Park, Lutterworth, Leicestershire (known as Magna Park); Heywood Distribution Centre, Heywood; Pipps Hill Industrial Estate, Basildon, Essex; Huntworth Business Park, Bridgwater, Somerset; Whitworth Freight Centre, Castleford; and Barton Business Park, Burton-on-Trent, Staffordshire. The site at Barton is not on the national forum and there are separate arrangements for that site.

5. Employees at the distribution centres employed by Argos are employed on a standard form of contract which was in the evidence before me. This included a provision at paragraph 4.2 to the effect that should there be a need to change the location of a distribution centre either temporarily or permanently situated within a reasonable traveling distance to the location at which the employee worked, "consultation would take place with Unite the Union, and these discussions will take into account all individual circumstances …" So far as is material, Unite has a national level collective bargaining agreement covering its members at five of the six distribution centres. This is known as the joint stakeholder agreement and explains some of the references to "stakeholder" in the documents, and it provides for a national forum, which explains the references to "national forum" in the documents, at which Argos and Unite can discuss matters. This is a bilateral arrangement between Unite and Argos. Unite want to have multilateral arrangements in which future employers of outsourced workers who had been TUPE'd such as the Magna Park employees at Wincanton would be represented. Mr Hull noted in paragraph 23 of his witness statement dated 19 May 2017 that he did not consider that to be sensibly achievable. He did not believe that any transferee would agree to be bound by the outputs of such meetings as a third party employer.

6. In early January there was an announcement made by Argos that there was to be a TUPE transfer of Magna Park employees from Argos to Wincanton. The Magna Park lease is due to expire in December. The TUPE transfer is now scheduled to take place next week on 1 June 2017. Argos said that there were issues about capacity at Magna Park, and it appears that operations are intended to move from Magna Park to a site in Kettering which is a site where work has already been outsourced to Wincanton. Argos say that there are no plans to outsource the work of other distribution centres, but Unite do not accept this statement. Unite issued a briefing on 27 January 2017 to employees. This noted that Argos had been asked to allow Unite to consider the financial rationale for the outsourcing exercise and complained that there was no meaningful dialogue. "We have sought assurances regarding the maintaining of all T&Cs and in the event of a transfer to Kettering we have also asked that assurances will be given that in the event further changes are made to the Argos network, T&Cs will be protected", wrote Unite. The update went on to cast doubt on whether assurances from Argos might be reliable.

7. Unite's February 2017 newsletter began:

> "Following Argos's announcement to TUPE the Magna Park workers over to Wincanton, the union have met the company and Wincanton on 16 and 25 January. We have sought from Argos its rationale. Unite has requested the company allow people to leave the business on Argos redundancy terms for those workers unwilling or unable to travel to the new Kettering site. The company has not responded to this request. Other requests for information were set out in the newsletter. The union's suspicions about Argos's good faith were set out and noted the company has not provided the union with sufficient comfort regarding terms and conditions of employment. Following any transfer to either Wincanton or the Kettering site. Whilst they have committed that your terms and conditions will transfer over, what happens after the transfer takes place has not been committed to.

> We believe that the company's approach to its current network operations will have a huge impact upon other Argos sites."

8. There was a meeting on 6 February 2017 between Unite and Argos. Mr Patel on behalf of Unite outlined that for people who transferred it was Argos's responsibility, and that Unite would not sit back and just talk to Wincanton, and outlined that putting TUPE to one side, Argos needed to adhere to the spirit of the national forum as there might be an impact on terms and conditions. There was discussion about Argos's ability to influence Wincanton because Wincanton would be running the Argos contract. It was explained that Unite was not comfortable with speaking with Wincanton and that Argos was the keeper of the purse, as it was put, and that Unite needed the commitment from Argos regarding what happened. Mr Patel stated that Argos were circumventing their responsibilities and that they needed to reach an agreement regarding what is adhered to for the future and that it needed to be an agreement with Unite and Argos, and that was where Unite was sitting regarding the situation. Another note of the meeting recorded that Mr Patel raised his understanding that the stakeholder would not transfer in its entirety due to it being part of the national forum, but stated Unite was keen for elements to stay the same.

9. By a letter dated 8 February 2017 Mr Draper wrote to Mr Hull enclosing the newsletter noting that there would be a ballot because:

> "We feel that you have not given sufficient guarantees to the Magna workforce and therefore by default give rise to suspicion and concern about job security for the remaining in-house operation. It was suggested that in order to avoid a dispute, we want to receive guarantees that in the event of TUPE transfer, all existing terms and conditions transfer, and also that in the event of further changes in the operation including site closures and moving to new sites, the option of voluntary redundancy is available for those that cannot and are unable to or do not want a transfer."

10. It was noted that regardless of employer, the dispute would continue, and it was noted that Argos was the employer as this was an open book contract. I should record that it was common ground that Argos would not be the employer in the legal sense once the TUPE transfer had been effected.

11. Argos produced an update it dated 8 February 2017 which noted among other matters that as this was a TUPE transfer, it was not a redundancy situation. Argos said that it was not part of an operation to outsource all work at distribution sites. Unite produced a Magna transfer update dated 8 February 2017. It was noted that while Argos had agreed to transfer their terms and conditions, something they were legally obliged to do, the concerns remained around the longevity of these terms and conditions following transfer to Wincanton:

> "We have asked that the Argos redundancy terms are made available to the Magna membership when the transfer takes place at Kettering. Argos said this should be dealt with post-transfer and it would be Wincanton's decision. The reality is Argos hold the purse strings and ultimately makes the decisions so they can guarantee this now."

12. Mr Hull wrote to Mr Draper by a letter dated 10 February stating that:

> "You have asserted a view that our actions will undermine the terms and conditions of employment of our colleagues. This is simply not the case."

13. There was a further meeting between Unite and Argos on 15 February. Mr Patel made a number of points to the effect that Argos was the paymaster and that he wanted guarantees. There were discussions about the adequacy of a consultation process, which is not in issue before me, and Mr Patel asked why Argos could not give reassurances as Argos could easily say yes and that it fits in with the stakeholder agreement. Mr Patel said he did not know who was telling Argos what to say but they were wrong and there was scepticism across all of the sites. Because Argos was doing this to one site now, there was a belief that this is what would happen to the other sites. Mr Patel said it was like a runaway train and Unite was trying to put the brakes on.

14. By a letter dated 22 February 2017 Mr Draper denied a suggestion that he was engineering a dispute, saying:

> "You have stated that the delivery footprint of the sites will change. Unite is experienced enough to know that businesses need to change to adapt to meet the demands of the market. We will of course take whatever steps are necessary to protect jobs and terms and conditions if we believe these changes are being done to the detriment of our members."

15. Mr Draper stated that he believed there was a legitimate trade dispute with Argos. He said that Unite was looking for a guarantee on all existing terms and conditions including current bargaining arrangements in the event of any transfer that any national forum sight remained part of the national forum. Other requirements were set out.

16. Argos produced a communication on 27 February which noted that if Wincanton had a business need to make changes to terms and conditions in the future, they would consult with the employees and the employees' representatives about the changes before they were implemented. The update continued that if Wincanton needed to relocate colleagues to Kettering, they would follow a consultation process with representatives and individual colleagues. Unite produced a document which is undated and which said that Unite had no intention of engineering a dispute and that "we are only seeking to achieve guarantees that existing terms and conditions will be protected in the event of organisational and operational changes both now and in the future". The document recorded that Unite was seeking a guarantee on all existing terms and conditions and bargaining arrangements in the event of any transfer. Any national forum site remains part of the national forum. In a further newsletter dated February 2017 Unite stated that Argos was driving a coach and horses through the national agreement which raised concerns as to how they intended to deal with any future changes, not just at Magna Park but at other Argos distribution sites. Unite believed that the Magna Park site was viable and had a strong future to play within the Argos network. There were further meetings on dates set out in paragraph 30 of Mr Draper's first witness statement.

17. On 11 April 2017 Unite wrote to Mr Hull noting that Unite intended to hold a ballot for industrial action, recording that the ballot was in relation to a trade dispute over a guarantee on all existing terms and conditions, including current bargaining arrangements in the event of any transfer, any national forum site would remain part of the national forum. The summary of the matters in dispute on the voting papers was (1) a guarantee on all existing terms and conditions including current bargaining arrangements; (2) in the event of any transfer, any national forum site remained part of the national forum; (3) a relocation package to be agreed; and (4) voluntary redundancy be available for those that cannot or do not want to move site in the event of future site moves.

18. On 26 April 2017 the general manager of Argos at Magna Park wrote to Mr Ruddy, the Unite representative at Magna Park, saying that there would be a transfer of warehouse operations from Argos to Wincanton on 1 June 2017. The letter recorded that Wincanton intended to open a dialogue with Unite pre-transfer regarding the potential relocation of Magna Park colleagues, regarding principles underlying the transfer of work from Magna Park to Kettering and changes and any redundancies arising from that.

19. At an ACAS meeting on 10 May 2017 Unite produced a position statement. That meeting followed the announcement of the results of the ballot. Under (2) the heading was: "In the event of any transfer, any national forum site remain part of the national forum". The commentary was to the effect that as a result of TUPE transfer, the current bargaining arrangements should remain in place. It was acknowledged that the stakeholder agreement would need to change to allow for these and potential further changes to the Argos network. It was noted that this would ensure that all new parties to the agreement were properly represented and voting rights were maintained.

20. It is apparent from all the evidence before me that Argos considers that: Unite has engineered this dispute; that it is not a trade dispute because the existing terms and conditions for employees at Magna Park will be transferred to Wincanton; and because if there is any dispute it relates to future employers and not Argos, and because there is nothing to argue about because Argos does not plan to carry out any future outsourcing. It is apparent that Unite considers that: Argos's statements about its future intentions in relation to outsourcing cannot be relied upon; it believes that by the TUPE transfers followed by a move the Magna Park employees will not have the benefit of current protections; and Argos employees at other distribution centres need further protection such as relocation packages to be agreed now. It is not apparent from the evidence before me that either side has managed to communicate successfully its point of view to the other side.

The issues

21. Argos alleges that Unite's actions are unlawful because Unite is committing the economic tort of inducing Argos employees to breach their contract. Unite relies on section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCA") , which provides a defence for acts done in contemplation or furtherance of a trade dispute. Argos says that Unite cannot rely on section 219 for two reasons. First, it says that this is not a trade dispute. Secondly, it says that there was not compliance with a precondition for reliance on section 219, namely a ballot before

action with a voting paper which includes a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates. Argos says that the summary was not a summary because it was inaccurate. Unite says it was a reasonable summary of the matters in dispute.

Relevant provisions and legal principles

22. It is common ground that because this decision will in effect determine whether the strike can proceed, the usual American Cyanamid v Ethicon [1975] AC 396 principles do not apply and the court is required to assess the strength of Unite's defence to the claim for the economic tort of inducing a breach of contract. If the defence is likely to succeed, the strike may go ahead; see RMT v Serco Ltd [2011] EWCA Civ 226, [2011] ICR 848 at paragraphs 10-13, and Balfour Beatty Engineering Services Ltd v Unite the Union [2012] EWHC 267 (QB), [2012] ICR 822.

23. Section 219(1) of TULCA provides that:

> "(1) An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the ground only—
>
> (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance"

24. A trade dispute is defined in section 244 of TULCA to mean:

> "… a dispute between workers and their employer which relates wholly or mainly to one or more of the following—
>
> (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
>
> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
>
> (c) allocation of work or the duties of employment between workers or groups of workers;
>
> (d) matters of discipline;
>
> (e) a worker's membership or non-membership of a trade union;
>
> (f) facilities for officials of trade unions; and
>
> (g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures."

25. Workers and employers are defined to mean the current employee and the current employer.

26. Section 226 of TULCA imposes a requirement that there be a ballot before action by a trade union. Preconditions to a valid ballot are set out. Section 226(2) provides that:

> "(2) Industrial action shall be regarded as having the support of a ballot only if—
>
> (a) the union has held a ballot in respect of the action—
>
> [...]
>
> (ii) in relation to which the requirements of sections 227 to 231 were satisfied …"

27. Section 229 provides at (2B):

> "The voting paper must include a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates."

28. The nature of a trade dispute was considered in University College London Hospitals NHS Trust v Unison [1299] ICR 204 ("UCLA"). In that case a hospital trust was negotiating with a consortium to erect and run a new hospital. The union sought to persuade the hospital to enter into a contractual agreement with the consortium which would guarantee existing terms and conditions for 30 years. When the hospital trust refused, a strike was called. The issue was whether there was a trade dispute within the meaning of the relevant act. At page 215 Lord Woolf, having referred to the argument of counsel, said:

> "…on the facts which are before the court, while it is true that a consequence of obtaining a guarantee would be to give the existing employees the additional security to which he refers, and therefore to that extent a matter which relates to their terms and conditions of employment, that is not the dispute which those employees are wholly or mainly concerned about. They are wholly or mainly concerned about the dispute with different employment; the employment with the so far unidentified new employer."

29. There was reference in UCLH to the earlier decision of Mercury Communications Ltd v Scott-Garner [1984] ICR 74. In that case Sir John Donaldson set out the development of the relevant statute and recorded that:

> "The dispute must therefore not only be between workers and their employer, but must relate wholly or mainly to matters which are specific to that employment …
> In context the phrase ´wholly or mainly relates to' directs attention to what the dispute is about and, if it is about more than one matter, what

> it is mainly about. What it does not direct attention to is the reason why the parties are in dispute about this matter."

30. He then went on to consider a situation where workers thought that they might be made redundant and were therefore pressing for higher wages. He continued:

> "A contributory cause of the dispute and possibly the main cause is the belief that redundancy (´termination....of employment' in the words of the section) is just around the corner, but the dispute is not about that or, if it be preferred, relates wholly or mainly to pay (´terms and conditions of employment')."

31. He noted that it was necessary to see what the dispute was actually about, noting that "wholly or mainly" indicates a degree of restriction.

32. Mr Cooper on behalf of Unite submitted that in circumstances where outsourcing in TUPE transfers were part of business life, I should treat any such future dispute with Wincanton after transfer as if it were a dispute with Argos before transfer, because the effect of TUPE was to transfer the employee subject to terms and conditions. I do not accept this submission because I am bound by the statutory wording set out in section 219 of TULCA. I am concerned to determine whether there is a trade dispute between workers and their employer that is necessarily different from trade disputes between workers and other possible future employers. I should also record that it is common ground that it is not for me to consider whether concerns set out by Unite are in fact well founded; see General Aviation Services v TGWU [1975] ICR 276.

33. As to the approach to section 229(2B) of TULCA, it was common ground that the summary had to be a reasonable summary of the dispute but needed to be no more than that. The meaning of the summary was to be determined by reference to the hypothetical reasonable member of the union who receives a ballot, who might be compared to the hypothetical reasonable reader of a publication in James v News Magazines [2008] EWCA Civ 130 at paragraph 14, who will be reading the ballot paper against the factual matrix of any publications to him by Unite and Argos.

Unite likely to prove a trade dispute between Unite and Argos

34. In my judgment Unite are likely to prove that the dispute between Unite and Argos is wholly or mainly or actually about the current terms and conditions governing the employment of Argos workers by Argos. This is because the dispute between Argos and Unite "relates wholly or mainly to (a) terms and conditions of employment … and (g) machinery for negotiation or consultation …" The relevant changes which might be agreed with Argos might include, for example: (a) removing or varying the right of Argos to relocate employees; (b) providing for an agreed formula for termination or payment in the event of relocation of a site; and (c) amending the joint stakeholder agreement to provide for it to apply to any new site at which Argos employees worked, and even amending to provide for the possibility that it would be multilateral.

35. I accept that the dispute is motivated by concerns on the part of Unite (whether the concerns are justified or not is immaterial, see General Aviation Services) that Magna Park employees when TUPE'd to Wincanton and relocated to Kettering will not form part of the national forum and should have that protection. I also accept on the

evidence that the dispute is also motivated by concerns that Argos employees at the other five sites (excluding Barton) might be TUPE'd to a new employer who might relocate, as appears likely to happen at Magna Park, or that Argos might move the distribution centre to another location which would be outside the scope of the national forum. Again, whether these fears are unfounded is not the issue. The fact that the dispute is motivated by concerns about protections available to the Magna Park employees when they are transferred to Magna Park or about concerns about whether Argos will transfer employees from one site in the national forum to one outside or TUPE transfer employees from another site to another company does not in my judgment prevent this dispute relating wholly or mainly to terms and conditions of employment with Argos or machinery for negotiation or consultation with Argos. This is because there is a distinction, as Sir John Donaldson pointed out in Mercury, between what the dispute wholly or mainly relates to and the reason why the parties are in dispute. The amendment to the national forum so that it would cover new sites to which Argos employees were relocated by Argos plainly relates to the employment with Argos, and even the amendment to make the national forum multilateral, which on the evidence is motivated by an attempt to secure the benefit of the national forum for Magna Park employees transferred to Wincanton, may assist employees who remain with Argos because beneficial employment practice from other outsource sites brought to the national forum might be adopted and adapted for their benefit.

Adequate summary of the matter or matters in dispute

36. In my judgment the summary on the ballot paper set out in paragraph 24 above was an adequate summary of the matter or matters in dispute between Argos and Unite, and the defence on this point is likely to succeed. Unite were asking for a guarantee on all existing terms and conditions (the first bullet point on the voting paper) and it is apparent that a guarantee means something more than that which is secured by the current terms and conditions and arrangements. As noted above, that first bullet might be obtained by removing or varying the right to relocate employees, or, perhaps more likely, agreeing relocation packages (the third bullet) or providing for a voluntary redundancy package (the fourth bullet). Ensuring that the national forum applied to any site to which employees might be moved (the second bullet) was also properly described. In these circumstances, if the summary is read either individually as bullet points or together, it seems to me to have been a reasonable summary of the matter or matters in issue between Unite and Argos.

Delay would not have been a bar

37. It is right to note that this application has been made at a time when the strike is continuing. It is also right to note that Argos had made points about an absence of a trade dispute in February and did not apply for relief when the terms of the voting paper were made known and waited until after an ACAS meeting on 10 May, itself some seven days after the result of the vote had been announced, before writing a letter before action. However, it is also fair to note that Argos was attempting to avoid legal proceedings and needed to take advice. Argos suffered the immediate consequences of the delay because King J refused to hear the application on short notice. It is said that the delay should mean that the equitable remedy of an injunction should be denied. If I had concluded that the defence was not likely to succeed, I would not have refused relief on the basis of delay. This is because a strike is continuing. Argos is continuing to suffer adverse effects as identified in Mr Hull's statement, and if I had thought that Unite's defence was likely to fail, I would have considered it appropriate to prevent

further damage which was likely to be unlawful. This is particularly so where it is common ground that Unite can call further strikes after the current round has concluded.

No failure to comply with PD 25

38. Mr Patel exhibited a letter from Wincanton which recorded an intention to move to Kettering and that there would be relevant consultations. It was suggested that this letter showed that Argos had failed to comply with paragraph 3.3 of PD 25A, which provides that Argos must set out all material facts of which the court ought to be aware. The letter does not in my judgment show that Argos had acted in breach of the Practice Direction. It is consistent with the other information which has been provided and does not support the suggestions made by Mr Patel.

Conclusion

39. For the detailed reasons given above, I dismiss Argos's application for an injunction.