Neutral Citation Number: [2017] EWHC 2046 (QB)

Claim No. HQ 17 X 01753

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice
Strand,
London
WC2A 2LL

Tuesday, 16th May 2017

**Before**:

**MR JUSTICE KING**

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**Between:**

**ARGOS LIMITED** — **Claimant**

**- and –**

**UNITE THE UNION** — **Defendant**

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**Mr Michael Duggan QC** and **Ms Sophia Berry**
(instructed by **Vista Employer Services Limited**)
appeared on behalf of the **Claimant**.
**Mr Ben Cooper QC** (instructed by **Thompsons Solicitors**)
appeared on behalf of the **Defendant**.

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# Approved Judgment

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## Mr Justice King:

1. I have before me an application, although one not yet issued, for interim relief. The interim relief is to restrain the Defendant union from calling or maintaining strike action which is to commence tomorrow.

2. I shall set out the chronology leading up to this application in a moment, but it is conceded by the Claimant that this application has not been made on notice. To be on notice, requires three days' notice. The court is, therefore, having to apply the provisions of CPR 25.3, which says as follows:

> (1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.
>
> (2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.
>
> (3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given."

3. The chronology is as follows. I take the chronology both from the witness statement of Mr Matt Draper, whose witness statement was provided to me today on behalf of the Defendant, and also that which is set out in Mr Hull's witness statement on behalf of the Claimant. His witness statement does not have a date, but I suspect it is 12th May.

4. In January and February 2017 there was an exchange of correspondence between the Claimant and the Defendant union in which each side set out its understanding of what was the dispute between the parties. It is clear, at that date, the Claimant considered that there was a real issue as to whether there was a valid trade dispute for the purposes of the protection of immunity against suit, granted under section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('The Act').

5. On 11th April 2017, ballot notices were sent to the Claimant. Those ballot notices set out a summary of the dispute which raised four issues in particular. Those four issues, taken from page 17 of the Claimant's bundle, were:

> "The union's summary of the matters in issue in the trade dispute are:
>
> (1) A guarantee on all existing Terms and Conditions including current bargaining arrangements
>
> (2) In the event of any transfer any National Forum site remains part of the National Forum
>
> (3) A relocation package be agreed

> (4) Voluntary redundancy be available for those that cannot or do not want to move sites in the event of a future site move."

6. The ballot papers were duly sent out to various distribution sites within the Claimant. On 2nd May 2017, the Claimant was notified of the ballot results, which showed a majority in favour of strike action. Critically, on 3rd May 2017, notice of the industrial action was given to start 14 days later (in accordance with the statutory provisions) on 17th May 2017, which is tomorrow.

7. No steps whatsoever were then taken by the Claimant to issue an application, be it with notice or without notice, until the beginning of Thursday, 11th May, when the Claimants, through those representing them (Vista Employer Services Limited) wrote an urgent letter before action dated 11th May. This is the Thursday before the Wednesday of the following week (i.e. tomorrow) when the strike was due to take place.

8. In that letter before action, is set out reasoning for the Claimant's contention that the ballot paper questions do not deal with a trade dispute within the meaning of section 244 of the Act and, for why therefore no trade dispute exists for the purpose of clothing the Defendant with the protection from suit conferred by section 219 of the Act. It then said:

> "We look forward to hearing from you by no later than 5pm today, [Thursday] 11 May 2017 to confirm that the action has been withdrawn, failing which we are instructed to take appropriate steps to prevent the action including seeking injunctive relief, damages and costs."

9. There is a response from Thompsons Solicitors the same day in which opposite contentions are given as to the trade dispute issue raised by the Claimant. The issue was understandably also raised as to the delay in issuing this application.

10. What then happened was that on Friday, 12th May, the Claimant sought to put together the application which is now before me. Notice was given to the court during that day of an intention to make an application on Monday (yesterday) and informal notice of the application to be heard on the Monday (the 15th) was sent to the Defendant's solicitors. This did not get to them until 8.30pm on the Friday, so that even that informal notice did not in fact take effect until Monday the 15th. That informal notice gave an indication that the application was to be issued and heard on the Monday, with a time estimate of one hour.

11. There was then, over the weekend between the 12th and 13th, an agreement by the Claimant to put the application back to 16th May, given that it was accepted that the draft application had not been sent earlier in the day on the 12th.

12. In the Defendant's skeleton argument, the events of 15th May are summarised as amounting to correspondence about arrangements for the hearing, the Claimant indicating an intention for the application to be issued and heard in Court 37 on 16th May, still with an hour estimate.

13. The correspondence on 15th May is of interest given the court must examine the reasons, if any, given for not pursuing an application on notice. The letter from Thompsons Solicitors on 15th May reads as follows:

> "We act for Unite the Union.
>
> We were very surprised to receive a copy of an email from your client's Leading Counsel at 20.37pm on Friday 12 May to a Judge's clerk, enclosing application documents, including a witness statement from Mr Paul Hull, and a skeleton argument and authorities on behalf of your client, and indicating that your client intended that the application should be heard today, Monday 15 May 2017, with a time estimate of 1 hour."

14. I pause at this point, because the reference to the copy email to a judge's clerk was a copy email to my clerk. That email read as follows. It was sent on 12th May at 20.33. It was sent by Mr Duggan, leading counsel on behalf of the Claimant:

> "Dear Mr Coke,
>
> I apologise for sending these papers so late but they have just been completed.
>
> I attach:
>
> - Skeleton argument of the Claimant
> - Bundle of authorities
> - Application bundle
>
> They will be lodged first thing at Court on Monday. I will also get my solicitor to forward this email to the Defendant's solicitors (they already have the application bundle).
>
> If the Judge had the opportunity to read the Skeleton and the statement of Mr Hull this would give his Lordship a very good idea of what the application entails. It is not known whether Unite will attend on Monday though they have been told the application will be made."

15. I have already indicated that the informal notice to the Defendant's solicitors in fact did not arrive until 20.37 that night. To continue the letter of 15th May from Thompsons Solicitors:

> "We observed that your client's application had not been issued (and, to our knowledge, still has not been as matter[s] stand). The draft application notice, and your client's Leading Counsel's email to the Judge's clerk, said

that the application bundle had been served on us as the Defendant's representatives, when plainly it had not been.

We objected immediately to not having been given proper notice of your client's proposed application, and to finding out about your client's proposed application at an hour of the day when it was impossible to take instructions.

At 11.34pm on Friday, we received an email from your client's Leading Counsel informing us, seemingly, that the bundle had not been sent to us and that your clients would not proceed with their proposed application today, but would inform the Judge that they would now proceed on Tuesday morning.

This is not an appropriate way for an application of this nature to proceed.

Your client has known of the subject matter of the trade dispute in general terms since at least 8 February (when our client wrote to yours setting out its broad concerns and its demand for additional guarantees of its members' terms and conditions) and in precise terms since at least 11 April, which was when formal notice of the ballot, setting out the specific summary of the issues in the trade dispute, was sent to your client. The ballot itself closed on 2 May and the scrutineer's report, setting out the results, was sent to your client on the same day. Formal notice of industrial action was sent to your client on 3 May 2017.

Your client failed to take prompt action to raise the issue upon which it now seeks to rely in support of its application, namely whether there is a 'trade dispute' within the meaning of section 244 of the Trade Union and Labour Relations (Consolidation) Act 1992. The first our clients knew of the formal objection to be made was more than a week after the closing of the ballot, upon receipt of your letter of 11 May, which required a response by 5pm that day. It was, of course, already too late by that stage for your client to make an application on the normal 3 clear days' notice, notwithstanding that your client had been aware of the detail of the trade dispute for a month. We consider that there is no good reason for your client's delay and consequent failure to make any application on proper notice and will be drawing this point to the court's attention and relying on it as appropriate in response to any application that may now be made on short notice.

A response to your letter was provided on 11 May, indicating that any proceedings would be vigorously

> contested. We heard nothing further from you during the course of 12 May, and only became aware of your client's application after office hours that evening.
>
> As already pointed out, your client's application notice had not been issued when we received it on Friday evening. However, it provides a time estimate of one hour for the hearing of this matter. Your client's application will be vigorously contested. Our client will be filing detailed evidence, which we are still in the process of obtaining, and will want to be heard through Leading Counsel. One hour will, on any analysis, be insufficient to deal with this matter, even on the 'informal on notice' basis you propose. Our view, shared by Leading Counsel, is that a time estimate of half a day is appropriate.
>
> The usual rule is for there to be three clear days' notice of an application of this kind. As we have already indicated, there is no good reason why such notice could not have been given in this case bearing in mind the length of time over which your client has known of the subject matter of the trade dispute about which it now complains in its application.
>
> It is of course a matter for the court as to whether it is prepared to grant your client's request this matter be listed tomorrow in the circumstances we describe in this letter. However, we request that you place this letter before the court when approaching the court to list this matter, so that it [is] appraised of the full circumstances."

16. The response of the Claimant, through Vista, on 15th May (yesterday) was in these terms:

> "Thank you for your letter received at 10:05am today. We note the contents of your letter.
>
> So far as service of the documents is concerned, our Leading Counsel had thought that they had been served by this firm but he, in any event, copied you into communications with the Judge's clerk as soon as submissions were finalised. We immediately agreed that the matter would be put off until Tuesday given that you wished to put in evidence and respond. You are aware that we wrote to you on 11th May 2017 to point out why the ballot had been misconceived and requested that your client confirm that the action proposed for 17th May would not go ahead. Your firm's response posited an erroneous statement about the questions on the ballot paper. You

were fully aware that our Client would, in the circumstances, most likely seek the assistance of the Court. It is misleading to state that our Client has been aware of the issues from February this year. The nature of the four questions on the ballot paper, the timing of the ballot and the notice of action are recent; in particular, it is the notice that has triggered the need for our Client to seek recourse to the Court. There can be nothing in the statement of Mr Hull that has come as a surprise to your client since he sets out the factual background by reference to the documents that have given rise to the application.

We remain surprised that you consider that there is a trade dispute. We would ask you, in particular, to reflect on the first question on the ballot. There can be no dispute on this issue when our client has already stated that terms and conditions are protected and when, in any event, TUPE operated to protect contractual terms. We would ask you to reflect on this point and consider whether action can be appropriate since this flaw renders the whole ballot ineffective and your client will not have the protection of section 219 of the Trade Union and Labour Relations (Consolidation) Act …

You have been made aware of the application and there is clearly a need for urgency given that the first date for proposed action is this Wednesday. We will give an undertaking to the Court to issue proceedings and issue the application.

We note your view on the length of time that will be needed for the hearing. We will liaise with our Leading Counsel's clerk and see what can be done to accommodate the hearing. We considered that one hour would have been sufficient since the Judge will have read the papers but will check regarding a ½ day slot, which we hope can be accommodated given the urgency of this matter. If your client goes ahead on Wednesday and an injunction was subsequently obtained then there is a great risk of personal liability to your client as we do not consider that section 219 applies. We would strongly suggest as an alternative, that your client postpones the action that is due to take place on Wednesday so that there can be an orderly hearing of the application with exchange of evidence and the application can be listed for a later date.

Our Client is very disappointed that it has had to go down this route. Its relationship with your client have hitherto been relatively harmonious and there has not previously been precipitate industrial action of this nature which we consider to be wholly disproportionate, especially given the

> assurance that our Client has already given. Our Client must, however, protect its position, unless your client withdraws the action to take place on Wednesday so that discussions can then continue."

17. There was then a response to that letter from Thompsons Solicitors on 15th May (yesterday) which reads as follows:

> "We refer to your letter of earlier today in reply to ours.
>
> We note what you say about the process that had led up to this application. However, we do not agree with it and stand by what we said in our letter of earlier today. Even on your own case, the ballot paper, sent to your client on or around 11 April, contained the exact details of the trade dispute about which your client complains. That left ample opportunity for your client to make its application giving the requisite period of notice, and arrange an appointment with a suitable time estimate before a Judge.
>
> We also note what you say in relation to the existence of a trade dispute. Our client remains confident that a trade dispute exists.
>
> However, our main purpose in writing is in relation to the arrangements for the hearing of this matter, which we understand you to be envisaging taking place tomorrow morning. As we understand it, you envisage the matter being added at the start of a Judge's list with a time estimate of an hour.
>
> Ordinarily, in matters such as this, we would expect arrangements to be made for there to be a specially arranged appointment before a Judge. In this case, as we have already said, we consider that a half day time estimate is realistic. The union will be filing detailed evidence and a skeleton argument, and will be represented by Leading Counsel. There will be a reasonable volume of documents, which it will be convenient for the Judge to read in advance.
>
> We consider that the prospects of an orderly disposal of this matter in a way which is convenient to the court will be greatly increased by putting these arrangements in place. Please would you let us know whether approaches have been, or are to be, made in this regard. If you are in contact with the court over the listing of this matter, please would

> you ensure that this letter, and our letter of earlier today are before the court.
>
> In the meantime, we expect our client's evidence and skeleton argument to be ready for service today, but after the close of business. Please would you inform us of the identity of any Judge known to be assigned to this matter, together with the name and email address of their clerk so that we may provide copies of our client's evidence and skeleton argument. Please could you also inform us of the Court Number and time of hearing if you have it."

18. There was then this final reply from the Claimants through Vista, dated 15th May:

> "Thank you for your letter of received this afternoon. We note that you will not be serving evidence until after close of pay this evening.
>
> We do not agree with your comments about the timing of the application. It would not have been appropriate for any application to be made until after notification of action was given as, until then, any such application would be entirely hypothetical. We are surprised at your suggestion that an application should have been made in April at a time when your client had merely given notification that [it] was going to hold a ballot and the notice was provided on 3rd May. We asked for undertakings on 11th May from your client, that it would withdraw the notice of action and this was refused.
>
> You had notice on Friday evening that the application was going to be made and, indeed, your letter of 11th May 2017 anticipated that our Client would be making an application. You have had the weekend and all of today to prepare a response.
>
> Please provide your evidence and submissions direct to our Counsel when it is ready as we may be travelling to London for the hearing at that time. His email is [then the address is set out].
>
> Until we have your client's evidence we are hardly in a position to advise the Court. The application will be made at 10.30am tomorrow to Court 37. We are advised that the Judge does not have any matters listed tomorrow so are hopeful that there should not be any problems in being heard. No doubt, you can make arrangements for your evidence and submissions to be lodged for the Judge in Chambers at the same time as you serve us with your evidence.

> Yours faithfully,"

19. In my judgment, the following appears. Firstly, this is an application made without notice. If it was to be made with notice then it should have been issued, at the very latest, on Thursday, 12th May. Under CPR 25.3, I have a discretion to grant an interim remedy on an application made without notice if it appears to the court there were good reasons for not giving notice. In (3):

> If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given."

20. There is an abject failure, in my judgment, of the Claimant to comply with CPR 25.3(3). There is no evidence before me setting out the reasons why notice has not been given. The correspondence I have referred to does not properly address this issue. It starts with the premise that it was legitimate for the Claimant to start the ball rolling with a letter before action on 11th May. I have no hesitation in saying that it does not appear to me there are good reasons for not giving notice.

21. Mr Duggan QC has done his best in careful submissions to seek to fill the lacuna in the evidence in support of this application. His oral submission was that the reason why the Claimant did not begin the process until 12th May (the Friday) was that the Claimant had been seeking, up to the last moment, a settlement whereby the strike would be withdrawn. It had been hoping to obtain this settlement through the parties' discussions at Acas, which were last in place on Wednesday, 10th May. It was only when the discussions at Acas on the Wednesday fell apart that the Claimant was in a position to start the application process with the letters before action on the 11th and the attempts to issue the application on Friday the 12th.

22. There is not a shred of evidence before me that this is the reason why the Claimant delayed so long. Indeed, Mr Cooper, in his oral submissions, says that if that is the explanation, it is not accepted on behalf of the Defendant, because their position is that when they attended Acas on the Wednesday they were told that for legal reasons the Claimant was not prepared to proceed.

23. The Claimant knew of the impending strike from 3rd May, when the notice of industrial action was given. Parliament has amended the obligation upon the union so that 14 days notice of strike action is given. It is obvious why 14 days is now given: to enable the employer, if he so chooses, to make an orderly application to the court for injunctive relief.

24. Even if there was evidence before me that the Claimant had been waiting until the outcome of the Wednesday Acas meeting, it knew and those advising it knew, of the obligation upon them to act promptly, in the event that the Acas discussions fell apart. The Claimant must have or should have, gone into that Acas meeting knowing that it would have to act very quickly to make an on notice application. It is obvious that if it be the case the Claimant and its advisers were waiting for the Acas outcome, none of those considerations were playing on their minds.

25. I find the correspondence of the 15th from the Claimant's representatives quite remarkable. They are basically saying there is absolutely nothing for the Defendant to

complain to about; that it may have all been at short notice, leading counsel may have had to work until the early hours of the morning to put together his skeleton argument and the Defendant may have had to pull all the stops out to produce what they have (the evidence of Mr Draper and the bundle of exhibits), but that is to nothing and there is no prejudice.

26. I reject that approach. The Claimant has an obligation to the Defendant and indeed to the court to show good reasons for not giving notice. I was drawn to the observations of Silber J in CEF Holdings [2012] EWHC 2514 (QB) in the context of an application without notice for a freezing order. Silver J referred to the applicable provision of the CPR:

> (1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice."

He then made these observations in paragraph 235:

> Generally a without notice injunction should be granted only in circumstances where to give notice would enable the defendant to take steps to defeat the purpose of the injunction, such as in the case of many search or freezing injunction, or where there is some exceptional urgency, which means literally there is no time to give notice (see, for example, National Commercial Bank Jamaica Ltd …"

27. I accept that those observations were made in the context of a different type of application, but they are observations on the need for good reasons to be given and that there has to be some exceptional urgency.

28. In a sense there is exceptional urgency here, because the strike is due to start tomorrow, but that exceptional urgency is wholly, in my judgment, of the Claimant's own making. It is quite remarkable, when one looks at this application, which is in court 37, that Mr Duggan on behalf of the Claimant was no doubt working all hours on the Friday to get the draft application material together. He communicated with my clerk, as I have indicated, at 20.33pm. The communication from the Defendant, which enclosed the Defendant's skeleton argument, was timed at 3.30am today. There is every reason why this type of application, save where there is good reason, should be made on orderly notice.

29. The application raises complex issues of law and, to a degree, of fact. The Claimant is seeking to restrain the union from calling or maintaining strike action by its members at a number of distribution centres from which the Claimant distributes its goods to customers.

30. I have read the papers and I say no more, for these purposes, than that it is clear that the trigger for the "dispute" between the parties has been the proposals of the Claimant, which were announced in January 2017, to transfer and outsource its distribution work at one of its sites (the Magna Park site) to another entity in Wincanton. This is due to take effect on 1st June. That transfer is being made

pursuant to TUPE and under the transfer all the existing employees of the Claimant will be transferred to the new employers. The industrial action proposed was on a ballot sent not simply to the employees at Magna Park, but to those at other distribution sites of the Claimant.

31. I do not disagree with the submissions made to me by Mr Cooper that this application raises points of wide public interest. There is an issue as to whether industrial action can be brought in support of protections or to enhance protections which the union wishes to obtain from a transferor before a TUPE transfer, to protect the interests of its current members after transfer.

32. There is a complex issue of whether a trade dispute is engaged with the current employer in the terms of section 244, where the union is concerned with what will happen to its members after transfer to a new employer, in the context of the application of TUPE, especially if there is an anticipated relocation after transfer. There is clearly an issue as to whether there is a trade dispute for the purposes of the Act, where the apparent concerns of the union are to protect its existing employees at other sites, who or which are not currently the subject of a proposed transfer or a relocation, and where the union wishes to use industrial action to support its attempts to persuade the employer to give protection in anticipation of a future transfer or relocation after transfer.

33. There is an issue as to the collective bargaining which has taken place in this case at the National Forum sites and the extent to which there can be a trade dispute when what is being sought is to include within those bargaining arrangements with the current employer, the site and position of a new employer after a transfer.

34. I do not go into the merits of the arguments for the moment. I just say this is not a straightforward application and if ever there was a case for this to be made on notice, it was this type of case.

35. It is not necessary for me to found my exercise of discretion on considerations of the prejudice to the Defendant of a without notice application, given my view that there just are no good reasons set out in any evidence on behalf of the Claimant for not giving notice. However, I am bound to say that if prejudice were relevant I see force in Mr Cooper's submissions to me. He would argue that arising out of the way in which the Claimant's application was put together with such speed there has been a failure to provide a full and frank disclosure of all relevant material, relevant to the court's necessary investigation into what have been the issues raised between the parties, in the pre-application communications. For example, Mr Cooper referred to the failure to provide that which Mr Draper has provided, which is the joint stakeholder agreement between the Claimant and the union in the context of recognition. The significance, if any, of this collective agreement is in issue in this application before me.

36. Mr Cooper also referred to a large number of minutes/consultation/collective bargaining meetings about the proposed transfer. This is all important, given the Claimant's point in the application that, looked at individually, or even collectively, that which is on the ballot paper does not reflect a trade dispute within the meaning of the Act.

37. Mr Cooper says to me, and I accept, that although in the short time available the Defendant has pulled out all the stops to fill the gap, there may yet be other relevant material which has not yet been obtained. It is said that, given the shortness of the time, although a witness statement in some detail has been put in by Mr Draper on behalf of the Defendant, had the proper notice been given the Defendant would have wished to pursue other material; for example on the experience of others, not only Mr Draper, as regards multiparty collective bargaining concerning more than one employer.

38. In all these circumstances, I decline to grant any interim relief and I decline to consider this application on its so-called merits. It has not been issued. It is without notice and no good reason has been given, in my judgment, for not giving notice. I dismiss the application before me.

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