Employment

High Court rules interim declaration a “very exceptional remedy” in contractual disputes

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Employment lawyers will be very familiar with principles governing applications for injunction, but perhaps rather less so with applications for interim declarations brought pursuant to CPR 25.1(1)(b). The judgment of the High Court in *British Airline Pilots' Association v British Airways City Flyer* [2018] EWHC 1889 (QB) is likely to ensure that this unusual remedy remains just that.

The application was brought by British Airline Pilots' Association (“BALPA”) in relation to a conflict with BA Cityflyer over the construction of a collective agreement governing the rostering of pilots and, in particular, whether BA Cityflyer were entitled to require pilots to undertake pre-05.00 duties without BALPA’s prior agreement. Having threatened an application for an injunction the union instead sought an interim declaration that pilots were entitled to refuse to undertake pre-05.00 duties.

The application came before Mr Justice Butcher, who noted the difficulty posed by an application for an interim declaration in that it effectively sought to circumvent the requirements of a summary judgment application by bringing a matter to court quickly without having complied with the safeguards and requirements that would be part of an application for summary judgment. Furthermore, the applicants contended that the ordinary safeguards applicable to most interim remedies did not apply, arguing that they did not need to satisfy the balance of convenience test.

Mr Justice Butcher rejected BALPA’s application concluding that an interim declaration was an exceptional remedy in the public law context and must be “a very exceptional remedy” in relation to the contractual rights of parties to a private law contract. It was significant that he had not been referred to a single private law case in which such a remedy had been granted. He noted that the court does not ordinarily take an interim view of contractual rights, “the rights contended for either do or do not exist” [27].

Mr Justice Butcher went on to consider the recent public law case of *NCA v N and Royal Bank of Scotland plc* [2017] 1 WLR 3938 in which Hamblen LJ concluded that it was difficult to see how an interim declaration could be appropriate in answering substantive law questions that only permit a final rather than a temporary answers. Hamblen LJ also determined that before granting an interim declaration the court should require the high degree of assurance of the applicant’s entitlement to the declaration generally required before mandatory injunctive relief will be granted. Mr Justice Butcher’s own assessment was that such a test could not be markedly different to the test for summary judgment (i.e. no real prospect of success).

Mr Justice Butcher reached the view that the present case was one of substantive law and that it would be inappropriate for the court to give an interim answer to questions of construction of a contract which only permits of a final rather than a temporary answer. He went on to conclude that in any event he could not be satisfied with a high degree of assurance that BALPA were entitled to the interim declaration.

Moreover, when considering the grant of an interim declaration the court must have regard to the balance of justice. In this case the prejudice to BA Cityflyer of granting the declaration outweighed that of the pilots. The evidence of the impact on pilots was assessed by Mr Justice Butcher as weak, whereas there was a potential of real injustice to the Respondent who might suffer considerable financial loss for which there may be no possible compensation, the union

having failed to offer a cross-undertaking.

Akash Nawbatt QC and Talia Barsam represented the Respondent, BA Cityflyer.

The judgment can be viewed here.