Notes for Speech to ELW Conference

Strategic Litigation

A personal perspective from a trade union advocate

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What is 'strategic litigation'?

Every case is potentially strategic. I guess most lawyers would consider the phrase to mean litigation which is intended to alter the law so as to benefit others beyond the immediate client or clients. I have given some examples of strategic litigation in which I have been involved in the Appendix to this paper to illustrate the general propositions below.

From the perspective of the advocate, innovative strategic litigation is one of the great professional pleasures – especially if the strategy pays off!

Strategic litigation may be the result of long-term planning where the legal team have identified the arguments long in advance of the actual case being found in which those arguments can be run. It may be necessary to wait for such a case to arise. In that situation, it will also be necessary that when the facts do arise, the potential claimants are members of the union in conjunction with whom the legal team work, or that that union is itself the potential litigant. It is obviously also necessary that the members and the union agree to proceed, and to deploy the identified strategy, and to instruct the legal team who have dreamed up the arguments.

Sometimes, the wait for the suitable case may be shortened because the union may be in a position, through its relevant members, to engineer the necessary and relevant facts. Or, it may be that the facts are common enough and all that is required is for the union's communication systems with its members and officers to bring relevant factual scenarios to the attention of the union's legal team for consideration for potential litigation.

Strategic litigation also often arises without any significant planning. This is more likely where the strategic litigation is not offensive but defensive in nature, i.e. where the union or the workers do not initiate proceedings but are defending them. In this scenario, the facts presented to the legal

team may stimulate the identification of a strategic new line of defence or an argument justifying the disapplication, restriction or avoidance of some detrimental rule of law hitherto thought inescapably applicable. Sometimes, the lawyer's knowledge of international labour law will suggest a potentially valuable forum hitherto disregarded.

Of course, many cases turn out to be of strategic significance which were never thought to be so at the time.

Frankly, strategic litigation, whether offensive or defensive, in my experience, arises more often by chance than by intention.

Most union litigation, inevitably, does not require much strategic consideration by the union. In choosing to advance a claim, the union may have few options: for example, where members have been dismissed apparently unfairly, industrial action to restore them is not industrially feasible, employer intransigence makes negotiation impossible, and the only alternative is a claim for unfair dismissal. Similarly, if a member is injured, made ill or is killed at work: the union probably has only one option, to sue for compensation. Likewise, in defending a claim for an injunction or damages for organising industrial action, the union either concedes or must try to defend itself in court.

No strategic considerations are usually necessary in such situations. Nevertheless, the legal team will use their ingenuity to deploy the best arguments available and these, or some of them, which may have a strategic impact beyond the immediate issue confronting the client.

The purpose of strategic litigation

If the phrase means what I think it means then its purpose will usually be to secure from the relevant court, tribunal or committee a decision which alters the law in a way which confers benefits on workers or their unions beyond the client(s) in the instant case. The strategic benefit here is not confined to a more favourable interpretation of some legal rule, though that is perhaps the paradigm example of strategic litigation. There are other strategic possibilities. The litigation (win or lose) may serve to highlight a situation with the effect of triggering a beneficial legislative change to the law or government policy. This might result because the litigation might galvanise workers, unions or the public to apply pressure for change.

Strategic litigation often takes place within the context of a wider industrial or political campaign in which the litigation element plays only a small part.

The role of the lawyer

Of course, the obvious function is to conduct the litigation and present the facts and arguments (both novel and more mundane) in the most attractive and persuasive way. But the role is necessarily wider than that.

Certainly, dreaming up new and groundbreaking arguments is part of the job. The strategic trade union lawyer is an opportunist looking for ways to exploit or avoid existing law (depending on whether the trade union litigator is the protagonist advancing a claim on behalf of the client(s) or defending from a claim made against them).

One essential element of the role is to carefully assess the prospects of success in promoting a claim that has strategic implications. The lawyer must avoid the temptation to advise either optimistically or pessimistically. She must be a realist.

Of course, whenever litigation is afoot there is always the risk of losing, particularly for unions fighting anti-union laws in far from impartial courts. But the risk of losing strategic litigation is one about which the advocate must agonise intensely since adverse consequences, particularly in international fora, may have dire consequences, perhaps unseen or unforeseeable. The evaluation of chances of success requires an iron nerve and great clarity of insight into all possible factors and outcomes, direct and indirect.

I draw attention to two aspects of the role of the strategic litigator.

The nature of labour law

Firstly, it is obvious that the advocate needs a profound knowledge of the relevant substantive law and the procedural rules of the courts, tribunals and committees in which the strategic case might be fought. Beyond that she will have a deep understanding of the nature of law. Much ink has been spilled on such jurisprudential questions and, in particular, the function and purpose of labour law. I don't wish to explore these issues now!

But, in truth, an understanding of the underlying realities of labour law is essential to the tactics and strategy of litigation and to the ability to provide the most accurate evaluation of the chances of success. An advocate under the illusion that the outcome of litigation is determined by the strength and cogency of the legal arguments and the manner in which they are deployed is so naïve as to render herself a liability.

Labour law is not neutral as between capital and labour. Neither is its function the protection of labour from the excesses of capital. All law in every form of society is intended to protect the interests and power of those who hold economic power and this indeed is the function of labour law. Thus, under capitalism (and, in particular, neo-liberalism) the legal rights of workers are, generally, intended to maintain the imbalance of power at the workplace on which so many jurists and academics have commented.

One way of securing this imbalance is by diverting issues which could otherwise be resolved by the exercise of collective strength into courts and tribunals in which the workers are likely to be intimidated, outgunned and under-resourced, where the outcome is statistically likely to be adverse and the remedy, if achieved, largely unenforced and unenforceable. The strategic advocate obviously factors in that truth.

Sometimes, labour rights are granted or upheld for the ostensible purpose of improving the efficiency of labour. The Working Time directive may be seen in that light.

Sometimes the purpose is to level the playing field between employers by preventing small employers undercutting larger ones on labour costs. The Adequate Minimum Wage Directive and its emphasis on extensive sectoral collective bargaining coverage comes to mind.

Sometimes cases are won or legislation is passed on the basis of an emotional reaction of outrage to particular instances of exploitation and oppression of labour. The first legislation to prevent children working in mines and mills exemplifies this.

Sometimes the fear of social disorder restrains further incursions on trade union rights and freedoms by legislation or judicial attack.

All these factors must be taken into account in the presentation of a case of strategic importance in court.

But, though it may not be of immediate relevance in the conduct of the case, the litigator will be aware that it is the countervailing power of organised labour which is the major determinant of the line which marks out the boundaries of labour law. Such power is not fixed. It ebbs and flows in response to levels of organisation, political education, leadership, solidarity, confidence, anger, experience, as well as to changes in technology, modes of production, economic fluctuations, wars, revolution, elections, and the influences of different ideologies and propaganda. Hierarchy, that essential cultural characteristic of capitalism and, with it, working class deference, respect for the law, and the belief that the law represents justice all play their part.

To the list above we must add pandemics, which so influenced the structure of labour law in the 14th century after the Black Death, though COVID-19 has not so much changed labour law as illustrated its almost complete inadequacy to protect the working class.

Then there is the background and ideological instincts of the judiciary to consider. The advocate and fellow practitioners will become familiar with the characteristics of the national and regional judges in their specialism and will share that knowledge. But the politics, disposition, idiosyncrasies, and the effect of peer pressure of the judges of international courts and the members of supervisory bodies of international instruments will not be so easy to discern. Even less easy to discover will be the peculiarities of the rapporteurs, registrars, associates, researchers, assistants, tip-staffs, interns and others who contribute to and may write or influence crucial parts of judgments.

It is in this foggy interplay of forces and factors that the trade union lawyer must do her best, knowing that labour law litigation is fought on an uneven and adverse terrain. Caution must inevitably be the watchword.

Industrial Strategy

There is one final element in the task of the union advocate to which I wish to draw attention.

The union lawyer must always bear in mind that the fight is that of the workers and that the legal component is very much secondary to industrial and political objectives and strategy. Lawyers inevitably think of a legal route to the solution of a problem but humility as to the role of law and of

the lawyers is essential. That humility will be forged in an appreciation of the limits of the law historically.

In this regard it is important to appreciate that legal strategy must be integrated with the industrial strategy of the union. Often, it is a question of resorting to law where industrial action has failed or where industrial action is not possible or cannot achieve the objective. Sometimes legal action is a useful accompaniment to industrial pressure by boosting morale or demonstrating to the employer that the union is prepared to commit on all fronts. But whatever its role, strategic litigation, if it is to be pursued, must be dictated by the overall strategy of the union.

Other Matters

The trade union lawyer will spend much of her professional life running cases of little significance to anyone other than the client. Though lacking the glamour of strategic litigation, it gives the pleasure of becoming intimate with other people's working lives, and the satisfaction of being useful.

But two more jobs remain. One is to educate, to pass on insights to members, officials and to academics. There is legal education as to the substance of labour law, its rights and restrictions; likewise trade unionists need a knowledge of the techniques of advocacy. They also need education in the nature of labour law and its limitations - especially as compared to the central role of solidarity and collective strength. There is a marked tendency on the part of trade unionists (lay and official) and, indeed, lawyers, to see litigation as a way to resolve the issues that arise at work. They need to know the adverse nature of the legal battleground.

Finally, the trade union lawyer has a unique and important role in seeking legal reform both to benefit workers and to create more legal space for trade unions to exercise their proper functions and facilitate the use of collective strength by the members.

Thanks for listening.

Appendix

Some examples of strategic litigation

I should give some brief examples of the ways in which strategic litigation may arise, from my own experience. Since participants today are European, these examples are of cases that ended in the ECtHR.

I start with the case of *UNISON v UK* (53574/99) [2002] 1 WLUK 47; [2002] IRLR 497. In that case an injunction against strike action was granted against the union by the English High Court and was upheld on appeal. In the light of the compendious critique of the UK's anti-union legislation by the ILO Committee of Experts in relation to Convention 87,[1] we thought it worth challenging the judicial denial of the right to strike in the ECtHR. In the result we established, for the first time, that the right to strike was protected by Article 11(1) - although the particular restriction in question was justified by reference to Article 11(2).

This was strategic litigation but not the result of premeditation, it was simply that the legal team was alert[2] to the possibility of litigation at international level and saw the opportunity to improve the ECtHR's jurisprudence on the basis of supportive ILO jurisprudence to the benefit of the union client, and more widely. It was sheer opportunism (though we calculated as carefully as we could the consequences of losing).

This contrasts with the case of *Wilson and Palmer v UK* (2002) 35 EHRR 20. That was a case where, throughout the 1980s, the General Secretary of the National Union of Journalists and I evolved a strategy to use the ILO, ECHR and ESC law to counter the increasingly draconian anti-union legislation of the 1980s if and when a suitable case presented. When, in 1989, a national newspaper decided to de-recognise the NUJ and offer higher pay to those who agreed no longer to be represented by it, the plan was to use UK anti-discrimination law to the fullest extent possible but, if that failed, to take the case to the ECtHR. We did lose ultimately in the UK courts after some 7 years of litigation but succeeded in the ECtHR, 5 years after that. In consequence UK legislation had to be amended.

The case of *ASLEF v. UK* (2007) 45 EHRR 34 was not so much strategic litigation as an opportunity presented by the failure of UK law to protect the autonomy of a trade union to choose its own criteria for membership

[1] In its Report to the ILC at 234-241, based on a submission I drafted on behalf of the national Union of Mineworkers in 1988.

[2] Not least because of the ILO application and the ongoing work we were doing on *Wilson and Palmer* – see above.

(in particular the right to expel fascists). There was nowhere else to go but to the ECtHR – where we were successful.

A planned piece of strategic litigation, though not so successful, was *NURMT v. UK* (2015) 60 EHRR 10. The principal element of the case was an attack on the UK ban on secondary action. This had been the subject of discussion between myself and the late Bob Crow, then General Secretary of the union, over the course of some years. He and his officers looked for a good case in which to mount the challenge. The omens looked reasonable: the *UNISON* case had recognized that Article 11 protected the right to strike.[3] Seven Turkish cases between 2007 and 2010 established that even trivial restrictions on the right to strike which might discourage its exercise, violated Article 11. Further support was to be found in *Danilenkov v Russia* (2014) 58 EHRR 19. And all European labour lawyers were buoyed up by the groundbreaking decision in *Demir and Baykara v Turkey* (2009) 48 EHRR 54 that the right to bargain collectively was an essential element of Article 11. In addition, the ILO and the ESC jurisprudence was, of course, all in our favour on secondary action.

The ECtHR in *RMT* definitively recognized that the right to strike was protected by Article 11 but, on a disingenuous basis, distinguished both the narrow margin of appreciation set in *Demir and Baykara* and the clear and unambiguous conclusions of the ILO and ESC jurisprudence on secondary action. It created such a broad margin of appreciation that the UK's gross and unparalleled restriction on secondary action was held not to violate Article 11.

My final example is that of *UNITE v. UK* (2016) 63 EHRR SE7, our failed defence of the right to bargain collectively in the form of the Agricultural Wages Board, established by legislation and abolished by it. No domestic remedy was available and there was nowhere to appeal other than to the ECtHR. The case was not the result of long planning except in the sense that I (and colleagues) was always on the lookout for collective bargaining cases in which *Demir and Baykara* and the full weight of the ILO and ESC jurisprudence could be deployed to expand the virtually non-existent right to bargain collectively in the UK. The case should have won but failed on the basis of margin of appreciation founded on a deliberate misstatement of our case: that Article 11 mandated the creation of a mandatory scheme of collective bargaining. That was never our case. Instead, (in short) we

[3] The importance of the right to strike had also been recognised in *Wilson and Palmer*.

argued that where there was such a legislative scheme, Article 11 protected it.

These two cases we considered presented a far greater likelihood of winning than losing, and in that evaluation I still consider we were correct on the material available to us at the time. Later cases have demonstrated just how unreliable the ECtHR is on industrial relations cases under Article 11.