

Defendant
P Cullen
First
PC1
26 April 2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BETWEEN:

CLAIM No. KB-2023-001961

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Claimant

and

THE ROYAL COLLEGE OF NURSING OF THE UNITED KINGDOM

Defendant

WITNESS STATEMENT OF PATRICIA YVONNE CULLEN

I PATRICIA YVONNE CULLEN of the Royal College of Nursing of the United Kingdom ("RCN"), 20 Cavendish Square, London W1G 0RN will say as follows:

1. Since July 2021 I have held office as General Secretary and Chief Executive of the RCN. The RCN has approximately 280,000 members employed in the National Health Service ("NHS") in England and who are within the scope of the current trade dispute. It is governed by the College Council. It is a member-led democratic trade union.
2. I was previously employed as a Community Nurse in West Belfast before working for the Public Health Agency and the Health and Social Care Board. I commenced employment with the RCN in 2016. In May 2019, I became Director of Northern Ireland, RCN. In April 2021, I commenced my role as Acting General Secretary before I was confirmed in my current role in July 2021.

3. The facts and matters stated in this witness statement are within my personal knowledge, unless otherwise stated. Where any fact or matter is not within my personal knowledge I have stated the source of the information. I confirm that all factual matters within this statement are true to the best of my knowledge, information and belief.
4. To avoid burdening the Court with duplicate documentation, I refer to documents exhibited to the statement produced by Miranda Worthington at "MW p. #".
5. The Court will of course be aware that the RCN has reluctantly taken the decision not to attend the application pursued by the Secretary of State. I should emphasise that no disrespect is intended either to the Court or to the Judge, the latter being placed in the unenviable position of having to intervene in the trade dispute that exists between the RCN and the Secretary of State and NHS employers.

Summary of RCN's position

6. RCN opposes the Secretary of State's application for an interim declaration. There exists a very real trade dispute between the RCN and the Secretary of State about pay. RCN has already balloted its members and has an impressive democratic mandate to take action. Public support for the RCN has been consistently high with around two-thirds supporting nurses going on strike. This application is part of a clear strategy by the Secretary of State to undermine the RCN and wear down its members in the industrial dispute. In doing so, the Secretary of State relies on oppressive legislation introduced by the Conservative government and designed to limit the ability of trade unions to call on their members to take industrial action. In particular, in circumstances in which the RCN has behaved responsibly and exercised considerable restraint in acting on the substantial mandate for action that it has been given by its members, the Secretary of State seeks to limit a final day of strike action and to leave the RCN in a position in which, at considerable expense, it has to re-ballot its members before any further action can be taken.

7. It is significant that no NHS employer has sought to challenge the industrial action called for 2 May 2023. That is because employers acutely acknowledge and understand the RCN's campaign and why pay restoration is not merely desirable but in fact necessary to avert a healthcare crisis.
8. The RCN's ballot closed at noon on 2 November 2022. The Secretary of State seeks a declaration that the proposed strike action on 2 May 2023 is unlawful. It has been pointed out to me that this time period clearly falls within the period set out in the Explanatory Notes which accompanied the Trade Union Act and which remain accessible on-line. The Explanatory Notes confirm that the ballot mandate "*... will automatically expire six months after the date of the ballot...*". That covers the period of 2 May 2023.
9. I understand that the Court ultimately has a discretion to grant the relief sought. In addition to taking into account the above factors, if it is suggested that the Explanatory Notes are dangerously misleading and inaccurate, then I invite the Court to take this into account when exercising its discretion whether to grant the relief sought. The RCN and its members should not be penalised in circumstances where the Government's own publicly available guidance is seriously deficient.

Trade Dispute

10. On 10 August 2022, RCN registered a pay dispute with the Secretary of State for Health & Social Care in respect of pay. Although our members are passionate and dedicated to providing care to patients, it saddens me to say that nursing is in a state of crisis.
11. A report¹ by the Organisation for Economic Cooperation and Development (OECD) laid bare what our members already knew. Compared to other countries in Europe, the pay of nursing staff in the UK has been falling in real terms. It has not increased over the course of the last decade. The continual

¹ https://www.oecd-ilibrary.org/social-issues-migration-health/health-at-a-glance-europe-2022_f49cef1c-en

real terms reduction in pay when set alongside record levels of inflation and a cost-of-living crisis combine to act as a “double whammy” for our members.

12. Real earnings for nurses have lagged behind employees in other professions in the United Kingdom, particularly those in the private sector. In the private sector, real median earnings fell by 3.2% between 2011 and 2021, while nurses’ median earnings fell by 6.0%. This means that nurses have experienced almost double the decline of those working in the private sector.
13. When wages of safety critical staff are allowed to stagnate or fall as they have done – nurses at the top of band five have experienced a 20% decline in real terms pay in the last twelve years – it has damaging impacts on both recruitment and retention of nursing staff. It is a false economy to conclude that cutting or holding down the pay of frontline and public sector workers saves money in the long term.
14. At the time we announced our intention to hold an industrial action ballot in July 2022, there were a record 46,841 vacant registered nursing posts in England’s NHS. It had risen by 17% compared to 12 months previously. This equates to roughly 1 in 8 of all nursing posts in the NHS. In the last year, a record 25,000 nursing professionals left the official Nursing and Midwifery Council register.
15. When nursing suffers, the reality is that patients suffer. Without a decent pay rise, which recognises the unique skills of our safety-critical profession, we risk more nursing staff making the difficult choice to leave the profession they love because they cannot afford to remain. The level of attrition of nursing staff in turn puts patient care at risk. As more and more nurses leave the profession without being replaced, the greater the consequential burden that has to be carried by those who remain. This in will lead to more making the decision to seek employment elsewhere and the already vicious circle spirals further out of control.
16. As a consequence, RCN members are increasingly concerned for patient safety and that has been as much a part of our campaigning and strike action as pay

increases. In a survey of our own members in 2022, 83% said they did not have the number of colleagues to provide safe patient care and meet all their needs.

17. Each additional patient per nurse is associated with the patient having to stay longer in hospital, being 12% more likely to die in hospital and 7% more likely to die after 60 days. Workforce shortages are also a key driver of the current inability to reduce waiting lists and post-Covid 'backlogs'.

18. The Government's failure to value our profession, by addressing fair pay and safe staffing, is not only impacting on patient care today but damaging our ability to educate and recruit the workforce of tomorrow. The figures are also concerning as to the fall in the number of people seeking to enter the profession. On 9 February 2023 figures were published showing a 19% drop in the number of people applying to nursing degree courses.

19. With the cost of living soaring and with years of below-inflation pay awards, our members felt that "enough is enough". The Government needs to give something back to nursing staff, not just expecting us to carry on as service pressures build to unsustainable levels. Our members passionately believe that this starts and ends with an above-inflation pay rise that goes some way to make up for a decade of underpayment.

Ballot for industrial action

20. On 26 September 2022, RCN sent to various NHS employers notices of intention to ballot under section 226A TULRCA 1992 [MW p. 14]. Although these proceedings concern planned industrial action in England, ballot notices were sent out in Scotland, Wales and Northern Ireland. This was unprecedented in the history of the RCN. For the first time in 106 years members across the United Kingdom were balloted to take industrial action.

21. The ballot paper described the trade dispute in the following terms [MW p. 17]:

The RCN demanded a pay award of RPI plus 5% for members employed in the NHS on Agenda for Change terms and conditions in respect of the pay year

2022/23. (In Scotland this was described simply as an above inflation pay award).

The RCN's demand was not accepted by the Secretary of State for Health & Social Care, or each responsible Minister in any of the devolved Governments in Scotland, N. Ireland and Wales, or any NHS employer in Great Britain. Therefore, the RCN is in dispute in relation to pay which is fundamental to members' terms and conditions.

This dispute also reflects the RCN's concern that the fall in members' pay in real terms currently and in recent years is having dire consequences for the nursing workforce in terms of recruitment and retention, and therefore patient safety.

22. The ballot closed at noon on 2 November 2022 [MW p. 16].

Ballot Result

23. In England ballot papers were sent out to members employed by 263 NHS employers. Of which, 129 met the 50% threshold requirement for participation (a requirement inserted by the Trade Union Act 2016). RCN achieved 116,878 votes in favour of strike action across all employers, including those where the 50% turnout wasn't met. This means that 50,116 members who voted in favour of strike action have been disenfranchised from being called out where we did not achieve the 50% turnout requirement. This is a sad state of affairs where our members are not able to participate in industrial action, notwithstanding that they have precisely the same trade dispute with the Secretary of State.

Trade Union Act 2016

24. Prior to the Trade Union Act 2016, there was no time limit placed on the validity of an industrial action ballot, provided that there was a call for action within 4 weeks of the close of the ballot. Section 9 of the Trade Union Act 2016 changed this and inserted amendments into section 234(1) TULRCA 1992 with the result that ballots only remain effective for 6 months, or with the agreement of the employer, this period can be increased to 9 months (and I note in passing that the NHS in Wales has gifted such an extension in a partnership approach that

is in stark contrast to the Secretary of State's current actions). RCN vociferously opposes the many changes introduced by the Trade Union Act as being oppressive, and amount to a disproportionate interference with members' fundamental right to strike. Of course I acknowledge that this is not the forum to air those grievances.

25. I understand that when the Trade Union Bill was being considered by both Houses of Parliament, the Government issued Explanatory Notes to members of both Houses which are (and remain) accessible on the legislation.gov.uk website: <https://www.legislation.gov.uk/en/ukpga/2016/15/notes/contents>.

26. The Explanatory Notes contain the following guidance in relation to the effect of section 9 of the Trade Union Act 2016:

Section 9: Expiry of mandate for industrial action six months after the date of the ballot

33 This section removes the current requirement that there must be some industrial action within a period of 4 to 8 weeks following a ballot in order for the mandate to remain valid, and replaces it with a provision that the members' agreement to a union's proposed industrial action will automatically expire six months **after the date of the ballot**; or up to 9 months **after the date of the ballot** where the longer period is agreed between the union and the members' employer [my emphasis]

27. The Explanatory Notes seem to be clear that the 6-month period of validity is counted "after" the date of the ballot. In this case, that is "after" 2 November 2022. That would cover 2 May 2023.

28. I do not address how section 234(1) TULRCA 1992 should be interpreted as that is a matter of law. However, I understand that the relief sought by the Secretary of State is discretionary in nature. It cannot be right that the Government has produced Explanatory Notes which say one thing, and for it to rely upon something inconsistent with the Explanatory Notes.

Industrial Action

29. Members know that taking strike action is not a decision they will come to lightly, but equally they recognise that the nursing profession has been pushed to the edge because of years of underinvestment. We know patient care is not safe – and not only are patients suffering but nursing staff in all roles are facing burnout and many are choosing to leave the profession for good. As a nation, we desperately need to attract more people into the profession so we can give patients the care we were trained to deliver and that they deserve.

30. In England, strike action was called on 15 December 2022. At the time this was announced in November 2022 the message I communicated in public was resoundingly clear:

“Anger has become action – our members are saying enough is enough. The voice of nursing in the UK is strong and I will make sure it is heard. Our members will no longer tolerate a financial knife-edge at home and a raw deal at work.

“Ministers must look in the mirror and ask how long they will put nursing staff through this. While we plan our strike action, next week’s Budget is the UK government’s opportunity to signal a new direction with serious investment. Across the country, politicians have the power to stop this now and at any point.

“This action will be as much for patients as it is for nurses. Standards are falling too low and we have strong public backing for our campaign to raise them. This winter, we are asking the public to show nursing staff you are with us.”

31. Members genuinely hoped that the Secretary of State would sit up and take notice of the strike action planned for 15 December 2022 and explore how it could be averted. Nothing meaningful was done to avert the strike or to de-escalate the situation. Nurses were simply ignored. After the first day of strike action I commented publicly:

“Nurses are not relishing this, we are acting with a very heavy heart. It has been a difficult decision taken by hundreds of thousands who begin to remove their labour from tomorrow in a bid to be heard, recognised and valued.

“It is a tragic first for nursing, the RCN and the NHS. Nursing staff on picket lines is a sign of failure on the part of governments.

“Our commitment to patients and safe care means that vital services are kept running. The scaremongering we have seen did upset some but also demonstrated the disrespect afforded to nurses for raising their voice. My plea to patients tonight is to know that this strike is for you too – it’s about waiting lists, treatments that are cancelled year-round and the very future of the NHS.”

32. Further strike action was called on 18 and 19 January and 6 and 7 February 2023. In calling such action the RCN has shown significant restraint. Its first two days of strike action were called in relation to roughly half of the employers in relation to which it had a mandate. The second period of action covered the remaining half of employers. The third period covered acute services only amongst a limited number of employers. A further period of strike action from 1 – 3 March 2023 was announced on 16 February 2023 but was called off on 21 February 2023 so as to allow negotiations to take place. From a mandate of six months, no individual employer has seen more than 4 days of strike action to date, while only 6 days in total have been held anywhere so far. Meanwhile, the Secretary of State has no doubt been watching the clock run down regarding the 6 month period through which the ballot was valid.

Pay Negotiations

33. The Secretary of State eventually tabled a pay offer which, as a democratic organisation, RCN put to its members to vote whether to accept or reject it. The vote ran from 28 March to 14 April 2023. I was always clear that a rejection would inevitably mean that the trade dispute would continue. In my newsletter to members on 31 March 2023 I was unambiguous as to what would happen if members rejected the offer:

... I’m clear that my next steps are determined solely by you, and we must be ready to escalate if we reject. But it’s important you understand what your vote to reject would mean in practice. If this offer is rejected, I will be ready to apply pressure on the government like never before – but I’ll need you to give even more than you have to date. Repeating what we’ve done so far won’t be

enough. We'd need to run longer, continuous strikes with a mandate reaching right across the country – and we'd need to remove derogations.

34. Self-evidently, members considered that the offer was rather underwhelming. Out of 277,906 members eligible to vote, 169,530 acted to cast a vote. Overall, 61% of eligible members voted in the ballot, out of which 46% voted to accept the offer, and the majority of 54% (some 91,646 members) voted to reject it.

35. On 14 April 2023 I wrote to the Secretary of State to advise of the results of the vote. I explained [MW p. 46-47]:

What has been offered to date is simply not enough. The government needs to increase what has already been offered and we will be highly critical of any move to reduce what has already been offered.

Since our talks in February, we have seen the pressures on the NHS continue to increase. The crisis in our health and care services cannot be addressed without significant action that addresses urgent recruitment and retention issues and nursing pay to bring this dispute to a close urgently.

Until there is a significantly improved offer, we are forced back to the picket line. NHS employers in England will be informed today of further strike action. The strike will run round-the-clock and without derogations from 8pm on 30 April to 8pm on 2 May 2023.

Meetings alone are not sufficient to prevent strike action and I will require an improved offer as soon as possible. In February, you opened negotiations directly with me and I urge you to do the same now.

Furthermore, we will now conduct a new England-wide statutory ballot for strike action, in respect of both the 2022-23 and 2023-24 pay years and in accordance with the Trade Union and Labour Relations (Consolidation) Act 1992.

After a historic vote to strike, our members expect a historic pay award.

36. The Secretary of State replied two days later, on 16 April 2023, just before I was about to go on Sunday with Laura Kuenssberg on BBC One. He said that the offer was “generous” and confirmed that there would be no more negotiations. He offered a meeting, which I wrote back to accept and attempt to schedule. However, so far it has not taken place.

The Notice of Action giving rise to these proceedings

37. On 14 April 2023 RCN provided NHS employers with notice of intended action in accordance with section 234A TULRCA 1992 [MW p.#]. Employers were notified that the dates of strike action will be between Sunday 30 April 2023 and Tuesday 2 May 2023. Within services that are delivered 24 hours the industrial action will commence at the beginning of the night shift on Sunday 30 April 2023 and will last until commencement of the night shift on Tuesday 2 May 2023. For services that are not 24 hours the industrial action shall commence at 8pm on Sunday 30 April 2023 and will last until 8pm on Tuesday 2 May 2023.

The challenge by the Secretary of State

38. Participating in strike action is a democratic right of every member who wishes to do so. Members are under a professional and a moral duty to speak out when things aren’t right or fair. It is bitterly disappointing that the Secretary of State initially sought to challenge the lawfulness of the industrial action planned on all three days, namely 30 April, 1 and 2 May 2023. In a letter before action dated 21 April 2023, the Secretary of State asserted (at paragraph 6)[MW p. 35]:

Unless by noon on Monday 24 April 2023 the RCN has instructed its members that they must not participate in industrial action between 30 April and 2 May 2023 and repudiates the Notices, informing them of their unlawfulness, the Secretary of State intends to apply to the High Court for an interim declaration pending a final declaration at trial that the industrial action threatened by the RCN between 30 April and 2 May 2023 is unlawful in its entirety, alternatively is unlawful insofar as it would take place from 00:00:00 on 2 May 2023 onwards.

39. This was received at 16:03 on Friday 21 April 2023. I note the correspondence from NHS Employers sent to the Secretary of State on the same day, 21 April 2023 [MW p. 33]. It is unclear when this was sent, however it seems unlikely that the letter before action was sent in response to the letter from NHS Employers. Indeed, RCN suspects that the letter from NHS Employers was specifically invited by the Secretary of State for self-serving reasons in order to avoid any dispute about his standing to seek the declaratory relief sought.

40. It is quite remarkable that no NHS Employer has commenced proceedings to restrain the strike action, or intimated any intention to do so. The Secretary of State very much admits that this is the case – see paragraph 12 of Ms Worthington’s witness statement: “... *it took some time to understand that no employers had been identified who were seeking to challenge the lawfulness of the industrial action...*”. [my emphasis]

41. The reasons why no other NHS employer has sought to restrain the RCN are all too obvious. They are sympathetic to RCN’s trade dispute. Further, the reasons were explained by RCN in correspondence dated 21 April 2023 [MW p. 32]:

...

Furthermore, we don’t believe it would be in our members interests or their employers’ interests for this issue to trouble the court. It will only serve to harden our members’ strength of feeling regarding the dispute and may result in additional industrial unrest at local level. It will also be of great interest to the wider trade union movement and the perception of the government’s intention to dilute trade union members’ ability to participate in lawful industrial action. We anticipate this issue will be hijacked by those whose interests extend beyond NHS pay.

In our opinion time and energy would be better served by working together to plan for the action than argue this issue in court. In that regard, we spoke with NHSE colleagues last night and we proposed alternative ways forward that are in line with what your Chief Nurses have identified are their greatest concerns regarding the action. Our proposals remain open, and we are happy to discuss this again.

42. The RCN does not shy away from the fact that it believes this challenge to be politically misguided. As RCN explained in its reply to the letter before action dated 24 April 2023 [MW p. 40]:

... It is unfortunate, to say the least, that notwithstanding the substantial efforts that have been made by the RCN to resolve this matter, the Secretary of State has taken the aggressive and unwarranted step of seeking to prevent RCN members from taking industrial action based on the overwhelming support for such action demonstrated by the results of the ballots that it has conducted across NHS employers.

43. The threat to challenge all 3 days of strike action was nothing more than a clear attempt to bully and intimidate the RCN into submission when the Government had no basis for challenging all three days. The explanations now advanced as to why the challenge is limited to the planned action on 2 May ring hollow: see paragraph 6 of Ms Worthington's witness statement which now suggests that there is "*no public interest*" in seeking to restrain the planned action on 30 April and 1 May. Indeed, the suggestion that the RCN "*...has not taken a reasonable approach after it was alerted to its unlawful action...*" deflects from the unreasonably hostile and aggressive stance adopted by the Secretary of State (Ms Worthington, paragraph 28).

44. I very much take issue with the suggestion that in calling for action on 2 May 2023, that somehow the RCN is acting outside its "*democratic mandate*": Ms Worthington, paragraph 29. Members have voted to reject the latest pay offer.

Public Support

45. The public support for nurses going on strike across the UK, and receiving a fair pay rise has been immense and unwavering.

- (1) RCN release – September 2022: polls showed that just short of two-thirds (64%) of the public supported nurses taking strike action in their fight for fair pay.
- (2) You Gov blog – December 2022: two-thirds of the British public (66%) say they support the nurses’ strike, with 45% of people saying they “strongly” support it.
- (3) Telegraph – January 2023: reported that an overwhelming majority of the public support nurses striking, and the number is increasing, according to new polling results. The poll, conducted by Savanta, highlights how public support for nurses taking strike action remains high and implies net support is going up.
- (4) The Times – April 2023: YouGov polling for The Times demonstrates support for nurses who are on strike is even higher at 67 per cent.

46. Public support has been clear throughout, and not just in the polls. Many nurses have experienced kindness from complete strangers, bringing them drink or food on picket lines, and other expressions of solidarity. The public can see the devastating impact that nursing staff shortages are having on the care they and their families receive. The public listens, and understands the concerns that we raise. Unfortunately, the Government doesn’t appear to want to listen or meaningfully address these concerns.

Conclusion

47. The RCN’s position is clear:

- (i) It already has an overwhelming democratic mandate from members to call strike action. This is not a stale dispute, but an ongoing one.
- (ii) The public support for nurses is consistently strong – around two thirds support nurses taking industrial action.

- (iii) The action called to take place on 2 May 2023 falls within the timescales set out in the Explanatory Notes to the Trade Union Act 2016.
- (iv) Not one employer has intimated an intention to challenge the lawfulness of the action.
- (v) It seems premature to grant an interim declaration at this stage even before the RCN has filed a Defence to the claim.

48. I would ask the Court to exercise its discretion not to grant the relief sought by the Secretary of State. There is one solution to this trade dispute, that calls for the Secretary of State to talk to RCN in the negotiating room, rather than using taxpayers' money to unnecessarily fight the RCN in Court.

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Name: PATRICIA YVONNE CULLEN

Signed: 

Dated: 24 April 2023