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Agricultural, Horticultural and Forestry Industry
Training Board v Aylesbury Mushrooms Ltd

QUEEN'S BENCH DIVISION

[1972] 1 All ER 280, [1972] 1 WLR 190, [1972] ITR 16

HEARING-DATES: 11, 12, 22 OCTOBER 1971

22 OCTOBER 1971

CATCHWORDS:

Industrial training - Training board - Establishment - Consultation - Duty of Minister to consult with specified organisations appearing to him to be representative of those engaged in industry - Failure to consult - Effect - Failure to consult association - Association a specialist branch of parent body - Consultation with parent body - Appropriate invitation for comments on draft order sent by Minister to association - Invitation not received by association - Association having no knowledge of order until after it was made - Whether Minister under duty to consult association - Whether consultation with parent body and sending of invitation for comments constituting consultation - Whether order applicable to members of association - Industrial Training Act 1964, s 1 (4) - Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966 (SI 1966 No 969).

HEADNOTE:

In 1965 the Minister of Labour had plans to set up a training board for the agricultural, horticultural and forestry industry under the provisions of the Industrial Training Act 1964. Preliminary consultations were held with the National Farmers Union ('the NFU'). By April 1966 a draft order had been prepared and a copy of the schedule defining the industry to which it related was circulated to a large number of addresses inviting comments. At the same time a press notice was published summarising the activities which it was proposed should be covered by the new board and advising any organisation which considered that it had an interest in the draft schedule and had not received a copy to apply to the Minister. Among the addressees to whom the draft schedule was sent was the Mushroom Growers Association ('the association') which was a specialist branch of the NFU, although largely autonomous. The membership of the NFU was approximately 150,000, of whom about 180 were full members of the association. The association was not represented on the NFU council but a representative was invited to attend when matters relating to mushroom growing were discussed. No comments were received from the association in response to the invitation accompanying the draft schedule and no application was made for a copy of it. The order constituting the board was made on 2nd August 1966 and came into operation on 15th August. It subsequently emerged that the association had never received a copy of the draft schedule and had no knowledge of the press notice or of the consultations which had taken place between the NFU and the Minister. The association contended that it was not bound by the order on

the ground that, before making it, the Minister was under a duty to consult the association since it was an organisation 'appearing to him' to be within one of the categories of organisations which, under s 1 (4) b of the 1964 Act, he was bound to consult.

a Section 1 (4) is set out at p 282 b, post

b SI 1966 No 969

Held - (i) The expression 'any organisation' in s 1 (4) meant that the Minister was under a duty to consult 'every' organisation which appeared to him to be an organisation which fell within the provisions of s 1 (4) and not merely one such organisation; in view of the importance which was attached to consultation in the scheme of the Act, and the fact that the Minister had not in terms stated that the association did not appear to him to fall within s 1 (4) it followed that the association was a body which had to be consulted (see p 284 d and p 285 c d and f, post).

(ii) No consultation had taken place with the association for the mere sending of a letter which was not received was but an attempt to consult; the essence of consultation was the communication of a genuine invitation, extended with a receptive mind, to give advice (see p 284 e and f and p 285 g, post); *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 applied.

(iii) Although, prima facie, consultation with a parent body would constitute consultation with the constituent parts, this general rule did not apply in the present case since the Minister had attempted and intended direct consultation with the association as well as with the NFU (see p 285 e and g, post).

(iv) Accordingly the 1966 order had no application to persons engaged in the growing of mushrooms solely by reason of their being so engaged (see p 283 h and p 285 h, post).

NOTES:

For the establishment of industrial training boards, see Supplement to 38 Halsbury's Laws (3rd Edn) para 690A.

For the Industrial Training Act 1964, s 1 see 12 Halsbury's Statutes (3rd Edn) 219.

CASES-REF-TO:

Rollo v Minister of Town and Country Planning [1947] 2 All ER 488; affd CA [1948] 1 All ER 13, [1948] LJR 817, 112 JP 104, 45 Digest (Repl) 376, 195.

INTRODUCTION:

Adjourned summons. By an originating summons dated 1st January 1970 the Agricultural, Horticultural and Forestry Industry Training Board ('the board') sought the determination of the court whether, on the true construction of s 1 (4) of the Industrial Training Act 1964, the Minister of Labour (subsequently the Secretary of State for Employment and Productivity) was under a duty to consult the Mushroom Growers Association ('the association') before establishing a training board for the agricultural, horticultural and forestry industry,

whether on the facts the Minister had consulted the association, and, if not, what was the effect of such failure on the provisions of the Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966 c. There were joined as defendants Aylesbury Mushrooms Ltd on their own behalf and as representatives of the members of the association. The facts are set out in the judgment.

c SI 1966 No 969

COUNSEL:

M F Gettleson for the board. J Bradburn for the association.

JUDGMENT-READ:

Cur adv vult. 22nd October.

PANEL: DONALDSON J

JUDGMENTBY-1: DONALDSON J

JUDGMENT-1:

DONALDSON J read the following judgment. The Industrial Training Act 1964 makes provision for the establishment of industrial training boards which, as their name implies, arrange industrial training for those employed in the industries concerned. The expenses of the boards are defrayed out of a levy imposed on employers in the industry, subject to such exceptions as may be specified in the order constituting any particular board.

Section 1 (4) of the Act provides:

'Before making an industrial training order the Minister shall consult any organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned and any organisation or association of organisations appearing to him to be representative of substantial numbers of persons employed in those activities; and if those activities are carried on to a substantial extent by a body established for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, shall also consult that body.' In the present proceedings the Agricultural, Horticultural and Forestry Industry Training Board seek a determination whether the Minister complied with his duty of consultation before making the order which established that board, and, if not, what are the consequences. The real defendants are the Mushroom Growers Association, but that is an unincorporated body and it has been thought more convenient that the nominal defendants should be Aylesbury Mushrooms Ltd, who are representatives of the membership of the association.

In the second half of 1965 the then Minister of Labour was minded to set up the plaintiff board and, as is customary, officials of his Ministry held preliminary consultations with the largest representative body concerned, namely the National Farmers Union. By April 1966 a draft order had been prepared. An advance copy of the schedule to the order, which defined the industry to which the order related, was sent to the National Farmers Union on 15th April 1966.

On 26th April 1966 copies of this document were circulated to a large number of addressees, including the Mushroom Growers Association, inviting comments. Simultaneously there was a press notice summarising the activities which it was proposed should be covered by the new board and advising any organisation which considered that it had an interest in the draft schedule and which had not received a copy to apply to the Ministry of Labour. No comments were received from the Mushroom Groers Association and no application was made by them for a copy of the schedule.

The Minister of Labour made the order constituting the board on 2nd August 1966, it was laid before Parliament on 11th August and came into operation on 15th August. Still there was no comment from the Mushroom Growers Association. I was told that the vice-chairman of the association knew of the existence of the order by October u967, but on the evidence filed in this case the first clear sign of hostility or indeed any activity by the Mushroom Growers Association towards the board occurred on 16th May 1968, when Mr Alderton, the secretary, wrote to the board. The letter is headed 'Mushroom Growers Association. Specialist branch of the National Farmers Union'. The text reads as follows:

'Dear Sir, This Association, on behalf of Mushroom Growers, Herewith makes formal application to be completely excluded from the Industrial Training Act, 1964, on the grounds [and then he sets out various grounds for exclusion and adds:] This application has the full support of the parent of the parent body of thid Association, The National Farmers Union.'

In subsequent correspondence it emerged for the first time that the Mushroom Growers Association had never received a copy of the draft schedule and had no knowledge of the consultations which took place between the Minister and the National Farmers Union between September 1965 and April 1966. It is implicit in the evidence filed, although not I think expressed, that the Mushroom Growers Association were also unaware of the contents of the press notice.

All this is rather surprising because the Mushroom Growers Association is a specialist branch of the National Farmers Union which, although largely autonomous, in 1966 occupied the same premises as the headquarters of the National Farmers Union, albeit as sub-tenants of part for which they paid an economic rent and of which they no doubt had exclusive possession. My surprise was not diminished when I was referred to r 2 (1) (b) of Part IX of the Rules of the National Farmers Union which provides:

'A notice to be served on the Council or on any branch may be given by sending it by post to th General Secretary of the Union at the offices for the time being of the Council, or to the Secretary of the branch at the office for the time being of the branch, as the case may be.'

Presumably independence is not carried to the point at which notices of correspondence addressed to the Mushroom Growers Association which end up with the National Farmers Union are not normally passed on to the intended recipient. Presumably, too, independence does not in any way inhibit consultation on matters of mutual concern.

The interrelationship of the National Farmers Union and the Mushroom Growers Association has been the subject-matter of an agreed statement of facts, but the only further information to which I need refer is contained in paragraphs 8-10 of that statement which are in these terms:

'The membership of N.F.U. is approximately 150,000; these about 180 are full grower members of M.G.A., 154 carrying on business in England and Wales, 5 in Scotland and 21 in Northern Ireland. M.G.A. is not represented in its own right on the N.F.U. Council, although a representative is invited to attend when matters relating to mushroom growing are discussed; N.F.U. is not represented in its own right at meetings of M.G.A. N.F.U. nominates the employers' representatives on the Agricultural Wages Board for the whole of the agricultural and horticultural industry. N.F.U. handles all matters connected with the annual price review, obtaining information where necessary from M.G.A.; mushroom prices are outside the review system, but mushroom growers are affected by, for example, changes in the fertilizer subsidy. M.G.A. deals directly with the Ministry of Agriculture on specific points relating to mushroom growing and informs N.F.U. thereof.'

Both parties are agreed that under the terms of s 1 (4) of the Act, some consultation by the Minister is mandatory and that in the absence of any particular consultation which is so required, the persons who should have been but were not consulted are not bound by the order, although the order remains effective in relation to all others who were in fact consulted or whom there was no need to consult. Both others who were in fact consulted or whom there was no need to consult. Both parties are further agreed that if consultation with the Mushroom Growers Association was mandatory and there was no or no sufficient consultation the order takes effect according to its terms subject to a rider that it does not apply to the growing of mushrooms or to persons engaged in this activity solely by reason of their being so engaged. They may, of course, come within the scope of the order in some other capacity.

Both parties are also agreed that the organisations required to be consulted are those which appear to the Minister, or to his alter ego who in this case was a Mr Devey, to be representative of substantial numbers of employers engaging in the activities concerned or persons employed therein and nationalised industries which engage in those activities to a substantial extent. Thus whether any particular organisation has to be consulted depends on a subjective test, subject always to bona fides and reasonableness which are not in question.

Against this background counsel for the association submits that the court must see what organisations appeared to the Minister to fall into the specified categories, that the Minister clearly sought to consult the Mushroom Growers Association thereby showing that he regarded it as being within the class of organisation which had to be consulted. It follows, as he submits, that neither the board nor the Minister can now turn round and say that consultation with the National Farmers Union constituted a sufficient discharge of his duties. Counsel goes on to submit that there can be no consultation without at least unilateral communication and that no such communication occurred.

Counsel for the board submitted that 'any' in the phrase 'the Minister shall consult any organisation' imposed a duty to consult not more than one organisation, that the posting of the letter of 26th April 1966 constituted consultation with the Mushroom Growers Association despite the fact that it was never received, that the Mushroom Growers Association was not an organisation which had to be consulted and that consultation with the National Farmers Union involved consultation with all its branches including the Mushroom Growers Association.

I have no doubt that the first point of counsel for the board is without foundation. 'Any' must mean 'every' in the context of s 1 (4). There is a

little more to be said for his submission that the mere sending of the letter of 26th April 1966 constituted consultation in that the Shorter Oxford English Dictionary gives as one definition of the verb 'to consult', 'to ask advice of, seek counsel from; to have recourse to for instruction or professional advice'. However, in truth the mere sending of a letter constitutes but an attempt to consult and this does not suffice. The essence of consultation is the communication of a genuine invitation, extended with a receptive Minister of Town and Country Planning n2). If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organisations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation.

n1 [1948] 1 All ER 13 at 17

n2 [1947] 2 All ER 488 at 496

This leaves only the related questions whether the Mushroom Growers Association did in fact appear to the Minister to be an organisation falling within the categories set out in s 1 (4) with the consequence that he was under an obligation to consult them and whether in any event his consultations with the National Farmers Union constituted consultation with the Mushroom Growers Association as a branch of the NFU. This is the heart of the problem.

Mr Devey has deposed in para 5 of his affidavit that:

'In accordance with practice the circulation of the draft schedule was not restricted to organisations that appeared to me to be representative of substantial numbers of employers engaging in activities specified in the draft schedule. This will appear sufficiently from a perusal of the document. In particular the Mushroom Growers Association was listed, although it was, and remains, a specialist branch of the National Farmers Union. The listed address of the Association is the same as that of the Union which is Agriculture House, Knightsbridge, London, S.W.1.'

In each case he sent a covering letter in one of three forms. The addressees on the first list, such as the National Farmers Union, the Trades Union Congress, the Confederation of British Industry, and major government departments received special letters from Mr Devey. Those on the second list received letters which were in standard form but were sent personally to named officials of the organisations concerned. These included the Local Government Examinations Board which clearly is an organisation which should have been consulted, but not one which in the terms of the Act had to be consulted. Those on the third list, including the Mushroom Growers Association, received or should have received letters in standard form addressed to the organisation impersonally. I can find no clue in the form of the covering letter to whether any particular addressee appeared to the Minister to be a s 1 (4) organisation and examples can be found in each list of organisations which plainly fall outside this category. I am thus thrown back on Mr Devey's affidavit coupled with a letter dated 20th January 1969, signed by a Mr Thomson of the Department of Employment and Productivity, which states that a copy of the draft schedule was sent to the National Farmers Union of which it is understood that the Mushroom Growers Association is a specialist branch 'and also as a matter of courtesy to the

Association'. Bearing in mind the importance which attaches to consultation in the scheme of the Industrial Training Act 1964, which seems to be based on the healthy principle of 'no taxation without consultation', and the fact that Mr Devey has not in terms said that the association did not appear to him to fall within the scope of s 1 (4), I feel obliged to conclude that it was an organisation which has to be consulted, although its small membership in the context of the number of persons employed in agriculture, horticulture and forestry and the specialised nature of their activities could well have led the Minister to take a different view.

This only leaves the question of whether it was consulted vicariously, and it may be accidentally, by means of the consultations with the National Farmers Union. This is a nice point. Prima facie consultation with the parent body undoubtedly constitutes consultation with its constituent parts, but I think that this general rule is subject to an exception where, as here, the Minister has also attempted and intended direct consultation with a branch. The association's complaint has very little merit, because it seems to have been completely blind to all that was going on around it. Nevertheless it is important that statutory powers which involve taxation shall be strictly construed and, so construed, I consider that the association should have been consulted and was not consulted.

I therefore answer the question in the originating summons as follows: Whether before making an order establishing a training board for the agricultural, horticultural and forestry industry, the Minister was under a duty to consult the Mushroom Growers Association -- Yes. Whether the consultations held by the Minister with the National Farmers Union constituted a sufficient consultation with an organisation or an association of organisations representative of those engaged in the activity of horticulture -- No. If it be held that the Minister was under a duty to consult the Mushroom Growers Association, whether on the facts such consultation took place -- No. If it be held that the Minister was under a duty to consult the Mushroom Growers Association and failed to do so, what effect such failure had on the provisions of the Industrial Training (Agricultural, Horticultural and Forestry Board) Order 1966 n3. The order has no application to mushroom growers as such.

n3 SI 1966 No 969

DISPOSITION:

Ruling accordingly.

SOLICITORS:

Wood & Sons (for the board); Theodore Goddard & Co (for the association).