Case No: EA-2021-000275

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18 November 2021

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

RYANAIR DAC	**Appellant**
- and -	
MR B MORAIS AND OTHERS	**Respondents**

- -
- -

Mr P Gott QC and Miss J Clement (instructed by Eversheds Sutherland (International) LLP) for the **Appellant**
Mr B Carr QC and Mr S Brittenden (instructed by Farrer & Co LLP) for the **Respondents**

Hearing dates: 29 and 30 September 2021

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JUDGMENT

SUMMARY

TRADE UNION RIGHTS

The claimants in the employment tribunal are airline pilots employed by the respondent and based in Great Britain. They are members of the trade union BALPA. They all participated in a strike called by BALPA. Because of that the respondent withdrew concessionary travel benefits from them for a year. They complained that they had been subjected to detrimental treatment contrary to (a) section 146 **Trade Union and Labour Relations (Consolidation) Act 1992**; and (b) regulation 9 **Employment Relations Act 1999 (Blacklists) Regulations 2010**.

In a decision arising from a preliminary hearing the tribunal decided that, in taking strike action the claimants were taking part in the activities of trade unions or trade union activities within the meaning of regulation 3 of the **2010 Regulations**. It did not err in so finding. The words in their ordinary meaning embraced participation in industrial action, and nothing in the **2010 Regulations**, the parent statute, or the **1992 Act** pointed to a different conclusion. The tribunal also did not err in concluding that the fact that certain actions related to the withdrawal of the benefits were taken in Dublin did not mean that the claimants did not have a cause of action under regulation 9.

In light of the wording of section 146 as read down by the EAT in *Mercer v Alternative Future Group Limited* [2021] IRLR 620, the tribunal's conclusion that, in taking part in the strike, the claimants were taking part in trade union activities for the purposes of section 146, was also correct.

In light of that read-down wording, it was, however, wrong to conclude that the outcome, in respect of section 146 and the **2010 Regulations**, depended on the strike being action to which section 219 of the **1992 Act** applied. But it was right in any event to conclude that, in light of the outcome of High Court litigation against BALPA in which that was at issue, it was not open to the respondent to run the point as a defence to the tribunal claims, as that would amount to an abuse of process.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. This appeal and cross-appeal concern whether, or in what circumstances, participation in industrial action is to be treated as amounting to participation in trade union activities. In *Mercer v Alternative Future Group Limited* [2021] IRLR 620 the EAT (Choudhury P) addressed this question in relation to the protection conferred by section 146 **Trade Union and Labour Relations (Consolidation) Act 1992** (the "**1992 Act**") against detrimental treatment on grounds related to union activities. The present appeal concerns both section 146 and certain rights conferred by the **Employment Relations Act 1999 (Blacklists) Regulations 2010** (the "**2010 Regulations**"). It raises issues said not to have been determined or resolved by the decision in *Mercer*.

2. I will refer to the parties as they were in the employment tribunal. The claimants are pilots employed by the respondent airline. They are all members of the British Airline Pilots' Association (BALPA), which is an independent trade union recognised by the respondent for collective bargaining. In September 2019 they all participated in a strike called by BALPA, following which the respondent made good on a warning that it had issued prior to the strike, and notified them that it had withdrawn concessionary travel benefits from them for a twelve-month period.

3. The claimants presented claims to the tribunal pursuant to the **1992 Act** section 146 and regulation 9 of the **2010 Regulations**. In a reserved decision arising from a preliminary hearing the tribunal (EJ Tobin, Mrs A Berry, Ms M Daniels) held that in taking strike action the claimants were (a) "taking part in the activities of trade unions or trade union activities" for the purposes of regulation 3 of the **2010 Regulations**; and (b) "taking part in the activities of an independent trade union" for the purposes of section 146(1)(b) of the **1992 Act**.

4. In *Drew v St Edmundsbury Borough Council* [1980] ICR 513 the EAT held that the statutory protection at that time, in respect of unfair dismissal for taking part in the activities of a trade union, did not extend to participation in industrial action. However, the present tribunal concluded that section 3 **Human Rights Act 1998** (the "**HRA"**) required the provisions with which it was concerned

to be interpreted as embracing participation in a strike, having regard to Article 11 **European Convention on Human Rights 1950 (**"the **Convention**"**)**. Section 3(1) provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." I call that the "**HRA** interpretative obligation".

5. The present tribunal also considered that whether or not the strike was "protected industrial action", for the purposes of Part V of the **1992 Act**, was relevant to what it had to decide; but that the respondent was prevented from asserting that the strike in the present case was not protected industrial action, given how earlier High Court proceedings relating to the strike had unfolded and concluded.

6. The respondent also argued that its conduct in this case was not within the scope of the **2010 Regulations** because the relevant conduct took place not in Great Britain but in Dublin. I will call that the scope argument. The tribunal rejected that argument. Finally, the respondent argued that the **2010 Regulations** had no application to this case, because the list in question was compiled by the respondent only for its own use. That argument was also rejected by the tribunal.

7. The respondent appealed against the tribunal's decision on eleven grounds. In March 2021 I directed that they should all proceed to a full hearing. The claimants cross-appealed in relation to the Part V issue. In May 2021 I directed that the cross-appeal should also proceed to the same hearing.

8. However, following that, on 2 June 2021 the EAT (Choudhury P) handed down its decision in *Mercer*, holding that, having regard to Article 11, and the **HRA** interpretative obligation, the protection of section 146 should be construed as extending to participation in industrial action.

9. In the respondent's written skeleton argument for this appeal, it was submitted that *Mercer* was, on a number of points, wrongly decided, and that I should not follow it. On the approach taken by the EAT to its own previous decisions, the respondent's skeleton referred to *Secretary of State for Trade and Industry v Cook* [1997] ICR 288. But neither skeleton referred to *British Gas Trading Limited v Lock* [2016] ICR 53, which I accordingly drew to counsel's attention. This led to grounds 1 – 5, which all raised points of law decided in *Mercer*, being dismissed without opposition. However, having regard to the fact that a further appeal in *Mercer* had itself been permitted to proceed

to a full hearing in the Court of Appeal, I also acceded to the respondent's application for permission to appeal the dismissal by me of grounds 2, 4 and 5 to the Court of Appeal. I heard full argument in relation to the remaining grounds of appeal and cross-appeal.

The Domestic Statutory Framework

10. I start with the **1992 Act**. Part III concerns "Rights in Relation to Union Membership and Activities". Sections 146 and 152 fall within it.

11. Section 146(1) confers on a worker the right not to be subjected to any detriment by an act or failure to act for one of a number of sole or main purposes, including, at (b): "preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so". Section 146(2) defines "appropriate time" as, in summary, a time (a) outside of working hours, or (b) within working hours if the employer consents.

12. Section 152 provides that for the purposes of Part X **Employment Rights Act 1996** (unfair dismissal) a dismissal shall be regarded as unfair if the reason or principal reason for it was (among other things) that the employee "had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time". "Appropriate time" is defined in the same way.

13. Part V concerns "Industrial Action". Section 219 confers protection from certain actions in tort, on acts done in contemplation or furtherance of a trade dispute, subject to the conditions set out there, and developed in the succeeding provisions. In summary, an act done by a trade union is not protected unless the act has the support of a compliant ballot, which must be preceded by a compliant pre-ballot notice, and followed by a compliant notice of industrial action. For these purposes, whether the act is be treated as that of a trade union is determined by sections 20 and 21.

14. Also within Part V, sections 237, 238 and 238A qualify the right to claim unfair dismissal, in the following ways (I need only summarise the principal provisions).

15. First, by section 237 an employee who was participating in unofficial action at the time of dismissal may not claim unfair dismissal. Action will be unofficial unless union members were

involved, and the action fell to be treated as union action in accordance with sections 20 and 21.

16. Secondly, in respect of action which is not unofficial, section 238 provides that an employee dismissed when taking part in the action loses the right to claim unfair dismissal, unless other such employees are not dismissed, or are dismissed but are then selectively re-engaged. However, thirdly, that is subject to section 238A. That defines protected industrial action as action the calling of which is not actionable in tort pursuant to section 219. Section 238A makes unfair, a dismissal for the reason or principal reason that the employee took protected industrial action. That protection lasts for the "protected period", which is at least twelve weeks, and, in some cases, longer.

17. For a summary of the pertinent legislative history I refer the reader to *Mercer* at [80]. But I note here that sections 146, 152 and 238 have antecedents going back to the 1970s, whereas sections 237 and 238A date back, respectively, only to 1990 and 1999.

18. I turn to the **2010 Regulations**. These were made pursuant to a power conferred by section 3(1) **Employment Relations Act 1999**. Regulation 1(c) provides that they "extend to Great Britain".

19. Regulation 2(2) provides:

> "References in these regulations to information supplied by a person who contravenes regulation 3 include information supplied by a person who would contravene that regulation if that person's actions took place in Great Britain."

20. Regulation 3 provides, in part:

> **"General prohibition**
>
> **3.**—(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.
>
> (2) A "prohibited list" is a list which—
>
> (a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
>
> (b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.
>
> (3) "Discrimination" means treating a person less favourably than another on grounds of trade union membership or trade union activities."

21. Regulation 9 provides

> **"Detriment**

> **9.**—(1) A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either—
>
> (a) D contravenes regulation 3 in relation to that list, or
>
> (b) D—
>
> (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
>
> (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.
>
> (2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless D shows that it did not.
>
> (3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning in Part 10 of the Employment Rights Act 1996."

Convention Rights

22. Article 11 of the **Convention** states:

> *"**Freedom of assembly and association***
> 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

23. I have already set out the relevant text of section 3(1) of the **HRA**.

The Tribunal's Decision

24. The employment tribunal's decision on whether taking part in strike action amounts to taking part in the activities of trade unions, or union activities, was, in summary, as follows. First, it noted that the **2010 Regulations** do not define "the activities of trade unions." So, the expression should have its plain and natural meaning. It was synonymous with "trade union activities." Collective bargaining and industrial action are all "intrinsic to the activities of a trade union." It is "difficult to

comprehend why, when collective bargaining has broken down, taking strike action would not amount to the activities of a trade union."

25. The tribunal also drew on the Department for Business, Innovation & Skills ("BIS") Guidance of March 2010 on the **2010 Regulations** which stated that "[p]articipating in official industrial action would also probably be categorised as trade union activity", and that a list of strikers drawn up to discriminate against them could constitute a blacklist; and it also stated that "in contrast" involvement in unofficial action would not qualify as trade union activity. The tribunal also referred to commentary in *Harvey* to similar effect, and suggested that this reading was consistent with *Winnett v Seamarks Brothers Limited* [1978] IRLR 397 and *Britool Limited v Roberts* [1993] IRLR 481.

26. At [11] the tribunal said this:

> "With respect to Mr Gott's submissions and argument, it does not seem logical that the following can amount to legitimate trade union activity:
>
> - Attending trade union meetings (whereupon members can hear arguments for and against strike action); and
> - Participating in union ballots (in which the members may vote for or against industrial action); and
> - Consulting with shop stewards or other lay or full-time trade union officials (about the implications of strike action); and
> - Organising strike action.
>
> Yet actually participating in the ensuing strike action cannot amount to industrial action. Such a demarcation is unsustainable."

27. Finally, the tribunal observed that taking strike action was compatible with taking part in the activities of a trade union, although not within section 146 of the **1992 Act**, citing the decision of the employment tribunal in *Mercer* (the appeal in that case to the EAT was then pending) and *Drew*.

28. I do not need to set out the tribunal's reasoning supporting its conclusion that the protection of section 146 should be read as extending to participation in strike action, given that it has now been accepted before me that, at EAT level, this question has been authoritatively determined in *Mercer*.

29. As to the Part V issue, though its reasoning is not entirely clear at all points, the parties agreed that the tribunal appears to have accepted that only the taking of action which is protected, in the sense that the union would be protected from suit in tort for calling it by section 219, would fall to be

treated as participation in union activities for the purposes of section 146 and the **2010 Regulations**. However, the tribunal considered that it was not open to the respondent to assert that the strike action in this case was *not* protected industrial action, because of the course and outcome of a High Court claim that it had earlier brought against BALPA. There was sufficient proximity between BALPA and the present claimants, such that it would be an abuse of process to permit it to do so.

30. In relation to the scope issue, the tribunal noted the effect of regulation 2(2) of the **2010 Regulations** (see above). It could not be right that the respondent might be liable to the claimants if it used a list supplied by a third party outside Great Britain, but not if it itself originated the list outside Great Britain. The respondent had chosen to operate within Great Britain, and could not evade the scope of the legislation by transferring some part of its decision-making outside of Great Britain.

31. I do not need to set out the tribunal's reasoning on the "own use" point, as that part of the decision has not been challenged on appeal.

The Grounds of Appeal and Cross-Appeal and the Arguments

32. The grounds of appeal and cross-appeal that remained live and were argued before me raised the following questions. First, do the pertinent rights conferred by the **2010 Regulations** apply in relation to participation in industrial action (grounds 6 and 7)? Was there, in this regard, a particular error in the penultimate sentence of [11] of the tribunal's reasons (ground 8)? Secondly, did the tribunal err in rejecting the respondent's scope argument in relation to the **2010 Regulations** (ground 11)? Thirdly, to the extent that trade union activities may include participation in industrial action, for the purposes of either the **2010 Regulations** or section 146, is that confined to cases where the action is protected industrial action for the purposes of Part V of the **1992 Act** (ground 9 and the cross-appeal)? Fourthly, if so, did the tribunal err in concluding that the respondent was estopped from asserting that the strike was not protected action in this case (ground 10)?

Respondent

33. For the respondent Mr Gott's principal arguments were as follows.

34. Grounds 6 and 7 concern the scope of "activities of trade unions" in regulation 3(2)(a) of the **2010 Regulations**. The meaning of that expression there, and the meaning of "activities of an independent trade union" in section 146 of the **1992 Act**, are the same. That is because section 3(6) of the **1999 Act** requires that expressions used in that section and in the **1992 Act** have the same meaning there as in the **1992 Act**, and section 11 **Interpretation Act 1978** presumes expressions used in subordinate legislation to have the same meaning as in the parent statute.

35. Further, the interpretation by the courts of an expression used previously in similar legislation, should be followed. As a matter of domestic law, "activities of an independent trade union" has been interpreted in *Drew* as not extending to industrial action. Neither *Winnett* nor *Britool* supported the proposition that actual participation in a strike or industrial action could amount to trade union activity. Further, in *Mercer* the EAT noted (at [29]) that there was no suggestion that *Drew* was wrongly decided as a matter of domestic law.

36. The BIS Guidance, whilst admissible, was no more than a statement of opinion. It could also not alter the true meaning of the instrument itself. The intention of the legislator must be determined objectively. The fact that regulation 3(2)(a) did not include a requirement that the activities must be "at an appropriate time" could not alter the meaning of the term "activities of a trade union" as determined in *Drew* and *Mercer*.

37. As to Article 11 and the **HRA** interpretative obligation, the tribunal had not relied on these in relation to the **2010 Regulations**. But in any event they did not give rise to any breach of Article 11, so the **HRA** interpretative obligation is not engaged in relation to them, as it can only bite where the domestic provisions breach a Convention right. The positive protection which it was incumbent on domestic law to provide, in view of Article 11, was secured by section 146, as now interpreted in *Mercer*. Even if the remedy under the **2010 Regulations** could, in a given case, be more generous, section 146 provided an effective remedy. The **2010 Regulations** were an entirely domestic matter. There was no Strasbourg jurisprudence on blacklisting, and no warrant to conclude that Article 11 required the **2010 Regulations** to be interpreted other than in accordance with their ordinary meaning.

38. Ground 8 contended that the general reasoning in [11] was, for similar reasons, flawed, and there was a patent error in the penultimate sentence, as the respondent had never submitted that participating in strike action could not amount to industrial action.

39. On the Part V points, it was now common ground that, reading its conclusion as a whole, the tribunal had decided that only taking part in protected industrial action could amount to participation in trade union activities for the purposes of section 146 or the **2010 Regulations**. That was challenged by the cross-appeal, which the respondent resisted. Mr Gott's principal submissions were as follows.

40. Parliament has carefully distinguished for the purposes of unfair dismissal law, between action which is protected, action which is neither unofficial nor protected, and action which is unofficial. It is highly unlikely that it would have nevertheless intended to make no distinction at all between protected action and official but unprotected action for the purposes of section 146.

41. It cannot be right that workers could be protected against detrimental treatment for participating in action which had been unlawfully called by their union, for example in a case where the union's leadership had called or supported action without holding a ballot at all. To confer such protection on the individual employees who participated in that action would undermine the Part V regime. It would effectively sanction unlawful conduct, by protecting participation in an unlawful strike. The remedies available to an employer against the union itself were in reality limited. Section 22 of the **1992 Act** imposes low limits on the damages that can be awarded.

42. The fact that in a given case the employees may not be able to be certain that the action is protected – for example where a ballot has been held, but there could be problems with compliance with the detailed balloting requirements of which they are unaware – cannot affect the analysis. In a case where the protection of section 238A is invoked, the tribunal may in any event have to determine the question as a necessary stepping stone to its conclusion. This would not be a novel problem.

43. Nor does *Mercer* or any other ECtHR or domestic authority establish that it would be incompatible with Article 11, for protection under section 146 to be confined to cases in which the action is both official and protected industrial action. It would not. The point had simply not arisen

for consideration in *Mercer*, and therefore nothing in the language of that decision should be taken as implicitly having decided it.

44. As the concept of trade union activities in the **2010 Regulations** must have the same meaning as it has in the **1992 Act**, then, if the **2010 Regulations** do protect some industrial action, it can also only be action which is protected industrial action.

45. The tribunal's conclusion on the abuse of process point was challenged by ground 10. The factual background was, in summary, this. Following a ballot and strike notice, the respondent issued a High Court claim against BALPA on 16 August 2019, raising issues as to compliance with Part V, and including an application for an interim injunction. Lambert J heard and dismissed that application on 21 August 2019. By an order dated 23 August and sealed on 28 August 2019 the application of the respondent (the claimant in the High Court) was dismissed, it was ordered to pay BALPA's costs as summarily assessed, and the claim was discontinued with no further order for costs.

46. Mr Gott's principal arguments were, in summary, as follows. First, the tribunal erred by concluding that there was sufficient proximity between the parties in the two pieces of litigation. For there to be an abuse of process the parties had to be the same. In any event, the High Court action had not sought to preclude the individual employees from taking action. An injunction could not have been obtained to require them to work. Section 236 of the **1992 Act** prohibited that.

47. Secondly, the High Court had not decided whether BALPA had complied with the Part V requirements. Lambert J had only refused an interim injunction, applying the test of whether BALPA's defence was likely to succeed at trial, in accordance with section 221(2). There had been no adjudication at a trial of whether BALPA's conduct was unlawful, as the claim had subsequently been discontinued. The respondent should not now be deprived of its ability to run the defence, to the later tribunal claim against it, that the industrial action was not protected by section 219.

48. On the scope point relating to the **2010 Regulations** (raised by ground 11), the respondent accepted that, for the purposes of the *Lawson v Serco Limited* [2006] ICR 250 test, the claimants were all based in Great Britain and able to bring claims for breach of regulation 9 in the tribunal.

49. But the tribunal erred in finding that there had been an actionable breach on the facts of this case. The respondent is incorporated in the Republic of Ireland and its Head Office is in Dublin. The relevant conduct took place there. A spreadsheet giving names of strikers had been compiled at Stansted airport. That was then sent to Dublin HQ and used to update rosters on the Netline server hosted in Dublin. The Head of Flight Operations, based in Dublin, compiled spreadsheets drawn from the Netline server. These were used by the staff travel department, also in Dublin, to suspend each pilot's ability to use the online system to book concessionary travel for a twelve-month period.

50. Regulation 1(c) states that the **2010 Regulations** apply only to Great Britain. UK legislation does not apply to the acts of foreign persons or corporations who are outside the UK, and which are performed outside of Great Britain: *Arab Bank plc v Mercantile Holdings Ltd* [1994] Ch 71, 82F-G. If that were not correct, the provision of regulation 2(2), in respect of information provided outside of Great Britain, would be unnecessary. This result was also in line with the BIS consultation paper which preceded the introduction of the **2010 Regulations**. In this case the use made of the list that was impugned took place in Dublin.

Claimants

51. For the claimants Mr Carr's principal arguments were as follows.

52. "The activities of trade unions" are not defined in the **2010 Regulations**. The tribunal was right to give the expression its ordinary natural meaning and to conclude that it embraces taking part in industrial action when collective bargaining has broken down. That is reinforced by a consideration of the consultation process that led up the enactment of the **2010 Regulations**, in which the Government of the day held to its view, before and after consultation, that participation in unofficial action should not be within the scope of "trade union activities", but official action almost certainly would be, in particular because the "at an appropriate time" qualifier was not to be used. As the tribunal noted, the BIS Guidance on the final **2010 Regulations** is also to the same effect.

53. This interpretation is also consistent with the fact that section 170 of the **1992 Act**, conferring rights to time off for trade union activities, expressly excludes activities consisting of industrial action

from its scope, implying that the expression would otherwise embrace such activities.

54. The respondent was also wrong to say that the expression "activities of trade unions" must have the same meaning in regulation 3 as in section 146. The definition in the **2010 Regulations** intentionally omitted the "at an appropriate time" qualifier and was not otherwise restricted in any way. *Drew* was no longer binding and in any event considered a statutory provision that *was* subject to that qualifier. It also referred to the predecessor of section 170, being section 28 of the **1978 Act**, but did not make any specific reference to the wording of section 28(2), which also contained an express exclusion of participation in industrial action from the scope of "trade union activities".

55. As to ground 8, the penultimate sentence of [11] plainly contained a misstatement. The overall sense showed that the tribunal must have meant to say "… cannot amount to trade union activity", not "cannot amount to industrial action." The reasoning of the paragraph as a whole was sound.

56. Whether a trade union has fully complied with the requirements of Part V cannot affect whether participation in the action by individual employees amounts to participation in trade union activity. That the Government intended that result in relation to the **2010 Regulations** is clear from the consultation materials and the BIS Guidance, which distinguish solely between official and unofficial action. There is also nothing in the **1999 Act** or the **2010 Regulations** to limit their scope by reference to any provision of Part V at all.

57. To impose such a condition would also significantly restrict the protection conferred on individual employees. The individual would have participated in the industrial action, and be vulnerable to blacklisting for having done so. But they would only be protected from such treatment if the union had complied with Part V in every respect, something about which they and/or the employer might not at the time be wholly certain. True it is that the protection of section 238A is dependent on the action in question being one in respect of which the union is protected by section 219. But that reinforced the conclusion that, had Parliament intended a similar condition to apply in respect of the **2010 Regulations**, it could and would have made a similar express provision.

58. Such an outcome would also not be compatible with Article 11, because it would compromise

the protection that the **2010 Regulations** conferred on individuals who were targeted by the use of a blacklist on account of their union activities. It was not correct that section 146 would provide a sufficient remedy in respect of any claim that might be brought under regulation 9. There was potential overlap, as recognised by regulation 11(8), providing for a set-off where both claims resulted in an award, but this itself recognised that the awards might not be the same. It was noteworthy in this regard that regulation 11(5) provides for a minimum award of £5000.

59. Nor, in order for taking industrial action to amount to participation in trade union activities for the purposes of section 146 as read down in *Mercer*, should a requirement be added that it be protected industrial action. There was no hint or suggestion of that in *Mercer* itself. At paragraph [43] the EAT concluded that the authorities demonstrated that the ECtHR regards any restriction, however minimal, on "the right to participate in a trade-union sanctioned protest or strike action" as an interference with Article 11 rights. The formulation of the words to be added to section 146(2), at [86](c), is simply "at a time within working hours when he is taking part in industrial action." This therefore applies to all official action, without any additional requirement that it be protected action.

60. There was support in the decision of the ECtHR in *UNISON v United Kingdom* [2002] IRLR 497 which propounded the test that the impact of any restriction on a union's ability to take strike action must not place their members at a real or immediate risk of detriment or being left defenceless.

61. For the doctrine of abuse of process to apply, it was not necessary for the parties to the two pieces of litigation to be identical. Where there was a difference in parties, the test was that "having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'." *Per* Sir Robert Megarry V-C in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510, 515, cited with approval by Lord Bingham of Cornhill in *Johnson v Gore Wood* [2002] AC 1 at 32C-G.

62. Further, the respondent had conceded the legality of the calling of the strike in the High Court action, by consenting to a compromise of it. The fact that the High Court had not finally adjudicated

the point did not matter. It would be a classic form of abuse for it to be permitted to contest a point which could and should have been pursued in the earlier proceedings, had it wished to do so. It did not matter how this was categorised, as the different sub-species of estoppel all fell under the general umbrella of a general rule against abusive proceedings. This had been explained by Lord Sumption JSC in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2014] 1 AC 160.

63. Turning to the scope issue relating to the **2010 Regulations**, the list in question was originally compiled at Stansted. Further, on 19 September 2019 all the pilots in Great Britain who had participated in the strike received a memo informing them of the 12-month withdrawal of their discretionary staff privileges. The detriment was meted out in relation to their employment in Great Britain and there was no *Lawson v Serco* issue about the pilots' ability to bring claims in the employment tribunal as such. If the respondent's reasoning was sound, then, had they been dismissed, they would not have been protected by section 104F of the **1996 Act** (unfair dismissal for a reason related to a blacklist), which could not be correct.

Discussion and Conclusions

64. I will start by considering the pertinent domestic authorities.

65. *Winnett* concerned a claim of unfair dismissal. The EAT (Slynn J and members) held that the tribunal had been entitled to find that the employee had, at the relevant time, in fact been taking part in industrial action. By reference to predecessors of today's sections 152 and 238 – paragraphs 6(4) and 8 of schedule 1 of the **Trade Union and Labour Relations Act 1974** – the majority in the tribunal "did not consider that an employee who was taking part in industrial action could at the same time at an appropriate time be taking part in the activities of an independent trade union. They found that in the present case the employee was not indulging in trade union activities but was engaged in industrial action." (1244F) The tribunal concluded that the employee was dismissed because he was taking part in the action, and not entitled to protection, a factual finding which the EAT upheld.

66. I pause to observe that, from the EAT's description, the majority of the tribunal appear to have

contrasted taking part at an appropriate time in the activities of a union with taking part in a strike or other industrial action. The EAT's decision however, does not express any view as to whether the "appropriate time" condition was the key to resolving the apparent tension between these provisions.

67. In *Drew v St Edmundsbury Borough Council* [1980] ICR 513 the claim was again of unfair dismissal. The tribunal considered that the employee had not been participating in union activity but in health and safety-related campaigning activities of his own. The EAT (Slynn J and members) held that it was entitled to so find. In so far as the tribunal had found in the alternative that what happened amounted to industrial action and could not at the same time constitute union activities for the purposes of the predecessor of section 152 of the **1992 Act** (which was then section 58 **Employment Protection (Consolidation) Act 1978** (the "**1978 Act**")), the EAT agreed. It could not fall under both section 58 and section 62 (the then current predecessor of section 138 of the **1992 Act**).

68. The EAT also indicated that the distinction between the activity of an independent trade union and taking part in industrial action was borne out by a consideration of sections 23 and 28 of the **1978 Act**; but it did not see the need to set out those provisions, or the argument by reference to them. Section 23 was, I observe, the predecessor of section 146 of the **1992 Act**, and included an "at an appropriate time" condition. But as in *Winnett*, I observe, there is no specific discussion by the EAT of whether the proviso to section 58, that the activity must be "at an appropriate time", was or was not an essential stepping stone to the overall conclusion.

69. Section 28 of the **1978 Act** was the predecessor of section 170 of the **1992 Act**. This too includes the express qualifier that, for its purposes, "trade union activities" excludes activities "which themselves consist of industrial action". I agree with Mr Carr that this lends support to the inference that the draftsman assumed that the ordinary meaning of "trade union activities", if unqualified, *would* embrace taking industrial action. That supported the conclusion that the resolution of the apparent tension between what are now sections 152 and 238 is not to be found in the meaning of that expression itself. *Winnett* and *Drew* leave open the possibility that the resolution depends on the "at an appropriate time" proviso to the former, without so deciding. An alternative reading is that,

because section 238 *expressly* applies to participation in industrial action, its wording trumps or qualifies what would otherwise be the scope of section 152. Or both points may have force.

70. *Britool Limited v Roberts* [1993] IRLR 481 also concerned a claim of unfair dismissal (albeit by way of unfair selection for redundancy). The EAT held, following *Drew*, that although "actual participation in a strike, whether as leader or otherwise, will rarely, if ever, constitute an activity within" section 58 of the **1978 Act**, this did not extend to the activities of leaders or organisers prior to, and leading up to, the strike, but short of their actual participation in it. This, I think, takes the analysis on the point of interest in the present case no further, save that it points to an expansive construction of what is now section 152, and a narrow one of what is now section 238.

71. I turn to *Mercer*. For the purposes of the tribunal's decision in that case the assumed facts were that the employee had been suspended because of her participation in a strike called by her union, UNISON. The claim was of detrimental treatment contrary to section 146.

72. At [27] the EAT stated that as a matter of ordinary language, the phrase "activities of an independent trade union" would be apt to include industrial action sanctioned by the union, and that it would be artificial to suggest that a strike organised and called by a trade union is not one of its own activities. This passage continues as follows:

> "In any event, it is not the meaning of the words, "activities of an independent trade union", in s.146 that leads to the exclusion of industrial action from its scope, but the effect of s.152, which protects against dismissal on the grounds of participating in the activities of an independent trade union, read with those provisions in Part V of TULRCA dealing specifically with dismissal for participating in industrial action. The short point is that if dismissal for taking part in industrial action is dealt with in Part V of the Act, such action cannot fall within the activities of an independent trade union under s.152. Furthermore, consistent with the presumption that words or phrases used in an Act have the same meaning throughout the Act (see **Bennion on Statutory Interpretation**, at 21.3), s.146 must be to the same effect."

73. The EAT goes on to say that this interpretation of section 146 is well-established, citing the discussion in *Drew*, and observing that there is no suggestion that *Drew* was wrongly decided as a matter of domestic law.

74. The discussion in *Mercer* goes on to note that a further reason for construing section 146 as not extending to industrial action is the "at an appropriate time" requirement. But a difficulty with

this is that it would not apply to a voluntary overtime ban; but, if so, then, applying ordinary rules of statutory construction, neither would section 152 bite on such action.

75. The discussion continues:

> "If that were correct, then an employee dismissed for engaging in industrial action at an appropriate time could bring his claim for unfair dismissal under s.152 and thereby avoid the carefully constructed regime in respect of dismissals for industrial action under Part V of TULRCA. For the reasons set out in *Drew*, that cannot be right: the employee dismissed for taking part in industrial action cannot fall within both s.152 and s.238-238A of TULCRA at the same time. If that were not the case, then the same employee would be entitled to a finding of automatic unfair dismissal under the former provision but would be subject to the limited protections against unfair dismissal under the latter. The only logical way to avoid that difficulty is to treat s.152 as not encompassing dismissal for industrial action."

76. *Mercer* thus confirms the approach that in ordinary parlance participation in a strike or other industrial action amounts to participation in trade union activities. It also suggests that the "at an appropriate time" proviso cannot wholly explain why all industrial action is outside the scope of section 152. The conclusion is that section 152 must be treated as not encompassing dismissal for industrial action. I note that this passage refers to sections 238 – 238A, not merely to section 238A. That is reflective of the underlying reasoning. In today's regime it is these sections which *together* govern the position in relation to unfair dismissal of those taking part in all industrial action which is not unofficial action. But the broader provision is section 238, which expressly *removes* (save as there provided) the right to claim unfair dismissal from those dismissed when taking part in industrial action which is not unofficial, and hence, where it applies, overrides section 152. The more-recently introduced section 238A then qualifies section 238 in a sub-set of such cases.

77. That is consistent with the reasoning in *Mercer* drawing directly on *Drew* as its starting point. When *Drew* was decided section 238A did not exist, nor indeed did section 237 (nor, in either case, any equivalent provision). The only provision at that time specifically concerning unfair dismissal of participants in industrial action, was section 62 of the **1978 Act**, the predecessor of section 238 (and a successor of schedule 1 paragraph 8 of the **1974 Act**).

78. Pausing, and standing back, the conclusions I draw from *Drew* and *Mercer* regarding the domestic framework are as follows: (a) "trade union activities" in its ordinary natural meaning,

embraces participation in union industrial action; (b) strikes, or other forms of action during working hours are not "at an appropriate time" as defined in section 152; (c) but section 238 applies to *all* industrial action, including, for example a ban on voluntary overtime (see, e.g. *Power Packing Casemakers Limited v Faust* [1983] ICR 292); and (d) the effect of section 238 is that it overrides section 152 in respect of *all* industrial action, even in cases where the nature of the action is such that it would not be taken out of the scope of section 152 by being not at an appropriate time.

79. In *Mercer,* the EAT concluded that this analysis of the domestic scope of section 152 then reads across to section 146, so that all industrial action, whether or not at an appropriate time, also falls outside its scope.

80. As to the impact of Article 11, the EAT in *Mercer* reached the following conclusions. First, the jurisprudence of the European Court of Human Rights (ECtHR) demonstrates that it "regards any restriction, however minimal, on the right to participate in a trade-union sanctioned protest or strike action as amounting to an interference with Article 11 rights" [43]. Secondly, the margin of appreciation given to contracting states in respect of such rights is narrower in respect of measures directed at primary or direct industrial action [49]. Thirdly, the fact that the case was concerned with the positive obligations of the state, and with a private employer, did not diminish the relevance of the **Convention** jurisprudence on the scope of Article 11, or the analysis of the narrow margin of appreciation allowed in such a case [50]. Next, the interference with the Article 11(1) right was not justified under Article 11(2), so that there was, overall, a violation of Article 11 [68].

81. To address this, it was decided in *Mercer,* section 146 should be "read down", applying the **HRA** interpretative obligation. It did not go against the grain of the domestic legislation to do so [82]. This could properly be achieved by treating section 146(2) as including an additional provision to the effect that "appropriate time" includes "a time within working hours when he is taking part in industrial action" [86]-[90]. Choudhury P observed that it was not a valid objection that this might lead to an inconsistency between sections 146 and 152, as such an outcome would not go against the grain of the legislation, having regard to the distinct history and features of the regimes relating to

action short of dismissal and to unfair dismissal.

82. Drawing the threads of this part of the analysis together Choudhury P concluded at [93]:

> "I accept that where the Act has expressly drawn a distinction between dismissal for trade union activities (dealt with under s.152) and dismissal for industrial action (dealt with under Part V), it would go against the grain to interpret s.152 as also encompassing industrial action. That would be inconsistent with a cardinal principle of the legislation that dismissal for industrial action is to be treated differently from dismissal for other trade union activity. Similarly, if another part of TULRCA had dealt with action short of dismissal in respect of industrial action, it might have gone against the grain to suggest that s.146 should also encompass industrial action. However, s.146 does not, as a matter of ordinary language, exclude industrial action from its ambit, and the words "at an appropriate time" do not unequivocally do so either. There is nothing else in the Act to suggest that one of its cardinal features is to deny workers protection against detriment by reason of participating in industrial action. Furthermore, as discussed above, there is nothing in the legislative history or any Parliamentary debate to suggest that the denial of such protection was a core aim; on the contrary, Parliament's expressly stated aim is that trade union law should comply with Article 11 rights. In those circumstances, it seems to me that it is not going against the grain to interpret s.146 as proposed, and the Tribunal erred in concluding otherwise."

83. I pause to make two observations. First, in line with the earlier analysis of the position in domestic law, the wording read down into section 146, to remedy the non-compliance with Article 11, applies, on its natural meaning, to "taking part in industrial action" within working hours, without any qualification, thereby ensuring that all such action is not taken out of the scope of section 146 either by the "appropriate time" proviso, or by the implied read-across of the express exclusion of industrial action found in section 152. Secondly, however, the decision recognises the distinct nature of the two areas of protection, including the fact that there is no provision in the **1992 Act** concerned with detrimental treatment short of dismissal in respect of industrial action, and concludes that the Part V regime therefore casts no light on the "grain" of the policy underlying section 146.

84. I turn, then, to the question of whether taking part in trade union activities, or the activities of a trade union, for the purposes of regulation 3 of the **2010 Regulations**, includes participating in a strike or other industrial action organised or called by the union.

85. As a matter of ordinary language and industrial relations reality, with nothing else to guide me, I would answer that question in the affirmative, for essentially the reasons given by the tribunal at [8] of its decision. Central to the raison d'être of trade unions, and the reason workers join them,

is the conduct of collective bargaining. The ability to take industrial action when collective bargaining breaks down is an intrinsic corollary of it, and in ordinary language, and the discourse of industrial relations, industrial action called by a trade union is a trade union activity.

86. With regard to the penultimate sentence of [11] of the tribunal's reasons I have no doubt at all that this was a simple misstatement. What the tribunal plainly meant to say, in [11] read as a whole, was that it was not logical or sustainable that the various bullet-pointed behaviours amounted to what it called "legitimate trade union activity", but yet taking part in the ensuing strike action could not amount to such activity. The tribunal did not, therefore, make the particular error postulated by ground 8. As to that paragraph as a whole (read as the tribunal intended) I do not think that a demarcation is unsustainable. It is the demarcation marked out by *Drew* and *Britool*. Though, as the authorities illustrate it may be difficult sometimes to apply in fact, that is true of many legal distinctions that are, in principle, still sound.

87. However, the salient point remains that, as a matter of ordinary language, "trade union activity" embraces union industrial action. I agree with the tribunal, therefore, that this expression, and its synonym, where they appear in regulation 3, bear that ordinary meaning. Section 3(6) of the **1999 Act** tells us that expressions used there have the same meaning as in the **1992 Act**. The principle that expressions interpreted by the courts in other legislation in the same territory should be interpreted in the same way, rather than undermining it, supports this reading. These expressions are not actually expressly defined in the **1992 Act** either; but, as I have discussed, *Mercer*, and *Drew*, and a consideration of the express wording of section 170 of the **1992 Act**, all confirm and support the natural reading of "trade union activities" as used in the **1992 Act**, as embracing industrial action.

88. Nor do I see that anything in the **1992 Act**, or the authorities, supports a different or narrower reading of the scope of regulation 3 of the **2010 Regulations**. The words "at an appropriate time" simply do not appear in section 3 of the **1999 Act**, regulation 3(2), regulation 3(3), regulation 9 or anywhere else in the **2010 Regulations**. Particularly where, in the parent statute, and indeed in the **2010 Regulations** themselves, the drafter has made cross-references to the **1992 Act** for other

purposes, there could be no warrant for treating this absence as some form of accidental oversight.

89. Nor is there any reason to treat the impact of section 238 of the **1992 Act** as carrying across to regulation 3, or, hence, regulation 9. The read-across within the **1992 Act** postulated in *Mercer* derives from the impact of section 238 on section 152, and hence section 146. But there is no equivalent of section 238 in the **2010 Regulations** at all. There is only, in relation to unfair dismissal, the equivalent of section 152, by the introduction of section 104F into – it may also be noted – not the **1992 Act**, but the **Employment Rights Act 1996**.

90. Consideration of the consultation history and the BIS Regulations is not essential to that reasoning, but provides comfort, if it be needed.

91. For these reasons I conclude that the tribunal in this case was right to hold, without needing to consider the potential impact of Article 11 and the **HRA** interpretative obligation, that for the purposes of regulation 3 of the **2010 Regulations**, taking part in the activities of trade unions, and trade union activities, includes participation in industrial action. It is not, therefore, necessary for me to decide whether, had the ordinary meaning of these terms in that regulation not embraced participation in industrial action, that would have meant that there was a failure to comply with Article 11, nor, if so, how that might have been addressed.

92. I turn next to the scope point relating to the **2010 Regulations**. My conclusions in relation to it are as follows.

93. First, regulation 1(c) merely tells us that, within the United Kingdom, this instrument extends to Great Britain, and therefore not to Northern Ireland.

94. Secondly, as has been noted, there was no issue in this case that the *Lawson v Serco Limited* [2006] ICR 250 test was met in relation to these claimants, all of whom are based in Great Britain. Accordingly, they could bring any claim relating to their employment, assigned to the employment tribunal, in the employment tribunal.

95. In this case the cause of action invoked by the claimants in the employment tribunal was that conferred by regulation 9. That gives a person, P, the right to complain if their employer "by any act

or any deliberate failure to act, subjects P to a detriment…". The detriment to which the claimants complained they had been subjected was that they were, in relation to their employment, deprived of concessionary travel benefits for a twelve-month period. It makes no difference that the respondent is incorporated and based in the Republic of Ireland, nor that the decision, and some implementing steps, were taken there. This was not a complaint about the acts of a non-British corporation taking place outside Great Britain, and with no other connection to it. The respondent operates in Great Britain, the claimants are all based in Great Britain, and they were complaining about treatment which disabled them from enjoying concessionary benefits in connection with their employment.

96. Nor does it make any difference that the list used to implement the travel ban was compiled in Dublin. It is an essential component of a complaint under Regulation 9 that there be a *contravention* of regulation 3 (which, by regulation 13, would be, of itself, independently actionable as a breach of statutory duty). Where a list has been supplied outside of Great Britain, that component of the regulation 9 cause of action might potentially be argued not to be satisfied. Regulation 2(2) however ensures that the "offshore" supply of a list will not be an obstacle to it being regarded as such a contravention. This feature therefore does not present any obstacle to these claims.

97. I conclude that the tribunal did not err when it rejected the respondent's "scope" argument.

98. I turn to the question of whether "the activities of a trade unions" or "trade union activities" within the meaning of regulation 3 of the **2010 Regulations**, should, in their application to industrial action, be construed as applying only to protected industrial action.

99. It follows from the conclusion I have already reached, about the meaning of those terms in that context, that my answer to that question is in the negative. In principle, if the industrial action in question falls to be treated as an activity of the trade union, then it will fall within the scope of regulation 3, regardless of whether it was action in respect of which section 219 applied. This flows form the ordinary meaning of the expression, and from the fact that there is no cross-reference in the **2010 Regulations** at all, specifically to Part V of the **1992 Act** in general, nor to or any sub-part of it; and no other route by which those provisions may have any influence upon its scope or meaning.

100. I turn to the question of whether "trade union activities" within the meaning of section 146 should, in its application to industrial action, be construed as applying only to protected industrial action. Although this was not raised as a discrete issue in *Mercer*, I consider that the answer to this question appears from the decision and outcome in that case. My reasons are as follows.

101. First, and foremost, the amendment to section 146 read down in *Mercer* extends the definition of "an appropriate time" to include "a time within working hours when he is taking part in industrial action". The starting point is that the ordinary meaning of "taking part in the activities of an independent trade union" is that it embraces all participation in union industrial action. Further, the wording that is added has the effect of both removing the "appropriate time" proviso in respect of *any* such activities which consist of taking part in industrial action; and, by expressly referring to "taking part in industrial action", it causes section 146 to trump section 238, rather than the other way around. Just as "industrial action" in section 238 means all union industrial action, so the words read down into section 146, on their face, apply to all union industrial action, without qualification or restriction.

102. Not only is this the natural reading of the scope of section 146, as read down in *Mercer*, it is consistent with the reasoning running through the decision, which I have traced earlier. The wording that is read down neutralises what would otherwise, as a matter of domestic law, be the gravitational effect of section 238 on section 146, identified in *Mercer*, drawing on *Drew*. It is also reflective of the conclusions that the EAT in *Mercer* comes to (at [41] to [42]) that the ECtHR has deprecated what it has detected to be the chilling effect of sanctions imposed on trade union members who take part in industrial action, and more generally at [43] about the jurisprudence of the ECtHR. It is also consistent with the EAT's conclusion, in relation to the margin of appreciation, at [48]-[49], that *Metrobus v United the Union* [2010] ICR 173 (CA), needs to be considered in light of the later discussion in *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] IRLR 467. It also reflects Choudhury P's own description of the wording, at [90]:

> "It is simply giving effect to what is, in my judgment, a clear and unambiguous obligation under Article 11, ECHR, to ensure that employees are not deterred, by the imposition of detriments, from exercising their right to participate in strike action."

103. Finally, this reading is consistent with the concluding thoughts at [93] of *Mercer*, on the "grain" question, contrasting the existence of the express regime in Part V dealing with unfair dismissal in relation to participation in industrial action, and the absence of any such express provision in relation to action short of dismissal in that respect; and the identification there of the underlying policy of the legislation in relation to the latter.

104. Mr Gott observed during submissions that he took issue with *Mercer*'s approach to the decision in *Metrobus*, but that he also accepted that this was not something that could be revisited before the EAT, accepting, as he recognised he must, that the place to pursue any challenge to *Mercer* must be the Court of Appeal. I conclude, on the point that I am presently considering, that the effect of the words read down into section 146 in *Mercer*, is that it protects all union industrial action, and not merely such action which is also protected in the sense that section 219 applies to it. What I am being asked to do is modify that wording, introducing a qualification or limitation to its scope that is not currently present. That would, in my judgment, itself involve a departure from *Mercer*, and lead to a different statement of the law at EAT level. I can see no proper basis to do that.

105. The decision of the tribunal in the present case is thoughtful and well-reasoned. I have so far upheld it. But I conclude that, had the matter come before it after the EAT's decision in *Mercer*, it would have been bound to apply the wording read down in *Mercer*. That would have pointed to the conclusion that the action with which it was concerned, entailing as it did, the claimants engaging in trade union activities at an appropriate time, being "a time within working hours when [they were] taking part in industrial action" was within the scope of section 146(1)(b), regardless of whether it was also protected industrial action. The tribunal therefore erred on this point.

106. Before I leave this aspect, I make a final observation. The activities protected by section 146 are those that amount to union activities, that is to say, participation in the activities of the union. In some cases, there may be a factual issue as to whether a union official is acting in that capacity or engaged in a campaign of their own – we have seen that such an issue indeed arose in *Drew*. In

relation to industrial action there may sometimes be an issue as to whether that action falls to be treated as union action. I have used the neutral phrase "union action", for the following reason.

107. The terms "unofficial" and "official" are, in origin, industrial relations terms. How the law distinguishes between action which is union action and that which is not, may depend on the legal context. For section 219 purposes, the law applies the section 20 and 21 regime. But this does not necessarily apply for all purposes. It will not apply for example, where the legal action is for contempt (see: *Express & Star Limited v National Graphical Association* (1982) [1986] ICR 589). The section 237 – 238A regime uses "unofficial" and "protected" as terms of art; but these definitions are in turn parasitical on the section 20 and 21 regime, the term "official" is used (somewhat misleadingly) in the heading of the section concerned with what is actually defined as "protected" action, and, as we know, section 238 is itself also concerned with action which is treated as that of the union.

108. Were the issue to arise under section 146, what the tribunal would have to decide is whether the industrial action was an activity of the union or not. I do not have to decide on this appeal what the appropriate test to apply would be, and I express no view about that, save to say that it should not necessarily be assumed that the section 20 and 21 regime ought to be the touchstone. That is an argument for another day; but it is for that reason that I have used the term "union industrial action" in this decision. There is of course no possible issue in this case, that this strike was a BALPA strike.

109. My conclusion on the "protected action" point means that, strictly, I do not need to determine the abuse of process ground. But in case I am thought to be wrong, I will set out my conclusion in relation to it. I consider that, if protection does indeed, as the tribunal thought, only adhere to participation in protected industrial action, then the tribunal was in any event right to conclude that it would be an abuse of process to permit the respondent to argue the point in its defence, in the circumstances of this particular case. That is for the following reasons.

110. As to the law, first, there is a general procedural rule against abusive proceedings, which may be regarded as the general policy underlying a number of different principles, going under names such as cause of action estoppel and issue estoppel – *per* Lord Sumption JSC in *Virgin Atlantic*

Airways at [17]. Secondly, an abuse may arise by the raising of a defence, as well as the bringing of a claim – *per* Lord Bingham of Cornhill in *Johnson* at [2002] 2 AC 31A-C. Thirdly, complete identity of parties on both sides is not always essential. What is required is sufficient "privity of interest" in accordance with the test cited in *Johnson*, in the extract cited to me by Mr Carr (see above).

111. Mr Gott is of course right that Lambert J did not determine the issue after a trial, but only decided that the union would be likely to succeed in its section 219 defence if the matter went to trial. But costs were then determined and the claim discontinued by consent. Whilst the judge had not definitively determined the lawfulness of the calling of the strike, the respondent chose at that point to bring the litigation to a conclusion. Had it thereafter issued a fresh claim in the High Court seeking damages, or even merely a declaration, it would surely have been struck out as an abuse.

112. I consider that there was sufficient privity of interest between the employees and BALPA in this case. The strike was no doubt the subject of a ballot, and then called, because BALPA believed that course to be in its members' best interests. It was they who BALPA called upon to strike, and they who would actually take part in it if they responded to the call. The cause of action on which the respondent relied in the High Court was, in the usual way, inducing *them* to breach their contracts of employment. Had the respondent obtained an injunction, it would have required BALPA to call the strike off. Conversely, the injunction having been refused, and the litigation ended, there was a legitimate expectation that the strike could proceed without its legality being open to the risk of further challenge or question. That legitimate expectation extended, in my view, to the individual employees who the union had called upon to participate in the strike.

113. I do not think that the fact that the respondent is the defendant to the claims in the employment tribunal, and could not necessarily predict what claims might ensue, affects the position. The respondent decided to warn employees that their travel benefits would be curtailed if they took part in the strike, and to make good on that warning following the strike. All parties: the respondent, BALPA, and the individual employees, were in a position to take a view about the potential repercussions of those actions, or indeed other actions that the respondent might potentially have

taken, and the claims or legal arguments to which they could give rise. It would have been open to the respondent, if so advised, for example, to make clear that any resolution of the High Court action would be on the basis that it was not relinquishing the right to contest the lawfulness of the calling of the strike for any other purpose.

114. In all the circumstances of this case, I therefore conclude that, even if it *was* a necessary condition of the protection of section 146, and/or the **2010 Regulations**, extending to the participation of employees in the strike, that the calling of the strike not be actionable pursuant to section 219, the tribunal did not err in concluding that it would be an abuse of process for the respondent to be permitted to defend the claims on the basis that that condition was not fulfilled.

Outcome

115. Accordingly, the appeal is dismissed. The cross-appeal succeeds. In respect of the **2010 Regulations** the tribunal was right to conclude that in taking strike action the claimants were taking part in trade union activities, and that the fact that certain actions were taken in Dublin did not preclude a claim under regulation 9. The tribunal was also right to conclude that by striking the claimants were taking part in union activities within the scope of section 146 of the **1992 Act**. It erred on the protected industrial action point. But even if I am wrong about that, its overall conclusion that this defence was not one that the respondent could run was, in any event, the correct one. Accordingly, the overall outcome of the preliminary hearing in the tribunal stands.