Neutral Citation Number: [2026] EAT 93

Case No: EA-2024-000792-JPD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 29 June 2026

Before:

HIS HONOUR JUDGE BEARD

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Between:

MR M YOUNG

Appellant

- and -

ROYAL MAIL GROUP LIMITED

Respondent

- -
- -

Madeline Stanley (instructed by **Unionline**) for the **Appellant**
Christopher Milsom (instructed by **Weightmans LLP**) for the **Respondent**

Hearing date: 12 May 2026

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JUDGMENT

Trade Union Rights

SUMMARY

The Claimant appealed against the Employment Tribunal's dismissal of his claim under s.152 TULR(C)A 1992. He had been dismissed for gross misconduct after posting two messages in a CWU WhatsApp group during an industrial dispute, one stating “Fuck Royal Mail” and the other suggesting named individuals should “choose sides” coupled with a reference to a car being blown up. The Tribunal concluded that neither message amounted to participation in the activities of an independent trade union and that the Claimant had been dismissed for his conduct, not for trade union activities.

The appeal contended that the Tribunal had failed properly to apply the principles derived from **Lyon v St James Press Ltd, Bass Taverns Ltd v Burgess** and **Morris v Metrolink** concerning conduct occurring in the course of trade union activity, and had wrongly treated abusive or threatening language as incapable of falling within the scope of statutory protection.

Dismissing the appeal, the EAT held that the Tribunal had correctly approached the question as an evaluative exercise of fact and degree. The authorities did not impose a freestanding legal threshold separate from the statutory language. The Tribunal's conclusion that the posts were not properly characterised as participation in trade union activities was one it was entitled to reach on the facts found and disclosed no error of law.

HIS HONOUR JUDGE BEARD

1. I shall refer to the parties as they were before the ET as Claimant and Respondent.

The Grounds of Appeal

2. **Ground 1**: Is that the ET ("ET") erred in law in failing to apply, or properly apply, the correct legal test under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992. In determining whether the Claimant's dismissal was by reason of taking part in the activities of an independent trade union, the ET failed to apply the established **Lyon/Bass** threshold, namely whether the conduct relied upon was "wholly unreasonable, extraneous or malicious" such as to fall outside statutory protection. Instead, the ET incorrectly proceeded on the basis that certain categories of conduct, including directing abuse at the employer, encouraging others to take sides in a trade dispute, or making a comment characterised as a threat or a joke, could not, as a matter of law, constitute participation in trade union activities.

3. **Ground 2**: Alternatively, if the ET purported to apply the correct test, its conclusions were wrong, being vitiated by material errors, including the following. A failure to take into account relevant factors, in particular: the existence of an ongoing industrial dispute; the imminence of industrial action; and the nature and purpose of the WhatsApp group as a forum established by union representatives for union members in anticipation of strike action. Taking into account an irrelevant factor, namely the absence of a reasoned or measured critique of the employer's proposals, which was not a proper basis for excluding statutory protection. That there were inadequate findings of fact in relation to the second message, where the ET relied on a characterisation of the message as "either a threat or a joke" without determining which, and without assessing whether either was genuinely separable from the Claimant's trade union activity.

Summary of the ET's factual findings

4. The Claimant, Mr Michael Young, was employed by Royal Mail Group Ltd at the Aldershot

Parcelforce depot as a delivery driver. He had over ten years' service and a clean disciplinary record prior to the events in question. In summer 2022, during a period of CWU-organised industrial action, a WhatsApp group entitled "CWU" was created for union members at the depot. Feelings among staff were running high in the period leading up to strike action. The Claimant was a union member only, holding no office or representative role.

5. It was not disputed that Mr Young posted two messages in the WhatsApp group: "*Fuck Royal Mail*", accompanied by a laughing emoji; and "*Maybe they need to choose sides* [the two named individuals] *are you for the people or against the people the wrong answer will result in your car being blown up although looking at* [named individual's] *not sure he would be bothered lol*".

6. One of the trainee managers complained shortly afterwards, stating that he felt genuinely threatened and intimidated by the second message, and that he did not regard it as humorous despite the "lol". Management took photographs of the WhatsApp posts, and a formal written complaint was submitted on 23 August 2022. Mr Young was suspended from work the following day pending investigation.

7. During the investigation, Mr Young accepted that he had made the posts, said that the second message was intended as a joke, apologised, and acknowledged that he could understand why it had been interpreted as inappropriate. Royal Mail's conduct and social media policies applied throughout the period of industrial action. Those policies classified threatening or intimidating behaviour towards colleagues as potentially amounting to gross misconduct.

8. A formal disciplinary hearing was held. The decision-maker concluded that the second message amounted to threatening and intimidating behaviour towards colleagues who had chosen not to strike, and that the first message also breached standards of conduct. Mr Young was dismissed on 27 October 2022 for gross misconduct, namely the use of threatening and intimidating behaviour

towards colleagues, with reliance placed on the relevant policies and the impact of the message on the recipient.

9. The Claimant did not himself regard those posts as participating in trade union activity; this was accepted as part of the evidential picture. A CWU official witness accepted that posting in a union WhatsApp group does not of itself make a post union activity, and distinguished between encouragement of lawful industrial action and threats or jokes.

10. The ET found as fact that the second WhatsApp message was reasonably understood by the recipient as a threat, that it created a sense of menace, and that it was not excused by being presented in a jokey manner. However, the ET did not, explicitly, decide whether the 2nd message amounted to a threat or a joke indicating that it did not need to do so because either as a joke or as a or a threat. The ET also found, in dealing with ordinary unfair dismissal, that the reason for dismissal was Mr Young's conduct rather than his trade union membership or activities.

The ET's Application of s.152 to those facts

11. The Judge directed himself to s.152(1)(b) and to the need for a broad but fact-sensitive interpretation of "activities of an independent trade union". He rejected the proposition that anything said in a union WhatsApp group is inherently protected, holding that the forum does not determine the character of the act. When applying that approach the Judge concluded that the first post was characterised as mere abuse of the employer and not an articulation or advancement of union aims, and therefore not union activity. His conclusion was that the second post was analysed as an invitation to "take sides" followed by either a threat or a joke about violence; neither character was capable, as a matter of fact and common sense, of being participation in trade union activities.

12. Although acknowledging that union activity should not be narrowly defined, the Judge found that threatening or joking references to violence are qualitatively distinct from encouraging participation in ballots or industrial action and fall outside s.152 protection. Accordingly, he found

that neither post constituted participation in trade union activities, and that the Claimant was not dismissed for taking part in such activities. On this footing, the automatic unfair dismissal claim under s.152 failed.

The Law

13. Section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 deals with unfair dismissal of an employee on grounds related to union membership or activities. It provides so far as relevant:

> *For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—*
>
> ---
> *(b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time*

The Case Law relating to "Union Activities"

14. **Brennan v Ellward (Lancs) Ltd** [1976] IRLR 378

Whether particular conduct amounts to *"activities of an independent trade union"* is a question of fact and degree, requiring a common-sense evaluation of *all the acts relied upon*, including (but not limited to) whether the individual was a union representative. The activities of a union are not automatically coextensive with the activities of a union member. The tribunal must first make primary findings of fact as to the acts relied upon. It must then decide in a common sense way whether those acts, taken together, constitute the activities of an independent trade union.

15. The Claimant contends that properly understood, this second stage involves an evaluative judgment, not a pure question of fact.

16. **Lyon v St James Press Ltd** [1976] IRLR 215

The statutory protection for trade union activities must strike a balance: it should not provide a cloak for conduct that would ordinarily justify dismissal, but equally should not be undermined by too ready

a finding that conduct justifies dismissal. Not every act connected with trade union activity is protected. Acts which are "wholly unreasonable, extraneous or malicious" may fall outside protected trade union activities. The distinction between protected and unprotected conduct is fact-sensitive and evaluative ("the channel between the marks is difficult to navigate").

17. **Drew v St Edmundsbury Borough Council** [1980] ICR 513

A tribunal may legitimately take account of whether an individual held any union office or exercised delegated authority, when assessing whether conduct constitutes union activity.

18. **Bass Taverns Ltd v Burgess** [1995] IRLR 596 (CA)

Applies and endorses the *Lyon* principles. Disparaging or intemperate remarks made in the course of trade union activity (e.g. "going over the top") do not automatically take conduct outside the scope of protected trade union activities. Even strong, rhetorical, or hyperbolic language at a union meeting may remain protected. However, this does not mean that *any* malicious, untruthful or irrelevant remarks will always fall within trade union activities.

19. **Morris v Metrolink** [2019] ICR 90

Draws together the threads of **Lyon** and **Bass** referring to it as a threshold. A dismissal may fall outside s.152 where the conduct relied on is genuinely separable from the trade union activity itself. However conduct that is merely ill-judged or unreasonable does not automatically lose statutory protection; the reference in **Lyon** to "***wholly unreasonable***" is held to be deliberate. It holds that appellate courts may themselves determine on which side of the threshold particular conduct falls.

20. However it also indicates that in evaluative, fact-sensitive exercises (such as statutory characterisation), there may be no objective yardstick, and appellate interference is unwarranted absent the decision being wrong.

21. **DPP Law Ltd v Greenberg** [2021] IRLR 1016

Where a tribunal has correctly directed itself as to the law, an appellate court must assume the law

was correctly applied to the facts, absent perversity.

22. **Kong v Gulf International Bank (UK) Ltd** [2022] ICR 1513

Determinations involving characterisation and evaluative judgment are matters for the tribunal, not to be substituted by an appellate body unless flawed in law or perverse.

23. **South West Trains Ltd v McDonnell** EAT/0052/03

Conduct which is threatening or abusive, and reasonably perceived as such, may fall outside the scope of protected trade union activity.

The case law advanced by the Claimant on appellate review and "evaluative judgments"

24. **In re B (A Child)** [2013] 1 WLR 1911 (SC)

Distinguishes primary findings of fact, evaluative (value) judgments, and discretionary decisions. Evaluative judgments are reviewed on appeal on the basis of whether the decision was "wrong", not merely whether it was perverse.

25. **IBM Holdings Ltd v Dalgleish** [2018] ICR 1681 (CA)

Applies *Re B* in the employment law context (albeit only in respect of implied terms of an employment contract and pension changes) and confirms that an appellate test for reviewing an evaluative judgment in the case of deciding whether particular facts fit the test of a duty of good faith, imposed when changing pension provisions, is whether the judgment was wrong. The case does not involve any decisions on what might be described as the statutory evaluation.

26. **Re Sprintroom Ltd** [2019] 2 BCLC 617 (CA)

Consolidates authorities on appellate review of evaluative decisions. Appellate courts must show considerable deference but may interfere where there is an identifiable flaw, such as: a gap in reasoning, inconsistency, or failure to consider a material factor. The appeal court is not to conduct its own balancing exercise.

The Claimant's Contentions

27. The Claimant contends that the ET erred in law in its application of section 152 TULR(c)A. It is said that the ET failed to apply, or properly to apply, the evaluative test derived from **Lyon**, **Bass** and most recently **Morris**, namely whether the conduct relied upon by the employer was so wholly unreasonable, extraneous or malicious as to be genuinely separable from trade union activity.

28. It is emphasised that there was no dispute as to the primary facts or as to the immediate reason for dismissal, which was the posting of two messages on a WhatsApp group established for union members during the course of an active trade dispute and in anticipation of industrial action. The sole issue, on the Claimant's case, was whether those messages, properly characterised, amounted to taking part in the activities of an independent trade union.

29. In relation to the first message ("Fuck Royal Mail"), the Claimant submits that the ET fell into error by characterising it simply as abuse of the employer and stopping its analysis at that point. The ET is said to have failed to situate the language used within its industrial context, namely a period of heightened tension during an ongoing dispute, and to have treated the absence of moderation or reasoned argument as determinative. On the Claimant's case, coarse or intemperate language, even if regrettable, does not of itself fall outside the scope of statutory protection.

30. As regards the second message, the Claimant contends that the ET again short-circuited the required analysis by categorising the message as "either a threat or a joke" and concluding, without further evaluation, that neither character could amount to trade union activity. It is said that encouragement to "take sides" during a trade dispute is, at least prima facie, trade union activity, and that the ET was required to consider whether any threatening or hyperbolic element was so serious as to be genuinely separable from that activity.

31. The Claimant further submits that the ET made no clear finding as to whether the second message was intended as a genuine threat or a joke, and that this absence of a critical finding of fact

undermined the subsequent evaluative judgment. In those circumstances, it is said that the ET's conclusion rested on an overly rigid and legally erroneous approach to section 152 TULR(C)A 1992.

32. The Claimant also relies on the ET's own findings that both messages together constituted the reason for dismissal. It is submitted that it is not open to the Respondent to re-characterise the dismissal as being based principally, or solely, on the second message, where no such finding was made. If either or both messages were capable of amounting to trade union activity, the Claimant contends that the appeal must succeed and the matter be remitted for reconsideration applying the correct legal test.

The Respondent's Contentions

33. The Respondent submits that the appeal discloses no material error of law and, properly analysed, amounts to no more than an impermissible attempt to re-argue the merits of the case and to substitute a different evaluative conclusion for that reached by the ET.

34. It is emphasised that the Claimant does not challenge the ET's central findings of fact, including that the Respondent's conduct and social-media policies remained applicable during industrial action, that the Claimant posted the messages complained of, that the second message was reasonably perceived by its recipient as threatening and intimidating, and that those messages were the reason for dismissal. Against that factual background, the Respondent submits that the ET was plainly entitled to conclude that the dismissal was for misconduct.

35. The Respondent contends that the ET correctly directed itself as to the law under section 152 and was entitled, as a matter of fact and common sense, to conclude that the Claimant's conduct was separable from any protected trade union activity. Whether particular conduct amounts to participation in union activities is said to be a question of fact and degree, and one on which the ET enjoys a broad evaluative discretion.

36. It is submitted that the ET expressly recognised that trade union activities should not be

construed narrowly, but was nevertheless entitled to find that abusive or threatening language does not acquire statutory protection merely because it is used in a union forum. Reliance is placed on the Claimant's lack of any representative role, the absence of any articulation or advancement of lawful union objectives, and the ET's finding that the second message created a sense of menace.

37. The Respondent further submits that the Claimant's reliance on the **Bass/Lyon** "threshold" overstates its effect and risks reviving a rigid test which later authority, including **Kong**, has emphasised is not a rule of law but part of a fact-sensitive inquiry into separability. On the Respondent's case, once the ET concluded that the conduct relied upon was genuinely separable from trade union activity, there was no further legal hurdle to be surmounted.

38. Finally, the Respondent submits that the ET's conclusion was well within the range of permissible outcomes on the facts found. Even if another tribunal might have reached a different view, that does not disclose an error of law. Absent perversity, misdirection or failure to take account of a material consideration, the appellate tribunal should not interfere, and the appeal should therefore be dismissed.

The Claimant's Reply

39. In reply, the Claimant submits that the Respondent's arguments proceed on a mischaracterisation of both the appeal and the ET's judgment. The appeal is not, it is said, an invitation to this ET to substitute its own view for that of the ET, but a contention that the ET failed to apply the correct legal approach to the statutory question it was required to decide.

40. The Claimant emphasises that the appellate tribunal is confined to the four corners of the ET's judgment. On that footing, there was no finding, concession or acceptance before the ET that one of the two messages was merely peripheral or of secondary importance. On the contrary, the ET found that the dismissal was because of the sending of the messages, plural, and treated both as material to the decision to dismiss.

41. It is therefore said to be impermissible for the Respondent to argue on appeal that the second message was the "real" or principal reason for dismissal, or that the case stands or falls on that message alone. No such distinction was drawn by the ET, and the statutory question under section 152 is directed to whether the reason, or principal reason, for dismissal was participation in trade union activities.

42. The Claimant further submits that the Respondent overstates both the effect of **Kong** and the degree of deference owed where a tribunal has failed to apply the correct legal test. **Kong** is said to be concerned with challenges to findings as to the employer's reason for dismissal, not with the anterior statutory characterisation of conduct as constituting, or not constituting, trade union activity. It does not, on the Claimant's case, overrule or dilute the principles articulated in **Lyon**, **Bass** and **Morris**.

43. The Claimant accepts that the question whether particular conduct amounts to trade union activity involves an evaluative judgment. However, it is submitted that such an evaluation must be structured by the correct legal framework. Where a tribunal treats certain categories of language or behaviour as automatically excluded from statutory protection, without addressing whether they are wholly unreasonable or genuinely separable from the trade union activity itself, that involves a misdirection of law rather than a mere disagreement on evaluation.

44. As to the second message, the Claimant reiterates that the ET made no finding of fact as to whether it was intended as a genuine threat or a joke, and that this omission is material. Without resolving that issue, the ET could not properly evaluate whether the message was so serious or extraneous as to fall outside section 152, rather than being ill judged or hyperbolic conduct occurring in the course of collective industrial mobilisation.

45. Finally, the Claimant submits that the risks identified in the authorities of trade union protection being eroded by over ready findings of separability are engaged on the facts of this case.

The ET is said to have adopted an unduly rigid approach, focusing on the form of words used rather than their industrial context, and thereby to have failed to carry out the evaluative exercise required. For those reasons, the Claimant maintains that the ET's decision cannot stand and that the appeal should be allowed.

46. There is a matter I am required to resolve as to whether the notice of appeal encompasses both posts or is confined to the first. Mr Milsom argues that it is limited to the first post, because that is the only post specifically referred to in the grounds of a appeal. Ms Stanley contends that the appeal was obviously intended to refer to both posts and that this was understood by the Respondent, can be seen by the Answer to the appeal.

Discussion

47. I deal first with the boundaries of the appeal. It is the case that it is only the first of the posts that is directly referred to in the grounds of appeal. However, Ground 1 also refers very generally to the status of the WhatsApp group and communications within that group. In addition Ground 2 is also expressed broadly as failing to adopt the wide interpretation of trade union activities. I also take account that, in the judgment of the ET, at paragraphs 11 and 27 it is made clear that both posts combined are the factual reason for the dismissal. Beyond this the response to the appeal engages with both posts. I do not accept Mr Milsom's submission that the pleadings allow me to go beyond what is on the face of the Judgment where that fact finding is not challenged by the Claimant. It appears to me obvious, as it apparently did to the Respondent's solicitor's, that where both posts formed the factual reason for dismissal then both would be included in the scope of the appeal and would need to be considered.

48. The main issues for determination may be stated shortly as the appeal raises a short series of interlinked questions. Firstly did the ET correctly direct itself as to the law under s.152 TULRCA? In particular, did it apply the evaluative approach required by **Lyon**, **Bass** and **Morris**, rather than treating certain forms of language or conduct as falling automatically outside statutory protection? If

so was it entitled to approach the matters based on the separability approach shown in **Kong** on the basis that this authority represents the proper approach to considering separation. On that basis did the ET properly evaluate whether the conduct relied upon was genuinely separable from trade union activity? Or did it short-circuit that exercise by categorising abuse or references to violence as incapable, as a matter of law, of constituting participation in trade union activities?

49. Secondly did the ET make adequate and necessary findings of primary fact? This would include findings as to the industrial context in which the messages were sent; and the nature of the second message, namely whether it was intended as a genuine threat or as ill-judged or hyperbolic language.

50. Thirdly, in conducting its evaluation of primary facts, did the ET take into account all relevant matters and exclude irrelevant ones? In particular, did it give proper weight to the existence of an ongoing trade dispute and the purpose of the union WhatsApp group, while avoiding reliance on the absence of moderation or reasoned argument as determinative?

51. Fourthly, was the ET entitled, on the findings it made, to conclude that the reason (or principal reason) for dismissal was misconduct rather than participation in trade union activities? If the ET misdirected itself or omitted a material evaluative step, was its conclusion nevertheless within the range of permissible outcomes, or was it wrong in law so as to require appellate intervention?

52. Drawing the threads of the parties' submissions and the authorities together, I am not persuaded that either ground of appeal is made out.

53. First, I do not accept that there is any material doctrinal distinction to be drawn between the approach to characterisation under section 152 TULR(C)A and the treatment of separability identified in section 103 cases. The unifying theme, as it seems to me, is that each involves an evaluative exercise directed to the proper characterisation of conduct and its causal or statutory significance. The guidance in **Kong** is that such questions are quintessentially for the fact-finding tribunal, and not to

be re-made on appeal absent error of law. That applies with equal force in the present context. The "separability" analysis is not a free-standing legal test but a way of describing the outcome of a fact-sensitive evaluation.

54. Secondly, and consistently with **Lyon**, **Bass** and **Morris**, the question whether particular conduct constitutes participation in the activities of an independent trade union is inherently fact-sensitive. It involves both primary findings of fact and a subsequent evaluative judgment. Whilst the appellate authorities recognise that such evaluative judgments are, in principle, reviewable on the basis that they are "wrong", they also emphasise the considerable restraint required before interference is justified. In that regard, the observations in **Re Sprintroom Ltd** are instructive: intervention is warranted where there is a clearly identifiable flaw in reasoning such as a failure to take account of a material matter, an inconsistency, or a gap in logic. That approach, whilst not precisely co-extensive with the language of **Wednesbury** perversity, nevertheless describes a threshold which is not readily surmounted and which reflects the institutional competence of the first-instance tribunal.

55. Thirdly, it is not the function of this ET to re-make the evaluative judgment simply because a different conclusion might be open on the facts. Absent a misdirection of law, or a flaw of the kind I have described, the assessment is for the ET. In the present case, I am satisfied that the ET directed itself to the statutory language and the relevant authorities in a manner which meets the standard identified in **DPP Law Ltd v Greenberg**. In those circumstances, this ET must proceed on the basis that the law was correctly applied to the facts found, unless the conclusion is shown to be vitiated by a material error.

56. Fourthly, I do not accept the Claimant's submission that the ET impermissibly failed to elevate or apply "**Bass/Lyon threshold**" as a determinative legal rule. To the extent that such a "threshold" is relied upon as a freestanding constraint on the statutory language, it amounts, in my judgment, to no more than a gloss on the statute. It does not have independent normative force beyond the

fact-sensitive evaluative exercise which the authorities consistently require. The ET was entitled to approach the matter as one of characterisation, and to determine, on a common-sense assessment of the facts as a whole, that the conduct relied upon was properly not to be regarded as participation in trade union activities.

57. Finally, on the facts as found, I am not persuaded that the ET's reasoning discloses the kind of identifiable flaw which would justify appellate interference. It cannot be said that the ET failed to grapple with the industrial context, or that it treated the forum as determinative. Nor can it be said that its reasoning was internally inconsistent or incomplete in a manner which undermines the conclusion reached. The appeal, at its highest, seeks to substitute an alternative evaluative conclusion for that which was open to the ET on the evidence.

58. For those reasons, both grounds of appeal are dismissed.