Neutral Citation Number: [2025] EWCA Civ 19

Case No: CA-2022-000134

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HIS HONOUR JUDGE AUERBACH
EA-2021-000275

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2025

Before :

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

BENJAMIN MORAIS & OTHERS	**Claimants (Respondents to the appeal)**
- and -	
RYANAIR DAC	**Appellants**
-and-	
SECRETARY OF STATE FOR BUSINESS AND TRADE	**Interested Party**

- -
- -

Paul Gott KC and Joanne Clement KC (instructed by **Eversheds Sutherland International LLP**) for Ryanair
Bruce Carr KC and Stuart Brittenden KC (instructed by **Farrer & Co**) for the Claimants
Daniel Stilitz KC and Hannah Slarks (instructed by **Government Legal Department**) for the Secretary of State

Hearing dates: 11 & 12 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean:

1. This appeal by Ryanair DAC from the Employment Appeal Tribunal concerns the proper interpretation of the Employment Relations Act 1999 (Blacklists) Regulations 2010, generally known as the Blacklisting Regulations.

2. The Claimants are pilots employed by Ryanair and are members of the British Air Line Pilots' Association ("BALPA"). BALPA is the professional association and registered trade union established to represent the interests of UK pilots. The union represents over 10,500 active commercial pilots and is recognised by Ryanair for collective bargaining purposes in respect of pay, hours and holidays.

Provision of travel benefits

3. Pilots employed by Ryanair enjoy the benefit of various travel concessions. The standard form contracts of employment provide:

> "Concessionary Travel ... All reduced rate or free travel is a concession only (and is not an entitlement) to Ryanair employees. This concession may be amended or withdrawn at any time at the discretion of the airline. Details of these concession benefits are contained in the Rough Guide to Ryanair [the staff handbook]."

Trade dispute between BALPA and Ryanair

4. BALPA registered a trade dispute with Ryanair for the purposes of section 244 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") in connection with pay and terms and conditions of employment.

5. On 17 July 2019 Brian Strutton, General Secretary of BALPA, wrote to Ryanair, providing notice of the proposed industrial action ballot and a copy of the ballot paper, pursuant to section 226A of the 1992 Act.

6. The ballot opened on 24 July 2019, with a closing date of noon on 7 August 2019. The ballot paper explained to members:

> "In accordance with the indicative industrial ballot which closed on 7 June 2019 and Ryanair's refusal to accept each element of BALPA's Pay Proposal for Pilots submitted on 8 March 2019 ('the pay claim') and other issues which BALPA has raised subsequently in correspondence and meetings as summarised below, you are asked to vote in favour of taking industrial action in support of BALPA's demand that Ryanair makes an acceptable offer which addresses each of the material in BALPA's pay and conditions claim and related issues. In summary, the issues which form the trade dispute concern:"
>
> • You are asked to take industrial action in support of a demand for a significantly better deal on pay and conditions of employment.

> It is proposed to take discontinuous industrial action in the form of strike action on dates to be announced over the period from 22 August 2019 to 6 February 2020. At this stage BALPA expects to organise the first period of discontinuous strike action to begin on date(s) to be announced in or around the week beginning Monday 19 August."

7. The ballot closed at noon on 7 August 2019. There was a 72% turnout. 353 members voted in favour of industrial action and 91 voted against, a majority just short of 80%.

8. BALPA gave the Respondent 14 days' notice of intended dates for strike action to take effect on the following dates: 22 and 23 August, 2, 3, 4, 18 and 19 September 2019.

9. Ryanair sought to obtain an interim injunction to restrain BALPA from organising (and its members from participating in) the proposed industrial action. In pre-action correspondence, it alleged that BALPA had failed to comply with the requirements contained in Part V of the 1992 Act.

10. In a judgment following a hearing on 21 August 2019, Mrs Justice Lambert rejected all Ryanair's grounds of challenge to the strike ballot, refused the application for an injunction, and ordered the Respondent to pay BALPA's costs. The judgment is notable for its clarity and for the fact that it deals with each point on the merits, rather than maintaining what in most industrial action cases is a pretence that the court is merely making an interim decision pending a trial.

11. Ryanair did not seek to appeal from the decision of Lambert J, nor to pursue the case to a trial. Shortly after her decision the company discontinued the claim and agreed to pay BALPA's costs.

12. On 16 September 2019 Darrell Hughes circulated a memo to all Ryanair's UK based pilots stating:

> "As you know, staff travel is a discretionary benefit allowing generous discounted access to Ryanair flights, including confirmed flights with the new blue tickets. Ryanair is not prepared to extend this discretionary benefit to the tiny number of UK (less than 5%) who continue to support these failed strikes just to damage our bookings, our business, and your job security. Accordingly, any UK based pilot who engages in any further BALPA strikes in September will have all staff travel privileges removed for 12 months. We hope that this will not be necessary, because everyone will work their rosters as normal."

13. Subsequently, on 19 September 2019 Diarmuid Rogers (Head of Flight Operations Base Management) wrote to all those pilots who went on strike on 18 and/or 19 September as follows:

> "I refer to our 16 September memo to all UK pilots.

> In accordance with the terms set out in that memo, your discretionary staff travel privileges have been withdrawn for a period of 12 months from 18 Sep 2019 to 17 Sep 2019 as follows:
>
> • Your access to the privilege travel booking system has been suspended for this period.
>
> • You are prohibited from making any privilege staff travel bookings through the system or by any other means
>
> • Existing privilege travel bookings (white tickets or blue tickets) up until 17 Sep 2020 have been cancelled.
>
> • You are forbidden from using jump seat travel privileged including travelling in uniform as supernumerary crew (unless specifically instructed/ rostered by the Company). Any attempt by you to use staff travel privileges during this 12-month withdrawal period will be a very serious disciplinary matter which could lead to a disciplinary sanction up to and including dismissal. ..."

14. On 6 January 2020 Captain Morais and his colleagues issued the present claim in the employment tribunal ("ET"). It alleged that the withdrawal of travel benefits constituted a detriment contrary to s 146 of the 1992 Act. Alternatively, it alleged that in deciding which pilots to withdraw travel benefits from, it was necessary for the Respondent to create or otherwise compile a list or record of BALPA members who participated in strike action; and that, in so doing, the Respondent created a "prohibited list" as defined by Regulation 3(2) of the Blacklisting Regulations.

15. Regulation 3 provides, so far as material:

> "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."

The Mercer case

16. On 4 May 2020 a claim by Ms Fiona Mercer that her employer, Alternative Futures Ltd, had subjected her to detriment contrary to section 146 of the 1992 Act was dismissed in the employment tribunal. Ms Mercer's case was ultimately to go to the UK Supreme Court and the various hearings in her case affected the progress of the present claim. It should be noted immediately that Ms Mercer did not bring any claim under the Blacklisting Regulations.

17. Returning to the present case, on 17 July 2020 Employment Judge Moor ordered the following preliminary issues to be determined at this hearing:

> "1. In taking strike action, were the claimants:
>
> 1.1 taking part in the activities of trade unions or trade union activities, for the purposes of Regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 ("the Blacklisting Regulations'?)
>
> 1.2 taking part in the activities of an independent trade union for the purposes of s146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act")?
>
> 2. Is the issue of the legality of the strike action pursuant to Part V of the 1992 Act relevant to either of 1.1 or 1.2 above, and, if it is relevant, is the respondent prevented from contesting the issue of legality under Part V of the 1992 Act on the basis of an issue estoppel or because it would be an abuse of process?
>
> 3. Do the Blacklisting Regulations apply in this matter, in the light of Regulation 1(c) and the matters pleaded in §24 and §29 of the Grounds of Resistance (to be supplemented by replies to request for further information)?
>
> 4. Whether the production of the employee record by the respondent for the respondent's sole use (as per §24 of the Grounds of Resistance, to be supplemented by replies to request for further information) can constitute blacklisting, or be a "prohibited list" under Regulation 3(2)(b) of the Blacklisting Regulations."

18. Following a remote hearing held on 8 and 9 October 2020 the ET (Employment Judge Tobin, Mrs Berry and Ms Daniels) issued its decision on 4 January 2021. It held that in taking strike action the Claimants were taking part in trade union activities for the purposes of Regulation 3 of the Blacklisting Regulations; and were also taking part in the activities of an independent trade union for the purposes of s 146(1)(b) of the 1992 Act. The ET appear at [26] to have accepted Mr Gott's submissions that participants in a strike would not be protected from blacklisting if were shown that their trade union had breached any of what the tribunal described as the "labyrinthine hoops" of the 1992 Act in calling for and then orchestrating industrial action; but at [28] – [31]

they accepted the Claimants' submission that, following the decision of Lambert J and the discontinuance of Ryanair's claim against BALPA, it was not open to Ryanair to reargue the alleged defects in the ballot which lay at the heart of the High Court proceedings.

19. The ET also held that the Blacklisting Regulations applied to the case notwithstanding that Ryanair's headquarters, where some decisions in the matter were made, are in Dublin. Finally they held that the production of an employee record by Ryanair for their own use identifying the individuals who had taken strike action amounted to blacklisting using a "prohibited list" under regulation 3(2)(b) of the Blacklisting Regulations. I will refer to this as the "own use" point.

20. Ryanair gave notice of appeal to the Employment Appeal Tribunal ("EAT"). Their grounds of appeal challenged each of the aspects of the ET ruling which I have set out with the exception of the own use point.

21. Judgment in Ms Mercer's appeal to the EAT was given on 2 June 2021 ([2021] ICR 1598; [2021] IRLR 620). Choudhury J, President of the EAT, held that, as a matter of domestic law without reference to the Human Rights Act 1998, Ms Mercer had no remedy for any detriment short of dismissal under s 146 of the 1992 Act, but that it was possible to read down s 146 so as to ensure compliance with Article 11 of the ECHR and to provide Ms Mercer with a remedy. Ms Mercer's employer, Alternative Futures Ltd, did not seek permission to appeal to this court, but the Secretary of State was given permission to intervene in the case and to appeal as intervener.

22. Ryanair's appeal to the EAT was dismissed, insofar as it was brought under s 146, in the light of Choudhury J's decision in the *Mercer* case. That did not, however dispose of Ryanair's appeal from the finding under the Blacklisting Regulations. In a reserved judgment handed down on 18 November 2021 the EAT (Judge Auerbach) upheld the finding that in taking strike action the Claimants were taking part in the activities of an independent trade union within the meaning of Regulation 3 of the 2010 Regulations. Judge Auerbach held that this interpretation did not depend on the strike action being protected from suit in tort under s 219 of the 1992 Act; but also held, as the ET had done, that in the light of the outcome of the High Court proceedings before Lambert J in which that had been in issue, it would be an abuse of process for Ryanair to be permitted to run the point as a defence to the claims in the ET.

23. Judge Auerbach gave permission to Ryanair to appeal to this court. Its appeal was stayed pending the outcome of the *Mercer* litigation.

24. On 24 March 2022 this court (Lord Burnett of Maldon CJ, myself and Singh LJ) gave judgment in *Mercer*: [2022] ICR 1034; [2022] EWCA Civ 1034, allowing the Secretary of State's appeal. The court held that s 146 could not be read down as the EAT had held. As a result, s 146 did not provide protection against detriment short of dismissal for participation in industrial action. This court refused the application by Ms Mercer for a declaration of incompatibility with the ECHR.

25. Ms Mercer subsequently obtained permission to appeal to the Supreme Court. By its judgment given on 17 April 2024 the Supreme Court agreed with this court that as a matter of domestic law, s 146 of the 1992 Act gave no protection from detriment short of dismissal to workers engaged in industrial action. The Supreme Court held that this

put the UK in breach of its positive obligation to secure effective enjoyment of the right to participate in a lawful strike guaranteed by ECHR Article 11; that s 146 could not be read down so as to fill the gap; and that a declaration of incompatibility should be granted. Mr Gott drew our attention to the fact that a clause in the Employment Rights Bill 2024 currently before Parliament would, if enacted, deal with the incompatibility.

26. The parties to the present appeal agreed that in the light of the decision of the Supreme Court in *Mercer*, the claim for substantive relief under s 146 could not succeed, and that aspect of the claim by Captain Morais and his colleagues was accordingly dismissed by consent. Ryanair contended that the claims under the Blacklisting Regulations were likewise bound to fail but the Claimants disagreed. Hence this hearing.

Grounds of appeal

27. Ryanair have three remaining grounds of appeal under the Blacklisting Regulations.

> "Ground 1 Error of law in interpreting the phrase "activities of trade unions" in regulation 3(2)(a) of the Employment Relations Act 1999 (Blacklists) Regulations 2010
>
> 1. The Tribunal erred in concluding that the phrase "activities of trade unions" in regulation 3(2)(a) of the Employment Relations Act 1999 (Blacklists) Regulations 2010 ("the Blacklisting Regulations") includes participation in industrial action. The phrase bears the same meaning as the domestic law interpretation of the materially identical phrase in section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act").
>
> 2. In particular, the Tribunal erred in law in failing to apply:
>
> (1) Section 3(6) of the Employment Relations Act 1999 (the enabling legislation for the Blacklisting Regulations), which provides that expressions used in section 3 of the 1999 Act and in the 1992 Act have the same meaning in both Acts.
>
> (2) Section 11 of the Interpretation Act 1978 (which provides that expressions used in enabling legislation have the same meaning in subordinate legislation made thereunder); and
>
> (3) The longstanding presumption that where legislation uses an expression that has been used in earlier legislation and has received a clear judicial interpretation (i.e. Drew v St Edmundsbury Borough Council [1980] ICR 513 ("Drew") subsequent legislation which incorporates the same word or phrase in a similar context must be construed in accordance with that earlier meaning.

3. The EAT erred in failing to correct these errors. The EAT further erred in concluding that Drew and Mercer v Alternative Future Group Limited and Secretary of State for Business, Energy and Industrial Strategy [2021] IRLR 620 ("Mercer") supported the EAT's domestic law interpretation of that phrase. They did not: both Drew and Mercer confirm that, as a matter of domestic law, the materially identical phrase "trade union activities" in section 146 of the 1992 Act, does not include participation in industrial action.

Ground 2: Error of law in concluding that section 146(1)(b) of the 1992 Act and/or regulation 3(2)(a) of the Blacklisting Regulations extends to all those taking part in "union industrial action"

4. The Tribunal concluded that, if section 146(1)(b) of the 1992 Act and/or regulation 3(2)(a) of the Blacklisting Regulations extended to participation in industrial action, that industrial action had to be "protected" industrial action, with the benefit of the immunity provided section 219 of the 1992 Act.

5. The EAT erred in law in allowing the cross-appeal against the Tribunal's finding in this regard, and holding instead that the legislation extended to all those taking part in "union industrial action" (without defining that term). In particular, the EAT erred in:

(1) Holding that the interpretation of the materially identical phrase in regulation 3(2)(a) was not the same as the domestic law interpretation adopted under section 146(1)(b), (as identified in Mercer);

(2) Holding that its conclusion on section 146(1)(b) of the 1992 Act was derived from the EAT's earlier decision in Mercer, in circumstances where Mercer did not consider or determine the question of whether the industrial action in question had to be lawful and official under Part V of the 1992 Act;

(3) Introducing a wholly novel, uncertain and undefined concept of "union industrial action" which does not reflect either the distinction drawn: (a) in section 219/238A of the 1992 Act between "protected industrial action" and industrial action which is not so protected; or (b) in section 20 of the 1992 Act between "official industrial action" and "unofficial industrial action";

(4) Failing to conclude that Parliament did not intend to confer protection on individuals in respect of acts which: (i) breached their own contracts of employment with their

> employer; and (ii) amounted to an unlawful act on the part of the trade union, which would commit the tort of inducing a breach of contract if the statutory protection in section 219 of the 1992 Act was not available; and / or
>
> (5) Reaching a conclusion that cut across the carefully balanced statutory regime set out in Part V of the 1992 Act, resulting in protection being conferred upon employees participating in strike action with no safeguards of notice or ballot, no industrial democracy, and no warning for employers or users of services that strike action is to commence.

(3) Ground 3: Issue Estoppel and Abuse of Process

> 6. The Tribunal erred in concluding that cause of action estoppel, issue estoppel and/or the rule in Henderson v Henderson prevented Ryanair from arguing that the industrial action taken by the Claimants was not protected industrial action. In particular, the Tribunal erred in reaching this conclusion when (a) the Claimants were never parties to the High Court claim brought by Ryanair for an interim injunction to prevent the industrial action called by BALPA going ahead; and (b) the judgment on which the Claimants relied was a judgment on interim relief only and did not conclusively determine whether the strike called by BALPA had been lawful and protected.
>
> 7. The EAT erred in failing to correct this error."

28. By a Respondents' Notice the Claimants submitted that in the event that this court determined that Regulation 3 of the Blacklists Regulations (or s 146 of the 1992 Act) was incompatible with Articles 10 to 11 ECHR, but that it was not possible to achieve compliance by reference to HRA 1998, a declaration of incompatibility should be granted. The Secretary of State was served with the pleadings and appeared in this court as interested party to the appeal.

29. The Secretary of State supported the Claimants in resisting Ryanair's appeal on the issues of interpretation of the Regulations and their compatibility with the ECHR, but has quite properly remained neutral on the abuse of process argument arising from the injunction application to Lambert J.

Submissions for Ryanair

30. Mr Gott relied on the wording of s 3(6) of the Employment Relations Act 1999 ("the 1999 Act"), which was the primary statute under which the Blacklisting Regulations were made. This provides that expressions used both in s 3 itself and in the 1992 Act have the same meaning in s 3 as in the 1992 Act. Since one of the phrases used in s 3 of the 1999 Act is "the activities of trade unions" that should be interpreted in the same way as the materially identical wording of s 146 of the 1992 Act was interpreted by the Supreme Court in *Mercer.*

31. Mr Gott submits that "*Mercer* confirms that as a matter of domestic law (without invoking section 3 of the Human Rights Act 1998) the phrase "trade union activities" in section 146 does not include participation in industrial action". He relies on the following passage from the judgment of Lady Simler JSC:-

> "44. Like the courts below, I consider that read in isolation and as a matter of ordinary language the phrase "activities of an independent trade union" in section 146(1) of TULRCA is apt to include participation in, or the organisation of, lawful strike action. However, the phrase cannot be read in isolation. In Drew v St Edmundsbury Borough Council [1980] ICR 513 Slynn J (then President of the EAT), explained (pp 517G - 518A):
>
> > "But the tribunal … considered that there was a distinction between the activities of an independent trade union and taking part in a strike or other industrial action. It was their view, that if what happened was taking part in industrial action, then it could not be a trade union activity for the purposes of section 58 of the Act [the predecessor of section 152] whatever might be the position as a matter of ordinary language.
> >
> > … Under section 58, if an employer dismisses because a man has taken part in the activities of an independent trade union, then the dismissal is unfair. Under section 62, if an employee takes part in a strike or other industrial action, the position is entirely different. There, a man is not entitled to bring a claim that he has been unfairly dismissed when at the date of his dismissal he was taking part in a strike or other industrial action, unless he can show that other employees who, to put it broadly, were taking part in industrial action were not dismissed at the same time, or, if some were offered re-engagement, that he was one who was not. It is quite impossible … for the same person to fall under both of those sections. Accordingly, it seems to us quite clear that there is intended by Parliament to be a distinction f*or the purposes of a claim of unfair dismissal* between what is an activity of an independent trade union and taking part in industrial action. It seems to us that that distinction is borne out, for the purpose of the legislation, when one considers the terms of section 23 and section 28(1) of the Act which are dealing with trade union membership and activities and time off for trade union activities. …" [emphasis added]
>
> Neither side in this case has suggested that the analysis in Drew is wrong as a matter of domestic law.
>
> 45. It seems to me that it is supported by the requirement in section 146(1) that the activity must be carried out "at an appropriate time" to qualify for protection. The phrase, "at an

appropriate time" is defined as meaning outside working hours, or within those hours where the employer consents: see section 146(2). Industrial action will normally be carried out during working hours if it is to have the desired effect since to withhold labour at a time when the employer has no expectation of labour being provided is unlikely to have any consequence. Although as both tribunals below noted, there are some forms of industrial action (for example, refusing to work voluntary overtime beyond contracted working hours) that would, on the face of it, be carried out outside working hours and therefore "at an appropriate time", the intention is plainly to limit that protection to activities which are not inconsistent with the performance by workers of primary duties owed to the employer.

46.This conclusion is reinforced by considering the wider scheme of TULRCA, and the limited protection available to individuals who participate in lawful industrial action in Part V (sections 237 to 238A) of TULRCA. This detailed scheme allows an employer lawfully to dismiss an employee for participating in industrial action where the action is unofficial; or dismissal is not selective (unless section 238A applies); or the employer waits for a period of 12 weeks after the commencement of industrial action. There is, accordingly, no universal protection provided to workers against dismissal for participating in industrial action, although plainly the conditions in which such a dismissal is lawful are limited.

47. By contrast, separate protection against dismissal for participating in the activities of a trade union at an appropriate time (the parallel provision to section 146) is contained in section 152 of TULRCA. To construe section 152 as including lawful industrial action in working hours would mean that an employee dismissed for engaging in industrial action at an appropriate time could bring a claim for unfair dismissal under section 152 and thereby avoid the carefully constructed regime giving limited protection for dismissals in sections 237 to 238A. For the reasons given in Drew, that cannot be right: an employee dismissed for taking part in industrial action cannot fall within both section 152 and sections 237 to 238A of TULRCA at the same time. Otherwise, the 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, and the regime in sections 237 to 238A would be redundant. Given that section 152 operates by reference to "an appropriate time" it is plainly to be interpreted as not encompassing dismissal for industrial action. It follows that on ordinary principles of statutory interpretation, section 146 does not provide protection against

> detriment short of dismissal for workers taking part in industrial action."

32. Turning to grounds 2 and 3, Mr Gott pointed out that both in *Mercer* and in the part of this case which concerned s 146 of the 1992 Act it had been conceded that Article 11 of the ECHR only requires protection of lawful industrial action, which Ryanair submit must mean action where the trade union has complied with all the requirements of Part V. There is no reason, he submitted, why a different approach should be taken to the Blacklisting Regulations. As the ET in the present case had accepted, it was "inherently unlikely" that Parliament intended to confer protection from blacklisting on individuals who were themselves in breach of contract and whose trade union had unlawfully induced such breaches.

33. On ground 3, Mr Gott submitted that no issue estoppel could arise from the decision of Lambert J. The parties to the High Court case (Ryanair and BALPA) were not the same as the parties to the ET claim (Ryanair on the one hand and Captain Morais and his colleagues on the other). There was not sufficient privity of interest between BALPA and the individual Claimants to support an estoppel. Moreover, Lambert J was not giving a definitive ruling on the interpretation of the Regulations. All she had to decide for the purposes of the interlocutory injunction application was that it was more likely than not that the s 219 defence would succeed if the claim were to go to trial.

Submissions for the Claimants

34. Mr Carr rejects Mr Gott's interpretation of the critical phrase in the Blacklisting Regulations and submits that Ryanair can derive no comfort from the Supreme Court decision in *Mercer*. The requirement in s 146 of the 1992 Act that the trade union activity must be carried out "at an appropriate time" was critical to the result. Lady Simler JSC confirmed that as a matter of ordinary language the phrase "activities of an independent trade union" is apt to include participation in, or the organisation of, lawful strike action.

35. Mr Carr places strong reliance on the enacting history of the Blacklisting Regulations. For ten years after the passing of the 1999 Act nothing was done to prohibit blacklisting. Then, in July 2009, the Department of Business, Innovation and Skills (DBIS) published a consultation document enclosing the text of draft regulations inviting comment. At paragraph 2.19 the document stated:-

> "There is no definition of "trade union activities" given in the 1992 Act, where the term is frequently used, always in conjunction with the words "at an appropriate time". It was suggested in the 2003 consultation that the term should be defined in the regulations to ensure that participation in unofficial industrial action and criminal activities in the name of the trade union were not covered. The Government considers it very unlikely such behaviours would ever be categorised as trade union activities for these purposes. For example, because unofficial industrial action by definition is not authorised by the trade union, it is difficult to see how such activity would be categorised as a trade union activity. In contrast, *all forms of*

> *official industrial action are likely to qualify because the qualifying phrase "at an appropriate time" is deliberately not used in this context…*" [emphasis added]

36. In December 2009 the Government published its response to the consultation. At paragraph 3.28 it said:-

> "3.28 The Government repeats its view that the term "trade union activities" almost certainly covers involvement in official industrial action. The absence of the qualifying phrase "at an appropriate time" helps ensure that this is the effect. Section 170 of the 1992 Act specifically excludes industrial action from the meaning of "activities of the union" for the purposes of that section, which therefore must mean that involvement in industrial action would normally be covered by the term… "

37. The Regulations were made on 1st March 2010 and came into force the next day, a draft having been approved by a resolution of each House of Parliament. At the same time the DBIS published its Guidance on Blacklisting. This stated:-

> "Participating in official industrial action would also probably be categorised as a trade union activity. This means that a list of strikers which was drawn up in order to discriminate against them in employment could constitute a blacklist…"

38. As to Ground 2, the Claimants submit that there is nothing in the Blacklisting Regulations which qualifies or otherwise limits the definition of the phrase "activities of a trade union" by reference to any of the provisions of Part V of the 1992 Act. The words "at an appropriate time" are nowhere to be found in the Regulations. The Claimants argue that the issue of whether a trade union has or has not complied with all the requirements of Part 5 so as to achieve immunity in tort is irrelevant to the issue of whether something is to be classified as a trade union activity for the purpose of the Regulations.

39. Further, on Ground 3, the Claimants submit in the alternative that even if Ground 2 might otherwise have succeeded, it would be a clear abuse of process for Ryanair to be permitted to run the point now in this court when it had abandoned its own litigation following the adverse ruling of Lambert J.

Submissions of the Secretary of State

40. Mr Stilitz submitted that the phrase "activities of a trade union" in its ordinary meaning plainly includes industrial action. On a proper analysis of *Mercer* there is no basis for departing from the ordinary meaning of those words when interpreting the Blacklisting Regulations. The consultation and guidance documents issued by the Department in 2009-10 clearly support the view that the intention of the Regulations was that the phrase should include participation in official industrial action.

41. On Ground 2 he submits that Parliament could have included in the Regulations a requirement of compliance with Part V of the 1992 Act but did not do so. The references in the consultation documents to official industrial action clearly mean

action organised by the trade union in accordance with its rules, in contrast with unofficial action by individual members.

42. Mr Stilitz added that if the Blacklisting Regulations were not to be interpreted as giving protection to those taking part in official industrial action, there was a real risk that the limited protection would involve the United Kingdom being in breach of its Article 11 obligations, in the same way as the Supreme Court had found that it was when considering s 146 in *Mercer*.

Discussion

Ground 1

43. There can be no real dispute that the natural meaning of the phrase "activities of an independent trade union" includes organising industrial action: see paragraph [44] of *Mercer*. Moreover, I accept the submissions of Mr Carr and Mr Stilitz that *Mercer*, so far from requiring us to depart from the natural meaning of the words when construing the Blacklisting Regulations, strongly supports adherence to the natural meaning.

44. The case of *Drew*, now quite venerable in employment law terms but approved many years later in *Mercer,* should be examined carefully. Section 58 of the Employment Protection (Consolidation) Act 1978 provided that dismissal for taking part in trade union activities at an appropriate time was to be regarded as dismissal for "an inadmissible reason" (in modern terminology, automatically unfair). But s 62 of the same Act provided that dismissal of an employee while he or she was taking part in industrial action was only unfair if the employer was carrying out selective dismissals or selective re-engagements. Thus, on a proper construction of s 58, dismissal for taking part in the "activities of an independent trade union" could not include dismissal for taking part in strike action, otherwise the two sections would be in head-on conflict. (The EAT do not appear to have focussed on the phrase "at an appropriate time", although it was to form part of the reasoning in *Mercer*.)

45. The ratio of *Drew*, therefore, is that where one statutory provision makes dismissal for taking part in the activities of an independent trade union unfair, while another provision of the same statute says that dismissal for taking part in industrial action is only unfair if certain conditions are fulfilled, it must follow that the trade union activities referred to in the first statutory provision cannot include taking part in industrial action. It is important to note that the judgment in *Drew* expressly stated that this distinction was to be drawn "for the purposes of the law of unfair dismissal". It gives no support to an argument that for any wider purpose industrial action is not to be regarded as one of the activities of an independent trade union.

46. *Mercer* applied the same logic, except that there were more than two statutory provisions involved. Sections 237, 238 and 238A of the 1992 Act gave protection for dismissal on the grounds of participation in industrial action subject to various conditions being fulfilled. Section 152 of the same Act provided that, for the purposes of the law of unfair dismissal, dismissal for taking part in the activities of an independent trade union was to be regarded as unfair. Applying the same principle as in *Drew*, the words "activities of an independent trade union" in s 152 could not include participation in industrial action. The phrase "activities of an independent

trade union" could not mean different things in s 146 and s 152. Thus s 146 of the 1992 Act – the one on which Ms Mercer relied – gave no protection against detriment short of dismissal for taking part in trade union activities.

47. The use of the phrase "at an appropriate time" in s 146 of the 1992 Act was also regarded as a strong pointer in the *Mercer* case towards interpreting "activities of an independent trade union" in s 146 as not extending to industrial action: see paragraph [45] of the judgment of Lady Simler JSC. By contrast, the phrase is simply not used in the Blacklisting Regulations.

48. I do not consider that s 3(6) of the 1999 Act assists Ryanair's case. That provides that expressions used in s 3 (and thus, Mr Gott argues, in the Regulations made pursuant to s 3) and also in the 1992 Act are to be given the same meaning in s 3 as in the 1992 Act: thus, for interpretation purposes s 3 is to be treated as if it were part of the 1992 Act. But, as Lady Simler JSC noted in *Mercer* at [108], the general presumption that the same words used in different sections of the same statute have the same meaning can be rebutted where it is appropriate to do so. Moreover, the phraseology is not identical in the two statutes: s 146 and s 152 of the 1992 Act refer to "the activities of an independent trade union", whereas s 3 of the 1999 Act and Regulation 3(2)(a) of the Blacklisting Regulations refer to "the activities of trade unions".

49. Ryanair's case on ground 1 in summary is that employers are free to blacklist any employee who has taken part in industrial action. The consultation document, response to consultation and Departmental guidance of 2009-10 cited above all point strongly the other way. Documents of this kind could not be used to contradict what Parliament had enacted in a primary statute or approved in regulations if they were indeed in conflict with it. But, if Ryanair are right, the Regulations singularly failed to implement the intentions of the Minister who laid them before Parliament, and singularly failed to deal with the mischief at which they were aimed. The Departmental documents strongly support the view that Regulation 3 of the Blacklisting Regulations should be given its ordinary meaning, and that in accordance with that ordinary meaning it is unlawful to blacklist an employee for taking part in the activities of trade unions, including industrial action organised or endorsed by a trade union.

50. I would also reject Ground 2 of Ryanair's appeal. There is no indication either in the text of the Blacklisting Regulations or in the Departmental documents that an employer is free to blacklist an employee taking part in industrial action organised or endorsed by a trade union unless it can be shown that the union had conformed with all the requirements of Part V of the 1992 Act so as to achieve immunity from being sued in tort. To be one of the "activities of an independent trade union", industrial action must be official, in the sense of being organised or endorsed by the union under its rules, but, like Judge Auerbach, I see no basis for importing into the Blacklisting Regulations a requirement of conformity with the balloting requirements of Part V of the 1992 Act.

51. In any event, even if my conclusion on Ground 2 were wrong, it would be academic in this case because I consider that the ET and EAT were right to describe Ryanair's attempt to relitigate the lawfulness of the ballot as an abuse of process. It is probably right to say that there is no issue estoppel in the formal sense, since the parties to the present claim are not identical to the parties to the High Court claim. But a more

obvious abuse of process of the *Henderson v Henderson* type would be hard to imagine. Ryanair applied to the High Court for an injunction to stop the strike, and failed. Lambert J in her judgment dealt with the series of technical points raised by Ryanair to challenge the validity of the ballot and rejected them one by one. She did not do so on the basis that there were triable issues but that all she needed to decide at the interlocutory stage was that the defence under s 219 was more likely than not to succeed: she dealt with each point on the merits. Ryanair did not seek to appeal her conclusions and did not take the matter to a trial.

52. Moreover, for what it is worth (though the abuse of process issue does not depend on it), I consider Lambert J's judgment entirely convincing in rejecting the points advanced by the company. The main argument seems to have been that because 12 new members working for Ryanair had joined BALPA in the period between the distribution of ballot papers and the announcement of the result, the entire process was invalidated. Lambert J rejected this on the authority of the House of Lords in *P v NASUWT* [2003] 2 AC 663; [2003] UKHL 8 and she was clearly right to do so.

Conclusion

53. I would dismiss this appeal.

Lord Justice Peter Jackson:

54. I agree.

Lady Justice Nicola Davies:

55. I also agree.