IN THE HIGH COURT OF JUSTICE
QUEENS'S BENCH DIVISION

QB-2019-002572

[2019] EWHC 2302 (QB)

Royal Courts of Justice
The Strand
London, WC2A 2LL

Tuesday, 23 July 2019

Before:

MRS JUSTICE ELISABETH LAING

B E T W E E N :

BRITISH AIRWAYS PLC — Claimant

- and -

BRITISH AIRLINE PILOTS' ASSOCIATION — Defendant

MR J. CAVANAGH QC and MR J. MILFORD (instructed by Baker & MacKenzie LLP) appeared on behalf of the Claimant.

MR S. CHEETHAM QC and MR J. MITCHELL (instructed by Farrer & Co LLP) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE ELISABETH LAING:

Introduction

1 The claimant, British Airways Plc, to which I will refer as "BA", applies for an injunction to stop industrial action by the defendant, the British Airline Pilots' Association, to which I will refer as "BALPA". BA is represented by Mr Cavanagh QC and Mr Milford. BALPA was represented by Mr Cheetham QC and Mr Mitchell. I am grateful to all counsel for their very helpful written and oral submissions.

2 This case raises three issues in connection with the balloting provisions in the Trade Union and Labour Relations (Consolidation) Act 1992, which I will refer to as "the 1992 Act".

(1) Did the notice of ballot served by BALPA on the 19th June correctly describe, for the purposes of ection.226A(2A)(a), the categories of employee BALPA intended to ballot?

(2) Was the notice defective because it failed properly to categorise the employees who work at BA's Waterside headquarters, in particular by failing to refer to their precise job titles?

(3) Did the ballot paper fail to comply with section 229D(2D) because it failed to specify the expected "period or periods within which" industrial action was expected to take place?

The facts

General

3 BA is the flag-carrier airline for the United Kingdom. It is the largest airline in the United Kingdom in every relevant respect. BALPA is the sole representative of pilots working in BA's fleets at Heathrow and Gatwick Airports. Nearly 90 per cent of BA's pilots are members of BALPA, so whatever the outcome of this application BA knows that a very high proportion of pilots are likely to be called out on strike. The result of the ballot was announced yesterday. About 90 per cent of BALPA members voted in the ballot. Of those, about 93 per cent voted in favour of the industrial action.

The organisation of BA's business

4 BA has two fleets, the long-haul and the short-haul fleets. Different aircraft fly in those fleets. Smaller aircraft fly in the short-haul fleet: see paragraph 34 of Mr Winstanley's first witness statement. The long-haul fleet itself consists of four distinct fleets, which in turn comprise four different aircraft: Boeing 747s; Airbus A380s; Boeing 777s; and Boeing 787s. The Airbus A350 will shortly be added to the long-haul fleet.

5 Pilots are licensed to fly different aircraft. Pilots are assigned either to the short-haul fleet or to one of the four parts of the long-haul fleet, and are trained to fly the aircraft in that fleet, or part of the fleet, as the case may be. They cannot transfer from the aircraft which they are licensed to fly, to another aircraft without long retraining and assessment. There is some difference between the parties about the period of that training but on any view it is at least

three months. A pilot will only be eligible for transfer between fleets on average once every five years. All pilots who are assigned to the short-haul fleet are licensed to fly all the aircraft in that fleet. The pilots in the long-haul fleet are licensed only to fly one of the big aircraft, and that licence determines to which long-haul fleet they are assigned.

6 When pilots are recruited, they are assigned to a particular fleet. It is said by BA that the pilots see themselves as belonging to a particular fleet. The fleet is the unit within which they are managed. Fewer than twenty pilots are able to fly more than one long-haul aircraft. BA employs 4,311 pilots at Heathrow and Gatwick. There are two main categories of pilot: captains and co-pilots. Co-pilots in turn are divided into first officers and senior first officers, based on experience rather than on role. BA employs 2,008 captains and 2,303 co-pilots. Each flight, long-haul and short-haul, needs both a captain and a co-pilot. An aircraft cannot fly with two co-pilots, nor can it fly with two captains, unless one of the captains is trained as a co-pilot. Only a handful of captains other than training captains are trained to do that. On long flights, an aircraft may have three or even four pilots. The extra pilots can be co-pilots.

7 There is a table at paragraph 38 of Mr Winstanley's first witness statement which shows the number of captains and senior first officers and first officers in the four divisions of the long-haul fleet. BA also has training pilots who are both captains and co-pilots. These pilots ensure that pilots' training is up to date. If his or her training is not up to date, the pilot is grounded. There is a table at paragraph 40 of Mr Winstanley's first witness statement which explains this. There is some flexibility, as he explains in paragraph 41. A training captain can train captains and co-pilots in aircraft, and on the simulator. A training co-pilot can train both, but only in the simulator. Training pilots can only train others about the aircraft which they themselves are qualified to work on.

Does BALPA know to which fleet the pilots are assigned?

8 There is extensive material in paragraphs 42 to 57 of Mr Winstanley's first witness statement which supports BA's belief that BALPA knows which aircraft and therefore which fleet pilots are qualified on and / or to which fleet they are assigned, and BALPA accepts this: see paragraph 28 of Mr Strutton's witness statement. Disruption would be enhanced if BA does not know to which fleet the pilots who have been balloted are assigned. There is considerable material in paragraphs 58 to 79 of Mr Winstanley's first witness statement on the extensive disruption which would be caused to BA's operations by any industrial action. An EU regulation requires passengers to be offered reimbursement or re-routing, plus care and assistance if their flight does not fly for any reason. The more widespread the disruption the harder it is to predict the effects on passengers.

9 It is important for BA to know how many and which pilots are going to work as that is a key part of planning. BA needs to plan in relation to each fleet because pilots cannot be transferred between fleets. For planning purposes BA needs to know not only how many pilots have been balloted and their ranks, it is said, but to which fleets the balloted pilots are assigned, in addition to their ranks. It is that information, it is said, which enables BA to infer how many pilots from each fleet and rank will not be at work on the strike days. BA's business, it is said, is different in this respect from that of, for example, other carriers such as Virgin Atlantic. If BA knows the proportions of pilots who have been balloted for each fleet, that would help BA with its planning.

10 Mr Winstanley explains that a small variance in assumptions can make a big difference as only two or three pilots need turn up in order to enable one flight to get away. Hundreds of

passengers can be affected. Knowing which fleets are most affected is important also in order to enable BA to know where to "park" its aircraft when they are not needed. Heathrow is not able to accommodate all BA's planes. Usually the space is not needed because the aircraft are in the air, but if many flights are cancelled, BA will need space in which to park them.

11 Disruption is also said to be bad for cabin crew because much of their pay is earned when they are in the air. Disruption can also mean that cabin crew are caught "down route". That can disrupt their rosters. Passengers will then have to be rebooked on other flights. It is sometimes necessary to "wet lease" an aircraft, that is to lease the aircraft with its crew to operate particular flights. BA needs to know that it has to do that as soon as possible after strike days are notified. Wet leasing is said to be expensive and difficult to do during the summer. Part of the necessary planning could involve putting a large long-haul aircraft on a short-haul route in order to consolidate smaller flights, and to redeploy the short-haul pilots. If BA knows which pilots of which fleets are going to be balloted, it is said that this can be done more effectively.

12 In paragraph 69 of his first witness statement Mr Winstanley explains that BA has told BALPA on three occasions, that is on the 3rd, the 10th and the 15th July, that it needed more information in order to work out to which fleets the balloted categories of pilots come. It is asserted that that would be a relatively straightforward thing for BALPA to do, and given the complexity of the fleets, it would give BA further information to help it with its planning. BA only operates a check-off system for fifty-nine BALPA members, and so BA is unable to find that information from its own records.

13 A further point which is made by Mr Winstanley is that the deployment of pilots can only be delayed for a short time because of the way in which pilots' working hours are regulated by EU Law. He mentions in his witness statement the two scenarios which BA have modelled on the assumption that 5 per cent of pilots turn up on the first day of the strike. In paragraphs 60 to 87 of his first witness statement Mr Winstanley explains the extra difficulties which will be caused because of the fact that the Airbus A350 is going to be added to BA's fleet from the 26th July 2019. That aircraft is planned to "go live" on the 5th August 2019. The aircraft are to be delivered in stages between August 2019 and July 2020. The pilots who are to fly those aircraft will have to have a period of intensive training on those new aircraft.

14 The strike will therefore affect the introduction of this new plane and the training programme for it. At this stage no pilots are fully qualified to fly it. Mr Winstanley makes the point that BA have been told how many training pilots have been balloted but not by fleet. Breakdown by fleet is important because it allows BA to make assumptions about how it can keep the training of its pilots up to date. Each month the training pilots are rostered to train pilots on simulators and in flight. For example, in August they are rostered to do nine hundred and sixty-two flying days, and six hundred and eighty simulator sessions. About fifty pilots per day are trained in a simulator. If the training does not take place, that will have a knock-on effect. It might take months to replace the missed training.

15 In his first witness statement Mr Winstanley also deals with a discrete issue, which is the categorisation of BA's employees at BA's Riverside headquarters. Fifteen of those employees have been balloted. It is said that BALPA may be intending to ballot the management pilots, that is managers who are also qualified pilots. Management pilots, it is said, do not work as pilots in their substantive roles. Some are required to fly in order to ensure that their training is up to date, and some are not required to fly but choose to.

BALPA have identified only one management pilot by role, that is the director of safety and security. Management pilots have many different roles. Many are crucial to contingency planning. The fact that they still hold a captain's or co-pilot's licence does not absolve BALPA from providing the details of their role if they are called out on strike.

16 The explanation for the fact that only one of the management pilots at Waterside has been described by role which is given by Mr Strutton in his witness statement is that, on the basis of the information which BALPA had at that time, that person was not licensed to fly as a pilot, and it is for that reason that he was not described as a pilot but was described by his role.

17 Mr Winstanley explains that some of the management pilots are in safety critical roles. Some of them cover a technical advice line for each fleet. Pilots call with emergency technical questions, and it is important for BA to know how many of the people in those roles have been balloted.

18 Mr Strutton's evidence (paragraphs 44 to 63 of his witness statement) deals with the Waterside issue, and then further evidence has been served in reply: paragraphs 10 to 31 of Mr Winstanley's second witness statement.

The timing of the industrial action

19 BA contends that it has no idea of the overall likely shape of the strike other than that it will be discontinuous, and that it will take place during a period of six months. That is said to be despite the fact (see paragraphs 95 and 96 of Mr Winstanley's first witness statement) that BALPA appears to have been making and to have plans. I note that that allegation is categorically denied by Mr Strutton in his witness statement.

20 BA make the point that pilots are financially affected by industrial action. They are not paid for strike days. Knowing how long a strike is likely to last could affect the way in which pilots vote. It is said that they are entitled to know what disruption will be caused to BA and to BA's customers when they decide how to vote. BA complains that the vague information which has been provided means that BA cannot keep its customers and affected businesses informed about what is going on, which or whom would benefit from knowing as far in advance as possible so that they can make contingency plans. If customers are told well in advance, they are more likely to stay loyal to BA.

The balance of convenience and damages

21 These topics are dealt with in paragraph 103 and following of Mr Winstanley's first witness statement. He points out that, by reason of s.22 of the 1992 Act, BA would only be able to recover £50,000 in damages from BALPA. He puts the cost of any strike at about £30 to £40 million a day, plus reputational damage, and huge inconvenience to the public.

22 I asked Mr Cheetham about this. BALPA does not dispute that if the relevant test is met this would be an appropriate case in which to grant an injunction because the balance of convenience and the inadequacy of damages as a remedy would point in that direction. So, I say no more about those two issues.

The notice given by BALPA

23 On the 19th June 2019 BALPA wrote to BA to give notice of the industrial action pursuant to s.226A of the 1992 Act. The letter was headed, "Notice of proposed industrial action ballot". Tthe relevant statutory provision was referred to. The trade dispute in question was then briefly described. The notice went on:

> "In accordance with the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) I am writing to confirm that it is BALPA's intention to hold a ballot for industrial action. I set out below details of all BALPA members who are British Airways Plc employees that BALPA intends to ballot. We believe that the opening day of the ballot, the first day when a voting paper is sent to a person entitled to vote in the ballot, will be 26th June 2019. Based on the information in its possession, BALPA reasonably believes that a total of 3,833 employees of British Airways will be entitled to vote in the ballot, and the employees concerned belong to the categories of work at the workplaces set out in the tables below."

There is then a table headed, "The categories of employees concerned". The categories given are “captain”, “training captain”, “training standards captain”, “training co-pilot”, “senior first officer”, “first officer”, and “director safety and security”. Total numbers of employees are recorded in each category. There is also a table of the workplaces at which the employees concerned work, showing the number who work in each workplace. The workplaces which are listed are Gatwick, Heathrow and Waterside Heathrow.

24 The notice continues:

> "The information provided above has been obtained from BALPA's membership database which is regularly updated from information in BALPA's possession, and it is as accurate as reasonably practicable in light of the information in BALPA's possession. However, the accuracy of the database is dependent on members updating BALPA, their officers or employees about any changes in their categories, workplaces or personal circumstances."

25 There is a reference to paragraph 18 of the Code of Practice on Industrial Action Ballots and Notice to Employers. BA are asked to confirm whether they accept that the information, which had been provided in the notice, complies with the requirements of s.226A(2)(c) of the 1992 Act.

26 The ballot paper is headed, "Ballot paper: dispute with British Airways Plc". The nature of the trade dispute is summarised, and a question is then asked, "Are you prepared to take part in industrial action consisting of a strike?" The member is then asked to put an X in the box: either “Yes” or “No”.

27 The ballot paper says, "The discontinuous strike action is expected to take place within the period 7th August 2019 to 21st January 2020, on dates to be announced". The member is then reminded that taking part in a strike or industrial action may be a breach of a contract of employment, and of the rights arising if they are dismissed. The ballot paper describes who is authorised to call on members to take part, or to continue to take part, in industrial action. It refers to Electoral Reform Services Limited as the scrutineer and gives instructions for the completion and return of ballot paper.

The law

28 For a long time, Parliament has provided an immunity against suit in tort for trade unions who induce or encourage their members to take industrial action "in contemplation or furtherance of a trade dispute". "Trade dispute" is defined in section 244 of the 1992 Act. It is agreed that the dispute which is described briefly in the notice and on the ballot paper is a "trade dispute" for the purposes of s.244. The precise limits of that immunity have changed over the years. The immunity is now found in section 219 of the 1992 Act. It has effect subject to section 219(4) which refers to the balloting provisions in section 226. In other words, the immunity now depends, among other things, on whether a defendant trade union has complied with the balloting and notification provisions in the 1992 Act.

29 Section 226 is headed, "Requirement of ballot before action by trade union". It reads as follows:

> "(1) An act done by a trade union to induce a person to take part or continue to take part in industrial action (a) is not protected unless the industrial action has the support of a ballot and (b) where section 226A falls to be complied with in relation to the person's employer is not protected as with respect to the employer unless the trade union has complied with section 226A in relation to him."

Subsection (2) explains that:

> "Industrial action shall be regarded as having the support of a ballot only if (a) the union has held a ballot in respect of the action (i) in relation to which the requirements of section 226B so far as applicable before and during the holding of the ballot were satisfied; (ii) in relation to which the requirements of sections 227 to 231 were satisfied; (iia) in which at least 50 per cent of those who were entitled to vote in the ballot did so and (iii) in which the required number of persons (see subsections (2A), (2C)) answered 'Yes' to the question applicable in accordance with section 229(2) to industrial action of the kind to which the inducement relates."

30 When an interim injunction is sought, and the defendant relies on the immunity, the court must in the exercise of its discretion whether or not to grant an injunction "have regard to the likelihood of [the defendant's] succeeding at the trial of the action in establishing any matter which would afford a defence to the action under section 219 … ": see section 221(2).

31 The question I have to answer is whether it is more likely than not that the defendant failed to comply with the relevant provisions of the 1992 Act: see *National Union of Rail, Maritime and Transport Workers v Serco Limited* [2011] IRLR 399 CA.

32 In paragraph 9 of their skeleton argument, Mr Cheetham and Mr Mitchell submit that the general approach to the provisions of Part 5 of the 1992 Act was clarified in the *RMT* case (to which I have just referred), and that there is no presumption that the legislation should be construed strictly against the union. At paragraph 9 of his judgment Elias LJ said:

> "In my judgment the legislation should simply be construed in the normal way without presumptions one way or the other. Indeed, as far as the 1992 Act is concerned, the starting point is that it should be given a 'likely and workable construction' as Lord Bingham put it in *P (A Minor) v National Association of Schoolmasters / Union of Women Teachers* [2003] ICR 386 at paragraph 7."

33 They also submit in paragraph 10 of their skeleton argument that account must be taken of union members having "an effective right to withhold their labour" and that the legislation is "not designed to prevent unions from organising strikes or even to make it so difficult that it will be impracticable for them to do so". They refer in that connection to the judgment of Smith LJ in *British Airways v Unite (No. 2)* [2010] ICR 1316 at paragraphs 109 and 113. They also cite paragraph 112 of Smith LJ's judgment. She said:

> "The new provisions now found in s.226 to 232 of the Act were designed to ensure that ballots for industrial action were secret, free and fair. In short, they were designed to ensure that a ballot had democratic legitimacy."

She went on to say at paragraph 152:

> "I consider that the policy of this part of the Act does not create a series of traps or hurdles for the union to negotiate. This is to ensure fair dealing between the employer and the union, and to ensure a fair, open and democratic ballot."

34 Section 203 of the 1992 Act gives the Secretary of State power to issue codes of practice containing "such practical guidance as he sees fit", for three stated purposes. Section 207 of the 1992 Act is headed, "Effect of failure to comply with code". Subsection (3) provides:

> "In any proceedings before a court or employment tribunal or the Central Arbitration Committee, any code of practice issued under this chapter by the Secretary of State shall be admissible in evidence, and any provision of the code which appears to the court, tribunal or committee to be relevant to any question arising from the proceedings shall be taken into account in determining that question."

I should say that it seems to me that that obligation is of limited relevance to the questions of statutory construction which lie at the heart of this case.

35 Section 226 of the 1992 Act is headed, "Requirement of ballot before action by trade union". Subsection (1) provides that an act is not protected unless the industrial action has the support of a ballot and "(b) where s.226A falls to be provided in relation to the person's employer is not protected with respect to the employer unless the trade union has complied with s.226A in relation to him". Subsection (2) sets out the circumstances in which industrial action is to be regarded as having the support of a ballot. They are "only if" the union has held a ballot in respect of the action in relation to which the requirements of s.226B, in so far as they apply before and during the holding of the ballot, have been satisfied.

36 Section 226A is headed, "Notice of a ballot and sample voting paper for employers". It imposes on the trade union an obligation to take such steps as are reasonably necessary to ensure that the notice specified in subsection (2) and a sample voting paper are, at the times specified, received "who it is reasonable for the union to believe (at the latest time when steps could be taken to comply with paragraph (a)) will be the employer of persons who will be entitled to vote in the ballot". Subsection (2) tells us what the notice referred to in subsection (2)(a) is. It is a notice in writing stating that the union intends to hold a ballot, specifying the date on which the union reasonably believes will be the opening day of the ballot and "(c) containing - (i) the lists mentioned in subsection (2A) with the figures mentioned in subsection (2B) together with an explanation of how those figures were arrived at". Subparagraph (ii) makes provision where there is a check-off arrangement. That is not of central relevance here.

37 Subsection (2A) makes provision about the lists. The lists are "(a) the list of categories of employees to which the employees concerned belong", and "(b) a list of the workplaces at which the employees concerned work". Subsection (2B) tells us what the figures are. They are:

> "(a) the total number of employees concerned;
> (b) the number of employees concerned in each of the categories in the list mentioned in subsection (2A)(a); and
> (c) the number of employees concerned who work at each workplace in the list mentioned in subsection (2A)(b)."

38 Subsection (2C) defines the information which is referred to in subsection (2)(c)(ii). It is:

> "Such information as will enable the employer readily to deduce;
>
> (a) the total number of employees concerned
> (b) the categories of employee to which the employees concerned belong, and the number of the employees concerned in each of those categories; and
> (c) the workplaces at which the employees concerned work, and the number of them who work in each of those workplaces."

39 Subsection (2E) explains when information is held by a trade union. Subsection (2G) provides that nothing in the section requires a union to supply an employer with the names of the employees concerned. Subsection (2H) provides that references to "the employees concerned" are references to those employees of the employer in question who the union reasonably believes will be entitled to vote in the ballot.

40 The word "categories" is not defined in the 1992 Act.

41 Section 229 is headed, "Voting paper". It explains the method of voting in the ballot, which must be by the marking of a voting paper by the person voting. Subsection (1A) describes the requirements that must be met by a voting paper. Subsection (2) provides that it must contain at least one of two questions:

> "(a) A question (however framed) which requires the person answering it to say by answering 'Yes' or 'No' whether he is prepared to take part or, as the case may be, to continue to take part in a strike;
> (b) a question (however framed) which requires the person answering it to say by answering 'Yes' or 'No' whether he is prepared to take part or, as the case may be, to continue to take part in industrial action short of a strike."

42 Subsection (2B) requires the voting paper to summarise the trade dispute to which the proposed action relates. Subsection (C) makes provision about industrial action short of a strike. It requires the type or types of industrial action to be specified, either in the question itself or elsewhere in the voting paper. Subsection (2D) provides, "The voting paper must indicate the period or periods within which the industrial action or, as the case may be, each type of industrial action is expected to take place".

43 Section 223(2B) is headed, "Small accidental failures to be disregarded". It is not relevant to this case in the sense that if BALPA has failed to meet the statutory requirements, no one suggests that those failures were small accidental failures; and in any event this provision is limited in its scope.

44 Section 234A of the 1992 Act is not engaged by the facts of this case because it concerns the notice which should be given to an employer of industrial action, but it is indirectly relevant to the construction of the provisions which I have to consider. Section 234A(1) provides that industrial action is not protected unless a union has taken such steps as are reasonably necessary to ensure that the employer receives within the appropriate period a relevant notice covering the action in question. The relevant notice is a notice in writing which contains the lists mentioned in subsection (3A), and the figures mentioned in subsection (3B) with an explanation of how they were arrived at; and (b) states whether the industrial action is intended to be continuous or discontinuous; and specifies, where it is to be continuous, the intended date for any of the affected employees to begin to take part in the action; and, where it is discontinuous, the intended dates for any of the affected employees to take part in the action.

45 Subsection (3A) provides that the lists referred to in subsection (3A) are (a) a list of the categories of employees to which the affected employees belong; and (b) a list of workplaces at which the affected employees work. Subsection (3B) provides that the figures referred to in subsection (3A) are: (a) the total number of affected employees; (b) the number of affected employees in each category in the list mentioned in subsection (3A)(a); and (c) the number of the affected employees who work at each workplace in the list mentioned in subsection (3A)(b).

46 Subsection (5C) explains what is meant in this provision by the phrase "the affected employees". Subsection (6) explains what is meant by discontinuous industrial action:

> "A union intends industrial action to be discontinuous if it intends it to take place only on some days on which there is an opportunity to take the action; and (b) the union intends industrial action to be continuous if it intends it not to be so restricted."

47 Significantly, in my judgment, this section makes two distinctions which are absent from section 229. Section 229 does not, unlike this provision, distinguish between continuous and discontinuous industrial action, and section 229 does not refer to the dates or intended dates of the action, unlike section 234A(3)(b). It also seems to me, and there is I think no dispute between counsel about this, that the references to categories of workers in the two sections must be given the same interpretation.

The category issue

48 Mr Cheetham relies on the statutory language. He submits that it is simple and clear. The question, he submits, is “What does the statute require the trade union to do?” The question is not “What would the employer find it useful for the trade union to do?” Mr Cheetham also submits that the legislative history is important. Section 226A was inserted in the 1992 Act by s.18 of the Trade Union Reform and Employment Rights Act 1993. This provided:

> "(2) the notice referred to in paragraph (a) of subsection (1) is a notice in writing - … (c) describing (so that he can readily ascertain them) the employees of the employer who it is reasonable for the union to believe (at the time when the steps to comply with that paragraph are taken) will be entitled to vote in the ballot."

49 The provision was further amended by the Employment Relations Act 1999. Subsection (2C) then read:

> "…containing such information in the union's possession as would help the employer to make plans and bring information to the attention to those of his employees who it is reasonable for the union to believe (at the time when the steps to comply with that paragraph were taken) will be entitled to vote in the ballot (3A). These rules apply for the purposes of paragraph (c) of subsection (2) - (a) if the union possesses information as to the number, category or workplace of the employees concerned, the notice must contain that information (at least); (b) if the notice does not name any employees that fact shall not be a ground for holding that it does not comply with paragraph (c) of subsection (2)."

This provision has been in its current form since 2004. I have already explained what that is.

50 Mr Cheetham submits that the legislative history shows, especially the changes in 2004, that Parliament intended to make categorisation broader and more straightforward for unions to operate. The amendments were introduced at a time when the Court of Appeal in *Westminster City Council v Unison* [2001] EWCA Civ 443 [2001] ICR 1046 had decided that it was sufficient for a union to provide "general job categories", albeit that analysis was based upon the earlier statutory language.

51 Mr Cavanagh's position about the statutory history is that in *London Underground Limited v National Union of Rail, Maritime and Transport Workers* [2001] ICR 647 Robert Walker LJ (as he then was) said (at paragraph 48), in relation to the intermediate iteration of the statutory language: "To that extent subsections (3A) and (5A) must in my view be interpreted in the light of the legislative purpose, which has always been inherent in s.226A and 234A, which has now been spelled out in the amendments". Robert Walker LJ then rejected a further submission about the scope of those provisions.

52 In paragraph 49 he referred to a further submission made on behalf of the union that the construction put forward by the employer would deprive the statutory language of any force. He said that that submission called for serious consideration, but he rejected it. He then said:

> "In practice, in many cases, the union will no doubt discharge its obligation by providing the irreducible minimum of information but the words '(at least)' in subsection (3A) and (5A) point to the possibility that there may be special circumstances in which a union would have to do more."

53 Mr Cavanagh submits that that passage shows that the purpose of enabling the employer to plan was seen by the Court of Appeal in the *RMT* case as being inherent in the previous language, even though the previous language did not refer to that purpose, and that it can therefore be regarded as being inherent in the current language, even though the current language does not refer to that purpose either.

54 BA also relies strongly on a decision of Choudhury J in *Virgin Atlantic Airways Limited v Capital PPU*, which does not seem to have a neutral citation number. The case number was QB-2018-000528. The approved judgment was handed down, apparently, on 20 December 2018. That case, like this case, concerned pilots. The ballot notice, which is set out in

paragraph 11 of the judgment, provided that the category of employees which would be balloted was "pilots" and gave workplaces of those pilots.

55 Choudhury J accepted the employer's submissions. He held that, on the facts, the notice given by the union was insufficient because the two jobs of captain and first officer, in particular, were so different that it would make a material difference to the claimant's ability to plan for the loss of one type of pilot as opposed to another. He therefore held that the union should have specified those categories, that is the subcategories of pilot, and not just the category of pilot. He said in paragraph 79:

> "Simply referring to 'pilots' does not in my judgment fulfil the legislative purpose. The employer needs to know how many captains and first officers are likely to be involved in the strike in order that it can make plans to avoid or minimise the effects of such action."

56 Choudhury J referred at some length to the previous authorities, including the *RMT* case, the *Westminster* case, and the decision of Blake J in *EDF Energy Powerlink v RMT*. In paragraph 44 he noted that in the *EDF* case the notice provided by the union stated that the category of employees affected was "engineer / technician", and that Blake J had held that the notice was unlawful because different trades were employed at the site in question, and there was no way of the employer knowing who might be called out to take part in the industrial action. He quoted paragraph 18 of Blake's decision. Blake J referred to the fact that different trades were employed at the site in question; to the fact that the claimant was not submitting that detailed job descriptions should have been provided, or details of rosters and shifts and so on. He accepted the claimant's point that it would make a material difference to the employer if he had to face the risk, for example, of the test room inspector withdrawing his labour as opposed to a fitter.

57. Choudhury J accepted four propositions which the claimant derived from the authorities.

(1) The category requirement was a real requirement and not a bare formality. Its purpose was to enable the employer to make plans to avoid or mitigate industrial action. The information as to category must be useful (he relied on the *RMT* case).
(2) Whether a trade union had satisfied the obligation was a question of fact and degree to be decided by reference to all the circumstances. He referred to the *Westminster* and *EDF* cases, and to a passage in *Harvey* which says:

> "A category of employee for this purpose is to be understood as meaning the general label an outsider might use to describe the relevant workers. The union is not obliged to conform to the particular job descriptions used internally by the employer, but the degree of specificity required depends very much on the circumstances."

(3) The mere fact that some grouping has been referred to by the union did not necessarily mean that the category requirement was satisfied.
(4) The obligation was an absolute one. It did not matter whether or not the employer was able to work out from its own information who the employees are.

58. In paragraph 52 he said that there was a clear statement both in the *RMT* and the *Westminster* cases that the only obligation was to provide general job categories. That did not mean "that for all purposes and in all circumstances any generalised statement of category would do". It all depended on the circumstances. He then recorded the submissions that were made about the different roles that captains and first officers played,

and to the union's submission that the law is clear, and the only obligation was to provide general job categories.

59. He also referred, very briefly, in paragraph 56, to a submission that the claimant was wrong to rely on certain passages in the *London Underground* case because that concerned a differently worded provision, "in particular the words 'at least' present in that version of the provisions are not present in the current version". I note that he does not refer to the change in the statutory language as a result of the removal of the reference to the express purpose of enabling the employer to plan. He said in paragraph 57, while accepting that the provisions were differently worded at the time of the *London Underground* case:

> "It seems to me that the legislative purpose behind these provisions has remained consistent throughout the different iterations of the provisions, and that these authorities remain as relevant now in understanding what is meant by 'categories' as they were then."

60. The approach of the claimant is, effectively, on the basis of Mr Winstanley's first witness statement, to submit that all of the information about which fleets the pilots belong to is necessary to enable BA to plan. The defendant's riposte is that far from making the law simple and clear, that approach does the opposite by making it harder for a trade union on the facts of any given workplace to decide how to categorise workers for the purposes of the notice. The purpose of planning is no longer an express statutory purpose.

61. It is submitted that BA's approach gives exclusive prominence to that purpose, and that BA's interpretation removes a union's discretion to categorise, and reduces each case to an unpredictable question of fact and degree; and by doing that, reintroduces the very uncertainty which it has been the trend of the successive amendments to remove. Mr Cheetham submits that the decision of Choudhury J is explicable because he relied on only one purpose which, it is apparent from his reasoning (and I accept this submission) he assumed had never changed, whereas in fact at the time of the *Westminster* decision and indeed, of the *RMT* decision, the statute imposed a more onerous duty on trade unions.

Discussion

62. I consider that the point about the legislative history which is made by Mr Cheetham in his submissions is a powerful one. It is difficult to see, given that Parliament has expressly removed the reference to planning from the statutory language, how the provision of information for the purposes of enabling the employer to plan is the primary or indeed a purpose of the current provisions. I do not consider that I get much help from the reasoning of Robert Walker LJ in the *RMT* case because both the initial, albeit relatively succinct, provision (which, by the time of *RMT*, had been amended), and the amendment itself were very differently worded from the current provision which I am considering.

63. The best guide to the purpose of the provisions is the language which has actually been used by Parliament. Parliament has told us what the purpose is in subsection (2C). The information referred to in subsection (2C)(ii) is, "Such information as will enable the employer readily to deduce…". Three matters are then described. It seems to me highly significant that the purpose is no longer said to be to enable the employer to plan.

64. In my judgment the purpose for which the information is said to be required in subsection (2C) requires on to focus on what the word "categories" means in this particular context. I consider that paragraph 124 of the judgment of Elias LJ in *London & Birmingham Railway*

Limited v Associated Society of Locomotive Engineers and Fireman [2011] EWCA Civ 226 [2011] ER 848 is helpful. Elias LJ said:

> "There is no statutory obligation requiring the union to use any particular category of jobs, and therefore there is no obligation to adopt the categories used for pay purposes. Indeed, there is clear authority that the only obligation is to provide numbers by reference to general job categories."

He then referred to the *Westminster* case:

> "These will not reflect the more sophisticated job breakdown typically used in pay negotiations."

The dichotomy described there by Elias LJ is not the same as the dichotomy in this case, but it seems to me that his general approach is clear.

65. I consider that the decision of Choudhury J may well be authority for the proposition that the union is required to provide, in the case of pilots, a categorisation which enables the employer to know whether those pilots are captains or first officers or senior first officers, but I do not consider that it is authority for any wider proposition precisely because I am not satisfied that Choudhury J was taken to what I consider to be a very important change in the statutory language, when the express reference to the purpose of planning was removed by Parliament.

66. I therefore consider that, on the first issue, it is more likely than not that the union will succeed in establishing its defence.

67. I turn then to the issue concerning the Waterside pilots. For similar reasons I consider that the union is more likely than not to establish its defence on this point. The categorisation, which, I infer from BA's arguments, they suggest is required in relation to the Waterside pilots is effectively not a categorisation but a list of job descriptions. I do not consider that that is what is required by the statutory provisions. I am also satisfied that the union has explained why it specified the job description of one of the employees at Waterside; on the information it had, it did not consider that he was in any way a pilot.

68. I turn finally to the timing issue. This, like the other points, is a short point of statutory construction. I have been referred to the decision of Lavender J in *Thomas Cook Airlines v BALPA* [2017] EWHC 2253 (QB). In that case the union in its notice told members that what was proposed was discontinuous industrial action in the form of strike action between the 8 September 2017 and the 18 February 2018. It was, therefore, a very similar case to this. Lavender J held (see paragraph 13 of the judgment) that when the members of the union voted for strike action they knew what they were voting for. I agree with that approach. It seems to me that anybody voting for strike action on the basis of the notice that was given by the union in this case would have known potentially that he might be going on strike for six months. So, they knew potentially what they were signing themselves up to, although the indication that the action was likely to be discontinuous may have led them to think that they would not be on strike throughout the six-month period.

69. Lavender J gave several reasons in his judgment why more was not required by the legislation (see paragraphs 10 to 23 of his judgment). Those in my judgment are cogent practical reasons for adopting a straightforward and literal approach to the construction of the provisions of section 229.

70. I also consider, and this was not, I think, referred to by Lavender J, that section 234A is indirectly relevant to the construction of section 229. The ballot and notification provisions must be read as a whole. These provisions show that distinctions between continuous and discontinuous action, and between the "periods within which" and "dates" were in the mind of the draftsman. He did not deploy those distinctions in the voting paper provision, section 229. This suggests that when the draftsman refers to the period of the strike or periods in section 229, he means the period or periods within which a trade union may call discontinuous strike action, on whichever dates it chooses.

71. For those reasons, which I have given relatively briefly because of the time, I consider that those provisions provide further support for the untechnical construction which Lavender J adopted to section .229. I therefore reject the submission that the ballot paper was defective for failing to identify on what days it was proposed that the strike action should take place within the period that was described in the notice. That is something for specification in the section 234A notice.

Conclusion

72. For those reasons I dismiss this application.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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