

United action

Unite v BA represents a very British right to strike, say **Jennifer Eady QC & Nadia Motraghi**

The most recent legal flare-up between British Airways and Unite (representing BA cabin crew) has dominated the headlines and for once it was not just labour lawyers debating whether there was a right to strike in the UK. In the High Court, BA got its injunction on the basis of what looked like a technicality: a failure to notify individual members of eleven spoiled ballot papers. Could the democratic will of BA cabin crew be overridden by such a failure on the part of the union? Ultimately the Court of Appeal (by a majority) held not. In so doing, the court seemed to acknowledge the need to recognise a “right to strike” without pronouncing on the legal basis of such a right.

The right to strike

The traditional (Denning-esque view) is that there is no “right to strike” in the UK: parliament has granted trade unions immunities not rights, see *Express Newspapers v McShane* [1979] ICR 210, [1979] 2 All ER 360 where Lord Denning held that unions had no right “to break the law or do wrong by inducing people to break contracts...only immunity if they did”.

That view was open to question once UK law incorporated the European Convention on Human Rights (the Convention) through the Human Rights Act 1998. Article 11 of the Convention recognises a right to freedom of association, which has been understood by many to incorporate a right to strike (as acknowledged by the European Court of Human Rights (ECtHR) in *Enerji Yapı-Yol sen v Turkey* (App No 68959/01)). If that is right, domestic laws constraining that fundamental right must be justified under Art 11(2) of the Convention.

The niceties of the Convention argument were, however, dismissed by the Court of Appeal in *Metrobus v Unite the Union* [2010] ICR 173, [2009] All ER (D)

03 (Aug) in which Maurice Kay LJ opined that in the UK “the right to strike has never been much more than a slogan or a legal metaphor”.

The union’s arguments were noted but the court did not consider the jurisprudence of the ECtHR sufficiently clear to warrant the conclusion that the right to strike was an essential element of Art 11. Lloyd LJ acknowledged that English law recognises a “right to strike” but only in the rather negative sense that unions are given exemption from tortious liability if they meet the conditions laid down in the domestic legislation.

In the first round of the BA and Unite dispute—in the Christmas injunction hearing before Cox J (*British Airways v UNITE the Union* [2010] IRLR

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In the return match, however, the traditional attitude of the UK courts seemed to hold sway at first instance, with McCombe J taking the view that he was bound by *Metrobus* in this regard, see *British Airways plc v Unite the Union* [2010] EWHC B5 (QB).

British Airways Plc v Unite the Union No 2: the facts

On its most recent injunction application, BA contended that Unite had failed to comply with the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) s 231, which requires a trade union to take such steps as are reasonably necessary to ensure that all persons entitled to vote are informed of the number of:

(i) votes cast;

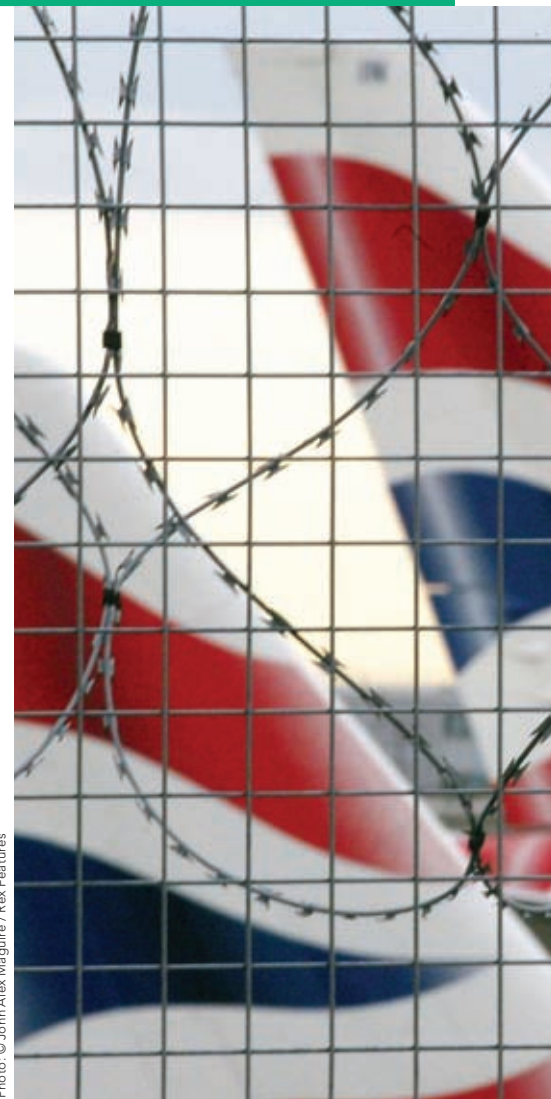


Photo: © John Alex Maguire / Rex Features

(ii) individuals answering “yes”;
(iii) individuals answering “no”; and
(iv) spoiled votes.

In January 2010, Unite gave BA notice of its intention to conduct a ballot. The ballot closed on 22 February 2010: 7,482 voted yes, 1,781 voted no and 11 ballots were spoiled. Notification was given to BA on 12 March; strike action was held between 20 and 22 March and between 27 and 30 March.

On 10 May 2010, Unite notified BA of further industrial action, relying on the same ballot. This time BA contended Unite had not complied with s 231.

Unite stated that at 3.59pm on 22 February it had received the scrutineer’s report. By approximately 4.45pm the report was given to union representatives, who posted copies on notice boards in crew report centres within 30 minutes.

It was also made available in the union’s offices, placed on display stands outside its offices and handed out to members in all report areas. A press release was put on its websites. Text messages and e-mails were also sent to



subscribing members though these did not contain the full results.

BA argued that putting the information on union websites and in the crew rooms was insufficient.

- First, it was not an active communication to members.
- Second, that method, even when combined with leaving leaflets in news stands and crew rooms would not ensure that the information came to the attention of all relevant members because many of them would be abroad, or off duty, or would not know to go online.

Unite contended that its methods were the most efficacious, given the dispersed membership and BA's requirement that cabin crew use computers for work purposes. Unite's experience had shown websites were the most effective means to keep in touch with cabin crew.

On BA's application for an injunction, however, McCombe J agreed with BA, holding that whether Unite had complied with s 231 was "properly arguable" and that the union's chances of success were "not overwhelming". Unite appealed.

Judgment of the Court of Appeal

The Court of Appeal held by a majority (Lord Neuberger MR dissenting) that the union had complied with TULRCA 1992, s 231 by posting full results on its website, on notice boards at Heathrow and Gatwick and in news-sheets. (*British Airways v UNITE the Union* [2010] EWCA Civ 669).

The Lord Chief Justice (LCJ), Lord Judge, described the ballot as having been "impeccably conducted", with the vote in favour of strike action "overwhelming". He concluded the means of communication used were sufficient to inform the members of the full results. It was not necessary to show that every possible means of communication was used or—if so—whether it was used to its utmost effect

The process was "far from perfect" but it was enough. The LCJ further noted that the

small-scale failures neither should it be fatal if there are minor failures in the provision of information about the results to members.

Smith LJ agreed stating: "[I]t would be a travesty of the democratic process and would seriously under the members' right to strike if the employer could obtain an injunction for a minor infringement of the duty to communicate the results." [Para 147]

She concluded that the policy of this part of the Act was to ensure fair dealing between employer and union and to ensure a fair, open and democratic ballot and "not to create a series of traps or hurdles for the union to negotiate." [Para 152]

Comment

The Court of Appeal did not descend into the detail of the argument whether the right to strike is recognised in this

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interests protected by s 231 appear to be the interests of union members, not employers, echoing the view earlier expressed by Millet LJ in *London Underground Limited v NURMT* [1996] ICR 170. Indeed, the LCJ commented on the "irony" of an employer relying upon a provision designed to protect members' interests to circumvent their wishes.

In his dissenting judgment, Lord Neuberger MR stated that the test was whether the union had done "its reasonable practicable best" or "acted reasonably and prudently" taking a practical view. He concluded that a reasonably prudent union would have communicated all required information (not just some as it did) by e-mail and text message.

Smith LJ, agreed with the LCJ: Parliament had not intended a personal communication with each member but rather that the union disseminate the full results in such a way as would enable every entitled member to access it easily.

More generally, the LCJ opined that informing the members of the full ballot results was not more important than conducting the ballot; suggesting that the provision of information to union members is important but not absolute.

If a ballot is unaffected by accidental,

country as a fundamental human right. The judgments of the majority do, however, seem to assume that some form of a right to strike must be respected if that is really the democratic will of union members.

Although the judgments may not answer the big question, they do suggest an approach that would allow British strike laws to sit more comfortably with the rights recognised by Art 11 of the Convention (and, therefore, our own Human Rights Act). Given that the Convention will continue to be part of domestic law for the foreseeable future, this is an important consideration. NLJ

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