Case No: A2/2019/1780

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(MRS JUSTICE ELISABETH LAING)

[2019] EWCA Civ 1663

The Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday, 31 July 2019

Before:

LORD JUSTICE DAVIS
LORD JUSTICE HAMBLEN
and
LADY JUSTICE SIMLER

Between:
BRITISH AIRWAYS PLC

Applicant

- and –
BRITISH AIRLINE PILOTS' ASSOCIATION

Respondent

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Mr John Cavanagh QC and **Mr Julian Milford** (instructed by **Baker McKenzie,** LONDON EC4V 6JA) appeared on behalf of the **Applicant**

Mr Michael Ford QC, Mr Simon Cheetham QC and **Mr Jack Mitchell** (instructed by **Farrers & Co,** LONDON WC2A 3LH) appeared on behalf of the **Respondent**

Judgment

(As Approved)

Lady Justice Simler:

1. This appeal is directed at the refusal to grant an interim injunction preventing the respondent trade union, the British Airline Pilots' Association (referred to as "BALPA"), from calling on its members to take part in industrial action in furtherance of a trade dispute following a ballot of its members, who are pilots employed by British Airways plc (referred to as "BA"), all based at Heathrow and Gatwick airports. The appeal does not concern the merits or otherwise of that trade dispute, which are not a matter for the courts.

2. Notice of the ballot and a copy of the ballot paper were sent to BA on 19 June 2019 (referred to as "the Notice"). The Notice confirmed that BALPA intended to hold a ballot for industrial action of 3,833 employees entitled to vote. The Notice provided a table with categories of employee and the number in each category. The categories identified were: captain, training captains, training standards captain, training co-pilot, senior first officer and director of safety and security. A table of workplaces and numbers in each was also provided. The result of the ballot was published on 22 July 2019 and supported the industrial action.

3. BA's application for an injunction was refused following a hearing at short notice on 21 July 2019. Because of the urgency, this appeal has been convened at short notice too. I record our gratitude to counsel on both sides and to the legal teams behind them for the obvious care with which the papers were prepared and the excellence of the arguments which have assisted the court.

4. At common law, (the position is different under the Convention and the Social Charter, which confer qualified rights to strike) there is no right to strike and those who take part in strike action will usually be acting in breach of their contract of employment, and unions who authorise or endorse such action will be liable for inducing a breach of contract and potentially other economic torts. To enable unions to organise industrial action and employees to participate in such action, Parliament has granted certain immunities in tort. Immunity was first granted by the Trade Disputes Act 1906 in very wide terms. The current protection is much narrower and is afforded by s.219 Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") for industrial action “in contemplation or furtherance of a trade dispute.”

5. Since 1984 the immunity is only available to a trade union organising industrial action if procedural rules about getting the support of a ballot and giving notice to the employer of the action are observed. Those rules do not have to be complied with, but the immunity is only available to a union in respect of its actions if they have been complied with.

6. Two important requirements to be complied with in order to attract the immunity (both introduced in 1984 but amended since) are now contained in ss.226 and 234A of the 1992 Act: first, the requirement in s.226, which makes a union's immunity conditional on the industrial action having the support of a ballot in relation to which the detailed rules set

out in ss.226-234 have been observed; and, secondly, s.234A, which makes a union's immunity conditional on notice being given to the employer of the taking of industrial action.

7. A challenge to the complexity of those balloting requirements as involving an unjustified and disproportionate interference with a union's rights to freedom of association under Article 11 of the Convention, which includes a right to strike, was rejected in *Metrobus Ltd v Unite the Union* [2010] ICR 173 CA. However, the need to give due weight to the rights to freedom of association was recognised in *NURMT & Ors v Serco & Ors* [2011] ICR 848 (CA) (referred to below as *Serco*) as in part the basis for rejecting an argument that the legislation should be strictly construed against those seeking the benefit of the immunities. Giving the judgment of the court, Elias LJ observed that the statutory immunities are simply the form taken by the legislation to carve out an ability for unions to take lawful strike action, it being for Parliament to determine how the conflicting interests of employers and unions should be reconciled in this area. He rejected the argument as illegitimate, saying it would have the same effect as a presumption that Parliament intended that the employer's interests should prevail unless the legislation clearly dictates otherwise. Instead Elias LJ held at paragraph 9:

> "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'...".

8. The call for industrial action by BALPA in this case will be unlawful (as amounting to the tort of inducing a breach of contract) unless the immunity in s.219 of the 1992 Act is available. This depends on BALPA satisfying the balloting and notification requirements summarised above and discussed further below.

9. Where an application for an interlocutory injunction is made pending trial and the party against whom the application is made claims the protection afforded by s.219, in exercising its discretion whether or not to grant the injunction, the court does not apply the *American Cyanamid* test but must have regard to the likelihood of that party succeeding at trial in establishing any matter which would afford a defence to the action under s.219: see s.221(2) of the 1992 Act. This approach, embodying the principle established in *NWL v Woods* [1979] ICR 867, recognises that an interim injunction usually determines in practical terms whether a strike can go ahead or not. The court must therefore assess the strength of the union's defence under s.219. If the defence is on balance likely to succeed, subject to any other compelling circumstances that would justify the exercise of the court's residual discretion, the injunction should not be granted.

10. In other words, if it is more likely than not that the union will succeed in establishing a trade dispute defence at a full trial, it is only in a “very exceptional case” that an injunction should be granted: see *Serco* at paragraph 13, Elias LJ. There is no suggestion that the present case falls into such a category. Indeed, it is common ground that the

likelihood of succeeding in establishing a trade dispute defence is determinative in this case.

11. In her extempore judgment given on 23 July Elisabeth Laing J rejected three separate grounds of challenge pursued by BA to the Notice. Only one of those grounds is pursued on this appeal. This is that the Notice did not comply with the obligation to give a list of the "categories of employees" and the number of employees in each of the categories entitled to vote because BALPA failed to specify, in respect of the balloted pilots, the numbers who are in (i) the short-haul fleet, or (ii) in one of the four long-haul fleets (each of which is specific to a particular aircraft type) respectively. BA contends that if BALPA had provided this information, it would have substantially assisted BA to make contingency arrangements to mitigate the effect of the strike action.

12. BA does not challenge any of the findings of fact made by the judge. Rather, it contends that she misdirected herself in relation to the meaning and effect of the relevant legislation when she held that it was not the primary purpose or even *a* purpose of the statutory provision as to notification requirements in s.226A, to assist the employer to plan how to mitigate the effects of the industrial action: see her judgment at paragraph 78. The judge accepted BALPA's submission that the legislative history was important and demonstrated that the 'planning purpose' had been deliberately removed by Parliament, leaving the purpose of the requirements as simply to provide such information as will enable the employer readily to deduce the categories, the workplaces and the numbers in each. BA submits that was a misdirection and meant that the judge left out of account altogether the employer's planning purpose as a yardstick against which to assess whether the categories had been sufficiently identified by BALPA in the Notice. In other words, her conclusion that planning is not a purpose of the current statutory provision drove her decision that BALPA had complied with its statutory obligation.

13. In this regard the judge differed from the approach adopted by Choudhury J in *Virgin Atlantic Airways v PPU* [2018] EWHC 3645 (referred to below as *VAA v PPU*). He had concluded that the purpose of the categories requirement is to provide information that would help the employer to make plans to avoid or mitigate industrial action and that whether a trade union has satisfied the requirement is a question of fact and degree, to be determined by reference to all the circumstances.

14. BA contends that had Elisabeth Laing J adopted the approach of Choudhury J to the purpose of the notification requirements and thereby directed herself correctly in light of her factual findings, she would have found in favour of BA and granted the injunction sought.

15. The central question on this appeal, accordingly, is whether it is more likely than not that BALPA will succeed in establishing a trade dispute defence at a full trial on the basis that it complied with the relevant balloting rules and, in particular, the requirement to describe the 'categories' of employees in s.226A(2A)(a) of the 1992 Act. That turns on whether it was necessary for BALPA to give more precise categories than were given of workers to be balloted or called on to take industrial action.

The relevant balloting provisions

16. Section 226 of the 1992 Act is headed "Requirement of ballot before action by trade union". Section 226(1) provides that an act done by a trade union to induce a person to take part or continue to take part in industrial action is not protected unless two conditions are satisfied. First, the industrial action must have the "support of a ballot" within the meaning of s.226(2) (3A) of the 1992 Act, which in broad terms means that the union must comply with detailed statutory rules as to how the ballot is conducted. Secondly, the action is not protected in relation to a tort committed against a particular employer unless the union complies with s.226A in relation to that employer.

17. Section 226(2) sets out the circumstances in which industrial action is regarded as having the support of a ballot:

> "The notice referred to in paragraph (a) of subsection (1) is a notice in writing—
>
> (a) stating that the union intends to hold the ballot,
>
> (b) specifying the date which the union reasonably believes will be the opening day of the ballot, and
>
> (c) containing—
>
> (i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at".

18. On this appeal the critical requirements to be complied with are those set out at s.226A of the 1992 Act. This is headed "Notice of ballot and sample voting paper". It imposes on trade unions an obligation to take:

> " such steps as are reasonably necessary to ensure that—
>
> (a) not later than the seventh day before the opening day of the ballot, the notice specified in subsection (2), and
>
> (b) not later than the third day before the opening day of the ballot, the sample voting paper specified in subsection (2F), is received by every person 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."

19. Subsection (2) contains the requirement that:

> "The notice referred to in paragraph (a) of subsection (1) is a notice in writing—

(a) stating that the union intends to hold the ballot,

(b) specifying the date which the union reasonably believes will be the opening day of the ballot, and

(c) containing—

(i) the lists mentioned in subsection (2A) and the figures mentioned in subsection (2B), together with an explanation of how those figures were arrived at, or

(ii) where some or all of the employees concerned are employees from whose wages the employer makes deductions representing payments to the union, either those lists and figures and that explanation or the information mentioned in subsection (2C)."

20. Subsection 2A makes provision about the lists referred to in s.226A(2)(c)(i):

"The lists are—

(a) a list of the categories of employee to which the employees concerned belong, and

(b) a list of the workplaces at which the employees concerned work."

The references to the "employees concerned" are to those employees who the union reasonably believes will be entitled to vote in the ballot: see s.226A(2H).

21. Subsection 2B sets out what figures must be provided:

"The figures are—

(a) the total number of employees concerned,

(b) the number of the employees concerned in each of the categories in the list mentioned in subsection (2A)(a), and

(c) the number of the employees concerned who work at each workplace in the list mentioned in subsection (2A)(b)"

22. Subsection 2C sets out what information is referred to in s.226A(2C)(ii) where some or all employees concerned are check-off employees who have union subscriptions deducted at source:

"The information referred to in subsection (2)(c)(ii) 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 at each of those workplaces."

23. Information provided in respect of check-off and non check-off members is qualified by s.226A(2D) as follows:

> "The lists and figures supplied under this section, or the information mentioned in subsection (2C) that is so supplied, must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time when it complies with subsection (1)(a)."

To be in the "possession of the union" the information must be held “for union purposes” in a document in electronic or other form and in the possession or control of an officer or employee of the union as particularly defined: see s.226A(2E).

24. Subsection 2G makes clear that nothing in s.226A requires a union to supply an employer with the names of the employees concerned.

25. There is a further notification obligation not directly in issue in this case, dealing with notice of a strike call in s.234A. This mirrors closely the language of s.226A dealing with notice of the ballot. Broadly, it requires the same list of figures for workplaces and categories of employees together with the information about how the figures were arrived at. The differences between the two provisions are not material for the purposes of this appeal, but the word ‘categories’ must have the same meaning in both sections.

The predecessor notification requirements

26. The obligation on unions to provide information describing employees believed to be entitled to vote in the ballot was first introduced into the 1992 Act as s.226A by section 18 Trade Union Reform and Employment Rights Act 1993, in force from 30 August 1993 and referred to as “version 1”. It required the provision of a notice in writing, among other things:

> "(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."

There was no reference to lists or to categories.

27. That provision was amended by the Employment Relations Act 1999, which first introduced the term categories and took effect on 18 September 2000, referred to as "version 2". The amended obligation on the union in s.226A was to give a notice in writing that among other things contained:

> "(2)(c) …such information in the union's possession **as would help the employer to make plans and bring information to the attention** of those of his employees 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". (Emphasis added)

So the obligation to provide information was linked to helping the employer make plans and bring information to the attention of his employees. Furthermore, for the purpose of complying with that obligation, rules set out in subsection 3A applied as follows:

> "(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 work-place of the employees concerned, a notice must contain that information (**at least**)". (Emphasis added)

The combination of the obligation in subsections 2C and 3A was to create a potentially open-ended obligation on the unions without setting any clear parameters for them.

28. The further amendments introduced by the Employment Relations Act 2004 leading to the current form of s.226A came into force on 1 October 2005 and have been in force ever since. The aim appears to have been to simplify and clarify the provisions. As the Explanatory Notes said at paragraph 141:

> "Section 22 simplifies the requirements of s.226A by making changes to the information the union is required to supply. The changes make it desirable, in the interests of clarity, to restructure the provisions of the section and the section therefore does so."

Further, at paragraph 143 the Explanatory Notes state:

> "The intention is to reduce the uncertainty currently present in s.226A by making the information that the union must supply specific and

> removing the need for the union to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those balloted. …"

Although the Explanatory Notes are not endorsed by Parliament, they are admissible as an aid to construction of a statute insofar as they cast light on the mischief at which it is aimed. Both sides accept that to be the case here.

29. The word 'categories' is not and has never been defined by the legislation. By virtue of s.207(3) of the 1992 Act, courts are required to take into account, so far as relevant, the provisions of the code of guidance ("the Code") entitled "Industrial Action Ballots and Notice to Employers" (March 2017) issued by the Secretary of State under s.203. The Code cannot affect the proper interpretation of the 1992 Act but provides practical guidance to trade unions and employers. Paragraph 15 of the Code provides:

> "There are many ways to categorise a group of employees. When deciding which categories it should list in the notice, the union should consider choosing a categorisation which relates to the nature of the employees' work. For example, the appropriate categorisation might be based on the occupation, grade or pay band of the employees involved. The decision might also be informed by the categorisations of the employees typically used by the employer in his dealings with the union. The availability of data to the union is also a legitimate factor in determining the union's choice."

30. The 2000 Code of Practice, based on the Employment Rights Act 1999 amendments (in other words version 2), dealt with providing ballot notices to employers at paragraph 14. Reflecting the amendments introduced in 1999, it explained that the ballot notice

> "must…contain such information in the union's possession as would help the employer to make plans, for example as appropriate to enable him to warn his customers of the possibility of disruption so that they can make alternative arrangements or to take steps to ensure the health and safety of his employees or the public or to safeguard equipment which might otherwise suffer damage from being shut down or left without supervision… In particular the union must provide as a minimum any information which it possesses as to the number, category or workplace of the employees concerned."

31. The requirement to provide information in the notice was further explained at paragraph 18 of the 2000 Code as follows:

> "in some circumstances the requirement is likely to be satisfied by indicating to the employer that entitlement to vote will be given to all the union's members engaged on, for example, a specified kind of work activity or in a certain grade or in a particular location. In some cases if the employer would otherwise be left in doubt more specific information such as a combination of these items of information may be needed… Ultimately it will always be a question on the facts of a particular case whether the notice gives an employer the required details."

32. The meaning of the word 'categories' in this context has been considered by the Court of Appeal in two cases. In *Westminster City Council v Unison* [2001] EWCA Civ 443, a case decided on the predecessor legislation, version 2, the union's notice described the housing workers concerned as "A&A workers" (working in the "assessment and advice unit") in a workplace with many job titles. This was challenged by the employer for failing to specify the categories of employee concerned in the sense of giving their job titles or descriptions. The challenge was rejected, and the notice was held to be compliant. In his judgment Pill LJ referred to the earlier case, *London Underground Ltd v NURMT* [2001] ICR 647 where at paragraphs 45 to 48 Robert Walker LJ considered the changes in the legislation from version 1 to version 2, but concluded there to have been no significant change in the legislative policy or in the purpose for which information was to be given to the employer; it was to enable an employer to know which parts of its workforce were being invited to take part in the industrial action so that the employer could try to dissuade them and make plans to minimise the effect of the action. Pill LJ held it was not necessary for the court to attempt a comprehensive definition of the word 'category' but concluded that the requirement was sufficiently met "upon the facts of the case". He continued at paragraph 56:

> "The number of staff involved was only 45. They were identified as A&A workers. The relevant staff are said to be those in the Assessment and Advice Unit. While not identified by name, information was provided by reference to the [Deduction of Contributions at Source system] by which the individual identities could easily be ascertained by the employers. It is not suggested that different professions or trades are involved within the A&A unit."

33. In the same case Buxton LJ held at paragraph 78:

> "What the union has to tell [the employer], if it knows, includes the 'categories' of employees affected by the action. That in my judgement is a very broad word and not to be either exclusively or narrowly defined. It means no more than a reference to the general type of workers. In this case, by means of the reference to the DOCAS deduction system, the employer actually had, or was given access to, a nominal role of those who were going to be taking the action; something that was more than the statute… intended.

> It is wholly artificial in those circumstances to say that the union should have given details of job descriptions and status of employees…"

He made clear at paragraph 81 that the only rule he was laying down was that "the obligations of the union must be assessed in the circumstances of the particular strike and in a common sense way in the light of the policy of the legislation."

34. In *Serco* there were two consolidated appeals dealing with the current version of s.226A. Elias LJ,(with whom Etherton LJ,as he then was, and Mummery LJ agreed) considered that the legislative history of the notification requirements shed light on the question he was considering, namely whether there was a duty on the union proactively to obtain information not in its possession. Having referred to s.226A(2C) in its version 2 form, he said at paragraph 63 that this

> "formulation identified the purpose behind these statutory notices, and it accurately reflects the current rationale. It is so that the employer can make plans to minimise the effect of the strike, and contact employees to seek to persuade them not to heed the strike call."

At paragraph 124, dealing with the respondent's argument that only three out of a total of 50 categories were identified in the notices so that they were deficient, Elias LJ rejected the argument, saying:

> "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: see *Westminster City Council v UNISON* ... and these will not reflect the more sophisticated job breakdown typically used in pay negotiations. Furthermore, the approach adopted by the union was in my view perfectly sensible and did not infringe its statutory duty. … Whatever difficulties that might cause an employer in marginal cases, I am satisfied that it complies with the statutory obligation. …"

The judgment below

35. As already stated, Elisabeth Laing J gave an extempore judgment. There is an agreed note of the judgment. The facts are set out in summary at paragraphs 3 to 32. These are not repeated here. Neither side seeks to go behind them.

36. Significantly, the judge accepted that BA has two fleets, long haul and short haul, with different aircraft flying in those fleets. BA pilots are licensed to fly different aircraft and are trained to fly in their fleet or part of their fleet, and are assigned either to short haul or one fleet within the long haul fleets. They cannot transfer from one fleet to another fleet without long periods of retraining and assessment.

37. The judge accepted that disruption to BA services would be enhanced if BA does not know the fleet to which pilots are assigned. She held:

> "it is important to BA to know how many and which pilots are going to work; it is a key part of planning as pilots cannot be transferred to different fleets. For planning, BA needs to know how many are balloted, and to which fleet they are assigned. It is that information which enables BA to infer how many pilots may be at work."

38. It was common ground that BALPA knew the fleet to which the pilots were assigned. However, the Notice gave the following information:

> "Based on the information in its possession, BALPA reasonably believes a total of 3833 employees of British Airways will be entitled to vote in the ballot and the employees concerned belong to the categories and work at the workplaces set out in the tables below.
>
> 1. The categories of employees concerned and numbers in each category:

Category of Employee	**Number of Employees in Category**
Captain	1529
Training Captain	173
Training Standards Captain	41
Training Co-pilots	49
Senior First Officer	627
First Officer	1413
Director Safety and Security	1
TOTAL	3833

> 2. Workplaces at which employees concerned work and number who work at each workplace:

Workplace	**Number of Employees who work at the Workplace**

Gatwick	276
Heathrow	3542
Waterside, Heathrow	15
TOTAL	3833

> 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 s 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."

It will thus be seen the Notice did not provide details of the fleets to which the pilots were assigned.

39. The judge dealt with the relevant statutory provisions and the legislative history. She noted the judgment of Choudhury J in *VAA v PPU* and the propositions he derived from the authorities. She concluded, in light of the legislative history and Parliament's express removal of the reference to planning from the statutory language in the predecessor legislation, that planning cannot be the primary or indeed even *a* purpose of the current statutory provisions. She derived no help from cases decided in respect of the differently worded predecessor legislation.

40. She considered the best guide to the purpose of s.226A in its current form is the language used by Parliament, namely that set out in subsection 2C, "*to enable the employer to readily deduce*" the numbers and categories involved. She derived assistance from the statement of Elias LJ at paragraph 124 in *Serco* to the effect:

> "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. …"

recognising that the dichotomy he described is not the same as in this case but indicated a clear general approach.

41. She accepted that the judgment of Choudhury J may well in an appropriate case be authority for the proposition that a categorisation beyond pilot and extending to captains, first officers or senior officers may be required, but it was not authority for any wider proposition because he was not taken to the important changes in the statutory language

used by Parliament when amending s.226A in its current form, namely the removal of the planning purpose. She therefore considered that it was more likely than not that BALPA would succeed in establishing its defence of this issue at trial.

The rival submissions

42. Mr John Cavanagh QC, who appears with Mr Julian Milford on behalf of BA, submits that the legislative history does not support the conclusion drawn by the judge and that paragraph 124 of *Serco* does not shed any light on the question in this case and does not lend support to the judge's conclusion contrary to her view. As to legislative history, she was wrong to infer from the deletion of some unnecessary statutory language that the statutory purpose had changed and was no longer to assist the employer in making plans. There was no need to spell out the statutory purpose because it was inherent and, he submits, blindingly obvious. He submits there is no valid basis for working backwards from a rearrangement and clarification of the statutory provision to draw the conclusion that the purpose which was inherent in the original version of s.226A no longer applies and can no longer be used as a guide to determine whether a trade union has complied with its statutory notification obligation.

43. Mr Cavanagh attaches no significance to Parliament's removal of the 'planning purpose' words from the statutory provision. The current version of s.226A represents, he submits, a complete redrafting of the provision, making seven significant changes including, critically, deleting the "at least" wording; but none of these justifies the inference that the planning purpose has gone. There was good reason to delete the planning purpose words: a general, potentially open-ended obligation in version 2 was replaced by much tighter, more specific requirements in version 3, which clarified the nature of the obligation with specific reference to lists, categories and overall numbers and it was no longer necessary to use them. But the legislative purpose did not change. He relies on the Explanatory Notes as supporting his submission that the amendments in version 3 involve simplifying and restructuring but not changing the legislative purpose.

44. He relies on the judgment of the Court of Appeal in *Serco* at paragraphs 62 and 63, decided under the current version of the legislation, as supporting his approach that the statutory purpose that has always been inherent remains at the heart of these provisions and is the single statutory purpose. It is a necessary yardstick by reference to which compliance with the categories requirement can be assessed, since 'categories' is otherwise a protean word and undefined. The word must derive its meaning from the context, which includes consideration of the legislative purpose. The meaning of 'categories' is a question of fact and degree (not a hard-edged term) but the answer is either right or wrong. He concedes that in this case the information as to categories given in the Notice is of some value but that it is not enough. Here, BALPA was positively required to categorise by reference to fleets. This was information it had, and it knew or ought to have known that BA needed it, given it is a pilots' union and pilots define themselves in this way, using "fleet", in effect, synonymously with "department".

45. Mr Cavanagh challenges the judge's analysis that the purpose now is simply to require the union to provide information which will enable the employer readily to deduce the total numbers, the categories and workplaces. That is simply to summarise the requirement and does not identify the purpose that lies behind the requirement. On this approach, he submits, the requirements in s.226A are arid and pointless technicalities. Moreover, if the requirements in s.226A cannot be examined for the purpose of assisting the employer to make plans in mind, there is no yardstick against which to judge or assess the union's compliance. Anything that can loosely be described as a category will be sufficient on this approach. The planning purpose continues to bear on the meaning of the word 'categories' and assists in determining the scope of the obligation. The approach must be an objective rather than a subjective one.

46. Mr Cavanagh submits that the judge misdirected herself on the meaning and effect of the 'categories' requirement in s.226A. Had she accepted that the purpose of the requirement was to assist the employer to plan for the industrial action, she would have held that BALPA should have categorised by reference to fleets as well as ranks and would have granted the injunction. That would not have imposed an onerous or unduly specific obligation on the union. It would not cause any inconvenience or difficulty. The union have ready access to the relevant information. The failure to provide the information, however, will exacerbate the disruption and inconvenience for both BA and its passengers. In all the circumstances, he submits, the appeal should be allowed and the injunction granted.

47. Against that, Mr Michael Ford QC, who appears with Mr Simon Cheetham QC and Mr Jack Mitchell on behalf of BALPA, supports the judge's judgment and attaches considerable significance to the deletion of the 'planning purpose' words in s.226A. He submits that the union no longer needs to determine what information to give to the employer by reference to what would help the employee to make plans and bring information to the attention of those balloted. He accepts that the underpinning rationale for the legislation, including the statutory notification requirements, has remained constant. However, the link between the planning purpose and the meaning of the word 'categories' has gone, so that the inherent purpose no longer informs the content of the obligation and no longer bears on the proper interpretation of the section.

48. Mr Ford relies on the legislative history as indicating that there is at least another competing statutory purpose: to ensure that the provisions are simple and clear in their application to unions and do not impose too high a threshold. He submits that competing purpose has, if anything, come to displace the original the planning purpose.

49. First, he submits that version 1 (which made no reference to categories but required a description of employees sufficient for the employer to readily ascertain them) imposed a high duty of specificity on the union. The overarching aim of version 2 was to clarify and simplify the law on industrial action notices: see paragraph 9 of the Explanatory Notes. To that end, the words in s.226A(2C) were introduced, requiring the union to provide a notice containing such information in the union's possession as would "help the employer to make plans" and introducing information as to the categories of the employees concerned. The changed provision, however, still imposed an unclear and high threshold

on unions by virtue of the express reference to the purpose of providing the information and the requirement for the union to provide "at least" the information it had about categories, suggesting that it might be necessary for the union to supply more information. Finally, the provisions were amended by the Employment Relations Act 2004, again to simplify and clarify the provisions: see paragraph 143 of the Explanatory Notes. Accordingly, the express purpose of helping the employer to make plans and provide information was removed; the union's duty was simply to provide a list of the 'categories' of employee, and the section defined what was meant by information in the possession of the union.

50. The history and, in particular, the changes in 2004 thus demonstrate an intention to make the categorisation decision broader and more straightforward for unions to operate. They involved a deliberate deletion of the 'planning purpose' words in circumstances where Parliament could have chosen to retain that wording in the new structure but did not do so.

51. Accordingly, he submits 'categories' is an ordinary word, meaning 'general type' of worker. It has a degree of flexibility within it; but to the extent that it depends on questions of fact and degree, these are not driven by any planning purpose. Whilst Mr Ford did not necessarily disagree with Choudhury J's conclusions on the facts of the case in *VAA v PPU,* albeit not expressly agreeing with them either, he complained that some of Choudhury J's observations went too far. He agrees that the absence of a definition of 'categories' means that this is indeed a protean term, but Parliament intended it to be operable and certain. Therefore, provided a sensible rational categorisation is adopted by the union, that is sufficient. In that sense the union has a discretion as to how to categorise. Had Parliament intended to prescribe the meaning of what categories are required, it could have done so expressly by spelling out the requirement to include information as to job titles, departments or duties if that was information in the union's possession.

52. Mr Ford submits that the argument advanced by BA in practical terms means that the underlying legislative purpose is being used in effect to reinstate the words which Parliament has expressly removed in the 2004 amendments and thereby contradicts the clear objective of the amendments, which was to remove the uncertainty caused by such a test and to make compliance with the law more straightforward for unions.

53. Moreover, almost any role can be described with more or less specificity, and BA pilots are no exception. Any employer can invariably say that more detailed information or a different method of categorisation would assist it in planning how to use the information obtained about a forthcoming ballot. BA's interpretation will thus remove the discretion on the part of the union to decide general categories of employee to ballot and will reintroduce the very uncertainty which Parliament, through the amendments referred to, intended to remove.

54. Even if the word 'categories' is approached in light of the purpose of helping an employer make plans, he submits that the correct test is whether a union has shown the

general categories of employee. The judge clearly considered it likely that the union would do so. Moreover, regardless of the precise route she took, Mr Ford submits that the judge was right to reject BA's argument based on purpose. On that premise there can be no dispute that the union provided categories of employees in the Notice in accordance with the guidance from the appellate courts and indeed consistently with the decision of *VAA v PPU* itself, if that was required to be followed. He submits the judgment was plainly the only correct conclusion available on the evidence.

Discussion and conclusions

55. The starting point is that the word 'categories' is not defined. It is, as both sides agree, broad and flexible. It is not necessary or desirable for this court to attempt a comprehensive definition or explication. As Buxton LJ held in *Westminster Council v Unison*, it is neither to be exclusively nor narrowly defined and means no more than a reference to the types or groups of workers. The legislation leaves it to the union to determine what categories are to be specified, but the lists, categories, workplaces and numbers must be as accurate as is reasonably practicable based on information in the possession of the union's officers or governing body at the time the notice is given.

56. The legislative history demonstrates that the legislative policy underlying the notification requirements when they were first introduced (albeit not expressly stated) was to give employers fair warning of what was coming, no doubt so that they had the chance to try to persuade employees not to take part and to make contingency plans to protect their businesses during the strike. In other words, the underpinning legislative rationale was to enable the employer to make necessary plans to avoid or mitigate the effects of strike action because of the practical difficulties liable to be caused otherwise.

57. It is significant, however, that Parliament deliberately deleted the "making plans" wording, because as was explained in the Explanatory Notes to the Employment Relations Act 2004, Parliament decided that the law should be amended to

> "reduce the uncertainty currently present in s.226A by making the information that the union must supply specific and removing the need for the union to determine what information has to be given by reference to what would help the employer to make plans."

To that end, the express purpose of providing information such as would help the employer to make plans was removed, and the union's duty was simply to provide a list of the 'categories' no longer subject to the high threshold of "at least" or anything similar. The section defined what was meant by information in the possession of the union. The changes to successive versions of the Code reinforce this.

58. The deliberate deletion of the "making plans" wording in the current version of s.226A therefore means that this purpose cannot be regarded as the measure by which a union is

required to determine what information is to be given in the ballot notice. It is no longer the yardstick by which the content of the notification obligation is to be judged.

59. Nonetheless, I do not consider that this alters the underlying rationale for the legislation and the notification requirements in particular. Notices are still required for a particular purpose. That purpose has always been inherent. Furthermore, while it is correct as the judge held, that the information required to be provided by the union is information that will enable the employer readily to deduce the numbers, categories and workplaces, it is a misuse of language to describe that as the purpose of the requirement. Rather, it summarises the requirement itself in relation to check-off employees but does not provide any purpose. In my judgment, notwithstanding the amendment, a continuing rationale underpinning the notice requirements is to enable employers to make plans to mitigate the effect of strike action. To conclude otherwise would be to reduce the notification requirements to a mere technical hurdle to be jumped by the union, as Mr Cavanagh submits.

60. However, I also agree with Mr Ford that the legislative history shows another underlying policy for enacting the statutory provision in its current form: that is, to achieve notification requirements that are capable of being clearly and certainly applied by unions without creating too great a burden on them and without creating a series of traps or hurdles in the way of their exercise of rights to take industrial action. This additional underlying rationale runs through the successive amendments to this legislation.

61. The predecessor provisions have already been set out. As originally drafted, the notice requirement in s.226A(2) was held in *Blackpool and Fylde College v National Association of Teachers in Further and Higher Education* [1994] ICR 648 to impose a duty that might in an appropriate case, and did in that case, require the union to reveal the identity of those members taking part in the ballot. That was regarded as inappropriate and led to version 2. As Elias LJ held in *Serco* at paragraph 63, the new formulation, with its reference to the planning purpose:

> "identified the purpose behind these statutory notices, and it accurately reflects the current rationale. It is so that the employer can make plans to minimise the effect of the strike, and contact employees to seek to persuade them not to heed the strike call."

Instead of the duty to reveal specific names, a different additional obligation was imposed by what was then s.226(3A). That provided, if the union possessed information as to the number, category or workplace of the employees concerned, the notice must "at least" contain that information. However, this provision itself caused difficulties, as discussed in *London Underground Ltd v NURMT* [2001] ICR 647, and made the task of the union more onerous than it had been when just required to provide lists of names. The changes introduced in the current version by the Employment Relations Act 2004, containing the requirements now in place, were intended, at least in part, to deal with those difficulties and remove the more onerous burdens.

62. Accordingly, if by her statement that the consequence of the 2004 amendments is that *"planning is not the primary or indeed a purpose of the current statutory provisions"* Elisabeth Laing J was stating that planning is no longer the yardstick by which the content of the notification obligation is to be judged, I agree with her. To the extent that some of the observations of Choudhury J would suggest a contrary approach, then I do not agree with him in that respect. If, however, she was concluding that the policy underlying the legislation of giving the employer fair warning of where and when industrial action is likely to occur so that contingency plans can be made has ceased to be an underlying legislative policy or purpose, then I disagree. Instead, and in agreement with Choudhury J in *VAA v PPU*, that has remained a consistent underlying rationale for the legislation through each iteration and remains important.

63. Given that, and the equally important legislative purpose that must be balanced against it, namely the need for the notification requirements to be capable of being clearly and certainly applied by unions without creating too great a burden on them, I consider that the starting point is to provide general job categories. There is no statutory obligation requiring the union to use any particular category of jobs. There are different ways in which it can be done: for example by profession, trade, occupation, grade, pay band. But there may be circumstances where a general job category is too uncertain or imprecise to fulfil the requirements of the statutory obligation and will not be sufficient.

64. There are examples where general job categories have been held to be insufficient in the decided cases:

(a) Notices stating that the union would ballot categories of workers "working on the TFL contracts either on a full-time or part-time basis" were held to be too imprecise for the employer readily to deduce the categories of employee concerned in *Metroline Travel Ltd v Unite the Union* [2012] IRLR 749. This was a check-off case, but Supperstone J held it was not clear from that phrase whether particular works fell within or outside the description. The notice was" plainly imprecise".

(b) In *EDF Energy Power Ltd v NURMT* [2010] IRLR 114 the category given by the union was "engineer/technician", but the employer did not recognise the term "technician" and categorised employees by trade as "fitters, jointers, test room inspectors, day testers, ship testers or OLBI fitters". Blake J held that the particular descriptions the employer was seeking fell into the category of trade and not job description and accordingly should have been given.

(c) In *VAA v PPU* Choudhury J concluded that "pilots" as a category was too broad and insufficiently specific in the circumstances of that particular case. There was evidence in that case about the significantly different level of responsibility and function of a pilot ranked as captain as compared with the rank of first officer. For example, a plane could not fly unless there was a captain on board. The information as to rank was readily available and in the union's possession as details of rank were included in the application form for membership of the union.

65. In other words, what amounts to a category is liable to be affected by the facts and circumstances of the particular case, subject to the union being in possession of the relevant information. It is to be assessed in a common-sense and practical way in light of the twin policy objectives of the legislation. Unions are not, however, required to determine what information has to be given by reference to what would help the employer to make plans and bring information to the attention of those to be balloted, for example by determining the relative importance to the employer's business and substitutability of the skills, roles, functions and qualifications of the employees who are to be balloted. That is not warranted by the current wording of the legislation and imposes too onerous a burden on the union.

66. I agree with Mr Ford that almost any role can be described with more or less specificity: by job title, by job description, by function, grade, type of work, assignment, team, division or department, whether full-time or part-time, permanent or temporary. BA pilots are no exception, and this case exemplifies the problem. There is no bright line between these divisions based on qualitative or fundamental differences. An employer will almost invariably be able to complain that more detailed information or a different method of categorisation would assist it in planning to mitigate the effects of strike action. However, equally, anything that can loosely be described as a category will not necessarily be sufficient in every case. The approach must be an objective rather than a subjective one.

67. Here, as Mr Brian Strutton (who is the General Secretary of BALPA) explains in his witness statement on behalf of BALPA dated 22 July 2019, for the purposes of attributing categories to its members, BALPA principally relied on the information in its database, held for union purposes by BALPA officers or employees. The rank given by the member which is seen by BALPA as their occupation was used to determine their category. Members are paid salary by reference to their rank and length of service, as shown by their payslips, and pilot name badges at BA give their ranks (for example 'captain') without more detail. He goes on to explain that BALPA's categorisation reflects the established way of referring to pilots both by BALPA and by BA. The contracts of employment, for example, do not refer to fleet or whether a pilot is long haul or short haul. In its Corporate Directory, BA lists the 'Title' and 'Position' of pilots by reference to their rank, such as captain. Furthermore, even if a pilot's fleet is analogous to a work department, fleet assignment is hardly a description of a job or occupation.

68. Moreover, BA does not suggest that the categorisation adopted by BALPA is not a proper means of categorising pilots or that it was not useful. Its argument, in essentials, is that more detail would have helped it to plan for the strikes. I accept that more information could have been provided and would have been of assistance to BA. That will almost always be the case, but the question is not whether the categories could have been provided with greater specificity but, rather, whether what was provided was sufficient to meet the statutory requirements. I am satisfied that it was. Regardless of the precise route she took, Elisabeth Laing J was right to reject BA's argument based upon purpose. Her conclusion that the particular categorisation adopted by BALPA in the Notice was in accordance with the language of s.226A was correct. Accordingly, I would dismiss this appeal.

Lord Justice Hamblen:

69. I agree.

Lord Justice Davis

70. I also agree with the judgment of Simler LJ and the appeal will therefore be dismissed.

Order: Appeal dismissed

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