Employment

# The Employment Relations Act 1999 (Blacklists) Regulations 2010: Ryanair DAC v Benjamin Morais & Ors

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Analysis from Stuart Brittenden KC and Bruce Carr KC.

1. In **Mercer v Secretary of State for Business & Trade** UKSC [2024] UKSC 12 the Supreme Court confirmed that section 146 TULRCA 1992 does not offer any protection for detriment short of dismissal for participating in industrial action. Because of this lacuna, the Supreme Court issued a declaration of incompatibility under section 4 HRA 1998. Clause 59 of the Employment Rights Bill seeks to address this deficiency. **Mercer** did not examine the protections available to trade union members who participate in industrial action under The Employment Relations Act 1999 (Blacklists) Regulations 2010 (**"the Blacklists Regulations"**).

2. **Summary**. **Morais** is the first occasion that the Court of Appeal has considered the scope of the Blacklists Regulations. The Court considered two issues of industrial relations significance. First, whether the reference to "activities of trade unions" in reg. 3(2)(a) of the Blacklists Regulations encompasses participation in industrial action? Second, if so, in order to qualify for protection from detriment for the purposes of regs. 3(2)(a) and 9, whether the underlying industrial action had to be "protected" in the sense of the union being immune from suit in tort for the purposes of s. 219 TULRCA, or whether participation in "official" action sufficed to qualify for protection?

3. In a judgment handed down on 17 January 2025, Bean LJ (with whom Peter Jackson and Nicola Davies LJJ agreed) decided that the Blacklists Regulations did provide protection where a prohibited list was used or complied by an employer to discriminate against those who had participated in industrial action, and that such protection applied where the industrial action was official (i.e. even where the union had not complied with the balloting and notification requirements in Part V of TULRCA).

4. **The facts**. The claimants were pilots who were members of BALPA. Each were entitled to discretionary staff travel concessions afforded by Ryanair. In 2019 BALPA registered a trade dispute with Ryanair concerning terms and conditions of employment for the purposes of s. 244 TULR(C)A. In August 2019 BALPA issued Ryanair with notice of strike action over various dates. Ryanair's application for an interim injunction to halt the strike action was rejected by the High Court (**Ryanair DAC v BALPA** [2020] IRLR 698).

5. On 16 September 2019, and following the discontinuance by Ryanair of the proceedings in the High Court, in advance of the notified days of strike action Darrell Hughes (Director of HR Strategy & Operations) circulated a memo to all UK based pilots warning that: "… any UK based pilot who engages in any further BALPA strikes in September will have all staff travel privileges removed for 12 months".

6. During the days of strike action each base supervisor compiled a list of BALPA members who participated in the strike. The lists were amalgamated in Stansted and forwarded to Ryanair's head office in Dublin. Diarmuid Rogers (Head of Flight Operations Base Management) produced a list of those who had taken strike action and then used that list to instruct its travel department, to remove discretionary travel benefits from those named on the list.

7. The pilots brought Employment Tribunal proceedings pursuant to regs 3 and 9 of the Blacklists Regulations as well as

section 146 TULR(C)A in relation to Ryanair's threat and subsequent withdrawal of concessionary travel benefits. They argued that the threat was issued and implemented in order to both deter and penalise the pilots for participating in official industrial action called by BALPA. The section 146 claims were discontinued in light of the ruling in **Mercer**.

8. **The Blacklists Regulations 2010**. The Regulations were introduced pursuant to the Employment Relations Act 1999 ("ERelA"). Regulation 3 defines what constitutes a "prohibited list" and prohibits any "person" from either compiling, using, selling, or supplying a prohibited list. Reg. 3 provides (with emphasis):

**General prohibition**

3.—(1) Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.

(2) A "prohibited list" is a list which—

(a) **contains details of** persons who are or have been members of trade unions or **persons who are taking part or have taken part in the activities of trade unions**, and

(b) **is compiled with a view to being used by employers** or employment agencies **for the purposes of discrimination in relation to** recruitment or in relation to **the treatment of workers**.

(3) **"Discrimination" means treating a person less favourably than another on grounds of** trade union membership or **trade union activities**.

(4) In these Regulations references to membership of a trade union include references to—

(a) membership of a particular branch or section of a trade union, and

(b) membership of one of a number of particular branches or sections of a trade union;

and references to taking part in the activities of a trade union have a corresponding meaning.

9. As to what constitutes a "list", this is defined expansively by section 3(5) ERelA. A "list" includes any index or other set of items whether recorded electronically or by any other means". The issue of whether or not a "mental list" qualifies has been acknowledged but not definitively answered: **Miller v Interserve Industrial Services Ltd** [2013] ICR 445, per Underhill J at [12].

10. Regulation 9 confers a right of action where an employer takes steps to "compile" or "use" a prohibited list for an unlawful purpose and has subjected a worker to a detriment, or where they rely upon information supplied by a third party who contravenes reg. 3 where they either know or ought reasonably to know that this is the case. Regulation 9(3) is disapplied where the detriment in question amounts to dismissal.

11. The remedies provided for under reg. 11(5) demonstrate that the regime is intended to be punitive rather than compensatory in nature. Where a claim is upheld, the Employment Tribunal is required to make a minimum award of compensation of not less than £5,000 (subject to certain exceptions).

12. **The CA ruling - is industrial action a protected activity?** Against that background, the issue addressed by the Court was whether the reference to "activities of trade unions" in reg. 3(2)(a) included participation in industrial action. Ryanair argued that industrial action fell outside of scope because section 3(6) of ErelA provides that expressions used in section 3 and also in TULRCA 1992 were to be given the same meaning. **Mercer** had decided that "activities of an independent trade union" in sections 146 and 152 TULRCA did not include participation in industrial action. It therefore argued that the Blacklists Regulations should be read in the same way.

13. Like Lady Simler in **Mercer** (at [44]), Bean LJ considered that there can be no real dispute that the "natural meaning" of "activities of an independent trade union" in section 146 TULR(C)A included organising industrial action. The question was whether **Mercer** required the Court to depart from that natural meaning in the context of the Blacklists Regulations.

14. It was necessary to examine the context within which **Drew v St Edmundsbury Borough Council** [1980] ICR 513 decided that the reference in what is now section 146 did not encompass participation in industrial action. The ratio of **Drew** (as applied in **Mercer**) was that where one statutory provision makes dismissal for taking part in the activities of an independent trade union unfair, while another provision within the same statute expressly provides that dismissal for participating in industrial action is only unfair if certain conditions are fulfilled, it "must follow" that the trade union activities referred to in the first statutory provision cannot include taking part in industrial action. As Bean LJ observed, a careful reading of **Drew** expressly limited this distinction being drawn "for the purposes of the law of unfair dismissal". **Mercer** applied the same "logic", although by that point in time, there were more provisions on the statute book dealing with dismissal for participating in industrial action: ss. 237, 238 and 238A (at [45] – [46]). Additionally, it was material that the limiting phrase "at an appropriate time" which appears in s. 146 did not feature anywhere in the Blacklists Regulations (at [47]).

15. The Court reflected on the implications of Ryanair's argument, the destination point was that employers were free to blacklist any employee who had participated in industrial action. Ryanair's arguments ultimately did not navigate a way through the clear expression of legislative intent as set out in the public consultation, the Government's response to the consultation, and departmental guidance (at [49]):

(1) The BIS consultation (July 2009) enclosed the text of draft Regulations inviting specific comment. At paragraph 2.19 BIS juxtaposed participation in official industrial action against participation in unofficial or "wildcat" action. It explained:

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

(2) Government Response to Consultation (December 2009). At paragraph 3.19 the Government noted the responses received objecting to the exclusion of unofficial industrial action from the scope of the forthcoming Regulations. The position was put beyond serious doubt at paragraphs 3.27-3.28:

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

(3) BIS Guidance on Blacklisting (March 2010) – this tracked the position adopted during the consultation process and explained:

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

16. The Court did not accept that "… the Regulations singularly failed to implement the intentions of the Minister who laid them before Parliament, and singularly failed to deal with the mischief at which they were aimed" (at [49]). As a matter of statutory interpretation, reg. 3 had to be given its ordinary meaning. For those reasons the position is now settled - "it is unlawful to blacklist an employee for taking part in the activities of trade unions, including industrial action organised or endorsed by a trade union" (at [49]).

17. **Does the industrial action have to be "official" or "protected"?** The Court then considered Ryanair's alternative

argument, that to qualify for protection, the industrial action had to be lawful, in the sense that the trade union had complied with the labyrinthine balloting and notification requirements in Part V TULR(C)A. Upholding the reasoning of HHJ Auerbach in the EAT [2022] ICR 565; [2022] IRLR 104#, there was no basis for importing such a requirement into the Blacklisting Regulations. There was also no indication in the consultation documents that an employer was free to blacklist an employee taking part in industrial action unless the union qualified for immunity (at [50]).

18. This aligns with the legislative context. Section 238A TULRCA provides that a dismissal will be regarded as automatically unfair if it takes place within the "protected period" and the employee is taking "protected action". Protected action can only take place where "an act by virtue of section 219 is not actionable in tort". This demonstrates that when Parliament intends to legislate so as to impose a precondition by reference to compliance with Part V, it does so expressly – it did so expressly in relation to section 238A, but not in relation to the Blacklists Regulations.

19. This conclusion chimes with practical reality and common sense. It would fundamentally restrict the protection provided by the Blacklists Regulations were it to be the case that an individual was protected from detriment if their union had successfully negotiated the minefield of Part V TULR(C)A, but not otherwise. From the individual's perspective, they have no control over whether Part V TULR(C)A has been complied with, and may not even know whether it has. Regardless, both the member and employer will know that he/she is engaging in the activity which has been authorised and endorsed by their trade union by reference to the call for action. It also cannot have been the intention of Parliament that such activity should be open to different consequences depending on compliance with Part V.

20. This analysis fits with the legislative intention that sits behind the Regulations. The vice to which the Regulations are directed is the punishment of individuals by employers or putative employers based on the activities of those individuals. From the perspective of the malign employer, it is a matter of indifference to them whether someone has joined the picket line in circumstances where the union has got its balloting process right as opposed to a situation in which the union had got it wrong.

21. It is of course the case that the relevant detriment which may trigger an application to the Employment Tribunal may be imposed many years after the "activity" which had led to the inclusion of a name on a blacklist – as occurred in respect of the lists maintained by the Consulting Association. Seen in that context, it also cannot have been the intention of Parliament that potentially many years later, and by reference to a potentially different employer, an Employment Tribunal would be required to adjudicate on the extent to which the union had complied with Part V in relation to a different employer who is not a party in the proceedings.

22. **Abuse of process.** Finally, the Court considered that in any event, Ryanair's attempt to relitigate the lawfulness of the industrial action was, at least in a general sense, an abuse of process. It was immaterial that the parties in the High Court proceedings and the Employment Tribunal proceedings were not identical. Lambert J rejected each of the challenges to the balloting requirements on the merits rather than deciding them as merely triable issues. Ryanair did not seek to appeal her conclusions or take the matter to trial.

23. **Implications.** The Court of Appeal ruling is of considerable industrial relations importance to trade unions. It also ends any uncertainty as to whether the Blacklisting Regulations offer protection in similar circumstances: see **Roffey v United Kingdom** (App. No. 1278/11, 21 May 2013) involving the permanent revocation of travel benefits to 5,000 striking employees, where doubts appear to have been raised about this. The point was not decided by the ECtHR because the application was dismissed on admissibility grounds: see [28] – [32]. It also means that the type of challenge advanced in **Miller v Interserve Industrial Services Ltd** [2013] ICR 445 – ultimately unsuccessful on its facts - could not be brought (at least to the extent that the relevant activities relied upon involved the organisation of or the participation in unofficial industrial action – see [4]).

24. Giving effect to Parliament's intention, the ruling in **Morais** impedes practices of employers who seek to deter, dissuade, or penalise trade union members for participating in industrial action by withholding discretionary benefits (travel concessions, bonuses, offers of overtime etc…) where they do so by means of a prohibited list. To that extent, **Morais** provides some qualification to the lack of protection identified in **Mercer**. Depending on what happens to clause 59 of the Employment Rights Bill, where an employer subjects a worker to detriment by subjecting them to less favourable treatment for participating in industrial action, they may have two avenues of potential challenge.

**Bruce Carr KC and Stuart Brittenden KC (Old Square) appeared for BALPA members, instructed by Alice Yandle and Caitlin Farrar, Farrer & Co. LLP.**