

EMPLOYMENT TRIBUNALS



Claimant: Mr Michael Osborne

Respondent: British Airways Plc

Heard at: Watford Hearing Centre (by video hearing)

On: 25 to 28 October 2021

Before: Employment Judge G Tobin
Ms B Robinson
Mr A Scott

Appearances

For the claimant: Mr J Barnett (counsel)
For the respondent: Ms G Leadbetter (counsel)

JUDGMENT

It is the unanimous judgement of the Employment Tribunal that:

1. The claimant was subject to an unauthorised deduction of wages, pursuant to s13 Employment Rights Acts 1996.
2. The claimant was subject to detriment on grounds related to trade union activities in breach of s146 Trade Union & Labour Relations (Consolidation) Act 1992.
3. The claimant was subject to detriment contrary to regulations 3 and 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010.
4. The case will now be issued for a remedy hearing to determine compensation.

REASONS

The hearing

1. This was a remote hearing which had been consented to by the claimant and the respondent. The form of remote hearing was a video hearing through HM Courts & Tribunal Service Cloud Video Platform, and (save as to the Judge) all participants were not at the hearing centre. A face-to-face hearing was not held because it was not practical in the light of the coronavirus pandemic and the ensuing governments restrictions.

The case

2. The complaints were summarised by Employment Judge Moore following the hearing of 5 February 2021. Judge Moore drafted a list of issue, although an updated list of issues was substantially agreed by the parties for the substantive hearing:

The key factual questions before the Tribunal, as detailed further below in their legal context, are:

1. Did the respondent put the claimant to a detriment by its reduction of BALPA credit in September 2019, and what was the reason for this reduction?
2. On 9-10 September 2019, did the claimant take industrial action (or was he unfit for work)?
3. In relation to some of the further alleged detriments, as detailed below, there is a dispute as to whether the act or failure to act relied upon took place and whether it caused the claimant detriment.
4. In relation to each of the further alleged detriments, what was the reason for the respondent's acts or failures to act? In considering this question the Tribunal may need to determine whether the list relied upon by the claimant in respect of his claims [HB1605] was a prohibited list.
5. The claimant notes the following was recorded at the case management preliminary hearing:

The claimant maintains he was certified as not fit to fly and the respondent agreed as at 5 September 2019 that it was right to consider him not fit to fly. Accordingly, the claimant he was entitled to sick pay on the occasions in question. The respondent maintains the position changed subsequent to 5 September 2019, that being certified as not fit to fly did not necessarily mean the claimant was off sick from work and entitled to sick pay, and that at the relevant time the claimant was not off sick from work and entitled to sick pay. Accordingly, the respondent contends that the claimant was paid all sums properly payable on the occasions in question.

Unauthorised deduction from wages: s13 Employment Rights Act 1996 ("ERA")

6. The sums claimed by the claimant as unauthorised deductions of wages are as follows:¹
 - a. £2,020.43 in September 2019 (14.5 bidline hours in respect of 9-10 September 2019). It is undisputed that this deduction was made on account of the respondent's determination that the claimant took industrial action. The claimant contends that he did not, and that the deduction was therefore unlawful;
 - b. £490.01 in September 2019 (deduction from the claimant's 'bank' hours). It is not in dispute that a deduction from the claimant's 'bank' hours was made. The claimant contends that it should not have been because he was unfit for work and therefore the Bidline Rules provided for there to be no need to use bank hours (4.8.2.3 at [HB2375]). The

¹ Although as set out above it is in dispute whether each of the same amounted to deductions from wages.

respondent contends that the deduction from bank hours was properly made as the claimant was not on sickness absence, and that in any event bank hours are not 'wages'.

- c. £207 not paid in December 2019 in relation to Flight Pay Supplement (reduction in Flight Pay Supplement related to union days from 35 hours to 20 hours). This is a payment ancillary to BALPA Credit. It is undisputed that the deduction was made. The question of whether the respondent was permitted to remove the union credit and therefore the Flight Pay Supplement is in dispute.
7. Was the deduction set out at paragraph 6(a) above made by the respondent on account of the claimant having taken part in the strike or other action? By operation of s14(5) ERA, s13 ERA does not apply to any such deductions. The respondent contends that deduction 6(a) falls into this category. The claimant contends that the deduction does not fall into that category because he was unfit at the material time.
8. Were the above sums "*wages properly payable*" within the meaning of s13(3) ERA? In particular:
 - a. Was the sum of £2,020.43 wages properly payable on the basis that the claimant was off sick and entitled to sick pay for these days, or not properly payable on the basis that the claimant had taken part in industrial action on 9-10 September 2019? There is a dispute between the parties as to whether the claimant took industrial action or was unfit for work.
 - b. Was the sum of £207 wages properly payable on the basis that the claimant had a contractual right to Flight Pay Supplement in relation to union days? There is a dispute between the parties as to whether the claimant had a contractual right to a certain number of credit hours; the respondent contends that the provision for credit hours is a right of BALPA's under the collectively agreed Memorandum of Agreement, and not a contractual right of the claimant. If he did have such a right, the respondent contends that this would have been a right to a benefit and not a defined sum capable of constituting 'wages'.
 - c. Was the sum of £490.01 wages properly payable, or was it a benefit expressed in non-monetary terms and not payable to the employee and therefore outside the definition of wages as per s27(5) ERA? It is not in dispute that a deduction from the claimant's bank hours was made; the claimant contends that it should not have been because he was unfit for work for the whole month and therefore the Bidline Rules protected his hours, the respondent contends that the deduction from bank hours was properly made as the claimant was not on sickness absence, and that in any event bank hours are not 'wages'.
9. Were the above deductions required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or alternatively had the claimant previously signified in writing his agreement or consent to the making of the deduction (s13(1) ERA)?
10. If deductions from wages were made as set out above, what sums are due to the claimant taking into account the need to avoid double recovery in respect of the 10-11 September 2019?

Detriment on grounds related to union membership or activities: s146 Trade Union & Labour Relations (Consolidation) Act 1992 ("TULRCA")

11. Was the claimant subjected to the following detriments as an individual:
 - a. Direct financial loss from the unlawful removal of agreed union activity days, namely:
 - i. Credit hours; and
 - ii. Flight Pay Supplement.It is not in dispute that BALPA days were removed but is in dispute whether by this the claimant was subject to detriment as an individual and whether it caused the claimant financial loss.
 - b. Direct financial loss from having been deemed to have taken industrial action, namely:
 - i. The deduction of the sum set out at paragraph 6(a) above;
 - ii. Loss of staff travel benefits; and
 - iii. Loss of bank hours.The respondent accepts that these sums were deducted but contends that a deduction from pay during industrial action cannot amount to a detriment. The claimant contends these deductions are simply detriments.
 - c. Distress and mental illness caused by the bullying nature of the respondent in handling the removal of union days.

The respondent does not accept that the removal of BALPA credit was dealt with in a bullying fashion.

12. Was any such detriment caused by any act on the part of the respondent? The acts relied upon are:
- a. The removal of agreed union activity days [The removal of BALPA credit is not in dispute];
 - b. The subsequent assignment to an already crewed duty (which the claimant says ultimately did not exist because it had been cancelled to passengers) [The assignment to a flight that had been cancelled to passengers is not in dispute];
 - c. The decision that the claimant had failed to report for duty and therefore had taken part in industrial action which the claimant claims was perverse and taken even though he was medically certified as unfit to fly. [That this decision was made is not in dispute];
 - d. Retrospective falsification of sickness absence data to claim falsely that the claimant failed to report for the reassigned duty [This matter is in dispute and turns on whether or not the claimant was properly classified as failing to report for the reassigned duty];
 - e. Failure to hear the claimant's grievances in relation to the above [This is in dispute];
 - f. Other failures to follow agreed and/or contractual processes [The respondent does not consider it necessary for the Tribunal to determine the contractual nature of the numerous policies said to have been breached]:
 - i. Removal of UN credit after final roster publication [The respondent contends that the change to BALPA credit was permitted as set out above];
 - ii. Addition of TASS (standby) after final roster publication [This is in effect the same point as above; the BALPA credit was amended to TASS (standby); the respondent contends that this was permitted];
 - iii. Threat of further changes without notice [The respondent contends that no such threat was made];
 - iv. Downgrade of and misleading completion of MOR [The respondent contends that the form was completed appropriately];
 - v. Refusal to provide any medical evidence to support the respondent's claim that the claimant was fit to fly;
 - vi. Refusal to accept that the Claimant's absence data was personal data;
 - vii. Failure and refusal to follow the ICO's lawful instructions in relation to the claimant's personal data;
 - viii. Failure and refusal to apply policies EG102 (bullying), EG300 (absence management), EG901 (disciplinary) and EG903 (grievance) [as at paragraph 7e above];
 - ix. Breach of the IAG Code of Conduct;
 - x. Breach of the IAG Data Protection and Private Policy;
 - xi. Breach of the Corporate Safety Policy;
 - xii. Breach of the BA Safety Management Manual (4.7 Departmental management);
 - xiii. Breach of the IAG Group Health and Safety Manual; and
 - xiv. Breach of the BA Just Culture behaviours, accountability and intervention;
 - xv. Refusal to meet the Claimant in March 2020 to resolve the above issues. Capricious behaviour by the respondent - namely a refusal to meet the claimant in March 2020 to try to resolve issues when he had travelled from Canada to the UK with that agreed purpose.
13. Did the acts or failures set out above take place for the sole or main purpose of penalising the claimant for taking part in the activities of an independent trade union at an appropriate time (s.146(1)(b) TULRCA)? The respondent accepts that it undertook an exercise to review all non-critical credited, non-flying activities and convert them to flying duties (paragraph 7 ET3). These mitigation steps were taken by the respondent to protect its customers and operations during the period of disruption (paragraph 14 ET3). Further the respondent contends that it was entitled in the circumstances to treat the claimant as having taken industrial action (paragraphs 26 and 40 ET3). The respondent's purpose in taking the steps set out above, where those steps were taken, is in dispute.
14. [The respondent considers that the following does not properly arise from the claimant's claims]. *The claimant claims that the respondent's actions in 'converting' his agreed union activity days to flying duties was unlawful and could never protect its customers as pleaded in any event because, among other things:*

- a. *Threat or pressure of industrial action cannot be used to justify removal of activities of an independent trade union at an appropriate time;*
 - b. *The flights had already been fully crewed at final roster making the claimant surplus to crew requirements and unable to be utilised by the respondent in the manner pleaded;*
 - c. *The action disproportionately affected union representatives (one shorthaul flight had been crewed with 7 pilots when it only required 2 pilots and 5 were union representatives who had also had their union days removed) while other ground duties such as simulator duties were not 'converted';*
 - d. *The flights were cancelled in any event;*
 - e. *The surplus crew would not have been able to have been used for any other useful duty as the respondent tries to claim. [Had the respondent intended to protect its customers it would have placed the 'converted' union rep crews on airport standby to be able to replace any missing crew - however this would not have allowed them to 'capture' standby union rep crews as striking unless they failed to report when called to report off standby (and since the flights had been cancelled the respondent reasonably knew that this was unlikely to happen)];*
 - f. *Had the respondent been able to reinstate cancelled flights due to resolution of the dispute as pleaded (§20 GOR), the original rostered crew would have simply reported to operate as planned and originally rostered making the claimant surplus to crew requirements and unable to be utilised by the respondent in the manner pleaded.*
15. If the Tribunal upholds any of the claimant's claims under s146 TULRCA, does it in its discretion wish to make an award of compensation in respect of the acts or failures complained of? If so:
- a. What amount of compensation is just and equitable having regard to the infringement complained of and to any loss sustained by the claimant which is attributable to the infringement (s.149 TULRCA). The claimant relies upon:
 - i. Extended illness;
 - ii. Avoidable medical and travel costs; and
 - iii. Extended loss of earnings.
 - b. Does the Tribunal consider that the act or failure complained of was to any extent caused or contributed to by action of the claimant (in particular the claimant's repeated insistence that he was not sick and, if so the Tribunal shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding (s.149(6) TULRCA)?

Detriment contrary to regulation 9 Employment Regulations Act 1999 (Blacklists) Regulations 2010 ("the Blacklist Regulations")

16. Was the claimant subjected to a detriment? The claimant relies upon:
- a. The detriments set out at paragraph 6 above; and
 - b. His assignment to an already crewed duty (which the claimant says ultimately did not exist because it was cancelled to passengers) and which the claimant says directly led to the claimant being considered to have taken part in industrial action.
17. Was any such detriment caused by any act on the part of the respondent? The claimant relies upon the acts set out at paragraph 7 above.
18. Did the respondent at the relevant time hold or compile a prohibited list, namely a list which (s3):
- a. Contained 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?
- The claimant relies on the document at [1605], the respondent's position is that this was not a prohibited list.
19. Did the respondent subject the claimant to the detriments set out at paragraph 10 above for a reason which relates to any prohibited list found to exist in accordance with paragraph 12 above and either:

- a. The respondent compiled and/or used a prohibited list contrary to s3; or
- b. The respondent relied upon information supplied by a person contrary to s.3 and knew or ought reasonably to have known that the information relied upon was supplied in contravention of s3.

The respondent's purpose in taking the steps set out above, where those steps were taken, is in dispute.

20. If the Tribunal upholds any of the claimant's claims under regulation 9, does it in its discretion wish to make an award of compensation in respect of the acts or failures complained of? If so, what amount of compensation is just and equitable having regard to the act or failure complained of and to any loss sustained by the claimant which is attributable to this act or failure (regulation 11)? The claimant relies upon
 - a. Extended illness;
 - b. Avoidable medical and travel costs; and
 - c. Extended loss of earnings.
21. In assessing compensation, the Tribunal shall take into account:
 - a. Whether any conduct of the claimant before the act complained of was such that it would be just and equitable to reduce the amount of compensation (regulation 11(6));
 - b. Whether the act or failure to act was to any extent caused or contributed to by action of the claimant, and if so by what proportion it would be just and equitable to reduce compensation accordingly (regulation 11(7)); and
 - c. The provision that the amount of compensation shall be reduced by the amount of compensation awarded by the tribunal in relation to any successful claim under s149 TULRCA in relation to the same failure (regulation 11(8)).

Uplift: s207A TULRCA

22. In relation to each of the claimant's detriment claims:
 - a. Did a relevant Code of Practice apply? The claimant relies upon the ACAS Code of Practice on Disciplinary and Grievance Procedures.
 - b. If so, did the respondent fail to comply with that Code?
 - c. If so, was that failure unreasonable?
 - d. If so, is it just and equitable in all the circumstances to increase any award of compensation and by what amount (not to exceed 25%).

The law

5. S13 ERA provides the right not to suffer an unauthorised deduction from wages:
 - (1) An employer shall not make a deduction from wages of a worker employed by him unless—
 - (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
 - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
 - (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
 - (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
 - (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in

relation to the worker the employer has notified to the worker in writing on such an occasion.

- (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

...

6. S14 ERA addresses excepted deductions:

- (5) Section 13 does not apply to a deduction from a worker's wages made by his employer where the worker has taken part in a strike or other industrial action and the deduction is made by the employer on account of the worker's having taken part in that strike or other action.

7. S146 TULRCA deals with detriments on the grounds related to union membership or activities:

- (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—
 - (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
 - (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, . . .
 - (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
 - (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.
 - (2) In subsection (1) "an appropriate time" means—
 - (a) a time outside the worker's working hours, or
 - (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.
- ...
- (5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

8. Regulation 3 of the Backlists Regulations provides a general prohibition:

- b. Subject to regulation 4, no person shall compile, use, sell or supply a prohibited list.
- c. A "prohibited list" is a list which—
 - (a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions, and
 - (b) is compiled with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers.
- (3) "Discrimination" means treating a person less favourably than another on grounds of trade union membership or trade union activities.

The witness evidence

9. The parties provided agreed bundle of 2,607 pages. We (i.e. the Tribunal) were provide with chronologies, a cast list, detailed skeleton arguments, written submission and authorities. We appreciate the efforts of the parties and their representatives in this regard.
10. We heard evidence from the claimant, who confirmed his witness statement and was cross-examined by Ms Leadbetter. The claimant also answered questions from the Tribunal and was re-examined by Mr Barnett.
11. The respondents called 4 witnesses as follows:
 1. Mr Peter Nye, Chief Pilot Technical. Mr Nye was the respondent's manager who made decisions regarding rostering and non-flying credit.
 2. Mrs Natasha Tootell, Flight Crew Manager and the claimant's Line Manager. Mrs Tootell communicated with the claimant in respect of the roster.
 3. Mr Allister Bridger, Director of Flight Operations. Mr Bridger responded to the claimant's grievance.
 4. Mr Jonathan Stiff, Lead Compliance Officer and Data Protection Officer. Mr Stiff replied to the claimant's data subject access request.

The respondent's witnesses similarly confirmed their written statements and were cross-examined by Mr Barnett. These witnesses were asked questions for clarification by the Tribunal prior to Ms Leadbetter asking questions in re-examination.

Findings of Fact

12. We set out the following findings of fact, which we determined were relevant to finding whether or not the claims identified above have been established. We have not determined all of the points of dispute between the parties, merely those that we regard as relevant to determining the claims in this case and the issues in dispute as identified above. We did not dealt with remedy at this hearing. When determining certain findings of fact, where we consider this appropriate, we have set out why we have made these findings.

13. In assessing the evidence and making findings of fact, we placed particular reliance upon contemporaneous documents as an accurate version of events. We also place some emphasis (and drew appropriate inferences) on the absence of documents that we expected to see as a contemporaneous record of events. Witness statements are, of course, important. However, these stand as a version of events that was completed sometime after the events in question and are drafted through the prism of either advancing or defending the claims in question. So, we regard the witness statement with some degree of caution as both memories fade and the accounts may reflect a degree of re-interpretation.
14. The claimant was an airline pilot and at the time of the hearing was employed by the respondent for 32 years. He had considerable flying experience and experience in various training and management roles within the respondent, reaching the position of Flight Training Manager Gatwick and Training Standards Capitan. The claimant was an elected trade union representative of the British Airline Pilots Association (“BALPA”), which is a registered trade union recognised by the respondent for the purposes of collective bargaining.
15. The respondent and BALPA had an agreement in respect of *facility time* that allowed BALPA representatives time away from their substantive duties to undertake trade union duties. A number of credit hours was made available to BALPA each month, which BALPA allocated to its representatives. These were called “union days” or UN days. Such allocation was determined by BALPA who informed the respondent of its distribution, and this formed part of the complex rostering system. The process of creating a roster was set out in the Bidline Rules; and under the Bidline Rules and European Aviation Safety Agency (“EASA”) regulations any changes to the final roster needed to be notified at least 14 days prior to the changed duty. On 9 August 2019 the rosters for September 2019 were published.
16. On 23 August 2019 BALPHA announced strike action for 9 September 2019, 10 September 2019 and 27 September 2019 [HB1500, 1501-1502]. 2-days later Mr Nye on behalf of the respondent’s Flight Ops Leadership Team wrote to the claimant and others about the Reduction of Non-Flying Duties [HB1523-1524]:

In order to focus on preparing for any anticipated disruption we have already significantly reduced the time we spent with BALPA on non-critical issues and the regular committee meetings have been suspended until further notice.

Following the announcement from BALPA of their intention to take industrial action on September 9th, 10th and 27th, we are now making preparations to protect our customers and operations during this period of disruption. As such we are reviewing all non-flying credit or duties and determining what can be converted to TASS/Trip Reserve (CO) to enable us to better support the operation.

Therefore, it is now appropriate to reduce all allocated BALPA credit in September, by approximately 50%. We are in the process of publishing a revised roster for you from 9th September onwards which can be viewed in eMaestro. The process will be completed this evening...
17. The claimant responded promptly protesting against this measure [HB1522-1523]. He stated:

...

What you have done is way outside of any agreements and causes uncertainty, stress and expenses. I find this an incredible distraction – to the extent that I do not believe I can take the risk that this might not interfere in the event of an incident onboard an aircraft. I cannot uphold the privileges of my licence in this state of uncertainty.

Please remove me from further duties and reconsider your ill-advised action.

...

18. We understand, and accept, that the claimant had some previous history of stress-related illness. On 26 August 2019 the claimant was informed that he was removed from the flight the following day [HB1525] and he was recorded as being on sick leave.
19. The claimant also filed a Flight Safety Report on 27 August 2019 [HB1503-1511 and 1577-1558] in respect of “Union credit and time off for BALPA activities arbitrarily and unlawfully removed”. The claimant complained of being singled out, bullied, unlawful deduction of wages and less favourable treatment for being a union rep. He said that the respondent had put him down as sick and that was incorrect.
20. The claimant raised a grievance that day under the EG903 procedure against Mr Nye [HB1553-1554] for bullying and harassment. The claimant made clear that he did not believe that any informal process was appropriate. He complained about the arbitrary nature of Mr Nye’s action, he said:

...I find this an incredible distraction – to the extent I do not believe I can take the risk that this might not interfere in the event of an incident on-board an aircraft. I cannot uphold the privileges of my licence in this state of uncertainty. On this basis I have asked to be withdrawn from duties. The Company put me down as “sick”. That is incorrect

...
21. The claimant had 2 UN or union days on his roster for 10, 11 and 12 September 2019 [HB1595]. These were converted to TASS (Time Assignable days) or duty days [HB1598]. TASS is where a pilot does not have a specific flight on their roster but is available to be allocated and ordered to report to a flight. The claimant, and BALPA, contend that not all activities are permitted to be converted to TASS under the Bidline Rules as the overarching British Airways Pilots Memorandum of Agreement defines UN days as “leave of absence with pay” and leave of absence is not permitted to be converted to TASS. The claimant’s total union credit for September was 35 and 50% was converted in accordance with the respondent’s response to industrial action. Despite being recorded as unfit to fly, on 29 August 2019, the claimant was assigned to a 2-day trip for 10 and 11 September 2019.
22. On 29 August 2019 following an enquiry from Mrs Tootell, his Line Manager, the claimant complained of Mr Nye’s arbitrary removal of his BALPA credit during a live month, which he contended was outside of any process or rules.

I have been put down as “sick”. This is entirely incorrect. I am not flying directly as a result of Mr Nye’s actions. This is not an issue of my own making. I would like any notes on my file to make this absolutely clear please. We have a rule set must be abided but that otherwise there will be chaos. I am not willing to put my licence underline what such a distraction hangs over my head.

23. Mrs Tootell responded on 30 August 2019 [HB1570]:

I have read through the APS are that you submitted earlier this week and saw that you had ticked the "illness/injury" box and mentioned that you cannot uphold the privileges of your licence in this state of uncertainty. On that basis, if you are not fit to operate it is appropriate that I manage your absence or sickness.

24. The claimant replied to Mrs Tootell protesting that he was not sick, that he could fly as a passenger, but that problem lay in Mr Nye's treatment of him [HB1571]. Mrs Tootell reply was clear [HB1572]:

Under the company processes, if you are not fit to operate, you are deemed to be sick. The underlying reasons as to why someone is not fit does not change the process.

25. Mrs Tootell further extended the claimant's sick leave on 3 September 2019 [HB1574] and requested he provide a sickness certificate in accordance with the respondent's procedure.

26. The claimant provided a medical certificate of 3 September 2019 [HB1576]:

[The claimant] was seen today in our clinic. He is fit to fly as a passenger on transatlantic flights. He expressed concerns about distractions caused by current company scheduling changes. It would be best if these distractions are minimised in the future, as I would understand his concerns operating if these distractions persist.

27. On 5 September 2019 Mr Bridger, to whom the grievance had been addressed, rejected the claimant's grievance [HB1589-1590]. He said the rationale to the changes had been explained and that he was comfortable that the claimant had not been singled out. He said that he did not agree that the changes amounted to bullying or harassment, so he did not believe it to be appropriate to hear the claimant's grievance. In respect of the claimant's sickness, he said:

If you are not able to complete your duties due to "distraction", I believe that this means that you are not currently fit to operate and therefore it is appropriate that you should be treated as sick.

28. 9 and 10 September 2019 proceeded as strike days.

29. The claimant's personal file, Crew History Report, shows sickness from 27 August 2019 to 9 September 2019 "sick cert received – no end date" [2219-2220]. Mrs Tootell accepted that the claimant's roster initially showed that 10 September 2019 was a sick day as this was how his absence was initially recorded, this was then changed to industrial action in accordance with the respondent's strategic response.

30. On 11 September 2019 People Services wrote to the claimant stating that as he failed to report for his rostered days on 9 and 10 September 2019 he was deemed to have taken part in industrial action [HB1583-1585]. He was subjected to the following detriments:

1. Loss of pay of pay – 14.5 bidline hours totalling £2,020.43
 2. Loss of Access to Premium Rate until November 2019
 3. Loss of payments under the All Colleague Bonus Scheme 2019-2020.
 4. Loss of payments under the Pilot Only Deferred Bonus Plan 2017-2019.
 5. Loss of Staff Travel Benefits for a period of 3 years
 6. Loss of eligibility to apply for fleet moves within Longhaul.
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31. On 24 September 2019 the claimant re-raised his grievance against Mr Nye. This was sent to Ms Angela Williams, Director of People.
 32. On 14 October 2019 Mrs Tootell wrote to the claimant to determine that his absence during the period of industrial action would not be treated as sickness absence because he consistently told her he was not sick and that his stress and anxiety did not prevent him from travelling to London from Toronto during that period, interacting with colleagues, visiting the CRC and travelling back again.
 33. Mrs Tootell referred the claimant to BAHS and he was seen by Dr Stephen Huston on 12 November 2019. [HB1720-1722]. Dr Houston's report was brief and he said that the claimant was unfit to return to work. He said that the claimant had been exposed to multiple concurrent stressors at home and at work. He said that "presently" the claimant did not feel well enough to be at work.

Determination

34. The Tribunal made it clear at the outset that we would not make any findings in respect of the contractual force or otherwise of the Bidline Rules. We accepted the respondent's submission that this was not necessary for our determination of the claimant's statutory claims. Furthermore, the Employment Tribunal is not the forum for determining complaints that ought to be determined by the Information Commissioner Office.

Detriment and deduction in the BALPA credit

35. *Action short of dismissal* was replaced by the term *detriment* in TULRCA in 1999. Everything previously held to amount to “action short of dismissal” amounts to a detriment. However, the term “detriment” should be given the same meaning as it has in the context of discrimination law, so its scope is wider than that which applied hitherto.
36. In *Ministry of Defence v Jeremiah* 1980 ICR 13, the Court of Appeal took a wide view of “detriment” in discrimination legislation. Brandon LJ said it meant simply “putting under a disadvantage”, while Brightman LJ stated that a detriment “exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment”. Brightman LJ’s words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337. Subsequent cases have established that detriment covers such things as reductions in pay or overtime (see *Edgoose v Norbert Dentressangle Ltd* ET Case No: 2601906/08), a refusal or reluctance to investigate grievances (see *Bone v North Essex Partnership NHS Foundation Trust* 2016 IRLR 295, CA), as well as general unfavourable treatment, and that the worker must have at least some reasonable sense of grievance. In *Lyon v Mersey Care NHS Trust* ET Case No:2408139/15 cancelling a management/trade union meeting and a senior management ‘walkabout’, which would have given union members direct access to management, was regarded as a detriment where one particular union representative would have been put in an awkward position with regard to his members as a result of the cancellation.
37. The claimant had been an elected BALPA representative for 14 years. He enjoyed undertaking trade union duties and he had a collective outlook. It is a common feature of trade union facility time that the relevant official does not have to account to his employer for the time spent and the trade union duties undertaken. Various large employers, and evidently the respondent, see the advantage in allowing its employees paid time away from their day-to-day work to undertake trade union duties. This facilitates the relative smooth running of collective bargaining. BALPA union credits was reduced by 50% and the claimant’s union days of 10, 11 and 12 September 2019 were cancelled because the trade union had notified the respondent of its intention to take industrial action on 9 and 10 September 2019 [see HB1523-1524]. So although the respondent’s witnesses contend decision was made to ensure the respondent would provide a service, the fact that measures were taken to compel the claimant, like other trade union representatives, to attend work when he was not previously operationally required to do so, it is obvious to the Tribunal that the respondent’s intention and was to disrupt the trade union action on the dates in question and thereby ensure as many flights as possible would proceed. We make this determination because the respondent has not satisfied us of the *specific operational justification* (as opposed to the general intention) of rescheduling the claimant to attend work on the days of industrial action.

Did the claimant take industrial action on 9 to 10 September 2019 or was he unfit for work.

38. The claimant worked in a safety-critical industry. It is difficult to imagine an environment which ought to be more cognisant and responsive to the deterioration of a key employee's mental health than the air passenger transport industry. The claimant had some history of stress-related illness and, we are satisfied, that he was able to manage his health and well-being and he was able to identify and address relevant stressors.
39. The claimant was impacted by Mr Nye's response to the trade unions industrial action and reacted forcefully as to how this affected him. He was able to identify immediately that this caused him stress and distraction. He felt that he was not sufficiently safe to flying in such a safety-critical environment. He brought this to his employer's attention, and he was able to make a Flight Safety Report. He acted proportionately and responsibly.
40. Any detached reading of the claimant's various correspondence over this period shows the claimant's disturbance over the way that he was perceived to have been treated. The claimant's repeated refusal to accept the categorisation of sick leave was an attempt to focus his challenge on the cause of the problem rather than on his reaction. He was focused on what he regarded as arbitrary and unconscionable treatment, and this was also an attempt to remove his stressor.
41. Mr Tootell's response on behalf of the respondent on 30 August 2019 was key. She referred to the claimant as not being "able to uphold the privileges of his licence", i.e. he was not able to fly as a pilot. Consequently, she chose to treat the claimant as on sick leave. With certain clarity, Mrs Tootell brushed aside the claimant's reservations; "under the company process, if you are not fit to operate you are deemed to be sick. The underlying reasons as to why someone is not fit does not change the process". The respondent's Absence Management Policy (EG300) does not provide a mechanism or guidance to determine actual sickness under the policy when this is in dispute. However, Mrs Tootell's purposive determination that the claimant was, in fact, sick for the purpose of sick leave, was consistent with the policy. Indeed, Mrs Tootell managed the claimant largely within the scope of this policy. She later asked the claimant for a GP's note and offered support from British Airways Health Service.
42. The claimant's sicknote was equivocal, probably because the claimant was reluctant at that time to concede that he was made ill by his employer's response to industrial action. Nevertheless, our reading of Dr Pomedli's note is consistent with Mrs Tootell's earlier interpretation – the claimant was concerned about the distraction, and he felt he was not fit to fully undertake his job.

43. It is highly significant that at the point that Mrs Tootell received the claimant's medical certificate, the claimant was recorded as being on sick leave. No clarification was sought in respect of his sicknote nor were any concerns raised. The respondent did not seek to challenge that the claimant was properly off sick and the respondent never sought at that time to obtain its own medical enquiries.
44. The respondent sought recourse to a "Flight Operations policy during industrial action" [HB1385-1399]. This "policy" was not incorporated into the claimant's contract of employment. It was not a published policy. It was a document that set out some management guidelines for a strategic response to industrial action. It is difficult to have much credence to a document largely redacted, when we are effectively told large sections of it are too secret for us to read. However, under section 3 Absence it states that Pilots must not be encouraged to attend work if they are unfit for duty. Notwithstanding it states that a doctor's certificate does not automatically evidence sickness, the respondent raised no objection to the claimant's sickness absence before reversing Mrs Tootell's determination.
45. Mrs Tootell originally treated the claimant as sick and was impervious to the claimant's protestations to the contrary. Her determination of 14 October 2019 was self-serving for the respondent. Nothing had changed on 14 October 2019. The claimant contention that he was sick had been repeatedly rejected by her for good reason, and it was illogical to assess the claimant's travel, meeting and interacting with colleagues as a contra-indicator of sickness.
46. In respect of Dr Houston's medical report, Mrs Tootell put considerable emphasis that the claimant was not fit for work when examined on 13 November 2019 but did not see this as applying at the time of the industrial action – a considerable stressor. She did not query what "presently" meant nor did she query if the claimant's position had improved or deteriorated in the recent weeks or months. Mrs Tootell did not ask any questions about 9 and 10 September 2019 and we thought that this was so unexplainable that we determine this was because she wanted to avoid any conclusive corroborative link to the claimant's ill-health at the time of the industrial action.
47. Although the claimant was in the UK at the time of industrial action, he visited to see his family and whilst here he attended some trade union meetings, which might be consistent with industrial action, but does not, in itself, amount to industrial action. There is no evidence that the claimant addressed any rally or stood on a picket line. Other than this trade union official being favourably disposed towards BALPA's balloted and lawful industrial action there is nothing to suggest that he actively took part in any industrial action. So, any possible argument that the claimant, whilst unfit for work, was also engaged in industrial action does not hold water. Under the circumstances we find that the claimant was, in fact, properly unfit for work on 9 and 10 September 2019 and that his absence from work was not due to him participating in strike activity.

Unauthorised deduction from wages

48. It follows from above that the claimant is entitled to a declaration that the respondent unlawfully deducted £2,020.43 from his wages in respect of 9 to 10 September 2019. He did not attend work because he was sick. He should have been recorded as still being on sick leave as he was immediately before the strike days.
49. Ms Leadbetter's point that the claimant's sick pay eventually ran out so the respondent could recover this under s25(3) ERA appears to have an initial and superficial application. However, we have not heard direct evidence from the respondent in respect of this and the application of this provision ignores the claimant's contention that it was largely the respondent's treatment of him from late August 2019 onward that caused his protracted illness. So, if the events that followed and the claimant's protracted sick leave absence was inevitable then his compensation might need to be set-off; however, the situation appears to the Tribunal to be a lot more complex and less predictable. The inevitability of the claimant's sickness absence and its causation may need to be addressed at a further remedy hearing.
50. Had the claimant been properly recorded as sick, instead of engaging in industrial action, then he would have had his bank hours protected pursuant to section 4.8.2.3 of the Bidline Rules [HB2375]. Notwithstanding bank hours were expressed as hours, the claimant was able to calculate a monetary value, so this does appear to fall within the definition of wages at s27 ERA and therefore appears to be payable. However, this might need to be more fully addressed at the remedy hearing.
51. In respect of Flight Pay Supplement the claimant does not need a contractual entitlement to the BALPA credit hours to establish that the £207 claimed is wages properly payable as the entitlement goes beyond what might be specified in his contract. Nevertheless, Ms Leadbetter's argument under *Lucy and other v BA PLC EAT 0033/08* is compelling and if the union days do not normally attract the Flight Pay Supplement then it is difficult see how the claimant can establish this shortfall. This can also be addressed at a remedy hearing, if this indication is not sufficient for the parties.
52. It follows from our determination above that the deduction under s14(5) ERA does not apply because the claimant was unfit to work at all material times.
53. Issue 9 of the list of issues does not apply. We heard no evidence or argument in respect of these deductions.
54. The claimant is not entitled to double recovery in respect of the shortfall of wages properly payable.

Detriment on the grounds of trade union membership or activities

55. We reject the respondent's contention that the BALPA representatives were not targeted following the announcement of the industrial action. Indeed, that appears to lie at the heart of the roster changes from the bits of the industrial action strategy that we were permitted to read [HB1385-1399]. The BALPA credit was reduced by an arbitrary 50% and we accept the claimant's contention that other pilots on leave did not have their leave cancelled. The fact that some training courses were also cancelled does not persuade us that the trade union representatives were not earmarked. The fact that James Losh was also affected for undertaking work for BALPHA, was subjected to similar detriment and asked if he was a trade union representative adds a persuasive layer to what appears to be a sufficiently convincing story of making efforts to undermine the perceived strike organisers and coordinators. The response of Mr Nye and the other respondent witnesses that their aim was narrow in merely protecting customers and operations during the period of disruption is unconvincing. We assess they sought to disrupt the industrial action and part of this was to get as many trade union representatives reporting for duty as possible, even to the extent of significantly over-crewing flights. We understand Mr Nye point that there may have been a need to move some planes following the disruption but this was not comprehensively demonstrated nor could we see how this worked in conjunction with the rosters of the claimant, or those of other trade union officials. Reinstating a flight and selling tickets so later is just not a convincing explanation for cancelling UN days. Mr Nye sought to operate the TASS assignment system to frustrate pilots swapping days to free themselves up for strike days. We determined that he also sought to frustrate BALPS officials by attempting to tied them to over-crewed flights.
56. The claimant demonstrated his distress and anxiety in correspondence and subsequent medical evidence. If the respondent would have dealt with the claimant's grievance, as set out in the appropriate policy then its officials might have understood the claimant's complaints of bullying instead of dismissing the claimant's arguments without hearing.
57. Issue 12(a) was not in dispute. This was due to BALPA's industrial action. Issue 12(b) is not in dispute, and we provide the context for this above which we determine was to disrupt the industrial action. Issue 12(c) is determined above. The claimant has established issue 12(d) to the extent that it was illogical to recast his sickness absence as failing to report for a reassigned duty.

58. The claimant raised a grievance. The Grievance procedure (EG903) formed part of the claimant's contract. Mr Bridger discussed the claimant's grievance with Mr Nye and came to the conclusion that the claimant had not been targeted or singled out for the treatment complained of on the basis that he was a BALPA representative, without hearing from the claimant. Mr Bridger refused to hear the claimant's grievance in breach of the claimant's contract of employment. This was an individual complaint of bullying in the application of detrimental treatment of a trade union official. It was not a collective grievance or a collective bargaining matter. The claimant re-raise his grievance after the industrial action was over and this was refused by Ms Victoria Titchen on behalf of Ms Williams. We do not understand the logic of this repeated refusal and can only attribute this to the claimant's perceived activities as engaging in industrial action.
59. We accept Ms Leadbetter submission that we do not need to determine the contractual nature of the policies under 12(f). To the extent that we regard these as detriments we make this clear above.
60. Issue 13 uses the wrong statutory language and test. We do not limit our assessment to whether the respondent's sole or main purpose was to "penalise" the claimant. We assess whether it was to *prevent or deter* him from taking part in the activities of BALPA *or penalise him* for doing so. The respondent accepts that it undertook an exercise to review all non-critical credited, non-flying activities and convert them to flying duties. Such that we can see, this was done in advance in the strategic response document [HB1385-1399]. It was done in secret, without input from passenger representatives or employee representatives. It was a blueprint document to tackle any industrial action, so not specifically the strike action of September 2019. There is no doubt for this Tribunal that the respondent took some action to mitigate the impact of the period of disruption on its customers and operations.
61. However, we are not satisfied that the steps taken by the respondent in respect of cancelling the claimant's union days and redeploying him to operational work went to this purpose. No impact assessment was undertaken, the claimant was not consulted nor was there and collective consultation with BALPA. The respondent's argument of in effect "all hands to the pump" rings hollow because there was no assessment of what pilots were needed where and how that could be achieved through existing resources before disrupting the trade union's activities. There was merely a new roster imposed (which had minimal effect) that took little or no account of trade union activities.

62. Although the claimant was properly off sick during the industrial action, the respondent perceived him to be taking part in industrial action. We do not understand how assigning the claimant to an over-crowded flight from Heathrow to New York, which did not in fact take place, could possibly protect customers or operations and we reject these assertions from the respondent's witnesses. The point's raised by the respondent in issue 14 are relevant to the specifics of our assessment, although we do not make the assertion under 14(a) – nor do we need to make this assertion. In essence, not only did the respondent's acts have the effect of preventing or deterring the claimant from take his union days, we are persuaded that this went so far as to have it as its main purpose on the basis of the respondent's flawed assertions and issues 14(b) to 14(f).

Detriment a country to the Blacklist Regulations

63. Our determination in respect of paragraphs 6 and 7 of the list of issues is set out above.
64. The list at pages 1606 and 1607 of the hearing bundle contains a list of BALPA representatives or those providing ancillary services (for example IT support). Virtually everyone on that list has recorded UN days during September 2019. We note that the claimant is included on this list. We are not persuaded that this constitutes a "mixed list" as contended by the respondent; however, if we are wrong on this point, the Department for Business Innovation & Skills published Guidance: The Backlisting of Trade Unionist: BIS Guidance on Blacklisting March 2010, provides that "mixed lists" do qualify as *prohibited lists*. The guidance of those who drafted the legislation is a key aid to construction, where no relevant case law available. The respondent's protestation of caution for so-called non-statutory guidance is resoundly rejected particularly when there appears to be on no other basis than it does not help that party's case.
65. We accept the claimant's submission that no other pilots were treated the same way as the claimant. UN days were classified as leave of absence with pay and this was entirely different from training of other ground duties. But we were not referred to any comparable list for non-trade union representatives. Furthermore, the cases of JL [HB1605], MB [1674] and SM [HB1673a-1673c] are particularly illuminating. JL undertook ancillary duties for BALPA but was not a BALPA representative and his assigned trip or duty was reversed. MB was not a trade union representative and provided documentation that he was sick, which was accepted by the respondent and his absence was no longer shown as taking part in industrial action. This was the case also for SM whose similarities with the claimant's case was striking; although again he was not a BALPA representative and he also declared himself unfit as he was not able to give his duties his full attention and the deductions made for industrial action were reversed.

66. The respondents contend that the list was prepared in accordance with the respondent flight operational response [HB1385-1399]. However, we find above that this policy was not merely a tool to ensure the respondent provide flights during industrial action as, we determine, it went beyond that limited response. The respondent sought to allocate duties that were not evidentially required and we regarded this as an attempt to disrupt the trade union representatives undertaking what we perceived to be their lawful activities.
67. None of the exemptions of regulation 4 of the Blacklists Regulations apply. We determine the list was compiled with a view of discriminating against the claimant, and others, who the respondent regarded as undertaking trade union activities. The fact that in the claimant's case the respondent belief that he had engaged in industrial action was wrong does not invalidate the point.
68. Taking Industrial action, including strike action, is taking part in trade union activities within the meaning of Regulation 3 of the Blacklist Regulations: *Ryanair DAC v Morais & Others EAT 000275/2021*. It is also taking part in trade union activities for the purpose of s146 TULRCA: *Mercer v Alternative Future Group Ltd [2021] IRLR 620*.
69. Regulation 3 precludes the compilation or use of a prohibited list "with a view to being used by employers ... for the purposes of discrimination ... in relation to the treatment of workers". Under regulation 3(3) "discrimination" means treating a person less favourably than another on grounds of trade union membership or trade union activities
70. The claimant relies upon the actual comparators of JL, MB and SM as identified above and given these examples we can draw no other viable conclusion than the claimant was subjected to the detriments because he was deemed to have taken part in the activities of a trade union.
71. In addition, under regulation 9(1) the claimant could bring a complaint to the Employment Tribunal against his employer if the employer subjected him to a detriment for a reason which *relates* [my emphasis] to a prohibited list, and the employer contravenes regulation 3. The reason the list was compiled was to reallocate trade union facility time, i.e. remove UN days from the claimant and other unions representatives on the days of industrial action. So the claimant has established the causation point under issue 19, the respondent took the steps to establish the list to subject the claimant to the detriments as found above. The claimant therefore succeeds in his claim under the Blacklists Regulations.
72. We hope that the parties may be able to agree compensation in respect of these various and to some extent overlapping, findings. If not, the issue of compensation will be dealt with following a remedy hearing.

Employment Judge Tobin

Dated: 2 March 2022

Sent to the parties on:
3 MARCH 2022

For the Tribunal: