‘Injunctions, *Cyanamid*, and the corrosion of the right to strike in the UK’

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Abstract

This paper critically reviews a number of recent English court decisions on the award of interim injunctions against strikes, granted on the grounds of breach of a number of procedural requirements contained in Part V of the Trade Union and Labour Relations (Consolidation) Act 1992. It is argued that the jurisprudential approach followed by English courts is at odds with the emerging human rights nature of the right to strike, as developed by the European Court of Human Rights (ECtHR). The paper calls domestic judges to abandon the traditional, *American Cyanamid*-based, test typically used in awarding interlocutory injunctions in industrial action cases, in favour of a more human rights-attuned ‘proportionality test’.
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1. Introduction

The common law has had a longstanding feud with industrial action, viewing it as a tortious act and a breach of contract, when not also, well into the 19th century, a crime. The UK Parliament has had a rather more ambivalent attitude towards industrial action in general and strike action in particular. While through the years it has sought to introduce a number of statutory immunities and protections for workers embarking in strike actions, as well as for the unions organising them, there is little doubt that over the past three decades its general thrust has been in the direction of an unrelenting curtailment of the freedom of workers to withdraw their labour in furtherance of a trade dispute. This erosion has occurred in several different ways, but undoubtedly one of the most peculiarly British limitations has taken place through the introduction by the Trade Unions Act 1984, and its numerous successive amendments, of several procedural and balloting requirements, whose punctual satisfaction by the organising unions is a prerequisite for the lawfulness of the contemplated strike action.

Balloting requirements have long been an effective mechanism for restraining the ability of British unions to call strikes. But – in retrospect - the 2009 Court of Appeal decision in Metrobus, discussed in the following section, will be seen as heralding a new era of judicial formalism and judicial legalism in applying the statutory balloting requirements contained in Part V of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992). Indeed, as we will point out in the third section of this article, this decision was followed by a string of other judgments that, in a similar vein, granted injunctions against strikes in a number of high profile cases involving trade

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3 Metrobus Ltd v Unite the Union [2009] EWCA Civ 829.
unions in the public and private transport sectors, precisely because of a strict application of the balloting requirements contained in TULR(C)A 1992. After briefly discussing, in the fourth section, the procedural and legal reasoning on which the award of interim injunctions against strikes is typically granted, the fifth and concluding part of this paper argues that the jurisprudential approach followed by English courts is at odds with the emerging human rights nature of the right to strike, as developed by the European Court of Human Rights (ECtHR) and domestic jurisprudence developing under HRA 1998. This part therefore calls national judges to abandon the traditional, American Cyanamid-based\(^4\) test typically used in awarding interlocutory injunctions in industrial action cases, in favour of the more human rights-attuned ‘proportionality test’.

2. *Metrobus v Unite* and judicial legalism

The facts of *Metrobus* are arguably more straightforward than the intricate regulatory framework on which the judgement is based. Unite the Union represents bus drivers working for several private bus companies operating routes in London, including Metrobus. In 2008 it sought to establish London-wide collective bargaining agreements, and improve the terms and condition of employment of its members across the various private operators of the capital. Faced with the opposition by Metrobus, between 18 August and 1 September 2008, it held a ballot for industrial action, as required by TULR(C)A 1992 s. 226. The results of the ballot showed an overwhelming support for Unite’s call for industrial action from some 90 per cent of a relevant workforce of about 850 bus drivers. With this strong mandate backing its industrial muscle, on 3 September 2008 Unite notified Metrobus’ Managing Director that its members would abstain from work for 24 hours on 12 September. As it happens that day of strike failed to persuade Metrobus to reach an agreement with Unite and on 2 October 2008 the union served the company’s Director with a second notice, announcing a further day of strike on 10 October.

It was at that point that Metrobus informed the union that its legal advice casted serious doubts on the accurate fulfilment by the union of several statutory balloting obligations, and demanded assurances that it would not call any further strike in reliance of the contested ballot. Further correspondence ensued, but eventually the company informed the union of its intentions to seek an injunction to stop the second strike. On 9 October the High Court found three fatal defects in the performance of the procedural obligations imposed by TULR(C)A on Unite, rendering the action ‘not protected’, and granted injunctive relief to Metrobus. On appeal, the Court of Appeal upheld two of the three defects identified by the High Court and confirmed the injunction.

The Court of Appeal had no hesitation in agreeing that the Union had breached TULR(C)A s. 231A by failing to inform the employer of the August 2008 ballot result ‘as soon as reasonably practicable’. All three Lord Justices

\(^{4}\) *American Cyanamid Co. v Ethicon Limited [1975] AC 396.*
agreed that the period of time between noon of Monday 1 September – the official closure of the ballot – and 11:00 am of Wednesday 3 September – the exact time the Unite regional officer emailed Metrobus to inform them of the result – constituted a failure to notify the result as soon as reasonably practicable. And this even if ERS Ltd., the private scrutiners contracted by Unite to run the ballot, had only notified the results to the union at 3.00 pm on 2 September, and even if the regional officer that had received this information was only authorised by Unite’s General Secretary to draft and send the email with the balloting results to the employer, at 5 pm – when ‘unfortunately… [he] and his secretary, …, had left work for the day’\(^5\) - an instruction he complied with as soon as he returned to his desk the morning after. Most importantly, as noted by Ewing and Hendy, the Court ‘regarded as irrelevant (and gave no consideration to) the fact that Metrobus had no conceivable need to know the result before it received it, would have derived no benefit from earlier receipt and alleged no prejudice by the delay’,\(^6\) a point to which we shall return in section 5 of this paper.

The Court also agreed that in all three notices sent to Metrobus (the initial pre-ballot notice of August 2008, and the two pre-strike notices of 12 September and 10 October), Unite, while providing the figures and other details of the workers affected, had failed to provide ‘an explanation of how those figures were arrived at’, in breach of the requirement imposed by s. 226A(2)(c) and s. 234A(3)(a) TULR(C)A 1992. There was some disagreement between the three judges as to the precise scope of these obligations. Lloyd LJ and the President of the Family Division agreed that these dispositions applied both when the workers affected by the ballot and strike were already known as union-members to the employer by reason of having their union contributions paid automatically by deduction from their salary (so-called ‘check-off’ employees) and when there were no such check-off employees. Maurice Kay LJ agreed with Unite’s counsel in holding that these provisions only imposed a duty to provide such explanations when none of the workers affected were check-offs, leaving it instead at the union’s discretion when some (as in the Metrobus case) or all of them were paying their union contributions by deduction from their wages. The argument between the Lord Justices provides a perfect illustration of how much interpretative leeway and, inevitably, legal uncertainty in inherent in the TULR(C)A 1992 provisions on procedural and balloting requirements.

The third flaw identified by the High Court pertained to the accuracy of the number of workers affected by the strikes as reported by the union in the two strike notices, in breach of s. 234A(3D) TULR(C)A 1992. On both occasions, and for slightly different reasons, the union erroneously reported the overall figure of workers affected as being slightly lower than the actual number (766, instead of 776, and 847 instead of 857). For different reasons, and at least in part because the mistakes related to partial figures that the union was not under a duty to provide, the three judges concluded that these were not fatal errors, although as rightly noted by Dukes, ‘Lloyd LJ did take steps … to

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\(^5\) Metrobus Ltd v Unite the Union [2009] EWCA Civ 829, paragraph 65 of the decision.

highlight the Government’s ‘evidently deliberate decision’ not to introduce a provision requiring disregard for small accidental errors. In future cases, he suggested, an employer might wish to rely on this decision when arguing that trivial errors did constitute a material breach of the statute’, a point to which we shall return in the next section.

Perhaps the most troubling part of the decision was the conclusion that ‘the provisions with which this appeal is concerned are not disproportionate restrictions on rights under article 11’. While this may be an implicit acceptance that domestic rules on industrial action need to be scrutinised for consistency with ECHR and HRA 1998 provisions, and therefore an indirect recognition of the existence of a ‘fundamental right to strike’ in English law, it set a solid precedent for subsequent decisions. As noted by Cox J in BA v Unite, Metrobus established ‘that the statutory requirements relating to ballots and strike notification … do not unduly restrict the exercise of the right to strike; that the legislation has been carefully adapted over many years, in order to balance the interests of employers, unions and members of the public; and that its provisions are proportionate. That decision is binding’.

3. Legalism and legality of industrial action

Metrobus was undoubtedly unwelcomed news for British trade unions. The dicta of Maurice Kay LJ reduced the concept of right to strike’ as not ‘much more than a slogan or a legal metaphor’. It also revealed a reluctance on the part of the English courts to engage at any substantive level with the fast developing jurisprudence of the European Court of Human Rights (ECtHR) that, with important decisions such as Dilek and Others, Demir and Baykara, Enerji Yapı-Yol Sen, and more recently in cases such as Danilenkov, Saime Özcan, and Kaya and Seyhan, has firmly anchored the right to strike on the substantive provisions of Article 11 of the European Convention of Human Rights (ECHR). The submissions made by John Hendy QC, Unite’s counsel in Metrobus, were swiftly dealt with by Lloyd LJ commenting that ‘interesting as this material is, it does not, for the purposes of this appeal, affect the substance of the points arising … provides part of the context for that decision [and should not be] regard[ed] as relevant in any more direct way to the present appeal’, and British legislation, as noted above, was held to be justified and proportionate under the margin of appreciation inherent in Article 11.

8 Metrobus Ltd v Unite the Union [2009] EWCA Civ 829, paragraph 113 (Lloyd LJ).
9 British Airways Plc v Unite the Union [2009] EWHC 3541 (QB); [2010] IRLR 423
10 Ibid, paragraph 27.
11 Dilek and Others v Turkey, Applications No. 74611/01, 26876/02 and 27628/02, 17 July 2007.
12 Demir and Baykara v Turkey, Application No. 34503/08, 12 November 2008.
14 Danilenkov v Russia, Application No. 7336/01, 30 July 2009.
15 Saime Özcan v Turkey, Application No. 22943/04, 15 September 2009.
16 Kaya and Seyhan v Turkey, Application No. 30946/04, 15 September 2009.
But as well as representing a setback in and of itself, *Metrobus* soon became the catalyst for further judicial and legal activity, some would say activism, in respect of the procedural limitations to the right to strike, and the award of interim injunctions against industrial action. Between July 2009 and the time of writing (May 2010), various courts have granted or confirmed injunctions against strikes on grounds of balloting and procedural defects on no less than five occasions.¹⁷

In *EDF v RMT*, the High Court decided that the words ‘engineers/ technician 64’ used in the ballot notice to identify the workers affected by the consultation, and produced by retrieving information from the union’s database, was not ‘sufficiently precise’ to satisfy the TULR(C)A s. 226A(2A)(a) requiring ‘a list of the categories of employee to which the employees concerned belong’. The Court had no doubt that an injunction against the strike had to be awarded, on the ground that ‘the prospects of a strike and the consequences of an unlawful strike are sufficiently imminent to consider this is an application properly made and deserving of relief’. And this even although, as at that stage the ballot itself had not even been concluded, there could be no clear indication as to the ballot results, and the union had not decided whether to call a day of industrial action or not.

In the December 2009 *British Airways* case, injunctive relief was granted by the High Court because some Unite members who were employed by BA at the time of the ballot would have been no longer employed at the time of strike action, since they had accepted voluntary redundancy and were therefore leaving BA. The number of voluntarily redundant staff that was wrongly included in the ballot amounted to roughly 1,003 individuals. This figure though should be taken in the context of a large ballot including some 11,190 employees, and 10,286 actual voters the overwhelming majority of which (9,514) voted in favour of the proposed strike action. The participation or exclusion of the 1,003 voluntary redundancy employees would have made no material difference to the outcome of the ballot. But Cox J decided that the breach of the TURL(C)A 1992 s. 227 ‘Entitlement to vote’ requirements had to be interpreted strictly, and therefore ‘there [was] no need … to go on to consider … whether the accidental failure [was] “on a scale which is unlikely to affect the result of the ballot”.

The level of legal formalism pervading these decisions was undiminished in the successive Network Rail case. In this case the employer contended that RMT, the union, had failed to satisfy the statutory requirements on the information that pre-ballot, post-ballot, and strike notices ought to contain, that the ballot constituency had been incorrectly identified, and that RMT had failed to give to its members the required notification of the results of the ballot in accordance with TULR(C)A s. 231. On this latter point, RMT had actually informed all its members via a text message sent to their mobile phones, of the positive outcome of the ballot, prompting them to consult a link on the union’s website to access the full results. This, Sharp J contended, meant that ‘RMT did not take all the steps that were reasonably necessary to ensure all its members were informed of the numbers following the ballot’.\footnote{Network Rail Infrastructure Ltd v National Union of Rail, Maritime & Transport Workers [2010] EWHC 1084 (QB ), paragraph 71 of the judgement.} As for the lack of adequate information in the statutory notifications, there was little doubt that, post-Metrobus, even a set of inaccuracies affecting between ‘13.4% to 16.8% of the workplaces for which information was given’, as reported by counsel for the employer, was going to inflict a fatal flaw on the process. The fact that the railway industry is a fast moving one, and subject to constant restructuring, and the consideration that RMT had undertaken a job evaluation survey and a corresponding spreadsheet to check the information available, were of no help to its defence either. As for the claim that the balloting constituency had been incorrectly identified, this accusation effectively boiled down to the union failing to send a ballot paper to five workers in a particular workplace employing some 21, or 23 (the figure was contested) members of staff. This in a ballot involving 851 workplaces and 4,556 union members. Once more the High Court found that the employer was entitled to regard that as a significant flaw and that, since s. 227 TULR(C)A 1992 had not been complied with, the union could not bring itself within s. 232B ‘escape clause’ to make allowances for this accidental and minor default.

This snowball effect of injunctions culminated in the May 2010 British Airways injunction saga. After being confronted with the frustrating judgement of the High Court in December 2009, Unite decided to re-ballot its workforce for a new wave of industrial action. This second ballot was concluded on 22 February 2010 and Unite, in compliance with TULR(C)A s. 231A, immediately informed BA management that out of 9,282 votes cast, 7,482 workers had voted in favour of industrial action, 1,781 against, and that the ballot box had returned 11 spoilt voting papers. After a first wave of industrial action, BA’s lawyers however noticed that Unite, when informing its members of the result of the ballot as required by s. 231, had neglected to convey the same information, ostensibly in breach of s. 231(d). Although it had sent both a text and an email to its members, they did not contain all the four items of statutory information required by TULR(C)A 1992. The fact that the union had issued a press release with the result details, had posted them on workplace notice boards, published them on news-sheets and on its website, and that – eventually – BA itself had informed all its staff of the ballot results, did not persuade the High Court that the letter of TULR(C)A 1992 s. 231 had been
satisfied. This second BA High Court injunction against Unite was arguably the high watermark of the triumph of judicial legalism in curbing the legality of industrial action in the UK. This position was eventually only partly rectified by the Court of Appeal,\(^{19}\) which found, Lord Neuberger MR dissenting, that the steps taken by Unite to inform its members of the ballot results, amounted to a sufficient compliance with s. 231. Distancing itself from the High Court in *Network Rail*, it noted that what was ‘reasonably necessary’ for the purposes of s.231 had to be seen in context, that the law contains no requirement for ‘active’ dissemination of information and there are no policy reasons why there might be such a requirement.

Positive as this final outcome may be, it should not obscure the fact that over the last year, and in particular since the *Metrobus* decision, English courts have taken a far more activist stance in interpreting narrowly the procedural obligations that unions are meant to satisfy before being able to call lawful, and protected, industrial action. Surely enough, these procedural hurdles are of statutory derivation but, as noted above, when confronted with various interpretative alternatives English courts typically choose the most restrictive one. So for instance, we now know from *Metrobus* that the statutory obligation, contained in TULR(C)A s. 231A, to inform employers of the outcome of the ballot ‘as soon as is reasonably practicable’, effectively means informing them on the same day the ballot results are known. *Network Rail* and the December 2009 *British Airways* decisions have established that the ‘Entitlement to vote’ definition contained in TULR(C)A s. 227 has to be interpreted so strictly that any accidental inclusion or exclusion of a small number of workers will invalidate the ballot, even where this was ‘on a scale which is unlikely to affect the result of the ballot’, effectively rendering the s. 232B ‘escape clause’ a dead letter. *Network Rail*, and the second BA High Court injunction, also established that the s. 231 obligation to inform workers of the ballot results ‘requires active steps to be taken to provide information’. This open-ended interpretation meant that informing the workers directly of the successful ballot result while referring them to other sources for the details of the ballot, constituted a breach of the union’s obligation. The Court of Appeal decision in *British Airways* in May 2010, explicitly called into question, and overruled, this narrow reading of the High Court, though the status of the legal rule introduced in *Network Rail* remains unclear.

This type of judicial activism would be problematic in and of itself, certainly to the extent that it detracts from legal certainty, and renders the exercise of lawful industrial action unreasonably difficult as well as unpredictable. A number of these decisions may also pose questions of *stricto sensu* judicial activism. At least three of these cases have been fought mainly on the union’s duty under TULR(C)A, s. 226A, from which the courts have derived and imposed another duty - of indeterminate scope - on trade unions to find information from members,\(^{20}\) shop stewards,\(^{21}\) and employers.\(^{22}\) The courts

\(^{19}\) *British Airways Plc v Unite the Union*, Court of Appeal (Civil Division), 20 May 2010 (not yet reported).

\(^{20}\) *British Airways Plc v Unite the Union* [2009] EWHC 3541 (QB).

may well run the risk of being accused of creating a substantive law which is impossible to comply with by the unions, and contrary to the intention of Parliament. But arguably these problematic aspects are further exacerbated by two further elements. Firstly by the procedural rules and the legal tests used by courts awarding interim injunctions against proposed strikes. Secondly, by the unwillingness of the courts to engage with the regulatory framework sustaining industrial action in the UK from a human rights perspective. These points are further discussed in the following two sections.

4. The traditional approach to awarding injunctions against strikes

While English courts display a considerable degree of judicial creativity in introducing increasingly restrictive interpretations of the - already stringent – statutory requirements for calling a ‘protected’ strike, they become extremely timid and ‘reticent’ when solicited to ‘engage with arguments based on international human rights and labour standards’.23 This is even more visible in the context of requests for interim injunctions advance by employers, where, as pointed out in this section they consistently prefer to operate well within the comfort zone traced by domestic procedural rules and the traditional common and equity law tests for injunctive relief. One of the arguments introduced towards the end of this section, and more comprehensively explored in the following one, is that the emerging human rights dimension of the right to strike, as evidenced by the jurisprudence of the ECtHR, will – sooner, rather than later - force them to reconsider their approach and, more specifically, the tests used to grant interim relief, and this through the very domestic mechanisms and jurisprudential precedents set by the Human Rights Act 1998 (HRA 1998).

Deakin and Morris rightly point out that ‘the true significance of interim injunctions in the industrial action context can be appreciated only with knowledge of the procedure by which they may be sought’.24 CPR Practice Direction 25A imposes upon applicants a duty to serve on the respondent trade union an application notice at least three days before the court hearing. However it also makes special provisions for ‘Urgent applications and applications without notice’ which have been interpreted by courts as being of particular relevance in the industrial action context. Under these special provisions, if a matter is sufficiently urgent, the application can be made, exceptionally without issuing a claim and without notice to the respondent. For these cases, TULR(C)A 1992 s. 221(1) provides that the court shall not grant an injunction unless satisfied that ‘all steps which in the circumstances were reasonable have been taken with a view to securing that notice of the application and an opportunity of being heard with respect to the application have been given to’ the union. English courts have been known to take a very relaxed approach in respect of this fragile guarantee, partly by requiring that only the steps, and not the notice in itself, be reasonable. So for instance in

22 Network Rail Infrastructure Ltd v National Union of Rail, Maritime & Transport Workers [2010] EWHC 1084 (QB)
Barratts they willingly granted an injunction without notice over the telephone on a Sunday afternoon, after the applicant employer had left a message with the union’s answering machine on a Friday evening after office hours. Adding insult to injury, when the union appealed for a discharge, the hearing was adjourned for a week because of pressure of business and a further two days passed before judgement was given. Obviously the urgency of factual circumstances justifying an injunction seem to be conceived differently depending on the applicant.

As for the traditional legal tests adopted by English courts asked to grant injunctive relief against strikes, they are fairly straightforward. In essence, and in spite of some marginal attempts by Parliament to introduce ‘restrictions on grant of injunctions’ in TULR(C)A 1992, s. 221, courts will fall back on the American Cyanamid test. There is ample evidence that, some thirty-five years since it was first adopted by the House of Lords, this test is enjoying a very healthy existence in the reasoning sustaining the award of injunctions against industrial actions. Cox J, in the 2009 BA case, explicitly referred to it, as well as to the s. 221(2) ‘adjustment’. Similarly Sharp J in Network Rail accepted that the employer had ‘a seriously arguable case under normal American Cyanamid principles’, and the test was invoked before the High Court in Milford Haven and implicitly replied upon in the second BA injunction.

American Cyanamid requires courts to establish that there is a ‘serious question to be tried’ and, if so, whether, on a ‘balance of convenience’, damages would be an adequate remedy for either side if its claim were vindicated at the actual trial. Both limbs of the test are not hard to satisfy in the context of strikes, and this is particularly true when an injunction is sought because the union is allegedly in breach of procedural and balloting requirements.

As for the first limb, its is fairly evident from the cases discussed in the previous section that, by viewing the procedural obligations contained in Part V of TULR(C)A 1992 as open ended and constantly amenable to expansive interpretation, English courts accept in principle that novel heads of liability may always arise. This is problematic per se, but it has the added side-effect of frustrating the industrial action protective rationale of s. 221(2), a provision prompting courts exercising their discretion to grant the equitable remedy, to have regard to the likelihood of the union ‘succeeding at the trial of the action in establishing’ the statutory immunities provided by s. 219, and the more specific ones provided by s.220 for peaceful picketing. But given the ease with which, in the context of balloting requirements, employers can suggest new heads of liability and, therefore, bring the action outside the statutory immunities provided by s. 219, the impact of s. 221(2) is largely frustrated.

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27 British Airways Plc v Unite the Union [2009] EWHC 3541 (QB), paragraph 80.
28 Ibid., paragraph 73.
29 Ibid., paragraphs 36 and 42.
Satisfying the second limb of the American Cyanamid is, if anything, an even easier task for employers and their counsel. The statutory limitations on damages awarded against trade unions in actions in tort, contained in s. 22 TULR(C)A 1992, mean that damages will rarely be viewed as adequate compensation for the employer. Conversely the damages suffered by the union are harder to quantify, and courts have been traditionally reluctant to accept the view that timing is of the outmost importance in industrial relations.30 Moreover, in recent years, courts have further altered the balance of convenience test to the detriment of unions by throwing the equivalent of Brennus’ sword on the employer’s pan, in the form of the ‘damage to the public interest’ notion.31 The best example to date of how different notions of ‘damage’ can mutually reinforce each other to the detriment of the union’s position is provided by the 2009 BA injunction against Unite, with Cox J opining that ‘a strike of this kind taking place now, over twelve days of the Christmas period, is in my view fundamentally more damaging to BA, and indeed to the wider public, than a strike taking place at almost any other time of year. For the reasons I have given the balance of convenience, in my judgment, lies firmly in favour of granting relief’.32

It is fair to say that, to date, the domestic normative and jurisprudential debate over the ‘right’ to strike has very much emerged in relative isolation from the emerging human right discourse which has been steadily developed by the ECtHR, and indeed the European Union, over the last few years. The strenuous attempts of Unite’s counsel in Metrobus to establish a link between the domestic and the European human rights discourse were met with diminishing comments by the judges deciding those cases.33 A further consequence of Metrobus’ reluctance to engage with this discourse was that subsequent cases deferred to it as a binding precedent, and similarly neglected the European, and international, human rights dimension of industrial action.34 Even where courts, as in EDF v RMT, reluctantly accept that industrial action ought to be considered from a human rights perspective, this acceptance ‘is not absolute and can be defined according to national law, and proportionate derogations from it may be permissible’.35 In this sense, the requirements as to pre-strike notification and ballots are seen as ‘not onerous or oppressive and [do] not unduly restrict the exercise of the right to strike’.36

There should be little doubt about the intimate connection between the right to strike and a number of international human rights sources, first and foremost, Article 11 ECHR. As the ECtHR pointed out already in 2007, ‘En ce qui concerne le droit de grève, la Cour rappelle que si l'article 11 ne le consacre

31 Associated British Ports v Transport and General Workers Union [1989] 3 AllER 822.
32 Ibid., paragraph 83.
34 British Airways Plc v Unite the Union [2009] EWHC 3541 (QB), paragraph 29.
36 Ibid, paragraph 4.
pas expressément, son octroi représente sans nul doute l'un des plus importants des droits syndicaux. Demir and Enerji Yapı Yol Sen have further consolidated this important jurisprudence of the Strasbourg Court.

But arguably the emerging human rights dimension of the right to strike need not exclusively require a careful scrutiny of existing UK legislation on industrial action but also, and this is the final argument developed in this paper, of the High Court’s jurisdiction when faced with employers' requests to award injunctions against strikes in a fashion that, arguably, engages Article 11 ECHR. Lying in the background of this argument is the equally fundamental question of whether the tests and reasoning used by the courts satisfy Articles 6 and 11 ECHR and HRA 1998 requirements. The following paragraphs suggest that these questions and preoccupations would be best addressed by the adoption of a proportionality test in the award of interlocutory injunctions against strikes.

5. Injunctions, fair trial, and proportionate interference with the right to strike

On the reasonable assumption that the right to strike is indeed a fundamental right derived from Article 11 ECHR, the present section suggest that injunctive relief restricting the exercise of the fundamental right to strike should not be awarded on the basis of the American Cyanamid formula, as slightly modified by TULR(C)A 1992, and that instead it must be justified as being no more than is necessary and proportionate in a democratic society, as demanded by Article 11(2) ECHR.

We advance this suggestion on the basis of three main normative arguments, discussed in the following subsections. Firstly we will highlight that English courts should, and indeed ought to, apply human rights doctrines in the award of interim injunctions in industrial action cases. While they may shy away from the responsibility of reviewing ‘the extent to which the current statutory regime is in compliance with those international obligations and with relevant international jurisprudence will fall to be carefully reconsidered’, the combined effect of Article 6 ECHR and sections 6(1) and 3(a) HRA 1998 require them to reassess their procedural practices for the award of interim injunctions and ensure that they are human rights compliant.

Secondly, a contextual analysis of the award by British courts of injunctions interfering with fundamental rights unequivocally indicates that American Cyanamid no longer provides the correct set of legal tests for awarding injunctive relief. While this contextual analysis does not point conclusively to a single alternative test applicable in the human right context, it clearly indicates that awarding injunctions against strikes on the basis of the existence of a ‘serious question to be tried’ and of the adequacy of damages as a remedy

37 Dilek and Others v Turkey, Applications No. 74611/01, 26876/02 and 27628/02, 17 July 2007, paragraph 68.
39 British Airways Plc v Unite the Union [2009] EWHC 3541 (QB), paragraph 27.
under the ‘balance of convenience’ limb of the test, is no longer – if it ever was - good law.

Thirdly, we suggest that the tests and reasoning sustaining the award of interim injunction in the industrial action cases should be based on the relief eventually provided being necessary and proportionate in a democratic society, as demanded by Article 11(2) ECHR. This argument builds on the solid foundations of the ECtHR jurisprudence established in Unison v UK, a judgement which, for all its weaknesses, accepted that injunctions can be viewed as an interference with Article 11, and that the Court will subject them to a proportionality review. We conclude by sketching out how this test may be outlined and operate in practice.

a. Article 6 ECHR and interim injunctions

Historically Article 6 has not been seen as covering interlocutory court proceedings. While the ECtHR interpreted the ‘right to a fair trial’ in the broadest possible way as to bring within its scope a very extensive number of jurisdictions and stages of proceedings, the orthodox position in respect of interlocutory proceedings in general, and of requests for interim relief in particular, has been overwhelmingly a negative one. This was ‘based upon the view that a person’s rights and obligations are only being determined in the sense of Article 6(1) when … being ruled upon on the merits’. The corollary of this strict, and much criticised, doctrine was that Article 6 would indeed be engaged whenever an interim measure could be considered effectively to determine the civil right or obligation at stake, being tantamount of a decision on the merits.

This latter last point alone could have swayed domestic judges, deciding on the award of injunctions in industrial action cases, to engage with the human right impact of the procedural and equitable remedies at hand. In recent months however, with the Grand Chamber’s judgement in Micallef v Malta, the Strasbourg Court’s jurisprudence on this fundamental aspect of the right to fair trial has gone through a dramatic evolution, with the Court asserting that

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41 Ewing and Hendy, ‘The Dramatic Implications of Demir and Baykara’, 12.
46 Ibid., 235.
48 Though as pointed above in section 3 English courts have traditionally evaded the question of whether the award of an interim injunction amounts, de facto if not also de jure, to a decision on the merits of the industrial dispute.
whenever an interim measure can be considered effectively to determine the
civil right or obligation at stake [...] Article 6 will be applicable.\textsuperscript{49} Given the
broad concepts of ‘civil right’ and ‘determination’\textsuperscript{50} in the Court’s established
jurisprudence, there seems little doubt that interim measures in the context of
industrial action, and the procedural steps leading to their award, ought to be
brought within Article 6 ECHR.

Two important considerations follow from these developments. Firstly, and
just to state the obvious, when asked to make sure that their procedures and
their exercise of their margin of appreciation in the award of injunctions
against strikes is human rights compliant, British courts will not be able to
claim that interim measures are outside the scope of Article 6 ECHR.
Secondly, and most importantly, they will have to make sure that the
procedures they follow are indeed respectful of the fundamental right to a
fair trial. Awarding injunctions without notice over the telephone on a Sunday
afternoon, after the applicant employer left a message with the union’s
answering machine on a Friday evening and after office hours,\textsuperscript{51} falls quite
obviously below the Article 6 right to effective access and fair hearing. But of
course we could point to less obvious examples in which important rights
derived from Article 6 ECHR, from fair hearing to equality of arms, are
undermined by the existing Civil Procedure Rules as applied by UK Courts.

In concluding this section we would also like to highlight that the emerging Court of Justice of the European Union
(CJEU) jurisprudence on the right to strike,\textsuperscript{52} as well as the entry into force of the EU Charter on Fundamental
Rights, may soon lead to the emergence of an EU law dimension to the award on interim injunctions in the context
of industrial action, in parallel with the ECHR. In contrast with the Strasbourg Court, the European Court of Justice
has long established a number of conditions before a national court can grant interim relief against a Community
norm, requiring among the other things, the presence of an ‘urgency and a threat of serious and irreparable
damage to the applicant’.\textsuperscript{53} On this latter point, in Zuckerfabrik, the ECJ noted that ‘with regard to the nature of the
damage, purely financial damage cannot … be regarded in principle as irreparable’.\textsuperscript{54}

b. HRA 1998 and interim injunctions

Having established that interim injunctions in the industrial action context fall
within Article 6, and having argued before that the right to strike is covered by
Article 11 ECHR, we now move one to assess whether American Cyanamid,
the traditional test used by English courts in this context, can be seen as
complying with Article 6 and 11 ECHR and sections 6(1) and 3(a) HRA 1998.
There are several reasons to believe that this is no longer the case, although
the confusing and inordinate state of English law on this important question
does not point univocally at the legal tests that should be used in the
alternative.

\textsuperscript{49} Micallef \textit{v} Malta, Application No. 17065/06, 15 October 2009, paragraph 85.
\textsuperscript{50} Ibid., paragraphs 75, 83-86.
\textsuperscript{52} Case C-436/05, International Transport Workers’ Federation and Finnish Seamen’s
Union [2007] ECR I-10779, paragraph [43]-[44]; and Case
C-341/05, Laval un Partneri [2007] ECR I-11767 paragraphs [94]-[95].
\textsuperscript{53} Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen AG \textit{v} Hauptzollamt
Itzehoe, [1991] ECR I-415, [33].
\textsuperscript{54} Ibid.
Pre-HRA 1998, this would have been a moot question. In the *Spycatcher* case domestic courts relied explicitly on *American Cyanamid* to award their injunctions, raising few if any questions in Strasbourg. But the introduction of the Human Rights Act 1998 has dramatically changed this state of affairs. For instance in the context of freedom of expression, s. 12(2) and 12(3) of the Act, as interpreted by the House of Lords in *Cream*, have substantially altered the role of *American Cyanamid* when Article 10 ECHR is affected. As noted by Lord Nicholls Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a “serious question to be tried” or a “real prospect” of success at the trial.

Arguably though, the most evident departure from the American Cyanamid test has occurred in the context of interim measures affecting Article 8 ECHR, and this without HRA 1998 providing an explicit statutory encouragement for a tightening up of the criteria for their conferral. Without entering into the details of British planning legislation, it may be worthwhile mentioning the important decisions of the Court of Appeal, and of the House of Lords, in *South Bucks DC v Porter*. The Court of Appeal was adamant that, in awarding planning injunctions under s. 187B of the Town and Country Planning Act 1990, courts had a ‘duty under s.6(1) to act compatibly with convention rights’ and needed to make sure that the injunctions be ‘proportionate’.

‘Proportionality requires not only that the injunction be appropriate and necessary for the attainment of the public interest objective sought — here the safeguarding of the environment — but also that it does not impose an excessive burden on the individual whose private interests — here the gipsy's private life and home and the retention of his ethnic identity — are at stake’

In the House of Lord, Lord Bingham, reinforced this very point by saying that

‘As a public authority, the English court is prohibited by section 6(1) and (3)(a) of the Human Rights Act 1998 from acting incompatibly with any Convention right as defined in the Act… . It follows … that when asked to grant injunctive relief … the court must consider whether, on the facts of the case, such relief is proportionate in the Convention sense, and grant relief only if it judges it to be so. Although domestic law is expressed in terms of justice and convenience rather than proportionality, this is in all essentials the task which the court is in any event required by domestic law to carry out’.

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56 *Observer and Guardian v UK* (1991) 14 EHRR 153. Note however the strong dissent on the use of *American Cyanamid* by the dissenting judgement of Judge Martens.
57 Requiring that ‘No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed’.
60 *South Buckinghamshire DC v Porter (No.1)* [2003] AC 558 HL, upholding CA at [2001] EWCA Civ 1549.
62 *South Buckinghamshire DC v Porter (No.1)* [2003] AC 558 HL, paragraph 37 (Lord Bingham of Cornhill).
These judgements, and the previous paragraphs, highlight the progressive decline of the American Cyanamid test as the correct authority and legal process for awarding injunctions when human rights are at stake. This is a dynamic that has already attracted some doctrinal attention. But while there would appear to be an emerging consensus over the inadequacy of American Cyanamid, there is admittedly less clarity in respect of which test or tests ought to be used in its stead. The following paragraphs argue that in the Article 11 ECHR context, proportionality would be the most suitable test, and briefly outline, by reference to ECtHR jurisprudence on freedom of associations, its possible facets.

c. Injunctions and the fundamental right to strike. A proportionality approach

Article 11(2) is unequivocal about the interferences with freedom of association. They can only be justified if they satisfy three main conditions. Firstly they must be ‘prescribed by law’. Secondly, they must be adopted for the protection of one of the four groupings of legitimate aims specified in Article 11(2), namely ‘national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others’. Thirdly, they must be ‘necessary in a democratic society’. We can assume, from our discussion in the previous sub-sections and from the case-law of the ECtHR, that interim injunctions are included in the concept of interference or limitation and therefore also need to satisfy these basic conditions. In UNISON v UK the Court had no hesitation in considering the union’s submission “that the decision of the Court of Appeal prohibiting the strike … was a disproportionate interference with its right, under Article 11, to take effective action to protect its members’ interests”, even if ultimately ‘in a weak decision, the ECtHR … proffered no rationale in support of the thesis that it is necessary in a democratic society that industrial action must be confined to a dispute between existing workers and their existing employer’.

As it may already be evident, the thorniest aspect of the test, is ascertaining what is ‘necessary in a democratic society’, a question that according to the Strasbourg court in Demir and Baykara, has to be assessed by reference to the ‘proportionality’ principle, requiring it to determine whether [the interference] was “proportionate to the legitimate aim pursued”. Thorny as it may be, this part of the test is also the most important in the context of industrial action, as in most cases it will be the ‘make or break’ element in allowing unions and workers their fundamental right to strike. In fact, most of

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64 UNISON v UK, Application No. 53574/99, 10 January 2002.
65 Ibid.
67 Demir and Baykara v Turkey, Application No. 34503/97, 12 November 2008.
68 Ibid., paragraph 97.
69 Ibid., paragraph 119.
the times – though of course not always – employers and domestic courts will find it relatively easy to claim that a restriction is prescribed by law, and that collective action interferes with the rights of others, be they employers, other workers, or the public at large. Strikes, almost by definition, interfere with the rights and interests of businesses and their customers. If they did not, there would be little point in organising them. However, even when such interference is established, Article 11(2) demands that the restrictions to freedom of association and the right to strike are also ‘necessary in a democratic society’. Courts would have to apply this limb of the test in a particularly restrictive way, for the right to strike to receive the meaningful and effective protection advocated by the ECtHR. In *Handyside v UK*, this requirement was elaborated as ‘comprising three criteria that must be fulfilled: the interference must answer a pressing social need, it must be supported by relevant and sufficient reasons, and it must be proportionate to the legitimate aim pursued’. If the balance struck by the State is disproportionate, this ‘will result in the Court finding that the measure of limitation is not necessary’.

Proportionality is admittedly a rather elusive notion. The principle requires the restriction, or more precisely the intensity of the restriction, not to be excessive in relation to the legitimate interests giving rise to it. This assessment, it has been noted, ‘is not a scientific process’, and does grant a considerable margin of appreciation to the state. But, still, there are a few recognised limits to this margin, both general and specific. As a general proposition applying to all the rights protected by Articles 8-11 ECHR, the Court will take the view that a measure is disproportionate ‘where there is an alternative, less intrusive way of protecting the public interest’, or ‘where it is purposeless, that is where the object cannot be achieved by the interference’. But the availability of alternatives, or the lack of it, should not be seen in isolation. In *Young, James and Webster*, for instance, the Court found that even without a closed-shop arrangement, ‘the railway unions would in no way have been prevented from striving for the protection of their members’ interests’. But, as noted by Christoffersen, ‘the availability of alternatives played a role, but the interference was very intense’. Surely the same could be said of the interference of injunctions which, as noted above, effectively prevent the exercise of the right to strike. Being such a drastic measure it ought to be awarded only in the most egregious cases of violation of the protected aims of Article 11(2).

But the proportionality reasoning also ought to convince courts that they would be in breach of Article 11(2) when granting an injunction due to the union’s procedural error, when that error had not had any material consequence on the outcome of the ballot. In such cases, and in the absence of other relevant

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70 *Handyside v UK*, Application No. 5493/72, 7 December 1976.
73 Harris et al., Law of the European Convention of Human Rights, 359.
74 Ibid.
75 *Young, James and Webster v UK*, Application No. 7601/76; 7806/77, 22 June 1981, paragraph 64.
76 Christoffersen, ‘Fair Balance’, 127.
circumstances, there would be no ‘relevant and sufficient reasons’ to interfere with the exercise of the right to strike. The ECtHR does not view procedural formalism with a positive eye when it interferes with Article 11.\(^{77}\) In the 2008 judgement *Sergey Kuznetsov v Russia*,\(^ {78}\) the applicant complained that he had been subjected to administrative measures for holding a lawful picket. The picket had been held in breach of the established domestic procedure for organising public assemblies, in that the applicant had sent the picket notice eight days before the picket date, whereas both the relevant national and local regulations on public assemblies established a ten-day notification period. The Court, while accepting that a breach of the procedural requirement had taken place, was unsympathetic to the formalistic approach of the Russian authorities, and held that

‘it does not appear that the two-day difference in any way impaired the authorities’ ability to make necessary preparations for the picket…. . In these circumstances, the Court considers that a merely formal breach of the notification time-limit was neither relevant nor a sufficient reason for imposing administrative liability on the applicant’.\(^ {79}\)

Once more it would appear that a proportionality test applied to the award of injunctions against strikes should compel English courts to reconsider their stance.

6. Conclusions

This paper has advanced the argument that the procedural and jurisprudential approach followed by English courts in granting injunctions against strikes is at odds with the emerging human rights nature of the right to strike. More precisely it has argued that the courts’ approach in this area of industrial law may well be inconsistent with the ECtHR’s emerging jurisprudence on Articles 6 and 11 ECHR, as evidenced by cases such as *Micallef*,\(^ {80}\) *Kuznetsov*,\(^ {81}\) and a number of other judgements more directly connected with the exercise of the right to strike. Through an analysis of some of the recent domestic cases in which courts ordered injunctions against strikes on a number of procedural grounds, and after consideration of the ECtHR’s jurisprudence on the right to fair trial as applicable to interim injunctions and on freedom of association and the breach of procedural requirements, this paper argued that domestic judges should abandon the traditional, *American Cyanamid*-based,\(^ {82}\) test typically used in awarding interlocutory injunctions in industrial action cases, in favour of the more human rights-attuned ‘proportionality test’. The paper has also supported this argument by reference to the emerging domestic

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\(^{78}\) *Sergey Kuznetsov v Russia*, Application No. 10877/04, 23 October 2008.

\(^{79}\) *Sergey Kuznetsov v Russia*, Application No. 10877/04, 23 October 2008, paragraph 43.

\(^{80}\) *Micallef v Malta*, Application No. 17065/06, 15 October 2009, paragraph 85.

\(^{81}\) *Sergey Kuznetsov v Russia*, Application No. 10877/04, 23 October 2008.

\(^{82}\) *American Cyanamid Co. v Ethicon Limited* [1975] AC 396.
jurisprudence under HRA 1998 signalling a steady departure from *American Cyanamid* as the right test for interim injunctions when fundamental human rights are at stake.

The use of a proportionality test may not invariably result in a favourable result for the unions and an adverse one for the employers, and this partly because of the overall regulatory framework limiting the exercise of the right to strike in the United Kingdom.\(^8^3\) In any case it should be clear that the suggestion that proportionality should be used instead of *American Cyanamid* is not made on policy grounds, but on grounds of legal analysis and legal rigour. In other words, proportionality should be used not because it may, or may not, result in union-friendly outcomes, but because it is the correct test to be used in a human rights context. In this sense we advocate a change that is in many respects comparable to the abandonment of the *Wednesbury* rule in favour of the proportionality test, in the context of human rights based judicial review. Having said that, we feel that a proportionate application of the power to grant interim injunctions should at the very least involve disregarding minor breaches of the balloting and notice requirements where those minor breaches do not affect the capacity of the union members or the employer to decide what to do about the proposed industrial action - which has to be the purpose of those requirements.

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\(^8^3\) Which is currently the object of a reference to the ECtHR in *RMT v United Kingdom*. 
**Bibliography**


