Industrial Action: the present limitations on the ability of trade unions to call industrial action

By Craig Ludlow[1]

Introduction

1. In this article I argue that the ability of trade unions to call industrial action in England is limited both by common law and statutory barriers to immunity in tort; and narrowed very considerably since the passing of the Trade Union Act 2016 ('TUA')[2]. It is acknowledged that the recognition of the right to strike in the Council of Europe ('CoE') has been of some assistance to unions in overcoming these obstacles, most notably in relation to overcoming minor errors of compliance with the complex statutory balloting and notice provisions[3], changing the approach taken by English courts in assessing applications made by employers for interim injunctions[4], and establishing that strike action is clearly protected[5] by Article 11 of the European Convention of Human Rights ('ECHR').[6] Nonetheless it will be further argued that both the European Court of Human Rights ('ECtHR') and English courts remain all too willing to grant the legislature a wide margin of appreciation[7] when considering the imposition of allegedly lawful restrictions in respect of interferences with Article 11 of the ECHR and thereby ignoring ECtHR case law that such restrictions should be construed strictly[8].

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[2] Dukes and Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) 45(3) ILJ 337.

[3] **Serco Ltd (trading as Serco Docklands) v National Union of Rail, Maritime & Transport Workers; London & Birmingham Railway Ltd (trading as London Midland) v Associated Society of Locomotive Engineers and Firemen** [2011] EWCA Civ 226, [2011] ICR 848 ('**Serco**'); **Balfour Beatty Engineering Services v Unite** [2012] ICR 822, [2012] IRLR 452 ('**Balfour Beatty**'); **Thomas Cook Airlines Ltd v British Airline Pilots Association** [2017] EWHC 2253 (QB) and **British Airways Plc v British Airline Pilots Association** [2019] EWCA Civ 1663 ('**BALPA**').

[4] **Serco Ltd (trading as Serco Docklands) v National Union of Rail, Maritime & Transport Workers** [2011] EWCA Civ 226, [2011] ICR 848, paras.10-13 (per Elias LJ).

[5] **National Union of Rail, Maritime and Transport Workers v United Kingdom** (Application no. 31045/10), (2015) 60 EHRR 10, [2014] ECHR 366, 37 BHRC 145, [2014] IRLR 467 ('**RMT**'), at para.84.

[6] https://www.echr.coe.int/documents/convention_eng.pdf

[7] **National Union of Rail, Maritime and Transport Workers v United Kingdom** ('**RMT**') (Application no.31045/10), (2015) 60 EHRR 10, [2014] ECHR 366, 37 BHRC 145, [2014] IRLR 467, at para.87 (ECtHR) and **Secretary of State for Justice v Prison Officers Association** [2019] EWHC 3553 (QB), paras.91 and 95.

[8] **Demir and Baykara v Turkey** (Application no. 34503/97), (2009) 48 EHRR 54, [2009] IRLR 766, [2008] ECHR 1345 ('**Demir**').

English common law and statutory framework on industrial action

2. Examples of industrial action range from strikes to lesser forms of action, including bans on overtime, go-slows, work-to-rule campaigns, boycotts, and picketing.[9] This paper will focus on strikes, which is defined in the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') as 'any concerted stoppage of work'[10].

3. In England there is no right to strike either at common law or in domestic legislation. Those who take part in strike action will therefore usually be acting in breach of their contract of employment[11] and unions who call for such action will be liable for inducing a breach of contract and potentially other economic torts. To enable unions to organise industrial action and employees to participate in the same, Parliament has granted certain immunities to tortious actions.

4. The statutory immunity against tort liability for strike organisers is set out in s.219 TULRCA. The torts covered are readily identifiable as inducing breach of contract (subsection (1)(a)), intimidation (subsection (1)(b)), and simple conspiracy (subsection (2)). Torts such as trespass, nuisance, and inducement to breach statutory duty[12] are not protected. If s.219 does not apply, then the industrial action will be unlawful.

5. Assuming that the tort(s) committed by the union are covered by s.219, the next step is to ascertain whether it acted 'in contemplation or furtherance'[13] of a 'trade dispute' (together known as the 'golden formula').

6. A "trade dispute" is defined at s.244(1)(a)-(g) TULRCA as meaning:

> *'…a dispute between workers and their employer which relates wholly or mainly to one or more of the following:*
> *(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;*
> *(b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;*

[9] **Midland Plastics v Till and ors** [1983] ICR 118; IDS Employment Law Handbooks, volume 7, chapter 1.27.
[10] Section 246, TULRCA.
[11] **Simmons v Hoover** [1977] QB 61, at 75H-76B,F-H; **BALPA**, at para.4.
[12] **Associated British Ports v TGWU** [1989] 3 All ER 796, [1989] IRLR305, CA.
[13] Judged subjectively: **Express Newspapers Ltd v McShane** [1980] AC 672 (HL); **Duport Steels Ltd v Sirs** [1980] ICR 161 (HL).

(c) allocation of work or the duties of employment between workers or groups of workers;

(d) matters of discipline;

(e) a worker's membership or non-membership of a trade union;

(f) facilities for officials of trade unions; and

(g) machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures.'

7. Because the trade dispute must be between 'workers and their employer', this means 'secondary action' is excluded from the scope of protection. The dispute must relate 'wholly or mainly' to the matters listed in (1)(a)-(g), so unions must devise the aims of a strike carefully to ensure that any 'unprotected' issues of concern to their members are not presented as aims of the strike. Wider aims outside of the listed matters i.e. a political strike or an increase in the statutory minimum wage, are not permissible objectives for a strike and will be unlawful.

8. The exclusion of strikes with political purposes and the 'wholly or mainly' requirement taken together can cause limitations on the ability of public sector unions to call industrial action.[14]

9. Ss.222-225 TULRCA identify four situations in which the immunity is not available:

(1) Action to enforce trade union membership.[15]
(2) Action taken because of dismissal for taking unofficial action.[16]
(3) Secondary action (which is not lawful picketing).[17]
(4) Pressure to impose union recognition requirement.[18]

10. Almost certainly the most significant two further limitations on the availability of the immunity is a union's ability to comply with the complex procedural rules about getting the support of a ballot and giving notice to the employer of the proposed industrial action:

[14] **Mercury Communications Ltd v Scott-Garner** [1984] Ch 37 (CA).
[15] S.222, TULRCA.
[16] S.223, TULRCA.
[17] S.224, TULRCA.
[18] S.225, TULRCA.

(1) the requirement in s.226, which means that a union is not protected by immunity unless the industrial action has the support of a ballot in relation to which the detailed rules set out in ss.226-234 have been complied with; and
(2) s.234A, which means that a union is not protected by immunity unless it has taken such steps as are reasonably necessary to ensure that the employer receives within the appropriate period a relevant notice of the taking of industrial action.

11. From 2016, s.3 TUA[19] introduced two additional significant requirements to compulsory balloting which are only likely to further limit trade unions' ability to call industrial action (particularly where there is a geographically diverse workforce), namely:

- For all ballots, at least 50% of those who were entitled to vote must in fact cast a vote[20].
- For ballots where the majority of those entitled to vote are at the relevant time '*normally engaged in the provision of important public services*', 40% of the electorate must vote 'Yes'[21].

12. The apparent downgrading of 'essential public services' to 'important public services' in the TUA amendments is notable, particularly as the ILO supervisory bodies only permit services to fall under the umbrella of 'essential services' in the strict sense of the term i.e. '*services whose interruption could endanger the life, personal safety or health of the whole or part of the population*'.[22] It perhaps indicates a future intention to widen the scope of the potentially justifiable restrictions to Article 11 under the guise of the state's margin of appreciation and thereby increase the limitations on trade unions' ability to call industrial action.

[19] Amending s.226, TULRCA.

[20] Section 226(2)(a)(iia), TULRCA.

[21] Section 226(2A)-(2F), TULRCA.

[22] CFA, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edition 2006), chapter 10, para.541: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf

Recognition of the right to strike in the Council of Europe

13. The ECtHR is part of the CoE and is the permanent judicial body which guarantees the rights safeguarded by the ECHR.

14. The Human Rights Act 1998 ('HRA') incorporates the ECHR into English law.[23] S.2(1)(a) HRA provides that a court determining a question which has arisen in connection with an ECHR right must take into account any judgment of the ECtHR. S.3 HRA provides that '*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights*'.

15. The ECHR does not contain an express right to strike, but Article 11 provides the qualified right to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

16. In what some academic commentators enthusiastically referred to as an '*epoch-making*' judgment[24] and the '*midwife*' of other major developments in which the ECtHR now recognises the right to strike as the youngest offspring of the maturing Article 11[25], in **Demir**[26] the Grand Chamber of the ECtHR upheld a complaint that there had been a violation of Article 11 when Turkey had denied the complainants the right to form trade unions and to enter into collective agreements.

17. Crucially, the judgment variously and purposively states that: in defining the meaning and notions in the text of the ECHR the ECtHR can and must take into account elements of international law other than the ECHR with the interpretation of such elements by competent organs[27] and any relevant rules and principles of international law applicable in relations between Contracting Parties[28]; that the evolution of case law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the ECtHR takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly the ECtHR does not accept that restrictions that affect the essential elements of trade union freedom, without which

[23] https://www.legislation.gov.uk/ukpga/1998/42/data.pdf
[24] Ewing and Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 ILJ 2 at 47.
[25] Ewing and Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39(1) ILJ 2, at 4.
[26] Ibid., n.8.
[27] Ibid., n.8, at para.85.
[28] Ibid., n.8, at para.67.

that freedom would become devoid of substance[29]; and that the right for a trade union to seek persuade the employer to hear what it has to say on behalf of its members and the right to bargain collectively with the employer have become essential elements of the "*right to form and to join trade unions for the protection of [one's] interests*"[30].

18. The judgment in **Demir** was quickly followed by **Enerji Yapi-Yol Sen v Turkey**[31], where the ECtHR stated:

"…Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests…The Court also observes that the right to strike is recognised by the International Labour Organisation's (ILO) supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights...It recalls that the European Social Charter also recognises the right strike as a means of ensuring the effective exercise of the right to collective bargaining…'[32].

19. Following **Demir** and its emphasis on interpreting the ECHR in light of external international instruments and material and the judgment in **Enerji** apparently confirming that the right to strike is an essential and indissociable corollary of the right to collective bargaining, it became relevant in Article 11 litigation that there were express rights to strike contained in article 6(4) of the CoE's European Social Charter 1961[33] ('ESC'), article 8(1)(d) of the United Nations' International Covenant on Economic, Social and Cultural Rights 1966[34] ('ICESCR'), and article 28 of the EU Charter of Fundamental Rights[35], as these should all now be referred to by the ECtHR and English courts in coming to judgments on Article 11 matters.

20. Like the ECHR, the International Labour Organisation ('ILO') instruments do not contain an express right to strike and the obligations under the ILO Conventions do not create legally enforceable rights (which is the same as the ICESCR). However,

[29] Ibid., n.8, at para.144.
[30] Ibid., n.8, at paras.145 and 154.
[31] Application No 68959/01 (unreported), 21 April 2009.
[32] Ibid., at para.24.
[33] https://rm.coe.int/168006b642
[34] https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx
[35] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

key ILO supervisory bodies, the Committee on Freedom of Association ('CFA')[36] and the Committee of Experts on the Application of Conventions and Recommendations ('CEACR')[37] have both stated that the right to strike is inherent in freedom of association and should therefore be protected by States signed up to Convention 87 and under the ILO Constitution[38]. Both committees link the right to strike with collective bargaining. They acknowledge that the right to strike is not unlimited, but have been concerned to ensure that any limitations, such as balloting or notice requirements, are not designed so as to place a substantial limitation on the exercise of the right to strike[39].

21. Additionally, the UN Committee on Economic, Social and Cultural Rights has stated that the UK's failure to incorporate the right to strike into domestic law constitutes a breach of Article 8 ICESCR[40] and the European Committee of Social Rights has found that UK law was in breach of Article 6(4) ESC (including the requirement to give notice to an employer of a ballot on industrial action in addition to the strike notice that must be issued before action being excessive).[41]

22. Therefore post-judgments in **Demir** and **Enerji**, all of the aforementioned international instruments and material became relevant and admissible in courts for unions seeking to make breach of Article 11 arguments and thereby overcome limitations on their ability to call industrial action imposed upon them by common law and statutory barriers. This was a significant development.

23. However, disappointingly for the unions, in **Metrobus**[42] the Court of Appeal dismissed a union's appeal against the granting of an injunction against it for minor breaches of the TULRCA balloting and notice provisions. The Court appeared to almost casually dismiss the union's breach of Article 11 arguments based on **Demir** and **Enerji**, when it stated:

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[36] CFA, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edition 2006), chapter 10, paras.520-676: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf

[37] CEACR, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008* (2012), pages 46-65: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

[38] ILO, Convention 87 on Freedom of Association and Protection of the Right to Organise (1948): https://www.ilo.org/legacy/english/inwork/cb-policy-guide/freedomofassocandrighttoorganiseno87.pdf

[39] Ibid., n.36, para.547.

[40] See Concluding Observations of the UN Committee on Economic, Social and Cultural Rights 1997 (UK), para.11 and 2002 (UK), para.16.

[41] Council of Europe, European Committee of Social Rights, *Conclusion XIX-3* (2010).

[42] [2009] EWCA Civ 829; [2010] ICR 173.

"The contrast between the full and explicit judgment of the Grand Chamber in the Demir and Baykara case on the one hand, and the more summary discussion of the point in the Enerji Yapi-Yol Sen case on the other hand is quite noticeable. It does not seem to me that it would be prudent to proceed on the basis that the less fully articulated judgment in the later case has developed the court's case law by the discrete further stage of recognising a right to take industrial action as an essential element in the rights afforded by article 11"[43].

24. Nonetheless in **Serco**[44], the Court of Appeal allowed an appeal against an injunction which had been granted against the trade union where the High Court judge had found that the union was in minor breach of various sections of the balloting provisions of TULRCA. Elias LJ stated:

'*Although the common law recognises no right to strike, there are various international instruments that do: see for example Article 6 of the Council of Europe's Social Charter and ILO Conventions 98 and 151. Furthermore, the ECHR has in a number of cases confirmed that the right to strike is conferred as an element of the right to freedom of association conferred by Article 11(1) of the European Convention on Human Rights which in turn is given effect by the Human Rights Act. This right is not unlimited and may be justifiably restricted under art 11(2) "*[45].

25. Thus it can be seen with direct reference in particular to the CoE's ESC and adopting the **Demir** and **Enerji** approach to dealing with alleged Article 11 violations, recognition of the right to strike in the CoE was of assistance to the union in overcoming the statutory barriers. Indeed it seems that this approach encouraged Elias LJ to go further in two respects and hold that: (1) just because the unions were seeking to take advantage of an immunity did not mean that it should be construed strictly against them, rather it should simply be construed in the normal way, without presumptions one way or the other. The starting point as far as TULRCA is concerned is that it should be given a "*likely and workable construction*"[46]; and (2) in applications for interim injunctions where the test usually applied was that set out in **American Cyanamid v Ethicon Ltd**[47], in the context of considering whether a union would be

[43] Ibid., at para.36 (per Lloyd LJ).
[44] Ibid., n.4.
[45] Ibid., at para.8.
[46] Ibid., at para.9.
[47] [1975] AC 396.

likely to be able to establish at trial that the immunities were applicable, s.221 TULRCA and the likelihood of the union establishing its defence at trial should now be the focus[48].

26. In the aftermath of **Demir**, **Enerji** and **Serco**, unions could be forgiven for thinking that the tide had turned in their favour in their battle to overcome barriers to their ability to call industrial action. However, in **RMT**[49], the ECtHR handed down a judgment which has been strongly described as a *'…poorly reasoned and barely consistent judgment, by what looks like a weak, bullied and timid court'*[50], albeit the same commentators acknowledged that it significantly advanced ECHR jurisprudence owing to it stating '*strike action is clearly protected by Article 11*'[51]. It follows from the latter point that assuming that this judgment is followed, it does assist unions to the extent that employers will at least have to justify any restrictions pursuant to Article 11(2) if they seek to impose restrictions on the right to strike.

27. In **RMT**, the complaint concerning the pre-strike notice provisions was rejected as inadmissible, and while secondary industrial action engaged Article 11[52] it attracted a lower level of protection under Article because it '*constitutes an accessory rather than a core aspect of trade union freedom*'[53]. Thus the UK's complete ban on secondary action was regarded as justified under Article 11(2) on the basis of a wide margin of appreciation afforded to the State. Thus the ECtHR seems to give with one hand and take back with another[54], as based on no discernible legal principle of 'accessory' the ECtHR created an additional exception to the right it had only just confirmed existed.

28. Furthermore, in **Secretary of State for Justice v Prison Officers Association**[55] the SoS sought an order of appropriate penalty against the POA for alleged civil contempt for twice breaching a permanent injunction ordered in 2017 prohibiting the POA from inducing, authorising or supporting any form of industrial action by a prison officer. The POA contested the injunction issued in 2017 on the basis of Article 11, citing

[48] Ibid., n.4, at paras.10-13.
[49] Ibid., n.5.
[50] Bogg and Ewing, 'The Implications of the RMT Case' (2014) 43(3) ILJ 221, at 251.
[51] Ibid., n.5, at para.84.
[52] Ibid., n.5, at paras.76-78.
[53] Ibid., n.5, at para.77.
[54] Bogg and Ewing, 'The Implications of the RMT Case' (2014) 43(3) ILJ 221.
[55] [2019] EWHC 3553 (QB), [2020] ICR 1257, [2020] IRLR 196.

Ognevenko v Russia[56] in support of the claim that an outright ban on the right to strike on an essential service is unlawful.

29. The High Court accepted that the ECtHR has in a number of cases since 2007 confirmed that the right to strike is an element of the right to freedom of association conferred by Article 11(1); and there are other international instruments that recognise this right, including the CoE's ESC and ILO Conventions.[57] However, the Court noted that Article 11(1) is qualified and can be justifiably restricted in accordance with Article 11(2) and placed reliance on **RMT** and **Association of Academics v Iceland**[58], where the ECtHR also found that legislation prohibiting strike action did not violate Article 11.

30. In finding for the SoS, the Court held that **Ognevenko** '*involves no new principle of law concerning the prohibition on industrial action*' and that this was not a case where there were no compensatory measures at all enabling the POA to represent and protect its members' interests.[59] It again cited the margin of appreciation afforded to member states as one of the reasons for its decision.[60]

31. However, despite the apparently principled shortcomings of the **RMT** judgment and although not directly relevant on ECHR grounds, indicative of the ongoing influence of the **Serco** judgment was its application to the facts of the judgment in **BALPA**[61].

32. The appeal to the Court of Appeal in **BALPA** was directed at the refusal to grant an interim injunction preventing the respondent trade union, the British Airline Pilots' Association (referred to as "BALPA"), from calling on its members to take part in industrial action in furtherance of a trade dispute following a ballot of its members, who are pilots employed by British Airways plc (referred to as "BA")[62].

33. Notice of the ballot and a copy of the ballot paper were sent to BA on 19th June 2019. The Notice confirmed that BALPA intended to hold a ballot for industrial action of 3,833 employees entitled to vote. The Notice provided a table with categories of employee and the number in each category. The categories identified were: captain, training

[56] Application No 44873/09, 20 November 2018 (Final judgment 6 May 2019).
[57] Ibid., n.55, at para.69.
[58] (2018) 67 EHRR SE4.
[59] Ibid., n.55, at para.85.
[60] Ibid., n.55, at para.91.
[61] Ibid., n.3.
[62] Ibid., n.3, at para.1.

captains, training standards captain, training co-pilot, senior first officer and director of safety and security. A table of workplaces and numbers in each was also provided. The result of the ballot was published on 22nd July 2019 and supported industrial action.[63] BA's application for an injunction was refused following a hearing on 21st July 2019.[64]

34. The only ground of appeal pursued before the Court of Appeal was that the Notice did not comply with the obligation to give a list of the "categories of employees" and the number of employees in each of the categories entitled to vote because BALPA failed to specify, in respect of the balloted pilots, the numbers who were in: (i) the short-haul fleet, or (ii) in one of the four long-haul fleets respectively. BA contended that if BALPA had provided this information, it would have substantially assisted BA to make contingency arrangements to mitigate the effect of the strike action[65].

35. Thus the central question on the appeal was whether it was more likely than not that BALPA would succeed in establishing a trade dispute defence at a full trial on the basis that it complied with the relevant balloting rules and, in particular, the requirement to describe the 'categories' of employees in s.226A(2A)(a) TULRCA. That would turn on whether it was necessary for BALPA to give more precise categories than were given of workers to be balloted or called on to take industrial action[66].

36. In dismissing BA's appeal, Simler LJ (giving the judgment of the Court) held that the starting point is to provide general job categories (there being no statutory obligation requiring the union to use any particular category of jobs)[67] and that the question was not whether the categories could have been provided with greater specificity but, rather, whether what was provided was sufficient to meet the statutory requirements[68]. Part of the Court's reasoning for dismissing the appeal was that:

"…*a continuing rationale underpinning the notice requirements is to enable employers to make plans to mitigate the effect of strike action. To conclude otherwise would be to reduce the notification requirements to a mere technical hurdle to be jumped by the union…However…the legislative history shows another underlying policy for enacting*

[63] Ibid., n.3, at para.2.
[64] Ibid., n.3, at para.3.
[65] Ibid., n.3, at para.11.
[66] Ibid., n.3, at para.15.
[67] Ibid., n.3, at para.63.
[68] Ibid., n.3, at para.68.

the statutory provision…to achieve notification requirements that are capable of being clearly and certainly applied by unions without creating too great a burden on them and without creating a series of traps or hurdles in the way of their exercise of rights to take industrial action"[69].

Conclusion

37. It seems that the high point of the assistance provided to unions by the Council of Europe's recognition of the right to strike has been the influence it had on the judgment in **Serco**, which has been largely to put an end to litigation about notices and ballots. Whilst **RMT** makes it clear that strike action is clearly protected by Article 11, it simultaneously undermined and rendered uncertain such protection by allowing interference with the right on a novel basis apparently justified by a wide margin of appreciation. This coupled with the uncertainty of how the higher balloting threshold and 'important public services' amendments brought in by the TUA will be dealt with by the courts, leaves one ultimately thinking that the ability of trade unions to call industrial action in England remains limited and that Novitz is correct to comment that '*the English situation appears irrational and inconsistent and in no way compliant with established international labour standards*'.[70]

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[69] Ibid., n.3, at paras.59 and 60.

[70] Novitz, 'United Kingdom' (chapter 15) in Mirni and Schlachter, *Regulating Strikes in Essential Services A Comparative 'Law in Action' Perspective* (2019), page 472.

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