

FACV No. 13 of 2011

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 13 OF 2011 (CIVIL) AND
(ON APPEAL FROM CACV NO. 66 OF 2009 AND CACV NO. 268 OF 2009)

Between:

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| Campbell Richard Blakeney-Williams | 1 st Appellant |
| Kenneth Gordon Craver | 2 nd Appellant |
| Terry Ann England as Personal Representative of the estate of Gregory Stephen England | 3 rd Appellant |
| Michael John Fitz-Costa | 4 th Appellant |
| Quentin James Lee Heron | 5 th Appellant |
| Michael Steven Shaw | 6 th Appellant |
| John Simpson Warham | 7 th Appellant |
| Brett Alexandar Wilson | 8 th Appellant |
| Mathew David Rogers | 9 th Appellant |
| Damon Neich-Buckley | 10 th Appellant |
| Hendrik Van Keulen | 11 th Appellant |
| Brian David Keene | 12 th Appellant |
| Pierre Joseph Roger Morissette | 13 th Appellant |
| Craig Michael Young | 14 th Appellant |
| John Wallace Dickie | 15 th Appellant |
| Douglas Gage | 16 th Appellant |

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| Christopher Leo Sweeney | 17 th Appellant |
| George Crofts | 18 th Appellant |
| and | |
| Cathay Pacific Airways Limited | 1 st Respondent |
| Veta Limited | 2 nd Respondent |
| USA Basing Limited | 3 rd Respondent |

FACV No. 14 of 2011

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 14 OF 2011 (CIVIL)
(ON APPEAL FROM CACV NO. 268 OF 2009)

Between:

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| Cathay Pacific Airways Limited | 1 st Appellant |
| Veta Limited | 2 nd Appellant |
| USA Basing Limited | 3 rd Appellant |
| and | |
| Campbell Richard Blakeney-Williams | 1 st Respondent |
| Kenneth Gordon Craver | 2 nd Respondent |
| Terry Ann England as Personal Representative of the estate of Gregory Stephen England | 3 rd Respondent |
| Michael John Fitz-Costa | 4 th Respondent |
| Quentin James Lee Heron | 5 th Respondent |

| | |
|--------------------------------|-----------------------------|
| Michael Steven Shaw | 6 th Respondent |
| John Simpson Warham | 7 th Respondent |
| Brett Alexandar Wilson | 8 th Respondent |
| Mathew David Rogers | 9 th Respondent |
| Damon Neich-Buckley | 10 th Respondent |
| Hendrik Van Keulen | 11 th Respondent |
| Brian David Keene | 12 th Respondent |
| Pierre Joseph Roger Morissette | 13 th Respondent |
| Craig Michael Young | 14 th Respondent |
| John Wallace Dickie | 15 th Respondent |
| Douglas Gage | 16 th Respondent |
| Christopher Leo Sweeney | 17 th Respondent |

Court: Chief Justice Ma, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Tang NPJ
and Lord Neuberger of Abbotsbury NPJ

Dates of Hearing: 27 – 28 August 2012

Date of Judgment: 26 September 2012

J U D G M E N T

Chief Justice Ma :

1. For the reasons contained in the judgment of Lord Neuberger of Abbotsbury NPJ, I agree with the orders proposed to be made disposing of the plaintiffs' appeal and the

defendants' cross appeal, as well as the orders for costs here and below.

2. I wish only to add a few observations in relation to the first issue dealt with in the judgment of Lord Neuberger of Abbotsbury NPJ, namely, the dismissal claim brought by the plaintiffs against the defendants on the ground of their participation in trade union activities (this is the subject matter of the defendants' cross appeal).

3. The conclusion reached by Lord Neuberger of Abbotsbury NPJ is that the industrial action which was said to be carried out by the plaintiffs in the form of contract compliance, came under the rubric of "activities of the trade union" for the purposes of s 21B(1)(b) of the Employment Ordinance Cap 57. As a matter of law, industrial action (including strikes) where such action has been proposed, organized and enforced by a trade union (as in the present case) will come under the statutory wording of "activities of the trade union".

4. This conclusion is entirely consistent in my view with the policy as reflected in the relevant constitutional and statutory framework:-

(1) Article 27 of the Basic Law (contained in Chapter III under "Fundamental Rights and Duties of the Residents") highlights specifically the right to form and join trade unions, and to strike.

(2) The prominence given to workers' rights is also recognized in Article 39 of the Basic Law (also under Part III) by the reference to international labour conventions as applied to Hong Kong.

(3) In addition, Article 18 of the Bill of Rights (contained in the Hong Kong Bill of Rights Ordinance Cap 383) states:-

"(1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

(2) No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

(3) Nothing in this article authorizes legislative measures to be taken which would prejudice, or the law to be applied in such a manner as to prejudice, the guarantees provided for in the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize as it applies to Hong Kong."

(4) The right to form and join trade unions is to be given a purposive and generous interpretation, in common with the approach of the courts in respect of all fundamental rights and liberties. This approach percolates down to the relevant statutory provisions which deal with trade unions.

(5) It is quite clear that the constitutional framework militates towards a conclusion that in order to give proper effect to the right to join a trade union (the right to form a trade union does not arise in the present case), this will encompass not only the right to become a member of a trade union, but also the right to be able to join in the activities of that trade union.

(6) The function of a trade union is essentially to protect and advance the rights and welfare of employees, and one of a trade union's principal functions (indeed I would say the main one) is to deal with employers in this context. Conflicts and disagreements are bound to occur: from the employers' point of view, trade unions are seen to act as a brake on the employers' ability to maximize efficiency or profit as they see it; from the employees' point of view, trade unions help ensure that a level playing field can exist in which workers' interests are more fairly pitted against what is seen as the economic strength of the employer. Sometimes these conflicts or disagreements will lead to industrial action promoted or organized by trade unions.

(7) Hong Kong, in common with many jurisdictions worldwide, has adopted a policy of protecting trade union rights and activities. There are a number of references to international labour conventions in relevant constitutional and statutory provisions (I have already referred to the Basic Law and the Bill of Rights). Section 21B of the Employment Ordinance, which is the provision focused on under the first issue before us, is based on the International Labour Convention No. 98 (the Right to Organise and Collective Bargaining Convention 1949). That section, in specific terms, protects employees from being dismissed by employers by reason of membership of a trade union or participating in trade union activities. It is notable that becoming a member of a trade union and taking part in activities of a trade union, are described in s 21B(1) as rights.

(8) I have earlier briefly alluded to industrial action which is promoted or organized by trade unions. Many people would think, and I agree, that this form

of activity is precisely the classic form of trade union activity; crudely put, it is exactly the type of activity that will be undertaken by trade unions if driven to it. In situations where a trade union has “proposed, organised and proceeded to enforce industrial action” (to use the words contained in the judgment of Lord Neuberger of Abbotsbury in para 42 below), it is difficult to conclude that a worker who joins in such industrial action (whether willingly, as a matter of solidarity with co-workers or even under compulsion) is doing anything other than participating in trade union activity. Not to be lost sight of in the present context is also the immunity extended to trade unions and members of trade unions in relation to acts in contemplation or furtherance of a trade dispute: see the Trade Unions Ordinance Cap 332 (para 51 below). Industrial action will clearly fall within such acts.

(9) This is not to say there are no limitations placed on the protection given to employees in relation to taking part in trade union activities: as s 21B(1)(b) of the Employment Ordinance makes clear, such activities must take place only at an “appropriate time” (as defined in s 21B(3)) in order for the protection to exist.

(10) In summary, the view taken of the meaning of the “activities of the trade union” by Lord Neuberger of Abbotsbury, with which I agree, is not only consistent with principle, common sense and the authorities, it is also consistent with the constitutional and statutory framework in Hong Kong.

Mr Justice Bokhary PJ :

5. I, too, agree with the judgment of Lord Neuberger of Abbotsbury NPJ.

Mr Justice Chan PJ :

6. I agree with the judgment of Lord Neuberger of Abbotsbury NPJ and the orders which he has proposed and with the observations made by the Chief Justice.

Mr Justice Tang NPJ :

7. I agree with the judgments of the Chief Justice and Lord Neuberger of Abbotsbury NPJ which I have read in draft.

Lord Neuberger of Abbotsbury NPJ :

8. This is an appeal and a cross-appeal against a decision of the Court of Appeal (Stock V-P, Kwan JA and Lam J (as he then was)), allowing in part an appeal brought by Cathay Pacific Airways Limited and two associated companies, USA Basing Limited and Veta Limited (which three companies I shall refer to as “Cathay”). The appeal was against a decision of Reyes J (“the Judge”), awarding the plaintiffs, who were airline pilots who had been dismissed from Cathay’s employment, damages for (i) breach of contract, (ii) breach of statutory duty, and (iii) defamation.

The background facts

9. During the summer of 1999, a dispute developed between Cathay’s management and the Hong Kong Aircrew Officers Association (“the Union”, which represented the great majority of the pilots employed by Cathay). The dispute concerned Cathay’s approach to its pilots’ rostering practices and contract entitlement, which, in the Union’s view, imposed unreasonably long flying hours and granted unreasonably short breaks on the pilots employed by Cathay (“the pilots”).

10. The dispute escalated over the ensuing year. In July 2000, the members of the Union voted by a very substantial majority to start a “contract compliance” regime (which had been implemented previously in relation to an earlier dispute). As the Judge explained, this regime involved “rigid adherence” to the strict terms of the pilots’ employment contracts. For instance, pilots would ensure that they were unable to be contacted on “guaranteed days off”, would refuse to fly if there was the slightest doubt about their fitness, would always insist on the full 45 minutes preparation before leaving home, and would only turn up at the airport the minimum 80 minutes before departure.

11. The pilots adhered to contract compliance, and this had a seriously disruptive effect on Cathay’s business (including flight delays, cancellations and diversions), as the Union recognized. However, it urged its members to maintain the regime, and threatened those members who did not comply with sanctions, including expulsion from the Union.

However, contract compliance failed to persuade Cathay that it should yield to the Union’s concerns.

12. As a result, the dispute escalated, and on 15 June 2001, the Union published an open letter putting its side of the dispute. In its letter, the Union expressed regret at the inconvenience being caused to passengers by contract compliance, and blamed Cathay for

discriminatory employment policies, mismanagement, and poor employee relations. The letter went on to say that the Union planned “limited industrial action” starting in early July.

13. On 20 June, the Union held a meeting to enable its members to vote on “limited industrial action” starting on 3 July 2001, a proposal which was again supported by a very substantial majority. Some nine days later, the Union informed its members that the contemplated action was a so-called “Maximum Safety Strategy” (“MSS”), which would involve reversing the established practice of expediting or abbreviating safety operations as laid down in Cathay’s operational manuals. As the Union recognized, this would lead to “flights commonly incur[ring] delays of 15 – 60 minutes or more”.

14. Cathay’s management reacted to this development in two ways. First, its director of flight operations sent a letter on 27 June to all crew members stating that, if there was “industrial action”, Cathay would “take firm action against any staff member who deliberately acts against the interest of our passengers”. The letter also stated that “Hong Kong labour ordinances do not permit an employee to take part in any trade union activity during his or her working hours without the consent ... of the employer” and that “[a]ppropriate action will be taken against such misconduct”.

15. Cathay’s second reaction to the threat of MSS was to set up an internal review team to identify those pilots who “had an attendance problem”, “had a warning letter on file in connection with a disciplinary matter”, or “were considered ... to be unhelpful and uncooperative”. Once those pilots had been identified, they were listed, and the review team then ranked the listed pilots in order of perceived unreliability in terms of “not working in Cathay’s interest”. The most “unreliable” 49 pilots (“the 49ers” as they were known, and as I shall refer to them) were then selected for dismissal.

16. On 9 July 2001, Cathay issued letters (“dismissal letters”) terminating the employment of all the 49ers (with one or two irrelevant exceptions). In all cases, (i) termination was by way of three months’ pay in lieu of notice, and (ii) no reason for the dismissal was identified in the dismissal letter.

17. On the same day, 9 July 2001, a number of public statements were made. The Union’s general secretary held a press conference, at which he denied Cathay’s recent statements that (i) there had been any escalation in MSS since it started on 3 July, and (ii)

pilots who were fit had been instructed to call in to say they were unfit to fly. In another statement later the same day, he said “the people of Hong Kong can decide who are the victims and who are the villains”.

18. On Cathay’s side, Mr Tyler, director of corporate development, issued a press statement, which set out Cathay’s position in relation to the dispute. The statement criticized the Union (whose actions were described as “selfish”, and whose tactics were described as “guerilla-style”). The statement went on to explain that Cathay had decided to take two steps as a consequence. The first step was to increase pilots’ pay, albeit by a lesser amount than an earlier offer, because, it was said, of the damage done to Cathay by contract compliance. The second step was “the very painful decision to terminate the employment of 49 of our pilots”. Those pilots were then described as employees “who, we feel, cannot be relied upon to act in the best interests of the company in the future”, and employees in whom “[w]e have, essentially, lost confidence”. The statement also said that “Hong Kong is tired of being held to ransom”.

19. Also on 9 July, Mr Chen, a director and the chief operating officer of Cathay, wrote a standard form letter to all members of Cathay’s flight crew. This letter described the dispute as an issue “not just for Cathay” but also “for the whole of Hong Kong SAR”. The letter went on to say that the “industrial action” would “drain” Cathay’s resources, and it also said that it “damages the reputation of the company worldwide”. The letter then stated that Cathay “cannot be held to ransom indefinitely”, that “the majority of pilots ... are strong supporters of the airline”. Accordingly, the letter said, the employment of the 49ers had been terminated, on the basis that Cathay should only take its business “forward with pilots who we believe will have the best interests of the company at heart”.

20. A day later, Mr Chen publicly stated that Cathay could “not allow this group [sc. the 49ers] to disrupt the airline, its employees, our customers or the reputation of Hong Kong”. He added that Cathay could not “allow this group to let much larger numbers of flight crews, who are showing the total professionalism we require -- suffer”.

The procedural history

21. In 2006, the majority of the 49ers began proceedings against Cathay for various heads of damage arising out of these events. By the time those proceedings came on for trial, over half of those who had brought proceedings had settled their differences with Cathay,

and so the Judge had to consider the claims advanced on behalf of eighteen (whom I shall refer to as “the plaintiffs”). The claims of one or two of the plaintiffs had special features, but I shall ignore those features for the purposes of this judgment, as they play no part on this appeal, and it would needlessly complicate matters to mention them.

22. The plaintiffs’ claim came before Reyes J on two occasions, a preliminary issue lasting a day, and the final hearing which was heard over nine days. In judgments given on 2 March 2009 and 11 November 2009, he decided that:

(a) Cathay had dismissed each plaintiff on account of (i) his membership of the Union and (ii) his participation in the Union’s activities, contrary to s 21B(2) of the Employment Ordinance (Cap 57) (“the Ordinance”), and he awarded each plaintiff \$150,000 under that head of claim (“the Ordinance claim”);

(b) Cathay’s dismissal of each of the plaintiffs was in breach of their respective employment contracts, and he awarded each plaintiff damages equal to one month’s salary on account of that head of claim (“the wrongful termination claim”);

(c) Cathay, through statements made by Mr Tyler on 9 July, and Mr Chen on 10 July 2001 had defamed each plaintiff, and on that account he awarded each plaintiff \$3 million by way of general damages and \$300,000 by way of aggravated damages, but he rejected any claim for special damages for loss of earnings, in respect of that head of claim (“the defamation claim”).

23. On appeal by Cathay, the Court of Appeal, in a decision reported at [2011] 1 HKLRD 901:

(a) Upheld the Judge’s decision that Cathay was liable for damages under the Ordinance claim, on the ground of the plaintiffs’ participation in Union activities, but not their Union membership, and declined to interfere with the award of \$150,000, the maximum permitted under the Ordinance;

(b) Reversed the Judge’s decision that the plaintiffs had established the wrongful termination claim, and therefore set aside the award of one month’s salary awarded to each plaintiff;

(c) Upheld the Judge's finding of liability on the defamation claim, but reduced the general damages to \$700,000 for each plaintiff, and overturned the awards of aggravated damages, while upholding the Judge's refusal to award special damages.

24. The plaintiffs now appeal to this court against the decisions of the Court of Appeal (b) to reverse the Judge's finding that they had not established the wrongful termination claim, and (c) (i) to reduce the general damages for defamation to \$700, 000, and (ii) to overturn the award of aggravated damages; and Cathay cross-appeals against (a) the Court of Appeal's decision to uphold the Judge's finding that its dismissal of the plaintiffs was in breach of the Ordinance.

The issues on this appeal

25. There are thus four issues to be addressed. I shall take them in the same order as that in which they were taken by the Judge and the Court of Appeal. The first two issues relate to the two heads of damage awarded by the Judge arising from Cathay's dismissal of each of the plaintiffs on 9 July 2001 - points (a) and (b) above. The third and fourth issues concern the measure of damages awarded to the plaintiffs for what are now conceded to have been defamatory statements ("the statements") made about them, on 9 and 10 July 2001 by Mr Tyler and Mr Chen of Cathay respectively - point (c) above.

26. The first issue arises from the Judge's conclusion that each of the plaintiffs was dismissed by Cathay "by reason of" his "exercising" (i) 'the right to be ... a member ... of a trade union' and (ii) "the right ... to take part in the activities of the trade union", contrary to subsection (2) of s 21B of the Ordinance ("s 21B"). The Judge awarded each plaintiff \$150,000 for this breach, and the Court of Appeal held that he was entitled to do so, but only on ground (ii), and not on ground (i). Cathay cross-appeals against this decision, contending that, in the light of the evidence and findings of fact, the Judge was not entitled to reach the conclusion that there had been a breach of s 21B(2).

27. The second issue arises from the Judge's upholding of the plaintiffs' contention that Cathay acted in breach of their respective employment contracts in purporting to determine them by simply giving three months payment in lieu of notice. Cathay did so in reliance upon a clause in the Conditions of Service that governed the employment contracts ("the Conditions"). The plaintiffs, however, contended that, because they were dismissed for

“gross misconduct” within the meaning of the Disciplinary and Grievance Procedures (“DGP”) (attached as an Appendix to the Conditions), Cathay should have invoked, and complied with, those procedures before it could determine their contracts in the way that it did. The Judge agreed, and held that, had Cathay invoked and followed the DGP, each of the plaintiffs would, in practice, have had an extra month of employment while the provisions of the DGP were gone through. Accordingly, he awarded them each a sum equal to one month’s pay. The Court of Appeal disagreed, because they considered that Cathay was not in breach of contract, and accordingly they reversed the awards of one month’s pay. The plaintiffs ask us to reinstate the awards.

28. The third issue concerns the correct measure of compensatory damages to be awarded to each of the plaintiffs for defamation. Cathay does not challenge the conclusion reached by the Judge (upheld by the Court of Appeal) that it had defamed the plaintiffs, but the plaintiffs contend that the Court of Appeal were not justified in reducing the award of \$3 million made by the Judge as general damages for defamation, and, even if the Court of Appeal were so justified, their substituted award of \$700,000 was insufficient. Accordingly, each of the plaintiffs seeks to reinstate the original award of \$3 million, or at least an increase on the sum of \$700,000.

29. The fourth issue relates to the question of aggravated damages for defamation. The Judge awarded \$300,000 to each of the plaintiffs by way of aggravated damages, a decision which the Court of Appeal reversed. The plaintiffs argue that the award was one which the Judge was entitled to make, and that we should reinstate it.

30. I shall deal with those four issues in turn.

Damages for breach of s 21B(2) of the Employment Ordinance

31. This issue requires us to decide whether, as the Judge held, in a conclusion which the Court of Appeal declined to interfere, each plaintiff was entitled to an “award of compensation” in the sum of \$150,000, under the provisions of the Ordinance. This was the maximum sum permitted under s 32P(4) of the Ordinance, as compensation under s 32P(1) on a “claim for remedies” under s 32M(1). Such a claim may be made where an employer cannot establish “a valid reason” for dismissal under s 32K of the Ordinance, which includes “(a) the conduct of the employee”. However, where that conduct falls within s 32A of the Ordinance, which effectively incorporates certain other provisions of

the Ordinance, including, crucially, s 21B, then the employee is nonetheless entitled to maintain a claim for remedies. The Judge held that s 21B, and therefore s 32A, of the Ordinance applied in the case of the dismissal of the 49ers, and that they were therefore entitled to an award of compensation, which he fixed at the maximum permitted of \$150,000 for each plaintiff.

32. The statutory provisions relating to this issue are quite lengthy and are set out in paras 32 – 38 of the decision of the Court of Appeal. However, the issue before us resolves itself into a single question, albeit that the answer to that question is not straightforward. That issue is whether Cathay “terminate[d] the contract of employment of” each of the plaintiffs “by reason of his exercising” “the right, at any appropriate time, to take part in the activities of the [Union]”. The determination of this issue turns on (i) Cathay’s reasons for dismissing the plaintiffs, and (ii) the meaning and effect of s 21B.

33. I turn, first, to consider Cathay’s reasons for dismissing the plaintiffs. Having considered the judgment below carefully, the Court of Appeal summarized the reasons briefly in this way in para 69 of their judgment, namely,

“[I]t seems clear that what the judge was saying was that the key reason for dismissal was Cathay’s perception that the plaintiffs [and, I think, the other 49ers] were themselves the most active participants in the limited industrial action which had taken place (contract compliance) and the most likely adherents to the proposed and recently invoked MSS action.”

All parties accepted that that was an accurate analysis of the Judge’s conclusion (which was more fully expressed in three different parts of his judgment, first between paras 69 and 71, secondly between paras 89 and 93, and thirdly between paras 106 and 112). I therefore proceed on the basis that the Court of Appeal’s helpful and clear summary is correct.

34. I turn then to the second question thrown up by this issue, which involves considering the effect of s 21B, which was introduced into the Ordinance by the Employment (Amendment) (No 3) Bill 1974.

35. Subsections (1) and (2) of s 21B provide as follows:

“(1) Every employee shall as between himself and his employer have the following rights –

(d) the right to be or to become a member or an officer of a [registered] trade union
.....;

(e) where he is a member or an officer of any such trade union, the right, at any

appropriate time, to take part in the activities of the trade union;

(f)

(2) Any employer ... who –

(a) prevents or deters, or does any act calculated to prevent or deter, an employee from exercising any of the rights conferred on him by subsection (1); or

(b) terminates the contract of employment of ... an employee by reason of his exercising any such right,

shall be guilty of an offence”

36. Section 21B(3) defines (i) “appropriate time” as being either (a) “outside [the employee’s] working hours” or, (b), if “within his working hours” is a time “at which, in accordance with arrangements agreed with ... his employer, it is permissible for him to take part” in “any activities of [the] trade union”, and (ii) “working hours” as meaning any time when, “according to his contract of employment, [an employee] is required to be at work”.

37. Given that it is common ground that the Union is a “registered trade union”, the question of principle to which this case ultimately gives rise is the breadth of the expression “activities of the trade union” in s 21B(1)(b), and, in particular, whether it extends to taking part in contract compliance (or, possibly, proposing to take part in MSS).

38. On behalf of the plaintiffs, Mr Grossman SC contends that, given that it was conceived by the Union, initiated by the Union, voted on through the Union, organised by the Union, and enforced by the Union, contract compliance was, as a matter of common sense and language, an “activit[y] of the [Union]”. He reinforces that argument by contending that the expression “activities of the trade union” should be interpreted generously, on the basis that, if it is not, the effect of s 21B(1)(b) and (2)(b) would conflict with common sense, and the outcome of claims based on allegations of breach of the section would turn on very fine distinctions.

39. Mr Huggins SC, for Cathay, on the other hand, contends that industrial action, whether working to rule (which would include contract compliance and, arguably, MSS) or striking (ie withdrawal of labour), is not within the expression “activities of the trade union”. That expression, he says, is apt only to cover actions which are performed by an employee for or on behalf of a union, as opposed to actions performed by an employee in his capacity of an employee, even where it is with the support of, or at the behest of, the

employee's union. In other words, the expression applies to acts such as attending meetings of, or on behalf of, the union, deciding on union policy, and implementing, organising or enforcing actions consequential on decisions of officials or members of the union, all of which are properly described as union activities. However, the expression does not, on this basis, apply to activities which are essentially those of an employee or of the employees generally, such as working to rule or striking.

40. This is, in my view, the most difficult (and quite possibly, the most important) question raised on this appeal. We have not been referred to any relevant decided cases on the issue in this jurisdiction, but there are a number of decisions of the United Kingdom Employment Appeal Tribunal ("EAT") which do provide some guidance, especially as s 21B was based on s 5 of the UK Industrial Relations Act 1971, now substantially re-enacted as s 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the UK 1992 Act"). However, although subsections (1)(b) and (2) of s 152 of the UK 1992 Act are virtually identically worded to subsections (1)(b) (read together with subsection (2) (b)) and (3) of the s 21B, there are two difficulties about relying on the English cases. The first is that they are not entirely mutually consistent, and one potentially relevant decision is cogently criticised in one of the leading English employment law books - see *Harvey on Industrial Relations and Employment Law*, Issue 213 (2011), Volume 3, para [518] commenting on *Drew v St Edmundsbury Borough Council* [1980] IRLR 459, para 13. Secondly, the UK 1992 Act contains many provisions which have no equivalent in the Ordinance, and those other provisions inevitably influence the interpretation of s 152 of the UK 1992 Act – that point is illustrated by both the passage in *Harvey* and the paragraph in *Drew* to which I have just referred.

41. As a matter of ordinary language, there is an obviously powerful case for saying that industrial action, such as working to rule or striking, is not one of the "activities of the trade union". Even where the union initiates, organises, and enforces, a work to rule or a strike, runs the argument, it is not the union which works to rule or strikes: it is the employees who do so. On this basis, therefore, the organising and enforcing of the strike or work to rule may be union activity, but the strike or work to rule themselves are not.

42. That argument is not without force. However, it seems to me that, once one takes into account common sense and practicality, there is an even stronger argument for saying that industrial action is within the expression "activities of the trade union". If a trade union has

proposed, organised and proceeded to enforce industrial action (as in the present case, where, as stated earlier, the Union threatened to impose sanctions on members who did not participate in contract compliance), it seems to me that any employee participating in the action would think of himself or herself as taking part in an “activit[y] of the trade union”.

So, I think, would any member of the public. Indeed, as mentioned above, in his letter of 27 June 2001 to all the pilots in connection with the threatened MSS, Cathay’s director of flight operations actually referred to the pilots’ potential involvement in that proposed industrial action as “tak[ing] part in trade union activity”.

43. Further, it would seem surprising if an employee who lobbied for, organised or policed such industrial action could rely on the protection afforded by s 21B(1)(b), whereas an employee who merely took part in such action could not. The notion that, when organising a strike, an employee is participating in union activity, but when taking part in the same strike, he or she is not so participating, seems a somewhat capricious result in practical terms.

44. In practice, of course, it would scarcely be possible to describe striking as an activity in which an employee can take part, “at any appropriate time”, given the definition of “appropriate time” in s 21B(3). But that does not mean that striking is not inherently capable of being one of the “activities of the trade union” within s 21B(1)(b): it merely means that an employee dismissed for taking part in industrial action consisting of a union-sponsored strike will rarely, if ever, be able to rely on s 21B. But it is wholly different where the industrial action consists of working to rule, such as contract compliance in this case, which, as the Court of Appeal put it in para 74 of their judgment, “included measures that could only be carried out when the plaintiffs were not, by their contracts, required to be at work”.

45. It might at first sight seem curious if some types of industrial action, or even some types of working to rule (possibly such as MSS, which the Court of Appeal said may well be different for these purposes from contract compliance), are outside the ambit of s 21B protection, when other types of industrial action, such as most working to rule, are within its scope. However, I think that the answer is that (i) the scope to be given to the expression “activities of the trade union” is broad, which produces a coherent and practical outcome involving relatively wide protection for employees, but (ii) such protection is circumscribed by the concomitant protection for employers, which is embodied in the

“appropriate time” limitation. Accordingly, most (possibly all) union-sponsored action is potentially protected by s 21B(1)(b), but if the action is not carried out “at [an] appropriate time”, it is excluded from the provision.

46. That conclusion seems to me to satisfy the primary requirement of fidelity to the language of s 21B, as well as being a result which has the effect of being relatively easy to understand and apply, which is generally an important aim in the law, and particularly in the field of the law relating to labour relations.

47. I now turn to the English cases, which, for the reasons already mentioned, must be approached with a degree of caution. Nonetheless, I am of the view that they support the conclusion I have reached. The consistent approach of the EAT has been to construe the words “activities of the trade union” widely, or at least “not ... restrictively” – see *British Airways Engine Overhaul Ltd v Francis* [1981] IRLR 9, para 10, *Britool Ltd v Roberts* [1993] IRLR 481, para 16. More specifically, I note that in *Dixon and Shaw v West Ella Developments Ltd* [1978] IRLR 151, paras 12 - 13, the EAT made it clear that they disagreed with the approach to the expression “activities of the trade union” urged on us by Mr Huggins, as explained in para 39 above.

48. In *Drew*, para 13, it was held by the EAT that, because the English legislation has a different provision dealing with dismissal on the ground of participating in a “strike or other industrial action” (now s 238 of the UK 1992 Act), what is now s 152(1)(b) of the UK 1992 Act, the provision equivalent to s 21B(1)(b), could not apply to taking part in industrial action, even when that action was precipitated and organised by the union.

However, that holding (which may have been followed in the rather confusingly expressed decision in *Winnett v Seamarks Brothers Ltd* [1978] IRLR 387, paras 18 – 22) has been condemned as *per incuriam* by *Harvey* at para [518], because another provision of the Act (now s 170(2) of the UK 1992 Act) expressly provides that, in certain circumstances, “activities of a trade union” excludes industrial action. As the Ordinance does not include a provision which is the equivalent of s 238 or of s 170 of the UK 1992 Act, neither view is of much direct assistance here, although, as discussed below, s 170 gives some indirect support for the view that industrial action is within the rubric of “activities of a trade union”.

49. It is to be noted that, in *Drew*, the EAT seems to have accepted that taking part in a “go slow” organized by a trade union, at least if it was in connection with health and safety

concerns, could involve an employee taking part in an “activit[y] of the trade union” – see at paras 8 – 10. Further, in *Britool*, the EAT accepted that “actual participation in a strike ... will rarely if ever constitute an activity within [what is now s 152(1)(b) of the UK 1992 Act]”, not because it was out with the scope of the wording of s 152(1)(b), but because of (i) the reasoning in *Drew*, and (ii) the point that “taking part in a strike could not of its nature be an activity undertaken outside working hours or with the consent of the employer” – see paras 13 and 8. Neither of those reasons would prevent industrial action, such as contract compliance, constituting “activities of the trade union” under the Ordinance. The reasoning in *Britool*, not least in the light of the words “if ever”, provides some, albeit rather limited, support for my conclusion.

50. It is also worth noting that the editors of *Harvey* in the passages to which reference has already been made, appear to have little doubt that, if organised or sponsored by a trade union, industrial action falls within the ambit of the expression “activities of the trade union”, as a matter of ordinary language. Further, that that view is strongly supported by s 170(2) of the UK 1992 Act, which (for certain other specified purposes not relevant for present purposes) specifically excludes industrial action from the ambit of the expression “activities of [a] trade union”, which, as *Harvey* states in para [518] strongly suggests that, absent such exclusion, the expression would include industrial action.

51. I draw some support for the view that the expression “activities of [a] trade union” extends to strikes and industrial action from certain provisions of the Trade Unions Ordinance (Cap 332), although it is right to record that neither counsel referred to it. Parts VI and VII of that Ordinance refer to the rights and liabilities of trade unions and employees in relation to industrial action. In very summary terms, ss 42, 43 and 43A of Cap 332 give “a registered trade union” and any “employee, or a member or officer of a registered trade union” immunity from civil liability in relation to any acts done “in contemplation or furtherance of a trade dispute” to which the union (or the employee, member or officer) is party, and s 46 renders peaceful picketing lawful if carried on by persons whether “acting on their own behalf or on behalf of a registered trade union ... in contemplation or furtherance of a trade dispute”. These provisions all appear to me to be consistent with the notion that industrial action sponsored by a trade union is seen by the legislature, indeed as a matter of law, as being within the ambit of activities for which a trade union is potentially responsible, and in which a trade union can fairly be treated as

being engaged – ie that such industrial action is, as a matter of ordinary language, within the scope of “activities of [a] trade union”.

52. The only other significant material to which our attention was drawn was the Explanatory Memorandum to the Employment (Amendment) (No 3) Bill. This states that s 21B was introduced into the Ordinance “to give effect to certain provisions of the International Labour Convention No 98”, “Right to Organise and Collective Bargaining Convention 1949” (which I shall call “ILO 98”). Article 1(1) of ILO 98 states that workers should enjoy adequate protection against anti-union discrimination in respect of their employment. Article 1(2) of ILO 98 states that such protection extends to dismissal (or any other acts prejudicing a worker) because of participation in “union activities outside working hours or, with the consent of the employer, within working hours”.

53. At the 31st session of the International Labour Conference held in San Francisco in 1948, discussions took place as to the meaning of the expression “union activities”, and at p 25 of the Report of that session, it is stated that the words “by reason of his membership of a union or his union activities” were

“inten[ded] to cover ... members, agents or officers of a union who, in the legitimate performance of their functions, *organise or direct labour conflicts*, appeal to the labour authorities established to deal with infringement of union rights or social legislation, represent the workers on bodies for the defence of their occupational interests, etc” (emphasis added).

Mr Huggins contends that these words, especially those which are emphasized, indicate, albeit by implication through omission rather than by express words, that the expression “by reason of his membership of a union or his union activities” was not intended to extend to actually taking part in “labour conflicts” – ie working to rule or going on strike.

54. I see the force of that point, but it is important to bear in mind that the wording of documents such as ILO 98, and also the wording of a report following a session such as that which took place in San Francisco, are normally the product of negotiations between competing interests. As a result, controversial, or even potentially controversial, expressions in formal agreements are not conclusively defined, on the basis that they will be sorted out by the national legislatures and the relevant national courts. Similarly, session reports often omit provisions on which agreement is not possible, on the basis that each state will follow its own course, within the confines of what has been agreed. Indeed,

I note that Article 3 of ILO 98 states that machinery “appropriate to national conditions” should be established, where necessary, to ensure respect for their right to organise as stated in the preceding articles.

55. Accordingly, given that there is nothing in the express words of ILO 98, or even in the report of the session in San Francisco, which assists on the issue before us, I do not consider that it takes matters much further.

56. In these circumstances, essentially for the same reason as the Court of Appeal, I consider that the Judge was right, on the facts which he found, to conclude that the plaintiffs were entitled to compensation under s 32P of the Ordinance. So far as the measure of such compensation is concerned, there is no challenge by Cathay to the Court of Appeal’s decision to uphold the Judge’s award of \$150,000 per plaintiff. Accordingly, Cathay’s cross-appeal should be dismissed.

Damages for breach of the plaintiffs’ employment contracts

57. The Conditions under which each of the plaintiffs (referred to therein as “officers”) was employed by Cathay (referred to therein as “the company”) cover issues appropriate to the normal run of employment contracts, such as probation, promotion, salary, bonus, insurance, death benefits and termination, as well as issues more specific to airline employees, such as rostering, crew positioning, uniforms and guaranteed days off. The arguments before us, and below, proceeded on the basis that only clauses 33 and 35 of, and Appendix 1 to, the Conditions are relevant for present purposes. I have seen no provision which significantly calls that approach into question.

58. Clause 33 provides that the DGP “will apply to all Officers”, and it then states that the DGP are included as Appendix 1 to the Conditions. Clause 35 is headed “Termination of Employment”, and clauses 35.1 and 2 deal with termination in the first month and during probation. Clause 35.3 states that “[a]n Officer’s employment may be terminated” after the probationary period “by either party, giving to the other party not less than three (3) months’ written notice or payment in lieu thereof”. Clause 35.4 entitles Cathay to determine an officer’s employment “forthwith” in certain events, such as (a) “the Officer wilfully neglect[ing] the interests of the Company”, (c) “the Officer fail[ing] to comply with Company regulations, rules or policies”, and (e) the officer being “guilty of any conduct ... which is prejudicial to the interests ... of the Company”. It is also worth

mentioning clause 32, which is concerned with redundancy; clause 32.3 provides that, where an officer is made redundant, he is entitled to six months' pay, rather than three.

59. The DGP set out in para 3 certain "General Principles", which include, in para 3.1, that "[t]he principles of common sense and natural justice should be followed when applying these procedures".

60. Paragraph 8.1 of the DGP explains that there are five disciplinary actions, which are, in increasing order of severity, admonishment, warning, reprimand, dismissal, and summary dismissal, each of which is then described. Paragraph 8.5(a) states that "[d]ismissal is normally reserved for more serious offences or for the repetition of less serious offences". Paragraph 8.5(b) provides that "[d]ismissal will take place after the appropriate notice has been given or payment made in lieu of notice". Paragraph 8.5(c) explains that "[o]fficers will not normally be dismissed for the first offence except in cases of gross misconduct". It then goes on to describe examples of "gross misconduct", which include:

“... ”

(vi) Wilful misconduct or disobedience of lawful and reasonable orders;

... ”

(viii) Conduct considered by the Company to be prejudicial to its interests”

... ”

(xiv) Wilful neglect of the Company's interests.

... ”

61. The DGP go on to deal with "Preliminary Investigation and Case to Answer", "Disciplinary Procedure", and "Appeals Procedure" in some detail in paras 9, 10 and 11 respectively.

62. The interrelationship between clause 35.3 of the Conditions ("clause 35.3") and para 8.5 of the DGP is not entirely straightforward.

63. For Cathay, Mr Huggins SC eschews any suggestion that, even where Cathay informs an employee that he is being dismissed for gross misconduct, it can bypass the DGP simply by serving three months' notice or giving three months' pay in lieu. In my judgment he is right to do so. The DGP is part of the Conditions (being Appendix 1 of, and expressly incorporated into, the Conditions by clause 33.1 of the Conditions).

Accordingly, clause 35.3 cannot be construed in isolation, and must be read together with the DGP, and indeed in the context of the whole of the Conditions (which of course includes the DGP). This approach, which is simply to try to give effect, as far as is possible, to all provisions in a contract, even where they appear at first blush to be contradictory or mutually inconsistent, was recently applied by this court in *Ko Hon Yue v Chiu Pik Yuk and others*, unreported, FACV No 8 of 2011, 23 February 2012.

64. The Conditions also have to be interpreted bearing in mind their overall purpose, namely to provide a set of rules governing the employment of Cathay's employees, and this requires them, so far as possible, to be given an interpretation which is workable and clear, and which represents a reasonable balance between the interests of employer and employee. (Of course, that does not mean that every issue of interpretation of the Conditions must be resolved in such a way as satisfies these standards, because the wording of a particular provision may be so clear that it precludes those standards being satisfied.)

65. If it was open to Cathay to determine an employee's contract for disciplinary reasons (to use a shorthand expression) simply by invoking clause 35.3, it would mean that the procedures laid down in the DGP in a case where an employee is being dismissed for "gross misconduct", within the meaning of para 8.5(c) of the DGP, could be circumvented, indeed rendered nugatory, by Cathay. It appears to me that, unless the wording of the Conditions ineluctably point to such a conclusion, it should be rejected. I note that that view accords closely with the majority opinions in the English Court of Appeal decision in *Gunton v Richmond-upon-Thames London Borough Council* [1981] 1 Ch 448 – see at 461G – 462D and 473G – 474A, per Buckley LJ and Brightman LJ respectively.

66. Once clause 35.3 is read together with the provisions of the DGP, it can be seen that it cannot be right to treat it as giving Cathay a right to determine on three months' notice (or with three months' pay), even where the determination is on the ground of gross misconduct, as such an interpretation would make a nonsense of the rights granted to an employee by the DGP, whom Cathay wishes to dismiss for "gross misconduct". In addition, there is the more specific point that such an interpretation would be hard to reconcile with para 8.5(b) of the DGP, which provides that, even if dismissal is warranted for a "serious offence", it will normally be "after the appropriate notice has been given or payment made in lieu of notice".

67. Accordingly, it seems to me clear that, dismissal for a disciplinary reason in accordance with clause 35.3 can only take place after the procedures laid down in paras 9 – 11 of the DGP have been gone through.

68. Mr Huggins takes his stand on this issue on behalf of Cathay on the fact that, in this case, the dismissal letter sent to each plaintiff was not expressed to be for disciplinary reasons, let alone for gross misconduct, and therefore, he says, the DGP had no relevance. On that basis, he submits that there was nothing to prevent Cathay from relying on its right to determine for no reason under clause 35.3. The fact that Mr Chen and Mr Tyler made their statements about the activities of the 49ers and the fact that those activities had led to their dismissal is irrelevant, according to this argument, because those statements were made after the dismissal of the 49ers: by the time those statements were made the 49ers were former employees.

69. On the facts of this case, I would reject that submission, forcefully though it was maintained. Once it is accepted (as Mr Huggins rightly does accept) that it is not open to Cathay to invoke clause 35.3 without going through the processes laid down by the DGP in a case where Cathay informs an employee that he is being dismissed for disciplinary reasons, it appears to me that it must follow that Cathay was obliged to go through those processes before it dismissed the plaintiffs on the facts of this case.

70. It is true that, in the dismissal letters, which formally communicated the determination of the plaintiffs' contracts, it appears that Cathay did not invoke or even refer to any aspect of their conduct (I say "it appears that" because, rather surprisingly, none of those letters was in evidence before the Judge). However, simply to focus on the dismissal letters, and to ignore what was being said by Cathay at around the same time, appears to me to be quite unrealistic – a triumph of form over substance, as the Chief Justice put it in argument. In my view, it would be thoroughly unrealistic not to treat the statements made by Mr Tyler and Mr Chen as part and parcel of a single exercise which included the dismissal of the plaintiffs from their employment with Cathay.

71. From the perspective of Cathay, it is quite clear that the dismissal of the plaintiffs and the publication of the statements were part of a single orchestrated exercise, no doubt carefully, hard-headedly, and (it is fair to add, subject to the other issues in this case) quite properly, conceived as a major initiative in a long-running and bitter dispute. From the perspective of the plaintiffs, they, together with the rest of the world, were being told by

Mr Tyler and Mr Chen, within 24 hours of the dismissal letters having been posted, why they were being dismissed. So far as the precise timing was concerned, some of the plaintiffs may have received their dismissal letters before the statements were released, others may have received them afterwards. There was no suggestion of Cathay having ensured that the 49ers received their dismissal letters before the statements were published (although Mr Huggins makes a fair point when he says that the instant proceedings appear to have been conducted on the basis that the letters were all sent before the statements were published).

72. Particularly given that the issue arises in the field of employment law, where technicalities should be kept to a minimum, it seems to me to be quite unrealistic to say that, in the present case, the plaintiffs were dismissed by Cathay for no reason. Strict contemporaneity cannot be the test: if it were, it would lead to the absurd result that, after dismissing an employee under clause 35.3 without giving reasons and telling him to clear his room, the employer could visit the employee, a minute later, while he was clearing his room, to tell him that he had been dismissed for disciplinary reasons. In my view, when considering the dismissal of the 49ers, it is not only unrealistic and highly artificial, but positively absurd, to treat (i) the dismissal letters themselves and (ii) Mr Tyler's statement and Mr Chen's letter and (although a day later) his statement as involving separate events, rather than individual aspects of a single overall exercise.

73. Furthermore, as Mr Grossman suggests, such an outcome would be wholly contrary to one of the main purposes of the DGP, particularly given their express emphasis on common sense and "natural justice". It would be contrary to common and natural justice (in a colloquial and, quite possibly, in a technical legal sense) if an employee could be deprived of any opportunity to challenge allegations of gross misconduct through the procedures laid down by the DGP, while the employer was free to announce to the world that the employee is being, is about to be, or has just been, dismissed on the basis of those very allegations. As Mr Justice Tang pointed out in argument, Mr Huggins's case gets into real difficulties if one postulates a case where Cathay informs an employee that he is guilty of gross misconduct, and only thereafter dismisses him giving no reasons for the dismissal. If Cathay would thereby be able to avoid the DGP, it would be patently absurd; if it could not thereby avoid the DGP, it would appear fatally to undermine Cathay's case here, which seems to me to require strict contemporaneity of dismissal and reasons.

74. The only difficulty to which the conclusion that Cathay could not avoid complying with the DGP before dismissing the plaintiffs under clause 35.3 gives rise is how far it goes. Thus, if Cathay privately decided to dismiss an employee for reasons of gross misconduct, but never vouchsafed those reasons to the employee or anyone else, or if it only told the employee or a third party some time later, would the employee have had a right to damages for Cathay's failure to implement the DGP? As Mr Grossman said, it is not necessary to answer such questions for the purpose of dealing with this appeal.

75. However, although it is strictly speaking unnecessary to determine such questions, I would be inclined to answer them by referring to the basic point that, if Cathay was in fact dismissing an employee for disciplinary reasons (which would, of course, include gross misconduct), then the DGP would have to be invoked and followed. Accordingly, while no claim based on the DGP could arise where a dismissed employee cannot produce evidence to show that a dismissal was for disciplinary reasons, it is quite different in a case where such evidence exists (as it plainly does in the case of the plaintiffs in these proceedings): in such a case, the DGP would have to be invoked and followed.

76. Thus, in a case where nothing is said at the time of the dismissal or at any time thereafter, and no documents exist, to indicate that a dismissal was for disciplinary reasons, no claim could be brought against Cathay by a dismissed employee for failure to invoke and follow the DGP. On the other hand, where disciplinary reasons are revealed as the reason for dismissal after the dismissal, whether to the employee or to a third party (e.g. a prospective employer of the employee), then the dismissed employee may then be able to mount a claim.

77. The above analysis should certainly not be interpreted as encouraging a dismissed employee (or his advisers) to indulge in speculative claims or enquiries into his former employer's state of mind at the time of the dismissal, in order to see whether evidence to support a claim exists. The court is concerned with assessing the available evidence, rather than with encouraging speculative, "fishing", investigations as to whether such evidence may just happen to exist.

78. Mr Huggins raises three further points on this issue. The first is that the statements were not made by the individuals responsible for dismissing the plaintiffs. But the statements were purportedly made on behalf of Cathay, and both Mr Tyler and Mr Chen plainly had ostensible (and no doubt had actual) authority to speak on behalf of Cathay.

Mr Huggins also suggests that the statements did not reveal grounds for dismissal which fell within the ambit of the DGP. I cannot accept that point either: it seems to me plain that the allegations against the plaintiffs in the statements fell within paras 8.5(c) (vi), (viii), and (xiv) of the DGP.

79. Mr Huggins's remaining point is that it would be peculiar if the effect of reading clause 35.3 and the DGP together meant that an employee was better off if Cathay was intending to dismiss him for disciplinary reasons than if it was intending to dismiss him for reasons which involved no wrong-doing on his part. However, at least on the basis of the above analysis, there appears to me to be no capriciousness in the dismissal procedures. If the dismissal is not based on any wrong-doing by the employee, he is merely entitled to three months' notice, or three months' pay in lieu (unless the dismissal is for reasons of redundancy, in which case he is entitled to six months' rather than three). However, if the employee is to have the "stigma" of a disciplinary reason for his dismissal, then, as a matter of elementary justice, he is entitled to have the protection of the DGP procedure first, and the fact that this may give him a few extra weeks in his job, as against someone who is dismissed for reasons involving no wrong-doing on his part, is merely the consequence of that entitlement.

80. For these reasons, I would allow the plaintiffs' appeal on the issue of whether Cathay was in breach of the Conditions, and restore the award of one month's pay made by the Judge to each plaintiff. It is only fair to the Court of Appeal, who took a different view on this issue, to record that they did not have the benefit of a number of the arguments canvassed before the Court of Final Appeal (many of which were raised by members of the Court).

Compensatory general damages for defamation

81. The Judge was of the view that, in the statements made by Mr Tyler on 9 July 2001 and by Mr Chen on 10 July 2001, the 49ers were being accused of "being unprofessional, of being bad employees, and of not caring for Cathay's best interests or those of Hong Kong", and that this was defamatory of them. The Court of Appeal saw no reason to disturb the Judge's findings. There is no challenge by Cathay to the Court of Appeal's decision to uphold the Judge's conclusion that these statements were defamatory of the plaintiffs on the ground that they suggested that, to use the Court of Appeal's pithy description at para 121 of their judgment, the plaintiffs were "troublemakers upon whom

Cathay could not rely”, and, at para 150, “bad and disloyal employees”. (Mr Chen’s letter of 9 July 2001 could not be relied on by the plaintiffs in this connection, because, as the Court of Appeal explained in para 113 of their decision, it was “published on an occasion of qualified privilege”, and there was no “plea of malice”). What is under challenge by the plaintiffs is the Court of Appeal’s decision to reduce the general damages awarded to the plaintiffs for this defamation from \$3 million to \$700,000 (as well as their reversal of the Judge’s award of aggravated damages, as discussed in the next part of this judgment).

82. The function of an appellate court when considering an appeal against an award of general compensatory damages for defamation is normally to address two questions. The first is whether any of the trial judge’s reasons for the award under challenge was erroneous. For instance, one of his reasons may have been based on a fact not borne out by the evidence, or may have been wrong in law or logic. If so, the appellate court must consider if the error vitiated the award, as sometimes it may not do so. The second, and broader, question which the appellate court must address is whether the figure awarded by the trial judge was too high or too low. This does not involve the appellate court deciding what figure it would have awarded: it must limit itself to considering whether, in the light of all the facts and circumstances of the particular case, the trial judge went outside the generous range of general damages open to him. Only if the appellate court decides that the trial judge adopted a wrong reason which vitiates his award, or that he went outside the permissible range, will it go on to consider for itself what damages to award (save where the appellate court concludes that it should remit the issue, but, to minimise cost, delay and use of court time, remission should be avoided if at all possible). The issue is more fully considered by Mr Justice Ribeiro PJ in his judgment *Oriental Daily Publisher Ltd and other v Ming Pao Holding Ltd and others*, unreported, FACV No 1 of 2012, which I have had the benefit of reading in draft and is to be handed down at the same time as this decision.

83. In the present case, I consider that the Court of Appeal were right to conclude that the award of \$3 million to each plaintiff could not stand; I reach that conclusion on the basis of both of the two grounds upon which general damages for defamation can be challenged.

84. First, it appears to me that the Judge wrongly equiparated the damage caused to each plaintiff in this case to the damage suffered by the plaintiff in *Chu Sik Kuk Yuen v Apple Daily Ltd and others* [2002] 1 HKLRD 1. In that case, Yuen J (as she then was) awarded

\$3 million to a solicitor, who was wholly inaccurately reported as having absconded with substantial amounts of her clients' funds, and who, as medical evidence established, consequently suffered from a significant bout of depression and prematurely gave birth to a baby who suffered from a life-threatening condition for some time.

85. I agree with the Court of Appeal that the libel in *Chu* were inherently far more serious than the libel in this case. It is hard to think of a more serious attack on a solicitor's professional reputation and on her feelings than the publication, in a newspaper with a large circulation, of a gratuitous and unqualified report that she has absconded with substantial client monies. By contrast, the statements in this case did not question the plaintiffs' character or their competence as pilots: they amounted, as the Court of Appeal said to implied allegations of disloyalty, disruptiveness and being poor employees. Further, the great majority of the readers of the statements would have appreciated that the statements had been made by an employer in the context of a long-running and bitter dispute with its employees, where both sides were well entrenched, and engaging in megaphone diplomacy. As the Court of Appeal said in para 151 of their judgment,

“The statements were made in the context of a campaign on the part of the Union which could have resulted in serious disruption to the general public in terms of passengers as well as cargo transport by air.”

86. Equally, the damage suffered by the claimant in *Chu* was self-evidently far more serious than the damage suffered in this case. Quite apart from the self-evidently greater harm to reputation and feelings which must have been caused by the libel in *Chu*, there was nothing in the evidence before Reyes J in this case remotely equivalent to the medically attested consequences of the defamation in *Chu*. It is true that the plaintiffs in this case claimed that their employment prospects had been severely affected by the defamatory statements, but they failed to establish any claim to special damages in this connection. On the other hand, I note that the \$3 million in *Chu* effectively included special damages amounting to \$470,000 loss of income.

87. Although he rejected the claim for special damages, the Judge plainly (and rightly) allowed each plaintiff something for loss of employment prospects. However, as just mentioned, there was no specific evidence which established that any plaintiff had been unemployed because of the defamatory statements. There could have been all sorts of other reasons for any difficulty which a plaintiff had in getting re-employment. Those reasons would include, most obviously, the simple fact, harsh though it may seem, that

some employers in the airline industry may have been disinclined to employ a pilot who had been dismissed as a result of a long-running, much publicised and bitter dispute with his previous employer, involving long term contract compliance and threatened MSS. In this connection, as Lord Hoffmann, giving the judgment of the Judicial Committee of the Privy Council in *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628, para 56, said, “it is usually difficult to prove a direct causal link between the libel and loss of any particular earnings”, and such “matters [can be taken] into account”, on the basis that “[t]he strict requirements of proving causation are relaxed in return for moderation in the overall figure awarded”.

88. Mr Grossman argues that the Judge did not assess damages on the basis that this was as bad a case as *Chu*, either in terms of the nature of the libel or the consequences to the plaintiff. All that the Judge was doing, according to this argument, was referring to the coincidence of the sum awarded in *Chu* and the sum which he proposed to award each plaintiff in the present case.

89. I cannot accept that argument. The Judge started his discussion of general damages by saying that “the safest approach” was to look at awards in “similar cases”; he then identified only two of those cases (one being *Chu*) as being helpful, and proceeded to reject one of them (for a reason which the Court of Appeal criticised, but that need not be considered further). That left the Judge with one case, and he said that he “should follow the *Chu* case and award each plaintiff . . . \$3 million”. It is clear from this, I believe, that he was, whether consciously or not, equipping the extent of the damage in that case with the extent of the damage in the case of each plaintiff. Further, I note that, in their written argument before the Court of Appeal, the plaintiffs described the libel in this case as worse than that in *Chu*.

90. The only aspect of the defamation in this case which could be said to be worse is that in *Chu* the defendant pretty quickly published a retraction and apology, albeit rather an anaemic one in all the circumstances. In this case, the statements were never retracted, and remained available through Cathay’s website (albeit that they were not easily accessible) for over eight years. However, no evidence was given to suggest that the retention of the statements on the website increased the damage to any plaintiff over and above the damage done by the original utterance. Further, it was not suggested that the statements remained accessible for any malicious reason, and they were removed from the website as soon as

the plaintiffs asked. The notion that Cathay was not intending to be vindictive is supported by the fact, relayed to us by Mr Huggins (and not challenged by Mr Grossman), that Cathay had offered each of the 49ers a letter to be shown to prospective employers, confirming that he had not been dismissed for disciplinary reasons.

91. In my opinion, therefore, by resting his assessment on quantum on the award made in *Chu*, the Judge made an error with which the Court of Appeal rightly identified, and which justified, indeed required, them to consider the question of damages for themselves. In my judgment, the Court of Appeal's decision to that effect can also be justified on the basis that \$3 million per plaintiff was too high a figure in any event in this case.

92. For the reasons already discussed, the defamation was serious in that it involved significant criticisms of the plaintiffs as employees, implying, as the Court of Appeal said in para 150 of their judgment, that the 49ers were "bad and disloyal employees meriting the termination of their services". However, Cathay made no express, or even implied, suggestion that the plaintiffs' ability as pilots was in question or that their honesty was challenged. The 49ers were said expressly not to "be relied upon to act in the best interests of the company in the future", and not "showing the total professionalism [Cathay] requires", and, arguably, of holding "Hong Kong ... to ransom". Defamatory though these statements may have been, they constituted allegations of a very general nature, which would have been appreciated by the great majority of readers as having been made in the context of a bitter labour dispute.

93. It is true that an appellate court should be slow to interfere with the trial judge's award of general damages for defamation, simply on the ground that it is too high or too low. However, following the approach of the English Court of Appeal (admittedly in relation to damages awarded by a jury) in cases such as *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670 and *John v MGN Ltd* [1997] QB 586, it seems to me that, where damages are plainly too high (or plainly too low), an appellate court should set the award aside and substitute its own figure. It is inevitable that many people will consider that there is a significant degree of inconsistency in the amount of general damages awarded in defamation cases, because (i) there is an inevitable degree of subjectivity in an area where there is so little logical or principled correlation between the damage suffered and money; (ii) opinions as to the seriousness of particular libels will legitimately vary; and (iii) the factual circumstances in which a defamatory statement is made, and the particular effect of

a libel, will vary from plaintiff to plaintiff. However, given the importance of maintaining the reputation of the courts and of enabling parties in defamation disputes to compromise their differences, an appellate court should ensure that the inevitable inconsistency is kept within reasonable bounds. In this case \$3 million was outside those bounds.

94. Accordingly, given that the damages awarded by the Judge were arrived at on a wrong basis, and were anyway plainly too high, this was a case where the Court of Appeal was plainly justified in stepping in and assessing damages themselves. As to the quantum of those damages, as explained more fully by Mr Justice Ribeiro PJ in Part F1 of his judgment in *Oriental Daily Publisher Ltd* to which I have referred, it would have been appropriate in the normal way to award a sum which included significant amounts in respect of (i) consolation for distress, (ii) loss of reputation, and (iii) vindication. Further, item (ii) should have included something for loss of earnings. However, general damages for libel have to be proportionate, as the English courts were reminded by the Court of Appeal in *Rantzen* and in *John*. And, in particular, bearing in mind the absence of any “hard” evidence as to loss of job prospects, and what Lord Hoffmann said about the need for “moderation”, any sum included for loss of earning potential should not have been extravagant.

95. Bearing in mind these points, it seems to me that, in contrast with the \$3 million awarded by the Judge, the \$700,000 awarded by the Court of Appeal was plainly within permissible bounds. I can understand why some of the plaintiffs may feel that this is on the low side, but, bearing in mind the factors discussed in the preceding paragraphs of this judgment, I am firmly of the view that it is not a figure with which an appellate court should interfere. It is true that the figure was not explained by the Court of Appeal. However, in common with the majority of defamation cases, as Lord Hoffmann said in *The Gleaner*, para 68, once a court has identified all the relevant facts and circumstances relating to a defamatory statement, and has alighted on what it considers to be the appropriate figure for general damages, “[t]he matter is not capable of further analysis”.

96. It is argued on behalf of the plaintiffs that the Court of Appeal had wrongly failed to include in their award anything for the loss of employment prospects. If they had so failed, then I agree that they would have been in error. However, it seems to me clear that there was no such error. Apart from the fact that any such error seems inherently unlikely, the Court of Appeal, in para 170 of their judgment, as Mr Justice Bokhary PJ pointed out

in argument, specifically quoted with approval a passage in *Gatley on Libel and Slander* (11th edition, para 9.2), where it is stated that, while “it may be virtually impossible to prove financial loss” (“such as loss of business or employment”), there will be cases where “the damage is insidious and merits a substantial award”. The only reason for quoting that passage in a judgment, particularly after they had said that they agreed with the Judge that the plaintiffs had established no causal link between the statements and any employment difficulties they had had, was to explain that the Court of Appeal were including something for loss of employment prospects in the \$700,000 they were awarding.

97. The only remaining point under this head arises from the fact that, having rejected the award of \$3 million substantially for the reasons which I have given, and before going on to decide on the figure of \$700,000, the Court of Appeal said this at para 189 of their judgment:

“Further, having regard to the awards in personal injury cases, the award of \$3 million for each plaintiff is, for that reason too, manifestly excessive.”

Seizing on that observation, the plaintiffs contend that the Court of Appeal wrongly took into account a reason which was wrong in law for assessing damages at \$700,000 per plaintiff, namely the level of general damages awards in personal injury cases.

98. At least at first sight, that is a bad argument for two reasons. First, personal injury damages were not put forward by the Court of Appeal in connection with their decision to award \$700,000, but in connection with their anterior and distinct decision to overrule the award of \$3 million. Secondly, the reason was, in any event, self-evidently not dispositive of even that anterior decision. That decision had already been taken by the Court of Appeal on the basis of points already discussed, and the reason was merely an additional (and superfluous) ground for overturning the award of \$3 million.

99. Having said that, I am prepared to proceed on the assumption that, having mentioned personal injury damages in this way when overruling the Judge’s award of \$3 million, the Court of Appeal may have had such damages in mind when they went on to substitute an award of \$700,000. So, I think that we ought to consider the argument.

100. In a case where it is considering what sum by way of general damages to award for defamation, I can see nothing wrong with the court referring to the level of personal injury damages, at least as a sort of cross-check where it has provisionally decided to award a

large sum. As Sir Thomas Bingham MR, giving the judgment of the Court of Appeal, said in *John* at 614H:

“It is ... offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable.”

That was a statement made in the context of a direction to a jury in a defamation case, and it clearly is less powerful when applied to a case such as the present, where the trial judge sat alone. Nonetheless, in my view, it remains applicable.

101. Of course, as Lord Hoffmann pointed out in an interesting passage in *The Gleaner*, paras 50 – 56, there are, or at least there can be, significant policy and practical differences between awards of general damages for defamation and awards of general damages for personal injury. While those considerations do not undermine the force of the point made in *John*, I accept that they do emphasise the very limited extent to which the level of personal injury damages can assist a court when it is assessing general damages for defamation. I doubt that personal injury damages would be of any legitimate assistance beyond providing a sort of cross-check in a case where a judge is minded to award a relatively large amount by way of general damages for defamation (and even then I am far from saying that a judge should, as opposed to may, find such an exercise helpful). That was just the purpose for which the Court of Appeal invoked general damages in personal injury cases in their judgment in this case.

102. Accordingly, I would dismiss the plaintiffs’ appeal against the Court of Appeal’s decision to substitute \$700,000 for the Judge’s figure of \$3 million for each plaintiff by way of general damages.

Aggravated damages for defamation

103. The Judge said that he thought it right to award each plaintiff \$300,000 by way of aggravated damages for two reasons. The first was that he did “not regard Cathay’s justification plea as having been meritorious”, on the basis that it adduced no “evidence of misconduct” on the part of the plaintiffs, but merely relied on “how they voted at union meetings”. The second reason was that “the absence of an apology ..., despite the lack of evidence to back its statements about the Plaintiffs, is bound to have increased the Plaintiffs’ hurt at being accused of disloyalty”.

104. In my opinion, the Court of Appeal were right to hold that the Judge was wrong in his decision to award aggravated damages. Having read the Judge's judgment and extracts of the transcript of the evidence and arguments at the hearing before him, it seems to me that this was a defamation case where the defendant decided to rely on a defence of justification simply by reference to (i) an interpretation of the statements (which was milder than that which was eventually found by the Judge to constitute their defamatory effect), and (ii) a combination of (a) the undisputed facts and (b) facts which it sought to extract by means of measured and unaggressive cross-examination of the plaintiffs. As the Court of Appeal said in para 192 of their judgment,

“Though a plea of justification was advanced, it was advanced in respect of a meaning other than the one for which the court ultimately held Cathay liable. At no stage was there an attempt to justify the wider meaning for which Cathay was held liable.”

The defence failed because the Judge rejected the defendant's case on interpretation. However, that case, although rejected by the Judge (and by the Court of Appeal), was not cynical or hopeless, even if some may have regarded it as weak.

105. In my view, it is wrong in principle to award aggravated damages to a plaintiff in a defamation case, solely because the defendant has decided in good faith to raise a defence of justification, which is then run in a reasonable way. The fact that the defence fails, even in a case where the court regards it as not merely wrong but weak, is not enough, on its own, to bring aggravated damages into play. I agree with what is said in the following passage in para 39-046 of *McGregor on Damages* (18th edition):

“Certain dicta may ... suggest that an unsuccessful plea of justification is *per se* evidence of malice and ground for increasing damages, but it is submitted that it can only be so if the plea is completely unsupported in the circumstances: otherwise an unwarranted risk would be added to a defendant's attempt to set up the truth of the alleged defamation.”

The rationale of aggravated damages is accurately, if concisely explained in para 7-009 of the same work as being (i) “the defendant's bad motives or wilfulness” (which cannot fairly be alleged in this case, not least because it was not put to any Cathay witness) or (ii) “the good character and reputation of the [plaintiff]” (which is more controversial and was not invoked in this case anyway).

106. So far as the absence of an apology is concerned, I do not consider that it can take

matters any further in a case such as this, where the defendant has decided in good faith to raise a defence of justification, which is then run in a reasonable way. After all, it is scarcely consistent for a defendant to apologise if he is running a defence of justification: it would positively undermine the defence. And to issue a limited or contingent apology (eg “While I deny any defamation, I am sorry if I upset you” or “if, contrary to my case, I did defame you, I hereby apologise”) might well be regarded by many people as cynical or at least valueless.

107. Mr Grossman suggested that the Judge’s award of aggravated damages could nonetheless be supported by the fact that the statements complained of remained on Cathay’s website. It would not be impermissible for an appellate court to reject a trial judge’s reasons for awarding aggravated damages, but nonetheless to uphold the award on different grounds. However, such a course could only be taken where the different grounds clearly justified the award. I do not consider the ground invoked by Mr Grossman gets near satisfying that requirement, at least on the evidence in this case. It is true that the statements remained on Cathay’s website for eight years or so. However, (i) it was not easy to access them in relation to any particular plaintiff; (ii) there is no suggestion that the statements were deliberately left on the website pursuant to a positive decision made by Cathay to retain them; (iii) as soon as the plaintiffs asked for the statements to be removed, this was done; (iv) it was not put to the defendants’ witnesses that there was any malice in the maintenance of the statements on the website; (v) there was no evidence that damage of any nature, over and above that for which general damages were sought, had been caused to the plaintiffs by the retention of the statements on the website.

108. I would therefore dismiss the plaintiffs’ appeal against the Court of Appeal’s decision to set aside the Judge’s award of aggravated damages.

Conclusion

109. For these reasons (as well as the short additional reasons given by the Chief Justice, in his judgment which I have seen in draft), I would (a) dismiss Cathay’s cross-appeal to set aside the Judge’s award of \$150,000 per plaintiff in respect of the Ordinance claim; (b) allow the plaintiffs’ appeal to the extent of reinstating the Judge’s award of a month’s pay for each plaintiff in respect of the wrongful determination claim; (c) (i) dismiss the plaintiffs’ appeal against the Court of Appeal’s award of \$700,000 per plaintiff for general damages for defamation, and (ii) dismiss the plaintiffs’ appeal against the decision of the

Court of Appeal to set aside the \$300,000 aggravated damages for defamation awarded by the Judge.

110. As to the costs of this appeal and cross-appeal, I would make an order *nisi* that there should be no order as to the costs in this court, on the basis that each party has succeeded (and failed) on two issues apiece. As to the costs below, I would make an order, also on a *nisi* basis, that they should be dealt with in the following way:

(a) The order made by the Judge as to the costs of both the trial of the preliminary issues and the trial itself, namely that Cathay should pay the plaintiffs' costs, should be reinstated, because the effect of my judgment is that the plaintiffs have largely won on each of the claims made against Cathay. It is true that the amount of damages they have recovered for defamation is significantly less than what the Judge awarded them, but their claim for any damages for defamation was resisted by Cathay, and they therefore had to come to court to get relief;

(b) As for the costs of the appeal to the Court of Appeal, just as in the appeal to this court, each of the parties has won (and lost) on two issues (and although there were other issues raised, each party also had mixed fortunes in relation to them), so I would make no order for those costs.

Chief Justice Ma :

111. Accordingly, for the above reasons, the Court makes the orders disposing of the plaintiffs' appeal and of the defendants' cross appeal as set out in para 109 above. As for costs, an order *nisi* is made in terms of the orders set out in para 110 above.

(Geoffrey Ma)
Chief Justice

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(Robert Tang)

(Lord Neuberger of Abbotsbury)

Non-Permanent Judge

Non-Permanent Judge

Mr Clive Grossman, SC and Mr Kam Cheung, instructed by Chiu, Szeto & Chang, for the appellants in FACV 13/2011 and the respondents in FACV 14/2011

Mr Adrian Huggins, SC and Mr Robin McLeish, instructed by Mayer Brown JSM, for the respondents in FACV 13/2011 and appellants in FACV 14/2011