Appeal No. UKEAT/0084/19/VP

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 & 26 November 2020
Judgment handed down on
17 December 2020

Before

THE HONOURABLE MR JUSTICE GRIFFITHS

(SITTING ALONE)

UNIVERSITY COLLEGE LONDON APPELLANT

MR T BROWN RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	MR EDMUND WILLIAMS QC and MR JAMES CORNWELL Instructed by: Gowling WLG (UK) LLP
For the Respondent	MR BEN COOPER QC and MR SPENCER KEEN Instructed by: Slater Gordon Solicitors 90 High Holborn London WC1V 6LJ

SUMMARY

The ET was entitled to find that the employer's "sole or main purpose" in giving the Claimant a formal oral warning for refusing to comply with an instruction to take down an email list he had created for union communications was "preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so" within the meaning of section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992.

The question of the employer's "sole or main motive" is a subjective question, to be judged simply by enquiring into what was in the mind of the employer at the time.

The question of whether the employee qualifies for protection under paras (a) to (c) of section 146(1) is an objective question, to be decided by the ET.

The ET made findings of fact on these questions which disclosed no error of law or other basis for a successful appeal.

The employer raised no data protection law issues until closing submissions: they were not raised in the pleadings, or in any of the witness statements, or in cross examination. In those circumstances, the ET would have been entitled not to entertain them. *IRC v Ainsworth* [2009] ICR 985; *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (Case C-312/93) [1995] ECR I-4599; *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1996] 1 CMLR 401; and *Van der Weerd v Minister Van Landbouw, Natuur en Voedseklwaliteit* [2007] 3 CMLR 7 considered.

Having considered the data protection law issues, the ET made findings open to it on the evidence, and correctly referred to and applied the authorities on the question of whether the alleged breaches, if they were taken as established (which they were not), could be said to remove Mr Brown from the protection of section 146 : *Morris v Metrolink Ratp Dev Ltd* [2019] ICR 90 CA; *Lyon v St James Press Ltd* [1976] ICR 413 EAT; *Bass Taverns Ltd v Burgess* [1995] IRLR 596 CA.

The ET also correctly applied the burden of proof.

THE HONOURABLE MR JUSTICE GRIFFITHS:

1. This is an appeal against the unanimous decision of an Employment Tribunal (ET) consisting of Employment Judge Stewart and lay members that the Claimant, Mr Tony Brown ("Mr Brown"), had been subjected to a detriment by his employer University College London ("UCL") within the meaning of section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the Act") so that his claim was well-founded and he was entitled to remedy (which has not yet been determined).

2. Section 146 of the Act provides, so far as material: -

> **"146. — Detriment on grounds related to union membership or activities.**
>
> (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of— …
>
> (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…
>
> (2) In subsection (1) "an appropriate time" means —
>
> (a) a time outside the worker's working hours, or
>
> (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;
>
> and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work…
>
> (5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section."

3. There was a certain amount of common ground. Mr Brown was a worker – an employee of UCL. Mr Brown was subjected to a qualifying detriment – he was issued with a formal oral warning on 8 March 2017. If he was taking part in the activities of an independent trade union, he was doing so at "an appropriate time".

4. What was disputed was whether the formal oral warning was given "for the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union…".

5. UCL's submissions to the ET (para 4) broke this down into two questions:

> "(i) What is it that [Mr Brown] actually did? and
>
> (ii) Why did the decision makers give the Claimant an oral warning?"

6. Similarly, this appeal has been argued by splitting the requirements of section 146 of the Act into two aspects:

   (i) What was the "sole or main purpose" of the manager who gave Mr Brown the formal oral warning? i.e. the "sole or main purpose" of the "act" mentioned in the body of section 146; and

   (ii) Was the manager's sole or main purpose to prevent or deter Mr Brown from, or penalise him for, taking part in activities protected under section 146(1)(b)? i.e. were they "the activities of an independent trade union"?

Background facts

7. The following facts are taken from the ET Judgment and Reasons dated 7 November 2018 ("the Judgment").

8. Mr Brown has been employed by UCL since 2007 and remains employed by them as an IT Systems Administrator in the Information Services Division ("the ISD"), which provides UCL with centralised IT services. UCL is a university with over 11,000 staff and about 39,000 students. Since 2009, Mr Brown has been an active member of a national trade union, the University and College Union ("UCU"). He was an elected UCU representative. UCU is recognised (with other trade unions) by UCL. UCU and the other recognised unions are parties to a Trade Union Recognition and Facilities Agreement with UCL dated March 2014 ("the Recognition Agreement").

9. Until 20 January 2016, ISD had a mailing list called ISD-ALL which could be used by anyone to send email indiscriminately and without moderation to every member of ISD staff. It could be used for this purpose by UCL management, by any individual employee, by the union - by anyone, in fact, including people who were not members of ISD staff at all. Every member of staff was on the list automatically; no-one could opt out of it.

10. It appears from the Judgment that they were getting emails, unsolicited, about all sorts of things, official and unofficial. Examples given by the ET were raffle tickets, lost keys, issues of general public interest such as violence against women and children – and, sometimes, emails from Mr Brown's union, UCU, whether or not they were members of his union, or any union.

11. In August 2015, James McCafferty (who gave evidence to the ET) became the Director of IT Service Delivery and Deputy Chief Information Officer of the ISD ("Mr McCafferty"). He raised with senior colleagues whether the ISD-ALL list was appropriate.

12. In November 2015, a member of staff asked to be taken off the ISD-ALL list "because she felt some of the posts were really disruptive or not appropriate" (Judgment para 10).

13. On 17 December 2015, the Head of the Communications Team at ISD, Chris Moos, proposed to change the ISD-ALL list so that moderation controls would be applied, and access would be restricted to ISD staff – although all members of ISD staff would still be on it.

14. The reasons he gave (summarised in ET Judgment para 11) were:

    (i) UCL people who were not in the ISD had been able to send email to ISD-ALL, "often without knowing it would go to four hundred plus staff";

    (ii) UCL wanted to reduce the number of times people hit "reply all" to ISD-ALL emails, which "annoy staff"; and

    (iii) UCL wanted "to stop the channel being used for "venting" to all staff or sending content that is only appropriate to be sent to a much smaller group".

15. He proposed replacing the old ISD-ALL list ("the old ISD-ALL list") with two new lists (summarised in ET Judgment para 12):

    (iv) A new ISD-ALL list ("the new ISD-ALL list") which could only be used by (i) management and (ii) web coms without moderation. All other ISD staff and organisations could also post to the moderated ISD-ALL list, but their posts "would go into a 'moderation queue' to be reviewed by the ISD web coms team". The new ISD-ALL list was therefore the same as the old one, except that there would be moderation (that is to say, checking and supervision) of emails before deciding if they should be allowed to go out to every member of ISD staff.

    (v) A new ISD-conversation email list ("the new Opt-in Conversation list"). The Judgment says very little about this, but the implication is that it was unmoderated, so that anyone on it could send anything they liked through it. Where it differed both from the old ISD-ALL list and the new ISD-ALL list, however, was that "staff could opt-in, if they so wished" (Judgment para 12). In other words, unless you chose to opt-in to it, you were not on it.

    Hence, there would be a list which everyone was on, and which they could not opt-out of, but posts would be moderated (the new ISD-ALL list); and there would also be a list which would not be moderated, but which you had to opt-in to (the new Opt-in Conversation list).

16. The proposed changes were officially announced by email to all ISD staff on 20 January 2016. They were explained; comments were invited; and a review was promised after three months (Judgment para 13).

17. The ET (that is, the EJ and members themselves, expressing their own independent judgment) disapproved of this proposal, expressing itself in para 53 of the Judgment in the following terms:

> "The Tribunal concluded that the Respondent's changes to the existing un-moderated email list ISD-ALL, which had existed for a period of at least 14 years, fundamentally changed the landscape in terms of the UCU's communication access to all staff, including non-union members. It is fanciful and naïve to suggest that flyers on desks and notices on notice-boards would achieve an alternative and equivalent reach to all staff, in an age where electronic communication has become overwhelmingly the norm and where there is rapidly increasing IT enabled remote working. It is also self-evident that, in real life, an opt-in list has radically less take up than an opt-out list, requiring, as it does, both knowledge of the opt-in list and pro-action as opposed to passivity. The Claimant cited an example of an opt-in of about 120 out of 500 staff."

18. Para 53 of the Judgment is a little difficult to reconcile with para 12. The new ISD-ALL list was the same as the old ISD-ALL list except that it was moderated. ET does not make a finding that, if Mr Brown or UCU had wanted to send an email to all staff (including members of other unions, members of no union, and members of UCU itself) in the ISD, inviting them to subscribe to an opt-in list, it would not have been allowed to do so. That would get over the "flyers on desks and notices on notice-boards" point. Nor does it make a finding that, if they had wanted to send an email to all staff about union matters, it would have been prevented from doing so by the moderation process.

19. The ET does say "…communicating officially with all staff must reasonably be taken to be included in any objectively definition (sic) of legitimate union activities, for the reasons set out above in paragraph 52 of these Reasons" (para 54 of the Judgment). The paragraph of the Judgment referred to (para 52) said this:

> "The Tribunal finds unanimously that, on the face of it, communicating with the whole staff body, including both union members (even though there was also a separate union members email list) and non-union members, regarding matters of legitimate concern to all staff, such as pay, pensions and working conditions and disputes with management relating to workplace arrangements, must form part of what can reasonably and objectively be described as a core trade union activity. The Tribunal further accepted the Claimant's contention that campaign communications, including those regarding potentially lawful industrial action on matters of dispute between staff and management, constitute a potentially powerful tool for the recruitment of new members of a trade union. Recruitment is also a legitimate trade union activity, within the spirit of Article 11 ECHR".

20. The UCU objected to the new ISD-ALL moderated list and new Opt-in Conversation list replacing the old, unmoderated and indiscriminate ISD-ALL list. Using the old ISD-ALL list, another UCU union representative in the ISD (not Mr Brown) immediately emailed in response to the announcement on 20 January 2016: "Fellow workers! If in doubt clamp down on freedom of speech of staff!" and encouraged

others to object as well, which they did (Judgment paras 13-14). The topic dominated a regular monthly meeting between UCL ISD management and the UCL ISD branch of the UCU on 22 January.

21. At this 22 January meeting, Mr Brown said that he was minded to set up a brand new distribution list, open to all ISD staff (apparently duplicating the old ISD-ALL list which was being replaced by the two new lists). Mr McCafferty "strongly urged him not to misuse UCL resources" (Judgment para 16).

22. On the same day, 22 January 2016, Mr Brown contacted the IT service desk and requested the creation of a new list entitled "ISD-discussion", which was done for him on 25 January. It was then up to Mr Brown what email addresses he put into his newly created ISD-discussion list. A UCU union meeting took place on 3 February and "the members voted to have a new open list". Mr Brown "set about populating his new mail list with the email addresses of all staff" (Judgment para 18).

23. On 19 February 2016, Mr Brown and all five of his fellow-ISD UCU trade union representatives sent an email to every member of staff on his new "ISD-discussion" list – thereby circumventing the abolition of the old ISD-ALL list, the moderation on the new ISD-ALL list, and the opt-in requirement of the new Opt-in Conversation list. Their email made it clear that recipients could opt out of the unofficial ISD-discussion list. The email "ended with a call upon the Director of ISD to reverse the decision regarding the ISD-All mailing list being moderated" (Judgment para 18).

24. On the same day, Friday 19 February, Andrew Dawson (Head of Data Services in ISD), told Mr Brown to delete his new ISD-discussion list, and followed up with an email:

> "…to confirm our earlier conversation, I have asked you to delete the ISD-discussion mailing list, please could you action this by 5pm today."

25. Mr Brown objected to the instruction and never complied with it. Instead, he ended the day (which happened to be his last day before taking a week's annual leave) by sending Mr Dawson an email:

> "…stating that he was writing in his capacity as a UCU rep and was copying his other UCU rep colleagues in to the email, inviting Mr Dawson to set out in writing why UCL believed that the discussion list should be deleted and undertaking for the representatives to consider his request in consultation with the membership. The email also stated that when they had met informally earlier in the day he had explained that the decision to create the new list had been taken by a meeting of the UCU and that in creating the list "I was acting in my capacity as Trade Union Representative" and that this had been clear from the first message sent to the list." (Judgment para 19)

26. The next working day, Monday 22 February, Mr Dawson emailed him to say that management would delete his ISD-discussion list, "As you have failed to follow management instruction to remove this list".

27. The following Monday, 29 February, Mr McCafferty notified Mr Brown by email that he would be the subject of a disciplinary investigation.

28. The investigation took some time, and a report was produced on 25 July 2016.

29. On 15 November 2016, UCL's Human Resources department wrote to Mr Brown convening a formal disciplinary hearing to consider the following charge of misconduct:

> "That on 19 February 2016 you wilfully disobeyed a reasonable management request to delete the email distribution list ISD-discussion."

30. Mr Brown asked for the disciplinary process to be paused while he raised a grievance, and it was later further postponed at the request of his representative.

31. The disciplinary hearing eventually took place on 1 March 2017. The decision maker was Andrew Grainger, a senior manager brought in from another department for this purpose. He was the Director of Estates at UCL. Mr Brown was represented at the hearing by one of UCL's law professors.

32. After the hearing on 1 March 2017, Mr Grainger gave his decision and his reasons in a letter dated 8 March 2017. Since the decision conveyed by this letter is the act complained of under section 146 of the Act, I will quote it (with emphasis in the original):

> "This letter confirms the outcome of the hearing, which was held to explore and establish the facts surrounding the misconduct charge made against you that;
>
> ● **On 19 February 2016 you wilfully disobeyed a reasonable management request to delete the email distribution list 'isd-discussion@ucl.ac.uk'**.
>
> As panel chair I took account of the written evidence presented by the Investigating Manager, Bella Malins, the management witness James McCafferty and the verbal submissions made by you and your representative Nicola Countouris during the course of the hearing.
>
> After full and careful consideration of all the information and facts presented, I have determined that there was sufficient material in order to come to a conclusion. My decision on the misconduct charge against you is as follows:
>
> **This charge was found to be upheld.**
>
> **Given the nature of this misconduct, I have concluded that the appropriate sanction is a formal oral warning, which will normally lapse 6mths after issue.**
>
> The rationale for my decision is explained below;

> As panel chair, l focussed explicitly on the charge made against you. I considered how you were asked to delete the mailing list both verbally and in writing, which you then chose not to do - resulting in management having to then take down the distribution list. It was noted, you confirmed in your oral submission that you fully understood the management request made to you at the time but that you felt it was not a reasonable request. I am satisfied management provided a rationale for the proposed changes to the ISD distribution list. It was explained to me that prior to the change only one ISD unmoderated distribution list was in operation, open to all staff in ISD. This was then replaced by two lists - one of which was moderated by management and the other which was open to all staff within ISD. Both the old list and the new unmoderated list were/are open to all ISD staff and could also be used for trade union correspondence. The only material difference between the two lists is that the new all staff list is an opt-in for staff whereas the old list was an opt-out. It is important to note, which was accepted by all parties, that both the old and new distribution lists were not set up specifically or exclusively for the purpose of trade union communication.
>
> In your response you stated that management did not make it clear to you that if you failed to follow the management instruction then you would be subject to disciplinary action. I have noted Adrian Barker's statement on page 7 of the management pack which states;
>
> *"AD and AB met with TB at 2pm on 19 February. AB indicates that they were explicit in indicating that the list must be taken down by 5pm or disciplinary action would be taken".*
>
> I have appreciated this could not be corroborated either way at the hearing as neither Adrian Barker (AB) nor Andrew Dawson (AD) were called as management witnesses. Although I have considered this evidence it did not materially influence my decision making. l have concluded that this was a clear management instruction to you to act and it is reasonable to expect serious consequences if such an instruction is actively ignored or a refusal to follow instructions.
>
> I do not consider your submission in defence of your action that you were acting in your capacity as a TU representative to be relevant in these circumstances.
>
> You have the right to appeal against this decision…"

33. I should say that the argument on Mr Brown's behalf addressed in the middle section of this letter (that is, the suggestion that "management did not make it clear to you that if you failed to follow the management instruction then you would be subject to

disciplinary action") is no longer pursued, and was not relevant to the ET Judgment or to this appeal.

34. Mr Brown did appeal from Mr Grainger's decision, and his internal appeal was heard by a panel of three. It was chaired by another manager brought in from outside ISD, Ms Helen Fisher, Faculty Manager at the UCL Faculty for the Built Environment. The appeal hearing took place on 12 June 2017. The appeal was unsuccessful.

35. Before me, both parties agreed that Ms Fisher's appeal panel was not directly relevant, although it was part of the evidential background to the ET's decision. The internal appeal conducted by Ms Fisher proceeded as a review of Mr Grainger's hearing and reasoning, rather than as a fresh decision based on a complete re-hearing (Judgment para 47). The act complained of in the ET proceedings was the formal oral warning given by Mr Grainger. The purpose said to be prohibited by section 146 of the Act – the "sole or main purpose" alleged – was the purpose of Mr Grainger in deciding to impose the formal oral warning. The only effect of the appeal was to leave that undisturbed. Nothing in the appeal decision was separately complained of by Mr Brown. Similarly, since the appeal was a review rather than a rehearing, UCL did not try and argue that it wiped the slate clean, by erasing and replacing Mr Grainger's decision.

The decision and reasoning of the ET

The agreed issues

36. The ET had inherited an agreed list of issues from an earlier preliminary hearing which it quoted in para 5 of the Judgment, as follows:

> "**The issues** (…)
>
> 1. Did the Claimant's creation of an email distribution list amount to 'taking part in the activities of an independent trade union at an appropriate time' within the meaning of section 146(1)9(b) of the TULRC Act 1992, as interpreted in light of Article 11 of the ECHR?
>
> 2. It is agreed that the Respondent's decision to discipline the Claimant by way of issuing a formal warning and rejected his appeal against this sanction was 'detrimental treatment' within the meaning of section 146(1) of the 1992 Act.
>
> 3. Was the 'sole or main purpose' of this detrimental treatment to prevent or deter the Claimant from taking part in the activities of an independent trade union (the UCU) at an appropriate time, or to penalise him for doing so, contrary to section 146(2) of TULRCA 1992, as interpreted in the light of Article 11 of the ECHR?
>
> 4. If so, what remedy should be ordered by the Tribunal within the provisions of section 149(1) of the Act?"

37. Issue 2 was (not unhelpfully) the identification of something which was, in fact, not in issue, and Issue 4 went to remedy only. That left Issues 1 and 3 as the issues for the Judgment and, as I will explain, those two Issues were the sub-headings of the final section of the Judgment ("Conclusions") which set out the ET's reasoning and decision.

38. The ET was not very well-served by the agreed Issues, not least because agreed Issue 1 referred only to Mr Brown's "creation" of the email list, whereas UCL drew a sharp distinction between "creation" of the list and Mr Brown's later refusal to take it down, when instructed to do so. There was support for this distinction in the way the disciplinary charge was framed against Mr Brown, and in the way that Mr Grainger framed the decision letter which imposed and explained the formal oral warning which gave rise to the case. Notwithstanding this potential confusion, the ET did go on to consider the proposed separation of the act of creation from the refusal to take it down for the purposes of the issues in the case.

Structure

39. Before doing that, the ET proceeded to structure its Judgment as follows:

    (i) Under the heading "The Facts" it set out a detailed chronological narrative without identifying any disputes of fact. This ran from paras 6-49 and pp 3-14 of the Judgment. It was heavily based on documents and rarely referred to evidence given to the ET by witnesses, mostly quoting from what witnesses and others said in the documents. (The ET had heard evidence from Mr Brown, Mr McCafferty, Mr Grainger and Ms Fisher). For example, when it came to the meeting of 22 January which I have referred to at paras 20-21 above it did so only by quoting by an email dated 24 January about it (Judgment para 16).

    (ii) Under the next heading, "The Law" (para 50 and sub-paras), the ET set out section 146 of the Act, and summarised Article 11 of the ECHR, Article 12 of the EU Charter and section 3 of the Human Rights Act 1998. It quoted from paras 46-48 of the ACAS "Code of Practice on time off for trade union duties and activities". It listed 23 cases to which it had been referred. It did not identify any proposition from these cases or indicate how they were relevant to or applied by the Judgment. It did, however, return to some of them in the final part of its decision, the "Conclusions".

    (iii) The ET then proceeded directly and finally to its "Conclusions" (paras 51-76, pp 16-27 of the Judgment).

40. The "Conclusions" section was divided into two under the following headings:

    (i) "Did the Claimant's creation of an email distribution list amount to 'taking part in the activities of an independent trade union at an appropriate time' within the meaning of section 146(1)(b) of TULR(C)A 1992, as interpreted in the light of Article 11 of the ECHR?" (para 51). I will call this "Question 1".

    (ii) "Was the sole or main purpose of disciplining the Claimant to 'prevent or deter' him from taking part in the activities of an independent trade union at an

> appropriate time or 'penalising him for doing so', contrary to section 146(2) of TULR(C)A 1992, as interpreted in the light of Article 11 of the ECHR?" (para 64). I will call this "Question 2".

The ET's treatment of Question 1

41. The ET addressed Question 1 in paras 51-63, pp 16-21, and concluded:

> "Accordingly, the Tribunal's unanimous conclusion is that the Claimant's action both in setting up the list and in refusing to take it down, were 'taking part in the activities of an independent trade union' within the ambit of section 146(1)(b) of TULR(C) 1992 and were protected as such." (para 62)

42. Question 1 was a straight repetition of Issue 1. It therefore addressed the Claimant's "creation" of an email distribution list. The charge of misconduct which Mr Grainger (before he had become involved) was asked to determine was that Mr Brown wilfully disobeyed a reasonable management request to delete it (para 29 above). This was also how Mr Grainger understood the question he was deciding, as set out in his decision letter in bold (para 32 above). Indeed, he strongly emphasised it: "I focussed explicitly on the charge made against you. I considered how you were asked to delete the mailing list….".

43. This was an important distinction and appears to be the basis of Mr Grainger saying, at the end of his detailed reasoning in the decision letter: "I do not consider your submission in defence of your action that you were acting in your capacity as a TU representative to be relevant in these circumstances". Mr Brown's action was setting up the list in the first place; the misconduct charge was refusing to take it down when instructed to. Whether or not he was right to approach the matter in this way, Mr Grainger was saying his decision was not based on "your action" but on Mr Brown's later failure to act, when he did not comply with the instruction.

44. By the end of its discussion of Question 1, the ET appears to have addressed its answer to this, real, issue, as opposed to the issue it had adopted as Question 1, to the extent that it answered the question in Mr Brown's favour both in relation to "the Claimant's action both in setting up the list and in refusing to take it down". It was right to do so.

45. The ET first addresses the question in the way that Mr Grainger himself approached it in his decision letter in its paraphrase of UCL's case in para 51.2(iii) of the Judgment as follows: -

> "Even if the act for which the Claimant was disciplined potentially fails within section 146, the *manner* in which he did the act – in flagrant defiance of a lawful management instruction – took him beyond the protection of the section. The manner was 'separable' from the act itself. ('the manner point') …"

46. This however still assumed that the "act for which the Claimant was disciplined" was the same as the act of setting up the list, so that the disciplinary charge that he

"disobeyed a reasonable management request to delete the email distribution list" was not a separate punishable act, as the disciplinary charge and Mr Grainger's decision saw it.

47. I do not think that referring to this issue as "the *manner* in which he did the act" fully reflected the dispute about whether the act of refusing to obey the instruction given on 19 February was the *same* as the act of setting the list up. Once they were identified as two separate acts, the question of whether they were so inextricably linked that the second act retained the protection created by the first (or, indeed, independently attracted such protection), could be more clearly asked and answered.

48. The body of the ET's discussion immediately after para 51 continued to assume, without clearly deciding, that the two could not be separated and were not separated, not only as a matter of causation and analysis, but as separate acts.

49. Thus, the conclusion it expressed in para 54 was "that the Claimant was undertaking trade union activities in setting up a replacement open email list and in refusing to take it down", but the reasons given did not focus at any point on the act of disobedience, but only on the act of setting the list up. The reasons given for the conclusion in para 54 are in relation to "His action, within two days of the Respondent's announcement…", i.e. Mr Brown's action in setting the list up on 22 January after the announcement on 20 January. The management instruction to take it down was a month later, on 19 February.

50. Welding together the setting up of the list on 22 January on the one hand, and the refusal to take it down on 19 February on the other, to the extent that they could not be distinguished at all for the purposes of deciding whether they were "taking part in the activities of an independent trade union" was contrary to the analysis in the disciplinary charge and in Mr Grainger's disciplinary decision, and it needed to be identified and resolved as a disputed question; indeed, the key question in the case, given the areas of agreement.

51. The ET did, however, then deal with what it had characterised as the 'manner' point as follows (paras 55-56):

> "55. As to the 'manner point' contended for by the Respondent, the Tribunal took the view that this contention, in part, begs the question of whether or not the management instruction was 'lawful' or not lawful, for example in the sense of contravening the Claimant's rights under section 146(1). In remainder, it merges with the 'unlawful' contention dealt with below.
>
> 56. Turning to whether the Claimant's acts in themselves, or in the manner in which he carried them out, were sufficiently 'unlawful', so as to place him out-with the protection of section 146: the Respondent did not define precisely in what manner the Claimant is alleged to have acted in breach of his contract of employment, save that it is contended that his refusal to take down the list was 'deliberate insubordination' in the face of a reasonable management instruction and therefore constitutes 'wholly unreasonable conduct'. This formulation, however,

> depends on whether management instruction was in fact reasonable."

52. Here it seems to me that the ET did at last rescue itself from the confusion caused by the formulation of agreed Issue 1 to refer only to the setting up of the list in the first place. The last sentence of para 55, in particular, but also the rest of paras 55 and 56 taken as a whole, correctly picked up the point that even the disciplinary charge was that Mr Brown wilfully disobeyed "a **reasonable** management request" and therefore, itself, linked obedience to the instruction to take the list down to the question of whether the instruction was "reasonable".

53. The next section of the Judgment considered the late allegations of data protection breaches (paras 57-59).

54. This led to consideration of "the extent to which 'unlawful' conduct by a Claimant might properly vitiate the protection for otherwise legitimate union activities afforded by section 146(1)" (para 60) and reference to *Morris v Metrolink* [2018] EWCA Civ 1358. Based on this, the ET rejected UCL's case on data protection (para 61 and sub-paras).

55. The ET concluded this section in para 62 as follows: -

> "Accordingly, the Tribunal's unanimous conclusion is that the Claimant's action, both in setting up the list and in refusing to take it down, were 'taking part in the activities of an independent trade union' within the ambit of section 146(1)(b) of TULR(C) 1992 and were protected as such."

56. This conclusion was expressly based, not only on Mr Brown setting up the list, but also on his refusal to take it down.

57. Leaving aside the data protection points, which the ET was right to see as a new and distinct issue, and which I will return to, the reasoning on that was so far relatively sparse. But the next section of the Conclusions, although directed to the question of Mr Grainger's subjective purpose, also contains further reasoning relevant to and supportive of the ET conclusion in para 62. In para 72.10 of the Judgment, the ET said:

> "72.10 It was wholly unrealistic to attempt to separate the disciplinary process against the Claimant from this wider context. It was entirely artificial and not credible for Mr Grainger to try to carve out a single act of disobedience to a reasonable management instruction by the Claimant from its surrounding context. The Claimant was explicitly acting as a union representative at the time of his refusal to take down the list. Whether or not the instruction to take down the list was 'reasonable' or not must necessarily entail a consideration of the substantive question raised by his defence; in refusing to take down the list, was he taking part in the activities of an independent trade union and therefore protected by section 146?"

58. In para 75.4 of the Judgment, the ET said:

> "It was clear to all concerned in the process that the Claimant's disobedience was directly related to, and intended to remedy, the Respondent's removal of the open-all email list which had existed for some 14 years and was the union's only electronic channel of un-moderated communication with all staff; Mr Grainger himself considered the Claimant's setting up of the list in the first place, and not simply the refusal to take it down, to be misconduct. Ms Fisher's appeal outcome letter included that 'the deletion of the list did not prevent a protected trade union activity" – a conclusion arrived at apparently without full consideration of the evidence. The Claimant's action were simply not separable, in anybody's mind, from their context of a trade union taking action against management steps to 'get better control' of the email system and Mr Grainger was punishing the Claimant for this act."

59. Although it is potentially confusing that these passages were joined to criticism of Mr Grainger's contrary analysis, in his evidence and in his decision letter, which saw the two as not only separable but separate, I think it is clear on any fair reading of the passages that they were expressing the ET's own findings of fact on a question which it was for the ET to decide; namely, whether the act of refusal to take down the list, as well as the act of setting it up in the first place, was a protected act within the definition of "taking part in the activities of an independent trade union" in section 146(1)(b).

60. A passage from the ET's much earlier summary of the submissions of Counsel also contained an ET finding which further supported its conclusion in this respect. At para 52 of the Judgment it had said:

> "The Tribunal found unanimously that, on the face of it, communicating with the whole staff body, including both union members (even though there was also a separate union members email list) and non-union members, regarding matters of legitimate concern to all staff, such as pay, pensions and working conditions and disputes with management relating to workplace arrangements, must form part of what can reasonably and objectively be described as a core trade union activity. The Tribunal further accepted the Claimant's contention that campaign communications, including those regarding potentially lawful industrial action on matters of dispute between staff and management, constitute a potentially powerful tool for the recruitment of new members of a trade union. Recruitment is also a legitimate trade union activity, within the spirit of Article 11 ECHR."

61. The ET's conclusion on Issue 1 and Question 1, therefore, was extended to the question of whether the refusal to take down the list, as well as the act of setting it up, was protected trade union activity, and found that it was (para 55 above).

62. Despite the false starting point created by the formulation of Issue 1, this was a conclusion on Question 1 which ended in the right place and it appears, on the face of it, to be a finding of fact which was open to the ET and for which it gave reasons based on the evidence and on the largely undisputed primary facts.

The ET's treatment of Question 2

63. The last section of the Conclusions, and of the Judgment, was where the ET addressed Question 2. Just as Question 1 had been taken from agreed Issue 1, Question 2 was taken from agreed Issue 3 (paras 36 and 40 above). This was:

> "Was the 'sole or main purpose' of this detrimental treatment to prevent or deter the Claimant from taking part in the activities of an independent trade union (the UCU) at an appropriate time, or to penalise him for doing so…"

64. The ET correctly observed that this question was about the 'sole or main purpose' in the mind of Mr Grainger, as disciplining officer (Judgment para 65). It noted Mr Grainger's evidence that his decision was based solely on 'clear insubordination and wilful disobedience' (para 68). It recognised that this linked Mr Grainger's intention to what the ET had now decided was trade union activity protected by section 146 (para 69).

65. It nevertheless continued its examination of the evidence of Mr Grainger's "sole or main purpose". It did so (citing section 148 of the Act and the decision of Burton J in *Yewdall v Secretary of State for Work and Pensions* [2005] UKEAT/0071/05/TM; see also *Serco Ltd v Dahou* [2017] IRLR 81 CA) by first deciding whether the Claimant had established a prima face case of impermissible purpose in the mind of Mr Grainger and/or Ms Fisher (para 71).

66. It found that Mr Grainger's analysis that the refusal to take the list down was distinct from the protected activity of setting it up was "obdurate and self-limiting"; "remarkable", and "simply not a credible position" (para 72.1). It referred to:

> "…the entire union context; the Claimant's role as a TU rep and his colleagues' insistence throughout that the Claimant was acting on their behalf; Ms Malins' investigatory Report which placed the Claimant's action squarely in the context of both the trade union and the Respondent's action in closing the open-all email list" and "the cogent defence submissions advanced by Professor Contouris" (Mr Brown's representative at the disciplinary hearing).

67. It attacked Mr Grainger's analysis, between paras 72.2-72.10 (pp 23-25) of the Judgment. The ET not only disagreed with it, it seems to have decided that it was not sincere (this becomes more explicit later in the Judgment, in the second para numbered 75 (there are two of them) and in the last two sentences of para 75.4). It also accused Ms Fisher of "fudging the issue" (para 72.3); speculated that HR must have been "well aware of senior management's agenda" (para 72.4), and criticised Mr McCafferty (para 72.5). "The Tribunal formed the view that senior management were fully determined to cease the old un-moderated email list and were not going to allow

any impediment to this overriding intention" (para 72.6). The ET "concluded unanimously that the nuisance and inconvenience problems caused by the original ISD-ALL list being un-moderated were in fact very minor" (para 72.7). It decided that "the real irritant and the principal motive for changing to a moderated list to which only management could freely post was to stem the free "venting" … on dispute issues between management and unions" (para 72.8).

68. The evidential basis for all of this was quite slim; and the ET's forthright substitution of its own assessment for that put forward by management was not the best way to approach the question of whether Mr Grainger's analysis was as he stated it to be, which was the question before the ET, rather than whether they agreed with that analysis. This was particularly given that Mr Grainger was from a completely different department, brought in, at Mr Brown's request, "in order to obtain complete impartiality and independence from the department" (Judgment para 36).

69. The ET's reasoning reached a conclusion in this closing passage from para 72.10 of the Judgment, following its own analysis (which I have quoted at para 57 above) that the refusal to take down the list was inseparable from the setting up of the list:

> "Mr Grainger wilfully refused to engage with this issue. It is remarkable for any senior manager sitting as a disciplining officer to cast aside a cogently argued defence to a disciplinary charge, particularly when argued by an acknowledged expert in the field, as 'irrelevant', without providing reasons for so deciding. The fact that Mr Grainger did so, and the fact that Ms Fisher then added a contradictory, but still relatively cursory, gloss in upholding his decision, all apparently upon the advice of HR, gives rise to the inference that the issue of trade union activities was being deliberately and consciously sidelined, discounted and then overridden without proper consideration, even at appeal in the determination to see the Claimant punished."

70. The reasoning of this is defective. The analysis of the ET and of Mr Grainger differed. The ET was entitled to consider its own analysis to be correct, but it was a bold step and, in my judgment, a misstep, to move from disagreement to doubting the good faith of the other person's point of view. As Elias J said in *Bahl v The Law Society*, with the whole-hearted agreement of the Court of Appeal at [2004] IRLR 799 at para 101, "Employers will often have unjustified albeit genuine reasons for acting as they have".

71. The ET decided that the issue of Mr Grainger's "sole or main purpose" was sufficiently raised to constitute a prima facie case against UCL (Judgment para 74; cf para 71). This prima facie case was not rebutted, leading to the ET finding that "the main purpose of disciplining the Claimant was to penalise him for taking part in trade union activities" (para 75.5).

The issues on the appeal

72. The original Notice of Appeal did not find immediate favour with Choudhury J who considered it on the paper sift under rule 3(7), but he ordered a preliminary hearing to

allow it to be more fully examined. At that hearing, Laing J permitted amendment of the Notice of Appeal, which thereby assumed the form in which it reached me ("the Amended Grounds").

73. In his skeleton argument and oral submissions to me at the substantive hearing of the appeal for which Laing J gave permission, Leading Counsel for UCL has further re-analysed and re-ordered his Amended Grounds. He introduced them at the hearing with what he suggested were the two overarching issues:

(i) First, "the proper scope of the protection" under section 146 of the Act (UCL appeal skeleton para 1); and

(ii) Second, "a fundamental, and as yet untested, point: to what extent, if any, can an employer change the method of email communication for its workforce when such change impacts upon a trade union's ability to communicate with non-members in that workforce, and enforce such a change? In particular, where is the balance to be struck between the competing rights of trade union freedom, employee privacy and data protection and the right of an employer to manage its business?" (UCL appeal skeleton para 2).

74. As to (i), I do not think it is my task as a judge to determine "the proper scope" of section 146 if, as the second over-arching issue formulated in (ii) confirms, this is an argument directed to policy. My job is not to set policy on employment protection, trade union rights, or anything else. My job is to construe, not the proper scope of the protection, but simply what its scope is, as created by Parliament when enacting the section, read (so far as appropriate) with subsequent enactments, including section 3 of the Human Rights Act 1996 and its introduction of Article 11 into domestic law. Furthermore, it is to do so within the confines of the issues of law raised by an appeal from an ET's decision on both facts and law, and to do so by way of disposing of a particular case. Similarly, the proposed question at (ii) is a rhetorical flourish which seems to me too broad to be a correct way of framing the appeal.

75. UCL argues that the appeal can be determined "by asking one simple question: Who controls an employer's IT systems and data (including personal data of which it is data controller)?... The ET failed to consider, let alone answer, this key question." However, the issues for the ET had been agreed by the parties at an earlier hearing, and this question was not included in them. It is also absent from UCL's written submissions to the ET. That may explain why the ET failed to consider it. I am not convinced that it would have been a useful substitute for, or even accompaniment to, an analysis of the issues raised by Mr Brown's allegation of a breach of his rights under section 146 of the Act.

76. Moving from the general to the particular, UCL presented the following arguments in support of its appeal from the ET decision: -

(i) Misconduct and lawfulness (Grounds 1, 1A, 2A, 2B).

The ET erred in characterising acts of deliberate misconduct as "taking part in the activities of an independent trade union (Ground 1). The ET erred in law in its approach to the reasonableness of UCL's instruction to Mr Brown "by purporting first to determine the scope of trade union activity" (1A). The ET

erred in law in its approach "to the supposed right of UCU to email all ISD staff members" (2A). The ET erred in law "in treating the question of lawfulness as a matter as to the state of the employer's mind rather than an objective question" (2B).

(ii) Competing rights (Ground 2)

The ET erred "in failing to properly, or at all, weigh the competing interests of the right of a business to manage itself, the individual's right to respect for private life and his correspondence and data protection rights against the Trade Union right to freely associate".

(iii) Substitution (Ground 3)

The ET erred in paras 72.7 and 72.9 of the Judgment "in substituting their own view as to how UCL should manage its data and or protect the data rights of others".

(iv) Data Protection (Grounds 4, 4A and 5)

The ET should have considered whether (a) section 55 of the Data Protection Act 1998 was or was likely to be, engaged and, if so, (b) whether an unlawful act would still fall within the protection of section 146 of the 1992 Act (Ground 4). The ET failed to consider whether Mr Brown "breached civil law data protection duties in setting up and/or in failing to remove the ISD-discussion list" (4A). The ET wrongly held that it could not determine the question of any data protection breach (5).

(v) Burden of proof (Ground 6)

The ET "erred in their failure to apply the burden of proof on the Claimant to establish that his actions fell within section 146". It was for Mr Brown to prove that his actions were lawful and the ET's findings that there was not enough evidence to decide how he populated his email list, "even on the Tribunal's own findings the Claimant had failed to discharge the burden of proof in relation to legality, particularly regarding compliance with data protection laws".

(vi) Purpose (Ground 7).

The ET "erred in law in its identification of the purpose" of Mr Grainger.

77. These were addressed by Leading Counsel for Mr Brown under the following headings:-

(i) Did the ET adopt the right approach to section 146 in relation (a) to the question of sole or main purpose and/or (b) to the question of whether Mr Brown was disciplined for trade union activities protected by the section.

(ii) Was the ET entitled to reject arguments based on data protection law which were raised for the first time in closing submissions?

(iii) Did the arguments based on data protection law make any difference, if entertained?

The law

Legislative and Convention provisions

78. Section 146 of the 1992 Act, which is in issue in this case, and which I have already quoted fully at para 2 above, is ultimately derived, via section 23 of the Employment Protection (Consolidation) Act 1978, from section 53 of the Employment Protection Act 1975. It has been amended both since the original legislation and subsequent to the 1992 consolidating Act which now contains it. It was part of a series of new trade union and employment rights introduced by the Government of 1974-79. Indeed, it was the 1975 Act which originally set up the system of Employment Tribunals (then called Industrial Tribunals).

79. Article 11 of the ECHR provides:

> "**Freedom of assembly and association**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

80. Article 12 of the more recent EU Charter of Fundamental Rights of the European Union (2012) is also referred to in the Judgment, although UCL placed less emphasis on this in the argument before me. Article 12 of the EU Charter provides: -

> "**Freedom of assembly and of association**
>
> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

81. Article 12 of the EU Charter adds nothing to Article 11 of the ECHR and falls short of Article 11 because it does not set out any equivalent of Article 11(1) ("No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society").

82. Section 146 of the Act, and its predecessors, long predate the Human Rights Act 1998 which made Article 11 of the European Convention on Human Rights ("the ECHR") part of UK domestic law. The ET Judgment is based on an interpretation of section 146 which is fully Article 11 (ECHR) compliant and, indeed, Article 12 (EU Charter) compliant. Section 146 is conferring rights of freedom of assembly and association, not taking them away. It confers them generously, providing a right not to be subjected to "any detriment".

83. UCL made submissions based, separately, on section 146, citing *Sanchez Navajas v Spain* 57442/00 European Court of Human Rights. That was a case in which salary had been deducted for leave granted for trade union activities. The report to which I have been referred says:

> "The Court notes that while Article 11 para 1 presents trade-union freedom as one form or a special aspect of freedom of association, the Article does not secure any particular treatment of trade union members by the State, such as the right to enjoy certain benefits, for example, in matters of remuneration. Such benefits are not indispensable to the effective enjoyment of trade-union freedom and do not constitute an element necessarily inherent in a right guaranteed by the Convention (see, *mutatis mutandis*, *Schmidt and Dahlstrom v Sweden*, 6 December 1976, Series A no. 21, para 34). The Court nevertheless considers that it may infer from Article 1 of the Convention, read in the light of Article 28 of the European Social Charter (revised), that workers' representatives should as a rule, and within certain limits, enjoy appropriate facilities to enable them to perform their trade-union functions rapidly and effectively."

84. UCL's Leading Counsel deduced from this the proposition that no trade-union right should be claimed under Article 11 unless it could be said to be "indispensable to the effective enjoyment of trade-union freedom". Whether or not that is correct, I do not find it of direct assistance in a case brought under section 146, which was won on the basis of findings of fact as to whether the terms of section 146, not Article 11, had been breached. If it were argued that section 146 is inadequate, and Mr Brown needed it to be read more generously through the lens of Article 11 in order to secure all his rights, that would be one thing. But he does not argue that. Mr Brown won in the ET on a conventional reading of section 146 and the ET did not apply any special reading of section 146 by virtue of Article 11, so far as the Judgment discloses. I reject the suggestion that Article 11 can be used to narrow a domestic right: that would be to turn things on their head. A domestic remedy can be broader than the Article 11 right; neither the word "indispensable", nor the concept that what the worker claims to be entitled to do without detriment must be "indispensable", can be found in section 146.

Correlations between section 146 and section 152 of the Act

85. Section 146 of the Act (as amended) explains in its title that it regulates "Detriment on grounds related to union membership or activities". Section 152 of the Act is entitled "Dismissal of employee on grounds relating to union membership or activities" and employs the same or closely related concepts, but in the context of dismissal, rather than (as in section 146) action short of dismissal.

86. In relation to the employer, section 152 defines the mental element as "the reason for" the dismissal of an employee, "or, if more than one, the principal reason"), whereas section 146 examines "the sole or main purpose" of the employer in subjecting the employee to "any detriment".

87. In relation to the employee, both section 152 and section 146 identify the relevant "grounds related to union membership or activities" referred to in their respective titles, and the lists overlap, although the section 152 list is longer. Within the overlap, and relevant to the present appeal, both sections refer to an employee taking part, actually or potentially, "in the activities of an independent trade union at an appropriate time". This phrase is identical in section 152(1)(b) and in section 146(1)(b).

88. Section 152 makes dismissal on grounds related to union membership or activities automatically unfair. The burden of proving the reason for dismissal, in any unfair dismissal case, is at least initially on the employer, under section 98(1) of the Employment Rights Act 1996: *Kuzel v Roche Products Ltd* [2008] ICR 799 per Mummery LJ at paras 14, 56, 59 and 61. That would include a section 152 case: cf *Kuzel* at para 61. Section 98(1) of the 1996 Act provides:

> "98. **General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

89. Section 98(1) of the 1996 Act does not apply to section 146 of the 1992 Act, because section 146 is about detriment, not dismissal. However, section 148 of the 1992 Act applies the following burden of proof in claims under section 146:

> "**148. Consideration of complaint.**
>
> (1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act."

There is in this respect also, therefore, a correlation between sections 146 and 152 of the Act.

90. What is now section 146 of the 1992 Act is entitled "Detriment on grounds related to trade union membership or activities" and the provisions invoked by Mr Brown have three principal elements: -

(i) A worker "taking part in the activities of an independent trade union", actually or potentially.

(ii) An act or failure to act by his employer "preventing or deterring him… or penalising him for doing so".

(iii) This act or failure taking place "for the sole or main purpose" described in (ii).

Subjective and objective questions

91. I think it is clear from the wording and structure of section 146 that:

(i) The question of the employer's "sole or main motive" is a subjective question, to be judged simply by enquiring into what was in the mind of the employer at the time.

(ii) The question of whether the employee qualifies for protection under paras (a) to (c) of section 146(1) is an objective question, to be decided by the ET.

92. This distinction is similar to the one drawn, in relation to section 103A of the Employment Rights Act 1996, by the Court of Appeal in *Croydon Health Services NHS Trust v Beatt* [2017] ICR 1240, per Sir Terence Etherton MR at para 80.

93. So far as (i) is concerned, "sole or main purpose" must be the "sole or main purpose" of the employer. More particularly, it must be the "sole or main purpose" of the person or persons within the employer organisation who have committed the "act" or "deliberate failure to act" complained of.

94. The predecessor of section 146 of the Act (section 23 of the Employment Protection (Consolidation) Act 1978) was discussed in *Department of Transport v Gallacher* [1994] ICR 967. The Court of Appeal emphasised the difference between "purpose" (the statutory word) and "effect", and also the importance of not drifting away from the statutory words. Per Neill LJ at 975A-C: -

> "To my mind the crucial part of the employer's case is the criticism that the industrial tribunal did not distinguish between "effect" and "purpose."
>
> In *James v Eastleigh Borough Council* [1990] ICR 554, 575–576, Lord Goff of Chieveley pointed out that if words such as "intention" or "motive" are to be used as a basis for decision they require the most careful handling, and that in some circumstances the concept of "purpose" may be relevant both to intention and motive. I respectfully agree and would add that it is usually dangerous to use "intent" and "purpose" as though

> they were interchangeable. Accordingly, it seems to me that it is important to adhere strictly to the statutory words."

95. Neill LJ also gave specific guidance on the meaning of the statutory word (at 975D):

> "In my judgment, in this context "for the purpose of" connotes an object which the employer desires or seeks to achieve."

96. In my opinion, no further gloss on the statutory wording is necessary, or would be helpful. The mental element in any wrongful act, whether it be a breach of statutory rights, a tort, or even a crime, can be one of the most elusive and slippery concepts in English law, and the more closely the words are parsed, the more the difficulty and room for error and confusion may increase, rather than the reverse. It is best to stick to the statutory words, and not to look for synonyms or definitions.

97. The application of the statutory words (in this case, "sole or main purpose") to the facts of any case, and the evaluation of the evidence to find those facts, may not always be straightforward and it is possible that reasonable people may reach different conclusions about the facts. But the only conclusion of fact which matters on what the employer's "sole or main purpose" was, and whether it breached section 146, is the one reached by the Employment Tribunal, which is for these purposes, whether sitting as Employment Judge alone or (as here) with members, acting as what has often been called the industrial jury: cf *Jafri v Lincoln College* [2014] ICR 920 per Laws LJ at para 21.

98. So far as (ii) is concerned (the objective question for the ET as to whether the employee qualifies for protection under paras (a) to (c) of section 146(1)), whether the organisation in question is "an independent trade union" is to be decided by the ET, not by the employer. The ET also decides any question of fact raised by the phrase "at an appropriate time"; or by the phrase "making use of trade union services" or (as in this case) by the phrase "taking part in the activities of an independent trade union".

Findings of fact

99. Many of the Grounds of Appeal (summarised at para 75 above) are challenges to the ET's findings of fact, rather than, as they are characterised, errors of law. This is true to a greater or lesser extent of Grounds 1, 1A, 2A, 3 and 7 in particular, but other Grounds are also vulnerable to this criticism in part.

100. In my judgment, these challenges cannot succeed because findings of fact were a matter for the ET. It had heard evidence from a number of witnesses, and I am told that there was sustained cross-examination of UCL's witnesses; particularly Mr Grainger. There was also a great deal of undisputed primary fact both because of the nature of the case and because of the full documentary record examined by the ET in paras 9-47 of the Judgment.

101. Drawing inferences from the primary facts, and evaluating both the oral and the documentary evidence, was the task of the ET. Save to the extent discussed in para 70 above, and paras 106-107 below, which made no difference to the outcome, I see no error of law in the way this was done. This goes also to the order in which questions were approached (Ground 1A).

102. Ground 2A misunderstands the Judgment by reading into it "the supposed right of UCU to email all ISD staff members". The Judgment found that Mr Brown, in setting up the list and in refusing to take it down, was engaged in the activities of an independent trade union and that no breach of data protection law had been established or was raised to the point where his own protection from detriment under section 146 was lost. These were questions of fact.

103. I do agree with Ground 3 that the ET's task, when answering the questions presented by the issues in the case, did not require it to form or express its own views on the way in which the email list changes ought to have been handed. To the extent that paras 72.7 and 72.9 of the Judgment did this, they were superfluous. However, that does not mean that the operative reasoning, to be found elsewhere in the Judgment, was unsound, or that the facts found, and the conclusions of fact and law reached in the Judgment can be challenged on appeal. In my judgment, they cannot.

104. In the present case, the ET found against UCL on both questions (i) and (ii) posed by the claim under section 146 (see para 91 above for the questions; and paras 61-62 and para 71 above for the ET's conclusions).

105. The ET found that both the setting up of the list and the refusal to take it down were protected activities under section 146(1)(b) of the Act. Both in setting it up and in refusing to take it down, Mr Brown was (the ET decided) taking part "in the activities of an independent trade union at an appropriate time". This was a decision against UCL on question (ii) (Judgment para 62).

106. There was no dispute that Mr Grainger's "sole or main motive" in imposing the formal oral warning was to discipline Mr Brown for refusing to delete the email distribution list. It followed from the ET's decision on (ii), that this alone was enough to make good Mr Brown's claim. It meant that even if Mr Grainger's explanation of his "purpose" was accepted, it was an impermissible one, and UCL therefore lost on question (i) (Judgment para 69). As it happens, the ET apparently did not accept Mr Grainger's explanation, and decided that his action was not narrowly directed at the refusal to take the list down but was "punishing the Claimant for his actions" (Judgment para 75.5).

107. I think the ET's finding that the reasons given by Mr Grainger in the decision letter were not "credible", by which they do appear to mean that they did not believe they were his real reasons, was a harsh and surprising one. It was neither clearly articulated nor very securely grounded. It lacked the cogency of reasoning required by Simler J in *Serco Ltd v Dahou* [2015] IRLR 30 in the EAT (upheld by the Court of Appeal at [2017] IRLR 81, see Laws LJ at para 49). However, if the first point was correctly decided (namely that when refusing to delete the list Mr Brown was "taking part in the activities of an independent trade union" for the purposes of section 146), the ET's decision on that point makes no difference to the outcome. I am not persuaded that it was not correctly decided.

108. The points I have already made mean that I have now dealt with the Grounds of Appeal grouped in the argument (para 76 above) under the headings (i) Misconduct and lawfulness; (ii) Competing rights and (vi) Purpose.

Data protection issues

109. A significant part of UCL's appeal is based on data protection issues. Grounds 1, 1A, 2, 2B, 3, 4, 4A and 5 are all based at least partly, and in some cases entirely, on these issues. The data protection issues were grouped in the argument under the headings (iii) Substitution ("as to how UCL should manage its data and or protect the data rights of others") and (iv) Data Protection.

110. Data protection issues were addressed in paras 57-61.9 pp 18-21 of the Judgment.

111. However, UCL did not raise any of these issues until closing submissions and they were not mentioned in Mr Grainger's decision letter. No data protection law breach, or allegation of illegality based upon either the Data Protection Act 1998 or the Privacy and Electronic Communications Regulations 2003, was raised in UCL's pleadings, or in any of the witness statements, or in the documentary evidence and correspondence put before the ET. None of the issues argued by UCL in closing had been raised in cross-examination. (See Judgment para 57). In short, "there had been no evidence on the matter before the Tribunal" (para 59). UCL did not ask for an adjournment to remedy that (para 59).

112. This aspect therefore raised two questions:

(i) Was it open to UCL to take these points at all?

(ii) If so, did they make any difference?

113. UCL relies on *IRC v Ainsworth* [2009] ICR 985 at para 58 per Lord Walker:

> "National courts are required to consider relevant issues of Community law even if not raised at the right time by the parties: *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* (Case C-312/93) [1995] ECR I-4599, para 21. Your Lordships did therefore hear argument on this point. For my part I do not think that reliance on the principle of equivalence is necessary for the appellants to succeed in these appeals…"

114. *Ainsworth* was a case involving a public tax authority, the Inland Revenue Commissioners, as *Peterbroeck* was. The nature of the facts and procedures in issue in *Peterbroeck* led to the ECJ decision that new points of Community law could be raised in the Belgian Court of Appeal in that case, but it did not decide that this would always be so. See para 15 of *Peterbroeck* [1996] 1 CMLR 793, 799: -

> "For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."

115. In *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1996] 1 CMLR 401, 828, the ECR ruled (at para 22):

> "…Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim."

116. See also *Van der Weerd v Minister Van Landbouw, Natuur en Voedseklwaliteit* [2007] 3 CMLR 7, at paras 33-39 affirming and applying this. In that case, the ECJ recognised the relevance of a domestic court's "obligation to keep to the subject matter of the dispute and to base its decision on the facts put before it" (para 34). It noted (at para 35):

> "…the principle that, in a civil suit, it is for the parties to take the initiative, and… as a result, the court is able to act of its own motion only in exceptional cases involving the public interest. That principle safeguards the rights of the defence and ensures the proper conduct of proceedings by, in particular, protecting them from the delays inherent in examination of new pleas".

117. UCL put forward no reason for raising these points only in closing submissions, when Mr Brown had not been given an opportunity to address them in his evidence, including his cross examination.

118. In those circumstances, I think the ET would have been entitled not to entertain these arguments.

119. However, it did entertain them, although it struggled because of the gaps in the evidence that resulted from the lateness of the afterthought. In particular, it was not able to decide whether the way in which Mr Brown had populated his new list had breached any data protection principle (see, for example, Judgment para 59: "…it remained unclear whether the claimant had used existing lists or the rather more laborious process of using public access data, to 'people' his new list"). It decided that the evidence did not support any allegation of serious breach, if there was any breach at all (Judgment paras 61.1-61.8). Indeed, it noted "It is not clear in precisely what way the Claimant's action are alleged to have been in breach of data protection legislation" (para 61.1).

120. In the circumstances, and on the evidence, these findings were all open to the ET, and they are fatal to the appeal based on data protection breaches, even if those points were admissible given the failure to allow them to be ventilated in the evidence.

121. The ET also correctly referred to and applied the authorities on the question of whether the alleged breaches, if they were taken as established (which they were not), could be said to remove Mr Brown from the protection of section 146 (Judgment

paras 60-61, citing *Morris v Metrolink Ratp Dev Ltd* [2019] ICR 90 CA, *Lyon v St James Press Ltd* [1976] ICR 413 EAT and *Bass Taverns Ltd v Burgess* [1995] IRLR 596 CA).

Burden of proof

122. The only Ground of Appeal remaining to be dealt with is Ground 6, which was presented in the argument (para 76 above) under the heading (vi) Burden of proof. It argues that the ET misapplied the burden of proof on Mr Brown to establish that his actions were protected by section 146 of the Act.

123. Ground 6 does not challenge the ET's process of, first, examining whether a prima facie case had been raised by Mr Brown and then whether UCL had rebutted it, which was in line with the approach suggested (but not required) by *Yewdall v Secretary of State for Work and Pensions* [2005] UKEAT/0071/05/TM EAT Burton J and also *Serco Ltd v Dahou* [2017] IRLR 81 CA.

124. Rather, it is based on the data protection arguments I have already considered (Amended Notice of Appeal paras 128-129).

125. The ET did place the burden of proof on Mr Brown so far as it lay on him in respect of the elements of his section 146 claim. However, if UCL was to base its case on breaches of data protection law, it had to prove such breaches with evidence, and this it failed to do. Moreover, the ET decision found as a fact that nothing in the data protection points relied upon took what were otherwise protected trade union activities outside the protection of section 146. That was a decision of fact, and it was not reached by the application of an incorrect burden of proof. The legal burden was applied correctly, on data protection, as on the other issues.

Conclusion

126. For these reasons, the appeal is dismissed.