Appeal No. UKEAT/0113/16/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 December 2016

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

METROLINK RATPDEV LTD — APPELLANT

MR S MORRIS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	DR EDWARD MORGAN (of Counsel) Instructed by: Prosperity Law LLP The Office Suite Top O'th Hill Farm Meadowhead Lane Nordern OL11 5UL
For the Respondent	MR CHANGEZ KHAN (of Counsel) Instructed by: Tillbrook's Solicitors Quires Green Willingale Ongar Essex CM5 0GP

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

UNFAIR DISMISSAL - Reason for dismissal including substantial other reason

The Employment Judge erred in holding that dismissal for storing and sharing confidential information for trade union purposes enjoyed the protection of **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") section 152. Finding of "automatic" unfair dismissal set aside.

The finding of "ordinary" unfair dismissal under **Employment Rights Act 1996** section 98 was based on the finding under **TULRCA** section 152 also set aside.

Claims remitted to an Employment Tribunal for rehearing.

A **THE HONOURABLE MRS JUSTICE SLADE DBE**

Introduction

B 1. Metrolink RATPDev, the Respondent, appeals from the Judgment of an Employment Tribunal, Employment Judge Slater, with Reasons sent to the parties on 9 December 2015. The Employment Tribunal held that the complaint of unfair dismissal contrary to section 152 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") was well C founded. The Employment Tribunal held that there was to be no reduction in compensation under **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 HL or for contributory fault. In her Reasons the Employment Judge held, that given her conclusion on the section 152 claim, D the dismissal was unfair under the provisions of section 98(4) of the **Employment Rights Act 1996** ("ERA").

The Statutory Provisions

E 2. Section 152(1)(b) **TULRCA** provides:

> **"(1) For the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee -**
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> **(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, …"**

Outline Facts

G 3. The recitation of the facts by the Employment Judge ran to 131 paragraphs, although the relevant facts are within a small compass. The Respondent operates the Metrolink service in Manchester. Its sole client is Transport for Greater Manchester. The Claimant was employed H by the Respondent from January 2000 until his dismissal on 17 December 2014. In April 2010, having been a member and branch officer of Unite, the Claimant joined the Workers of England

Union and became its North West representative. At the time of his dismissal the Claimant was employed as a Customer Service Team Leader. He reported to Graham Lord-Jones.

4. In June 2014 the Respondent was carrying out a restructure of its staffing arrangements. At paragraph 28 of the Reasons the Employment Tribunal held:

> **"28. As part of the restructure exercise, 14 supervisors, including the claimant, were assessed at an assessment day on 19 June, to determine whether they should be offered a position as customer service team leader. There were 12 such positions available. The supervisors were assessed against competencies in a matrix agreed with Unite. The assessment day was overseen by an external organisation. The assessment included a maths and English test."**

5. Mr Lord-Jones was not one of the assessors. The Employment Tribunal held that it was some time before the supervisors were informed of the outcome of the assessment. The Tribunal held that Mr Lord-Jones met Sandy Crighton, the Customer Service Director, and was given information about the performance of candidates at the assessment day. Mr Lord-Jones recorded this information in the notes section of a diary. On 2 July 2014 the Claimant was informed by Mr Crighton that he had been successful in the assessment and was to take one of the Team Leader roles. On that day, on 2 July, the Claimant was away from work in his caravan. The Tribunal held at paragraph 31 that Mr Lord-Jones recorded some further notes following another conversation with Mr Crighton. The Tribunal held that it must have been at some time at the latest by 12 August 2014 that a photograph was taken of Mr Lord-Jones' diary with the notes of the conversation that he had had with Mr Crighton about the assessment exercise. The Tribunal Judge held that 12 August was the date on which Mr Armsden - who reported to the Claimant or was in a post at a lower level than the Claimant - sent the Claimant a copy of the image that he had received or taken of the diary (no decision was made as to who took a photo of the diary). Of the five of the fourteen candidates who failed the assessment, four were members of the Claimant's trade union. Mr Armsden was one of the four.

6. On 31 July 2014 the Claimant as union representative had written to Marie Daly, Director of HR, saying that the union wanted to raise a formal collective grievance regarding the assessment and restructuring exercise. On 6 August the Claimant and some of the affected members met Ms Daly. The Employment Tribunal recorded that it was common ground that at the end of the meeting the union members and the Respondent were satisfied that the grievance had been resolved. By 12 August Mr Armsden came into possession of the image from Mr Lord-Jones' diary. The Tribunal recorded that he says he did not know and did not ask how the image had been obtained. Mr Armsden telephoned the Claimant during the day and told him that Liam Kennedy had sent him the image of Mr Lord-Jones' diary and he would view it on his iPad when he got home. He sent a copy of the screen shot of Mr Lord-Jones' diary to the Claimant, the Claimant having asked Mr Armsden for it. Mr Armsden did this by way of an attachment to an email, which he sent to the Claimant on 12 August 2014. At paragraph 40 of her Judgment the Employment Judge held:

> **"40. … It is common ground that the photograph was taken without Mr Lord-Jones' knowledge or consent. The claimant accepts, in these proceedings, that the information was confidential."**

7. The Employment Judge went on at paragraph 41:

> **"41. It is common ground that Mr Armsden sent the image to the claimant at the claimant's request. I find that this was because Mr Armsden and other members of the Workers of England Union raised a concern with the claimant about this in his capacity as their trade union representative."**

8. It is not entirely clear what the Tribunal Judge means by "about this" in that paragraph. The Employment Judge recorded that the Claimant was on holiday on 12 August and returned to work on 25 August. On 28 August he went to the HR department intending to see Ms Daly about the diary image. She was away. He showed an image of the diary on his BlackBerry to Katie Huthwaite, a more junior member of the HR team. The Employment Judge held that given the size of the screen on the BlackBerry it was unlikely that Ms Huthwaite could have

made out much of the document. It was common ground that the Claimant told her that the image came from Mr Lord-Jones' diary. There was a dispute about what was said between those two parties. The Employment Judge drew inferences from varying statements and notes that:

> **"45. It is clear from the evidence that Ms Huthwaite did not attach any particular significance to the conversation at the time. …"**

9. The Employment Tribunal found that the Claimant explained to Ms Huthwaite that the main reason he wanted to meet Ms Daly related to the assessment centre and the successful and unsuccessful candidates. He told her:

> **"46. … that he had images on his phone of [Mr] Lord-Jones' diary that he was going to use as evidence and showed these to her. He said he wanted to know why [Mr] Lord-Jones had this information as he had not been at the assessment centre. He said that he thought the comments in the diary were detrimental to the unsuccessful candidates. …"**

10. The Employment Judge continued :

> **"46. … Ms Huthwaite asked the claimant if he had been snooping around on Mr Lord-Jones' desk to take the photographs and the claimant seemed quite shocked that she had asked him that. He said he had not taken the photographs and that the diary was open on Mr Lord-Jones' desk. Ms Huthwaite did not ask who had taken the photograph. Ms Huthwaite told the claimant that he would have to wait for Ms Daly's return."**

11. There was no evidence in the disciplinary process that the Claimant had shown the images to anyone else than Ms Huthwaite although they were referred to in the grievance letter of 7 September 2014. On 5 September 2014 Ms Daly became aware of Twitter postings from the Claimant's wife containing information sensitive to the Respondent's business. Ms Daly spoke to the Claimant about this. On 7 September 2014 the Claimant wrote saying in a grievance letter that three of the affected members had contacted him on 5 September 2014 with concerns about the restructure. He wrote that the union wished to proceed with a formal collective grievance. The second point made in his letter of 7 September was:

> **"We wish to raise the issue of [Mr] Lord-Jones 2013 dairy [sic], and the personal comments made about our members and their assessment day."**

A This point was taken from an email from Mr Armsden to the Claimant dated 6 September 2014.

12. On 9 September the Claimant was suspended over the Twitter issue. There was an investigation. No disciplinary action was recommended, but the Employment Tribunal held:

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> **"59. … the respondent could reasonably be concerned that confidential information entrusted to [the Claimant] in his capacity as a trade union representative could end up in the public domain as a result of [his wife's] actions."**

C 13. Whilst the investigation into the Twitter issue was underway, the issue of the photo of Mr Lord-Jones' diary came to the attention of Ms Daly. The Employment Judge found at paragraph 62 that Ms Daly informed Mr Lord-Jones on 19 September of the conversation between the Claimant and Ms Huthwaite. This was the first time Mr Lord-Jones became aware

D that the Claimant or anyone else had a photo or print of his diary, which was kept for his own purposes and not generally shared with anyone else. An investigation was conducted into the matter of the images taken without his consent of Mr Lord-Jones' diary.

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14. On 17 October 2014 the investigation remit was formulated. Under the stated remission for the investigation the two letters of collective grievance of 31 July and 5 September (the

F Tribunal refers to 5 September; it may have been 7 September) were referred to. The quotation cited in the Employment Tribunal's Judgment of the scope of the investigation was:

> **"This has caused reason for concern that [the Claimant] has saved information from [Mr] Lord-Jones' private notes without consent from [Mr Lord-Jones]. It is believed that [the Claimant] has shared this confidential information with colleagues, including [Ms] Huthwaite, …"**

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15. Under the heading of "remit", she wrote:

> **"You are requested to lead an investigation into the above allegation as a matter of priority. The investigation must establish ways of confirming that [the Claimant] has shared private and confidential information of [Mr] Lord-Jones in his role of Customer Services Manager."**

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16. There was an investigation meeting on 27 October 2014 at which the Claimant refused to say who sent him the email with the attachment of the shot of Mr Lord-Jones' diary. Mr Lord-Jones gave evidence to the Employment Tribunal. The Employment Judge recorded at paragraph 76 that Mr Lord-Jones is a retired police officer. His statement recorded that he was surprised to learn that someone had taken a picture of the notes as his notebook was either in his briefcase or on the desk in his office, which was locked when he was not there. There was no mention of the diary being kept in a locked cupboard as mentioned in later statements. The statement continues:

> **"During the day while I'm working, the note pad would have been on my desk. If I nipped out to the toilet or left the office, I may have left my notebook there but it would never have been open on that page."**

17. Mr Lord-Jones' statement concluded with the words:

> **"I'd like to be clear that I don't think I can work with [the Claimant] again in his capacity as team leader as I feel it is a betrayal of trust."**

18. The Tribunal Judge records that a summary of the investigation report suggests that there was a serious breach of confidentiality in relation to the information shared by the Claimant. This was confirmed by the Claimant in the investigation meeting on 27 October. The Tribunal Judge records:

> **"79. … It reported that the claimant had agreed he had shown the information to colleagues, including [Ms] Huthwaite. …"**

19. The Tribunal Judge went on:

> **"79. … I note that this is incorrect, in that the claimant had not admitted showing the information to anyone other than [Ms] Huthwaite. …"**

20. The Tribunal Judge cited from the conclusion of the report, which is:

> **"we have reason to believe [the Claimant] has obtained and shared sensitive company information relating to individuals within the business."**

21. Following that investigation report, Ms Daly asked Carl Phillips, a manager at the Respondent, to conduct disciplinary proceedings. A disciplinary charge was formulated and sent to the Claimant. The charge was:

> **"That you have stored and have shared private and confidential information that is the property of a manager within [the Respondent]."**

22. Mr Phillips warned the Claimant that this could lead to the termination of his employment without notice or payment in lieu of notice.

23. The disciplinary hearing took place on 1 December 2014. In the disciplinary hearing the Claimant said that he had been provided with a copy of the picture of the diary by Mr Armsden. The Tribunal Judge records that there was a reference to Mr Kennedy, which Mr Phillips said was somewhat confused. The Employment Judge set out a passage from Mr Phillips' witness statement in which he said of the disciplinary hearing:

> **"… What was clear, however, is that he had admitted receiving and storing the confidential information. He had also produced no evidence that he intended to return the confidential information or retrieve the copies of the stolen confidential information that was in circulation. He had instead sought to try and exploit the stolen confidential information."**

24. The Tribunal Judge continued at paragraph 107:

> **"107. Mr Phillips writes in his witness statement that he decided he had reasonable grounds to find that the disciplinary charge was established. The disciplinary charge was "that you have stored and have shared private and confidential information that is the property of a manager within [the Respondent]". …"**

25. After making further enquiries, Mr Phillips found that the Claimant had been guilty of gross misconduct because he had stored and used confidential information. The Employment Judge at paragraph 113 said as follows:

> **"113. The importance Mr Phillips put on trying to find the source of the information, beyond what the claimant told him about Mr Armsden sending it to him and the claimant supplying a copy of the redacted e-mail, is only explicable in terms of Mr Phillips considering the claimant's involvement in the theft or solicitation of the material, rather than the charge he was supposed to be dealing with, which was that of storing and sharing the information."**

26. Further, the Employment Judge observed at paragraph 116:

> **"116. Although Mr Phillips denied, in cross examination, that he allowed himself to be influenced by the views of others, I find, on a balance of probabilities, that he was influenced to some extent by the views of others, both as to the claimant's likely involvement in the theft of the information and as to the claimant's previous track record."**

27. As for the reason for the dismissal, the Employment Judge continued:

> **"121. Mr Phillips went on to state that it was unacceptable to steal or to handle a manager's private and confidential information. He wrote that invading someone's privacy and stealing their private and confidential information is gross misconduct.**
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> **122. Mr Phillips wrote:**
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> > **"I do not accept your characterisation that "trade union activity" involves receiving and storing stolen confidential information of a private nature which belongs to a manager such as [Mr] Lord-Jones. I am also surprised that you should seek to protect the identity of the individuals who you have named as having supplied the stolen confidential information to you." "**

28. The Tribunal then drew conclusions in a few paragraphs. Under the heading "What was the principal reason for the claimant's dismissal?" the Employment Judge held:

> **"150. … The charge against the claimant was "that you have stored and have shared private and confidential information that is the property of a manager within [the Respondent]". However, there is a reference in the conclusions section of the outcome letter to receiving and storing and to "handling, receiving and storing stolen private and confidential information". …"**

29. The Tribunal went on to hold:

> **"151. What is clear is that the dismissal related to the claimant's conduct with regard to the information from Mr Lord-Jones' diary.**
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> **152. I conclude, based on the evidence of Mr Phillips that he found the disciplinary charge proven and dismissed for this reason, that Mr Phillips dismissed the claimant because he stored and shared the diary information. He did not consider receipt of the information to be gross misconduct."**

30. The Employment Judge continued:

> **"153. The storage related to keeping the information on the claimant's computer. Mr Phillips understood the claimant to be arguing that he had received the stolen information in the context of legitimate use for trade union purposes. Mr Phillips understood from the investigation report that the claimant was saying that he stored the information because he felt that it was his responsibility, in order to protect his union members, in his role of the Workers of England Union representative. However, Mr Phillips stated in the outcome letter that he rejected the argument that "trade union activity" involves receiving and storing stolen confidential information of a private nature which belongs to a manager such as [Mr] Lord-Jones. It does not appear from the outcome letter or Mr Phillips' evidence that he rejected the argument that, as a matter of fact, the claimant was storing the information because he wished**

> **to raise concerns about the information recorded in Mr Lord-Jones' diary on behalf of members in his capacity as trade union representative. Rather, he took the view that this could not be a trade union activity if the information was stolen confidential information."**

31. The Employment Judge's conclusions are set out at one paragraph, paragraph 155:

> **"155. I conclude that the claimant stored the information because Mr Armsden and other members of the Workers of England Union had expressed concern about information about the assessment being in Mr Lord-Jones' diary when he was not amongst the assessors. He shared it, in the sense of referring to it, but not attaching a copy of it, in the collective grievance of 7 September 2014 because a member, Mr Armsden, had asked him to raise a concern about this. The claimant was acting in the capacity of a trade union representative, storing and then sharing the information (to the extent of referring to it in the collective grievance letter) because of concerns raised with him by members. He needed to retain the information so that he could raise concerns on members' behalf and he raised those concerns by means of the reference in the collective grievance. Whilst the collective grievance does not perhaps explain as clearly as it might the concerns raised by the information in Mr Lord-Jones' diary, it is clear that the concerns relate to the fairness of the assessment process. The reference to the diary entry cannot be detached from the rest of the grievance. The claimant was taking part in the activities of an independent trade union by storing the information and raising this on behalf of members. This was at an appropriate time. The claimant was dismissed because of this storing and sharing of information. The reason for dismissal was because the claimant had taken part in the activities of an independent trade union at an appropriate time and the dismissal was automatically unfair."**

32. Therefore the reasoning for the conclusion at paragraph 152 is contained at paragraph 155 and in particular in that last section of paragraph 155. The Employment Judge said at paragraph 157 that:

> **"157. Given this conclusion, it is not strictly necessary to consider whether the dismissal was unfair under the provisions of section 98(4) [ERA], but I do so for completeness."**

33. At paragraph 158 the Employment Judge referred back to her conclusions on the reason for dismissal and said:

> **"158. Since I have found that the reason for dismissal was the storage and sharing of information, I will use this terminology, rather than that of retention and processing. …"**

34. The Employment Judge went on to conclude at paragraph 161 that:

> **"161. … dismissal for storage of the information alone would be outside the band of reasonable responses [in dismissing]. If it had not been for the trade union context, some sort of warning for storing and not deleting the information might have been appropriate, but dismissal for storage alone would be outside the band of reasonable responses."**

That is the reason why she would have held that in the ordinary unfair dismissal claim she would have found the dismissal to be unfair.

35. As for issues of **Polkey** and contribution, the Employment Judge held at paragraph 164 that given her conclusion that the complaint under **TULRCA** section 152 was made out, she did not consider that the **Polkey** issue or the question of culpable or blameworthy conduct fell to be considered.

Discussion

36. Dr Morgan, counsel for the Respondent, contended that the Employment Judge erred in her application of **TULRCA** section 152. She failed to consider that the reason for the dismissal was that the Claimant had stored and used or disseminated information that was private, confidential and had been taken from Mr Lord-Jones without his permission: in effect, stolen. The Employment Judge erred by failing to take that important feature of the storage of the information into account when considering her decision under section 152. It was said that the Employment Judge wholly failed to take into account the main focus of the disciplining of the Claimant and the reason for the dismissal. Dr Morgan contends that the Employment Judge confused context with the reason for the dismissal, context being the very lengthy recitation of events leading up to the relevant events for the purposes of this claim, for example the Twitter feature and other events in the past. This was despite the fact that the Employment Judge accepted Mr Phillips' evidence, in which he clearly articulated what the disciplinary complaint was and the reason for dismissal.

37. Dr Morgan submitted that not every act carried out for trade union purposes falls within the scope of section 152. He refers in this regard to **Lyon v St James Press** [1976] ICR 413, a

very early case on the predecessor of section 152, in which the Employment Appeal Tribunal held at page 419C:

> **"… We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair."**

38. In this case it is said that the Claimant was dismissed for having confidential, private information that had at the very least been improperly obtained, if not stolen, which was the term used in the disciplinary and dismissal context. Dr Morgan also relied on the more recent case of **Azam v Ofqual** UKEAT/0407/14, in which HHJ Eady QC at paragraph 40 of the Judgment repeated in effect the approach in **Lyon** in considering the legal principles applicable to section 152 protection, having in addition referred to the ACAS Code of Practice 3 on Time Off for Trade Union Duties & Activities.

39. Further, Dr Morgan draws attention to the chronology of events in this case. The grievance regarding the restructure had been resolved before the Claimant received and stored the email with the attachment of the photograph of Mr Lord-Jones' diary. The grievance had been resolved on 6 August. It is said that the Claimant was well aware that the material that he had received was confidential. Further, he knew how seriously the Respondent regarded confidentiality. There had very recently been the Twitter incident, in which there had been an inquiry in respect of which the Employment Judge held that the Claimant had not been entirely exculpated.

40. Accordingly, on the facts before her, it is said that the Employment Judge wholly failed to engage with the effect of the Claimant's culpable conduct in having confidential information that had been unlawfully obtained and that was the basis of the decision to dismiss. So far as the unfair dismissal decision is concerned, that was based on the erroneous finding in relation to

section 152, and, again, the Employment Judge wholly failed to take into account the main complaint of the Respondent that confidential information had been stored or retained by the Claimant. Accordingly, that decision too could not stand. No argument was advanced on **Polkey**.

41. Mr Khan rightly conceded that retention of confidential information can remove a Claimant from the protection of section 152 but says that that is not so on the facts of this case. Mr Khan recognises that there is no reference at all by the Employment Judge in the conclusions section of her Judgment to the fact that the information stored and retained by the Claimant was confidential and had been wrongfully obtained. Counsel sought to plug this hole by reference to findings of fact in the lengthy recitation of events made by the Employment Judge, with particular focus on paragraphs 108 and 124. Mr Khan contends that these facts of retaining and storing unlawfully obtained - and, as Mr Phillips had said, stolen - confidential information did not fall within the category of conduct referred to in **Lyon** or **Azam**, which takes dismissal for those reasons outside the protection of section 152.

42. Mr Khan contended that the Claimant acted properly with the confidential information. He went to HR with the image taken from Mr Lord-Jones' diary. Mr Khan contended that he did so very soon after he returned from his holidays. He asked: what else could he do? He said that HR were not concerned by this. So far as the reference to paragraph 108 in the Judgment is concerned on which Mr Khan relies, he points out that there is reference to Mr Phillips in his oral evidence saying that the storing of the photo on the Claimant's computer was in breach of data protection laws. He points out that Mr Phillips could not identify the laws breached and also that data protection laws were not referred to in the disciplinary proceedings taken against the Claimant. Reference to data protection laws is also made at paragraph 124 relied upon by

Mr Khan. The Tribunal Judge commented that Mr Phillips did not state that there was a breach of data protection laws in his letter to the Claimant and nor did he explain which particular provisions relating to data protection he alleged the Claimant had breached and how.

43. Mr Khan submitted that the Claimant had the images of Mr Lord-Jones' diary on his system for trade union purposes. Accordingly dismissal for having those images on his system fell within section 152 and was dismissal for taking part in the activities of a trade union. He contended that the decision of the Employment Judge should be upheld. So far as the unfair dismissal finding was concerned, Mr Khan submitted that the Tribunal Judge did not err in her conclusion that this dismissal was an unfair dismissal.

Decision

44. The language of **TULRCA** section 153 which gives statutory protection to those who are taking part in the activities of an independent trade union is to be applied. It is well established that not every act carried out by someone as an activity of an independent trade union enjoys the protection of section 152. This was articulated as long ago as 1976 in **Lyon** at page 419C in the passage previously cited in which it was held:

> **"… We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair."**

45. That qualification was repeated and considered in other authorities, including **Bass Taverns Ltd v Burgess** [1995] IRLR 596 CA and **Mihaj v Sodexho Ltd** UKEAT/0139/14 and as recently as 2015 in **Azam**.

A 46. In the conclusions section of her Judgment the Employment Judge accepted the evidence of Mr Phillips set out at paragraph 150 of her Judgment, namely that the disciplinary charge for which the Claimant was dismissed was:

> **"that you have stored and have shared private and confidential information that is the property of a manager within [the Respondent]."**

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47. Further, the Employment Judge accepted evidence that included the reason for the dismissal being that given in the outcome letter, "handling, receiving and storing stolen, private and confidential information". Mr Khan does not wish me to use the word "stolen". However, on any view, the information on the Claimant's system was information taken by photo of Mr Lord-Jones' diary without his consent, and it contained confidential and private material. That term, "unlawfully obtaining and retaining", is used of identity theft, stealing passwords and other non-concrete items. In any event, at the very least, the information retained and stored by the Claimant was information that was private, confidential and unlawfully obtained.

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48. In my judgment, as a matter of principle, dismissal for the retention of unlawfully obtained information for trade union activities in general does not enjoy the protection of section 152. Mr Khan contends that that conclusion must depend on the facts. If the unlawfulness played a small part in the activities which an individual engages in on behalf of a trade union, or if the unlawfulness element is not deliberate, it may be that storing and sharing unlawful material may not lead to the loss of protection under section 152. To that extent, the decision as to whether or not section 152 protection is lost is fact-sensitive. However on the facts of this case the Claimant well knew that what he had retained and stored was unlawfully obtained, was confidential information belonging to Mr Lord-Jones and was his private information. It is fanciful to say, as has been contended, that the Claimant acted properly by going to HR with the shots that he had been sent of Mr Lord-Jones' diary. The Claimant should

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not have asked for it, which he agreed that he did in the first place, and, if he had received it, he should have deleted it. It is also fanciful to say that the only thing he could have done was to go to HR and that he took the proper course of action.

49. In my judgment, the Employment Judge failed to apply section 152 **TULRCA**. The Employment Judge did not consider the real issues in the case in the conclusions section of the Judgment. She failed to consider whether the dismissal for the wrongful or unlawful retention of confidential information for trade union purposes enjoyed the protection of section 152. The appeal against the finding in favour of the Claimant of his claim of automatic unfair dismissal under section 152 is allowed. It follows that the finding that there was an unfair dismissal under section 98(4) **ERA**, which depended on the erroneous conclusion under section 152, also falls, and the appeal in that regard is also allowed. It is plain from paragraph 158 that the conclusion in relation to the ordinary unfair dismissal claim depended entirely on the erroneous conclusion under section 152.

Disposal

50. I have had a request to substitute a decision of this Employment Appeal Tribunal for that of the Employment Tribunal and dismiss the claim under section 152. Reference has been made to **Jafri v Lincoln College** [2014] ICR 920 CA, in particular to paragraphs 44 and 45 in the judgment of Laws LJ. In the circumstances of this case and on the findings of fact in the conclusions section of this Judgment, which must in any event stand, this case comes very close to a case in which on a proper application of the law there can be no other possible answer than to say that the reason for the dismissal was not for the Claimant taking part in trade union activities but for the gross misconduct in retaining unlawfully obtained confidential and private information. I am on the verge of making an order for substitution, and it is difficult to see in

A the circumstances of this case how more than one outcome on proper application of the law is possible. However, there would be a very small percentage chance that the outcome would be different on remission, and, having regard to paragraph 45 in **Jafri**, I am not going to make an order for substitution. However, I would like it noted that in the Judgment that if on a remitted hearing the Claimant fails in his claim the Tribunal should consider very carefully whether a costs order should be made against him.

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