

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 11 February 2015  
Judgment handed down on 25 February 2015

**Before**

**HIS HONOUR JUDGE SHANKS**

**(SITTING ALONE)**

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MR M WATSON

APPELLANT

LONDON METROPOLITAN UNIVERSITY

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

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## **SUMMARY**

### **TRADE UNION RIGHTS - Action short of dismissal**

The Claimant had complained under section 146(1) of the **Trade Union and Labour Relations (Consolidation) Act 1992** that he had been subjected to a detriment for union-related activities. The Employment Tribunal rejected the complaint and the Claimant appealed. The appeal was dismissed: the Employment Tribunal had properly applied the “reverse onus” provision at section 148(1) of the Act and their conclusion could not be described as “perverse”.

## **HIS HONOUR JUDGE SHANKS**

### **Introduction**

1. This is an appeal against a decision of the Employment Tribunal (EJ Broughton and members) sitting in Watford, sent out on 5 February 2014. After a five day hearing the Tribunal rejected Mr Watson's complaint under section 146(1)(b) of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("1992 Act") that, in issuing him with a final warning on 1 May 2013, his employer, London Metropolitan University, had subjected him to a detriment for the sole or main purpose of deterring him from trade union activities or penalising him for having taken part in such activities.

2. Mr Watson says, in summary, that the Tribunal misapplied the provisions relating to the burden of proof in section 148(1) of the **1992 Act** or reached a perverse conclusion and that they failed to give proper reasons for saying that he had acted in such a way as to justify a finding of dishonesty. The appeal has been argued by the same counsel as appeared below with conspicuous skill on both sides.

### **Background facts**

3. In 2003 the University set up the Working Lives Research Institute ("WLRI") with Professor Jefferys as its director. Mr Watson was appointed a research assistant in the WLRI in 2006.

4. Mr Watson was an active member of UNISON and at the relevant time Branch Chair. The ET found that the relationship between the University and the unions was "fraught," that there were a number of areas of dispute, and that Mr Watson was regarded by some members of the senior management team as a "thorn in the side".

5. There was before the ET in particular an email exchange between Paul Bowler (the Deputy Chief Executive) and Professor McCaffery (the Deputy Vice-Chancellor) from 18 January 2013, in which Mr Bowler had commented unfavourably on a communication by Mr Watson to members of UNISON on 17 January 2013 about a business process review exercise being run by Capita, and had referred to “1970’s ‘Bully Boy’ style of Union Official behaviour”, and stated that he had always favoured a tougher stance with the Unions. Professor McCaffery’s response stated that he agreed with Mr Bowler and went on: “This is wholly unacceptable behaviour as a staff member even if he is acting in a TU capacity (as well as a fundamental breach of the University’s values ...). I assume the next step would be to suspend him with immediate effect ...”. The ET found that the University had not adopted Mr Bowler’s approach but had adopted a more constructive way forward in relation to the issues over the Capita business review which had drawn a line under the matter and that no action had been taken against Mr Watson personally (although the ET recognised that it was a central plank of his claim that the subsequent warning was indeed caused by his union activities and what he had said in his communication to members on 17 January 2013) (see paragraph 2.37 of the Judgment).

6. At about the same time in January 2013 it came to the knowledge of the University’s senior management that Jawad Botmeh, who had worked in the WLRI as an administrator since October 2008, had been convicted of conspiracy to cause explosions and sentenced to 20 years imprisonment in the mid-1990s. Because of their concerns on learning of the conviction, the board of the University requested the establishment of an investigation into a number of matters, including how Mr Botmeh had been recruited.

7. Mr Botmeh had originally been recruited to cover for someone on maternity leave. He had been the only applicant for the post. Mr Watson had been on the interview panel, which had known about Mr Botmeh's conviction, and Professor Jefferys had approved the original appointment and its renewal. Mr Botmeh, Mr Watson and Professor Jefferys were among five people who were investigated. Mr Watson was called to meetings with the investigator on 7 and 18 February 2013. He and Professor Jefferys were suspended for potential gross misconduct (although their suspensions were lifted by Mr Bowler on 13 March 2013).

8. The investigator produced a report on 5 March 2013 which recommended disciplinary action against Mr Watson and Professor Jefferys and they were sent letters charging them with gross misconduct. The charges against Mr Watson were that:

- (1) He had failed to disclose that he knew Mr Botmeh on a casual appointment form;
- (2) He had been dishonest in response to a question put during the investigation with regard to his knowledge of how Mr Botmeh had come to learn of the vacancy in 2008;
- (3) He had demonstrated favouritism towards Mr Botmeh by assisting him in the recruitment process; and
- (4) He had demonstrated an inappropriate conflict of interest by being on the interview panel.

Among other things the investigator would have been in possession of copies of emails to and from Mr Watson's University email address during October 2008 which showed (a) that he had notified Mr Botmeh of the forthcoming vacancy on or before 2 October when the job description had not been finalised and the job had not been advertised, and (b) that Mr Botmeh

had initially sent him a half page CV which he (Mr Watson) had forwarded to his own personal email account on 7 October 2008, and (c) that Mr Botmeh had sent him a two page CV on 9 October 2008 which went with the formal application before the interview panel.

9. Professor McCaffery conducted the disciplinary hearings. The hearing in relation to Mr Watson took place on 17 and 25 April 2013; he was represented by a UNISON representative and he called five witnesses, including Mr Botmeh. In a detailed letter dated 1 May 2013 Professor McCaffery set out his conclusions: he found that Mr Watson was not guilty on charges (1) and (4) because he had been requested to be on the interview panel and had declared to the Chair that he had met Mr Botmeh on one occasion before the interview; he found him guilty of favouritism on charge (3) in that he had told Mr Botmeh about the vacancy before it was advertised and (in effect) given him the opportunity to improve his CV (it is notable that Mr Watson has not sought to challenge Professor McCaffery's conclusions on charge (3)); on charge (2) he found that although he could not say that Mr Watson had been dishonest when he said he did not know how Mr Botmeh learnt of the vacancy when he was asked about it on 7 February 2013, by the time of the hearing he was dishonest in still maintaining that he did not know. In the light of those findings he issued Mr Watson with a first and final six month warning. In relation to Professor Jefferys he upheld the charges made against him and also gave him a six month final warning.

10. Both Mr Watson and Professor Jefferys appealed to Maureen Laurie, an independent Governor of the University. Mr Watson's hearing took place on 29 May 2013; again, he was represented by UNISON; Professor McCaffery presented the management case. In relation to charge (2), Mr Watson maintained that Professor McCaffery had "moved the goalposts" by finding him guilty of dishonesty at the hearing when the allegation was that he had been

dishonest during the investigation. Ms Laurie rejected that point, stating that Professor McCaffery had been entitled to take account of Mr Watson's responses during the entire process (including the investigatory meeting of 18 February and the disciplinary meetings on 17 and 25 April 2013) and to conclude that he was being dishonest in maintaining, in the face of the email records, that he did not know how Mr Botmeh came to be aware of the vacancy in 2008. Overall she upheld Professor McCaffery's decision. Professor Jefferys' appeal was upheld to the limited extent of reducing his warning to one of three instead of six months.

11. At the hearing before the ET, Professor McCaffery gave evidence and was questioned closely by Mr Panesar and the Tribunal. He conceded that he had "moved the goalposts" in relation to charge (2) and, when asked to indicate by reference to the notes of the disciplinary hearing where Mr Watson had been dishonest in claiming not to know how Mr Botmeh learnt of the vacancy, he was unable to do so. The ET said at paragraph 2.26 in relation to this:

**"The fact that an allegation was upheld but was now accepted to have been upheld on improper grounds would, perhaps, tend to support the claimant's case, even quite strongly. However, we found Professor McCaffery to be honest and credible, not least for openly admitting his errors. It seems he was somewhat confused but had genuinely believed at the time that there was evidence of dishonesty, which there was, just not in the way the allegation was upheld".**

### **The law**

12. The relevant provisions of the **1992 Act** are these:

**146. (1) A worker has the right not to be subjected to any detriment as an individual by any act ... by his employer if the act ... 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 ...**

**(5) A 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.**

...

**148. (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 ..."**



The effect of those provisions is that once a *prima facie* case that a worker has been subjected to a detriment for a prohibited purpose is established the burden passes to the employer to show on the balance of probabilities that in fact he was subjected to the detriment for some other, unprohibited, purpose. If the employer cannot show that, the complaint will succeed.

13. In this case, it was conceded by the University that there was a *prima facie* case that Professor McCaffery had imposed the warning for a prohibited purpose. The burden therefore lay on the University to show on the balance of probabilities that the true purpose of the warning was, as it purported to be, a sanction for Mr Watson's conduct in relation to Mr Botmeh's recruitment and the investigation into it, and accordingly not a prohibited purpose. This inevitably involved making an assessment of Professor McCaffery's evidence and considering the relevant surrounding circumstances and drawing an appropriate inference as to his true purpose based on his evidence and those circumstances.

### **The ET's decision**

14. Having recorded that it was accepted that there was a *prima facie* case, the ET proceeded to consider in detail the factors that potentially supported Mr Watson's proposition and then the factors that would tend to "show otherwise" (see paragraphs 2.15 and 2.35). The factors in Mr Watson's favour were recorded in paragraphs 2.16 to 2.35 and included:

- (1) A detailed account of the matters I refer to at paragraphs 4 and 5 above and the conclusion from them that there was potentially "motive" on the part of the University;
- (2) The fact that Professor McCaffery had "moved the goalposts" in relation to charge (2) and was unable to point to evidence from the disciplinary hearing that Mr

Watson was dishonest at the hearing, as to which they made the assessment in relation to Professor McCaffery which I set out at paragraph 11 above;

(3) The fact that Mr Bowler was in charge of the investigation and that the investigation and disciplinary hearing were kept to members of the senior management team;

(4) The fact that Professor McCaffery had expressly referred to Mr Watson's suspension on 17 January 2013, although the ET also recorded that a line had been drawn under the Capita matter.

The factors showing otherwise were recorded at paragraphs 2.36 to 2.59 and included:

(1) The ET considered the University to have behaved reasonably in starting the investigation in relation to Mr Botmeh when they did;

(2) No action was taken against Mr Watson personally in relation to the Capita matter although his suspension followed soon after;

(3) Everyone involved in Mr Botmeh's recruitment was investigated;

(4) The investigator was independent;

(5) Mr Bowler lifted Mr Watson's and Professor Jeffery's suspensions;

(6) Professor Jefferys' was not a union representative and there was no evidence of senior management irritation with him but he effectively received the same sanction;

(7) Professor McCaffery rejected charges (1) and (4) which could, in theory, have been upheld;

(8) There were significant grounds to uphold charge (2);

(9) Charge (3) was upheld on reasonable grounds;

(10) The appeal was heard and rejected by an independent governor who had no animus against Mr Watson or unions.

15. The ET's conclusions were set out at paragraphs 2.60 to 2.63 in these terms:

**“2.60. We consider that those factors [i.e. those set out in paragraphs 2.36 to 2.59] significantly outweigh those that would, otherwise, have tended to support [Mr Watson's] case ...**

**2.61. [The University] was genuinely concerned about the process that led to Mr Botmeh's appointment. ...**

**2.62. ... The initial claimed inability to remember (notwithstanding that it was not officially upheld), inconsistencies in [Mr Watson's] answers with the email record and, primarily, the apparent favouritism shown during that process were the principal reason for the final warning.**

**2.63. Notwithstanding the fact that some emails disclosed inappropriate attitudes on behalf of some of the senior management ... punishment for, or deterrence from, [Mr Watson's] union activities was not the principal reason for either his suspension or his warning. The claims must therefore fail.”**

16. Although strictly speaking it might have been better if the ET had analysed the case by considering factors in favour of and against the University's suggested purpose rather than those in favour of and against Mr Watson's suggested purpose, since there were only two possibilities put forward, it did not make any difference. It is quite clear that on all the evidence presented to it, the ET was satisfied on the balance of probabilities that the purpose of the sanction imposed on Mr Watson was the one claimed by the University and was not to deter him from or punish him for his union activities.

### **The appeal**

17. Mr Watson's case on the appeal is that, given the unusually strong evidence of anti-union animus on the part of the University (and Professor McCaffery in particular) and given that Professor McCaffery accepted that he had wrongly upheld the charge of dishonesty, the ET must have applied the reverse burden of proof wrongly or reached a perverse conclusion (ground 1). He also raised a related point to the effect that the ET had not given reasons for

saying (as they did at paragraph 2.26 and more fully at paragraphs 2.55 and 2.56) that Mr Watson had, notwithstanding Professor McCaffery's concession at the hearing, acted in such a way as to justify a finding of dishonesty and that their finding to that effect was also perverse (ground 2).

18. Taking ground 2 first, it seems to me that there was ample material to support the ET's finding and that their explanation for it is sufficiently set out at paragraphs 2.55 and 2.56. It is clear they rejected the notion that Mr Watson would not have remembered details about the appointment of a "high profile" job applicant who had become a friend of his and they considered that the inconsistent answers given in relation to the emails (described at paragraphs 2.56 and 1.8 to 1.18) confirmed that he was being dishonest in his responses to questions about it. In my judgment, it was perfectly open to the ET to find that, in endeavouring to be fair, Professor McCaffery had got confused in his findings but that there were grounds for his general conclusion (and, indeed, that of Ms Laurie) that Mr Watson had been dishonest when asked about Mr Botmeh's appointment.

19. So far as ground 1 is concerned, as I have said it is clear that the ET were satisfied on the balance of probabilities looking at all the evidence that the true purpose of the sanction imposed by Professor McCaffery was what it purported to be. It is right that the evidence of anti-union animus was a strong factor in Mr Watson's favour but the ET clearly took it into account and reached a conclusion based on inference from all the circumstances. So far as Professor McCaffery's concessions were concerned, it is important to remember that it was not for the University to show that its decision making process was satisfactory in every respect; what it had to show was that the purpose of the sanction imposed was genuinely because of Mr Watson's conduct in connection with the appointment of Mr Botmeh and the subsequent

investigation; evidence of inadequate decision making was of course relevant to the latter question but by no means decisive. I do not think there is any basis for the suggestion that the ET wrongly applied the “reverse onus” provision or that their conclusion can possibly be classified as perverse.

**Disposal**

20. I therefore dismiss the appeal.