Appeal No. UKEAT/0407/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 March 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MS S AZAM — APPELLANT

OFQUAL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR P JOHNSON (Solicitor) Johnson's Solicitors 11a Queen Street Oldham OL1 1ED
For the Respondent	MS NAOMI CUNNINGHAM (of Counsel) Instructed by: Wragge Lawrence Graham & Co Solicitors Two Snowhill Birmingham B4 6WR

SUMMARY

TRADE UNION RIGHTS - Dismissal

Automatic Unfair Dismissal - section 152(1) of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA") - whether the reason or principal reason for the Claimant's dismissal was that she had taken part or proposed to take part in the activities of an independent trade union at an appropriate time.

Dismissing the appeal:

The Employment Tribunal ("ET") had not erred in addressing the Respondent's motive. The Claimant's case before the ET had been that the Respondent had an ulterior motive in dismissing her for the reason given (her disclosure of confidential information and disregard of a direct instruction from a manager that she should not disclose and distribute that information) as it really wished to get rid of her due to other (unrelated) trade union activities. The ET found that was not the case.

In any event, and notwithstanding that focus of the Claimant's case, the ET also considered whether the activity for which she was dismissed amounted to dismissal for a prohibited reason for section 152 **TULRCA** purposes. It found that the Claimant had deliberately misled the trade union branch executive committee by failing to inform it of the confidential nature of the information it then agreed she should distribute to members. In the circumstances, it concluded that the activity for which she had been dismissed fell outside the pursuit of any lawful trade union activity. That was a conclusion open to the ET on the facts and disclosed no error of law in terms of its approach.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent as below. The appeal is that of the Claimant against the Judgment of the Birmingham Employment Tribunal ("the ET"), Employment Judge Dean sitting alone on 28-30 May 2014 and again in chambers on 5 June 2014. It was sent to the parties on 18 August 2014. The Claimant was then represented by Mr Healy of counsel but today is represented by Mr Johnson, a solicitor. The Respondent was represented both below and before me by Ms Cunningham of counsel.

2. By its Judgment the ET dismissed the Claimant's complaints of unfair dismissal, automatic unfair dismissal because of trade union activities and unfair dismissal under section 98 of the **Employment Rights Act 1996** and also of wrongful dismissal and breach of contract. The Claimant appeals the dismissal of her claim of automatic unfair dismissal, permission having been given to her to do so by HHJ Serota QC.

The Background Facts

3. The Respondent is the regulator of academic and vocational qualifications examinations and assessment in England and vocational qualifications in Northern Ireland. At its Coventry branch, it employs some 180 staff, of whom around 50% are members of PCS, the independent trade union recognised by the Respondent. The Claimant was there employed from June 2009 until her dismissal on 27 November 2013. She had latterly been promoted to the position of Delivery Hub Officer. For the last three-and-a-half years of her employment she had been the trade union representative for PCS, being Branch Chair for a large portion of that time.

4. Autumn 2013 saw the Respondent in the process of formulating significant changes to its pay and grading arrangements. The Claimant was involved in discussions with the Respondent in a series of joint negotiating committee meetings in her role as PCS Branch Chair. On 4 October 2013, during those discussions, at the Claimant's request, the Respondent disclosed a spreadsheet detailing each of the roles in the organisation together with the old and proposed new grades. That disclosure was expressly on the basis that the information concerned remained confidential and there were subsequently various further exchanges between the Claimant and the Respondent emphasising the confidential nature of the information and the strict embargo on the Claimant disclosing it to her members, or using it for other purposes. I return to the relevant parts of the history in this regard when considering the ET's reasoning.

5. Notwithstanding those exchanges and (as the ET found) the Claimant's understanding as to the confidential nature of the information in question and the conditions of its disclosure, the Claimant agreed with her PCS branch executive committee that she would send a copy of the spreadsheet to branch members. That agreement was obtained without the Claimant having informed the branch executive committee that the Respondent had only disclosed the spreadsheet on the basis that it was and remained confidential; not to be distributed to others.

6. Unbeknown to the Respondent, on 10 October 2013 the Claimant sent a copy of the spreadsheet to PCS members under the cover of an email advising them how to appeal their new grades (individual proposed new grades having been notified to staff by the Respondent on 8 October 2013). The Respondent became aware of the Claimant's action the next day when a member of its staff (not a member of PCS) complained, concerned that sensitive information had been disclosed to PCS colleagues. The Claimant was duly suspended from duties on 16

October 2013 and an investigation undertaken. A disciplinary hearing took place on 21 November 2013, conducted by Mr Jeacock, then Interim Chief Operating Officer of the Respondent, who had not met the Claimant before, having only joined the Respondent after her suspension, and he was assisted by Ms Pethick, the HR representative.

7. The Employment Judge was impressed by Mr Jeacock's evidence and found him to have maintained his independence. Mr Jeacock and Ms Pethick did not accept the Claimant's explanation that she had believed the spreadsheets were only confidential until such time as the letters went out to individual employees regarding the outcome of the process for them. Rather, the conclusion of the disciplinary hearing was that the Claimant had been guilty of gross misconduct and should be dismissed. The Claimant appealed. That appeal was heard by Ms Stacey, the Chief Regulator and the Respondent's Chief Executive, on 13 December 2013, but the decision to dismiss was upheld.

The Employment Tribunal's Reasoning

8. The ET heard evidence and submissions over three days. It referred to documentation contained in a bundle of over 1,000 pages. It received evidence from the Claimant and her witnesses: Mr Goodwin; Mr Hamilton by witness statement; a Dr Glanville, Chair of the PCS branch at the relevant time; a Mr Atkinson, member of the PCS branch executive committee; and Ms Prendiville, full-time officer of PCS. For the Respondent the ET heard from Mr Jeacock, Chief Operating Officer of the Respondent, and Ms Stacey, the Chief Regulator.

9. The ET was satisfied that the spreadsheet had been disclosed to the Claimant and thus to PCS under the condition of confidentiality, as the Respondent described. That was in

accordance with the Recognition Agreement between the Respondent and PCS, which provided:

> **"Information provided in confidence by Ofqual or PCS will remain confidential to the other party and not be distributed, unless permission is provided in writing for its specific further use."**

Moreover, even if the Claimant had mistakenly assumed that the information was only to remain confidential until staff had received their letters confirming their individual places in the reorganisation, any such assumption would have been dispelled on receipt of emails from Mr Robson of the Respondent on 4 and 6 October 2013. That of 4 October stated as follows:

> **"The information provided to you today was given in confidence and received in confidence. It is not for sharing with your members in any way and you recognise this will mean that it cannot therefore be used to inform or support any members meeting you have and it will be a serious breach of the Recognition Agreement if it were to be so used."**

That of 6 October 2013 (sent from a HR consultant on Mr Robson's behalf) stated:

> **"We also wish to publish the new structure as soon as we [are] able. It would not be right to publish it however until roles of which further information is sought are resolved and until any appeals are considered. I look to the PCS to support this given the otherwise potential adverse impact publication could have for members of staff involved."**

10. The ET considered that the Claimant's case that she had misunderstood the period for which the spreadsheet would remain confidential was undermined by her own actions - in particular her emails to the Respondent at the relevant time - and also by her answers to the ET in cross-examination. The ET further took the view that the Claimant had misled her PCS branch executive committee in not informing its members of the emails she had received from the Respondent explicitly directing her not to disclose the spreadsheets or even the confidential basis on which the spreadsheet had originally been disclosed. This, the ET found, took the Claimant outwith her legitimate remit from the branch executive committee. It breached the Recognition Agreement and the *ACAS Code*. At the same time her action was in breach of the Respondent's clear direction to her, breached the Civil Service Code and the Respondent's own

Code of Conduct and gave rise to a breach of the Terms and Conditions of her employment. The ET had express regard to paragraph 47 of the *ACAS Code of Practice - Time off for trade union activities and duties* and to the Respondent's Code of Conduct, which expressly considered the subject of disclosure of confidential information, stating:

> **"Disclosure of information**
>
> **<u>Confidential information</u>**
>
> **You must not disclose or misuse confidential information that you know about work colleagues … or other organisations or individuals that may work with us."**

Going on, specifically in relation to trade union representatives:

> **"If you are an elected national, departmental or branch representative or officer of a recognised trade union, you do not need to seek permission before publishing union views on an official matter where this relates to a matter of legitimate concern to your members. If your official duties relate to the matter in question, then you will need to seek permission."**

11. It further noted that the Respondent's disciplinary policy and procedures gave examples of gross misconduct, which included:

> **"Unauthorised use or disclosure of official information;**
>
> **Serious enactments of subordination;**
>
> **Serious breach of confidence;**
>
> **Serious breach of Code of Conduct / Civil Service Code."**

12. The ET considered the Claimant's case that the Respondent had used her disclosure of confidential information as a pretext to terminate her employment; the real reason being her legitimate activities on behalf of PCS members, in particular emails she had sent complaining regarding the handling of PCS members' grievances, and an email she had sent to a Ms Galliers, a member of the Respondent's board on 10 October 2013, raising various concerns about labour relations within the Respondent. The ET had regard to past relations between the Respondent and the Claimant; noting she had previously performed her trade union role

robustly without suffering any detriment. On the contrary, the Respondent had provided the Claimant with additional training and promoted her a few months prior to these events.

13. The ET found the reason for the Claimant's dismissal had not been her emails to the Respondent raising concerns about legitimate trade union matters; it had been her gross misconduct in disclosing in breach of contract confidential information and in thereby disregarding a clear instruction from her manager. Although the disclosure of the spreadsheet to members had been endorsed by the PCS branch executive committee, that approval had only been given as a result of misleading and incomplete information provided by the Claimant, who had failed to represent the true basis on which the spreadsheet had been disclosed to her. This led the ET to conclude that the distribution of the spreadsheet to members was an activity beyond and outside her pursuit of lawful trade union activities. The reason for her dismissal was thus not because of her trade union activities. It was not automatically unfair.

14. Moreover the Respondent had formed a genuine belief that the Claimant had deliberately breached the confidential nature on which information had been disclosed to her, and her disclosure of that information to PCS members was in breach of a specific instruction by a manager and in breach of the terms of confidentiality and her contractual obligations to her employer. There had been a thorough investigation and a fair hearing by Mr Jeacock. He had considered alternatives to dismissal but had reached a decision that was substantively and procedurally fair and fell within the range of reasonable responses of a reasonable employer in all the circumstances. This was not an unfair dismissal. Moreover the ET was itself satisfied that the Claimant had acted in fundamental breach of contract and thus the decision to summarily terminate her employment had not been wrongful.

The Appeal

15. As stated, the focus of the appeal is with the conclusion on the claim of automatic unfair dismissal. If the appeal were to be successful on that basis, that might have implications for the other claims, but the arguments fall to be addressed under that heading. The grounds of appeal are essentially twofold. First, that the ET erred in law in the application of the test applicable when considering a claim of automatic unfair dismissal; specifically, having taken part in activities in her capacity as a trade union Branch Chair at an appropriate time, the Claimant was engaged in the activities of a recognised trade union for the purposes of section 152 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"), so her dismissal for this activity was automatically unfair. Second, the ET erred in accepting without scrutiny the Respondent's assertion that the information in the spreadsheet was confidential.

Submissions

The Claimant's Case

16. For the Claimant it was submitted that the ET had to first determine what the activity was, and whether it fell within the ambit of the activities of an independent trade union, before going on to consider whether there was anything in the manner in which the activity was carried out that took it outside the protection provided. In this regard, it should be noted, first, the Claimant had obtained the information in question only because of her trade union role. Second, she had distributed that information solely in that capacity even if, on the ET's finding, her trade union branch executive committee had not properly understood the basis on which the information had been provided to her before agreeing to its distribution to members.

17. The *ACAS Code* did not assist because it did not go to the question of automatic unfair dismissal. Of more assistance was the case-law, in particular the useful summation of the EAT in **Mihaj v Sodexho Ltd**, unreported, UKEAT/0139/14/LA (see below).

18. Moreover, whether this was a sham conduct dismissal to disguise some background anti-union animus was not the question; see the approach taken by the EAT in **Burgess v Bass Taverns Ltd** UKEAT/409/93, where it had been allowed that the dismissal might not be "an artificial dismissal for trade union reasons" but could still mean that "what the Appellant was doing at the time was acting in a trade union capacity in a way which protected him under the [equivalent to section 152 **TULRCA 1992**]". Allowing that proven anti-union motive would be a relevant factor, it was not a necessary matter for the ET to find for the Claimant's case to be established. It might be that the ET had allowed itself to be misled because that had been part of the Claimant's case below. That did not, however, absolve it from applying the correct test and asking the correct questions. It had to determine the act for which the Claimant had been dismissed and whether that amounted to the carrying out of trade union activities. Specifically its task was as follows (reading in from the Claimant's skeleton argument):

> **"22. … the Tribunal must first ask itself what activity [led] to the dismissal. Then it must ask itself whether that activity was a trade union activity - an act carried out as part of the activities of an independent trade union. If the activity was the activity of an independent trade union then the next question to ask is whether it was carried out at an appropriate time. If it was carried out at an appropriate time, then the employee is [protected] by [section] 152 and any dismissal will be automatically unfair unless the way it which the activity was carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities."**

19. On the second ground, the ET appeared simply to have accepted the Respondent's assertion that the information in question was confidential. That said, Mr Johnson accepted that he could not say that the information had lost its confidential nature because the ET had decided that such time as it might had not yet been reached when the Claimant distributed the spreadsheet to PCS members. He also accepted that the ET had found that the information had

been disclosed to the Claimant on the basis that it was confidential and recognised the difficulty of putting his case on this second ground given that that had not been the case as put below. Accepting there was no error of law in the ET determining the case as put before it, rather than some other case, Mr Johnson did not seek to pursue his case on this ground in oral argument.

The Respondent's Case

20. For the Respondent, Ms Cunningham submitted this was really a perversity appeal and could not succeed. The ET's finding was clear. As set out in the last sentence of paragraph 50, the reason for the Claimant's dismissal was her gross misconduct, in breach of contract, in disclosing confidential information and disregarding a direct instruction from a manager.

21. There was an implication in the first ground of appeal that the ET failed to deal with the allegation that the disclosure was itself part of the Claimant's trade union activities because it was distracted by irrelevancies about a possible ulterior motive for the dismissal. In truth the ET had dealt with both questions. It had addressed the question of ulterior motive because that was primarily how the Claimant's case had been put below. The way in which the Claimant's case was now emphasised was not put with any force below, not least as the Claimant had accepted that, if she had done what the Respondent alleged, then that was indeed gross misconduct; her case being that the Respondent had overplayed the sanction for that misconduct because of her other trade union activities.

22. The Respondent did not disagree with the way in which the legal test was expressed. It was for the ET to determine whether the Claimant was engaged in trade union activities. If she was, then it was immaterial how she carried out those activities, unless she did so in such a way as to remove them from the scope of what could properly be called trade union activities. The

ET had indeed found that the Claimant had carried out her activities in such a way as to remove them from the scope of what could properly be called trade union activities, see the express finding at paragraph 50 and then (specifically addressing this question) at paragraph 51:

> **"Furthermore, although the confidential information disclosed by the claimant to the union's members was one that had been endorsed by the BEC following their meeting on 10 October, that approval was given as a result of misleading and incomplete information being provided to them by the claimant, who failed to represent the true basis upon which the spreadsheet confidential information had been disclosed. I conclude that the claimant's disclosure of the confidential information was activity beyond and outside her pursuit of lawful trade union activities at the material time."**

23. As for the second ground, the Respondent did not accept that the ET had an obligation to consider whether the information was truly confidential; it was sufficient to find that the Respondent reasonably believed that the Claimant had been guilty of a breach of confidence and had deliberately defied an express instruction to keep the spreadsheet confidential. In any event, the ET did find the document had the relevant nature of confidence (paragraph 18).

The Claimant in Reply

24. It was the Claimant's case that, if an ET determined that the conduct for which she was dismissed amounted to a trade union activity, then that was automatically unfair unless the ET also found that activity fell within one of the exceptional cases allowed by the authorities.

The Legal Principles

25. By section 152(1) of the **Trade Union and Labour Relations (Consolidation) Act 1992** the dismissal of an employee shall be regarded as unfair if the reason or principal reason for the dismissal was that the employee had (relevantly) taken part or proposed to take part in the activities of an independent trade union at an appropriate time. "Appropriate time" is defined by section 152(2). What is the reason or principal reason for a dismissal is for the ET as a question of fact (**Kuzel v Roche Products Ltd** [2008] ICR 799). The burden of proof will

be on the Respondent (**Maund v Penwith District Council** [1984] ICR 143). In a section 152 case, it is unnecessary for an employee to show that an employer's action was motivated by malice or anti-union hostility (**Dundon v GPT Ltd** [1995] IRLR 403).

26. The question for this court was whether the ET had reached a permissible view as to the reason for dismissal and in its determination whether that was or was not a prohibited reason (**Burgess v Bass Taverns** [1995] IRLR 596 CA). If the ET has reached such a permissible view it is not for the EAT to interfere.

27. Is it the case that any activity claimed to be a trade union activity is covered by the protection? The answer to that question is plainly no; see the Judgment of Pill LJ in the case of **Burgess v Bass Taverns**, who noted:

> **"8. Reference was made to the decision of the Employment Appeal Tribunal (Phillips J presiding) in *Lyon v St James Press Ltd* [1976] IRLR 215. Miss Slade rightly says that the case was decided under earlier legislation in which there was no equivalent of s.58(2)(b). 'Appropriate time' was not defined in the Employment Protection Act 1975.**
>
> **9. Phillips J stated at paragraph16:**
>
> > **"The special protection afforded by para. 6(4)"**
>
> **of the 1975 Act**
>
> > **"… to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of the trade union must not be obstructed by too easily finding acts done for the purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."**
>
> **Phillips J added at paragraph 20 in relation to acts claimed to come within the protection:**
>
> > **"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." "**

28. Merely going "over the top" will not, however, suffice. The approach to the facts in the case of **Burgess** is instructive; see, further, the Judgment of Pill LJ at paragraphs 12 to 14:

> **"12. In the findings of the industrial tribunal as to what the respondent said, I find nothing beyond the rhetoric and hyperbole which might be expected at a recruiting meeting for a trade union or, for that matter, some other organisation or cause. Neither dishonesty nor bad faith are suggested. While harmonious relations between a company and a union are highly**

desirable, a union recruiting meeting cannot realistically be limited to that object. A consent which at the same time prevents the recruiter from saying anything adverse about the employer is no real consent. Given that there was consent to use the meeting as a forum for recruitment, it cannot be regarded as an 'abuse of privilege' to make remarks to employees which are critical of the company. An industrial tribunal may be surprised at the situation which developed, but it was the employers who, at the start of their induction course, put the respondent in the position of being both trainer manager and recruiter. Having put him in that position, they cannot reasonably expect his activities in the latter role to be limited by the fact that he also was performing the role of trainer manager.

13. It appears to me that the industrial tribunal did base their decision on an implied term of the kind now contended for, albeit not in the same way. The company's case is not, in my judgment, improved by the present reliance upon an implied term that the recruiter should say nothing to criticise or disparage the company or upon the presence of the word 'consent' and the word 'permissible' in s.58(2)(b). One has only to consider the likely reaction if the company had attempted to make the term expressed. It is difficult to envisage any trade union official accepting a limitation upon his activities at a recruiting meeting that he should say nothing critical about his employer. Indeed, it is difficult to envisage a sensible employer attempting to require such a term. It is wholly unrealistic, in my judgment, to believe that such a term can be implied in the present context. The respondent's admission that he had 'gone over the top' does not, in my judgment, provide a basis for a finding that during his speech he was not taking part in trade union activities. That is an expression sometimes used colloquially in [situations] when that moderation and balance normally shown in social intercourse is perceived to have been exceeded. In the circumstances of the present case, however, it was not an admission that could form the basis for a conclusion that in law the contents of the speech were outside the scope of trade union activities. The Employment Appeal Tribunal correctly concluded that the industrial tribunal had fallen into error.

14. I would base the decision on this appeal upon the grounds already expressed rather than upon the Employment Appeal Tribunal's reliance on a verbal inconsistency between the industrial tribunal's finding that the respondent was 'taking part in the activities of an independent trade union at an appropriate time' and their subsequent finding that he was not dismissed for trade union reasons. I would add that in dealing with the facts of this case, I am very far from saying that the contents of a speech made at a trade union recruiting meeting, however malicious, untruthful or irrelevant to the task in hand they may be, come within the term 'trade union activities' in s.58 of the Act."

29. If there were any potential conflict between the approach adopted in the **Lyon v St James** case and the case of **Burgess**, then the approach laid down in **Burgess** is to be preferred; see per Slade J in **Mihaj v Sodexho Ltd** [2014] UKEAT/0139/14:

"17. The Judgment of the Court of Appeal in *Bass Taverns v Burgess* [1995] IRLR 596 makes it clear that the way in which trade union activities are carried out is immaterial to the decision as to whether they are in fact trade union activities unless the way in which they are carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities.

…

20. However, the approach in *Bass Taverns*, in the Court of Appeal rather than that in *Lyon v St James Press*, is to be followed if and insofar as there is any relevant inconsistency between the two. In our judgement, the Employment Judge failed to apply the approach set out in *Bass Taverns* in that he determined that an Employment Tribunal at a full Liability Hearing was not likely to hold that the dismissal of the Claimant fell within the statutory protection because of the way in which trade union activities were carried out. The issue for the Employment Judge to decide was whether an Employment Tribunal, on a full Liability Hearing, was likely to find that the Claimant was dismissed for carrying out trade union activities. The way in which those activities was carried out was not relevant unless it was such as described in *Bass* or *Lyon*, namely acting in bad faith, dishonestly or for some

> **extraneous cause or in any other way such as to take those actions outside the proper scope of trade union activities."**

30. In establishing which side of the line an activity falls, it may be instructive to have regard to the *ACAS Code of Practice No 3 - Time Off for Trade Union Duties and Activities 2010*. In particular, (relevant to the present case), paragraph 47 provides as follows:

> **"When using facilities provided by the employer for the purposes of communication with their members or their trade union, union representatives must comply with agreed procedures … in respect of access to and use of company information. The agreed procedures will be either those agreed between the union and the employer as part of an agreement on time off … or … general rules applied to all employees in the organisation. In particular, union representatives must respect and maintain the confidentiality of information they are given access to where, the disclosure would seriously harm the functioning of, or would be prejudicial to, the employer's business interests. … Union representatives should understand that unauthorised publication risks damaging the employer's business, straining relations with the representative body concerned …"**

Discussion and Conclusions

31. It is convenient to first address the second ground of appeal, the question whether the ET erred in failing itself to consider whether the information was truly confidential. That was a point that was effectively all but abandoned before me and rightly so. It was not a point taken below, and the ET cannot be criticised for proceeding on the basis that it was accepted that the information given to the Claimant in confidence and (a strict assertion of that confidence continuing) retained that characteristic at the relevant time.

32. This is a point that has to underpin my approach to this appeal more generally: the reasons given for any Judgment have to be read in the light of the case that was before the court or tribunal concerned. It is not an error of law to determine the case as it is presented rather than some other; it will not amount to inadequate reasoning if the court or tribunal does not address in detail points that were not really in issue before it.

33. Mr Johnson fairly concedes that the emphasis of the Claimant's case below had been on ulterior motive; the argument had been that the dismissal was really aimed at enabling the Respondent to rid itself of the Claimant because of her other trade union activities, most specifically her general complaint about the Respondent made to Ms Galliers. It was suggested that these matters had effectively made her a thorn in the Respondent's flesh, and the way in which the ET understood the Claimant's case below was that the activity of distributing the spreadsheet was used by the Respondent to dress up the dismissal as being one relating to her misconduct when the reason really related to other activities on her part. The ET rejected that case on the facts (see, for example, its findings set out at paragraphs 37 to 38, 42 and 43). It did not err in dealing with that (ulterior motive) case; that had been part of the Claimant's case as presented before it. Accepting that, Mr Johnson says, however, that the ET's error was in allowing itself to be distracted by that case and in failing to properly address the question whether the dismissal of the Claimant for her conduct in distributing the spreadsheet to her members was itself a dismissal for trade union activities.

34. Although that case may not have been at the forefront of how the Claimant's case was presented below, I can see that it was part of her case and on that basis I agree with Mr Johnson that the ET would have been in error if it had failed to consider the case before it in this regard. Where I disagree with him, however, is in my conclusion that the ET clearly did. Indeed, it specifically considered whether the Claimant's dismissal for distributing the spreadsheet was automatically unfair because it amounted to an activity of an independent trade union.

35. In assessing the ET's reasoning in this regard, it is again important to note what was and what was not in issue before it. It was not in dispute that the Claimant had been given the spreadsheet in her capacity as a trade union representative; she would not have been given the

spreadsheet in the normal course of her employment. The ET was thus not obliged to detail its reasoning on that point. It was also not an issue that distributing that information to members *per se* (even this spreadsheet, if it had not been confidential and only disclosed to her on the basis that she would not distribute it) could be a trade union activity.

36. Adopting Mr Johnson's analysis, it can be seen that, accepting that which was not in issue, the ET addressed the relevant questions. First, it plainly did ask what activity led to the dismissal. It found (paragraph 50) it was the Claimant's gross misconduct in disclosing, in breach of contract, confidential information (the spreadsheet) and disregarding a direct instruction from a manager (i.e. that she should not disclose and distribute that information).

37. Mr Johnson's second and third questions would require that the ET should have asked whether that was a trade union activity - an act carried out as part of the activities of an independent trade union, and, if so, whether it was carried out at an appropriate time.

38. Although I understand that Ms Cunningham had sought to question whether the activity had been carried out at an appropriate time, the ET does not seem to have found that was a relevant question in this case: there is no suggestion that - had the Claimant been found to have been performing a trade union activity - the ET would have found she had done so at an inappropriate time. As for the question whether the Claimant was performing a trade union activity, the answer to that was dependent on what Mr Johnson sees as the fourth question: whether the activity was carried out in such a way as to be dishonest, in bad faith, or for some extraneous cause or in some other way such as to remove it from the scope of what could properly be called trade union activities (see per Slade J in **Mihaj v Sodexho Ltd**, cited above).

39. For my part I do not see that Mr Johnson's questions 2 and 4 are necessarily separate: whether an activity is properly to be regarded as an activity of an independent trade union (question 2) may itself depend on the answer to what he has identified as the fourth question. And that, in turn, will invariably be one of fact and degree for the ET. The question does not relate to the manner in which such an activity is carried out - certainly whether it is done in the way the employer would like is not the test - *unless* it was such as to take it "outside the proper scope of trade union activities".

40. In assessing whether the activity is properly to be regarded as one of an independent trade union or whether it falls outside the scope of such activities, I again part company with Mr Johnson; I consider the ET may be assisted by the *ACAS Code*. Relevantly here, that recognises that constraints might be placed on trade union activities in terms of the disclosure of information received from the employer where that information is confidential. More specifically, however, in this case the ET expressly found as a fact that the Claimant had misled her branch executive committee (paragraph 41) and concluded that vitiated the endorsement of her activity in distributing the spreadsheet to members (paragraph 51). The ET found the Claimant's actions in this regard to have been deliberate (paragraphs 40 and 41) and, on the basis of its findings of fact, concluded that the activity for which she had been dismissed thus fell outside the pursuit of any lawful trade union activity (paragraph 51). So, to the extent that the Claimant's case included the assertion that the conduct for which she had been dismissed (the distribution of the spreadsheet disclosed to her on a confidential basis and expressly not for distribution to her members) amounted to a trade union activity, the ET expressly dealt with the point, reaching a permissible conclusion in that regard with which this court cannot interfere.

41. For all those reasons I dismiss this appeal.