Appeal No. UKEAT/0070/17/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 18 September 2017
Judgment handed down on 25 October 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

JET2.COM LIMITED — APPELLANT

MR J DENBY — RESPONDENT

Transcript of Proceedings

JUDGMENT

AMENDED this 21st day of March 2018 pursuant to Rule 33(1)
of the Employment Appeal Tribunal Rules 1993 (as amended)

APPEARANCES

For the Appellant	MR DAVID READE (One of Her Majesty's Counsel) and MR JAMES WYNNE (of Counsel) Instructed by: Bird & Bird LLP 12 Fetter Lane London EC4A 1JP
For the Respondent	MR PAUL WILSON (of Counsel) Instructed by: RDC Solicitors City Hub 9-11 Peckover Street Little Germany Bradford West Yorkshire BD1 5BD

SUMMARY

TRADE UNION RIGHTS

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

Trade Union Rights - refusal of employment because of trade union membership - section 137(1)(a) ***Trade Union and Labour Relations (Consolidation) Act 1992*** *("TULRCA")*

Approach to determining the reason for refusal and adequacy of the Employment Tribunal's reasons

The Claimant was a pilot who had previously been employed by the Respondent, when he was also a member of the pilots' trade union, BALPA. On 3 July 2009, the Claimant had spoken with the Respondent's Executive Chairman, Mr Meeson, advocating that BALPA might have a role in representing the interests of pilots within the workplace. Mr Meeson had resisted that suggestion, following up on the conversation the next day with a heated expression of his views in that regard. BALPA had subsequently obtained a declaration of recognition from the Central Arbitration Committee in 2010 but problems continued in its relationship with the Respondent over the following years. In the meantime, in 2011, the Claimant had left the Respondent's employment to take up another opportunity. In 2014, however, he wanted to return and duly applied to be employed as a pilot by the Respondent once again. The Claimant's initial application was unsuccessful but he re-applied only to find out, in 2015, that he had been refused. On the Claimant's subsequent application to the Employment Tribunal ("the ET"), under section 137(1)(a) **TULRCA** (which renders it unlawful to refuse employment to a person because he is a trade union member), it was found that the decision had been that of Mr Meeson and his sole reason for refusing to agree to the Claimant's employment was because of the Claimant's activities for BALPA, which were related to his trade union membership; the ET thus finding that the Respondent had acted in breach of section 137(1)(a). The Respondent appealed, contending the ET had (1) erroneously adopted too broad an approach to trade union

membership for these purposes, either as a matter of statutory construction or on the facts; alternatively (2) failed to conduct the required exercise for determining the reason for the refusal, or had failed to provide adequate reasons for its conclusion.

Held: *dismissing the appeal*

(1) "Membership" for the purposes of section 137(1)(a) **TULRCA** was not to be construed narrowly as meaning mere membership (the carrying of the union card) - the provision was concerned with status and it would leave a gap in the statutory protection, contrary to the legislative intent, if an ET was unable to conclude that an objection to trade union activities that were incidental to membership was not an objection to membership itself (**Harrison v Kent County Council** [1995] ICR 434 EAT applied). Although a narrower view of membership had been expressed, *obiter*, by a majority of the House of Lords in **Wilson v Associated Newspapers Ltd and Palmer v Associated British Ports** [1995] ICR 406, that related to a different statutory provision (the predecessor to section 142 **TULRCA**), which allowed for a separate protection for trade union activities. In any event, it was now necessary to construe the statute compatibly with the European Convention on Human Rights and a narrow approach to section 137(1)(a) would fail to respect the Claimant's article 11 right of freedom of association (and see **Wilson and Palmer v UK** [2002] IRLR 568 ECtHR).

Thus adopting a broad, purposive approach to section 137(1)(a), the ET had found that Mr Meeson's refusal to employ the Claimant was because of his earlier activities as an advocate for BALPA's representational role in the workplace and it had been open to the ET to find that such activities were incidental to the Claimant's trade union membership and thus that the refusal was in breach of the statutory protection.

(2) As for the ET's approach to determining the reason for the refusal to employ the Claimant, it had rejected various iterations of the Respondent's positive case and had then gone on to consider whether the reason was contrary to section 137(1)(a). In carrying out its task in this respect, it had engaged in a reasoned adjudication of the relevant evidence and had

adequately explained its conclusions. Moreover, having found that Mr Meeson was the sole decision taker, the ET was entitled to focus on that which it had concluded was in his mind when making the decision.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns a complaint under section 137(1)(a) of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULRCA"), of a refusal to employ because of trade union membership. It raises issues as to the meaning of trade union membership in this context and also questions whether the Decision below was adequately reasoned given the particular facts of the case.

2. Throughout this Judgment I refer to the parties as the Claimant and Respondent, as below. My Judgment follows the Full Hearing of the Respondent's appeal from a Judgment of the Leeds Employment Tribunal (Employment Judge Keevash, sitting with members Mr Weller JP and Mr Haykin, in September and November 2016; "the ET"), sent out on 7 December 2016, upholding the Claimant's claim that the Respondent had refused him employment because he was a trade union member. Both parties were represented by counsel before the ET, although Mr Reade QC did not then appear. Considering this appeal on the papers, His Honour Judge Shanks took the view that only the first ground of appeal should proceed. After a hearing under Rule 3(10) of the **EAT Rules 1993**, I allowed the Respondent to pursue limited further grounds.

The Facts

3. The Respondent is described as the North of England's leading leisure airline. It has nine bases in the United Kingdom and Spain and, in 2016, employed some 600 pilots out of a total workforce of more than 5,000. The Claimant is an airline pilot. He initially started work with the Respondent in November 2005. In June 2008, he was elected to the Respondent's Flight Deck Crew Council ("the FDCC") and, shortly afterwards, became Chairman and pilot

representative for the Leeds Bradford and Manchester airports. At around that time, he also became increasingly involved with the British Airline Pilots' Association ("BALPA"), a registered independent trade union, of which he was a member.

4. On 3 July 2009, the Claimant spoke to the Respondent's Executive Chairman, Mr Meeson, in the crew room at Leeds Bradford airport. He raised issues of concern to the Respondent's pilots, explaining there was a groundswell of opinion that pilots should be represented by BALPA. Mr Meeson had previously demonstrated his animus towards BALPA when in June 2009 (along with the Respondent's Business Development Manager, Mr Doubtfire) he had interrupted a union meeting (see the ET's record of what occurred on that occasion at paragraph 5.4 of its Decision). On 3 July, however, Mr Meeson replied in neutral terms, albeit making clear he did not want BALPA involved. The nature of his response then changed when, early the next day, he tracked the Claimant down by 'phone (see ET paragraph 5.6 to get a full sense of Mr Meeson's comments); his conduct of the conversation on 4 July 2009 was unpleasantly aggressive and made clear his hostility towards both the union and the Claimant's suggestion it should have any role in collective bargaining for the Respondent's pilots. The conversation ended with Mr Meeson saying (I replicate how the ET sets this out):

> **"I don't give a F***, I'm not talking to you any more about this. If you want to bring BALPA into this company I will fight it every way possible.**
>
> **You are a C*** a F****** C***."**

He then hung up on the Claimant.

5. As a result of that exchange, on 6 July 2009, the Claimant resigned his position as Crew Council Chairman and pilot representative.

6. Mr Meeson's vividly expressed antipathy towards BALPA in internal management emails is also recorded by the ET when it sets out the narrative thereafter. Further continuing this aspect of the history, in 2010 BALPA submitted an application to the Central Arbitration Committee ("CAC") for recognition. That was resisted but on 18 January 2010 the CAC issued a declaration of recognition. Upon the Respondent and BALPA being unable to reach agreement about the method for collective bargaining, on 19 May 2011, the CAC specified a method. Even then, all did not run smoothly as BALPA subsequently brought High Court proceedings claiming the Respondent had not complied with the method specified by the CAC. It appears that the Claimant's name appeared in the documents for the High Court proceedings and the legal disputes between the Respondent and BALPA continued in the High Court, and also in separate ET proceedings, into the spring of 2015.

7. Returning to the Claimant's personal narrative, on 7 January 2011, he gave notice he was leaving to take up an opportunity with another airline, Air Emirates. The Respondent expressed disappointment and thanked the Claimant for his loyalty, although it later raised some doubt about that, apparently due to a concern that he might have been encouraging others to join Emirates, a suggestion the Claimant rebuffed (see the ET at paragraph 5.33).

8. Moving into 2014, in early October, the Claimant applied to return to the Respondent as a pilot. He passed all stages in the selection exercise and was signed off by the Respondent's Fleet Manager and Head of Flight Crew Training, but his application stalled when it got to the Respondent's Director of Human Resources, Mr Chambers. The Respondent's internal emails (set out by the ET in its findings of facts, at paragraphs 5.39 and 5.40) record the exchange between senior management at the time. By email on 6 January 2015, the Flight Safety Manager informed the Respondent's Director Flight Operations (Mr Dobson):

> **"I've just heard a rumour that Nick Denby is in the process to be re-employed by us. Given the manner of his leaving, would it be entirely wise to take him back on? …"**

Mr Dobson responded:

> **"We have rejected his application for those very reasons. Thanks for highlighting the issue to us"**

9. On 8 January 2015, the Claimant was informed that he would not be offered a role with the Respondent, which he apparently accepted without demur. On or about 22 September 2015, he submitted a further application. That application was now supported by Mr Dobson and it was acknowledged that the Claimant would not need to be reassessed. Hearing nothing, however, the Claimant followed up his application with an email to Mr Dobson on 14 October 2015, seeking to know whether the Respondent would re-employ him. He also emailed Mr Meeson in similar vein on 19 October (see the ET at paragraphs 5.53 and 5.54). Mr Meeson's reaction is recorded in his email to Mr Dobson, the next day, as follows:

> **"Below a message from Nick Denby. I won't answer. He told me that he was a Shop Steward at his previous Company before us as well - so I don't know why this Leopard will change his spots.**
>
> **His allusion to the Church is simply I have said that Unions are a Hierarchy, like the Church their interest is in getting more numbers, therefore more income and promotion for the officers of the Union/Church."**

10. On 10 December 2015, the Claimant emailed the Respondent to say he had seen from the careers portal that his application had been unsuccessful and he asked why. He followed that up with a telephone call, in which he raised his concern that Mr Meeson had been involved in the decision to reject his application and referred back to the ways in which Mr Meeson had expressed his animus towards trade unions previously (although it is common ground that the Claimant was not a BALPA member as at December 2015). He also mentioned he was considering ET proceedings. That led the Respondent to ask that further communications be between the parties' lawyers. It was only in response to a communication from the Claimant's

solicitors in January 2016 (in which it was suggested his application had been rejected because of his trade union activities) that the Respondent's solicitors explained:

> **"Your client's application for a role within our client was unsuccessful, but not for the reason he asserts.**
>
> **Our client's recollection of your client is that he could be negative towards the business. When he left our client in 2011 for an opportunity to earn more money by flying in the Middle East he spoke openly about how superior his remuneration package was going to be, which was considered by our client to be inappropriate and insensitive to his colleagues and unhelpful to the Company's attempts to retain its valued pilots."**

The ET's Decision and Reasoning

11. Having set out its primary factual findings (summarised above), the ET first considered how it should approach trade union membership for the purposes of section 137(1) **TULRCA**. It took the view it was bound by the decision of the EAT in **Harrison v Kent County Council** [1995] ICR 434 (see below), but stated it would in any event have adopted a broad approach to the interpretation of "membership" for these purposes as that was consistent with the **Human Rights Act 1998** ("the HRA") and the **European Convention on Human Rights** ("the ECHR") (and see **Wilson and Ors v UK** [2002] IRLR 568 ECtHR - discussed further below).

12. Turning to the reason why the Claimant was refused employment in 2015, the ET first identified that the relevant decision taker had been Mr Meeson (see, in particular, ET paragraph 11). It found Mr Meeson to be an unreliable witness (see its reasoning at paragraphs 12 to 14), specifically, he had deliberately sought to disguise the truth in a disingenuous attempt to distract from his underlying animus towards BALPA. The ET accepted the Claimant's evidence as to his exchanges with Mr Meeson on 3 and 4 July 2009, holding that he had been both carrying out his role as Chairman of the FDCC and:

> **"15. … seeking as a trade union member to persuade Mr Meeson to agree to more BALPA involvement in the negotiation of the terms and conditions of the pilots. The Claimant was voicing his opinion that BALPA should be more involved in the negotiation process with the Respondent. … he was speaking on behalf of its members and seeking to persuade Mr Meeson to listen to what he had to say. He was clearly an advocate for the union and its policies including its desire to seek recognition by the Respondent for collective bargaining purposes."**

Similarly:

> **"28. … The Claimant had sought to persuade [Mr Meeson] to agree to more BALPA involvement in the negotiation of the Respondent's pilots' terms and conditions. In doing so, he clearly spoke as an advocate for the trade union and its policy of seeking some engagement with the Respondent for collective bargaining purposes. The Tribunal found that the Claimant's conduct constituted participation in BALPA's activities. In its judgment, it was impermissible to refuse him employment for that reason because it related to the Claimant's trade union membership."**

13. Allowing that Mr Meeson could be heated in his exchanges with employees in other contexts, the ET concluded:

> **"16. Mr Meeson's reaction on 4 July 2009 demonstrated that he did not welcome the Claimant's suggestion that the Respondent engage more with BALPA. On the contrary he was outraged by it. The Tribunal heard evidence that Mr Meeson had heated exchanges with two other employees that day. It also appeared that this was not unusual. After such exchanges with him people described how they had been "*Philiped*". In the Tribunal's judgment that did not detract from its finding of fact that on this occasion Mr Meeson was angry towards the Claimant because he had advocated for BALPA with a view to its achieving more involvement in the bargaining process. The Tribunal also found that Mr Meeson was so angry that he continued to feel animosity towards the Claimant. It found that Mr Meeson did not refuse to employ the Claimant because of the mere fact that he was a BALPA member. The reason for his decision was that he believed that the Claimant had taken an active role in promoting the pilots' ambition that they would be represented by BALPA for the purposes of collective bargaining and that the Respondent would recognise BALPA for such purposes. He did not want the Claimant [to] work for the Respondent because of that activity and, in particular, because of what the Claimant had said during the conversations on 3 and 4 July 2009."**

Thus the ET found Mr Meeson had a continuing animus towards the Claimant because he had advocated for BALPA with a view to its achieving more involvement in the bargaining process; he did not refuse to employ the Claimant because of the mere fact of that membership but because of his past advocacy, an activity that was related to his trade union membership.

14. In reaching that conclusion, the ET had regard to the Respondent's positive case that the Claimant had been rejected for other reasons, but expressly rejected that contention:

> **"17. In reaching that conclusion the Tribunal rejected the Respondent's case that the reason for its decision related to one or more of several other matters. These included the allegations that the Claimant had behaved badly towards other colleagues over rostering; he had left early after resigning his position in 2011; he had bragged about his new position with Emirates; he had sought to entice colleagues away from the Respondent; he had "*crashed*" a Stampe aircraft. The Tribunal rejected Mr Meeson's evidence that some (if not all) of these matters did lead him to make that decision. That evidence was unreliable and unconvincing. The Tribunal found that none of these featured in Mr Meeson's mind when he made his decision."**

The Appeal in Summary

15. By its first ground of appeal, the Respondent contends the ET erroneously adopted a broad interpretation to the definition of trade union member for the purposes of section 137(1)(a) of **TULRCA**, such as would embrace trade union *activities* rather than the binary question of *membership* and, in any event, relied on activities carried out by the Claimant acting in non-union capacity. Otherwise (grounds 2, 3 and 4), the Respondent contends the ET failed to have regard to relevant matters, alternatively provided inadequate reasons for concluding the reason for the Claimant's non-employment was his union membership (even as broadly defined). The Claimant resists the appeal, relying on the ET's reasoning in all respects.

What it is to be a Member of a Trade Union for the Purposes of Section 137 TULRCA - Legal Principles and the Parties' Submissions

The Statutory Provisions

16. Section 137 **TULRCA** relevantly provides as follows:

> ***"Access to employment***
>
> **137. *Refusal of employment on grounds related to union membership***
>
> **(1) It is unlawful to refuse a person employment -**
>
> **(a) because he is, or is not, a member of a trade union, or**
>
> **(b) because he is unwilling to accept a requirement -**
>
> **(i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union, or**
>
> **(ii) to make payments or suffer deductions in the event of his not being a member of a trade union.**
>
> **(2) A person who is thus unlawfully refused employment has a right of complaint to an employment tribunal.**
>
> **(3) Where an advertisement is published which indicates, or might reasonably be understood as indicating -**
>
> **(a) that employment to which the advertisement relates is open only to a person who is, or is not, a member of a trade union, or**
>
> **(b) that any such requirement as is mentioned in subsection (1)(b) will be imposed in relation to employment to which the advertisement relates,**

a person who does not satisfy that condition or, as the case may be, is unwilling to accept that requirement, and who seeks and is refused employment to which the advertisement relates, shall be conclusively presumed to have been refused employment for that reason.

(4) Where there is an arrangement or practice under which employment is offered only to persons put forward or approved by a trade union, and the trade union puts forward or approves only persons who are members of the union, a person who is not a member of the union and who is refused employment in pursuance of the arrangement or practice shall be taken to have been refused employment because he is not a member of the trade union.

(5) A person shall be taken to be refused employment if he seeks employment of any description with a person and that person -

(a) refuses or deliberately omits to entertain and process his application or enquiry, or

(b) causes him to withdraw or cease to pursue his application or enquiry, or

(c) refuses or deliberately omits to offer him employment of that description, or

(d) makes him an offer of such employment the terms of which are such as no reasonable employer who wished to fill the post would offer and which is not accepted, or

(e) makes him an offer of such employment but withdraws it or causes him not to accept it.

(6) Where a person is offered employment on terms which include a requirement that he is, or is not, a member of a trade union, or any such requirement as is mentioned in subsection (1)(b), and he does not accept the offer because he does not satisfy or, as the case may be, is unwilling to accept that requirement, he shall be treated as having been refused employment for that reason.

…"

17. Section 143 **TULRCA** clarifies what is meant by references to being or not being a trade union member for these purposes, but does not assist on the issue raised by this appeal.

18. The protection now provided by section 137(1)(a) was introduced by means of the **Employment Act 1990** ("the EA 1990"). Section 1 of the **EA 1990** removed the pre-action closed shop - protecting against a refusal of employment because of non-membership of a trade union - but also made it unlawful to refuse employment because of trade union membership. Prior to that, there was no statutory protection for an applicant for employment discriminated against on grounds of trade union membership; the only protection was against detriment or dismissal on grounds of union membership once employed, see now sections 146 and 152 **TULRCA**. The protections now found at sections 146 and 152 go further than section 137(1)(a), however, and expressly extend both to union *membership* and *activities* (at *an*

appropriate time) and (by amendment) to the *use of union services* (also at *an appropriate time*).

19. Additionally, the **Employment Relations Act 1999 (Blacklists) Regulations 2010** SI 2010/493 ("the 2010 Regulations") now provide a remedy for applicants refused employment because they are on a prohibited blacklist of trade union members or activists (see regulation 5).

The Case-Law

20. Adopting a narrow approach to *membership* under section 137(1)(a) might suggest it is the mere fact of membership of a trade union (simply carrying the card) that is required. In **Discount Tobacco & Confectionery Ltd v Armitage *(Note)*** [1995] ICR 431 EAT, however, trade union membership (albeit, in a dismissal claim under the predecessor provision to section 152(1) **TULRCA**) was construed more widely, to include use of the union's services (see per Knox J at page 433B-E):

> **"The evidence … in relation to union membership … was that the employee made use of her union membership by getting … [her union official] to help in elucidating and attempting to negotiate the terms of her employment. … [T]he question for this tribunal is whether on that evidence of union involvement, to use a neutral expression, it was possible for the [employment] tribunal to reach the conclusion that her dismissal was for membership of the union. [Counsel for the employer] drew a distinction between membership of the union, on the one hand, and resorting to the services of a union officer to elucidate and negotiate the terms of employment, on the other, … he accepted that there was evidence of the latter but said that it did not or could not amount to evidence of the former, membership of the union.**
>
> **We find ourselves unconvinced of that distinction. In our judgment, the activities of a trade union officer in negotiating and elucidating terms of employment is, to use a prayer book expression, the outward and visible manifestation of trade union membership. It is an incident of union membership which is, if not the primary one, at any rate, a very important one and we see no genuine distinction between membership of a union on the one hand and making use of the essential services of a union, on the other.**
>
> **Were it not so, the scope of [the protection] would be reduced almost to vanishing point, since it would only be just the fact that a person was a member of a union, without regard to the consequences of that membership, that would be the subject matter of that statutory provision and, it seems to us, that to construe that paragraph so narrowly would really be to emasculate the provision altogether."**

21. The approach taken in **Armitage** was subsequently approved by the Court of Appeal as "unquestionably correct", in the joined cases of **Wilson v Associated Newspapers Ltd and**

Palmer v Associated British Ports [1994] ICR 97 CA, both involving detriment claims (the detriment being the denial of an inducement to forgo collectively agreed terms and conditions) brought under the predecessor provision to section 146 **TULRCA**.

22. Similarly, when this issue came to be considered in relation to section 137(1)(a) itself - in **Harrison v Kent CC** [1995] ICR 434 EAT - the narrower reading of membership the ET had adopted in that case was decried, see per Mummery J (as he then was) at page 443A-G:

> **"(2) The [employment] tribunal's construction of section 137(1) of the Act of 1992 takes a narrower view of the conceptual limits of membership of a trade union than is expressed by the ordinary and natural meaning of the language of the section. The fallacy in the tribunal's approach is to proceed, by analogy with section 146(1) and section 152(1), to draw a rigid distinction between, on the one hand, membership of a trade union and, on the other hand, taking part in the activities of a union. Although membership and activities are specified in separate paragraphs of section 146(1) and section 152(1), it does not follow that they are self-contained, mutually exclusive categories or concepts. Trade union membership and trade union activities overlap. In this context a divorce of the *fact* of membership and the *incidents* of membership is illusory. We agree with the comment of Dillon LJ in *Associated British Ports v Palmer* [1994] ICR 97, 101, that membership of a union means more than the bare fact that a person's name has been entered in the register of members and that he holds a union membership card. Participation in the activities of a union is one of the ways in which membership of a union is manifested and the rights incident to it are realised. In our view, if a person is refused employment because he was or is a trade union activist or for a reason related to his union activities it is open to the [employment] tribunal, under the provisions of section 137(1)(a), to conclude that he is refused employment because he is a member of the union. It will be a question of fact in each case for the tribunal to determine the reason for refusal to employ a person and whether that reason was impermissible because it related to union membership. We say nothing to deter the tribunal of fact, in an appropriate case, from being "robust in its findings".**
>
> **(3) The construction adopted by the [employment] tribunal would have a consequence inconsistent with promoting the purpose of the provision. The purpose of section 137(1)(a) of the Act of 1992 is to protect a person from being discriminated against in access to employment on grounds related to union membership. In reality, the persons most likely to be discriminated against are those who have been most active in membership. On the distinction drawn by the [employment] tribunal between trade union membership and trade union activities, the more active the member, the weaker the protection. It is a construction which, in the words of Knox J in *Discount Tobacco & Confectionery Ltd v Armitage (Note)* [1995] ICR 431, 433F, would "emasculate the provision altogether". We favour a purposive construction and a pragmatic approach."**

23. The EAT in **Harrison** thus specifically rejected the argument that, given sections 146 and 152 referred to both membership *and* activities, the fact that section 137(1)(a) only referred to trade union membership meant it was impermissible to have regard to past trade union activities. It further concluded that, as the construction of section 137(1)(a) was free from

ambiguity or obscurity, it was not permissible to refer to Parliamentary materials as an aid to interpretation (see page 443G-H).

24. Before passing to the next stage in the jurisprudence, I note that Mr Harrison had been applying for employment with an employer that was not antipathetic to trade unions: over one-third of its employees were trade union members and it had a recognition agreement with the trade union to which Mr Harrison belonged (UNISON); the ET had found it was the manifestation of Mr Harrison's anti-managerial and confrontational attitude, within and without his trade union activities, that was the reason he was refused employment.

25. Whilst it is common ground that **Harrison** is the last authority on the question of "membership" under section 137(1)(a), the **Wilson and Palmer** cases proceeded further, first to the House of Lords, where the decision of the Court of Appeal (in favour of the Claimants) was reversed, see [1995] ICR 406 HL. The strict *ratio* of the House of Lords decision in **Wilson and Palmer** does not impact upon the present case but the Respondent places reliance upon the *obiter* view expressed by the majority (Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Lloyd of Berwick) to the effect that **Armitage** established no general principle that membership necessarily includes activities, see per Lord Bridge of Harwich at page 418B-F:

> **"I do not question the correctness of the Employment Appeal Tribunal's decision in the *Armitage* case. Once the [employment] tribunal had rejected the employers' evidence as to their reason for Mrs Armitage's dismissal, it was an obvious inference that she had been dismissed because the employers resented the fact that she had invited the union to intervene on her behalf. In this narrow context the reasoning of Knox J may have been a legitimate means of refuting a particular argument advanced by the employers' representative. But if the passage cited is held to establish as a general proposition of law that, in the context of section 23(1)(a) and section 58(1)(a) of the Act of 1978, membership of a union is to be equated with using the "essential" services of that union, at best it puts an unnecessary and imprecise gloss on the statutory language, at worst it is liable to distort the meaning of these provisions which protect union membership as such.**
>
> **A union which has a collective bargaining agreement with employers is in a position to offer its members the service of negotiating their terms and conditions of employment. A union which has no such agreement with employers is unable to offer its members that service, but is able to offer them other important and valuable services. Thus, it cannot be said that the service of collective bargaining is an essential union service or that membership of a union unable to offer that service is valueless or insignificant. Accordingly, it seems to me that the reasoning of**

> **Knox J in the *Armitage* case could not properly be applied to the circumstances of the two cases with which we are concerned. …"**

And per Lord Lloyd of Berwick at pages 424G-425B:

> **"… the Court of Appeal was much influenced by the observations of Knox J in *Discount Tobacco & Confectionery Ltd v Armitage (Note)*, … a decision which the court regarded as unquestionably correct. It may well have been correct on its facts. Having rejected the evidence given by Mrs Armitage's employers, the tribunal was entitled to infer that the real reason for her dismissal was that she was a member of the union and made use of the union's services to press her complaint. But, like Lord Bridge of Harwich, I cannot regard the case as authority for the broad proposition that membership of the union and making use of the union's services are in some way to be equated. In my view, section 23(1)(a) was intended to protect trade union membership as such, that is to say, the right to associate as members of an independent trade union, just as section 23(1)(b) was intended to protect those taking part in trade union activities at an appropriate time. I can see no justification for reading in the words "or making use of the essential services of the union" in section 23(1)(a) and still less justification for regarding trade union membership and the use of trade union services as the same thing. They do not mean the same thing in section 23(1)(c). So why should they mean the same thing in section 23(1)(a)? I do not accept Knox J's view, post, p. 433E, that this would reduce section 23(1)(a) to vanishing point. Unions may flourish even though they are not recognised for collective bargaining. In so far as the industrial tribunal relied on the broad statement in the *Armitage* case in reaching their "robust" conclusion in paragraph 62 (see per Dillon LJ [1994] ICR 97, 110), they erred in law."**

26. Lord Browne-Wilkinson did not share this view on the membership issue but preferred to say no more on the point as it was unnecessary for the determination of the appeals. Lord Slynn of Hadley, however, provided the following, *obiter*, observations, see page 422D-F:

> **"Like Dillon LJ in the Court of Appeal … I do not consider that action "preventing or deterring" someone from being a member of a trade union or penalising him for doing so is limited to action taken in respect of his status as a member - the fact that he has or wants to have a union membership card. It may include action to prevent or deter him from, or action penalising him for, exercising his rights as a member of a trade union. The exercise of such rights is not necessarily included in the phrase "taking part in the activities" of a trade union, words more apt to cover such activities as attending union meetings or acting as an official of the union."**

27. The point was re-visited by the EAT (HHJ Peter Clark presiding) in **Speciality Care plc v Pachela** [1996] ICR 633 (a case brought under section 152(1) **TULRCA**), offering guidance as to how the apparent divergence in views might be reconciled, see pages 642H-643E:

> **"(1) *Discount Tobacco & Confectionery Ltd v Armitage (Note)* … was and remains unquestionably correct on its facts. That was the unanimous judgment of the Court of Appeal, expressed by Dillon LJ in *Associated British Ports v Palmer* …, on an issue material to its decision in the appeal before the court. The observations of their Lordships on appeal … from that decision were obiter. Nevertheless, Lord Bridge, with whose speech Lord Keith entirely agreed, did not question the correctness of the decision on its facts. Lord Browne-Wilkinson declined to express a view on this issue. Nevertheless, his comment that he would not share the view expressed by Lord Bridge places him closer to Lord Slynn who plainly approved the approach of Dillon LJ in the Court of Appeal. Finally, Lord Lloyd thought that**

Knox J had gone too far in *Armitage*, but allowed that the decision in that case may have been correct on its facts. In summary, *Armitage* remains undisturbed on its facts in our judgment.

(2) That means in practice that where a complaint of dismissal by reason of union membership is made, as in this case, it will be for the tribunal to find as a fact whether or not the reason or principal reason for dismissal related to the applicant's trade union membership not only by reference to whether he or she had simply joined a union, but also by reference to whether the introduction of union representation into the employment relationship had led the employer to dismiss the employee. Tribunals should answer that question robustly, based on their findings as to what really caused the dismissal in the mind of the employer.

(3) In so holding, we have deliberately refrained from making any wider observations as to the correct approach in cases where the facts are more akin to those in *Associated British Ports v Palmer* and *Associated Newspapers Ltd v Wilson* … To do otherwise may give rise to the dangers of expressing views beyond those necessary for deciding this appeal."

28. Subsequently, the **Wilson and Palmer** claims reached the European Court of Human Rights, see **Wilson and Ors v United Kingdom** [2002] IRLR 568. The employees and their respective trade unions complained that UK law failed to secure their rights under article 11 **ECHR**, which provides:

"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. …"

29. The European Court of Human Rights agreed, (relevantly) ruling that:

"44. … the Court has consistently held that although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members' interests, it is not indispensable for the effective enjoyment of trade union freedom. Compulsory collective bargaining would impose on employers an obligation to conduct negotiations with trade unions. The Court has not yet been prepared to hold that the freedom of a trade union to make its voice heard extends to imposing on an employer an obligation to recognise a trade union. The union and its members must however be free, in one way or another, to seek to persuade the employer to listen to what it has to say on behalf of its members. In view of the sensitive character of the social and political issues involved in achieving a proper balance between the competing interests and the wide degree of divergence between the domestic systems in this field, the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured …

…

46. … the essence of a voluntary system of collective bargaining is that it must be possible for a trade union which is not recognised by an employer to take steps including, if necessary, organising industrial action, with a view to persuading the employer to enter into collective bargaining with it on those issues which the union believes are important for its members' interests. Furthermore, it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade

> **union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers."**

30. As to where the case-law thus leaves the interpretation of membership for the purposes of section 137(1)(a), in **Miller v Interserve Industrial Services Ltd** [2013] ICR 445, the EAT (Underhill J, as he then was, presiding) referred to commentary on this issue in an endnote but did not otherwise address the point as the appeal had been argued under the **2010 Regulations**.

Parliamentary Materials

31. In arguing its appeal, the Respondent has referred to various Parliamentary materials as an aid to construction. The rule in **Pepper v Hart** [1993] AC 593 makes clear that reference to such material is only to be permitted in limited circumstances, as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity and where doing so clearly discloses the mischief aimed at, or legislative intention lying behind, the ambiguous or obscure words. In **Gow (FC) v Grant** [2012] UKSC 29, it was acknowledged (see paragraph 29) that reference to Parliamentary material has become more commonplace, with some relaxation of the rules. That said, the Supreme Court made clear:

> **"29. … It remains the case that this approach should be used only where the legislation is ambiguous, and then only with circumspection … [and when] used … the purpose of the exercise is to determine the intention of the legislator. …"**

With this in mind, I set out some of the Parliamentary material relied on in the present appeal.

32. In the lead up to the enactment of the **EA 1990** (section 1 of which was the original legislative basis for section 137 **TULRCA**), amendments were proposed to include protection for "trade union activities" or "normal trade union activities". All were defeated.

32.1. Speaking in opposition to such a proposed amendment at the Commons committee stage, Patrick Nicholls MP (then Parliamentary Under-Secretary for Employment) said:

> **"The central issue of the clause, and the amendment, is status. … referring to activities … goes unnecessarily beyond that. … Being a trade unionist is not only a matter of having a membership card; it implies a certain style and certain activities … It would be wrong for an employer to be able to say, "Because you are a trade unionist, I shall not employ you." That underpins the clause and must be right. …"**
>
> **(Standing Committee D, 1989-90, Parliamentary Debates, vol 2, col. 27)**

32.2. In the Commons debate on the proposed amendment, the Under-Secretary further stated:

> **"[It was said that] … in Committee we had presented the case on the basis that activities and membership were one and the same thing, but I would not put that construction on it. We made the point that we were dealing essentially with the status of a person, be he a member of a trade union or not, rather than with his activities.**
>
> **It is equally clear that the mere fact of membership carried with it certain incidental activities which are implicit. That much was decided by the court … in *Discount Tobacco and Confectionary Limited v Armitage.* If one reads that case … it is clear that, although there may be the normal incidence of trade union activity, the organisation of industrial action would not form part of it. …"**
>
> **(Hansard, HC Deb 17 May 1990, vol 172, col 1091)**

32.3. At the House of Lords' committee stage, the proposed amendment used the words "normal trade union activities". Speaking in opposition, Lord Strathclyde (Parliamentary Under-Secretary of State, Department of Employment) said:

> **"We need to be clear that Clause 1 deals with the problem where the possibility of getting a job depends upon the status as a member or non-member of a trade union of the individual who is applying for it.**
>
> **It is quite another thing to deal with the particular activities of an individual, whether inside or outside a trade union. The Government do not accept that is a valid comparison. We are not concerned about the activities of individuals and Clause 1 is not about the trade union organisation and representation in the employer's workplace …**
>
> **… in the Government's view, the Bill as drafted will protect a job applicant who has engaged in activities that are no more than an ordinary and basic part of being a member of a trade union. … The fact is that, whatever the circumstances, anyone who thinks he has been refused employment because he is a member of a trade union will be able to complain to a tribunal, and it will be for the tribunal to decide on the details of the particular case.**

> **If an employer were to say that his reason for refusing an applicant was, for example, because the individual had in the past attended and spoken at union meetings or that he had sought the help of his shop steward in taking up grievances with a previous employer, there is no reason to believe that a tribunal would for a moment accept the attempted distinction between those activities and membership.**
>
> **…**
>
> **If the … purpose [of the amendment] is to protect the ordinary and basic incidents of being a union member, the amendment is unnecessary, because the mere fact of membership carries with it a number of incidental activities which are implicit in that. …"**

The Parties' Submissions on Membership

The Respondent's Case

33. The Respondent contends the ET erred in law in failing to apply a binary test of trade union membership or non-membership, as favoured (*obiter*) by a majority of the House of Lords in **Wilson and Palmer**; alternatively, and in any event, the ET attributed too wide an interpretation to the trade union activities covered by section 137(1)(a).

34. The Respondent's primary position is that *membership* for the purposes of section 137(1)(a) **TULRCA** should be approached narrowly: it is a binary provision, reflecting the legislative background (the ending of the pre-entry closed shop; the protection afforded to trade union members mirroring that afforded to non-members). That was consistent with the plain meaning rule of statutory construction: the provision was grammatically capable of one meaning only, which conformed to that intended by Parliament (see section 195 *Bennion on Statutory Interpretation* (6th Edition; 2013); on its face, there was nothing in section 137(1)(a) to suggest it applied to trade union activities (similarly, see subsections 137(1)(b), 137(3), 137(4) and 137(5)). This approach was reinforced by the fact that sections 146 and 152 **TULRCA** expressly dealt with both trade union membership *and* activities - and the *obiter* view of the majority of the House of Lords in **Wilson and Palmer** should be preferred to **Harrison** on this point (**Harrison** was determined shortly after the Court of Appeal's ruling in

Wilson and Palmer and could no longer be viewed as correct). **Armitage** was correctly decided on its facts but did not support any wider interpretation (and the observations of the EAT in **Pachela** should not be taken to go further than this). As for the ruling of the European Court of Human Rights in **Wilson and Palmer**, that was concerned with a trade union's right to be heard for the purposes of article 11 **ECHR** and did not extend to the present case. Further, it did not assist to point out (as the Claimant did) that section 137 had been enacted separately (so nothing should be taken from its failure to mirror the structure of sections 146 or 152): Parliament had had the opportunity to replicate those provisions by amendment (it introduced sections 145A to 145F - addressing the issue of inducements - as a direct result of the decision of the European Court of Human Rights in **Wilson and Palmer**) but had chosen not to do so. On the other hand, Parliament had introduced a new protection against dismissal for using trade union services at an appropriate time (see sections 146(ba) and 152(ba) **TULRCA**, an amendment introduced by the **Employment Relations Act 2004**), suggesting the EAT in **Armitage** had been wrong to say membership includes making use of services (and see *Harvey on Industrial Relations and Employment Law* at [N1-828]).

35. In the alternative, even if the binary approach was incorrect and section 137(1)(a) should be interpreted more broadly, the activities covered could only be those inseparable from membership; to conclude otherwise would be contrary to the wording of section 137, which - however *membership* was to be understood - did not extend protection to trade union *activities*. Although the EAT in **Harrison** had spoken of an overlap between trade union membership and activities, it still recognised these were distinct concepts. Similarly, in **Armitage**, membership was seen as extending to use of the essential services of the union, which necessarily implied there were other union-related activities, insufficiently incidental to membership, not included. This constraint on the broader approach to section 137(1)(a) was supported by reference to

A sections 146 and 152, which distinguished between trade union *membership, activities* and *services* (there being a presumption that Parliament does nothing in vain, each word should be given significance, see section 355, *Bennion*). Moreover, both sections 146 and 152 only extended protection to trade union activities carried out *at an appropriate time* and a broader interpretation of section 137(1)(a) would allow a wider protection, with no limitation on the activities covered. If there were any ambiguity on this point such that it was appropriate to have regard to Parliamentary debates, the record supported the view that the intention had been for a binary approach to the protection, as tempered (narrowly) by **Armitage**.

36. In the present case, the Claimant's activity found to fall within the term *membership* was his attempt (on 3 July 2009) to persuade Mr Meeson to agree to more BALPA involvement in pilots' terms and conditions (see ET paragraphs 15 and 28). The ET did not focus on the Claimant's status as a member of BALPA: when his application for employment was refused, he was not a BALPA member and in 2009 he had (as Chairman of the FDCC, a non-union organisation) been speaking for pilots regardless whether they were BALPA members or not. In any event, this was not akin to **Harrison**; the activity "*related to*" trade union membership was the Claimant's seeking to persuade Mr Meeson to agree to more BALPA involvement, but a union's role in collective bargaining was not a necessary part of a union's own activity, still less an inseparable part of membership (per Lord Lloyd in **Wilson and Palmer** at page 425).

The Claimant's Case

37. The Claimant rejects the contention that the ET erred in its approach to section 137(1)(a): **Harrison** was the only authority directly on point and was binding on the ET; following the EAT's analysis in **Pachela**, the broader purposive interpretation of membership remained applicable, notwithstanding the *obiter* comments made in **Wilson and Palmer** in the

House of Lords; in any event, by virtue of section 3 **HRA**, the scope of section 137(1)(a) had now to be interpreted compatibly with article 11 **ECHR**, as to which, see **Wilson and Palmer** before the European Court of Human Rights. There was no ambiguity in section 137(1)(a): trade union membership does not obviously and necessarily exclude trade union activities; there was no reason to understand membership as limited to carrying a card. If, however, it was considered appropriate to look at Parliamentary materials, it was apparent that the narrower approach did not reflect the legislative intent: the Secretary of State having confirmed that membership covers certain activities incidental to it (and can include past membership and activities). This approach was, moreover, consistent with the overall development of statutory employment protection for individuals in connection with trade union membership or involvement; to adopt an overly narrow approach would leave a lacuna in the legislation in respect of applicants refused employment because they have taken part in trade union activities (sections 146 and 152 only applied to existing employees and the **2010 Regulations** only protected those on a prohibited blacklist). It was no answer to say Parliament must have intended a different approach as between section 137(1)(a) and sections 146(1) and 152(1); these provisions were implemented piecemeal and in response to case-law developments. Section 137(1)(a) was intended to provide even-handed protection for those who were not trade union members (ending the pre-entry closed shop) and for those who were; the latter protection would be lost if employers could lawfully refuse to employ someone because of their past trade union activities. And while sections 146 and 152 protected activities *at an appropriate time*, that was necessary because the employee was in employment; it made no sense to speak of "an appropriate time" in respect of those who were applicants for employment.

38. As for the application of section 137(1)(a) in this case, the ET's approach did not lose sight of the Claimant's membership of BALPA (that he was also Chairman of the FDCC did

not detract from the fact he was acting as a member of BALPA). It followed from the analysis of the EAT in **Harrison** that the applicant did not need to be a union member when applying for employment but did have to have been a member when engaged in the trade union activities. This still left it open to an employer to reject an applicant for their past disruptive conduct of union activities, that would not be engagement in activities incidental to union membership (the approach in **Harrison** excluding certain activities). On the facts as found by the ET, however, the activities on which its decision was based would meet the broader approach (the overlap test) allowed by the Respondent's alternative argument. In truth, the Respondent was making a perversity challenge in seeking to suggest otherwise.

Reason for Non-Employment and the Adequacy of the ET's Reasons

The Relevant Legal Principles

39. It is common ground that, in determining the reason for the refusal to employ the Claimant in 2015, the ET had to look into the mind of the relevant decision taker (Mr Meeson) and find what it was that caused him to act as he did (see **Miller v Interserve Industrial Services Ltd** [2013] ICR 445 EAT at paragraph 14). Whilst it was open to the ET to reject any alternative explanation put forward by the Respondent, it was not then bound to find the reason was that which is prohibited by section 137(1)(a) (see, by analogy, **Kuzel v Roche Products Ltd** [2008] IRLR 530 CA, at paragraph 60, a claim of automatic unfair dismissal for making a protected disclosure); that remained for the Claimant to prove.

40. In explaining its conclusion as to the reason for the Claimant's non-appointment, it is further agreed between the parties that the ET was required to set out its findings of fact, identify the relevant law and state how it had applied the law to those findings in order to decide the issues (Rule 62(5) Schedule 1 **Employment Tribunals (Constitution and Rules of**

Procedure) Regulations 2013 ("ET Rules")), providing sufficient explanation to enable the parties to understand why they had won or lost (**Meek v City of Birmingham District Council** [1987] IRLR 250 CA per Bingham LJ at page 251). In assessing the adequacy of an ET's reasoning, it is not for the EAT to adopt an overzealous approach and to dissect the decision with a fine toothcomb (**ASLEF v Brady** [2006] IRLR 576 EAT, per Elias J (as he then was) at paragraph 55) but if an ET fails to enter into a reasoned adjudication on a party's case that can give rise to an error of law such as to render the decision unsafe (**Serco Ltd v Dahou** [2017] IRLR 81 CA per Laws LJ at paragraph 36).

The Parties' Submissions on Reason and the Adequacy of the ET's Reasons

The Respondent's Case

41. By its grounds of appeal under this head, the Respondent contends the ET erroneously assumed its rejection of the Respondent's case on reason (see ET paragraph 17) must mean that the Claimant's case as to the prohibited reason was established, notwithstanding that the burden of proof remained on him throughout. That was an error of law: it was necessary to look at the detailed facts and materials to determine what the real reason had been (see **Kuzel** and **Serco v Dahou**) and the ET had failed in that task. It had recorded its primary findings of fact at paragraph 5 (largely recitations from the evidence) but its conclusions largely failed to explain its reasoning by reference to those earlier findings, focusing on its view of the credibility of Mr Meeson. More specifically, the ET failed to assess the parties' differing interpretations of the documentary evidence (or the inferences arising therefrom) and, save for Mr Meeson, had not assessed the credibility of the witness evidence. In particular, the ET had not engaged with the Respondent's case that the Claimant's evidence was prejudicial and not credible; it failed to address a conflict in his evidence as to what was said on 4 July 2009 (in his ET1, the Claimant alleged Mr Meeson said he would "*personally fight the Claimant*" but in his contemporaneous

note he recorded Mr Meeson saying he would "*fight recognition*") and had not engaged with the Claimant's evidence in cross-examination that his relations with Mr Meeson were subsequently "more upbeat". And the ET's conclusion as to why the Claimant was rejected in 2015 was dependent upon its finding that Mr Meeson's evidence was "*unreliable and unconvincing*" (paragraph 17) but it made no such finding in respect of the Respondent's other witnesses and had not addressed the argument that the reasons behind the 2014 rejection likely played a part in the conclusion reached in 2015. Moreover, the ET wrongly concluded (see paragraphs 16 and 17) that, because it did not believe Mr Meeson's evidence, it should accept the Claimant's case as to the reason for his non-appointment. That was, however, neither logical nor sufficient: it was necessary for the ET to find as a fact the reasons argued for by the Claimant by another route (see **Kuzel**).

The Claimant's Case

42. The ET had been entitled to find the decision not to employ the Claimant had been Mr Meeson's alone (he had made his view clear to Mr Dobson, who confirmed that, had Mr Meeson not objected, the Claimant would probably have been employed) and its decision on reason was compliant with Rule 62(5) **ET Rules** and **Meek**; this was not a case that required the level of detailed reasoning on the evidence as **Serco v Dahou**. The ET may not have addressed every evidential issue raised during the hearing (including points raised by the Claimant) but it had answered the key question (paragraph 28) and explained why it rejected the Respondent's case (see ET paragraphs 12 to 15); indeed, it had gone further and found that the Respondent had engaged in a deliberate tactic designed to disguise the truth (paragraphs 15 to 17). The ET had, moreover, not jumped to its conclusion on reason having made its finding regarding Mr Meeson's credibility; it had gone on to explain how its findings as to what had been said on 4 July 2009 (on which it had expressly accepted the Claimant's contemporaneous

note, see paragraph 15) informed its conclusion as to what had been in Mr Meeson's mind when Mr Dobson later asked if he would be prepared to re-employ the Claimant (paragraph 16).

Discussion and Conclusions

(1) Conclusions on Membership

A narrow approach to membership?

43. I do not accept that trade union membership for the purposes of section 137(1)(a) **TULRCA** is limited to the mere fact of membership as opposed to non-membership (the Respondent's "binary" construction of the protection). In this regard, I respectfully adopt the reasoning of the EAT (Mummery J presiding) in **Harrison**; not just because I consider it appropriate to follow the last decision at EAT level on this issue (although I do) but because I am satisfied that is how *membership* in section 137(1)(a) is to be read.

44. Section 137(1)(a) is concerned with the *status* - union member or non-member - of the particular applicant for employment; it is not the employer's general attitude towards trade union membership that is in issue (however evidentially relevant) but the decision to refuse employment to the particular applicant because of their membership status. It is quite possible an employer might object to union membership on the part of an applicant for one post but not another. It is equally plausible that the objection will be to the outward manifestation of membership by a particular applicant - to the way in which their membership is expressed - in contrast to the absence of any manifestation of membership by another. Indeed, it is hard to see how the objection would arise other than in response to the outward manifestation of union membership; after all - absent the operation of a blacklist (when the **2010 Regulations** would apply) - the employer is otherwise unlikely to know of an applicant's trade union status. To construe membership narrowly, such that an ET was unable to conclude that an objection to the

manner of membership - the outward manifestation of that which is incidental to membership - falls within section 137(1)(a), would be counter to the purpose of the protection; it would be left without substance.

45. That purposive construction is strengthened when regard is had to other provisions within section 137. Subsections 137(3), (4) and (6) provide that an applicant's trade union membership (or non-membership) will be presumed to be the reason for refusal in certain instances. There is an obvious need for such deeming provisions because of the difficulty that might otherwise arise in establishing the prospective employer's reason for refusing employment to a particular applicant. Even then, the protection afforded by section 137(3) extends to that which *indicates, or might reasonably be understood as indicating*, such that an employer's animus to that which is incidental to union membership might be included. Having regard to the section as a whole, I thus see no reason to construe the more general protection afforded by section 137(1)(a) in such a way as to restrict that to which an ET might have regard as evidencing the real reason for the refusal.

46. In reaching this view, I reject the suggestion that there is a clear divide between trade union membership and activities. The separate protection provided in sections 146 and 152 **TULRCA** does not mean there is no overlap between these concepts: as recognised in **Armitage**, certain union activities are "*the outward and visible manifestation of trade union membership*" such that to participate in those activities is an assertion of that membership. An ET is thus entitled to find an employer's objection to an applicant's participation in activities incidental to their trade union membership *is* an objection to their status as a trade union member. It is, further, no objection to this approach to complain it offers a broader protection to *activities* to that provided by sections 146 and 152 (limited to those activities carried out *at*

an appropriate time); as the Claimant observes, there is no need for a similar restriction in the case of an applicant for employment as opposed to an existing employee; a distinction that explains why section 137 is structured differently to the other protections in Part III of **TULRCA** and has not been subject to the same amendments.

47. It is right, as the Respondent seeks to emphasise, that a distinction between union *membership* and *activities* (or *using the essential services* of the union) was drawn in the *obiter* observations of the majority of their Lordships in **Wilson and Palmer** in the House of Lords. Those observations were made in the context of a claim under the predecessor provision to section 142 **TULRCA** (so, expressly making separate provision for participation in union activities), but still allowed that an inference might be drawn that an objection to engagement in union activities (or use of union services) was really an objection to membership (accepting that **Armitage** might have been correctly decided on its facts). The present case is concerned with a different statutory protection, which has no separate provision for union activities. Moreover, by virtue of section 3 **HRA**, I am now obliged, so far as it is possible to do so, to read and give effect to primary legislation in a way that is compatible with rights under the **ECHR** and it is clear (as a result of the judgment of the European Court of Human Rights in **Wilson and Palmer**) that the right to freedom of association (article 11 **ECHR**) must allow employees the ability to instruct or permit their union to make representations to an employer, or take action in support of their interests on their behalf. Whilst Contracting States enjoy a wide margin of appreciation as to how this freedom is to be secured, it cannot be right to adopt a narrow construction of section 137(1)(a) if this would lead to a gap in the protection of an employee's article 11 right to join a trade union for the protection of their interests.

48. Where an applicant who has been refused employment cannot point to their inclusion on a blacklist (so, cannot bring their complaint under the **2010 Regulations**), it is very likely that the employer's objection to their union activities - the outward manifestation of their union membership (past or present) - will be the best evidence that the refusal was in fact due to their union membership. More specifically, it may evidence the employer's objection to the union membership of that particular applicant, in contrast, perhaps, to the lack of objection to union membership (not similarly made manifest) on the part of others who have been offered employment. To avoid allowing a lacuna in the protection, section 137(1)(a) must be construed in such a way as to allow that these circumstances might be found to amount to a breach.

49. For completeness, I make clear I have reached this view without regard to any Parliamentary materials; I, like the EAT in **Harrison**, consider section 137(1)(a) is sufficiently free from ambiguity to render it inappropriate to do so. Had I been persuaded, however, that the meaning of section 137(1)(a) was ambiguous or obscure, the Parliamentary materials to which I have been referred would only have supported my reading of the section and, indeed, would have provided further explanation (if needed) as to why Parliament has seen fit not to amend the protection, given it has been interpreted in a way consistent with the intention behind its enactment.

The Present Case

50. Adopting that broader, purposive approach, I turn to the ET's decision on the facts of the present case. The finding as to Mr Meeson's (and thus the Respondent's) reason for refusing the Claimant employment is clear (see paragraph 28, which references back to paragraphs 15 and 16): it was not the mere fact of his BALPA membership but because he had taken part in the activities of that union in actively advocating and promoting its role as

representing the interests of the pilots in collectively bargaining for them. That the Claimant was also speaking as a pilot himself and as Chairman of the FDCC does not undermine the ET's entirely permissible finding that this was participation in the activities of a trade union; the ET correctly focussed on that which was in Mr Meeson's mind: he had continued to feel animosity towards the Claimant because of his past attempt to obtain union representation in the workplace, something the Claimant had done not simply as a pilot and Chairman of the FDCC but as a BALPA member. It is nothing to the point that the Claimant was not in fact a BALPA member when he applied to be re-employed by the Respondent in 2015: the refusal related to his activities at a time when he was a member and the ET was entitled to find that sufficient for section 137(1)(a) purposes.

51. The Respondent submits, however, that, even on a broad construction of section 137(1)(a), such activity would not be incidental to trade union membership so as to amount to its outward manifestation. I accept that each case will be fact specific. It is unhelpful to seek to define precisely which activities are to be treated as incidents of trade union membership for these purposes; this will be a matter for the ET's judgment in any particular case. That said, it is hard to think of anything more fundamental to trade union membership than seeking to be represented by that union in the workplace. The very definition of a trade union provides that its principal purposes will include *the regulation of relations between workers and employers* (section 1 **TULRCA**). In some cases, an ET might not find an objection to a request for trade union representation evidenced an objection to trade union membership, but in other instances that will be a permissible conclusion (and see the guidance in **Pachela**). In the present case, the ET found that the reason operating on Mr Meeson's mind - the Claimant's participation in BALPA's activities - did indeed relate to his trade union membership (see paragraph 28). Given the nature of those activities, this was a permissible finding under section 137(1)(a).

A

(2) Conclusions on Reason and the Adequacy of the ET's Reasons

52. The burden of establishing that a refusal of employment was because of trade union membership contrary to section 137(1)(a) must fall upon the complainant: although the employer will be best placed to explain the reason for the non-appointment, this is not a case where the burden of showing the reason is placed on the Respondent (in contrast, e.g., with section 98 **Employment Rights Act 1996**) and there is no provision for a shifting burden of proof (e.g. in contrast with section 136 **Equality Act 2010**). That said, the ET's focus will inevitably be upon the mental processes of the relevant decision taker within the Respondent: what caused them to act as they did (**Miller**)? And, if a Respondent to a claim under section 137(1)(a) puts a positive case as to reason, an ET will need to address that case for its decision to be **Meek** (and Rule 62 **ET Rules**) compliant.

53. Here, the ET rejected various iterations of the Respondent's positive case on reason, specifically, that Mr Meeson could not recall aspects of the litigation with BALPA (paragraph 12) or that there were other reasons in his mind that had led him to make his decision (paragraph 17). These were permissible findings on the evidence before the ET and its conclusions adequately explained. More than that, the ET found that Mr Meeson was evasive in his answers as a deliberate tactic designed to disguise the truth (paragraphs 12 and 14).

54. Having thus concluded that Mr Meeson's evidence could not be taken at face value, it is apparent that the ET went on to consider whether the Claimant's case was made out. It accepted the Claimant's evidence as to what was said in his exchanges with Mr Meeson on 3 and 4 July 2009. The Respondent complains that the ET did not expressly address an apparent inconsistency between the Claimant's contemporaneous record of what Mr Meeson had said on 4 July 2009 and his re-telling of this event in his ET1 but I am unable to see it was obliged to do

so, or that this point of detail could materially impact upon the conclusion reached. The evidential points raised by the Respondent are not of a similar nature to those in **Serco v Dahou**, a case expressly about detail, where the ET had identified six factors as calling "for an explanation" (see paragraph 22) but then failed to deal with those factors in its reasoning. Here, the ET had expressly accepted the Claimant's oral evidence that his contemporaneous account was accurate (paragraph 15). That had been accepted by Mr Meeson in the Respondent's internal investigation at the time (paragraph 5.16). In the circumstances, the ET was not required to specifically address a slight difference in the Claimant's ET1, over half a decade later. In any event, when it came to the reason for the Claimant's non-employment, the ET's focus was bound to be on Mr Meeson. The Claimant had established the history necessary to his claim (about which there was really little dispute) and the ET was entitled to find that his attempt to introduce BALPA into the workplace had angered Mr Meeson to such an extent that he continued to feel animosity towards the Claimant many years' later (a permissible inference from the ET's earlier findings of fact, see e.g. paragraphs 5.4 and 5.6).

55. The Respondent further complains the ET failed to engage with its case that Mr Meeson had evinced goodwill towards the Claimant shortly after the 4 July 2009 discussion (something it is said the Claimant effectively agreed in cross-examination). Again, however, I am not persuaded that this is a matter the ET was obliged to address in its reasons. The Judgment has to be read as a whole; doing so, it is apparent that Mr Meeson was capable of entirely civil conversations shortly after his anti-union outbursts (see, for example, the ET's finding as to his reaction to the Claimant on 3 July 2009, paragraph 5.5, in contrast with his conduct when interrupting the BALPA meeting around two weeks' earlier, paragraph 5.4). It is equally apparent that the question of BALPA representation within the workplace continued to be viewed negatively within the Respondent over the following years and the Claimant's former

A trade union role was still in Mr Meeson's mind when responding to Mr Dobson about his 2015 application for employment (paragraph 5.55). Given those primary findings of fact, the ET was entitled to find that the Claimant's case on reason was made out (paragraphs 15 to 16 and 28).

B

56. In permitting additional grounds of appeal to proceed on the earlier Rule 3(10) Hearing, I had been concerned as to whether the ET had adequately explained why it had rejected the alternative reason for the Claimant's non-employment apparently relied on as the basis for the C 2014 refusal; essentially, the circumstances of his earlier resignation and the question of his loyalty (see the ET's recitation of the evidence in that regard at paragraphs 5.39 to 5.40). The answer to my concern is, however, as the Claimant has pointed out: whether others had D alternative, non-objectionable, reasons for not employing the Claimant (although that was not Mr Dobson's evidence) the ET had clearly concluded that the decision was that of Mr Meeson alone and, having heard his evidence, the ET was satisfied his sole reason was the Claimant's earlier participation in trade union activities, which related to his union membership. Just as it E would be wrong to fix an innocent decision taker with the tainted reasoning of others within an organisation (see **CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562 CA), if an ET is satisfied that the person making the relevant decision did so for a prohibited reason, that conclusion cannot F be avoided because others would have made the same decision for legitimate reasons. Having positively found that Mr Meeson had only a tainted reason for his decision, the ET was not required to consider other hypotheses as to why the Claimant was not appointed.

G

Disposal

57. For all those reasons, the appeal is dismissed.

H