

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

At the Tribunal  
On 10 July 2014

**Before**

**HIS HONOUR JEREMY McMULLEN QC**

**MR A HARRIS**

**MR B M WARMAN**

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NORTH ESSEX PARTNERSHIP NHS FOUNDATION TRUST

APPELLANT

MR E BONE

RESPONDENT

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Transcript of Proceedings

JUDGMENT

*[Corrected under Rule 33(3)*

*20 August 2014]*

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## **APPEARANCES**

For the Appellant

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For the Respondent

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## **SUMMARY**

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

### **PRACTICE AND PROCEDURE - Costs**

The claimant, a member of WEU an independent trade union, made 21 claims of detriment for taking part in its activities, and for race discrimination against him as an Englishman. He succeeded on only four, against which the Respondent appealed. The EAT considered analytically the ET's reasoning on each of the four trade union claims and found errors of approach in each one. On the findings there was no reason to remit the claims to the ET and they were dismissed.

The Respondent was ordered to pay part of the Claimant's costs in the EAT since it should not have argued that the union was not independent of its influence.

## HIS HONOUR JEREMY MCMULLEN QC

1. No better introduction can be found to the appeal before us than that in the Judgment of Jackson LJ. This case came before the Court of Appeal where Jackson LJ gave the Judgment, with which Briggs and Christopher Clarke LJJ agreed: see EWCA Civ 652. It related to what the EAT over which I presided found to be a jurisdiction point. The Court of Appeal decided that it was not a jurisdiction point and that the case should be remitted to the EAT to decide the merits, which we had not dealt with because of the jurisdiction, as we saw it, issue. There Jackson LJ summarised the case as follows:

**“Part 2. The facts and the tribunal proceedings**

**10. Mr Bone began working for the NHS Trust as a band 5 registered mental nurse in June 2006. In July 2008 he was promoted to band 6.**

**11. In April 2009 Mr Bone became involved with the Workers of England Trade Union (‘WEU’) and regarded himself as a representative for the members of that union at the hospital.**

**12. A ‘working in trust partnership agreement’ existed between the NHS Trust and the recognised trade unions. The WEU was not a party to that agreement. Amongst the recognised trade unions the two principal ones were the Royal College of Nursing and Unison.**

**13. Mr Bone was at all material times a member of Unison in addition to being an active member of WEU.**

**14. Neither the NHS Trust nor the existing trade unions welcomed the arrival of WEU on the scene. Between late 2009 and 2011 there was much strife between Mr Bone and Unison. The NHS Trust did not support Mr Bone.**

**15. On 20th January 2011 Mr Bone commenced proceedings against the NHS Trust before the employment tribunal at Bu12qwry St Edmunds, asserting that he had suffered (i) racial discrimination and (ii) detriment on grounds related to union activities contrary to section 146 of the 1992 Act.**

**16. On 3rd March 2011 the NHS Trust served its response. The Trust disputed Mr Bone's claim on a number of grounds, but did not dispute that WEU was an independent trade union for the purposes of section 146 (1) (b) of the 1992 Act.**

**17. The employment tribunal convened a pre-hearing review on 28th July 2011. On that occasion Employment Judge Morron dealt with a number of jurisdictional issues. He struck out five claims which had no prospect of success and gave case management directions in respect of the surviving claims.**

**18. The trial of Mr Bone's claims took place at the Bury St Edmunds Employment Tribunal over nine days during January and February 2012. The NHS Trust strongly disputed Mr Bone's claims on the facts but did not dispute that WEU was an independent trade union.**

**19. The employment tribunal handed down its reserved judgment on 1st March 2012. After reviewing the factual history in detail, the tribunal upheld four specific complaints made by Mr Bone. These were as follows:**

**i) On 5th May 2010 Steve Adshead, a fellow employee and Unison local representative, circulated an email suggesting that WEU was linked with fascism and the British National**

Party. The NHS Trust failed to deal with this matter in accordance with their disciplinary procedures and dignity at work policies.

ii) At a meeting in May 2010 Mrs Chalkley, a nursing colleague, described Mr Bone as a bigot. The NHS Trust did not intervene robustly as it should have done to protect one member of its workforce against another.

iii) On 28th May 2010 Mr Adshead arrived at the duty office, in order to commence his duties. He greeted Mr Bone 'Hello Adolf'. The NHS Trust did not deal with this matter effectively, nor did it require Mr Adshead to apologise.

iv) On 1st December 2010 Mr Hutchison, a local Unison branch official, sent an email to a member of staff, Mr Alexander Watts, at his workstation via the internal email system. Mr Hutchison expressed concerns about the 'creeping crypto fascism' of WEU. This email was, in the tribunal's view, the consequence of the NHS Trust management's 'weak and lamentably ineffective conduct' in failing to protect Mr Bone.

20. The tribunal rejected Mr Bone's claim for racial discrimination, but upheld his claim under section 146 of the 1992 Act. The tribunal held that the four matters identified above had the effect of preventing or deterring Mr Bone from taking part in the activities of an independent trade union at an appropriate time and also thereby penalising him for doing so. Accordingly the tribunal held that Mr Bone's claim fell within section 146 (1) (b) of the 1992 Act."

2. The particular issue referred to the Court of Appeal was that the Claimant was a member of the Workers of England Union, a listed trade union but which was not a union which had a certificate of independence until that was granted by the Certification Officer on a reference by this EAT to him. His certificate was granted on 27 June 2013. The point that arose was whether or not the activities of the Claimant in that trade union in 2010 qualified him to make a claim under section 146(1)(b) of the **Trade Union and Labour Relations (Consolidation) Act 1992**, which provides as follows:

**"Detriment on grounds related to union membership or activities.**

**(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of —**

**(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,**

**(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,..."**

The other subsections of that paragraph are not relevant for the purposes of the case.

3. The Court of Appeal decided that the point which was effectively drawn to the attention of the parties on the day of the EAT hearing was not a point going to jurisdiction but which was a point which could be taken by a party who contested the independence of the trade union. That point was taken by the Respondent before the EAT. The Court of Appeal decided that point should not have been allowed to be aired, or the reference to the Certification Officer could have included a question to him as to whether the union was independent in 2010. The Court of Appeal decided that a certificate of independence is valid from the date it is given and from a “reasonable” or “modest” period of time before that. Such period includes the time during which the Certification Officer is dealing with the reference. The Court of Appeal decided that it would be quite likely that if the historic nature of the union were referred to the Certification Officer, he would decide that it was independent in 2010.

4. Nevertheless that point was not decided before, in case management of the present hearing, the Respondent was given the opportunity to say whether this case should not go ahead on the merits. No point was taken. So we have now disposed of all preliminary matters and the case is before us, a differently constituted EAT, in order to determine the merits of the case, which are summarised above.

5. The parties have been represented, as before, by Miss Azib for the Respondent and Mr Lakha for the Claimant, both of Counsel.

### **The issue**

6. The essential issue in the case is to determine whether the Tribunal erred in law in respect of four findings it made of detriment against the Claimant contrary to section 146. The intention to deter (we will use simply that shorthand) the Claimant from his membership of or

activities in the Workers of England Union is an improper purpose, and the Tribunal found in respect of four of the allegations he made that there was improper purpose.

7. It rejected all his claims of race discrimination and it rejected all his other claims. There are said to be 21 claims before the Tribunal. In respect of the Judgment before us, they are numbered A-P. Then there are three other Tribunal claims.

8. Broadly speaking, the Claimant lost some 15 individual claims of detriment and succeeded on four. In respect of race discrimination he lost all his claims. There is no appeal by either side except in respect of the four claims for which the Tribunal found in favour of the Claimant.

9. The issue to decide is whether the Tribunal erred in law in making those decisions or made a decision which was perverse in respect of any one.

### **The law**

10. The statute is set out above. In respect of the correct approach, the summary given by *Harvey on Industrial Relations* relied on jointly by the parties relates to what is the first issue in the case: what is the purpose for which action is taken or for which action is not taken. The summary is as follows:

**“716. It is not enough to show that the employer has subjected a worker to some detriment. It is necessary also to demonstrate that the employer’s motivation in so doing was improper. The proscribed mental element differs depending on the nature of the ‘union ground’ concerned. In most instances, it is necessary to demonstrate that the employer acted (or failed to act) with an improper *purpose*; in one instance it is necessary to demonstrate that he acted (or failed to act) for an improper reason. ...**

**“717. It is trite to say that, at least in this sort of context, a reason for an action is the ulterior cause of that action; whereas a purpose is its ulterior aim, the effect which that action is designed to achieve (*Carlson v Post Office* [1981] IRLR 158, [1981 ICR 343, EAT; *Gallacher v Department of Transport* [1994] IRLR 231...”**

Then at 718:

**“The distinction must not be overdone. Indeed it may sometimes appear unreal, in that an employer’s purpose may sometimes be said to be the reason for his action. However, the distinction must not be overlooked. It is important to pick up the stick at the right end.”**

**“725. In this sort of case an employment tribunal should take a ‘robust’ attitude to the evidence (cf *Speciality Care plc v Pachela* [1996] IRLR 248, [1996] ICR 633, EAT, para [465] above). Therefore, inflicting any form of detriment on a worker because he is a trade unionist is likely to give rise to an inference that the employer acted for the purpose of deterring or penalising membership etc but the inference is not inevitable. The onus of proof, however, is on the employer to prove that his purpose was not improper (para [732] below).”**

11. That summary is clearly correct, as a look at the authorities there cited makes clear. In **Carlson** above, Slynn P, presiding in the EAT said this:

**“At most there was a disadvantage to the non-recognised union or to its members but nothing was done for the purpose of penalising any individual for belonging to a particular union.”**

12. That is a fair background to the approach in this case, and it is one which is fully endorsed by the lay members of this Employment Appeal Tribunal with great experience of trade union organisation and indeed the organisation of trade unions in workplaces where they are competing for members.

13. In **Gallacher**, the approach both to inferences and to the remission of cases to an Employment Tribunal was developed. The Judgment of Neill LJ, dealing first with the issue of interpretation of the statutes, includes this:

**“To my mind the crucial part of the employer’s case is the criticism that the industrial tribunal did not distinguish between ‘effect’ and ‘purpose.’**

**...In my judgment in this context ‘for the purpose of’ connotes an object which the employer desires or seeks to achieve. As Dillon LJ pointed out in *Associated British Ports v Palmer* [1994] ICR 97, 102E there is a close link between ‘purpose’ in section 23 and ‘reason’ in section 58 of the Act of 1978. Furthermore, it is to be remembered that the ‘purpose’ envisaged in section 23(1) is an illegitimate purpose which contravenes the statute.”**

14. Peter Gibson LJ, recognising how rare it is for a Tribunal of fact to be overturned, said this:

**“That finding, repeated in paragraph (13), constitutes an inference of fact which the industrial tribunal were drawing from the primary facts. An appeal court will be very slow to interfere**



with facts found by those who had the benefit of seeing and hearing the witnesses for themselves. But in this case I feel less inhibition about doing so, given that the intention to found is not a primary fact but an inference and that the tribunal themselves have indicated the greater importance of the documents than the oral evidence in this case.

...

...I find it impossible to draw the inference drawn by the industrial tribunal. In considering the purpose to be inferred in relation to what they found to be reasonable, well-intentioned and common sense comments, it is appropriate to bear in mind what the industrial tribunal themselves said in paragraph (12) of the decision...

It appears to me that the comments cannot fairly be inferred to have been made for the purpose of deterring the applicant.

...

Having reached this conclusion, I can see no useful purpose being served by remitting the case for a fresh hearing.”

15. The second issue relating to construction is illustrated by **Yewdall v Secretary of State for Work and Pensions** UKEAT/0071/05, a Judgment of the EAT presided over by Burton P, where the question of what the Claimant has to prove is dealt with. The Tribunal says this:

“24. This gives the same mechanism to sections 146 and 148 of TULR(C)A as is provided, for example, by section 63A of the Sex Discrimination Act 1975, where the onus of proof only passes to the employer after the establishment of a *prima facie* case of unfavourable treatment on discriminatory grounds by the employee which requires to be explained. Once it requires to be explained, then the burden passes to the employer. Plainly that, in our judgment, is correct in this case. Otherwise the employer will have the burden of giving some explanation in a case where it is not clear what it is he has to explain.”

16. So once the Claimant has made a *prima facie* of detriment or unfavourable treatment, the burden passes to the Respondent under this statute to show that its purpose was not an improper purpose.

17. As to matters of procedure, a Judgment I gave in **Millin v Capsticks LLP & Ors** UKEATPA/1010/12/RN in the EAT this year indicates that, in a complicated discrimination case, where a schedule has been agreed of acts relied on and therefore requiring adjudication, parties should stick to it or additions should be made in open tribunal and with consent, so that

if something is not on the schedule it should not be the subject of an adjudication without notice.

18. As is so often the case in this court, there is a complaint that the Reasons may be insufficient (see **Meek v Birmingham District Council** [1987] IRLR 250) and that the Judgment is perverse. But it must be borne in mind an overwhelming case is to be made for perversity to succeed (see **Yeboah v Crofton** [2002] IRLR 634 CA).

19. We also bear in mind that a case should not be dealt with on the facts by the EAT unless there is only one conclusion from the material presently available (see **Jafri v Lincoln College** [2014] IRLR 544 CA).

### **Discussion and conclusions**

20. Because we have the advantage of very clear Skeleton Arguments supplemented by written arguments, we will take the arguments of Counsel and our findings on them in the succession in which they are made.

21. First it is necessary to record the observations made by Miss Azib at the outset of her argument, which were as follow. WEU is not recognised formally, and this is relevant when looking at the acts of the Respondent or its failures. This of course is a reflection on the passage we have cited from **Carlson**. It is unchallenged. We agree with it as helpful context. Secondly, out of the 21, as she says, complains argued by the Claimant only four succeeded, of which two relate to actions of Unison and not of the Respondent. If the aim or purpose of the Respondent was to eliminate the influence of WEU, why, she asks, did the majority not succeed? Indeed, suspension would have been the most obvious way of marginalising or

eliminating WEU. We see force in this. Thirdly, the Claimant never put forward that it was the Respondent's intention to eliminate WEU. This was not part of the schedule, nor was it part of the evidence, nor was it put to the Respondent's witnesses. We think Millin is a helpful support for this observation. It is not challenged.

22. Indeed Miss Azib goes so far as to say that the Tribunal found the Respondent was neutral. We will say a little more about this. But if she is right, she contends that it would contradict a finding as to the sole or main purpose being to deter the Claimant from his activities. She contends that is a primary finding and would override other findings.

23. With those observations in mind, she contended that the primary step was to identify the prima facie case. In respect of this, after an exhaustive analysis of the pleaded case, which is voluminous, she contends that the Claimant does not assert a connection between the detriments which she accepts occurred (and they were very disgraceful and obviously distasteful and hurtful to him) between that and his trade union activities. Insofar as there are contentions, they are principally about racial stereotyping of him as an Englishman, which claims were dismissed. She further contends that the Tribunal confused the motives of Unison with those of the Respondent and she submits that there was no challenge to the Respondent's case that it was neutral, and that there was no agreement by the Respondent as to Unison's actions, a point made by Unison officers themselves.

24. She further contends on the law that it is not sufficient in order to establish an improper purpose that an effect is foreseeable, nor is knowledge of the likely effect sufficient to prove that it was an improper purpose to bring about that. She engagingly used the example of her eating a large chocolate cake, knowing that it would have an effect on her figure and yet

continuing to eat because it tasted good. We much enjoy such graphic imagery by Counsel and sometimes it is helpful.

25. As to these points, Mr Lakha contended there was no finding that the Respondent was neutral which covers everything. On the contrary, there are strong findings that the Tribunal held it against the Respondent that it had discriminated against the Claimant in order to deter him from his activities in the WEU.

26. For this, he can do no better than to cite the words of the reserved Judgment itself, which are these:

**“The unanimous judgment of the Tribunal is that in respect of four occasions the Respondents subjected the Claimant to detriment by their deliberate failure to act for the main purpose of preventing or deterring him from taking part in the Workers of England Trade Union at an appropriate time.”**

27. The question is, in respect of those four, is each of the elements of section 146 met? There can be no doubt that he is right when he says that there are a number of places where very firm findings are made by the Tribunal about the Respondent’s conduct or lack of conduct in failing to react in a way in which it would regard as appropriate. Some of these are wholly untargeted and are therefore, as a matter of construction, apt to include all of the 21 claims sought. See, for example, paragraph 53, which does not confine itself to the four allegations and paragraph 63, which is a general summary. What is necessary, both parties agree, is to look at the application of the law to the four findings which are the subject of the appeal.

28. To some extent we agree with that, but it is also relevant in this context to see how the Tribunal dealt with the findings on the claims where there is no challenge. On this, it is important to recognise that the parties agree that the Tribunal made unimpeachable decisions.

Broadly speaking, of the 15 claims numbered A-P (there is no O), excluding the four which were upheld, they divide into those where the Tribunal has found there was no detriment (that is, the Claimant did not pass the **Yewdall** test of a prima facie case) or it failed for some other reason. So, for example, allegations A, B, F, G, H, I, J, L, O and, so far as may be relevant, the other three ET1 claims all failed for no detriment, but also amongst those are findings as to motive. Motive is important for determination of the four claims under appeal.

29. So in claim F the Tribunal finds the following:

**“It was to do with the overtime issue and in the light of the findings that we have made there is no evidence to indicate that Mrs Livras’ findings were coloured or tainted in any way by Mr Bone’s involvement with the Workers of England Trade Union. As the Respondents rightly point out Mr Mafin was in attendance with Mr Bone at the 15 June meeting.”**

30. As to claim I, that failed because there was no connection between the detriment the Claimant suffered and his trade union activities.

31. Claim K failed because there is a specific finding that the Respondent acted the way it did in order to preserve its neutrality as between the trade unions and this defeated the claim. It has not been argued before us or it seems the Employment Tribunal that staying neutral to avoid trouble with Unison was an improper purpose, although in some contexts there might be an argument on causation.

32. Claim L failed, as we have said, because of no detriment but also because of the lack of a motive. The Tribunal expressed it in this way:

**“49 [It] was not provided to Mr Bone with a view to making him uncomfortable or to make him feel unwanted.”**

33. As for claim O, again this failed on the ground of there being no detriment but also on the ground of motive, for the Tribunal says this:

**“The conclusions with which Mr Bone disagrees were not, on Mr Cleaver’s part, designed to deter Mr Bone from taking part in the activities of the Workers of England Trade Union at an appropriate time or penalising him for doing so.”**

34. The second claim to the Tribunal failed because the Respondent appeared neutral. In the third claim, there is reference to “any intention to inflict a detriment relating to trade union membership, as to which there was none”. And the same goes for the fourth ET1. There was nothing to indicate that the motive was upon the grounds of race or of grounds relating to trade union membership or activity.

35. Thus the Tribunal has been faithful to its approach, which it vouchsafed to the parties, of going through the schedule of acts and making decisions upon them.

36. So we now turn to the four successful claims the subject of an appeal. In respect of these we broadly accept the submissions of Miss Azib.

### **The first claim**

37. The first relates to the 5 May 2010 Unison e-mail. The Tribunal here makes it clear that the reason the Respondent behaved as it did was that it was fearful of intervening as they anticipated a backlash from Unison. That, we hold, is the finding as to the intention, the motive or the purpose of the Respondent in deciding to act as it did. The Tribunal also decides that the statute was breached by looking at the effect which was foreseeable of its action. Here, the Tribunal erred because it is not sufficient to say that an act was foreseeable in order to establish liability. The act must be done or deliberately failed to be done with the improper purpose.

38. The Tribunal also considers neutrality, and it is fair to say that it seems to dismiss neutrality as a reason in this case in a passage in the middle of paragraph 36, but does go on to reinforce its view as to neutrality in paragraph 38. It says this indeed will have breached its neutrality. The Tribunal returns to examining the statutory concept of “with the purpose or intention” by looking again at the consequences for the detriment (see the end of paragraph 36). Thus we hold that, on the detailed analysis of the statutory tort found by the Tribunal here, it has erred in the respects which we have outlined above. The Tribunal here has accepted that the employer was trying to remain neutral and that the way in which it acted was entirely prompted by fear of a backlash from Unison. For that reason the Tribunal erred.

39. Further, if it was the purpose of Unison to ostracise the Claimant, there is no connection to the Respondent and there is no reason to attribute liability to the Respondent for that decision to ostracise, made quite improperly by the Claimant.

### **The second claim**

40. In this case the Tribunal has erred because there is no finding by the Tribunal that it was the sole or main purpose of the action or failure to act to deter the Claimant in an improper way. There are no express findings as to what Miss Morgan did or did not do. There are several criticisms on the grounds of perversity here. Miss Morgan gave evidence in the form of a witness statement and orally, upon which she was not challenged, that she was not interested in the trade union involvement or trade union activities of the Claimant in any way. She did not regard this as a problem unless it affected his ability to undertake the role for which he was paid.

41. Mr Lakha contended most strongly that it was wrong to introduce this evidence in isolation, for her evidence is not credible. But there is no finding on credibility against Miss Morgan, in the way Mr Lakha put to us, in that her witness statement was contradictory and she should not be believed. He drew attention to paragraph 15, where Miss Morgan says that she did take some action in relation to Miss Chalkley and that was sufficient. In our judgment, if the Tribunal were to reject Miss Morgan's evidence on the ground that she was not a credible witness it should have said so. This allegation of perversity is upheld notwithstanding the high hurdle it has to surmount in order for it to work. Miss Morgan did not know the status of the Claimant. Further, there is substance in Miss Azib's point again that this is attributing the aims of Unison, in ostracising the Claimant, to the Respondent. That does not satisfy the terms of the statute.

### **Claim E**

42. Much of the same criticism can be made here too. The Tribunal made a clear finding that the reason why the Respondent acted or did not act as it did was so as to not to offend Unison. That is not a finding which satisfies section 146. See our view on claim K above.

43. Secondly, we agree with Miss Azib's submission that the Tribunal ignored the chronology and decided perversely. An investigation was set up into Mr Adshead's comment, and indeed it included other matters too. But Mr Adshead disappeared from the scene shortly after making the comment. The lay members of this Tribunal are particularly concerned about the finding by the Tribunal that some action should have been taken in respect of Mr Adshead long after he had left the employment. This is quite impossible to achieve. The Tribunal wrongly criticised the Respondent or, more particularly, cannot correctly have attributed



improper motive to the Respondent for the way in which it dealt with matters after Mr Adshead had left.

44. Thirdly, Miss Azib repeats her contention, based on the general proposition that it is wrong to find an effect and therefore an intention. We agree that again the Tribunal concentrates on effect rather than making a finding under the statute. See paragraph 42.

45. She is right when she submits that there was no evidence to say that by not disciplining Mr Adshead, who had by then left, the Claimant would be deterred from his trade union activities. In any event, we accept her submission that simple knowledge of the effect, if this were the case, is insufficient.

### **Claim M**

46. We accept Miss Azib's submission that the principal criticism of this passage is in the chronology. It is not so much that Mr Hutchison sent an e-mail on 1 December. It is that it was sent as a direct consequence of the conduct of the Respondent. In other words, what it had done, let us assume, in the period from May to December, provoked Mr Hutchinson into sending this letter. Since that is the way the Tribunal reasons it, it is impossible for it to have come to the conclusion which it did that the purpose of the Respondent, by its inaction, was to provoke Mr Hutchinson to send the offensive letter. In our judgment, this is a step too far. It cannot be said that the previous actions were designed with the improper motive.

47. The Tribunal wrongly, in our view, came to the conclusion that it was the Respondent's intention to have a quiet life and to eliminate the WEU's influence. As we have noted above, this is the kind of point that should have been included in the schedule. It was not. It was not

in any of the evidence and it was not put. In fact the Tribunal simply infers its finding, if that is the correct way to put it, that this is the aim to be achieved. In our judgment, it was wrong of the Tribunal to do this in the absence of a firm platform of a claim and evidence. We would ourselves, like Peter Gibson LJ (above), be unwilling to interfere, but feel a little more confident in doing so since this is simply an inference. This is indeed a very sinister and firm finding, which is not justified in relation to the pleadings.

48. So, taking an astringent view to this case, the proper approach is not to generalise, for generalisation is inapt where four out of 21 claims have been upheld and the rest dismissed. What is required is a specific application of the law to the findings. In our judgment, in respect of the four claims on which the Tribunal found for the Claimant, it has in one way or another reached erroneous conclusions. So, for those reasons, this appeal is allowed and there is no need or purpose or justification in taking a further step to refer it back to the Employment Tribunal.

### **Costs**

49. Following the conclusion of our hearing, the third in the EAT, an application has been made for costs foreshadowed in previous correspondence by the Claimant. By consent I deal with this matter sitting alone.

50. The basis of the application is Rule 34, that there has been unreasonable conduct by the Respondent or that the proceedings have been unnecessary. The target of the application is the (second) hearing before this court on 30 September 2013 where the Certification Officer's certificate was before us and we decided, following submissions from both parties, that the matter went to jurisdiction, that the Certification Officer had declared the position as at the date

of the certificate, but that the union was not independent as at the date of relevant detriments in 2010.

51. It is fair to say that the Court of Appeal acknowledged that the EAT encouraged the reference to the Certification Officer. We felt that the issue went to jurisdiction and that, because that occurred, and the Respondent acknowledged that there was an issue, it had to go to the Certification Officer. No complaint is made about that (first) hearing, but it is said by Mr Lakha that the further conduct of these proceedings was tactical opportunism and was disingenuous because the Respondent should have known all along that this was not a trade union under the thumb of the Respondent.

52. The primary basis for the submission is the opinion of the Court of Appeal that this is a matter, albeit encouraged by the EAT, which was in the hands of the Respondent. If it wanted to take this point, not a jurisdiction point, but one as a constituent element of the tort which was missing in this case, it should have done so at an earlier stage. That would have had the advantage that the Certification Officer would have been investigating the matter in 2011, not long after the torts were said to have been committed and could have said that the certificate covered the time during his investigation, or earlier. The point is that, although encouraged by the EAT, for which we take some responsibility, it is the Respondent's case. It was a way of administering a sudden death to the case because it would show that the Claimant could not have brought the claims in the first place. So it was content to run with the point which the EAT had drawn to the attention of both parties. After the certificate was granted, it was open to the Respondent to acknowledge that indeed this union was not under its thumb; it was inimical to it actually at any time. And it might have taken the view that it was not going to contest the issue. In my judgment, that has force.

53. The difficult position facing the Claimant, which Miss Azib advances, is that the Respondent has come to the EAT on the jurisdiction point and has succeeded, and the case has gone with our permission to the Court of Appeal, and it would be wrong to award costs in respect of such a hearing.

54. I agree there is considerable force in that, but the point is the case should have been advanced at an earlier stage, as the Court of Appeal makes clear. I suppose what ought to have happened is the Respondent should have recognised that that was the legal position and should not have sought to contend that the union was not independent. In those circumstances I consider that there is some force in the Claimant's case that the proceedings were unnecessary and that the Respondent could have made this application to the ET at an earlier stage.

55. In my judgment, it is right that some costs should be awarded to the Claimant. I make this order not because I am sympathetic to what is effectively an abortive EAT hearing and the trip to the Court of Appeal but because of the correctness of Mr Lakha's position. I do not go so far as to say with him that the Respondent was disingenuous in its approach, but it could have recognised that at any stage this union was going to be found never to have been under the influence of the Respondent and that the excursion to the Certification Officer would have probably been on a false premise. Now the Court of Appeal has helpfully clarified the law, and Mr Cockburn can give a certificate which can in reality be retrospective. The matter is clear now.

56. So in all the circumstances I will exercise my discretion under Rule 34.

57. I now turn to the amount of the costs. It is wrong the Claimant should have all its costs. Doing the best I can, and knowing that there is an application for a detailed assessment, I am minded to make an award of £5,000, slightly less than one third of that sought. Having heard Miss Azib on that, I finally make the order.

58. I am grateful to both counsel for their clear and concise arguments in what is obviously a sensitive case, especially as the employment relationship is continuing.

*Post scriptum*

It may seem fitting that the very last case I hear as a judge relates to a trade union activist and relies on legislation dating from 40 years ago when I started in this field. Unusually, I go out with my last word in Latin: *Valete!*