Appeal No. UKEAT/0084/20/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 13 April 2021
Judgment handed down
17 June 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

DR G SMITH MBE

MS S M WILSON CBE

MRS T COXHILL APPELLANT

UNITE THE UNION RESPONDENT

JUDGMENT
FULL HEARING

APPEARANCES

For the Appellant	TIM DRACASS (Of Counsel) Instructed by: MRS T COXHILL The Appellant
For the Respondent	SARAH FRASER BUTLIN (Of Counsel) Instructed by: Unite the Union Legal Department 128 Theobald's Road London WC1X 8TN

SUMMARY

TOPIC NUMBER 21; TRADE UNION MEMBERSHIP

In considering whether the exception from liability for unjustifiable discipline of trade union members provided by section 65(5) TULR(C)A 1992 applies, the tribunal must consider whether the trade union would have applied the same disciplinary sanction to comparable conduct absent the component of that conduct that resulted in it being protected. In this case, the employment tribunal, in an otherwise carefully considered judgment, determined itself that the same sanction would have been appropriate for the claimant's conduct, absent the protected component, rather than determining what the union would have done in such circumstances. The matter was remitted for the employment tribunal to determine this issue afresh.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of the employment tribunal sitting in Reading on 17-19 July 2019 (with a day in chambers on 23 July 2019) holding that the claimant was not unjustifiably disciplined by the respondent, Unite the Union. The tribunal was chaired by Employment Judge Anstis, sitting with Mr J F Cameron and Mrs A Gibson. The judgment was sent to the parties on 19 August 2019. We will refer to the parties as the claimant and the Union.

The facts

2. We have taken the outline facts from the judgment of the employment tribunal. The employment tribunal described the claimant's role in the Union:

> **1. The claimant is a long-standing employee at Heathrow Airport, employed as a security officer. However, for many years up to the date of her claim she worked full time on her trade union duties while remaining employed by the airport. She was branch secretary of her local Unite the Union branch (branch 562, sometimes referred to as LE/562) and held many other elected positions within the union. In the terminology of the union, she was a "lay official" working under rule 6 of the union's rules.**

3. Historically, there had been only one branch of the Union at Heathrow, branch 562, until those working at Terminal 4 broke away:

> **31. As we have mentioned before, relationships between various union officials (both lay officials and employed union staff) were not good at Heathrow. This was not a new issue, but one which had a lengthy history, including at least in part a move in 2013 to break up the union branch at the airport into new branches based at the different terminals of the airport. This had led to a full vote of members based at the branch, following which members at Terminal 4 had formed a new branch but the airport branch (562) remained otherwise intact. We are not concerned with the rights and wrongs of these disputes, or their origin, but they lead to a position in which there were strong personal loyalties in parts of the airport to local leaders, along with a suspicion of the motives of other leaders or would-be leaders.**

4. The employment tribunal described the leadership of branch 562 and noted that for part of the time in question there was no treasurer (which was relevant as the case concerned the use of Union money to fund legal advice):

> **32. The claimant was a long-standing and experienced branch secretary. A colleague, Natalia Saccar, had become chair of the branch only six months before.**
>
> **33. Another position at the branch was that of Treasurer. The Treasurer of branch 562 resigned her position on 6 October 2016. The effect of this is that there was no branch treasurer at the time of two of the three payments referred to.**

5. The employment tribunal set out the relevant rules of the Union (including an amendment subsequent to the events in question), and supplementary guidance:

> **34. The position of union branches is dealt with in rule 17 of the union's rules, which includes the following:**
>
> > **"17.3 Branches shall have direct access to a proportion of membership subscriptions … These funds may be used to meet the cost of administering the branch; for recruitment and other campaigns … for local affiliations; to assist members or their dependents who have suffered misfortune; or for other worthy cause, subject to any provisions elsewhere in these rules, and that no general purposes funds should be used for political objects …**
> >
> > **17.9 The branch chair shall preside over all meetings of the branch and shall ensure that business is conducted in accordance with the rules and branch standing orders … The branch secretary shall be responsible for the general administration of the branch including maintaining the branch membership, financial and other records in the manner required by the executive Council, taking in preserving branch minutes and conducting all correspondence on behalf of the branch.**
> >
> > **17.10 The branch treasurer shall be responsible for dealing with financial transactions concerning the branch, ensuring that all payments are made in accordance with the rules of the union …**
> > **He/she shall provide the branch secretary with a record of all financial transactions and ensure they are accurately recorded in the branch records and that all monies are dealt with in accordance with the rules and the instructions of the executive Council."**
>
> **35. Since these events, rule 17.3 has been amended by the addition of the following wording:**
>
> > **"Branch funds shall not be utilised to assist a member or former member in obtaining legal advice, assistance or representation in respect of any court, tribunal or other proceedings brought against**
> > **(or intended to be brought against) the Union."**
>
> **36. The union's rules are supplemented by guidance and standing orders given by the executive council. In a section headed "Branch Financing" these say:**

> **"From a legal and financial perspective, it is important to recognise that these monies in all cases are the property of Unite and therefore can only be used for legitimate union purposes …"**

6. In the Summer of 2016, some of the members of the Union who work at Terminal 3 decided to break away from branch 562. The limited evidence before the employment tribunal suggested that members transferred to the new Terminal 3 branch on 21 August 2016.

7. There was a meeting of branch 562 on 8 September 2016. The employment tribunal described the events at that meeting:

> **What occurred at that meeting?**
>
> **48. The attendance register shows eight members in attendance at the meeting of branch 562 on 8 September 2016. That number includes the chair, the claimant and Mr Johal and Mr Gill, who were two of the three dissenting shop stewards from Terminal 3. No one else from Terminal 3 is recorded as having attended the meeting.**
>
> **49. The claimant was responsible for taking the minutes of the branch meeting on 8 September 2016. It is not disputed by the respondent that these are an accurate record of what occurred at the meeting, and the relevant extracts are as follows:**
>
> > **"T3 members advised branch of the following which they have written to Unite about but had no response:**
> >
> > **Irregular steps have been taken by T3 Chair to split from Branch 562 without any democratic or fair conduct or correct process of authority. T3 representatives have been informed that this unprecedented move has been sanctioned by the region. There has already been a consultative ballot of the membership and the T3 members voted to remain with branch 562 which is the current mandated position of all representatives in T3 and as a democratic body they have no right to ignore the membership. It was felt that this action was being pursued by the Chair of T3 for his own selfish gain which has no relevance whatsoever to the T3 membership. There is significant opposition and outrage to this aggressive move and the actions have been taken in secret without any knowledge of branch secretary or chair of branch 562 who should have been consulted. T3 membership are requesting that this move should be halted with immediate effect as any such move can only be achieved through a proper consultative ballot of the membership as was the case, process and precedent set in 2013. T3 membership have requested a response by Unite by 9 September 2016 and have stated that they will seek legal advice if no response or direction is given.**
> >
> > **Branch secretary stated that there has been no official communication in regard to this matter. Branch chair stated the same. Branch secretary stated that it was also the case in 2013 when she was not consulted …**
> >
> > **Sam Johal made a request to branch for funds to seek legal advice on this matter.**

> **It was pointed out from floor that there was already a sum set side left over from previous attack for legal advice which could be contributed to this. Sam felt that this would be insufficient and it was put to floor that in line with previous cases this should be topped up. Branch had previously funded legal cases. It was agreed he would keep branch updated and informed of any further requirement."**

The minutes then record Mr Johal as making the following proposal, which was unanimously approved:

> **"To fund legal advice and potential action against further split of Branch 562 without proper consultation of membership."**

It is later recorded that:

> **"Imposition of new branch on membership should be stopped. Objections raised to all parts of process regarding split and elections."**

50. Many times during her evidence the claimant appeared to suggest that her subsequent actions as secretary amounted to no more than carrying through the actions agreed (or mandate given) at that meeting. If this was intended to suggest that she had no personal interest or desire to halt the breakaway by Terminal 3, we do not accept that. As she herself acknowledged, she was as wholeheartedly committed to preventing the new branch at Terminal 3 as anyone else at that meeting was.

51. It is striking that the proposal (which when approved became known as the "mandate") appears to be open-ended, to have no financial limits or requirement for accountability in the use of funds and is without any requirement for further approval by the branch before legal action is taken. The claimant in her evidence to us said that she felt that this mandate was sufficient for the legal proceedings that were eventually taken by Mr Johal and Mr Gill, albeit that it appeared from some of the investigation notes that the claimant and Dr Saccar only learnt after the event that Mr Johal and Mr Gill had actually started legal proceedings. The claimant in her evidence did not see anything wrong with a mandate in these terms. It was described in argument as being a "blank cheque" given to Mr Johal and Mr Gill. The claimant rejected that characterisation, but it does appear to us that it came close to that. The claimant's view appeared to be that with that mandate having been approved it was then for Mr Johal and Mr Gill to carry it through as they saw fit, without further question or limits, and for her to provide the funds for them to do this. This seems to us to be at the least very poor practice in managing the branch's money.

8. The employment tribunal accepted that the claimant had not known that the new branch had been established at the time of the meeting.

9. Mr Johal and Mr Gill brought proceedings against various officials of the Union. The proceedings were unsuccessful:

> **60. The matter came before Mr Justice Collins on an on-notice basis on 5 October 2016, when it was dismissed with an order that Mr Johal and Mr Gill pay £1,000 costs to the union.**

10. The legal action cost £8,121.65.

11. The Union took disciplinary action against the claimant. After an investigation had been concluded, a letter was sent to the claimant on 19 December 2016, stating:

> **"In outline, it is alleged that as a branch officer, you have taken part in and had oversight of decisions that amount to an inappropriate use of union funds. It appears that significant sums of LE/562 branch funds have been used to obtain legal advice and then to commence High Court action against the Union.**
> **The charges that will be considered against you at the hearing are as follows:**
>
> **27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder or a lay office or a representative of the union.**
>
> **27.1.2 Being a party to any fraud on the union or any misappropriation or misuse of its funds or property.**
>
> **27.1.5 Bringing about injury to or discredit upon the union or any member of the union including the undermining of the union, branch or workplace organisation and individual workplace representatives or branch officers."**

12. On 27 July 2017 a hearing took place before a disciplinary panel comprising Gary Reay (chair) and Joanne Harris. The following conclusions were reached:

> **a. "The Panel's key consideration was whether Union funds had been used to take High Court action in an attempt to prevent the Union from carrying out its own Policy in accordance with … guidance around branch reorganisation."**
>
> **b. The claimant "made no attempt whatsoever to ensure that any legal advice received was considered and actually supported the decision to proceed to take legal action … the absence of any scrutiny, led the panel to believe … [the claimant] had supported and overseen the spending of branch money to seek the injunction".**
>
> **c. The claimant had the opportunity to seek clarity from the region about the new branch but did not do so.**
>
> **d. "Whilst the Panel recognises it is the right of any representative body to question the legitimacy of any Unite decision made on behalf of those they represent, such should however be progressed through the respective appeal process … What is in question is the propriety of appropriating union (branch) funds to support High Court action when no Union Rules have been broken … and … the membership transfer had already taken place with an overwhelming majority of the … accountable representatives of workers elected from T3 in favour of the new branch."**

13. On 8 August 2017 the claimant was informed that the three charges against her had been upheld, and was made subject to the following sanction:

> **1. Withdraw your credentials with immediate effect and bar you from holding any rule 6 lay office for the remainder of this term and the following electoral term of 2018 - 2021.**
>
> **2. Bar you on an indefinite basis, from holding any lay office or representative position which involves any financial responsibilities. This would include Branch Secretary, Treasurer, Auditor or signatory to any branch account.**

14. The claimant appealed. The appeal panel upheld the original panel's findings that there had been breaches of the three rules, but, by a majority, substituted a lesser disciplinary sanction:

> **a. Withdrawal of the claimant's workplace representative and branch officer credentials until the end of June 2018.**
>
> **b. That the claimant must attend training again before taking up lay office.**

15. The decision was ratified by the executive council, by a majority, on 6 September 2017.

The claim

16. By a claim form received by the employment tribunal on 7 January 2018, the claimant alleged that she had been unjustifiably disciplined contrary to section 64 Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992). Her claim failed because her treatment was held to come within an exception provided by section 65(5) TULR(C)A 1992.

The law

17. The right not to be unjustifiably disciplined is provided for by sections 64 to 67 TULR(C)A 1992. In a careful consideration of the law, the employment tribunal made one point with which we disagree. At paragraph 21 the employment tribunal stated:

> **21. While this is a code which operates independently and without direct relation to any of the provisions in the Equality Act 2010, it was helpful for the purposes of discussion during the hearing to adopt some of the language used in Equality Act 2010 cases, with the conduct to which section 65 applies being described as a "protected act".**

18. With respect to the employment tribunal, analogy is not always helpful, with any illumination it might offer often being outweighed by the risk of false comparison, jumping from noting that things are similar to assuming that they are the same. For reasons we shall explain, we do not consider their use of the term "protected act" is apt to describe the conduct that attracts protection. It is important to note that sections 64 to 67 TULR(C)A 1992 have a number of unusual features, in which they differ from other employment law provisions to a significant degree. We did not consider the analogy that Mrs Fraser Butlin (Counsel for the respondent) drew between these provisions and the identification of comparators for the purposes of the Equality Act 2010 was of significant assistance.

19. In the following quotation of the statute we limit ourselves to the relevant parts for the purposes of this appeal (or that provide context) and have added emphasis. The right not to be disciplined unjustifiably is provided for by section 64 TULR(C)A 1992:

> **64. Right not to be unjustifiably disciplined.**
>
> **(1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.**
>
> **(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that—**
>
> **(a) he should be expelled from the union or a branch or section of the union,**
>
> **(b) he should pay a sum to the union, to a branch or section of the union or to any other person;**
>
> **(c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,**
>
> **(d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,**
>
> **(e) another trade union, or a branch or section of it, should be encouraged or advised not to accept him as a member, or**
>
> **(f) he should be subjected to some other detriment;**

and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65.

(3) Where a determination made in infringement of an individual's right under this section requires the payment of a sum or the performance of an obligation, no person is entitled in any proceedings to rely on that determination for the purpose of recovering the sum or enforcing the obligation.

(4) Subject to that, the remedies for infringement of the right conferred by this section are as provided by sections 66 and 67, and not otherwise.

20. The tribunal held that the claimant had been disciplined by the Union by being subject to detriment, by way of the original disciplinary outcome and the reduced penalty after the internal appeal. That determination is not challenged in this appeal.

21. Section 65 TULR(C)A 1992 is the core provision for the purposes of this appeal. It is helpful to break it down into its component parts (but always keeping the overview in mind):

"65. Meaning of "unjustifiably disciplined" .

(1) An individual is unjustifiably disciplined by a trade union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is—

(a) conduct to which this section applies, or

(b) something which is believed by the union to amount to such conduct;

but subject to subsection (6) (cases of bad faith in relation to assertion of wrongdoing). (Emphasis added)

22. Generally, one has to determine whether there has been "conduct" to which the section applies and whether that conduct was the reason, or one of the reasons, for the member being disciplined. Imediately, it is apparent the provisions, although having some similarity to other provisions of employment law, are significantly different. While one is looking for the reason for the discipline, it is sufficient if the protected conduct is "one of the reasons" for the discipline – this is significantly different to ascertaining the reason, or principal reason, for a dismissal in the context of unfair dismissal.

23. Subsection (7), which was not quoted by the employment tribunal, provides that:

> **(7) In this section—**
>
> **"conduct" includes statements, acts and omissions;**

24. While it may seem a little pedantic, because the term "conduct" includes "acts", we do not consider it is apt to refer to the type of "conduct" that falls within the provisions as a "protected act" as the employment tribunal did. The statute refers to "conduct" and we will adopt that terminology. The risk with paraphrasing is that the analogous wording may gain currency and usurp the statutory wording.

25. The types of "conduct" that are within the purview of section 65 TULR(C)A 1992 are set out in sub-sections 2 to 4:

> **(2) This section applies to conduct which consists in: …**
>
> **(c) asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law;**
>
> **(d) encouraging or assisting a person:**
>
> **…**
>
> **(ii) to make or attempt to vindicate any such assertion as is mentioned in paragraph (c);**
>
> **(3) This section applies to conduct which … involves any person being consulted or asked to provide advice or assistance with respect to a matter which forms, or might form, the subject matter of any such assertion as is mentioned in subsection (2)(c) above.**
>
> **(4) This section also applies to conduct which consists in proposing to engage in, or doing anything preparatory or incidental to, conduct falling within subsection (2) or (3). (Emphasis added.)**

26. As the employment tribunal noted, the types of conduct that fall within the provisions are extremely widely-drawn, and include preparatory or incidental conduct.

27. The provision key to this appeal is sub-section (5), which the employment tribunal found applied, so that the claimant had not been disciplined unjustifiably:

> **(5) This section does not apply to an act, omission or statement comprised in conduct falling within subsection (2), (3) or (4) above if it is shown that the act, omission or statement is one in respect of which individuals would be disciplined by the union irrespective of whether their acts, omissions or statements were in connection with conduct within subsection (2) or (3) above. (Emphasis added.)**

28. This is an unusual provision. It excludes liability for discipline of a union member for conduct that would otherwise fall within the protection of section 65 TULR(C)A 1992 (because the reason, or one of the reasons, for the discipline is one of the wide range of impermissible reasons set out in subsections (2) to (4)); because there is "comprised" in the "conduct" an "act, omission or statement" that would usually result in individuals being disciplined, irrespective of whether the "acts, omissions or statements" were "in connection with" the "conduct" that would otherwise be protected. The provision is complex and unusual. It is worth taking the time to read it a number of times.

29. The provision may require "conduct" that would otherwise be protected as a whole, to be split into component parts. There may be a component of the conduct that resulted in the disciplinary sanction that, absent another component that resulted in the protection applying, would have resulted in disciplinary action, so that the discipline is not "unjustifiable". Although of no statutory force, the approach adopted in the Department for Business Innovation and Skills Guidance provides a helpful illustration:

> **Conduct which is partly protected and partly unprotected**
>
> **Disciplinary action may not, however, be unjustifiable if it is for unprotected conduct which formed a part of conduct described above (and which therefore counts as protected). If the union can distinguish between the two parts and show that individuals would be disciplined for the unprotected part whether or not it took place in connection with the protected conduct, then discipline for the unprotected conduct will not be unjustifiable.**

> **For example, a member who made an assertion in good faith that a union had broken its own rules would be protected against unjustifiable discipline, because that is conduct listed above. However, if he made his assertion in a way not permitted by those rules - for example by acting in a disruptive way at a union meeting - and the union could show that individuals who acted in that way were always disciplined, then disciplinary action for disruptiveness would not be unjustifiable.**
>
> **Disciplinary action for making the assertion itself, however, would be unjustifiable, even if members had previously always been disciplined for making assertions.**

30. In **Unifi v Massey** UKEAT/0223/04/MAA, the claimant was a candidate for election to sit on the Board of the RBS Pension Fund. In a personal statement she criticised the union's preferred candidates in a manner that meant that her conduct was protected. The union relied on section 65(5) TULR(C)A 1992. HHJ Peter Clark described the operation of the provisions:

> **The discipline under (1) above will be prima facie unjustifiable if the reason, or one of the reasons for it, falls within any of the 12 categories of conduct contained in section 65(2) - (4). We are principally concerned with conduct on the part of the Applicant which falls within, or which the Respondent believed fell within, section 65(2)(c), namely, an assertion (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment or any rule of law.**
> **(3) That prima facie lack of justification is subject to:**
>
> **…**
>
> **(b) cases where the conduct falling with section 65(2) - (4) consists of an act, omission or statement by the member which is one in respect of which members would be disciplined irrespective of the same being in connection with conduct under subsections (2) and (3). (Section 65(5)).**

31. The EAT decided that the employment tribunal had been entitled to hold that section 65(5) TULR(C)A 1992 did not apply. The EAT held that it was the protected component of the claimant's conduct that had resulted in the discipline, not the unprotected component:

> **(2) Reason for discipline**
>
> **31 In the light of our finding in relation to item (4) we are left with the Tribunal's findings in respect of the no confidence motion and AC determination. What was the reason or reasons for these determinations? Did that reason or one of the reasons fall within section 65(2)(c)? One of the reasons for the NCC motion and the AC determination, so the Tribunal found as fact, was the belief in each case that the Applicant's pen portrait amounted to an attack on the independence of union preferred candidates should they be elected trustees of the RBS Pension**

> **Fund. That was an assertion by the Applicant that those candidates, members and office holders in the union, and endorsed by the union, proposed to contravene a rule of law, namely the duty of a trustee to act independently; see Cowan - v- Scargill [1984] 2 AER 750, to which the Tribunal was referred by Mr Draycott (EWR paragraph 14). In these circumstances we can see no grounds in law for impugning the Tribunal's findings at paragraphs 24 - 25 EWR.**
> **32 In reaching a similar conclusion in relation to the AC determination we are satisfied that the Tribunal was entitled to take into account, on the whole of the evidence, the inference which they drew (EWR paragraph 32) that the members of that committee took into account everything which they had seen in the correspondence copied to them, notwithstanding the assertion of Mr Ainsworth to the contrary.**
>
> **(3) Section 65(5)**
>
> **33 Again, in relation to both, now relevant determinations, the Tribunal did not accept that another member would have been disciplined without the section 65(2)(c) reason applying. That, in our judgment, was a finding open to the Tribunal. At paragraph 24 EWR they found that it was not the fact of her standing in the election and showing disunity which led to her being disciplined, it was solely the reason falling within section 65(2)(c).**

32. In **Unison v Kelly** [2012] IRLR 442, the claimants in the employment tribunal had produced a satirical leaflet accusing the Standing Orders Committee of breach of the union's rules. The claimants adapted the Japanese pictorial maxim "the three wise monkeys" who "see no evil, hear no evil, speak no evil". It was alleged that in so doing they had caused racial offence. The rejection of the union's attempt to rely on section 65(5) TULR(C)A 1992 by the employment tribunal was upheld in the EAT. Supperstone J stated that:

> **An individual is unjustifiably disciplined if 'one of the reasons' for disciplining him is attributable to the actual or supposed conduct to which s.65 applies (s.65(1)). If a member of a union says or does something for which members would normally be disciplined anyway, independently of the fact that the conduct is or is connected with a protected act, then it is not unjustifiable to discipline the member in question for that conduct (s.65(5)). Paragraph 2892 in Division M of Harvey on Industrial Relations and Employment Law gives the following example:**
>
> > **· ... suppose a union leader, haranguing a mass meeting, urges members to come out on strike. Joe Just is opposed, and expresses his opposition by throwing a bad egg at the orator. According to the blacklist it is "unjustifiable" to discipline a member for indicating opposition to a strike; but if it is shown that members who throw missiles at union officials are usually disciplined for, say, bringing the union into disrepute, then Joe can be justifiably disciplined for throwing the egg, even though it would be "unjustifiable" to discipline him for opposing the strike.'**
>
> **Accordingly the respondents cannot be disciplined for the allegations they made against the SOC; on the other hand they could be justifiably disciplined for causing racial offence by the cartoon. However the tribunal was entitled to conclude that the discipline that was in fact imposed was as a result of what the**

> **respondents said about the SOC and that they would not have been banned from holding office for such lengthy periods for the unintentional racial offence.**

33. Supperstone J rejected the argument that the wording "would be disciplined" in section 65(5) TULR(C)A 1992 requires only that some form of disciplinary sanction would be applied (including a lesser sanction, as might appear to be the case from the wording of the provision):

> **64. Mr White contends that the tribunal put an impermissible gloss on the statutory wording which requires the tribunal to consider whether the act, omission or statement of the claimant is one in respect of which individuals would be disciplined by the union, not whether precisely the same disciplinary sanction would be applied. Section 64(2) should be read with s.65(5). Section 64(2) provides that an individual is disciplined if a determination is made by an official of the union that the person is deprived to any extent of the benefits, services or facilities of the union (s.64(2)(d)) or subjected to some other detriment (s.64(2)(f)). Section 64(2) sits, he submits, uneasily with s.65(5) if s.65 requires the tribunal to consider whether the union would have imposed precisely the same disciplinary sanctions on the appellants irrespective of whether their production and distribution of the leaflet was in connection with conduct falling within s.65(2). He submits that the test applied by the tribunal is one which a trade union is unlikely to be able to satisfy, is not required by the wording of s.65(5), and is incompatible with Article 11 of the Convention (on the assumption that the challenge under ground 1 fails and ss.64-65 are otherwise compatible with Article 11).**
>
> **65. We reject Mr White's submissions. We agree with Mr De Marco that the words 'would be disciplined' in s.65(5) mean would have been disciplined as the relevant individual was in fact disciplined. As Mr De Marco observes, if an employee who had been expelled from his union for alleging a breach of the union's rules by producing a satirical leaflet could not rely on the statutory protection because an employee who produced a similar satirical leaflet which did not allege a breach of rules would have been subjected to an oral warning under a disciplinary procedure then the statutory protection would have no real meaning or effect.**

34. The parties in this case accepted before the employment tribunal that the wording "if it is shown" in Section 65(5) TULR(C)A 1992 requires the union to show that the exclusion of liability applies.

35. Section 65(6) TULR(C)A 1992 provides a further exception from liability where an assertion that would otherwise constitute protected conduct is false and made in bad faith. That sub-section was held not to apply in this case. That determination is not the subject of a cross-appeal.

The Tribunal's determination

36. The tribunal considered that the analysis could be assisted by considering 3 potential reasons for the claimant being disciplined:

> **82. It was suggested during the hearing, and later adopted by the parties during their submissions, that there were three potential reasons for the claimant being disciplined. We will call them reasons (a), (b) and (c). They were:**
>
> **a. The fact of her support for the legal action by Mr Johal and Mr Gill against the union.**
>
> **b. Her having funded (or participated in the funding of) the legal action using union funds.**
>
> **c. The lack of proper governance by the claimant during the meeting of 8 September 2016, the nature of the mandate given to Mr Johal and Mr Gill and/or her supervision over their exercise of that mandate.**

37. Within the section headed "the facts" the employment tribunal recorded that:

> **86. When Mr Reay was asked whether the claimant would have been disciplined had she spent her own money on the litigation by Mr Johal and Mr Gill (effectively reason (a)) he immediately and without hesitation said that she would not.**
>
> **87. He was clear about this, and we accept it as being correct. The respondent's focus (as will appear below) has always been on the use of union money to bring the legal challenge, not the legal challenge itself. If the claimant had used her own money to fund the legal action by Mr Johal and Mr Gill she would not have been disciplined. Reason (a) was not a part of the decision to discipline her, either at the original stage or at the appeal stage.**
>
> **88. In cross-examination, Mr Reay gave both (b) and (c) as reasons for the discipline. He said that the claimant had been wrong to use union money to fund the legal action when there were other internal routes available for resolution of the dispute. He said that as branch secretary she had a responsibility to exercise "due diligence" in the spending of union money and in ensuring compliance with the rules.**
>
> **89. When asked directly what the claimant had done wrong, he said that it was using union money to take the union to court, but that there were also other factors (which we take as a reference to the governance points). He agreed that what was written in the notes about the 'key consideration' was correct. He did not accept that the payment of money for legal action against the union amounted to either a "worthy cause" or being for the benefit of "members who have suffered misfortune" as the claimant had said in her evidence.**
>
> **90. He said that if the claimant's governance had been perfect (thus removing reason (c)) she would still have been disciplined, and that if she had applied this money to some other cause (for instance, the family fun day we heard evidence about) but with a similar lack of proper governance over the use of the money she would have been disciplined and the same sanction would have been applied.**

> **91. While Mrs Fraser Butlin and to some extent Mr Reay in the tribunal sought to characterise the decision as being one based on reason (c) this does not match with the evidence given or the material from the time. The note of the decision records that the 'key consideration' was the use of the union funds to take High Court action against the union. Mr Reay did not disagree with this. A reading of the materials from the time (extracts from which are set out above) show that it was this use of the union's money that was central to the decision to discipline the claimant, and not any consideration of her lack of governance in respect of the decision or the subsequent spending of the money. We accept that the governance question was a factor in the decision to discipline the claimant, but it was secondary to the 'key consideration' which was that the union's money had been used to sue the union.**
>
> **92. The reasons for the disciplinary sanctions were reasons (b) and (c), with reason (b) being the predominant reason.**
>
> **93. As explained above, it is not necessarily to set out a separate analysis of the appeal decision, and our findings as to the reason for the original disciplinary sanctions are equally applicable to the reason for the appeal sanctions. (Emphasis added)**

38. Within the section headed "Discussion and Conclusions", the employment tribunal first considered whether the discipline would be unjustifiable subject to section 65 TULR(C)A 1992 applying:

> **Was the reason for the discipline within s65(2)-(4)?**
>
> **108. We accept Mr Dracass's submission that section 65(2)(c) (when read with subsections (2)(d), (3) and (4)) is very widely drawn.**
>
> **109. The question section 65 is addressing is what conduct amounts to a 'protected act' for the purposes of the rules on unjustified discipline. To start at subsection (4), that applies to, "conduct which consists in … doing anything preparatory or incidental to … conduct falling within subsection (2) or (3)". Subsection (3), in turn, covers "conduct which involves any person being consulted or asked to provide such advice or assistance with respect to a matter which forms … the subject-matter of … [an] assertion … mentioned in subsection 2(c) above". Subsection 2(c) relates to "asserting (whether by bringing proceedings or otherwise) that the union … has contravened or is proposing to contravene a [legal] requirement".**
>
> **110. By following that legislative chain, we can see that conduct consisting of the assertion that the union has contravened a legal requirement is protected, as is conduct in asking someone to advise on such a matter and "anything preparatory or incidental to" such a matter.**
>
> **111. Plainly this is capable of covering reason (a) but we find that it also covers reason (b) and (c), since the funding of the legal advice (regardless of the source of the funds) and any formal steps taken to endorse or encourage the taking of legal advice can be caught by being "preparatory or incidental to" such an assertion. Where the union says that such actions are disciplinary matters in their own right, the answer for the union is in a consideration of section 65(5), not that such steps are not covered by section 65(2)-(4) in the first place (see para 66 of Kelly cited above). (Emphasis added)**

39. The employment tribunal set out its conclusions on section 65(5) TULR(C)A 1992:

> **113. We accept Mr Dracass's submission that the wording "if it is shown that" requires the union to prove that this subsection applies.**
>
> **114. There was some discussion at the hearing about what actual or hypothetical comparator the union could point to in support of its case that anyone else would have been disciplined for these actions even if they had not been in connection with a legal challenge to the union. We heard some evidence and argument to the effect that the claimant and her branch had authorised payments for the family fun day in much the same way as they had for the legal action (a 'mandate' with no budget and with bills being paid as submitted by various individual members). No disciplinary action had been taken in respect of that but (i) it does not appear that this ever came to the attention of anyone within the union with authority to propose disciplinary action, and (ii) both the respondents' witnesses considered that such an activity would fall within the activities for which branch funding could be made available, being a "worthy cause".**
>
> **115. The answer to this depends on looking at the claimant's actions as a whole, and then removing the protected element of support of legal action against the union.**
>
> **116. In that case we have a scenario in which a branch secretary has been party to and endorsed a loosely expressed mandate from the branch which appears to authorise unlimited spending by branch members, with them having no accountability for budgeting or any requirement for further authorisation of their actions by the branch. Not only that, but the expenditure is on something which can be costly and notoriously difficult to keep within limits (legal fees) when other avenues were available (such as an internal complaint) to achieve the desired outcome.**
>
> **117. We go further than that and find that the expenditure in question was not one which the branch was entitled to make under rule 17.3. We do not accept the claimant's suggestion that this payment was made on account of "members … who have suffered misfortune". That provision is not designed to assist members who are aggrieved at a decision that another part of the union has made. That only leaves expenditure on "worthy causes". We do not consider that money spent on legal challenges to the actions of another part of the union are a "worthy cause", and especially not when this is done without having previously taken any steps to resolve the matter internally. The end result of this was, of course, a loss of around £8,000 to the union.**
>
> **118. What we thus have is a serious failure of governance and the spending of branch money outside the scope permitted by the union's rules. The union was not able to point us to any comparable situations – perhaps because, as we were told during submissions, anyone faced with such an allegation would normally resign their union position. However, it appears to us to be inevitable that someone in such a situation would face serious disciplinary action, and we are satisfied that sanctions arising from this would at least equal to that which the claimant was subject at the initial disciplinary stage.**
>
> **119. As is set out in the note of the decision, the key consideration here was the use of union funds to sue the union, but the significance of that in this case was the use of union funds in this manner, not the fact of suing the union. We are satisfied that anyone who had used union funds in comparable circumstances,**

but not involving a legal challenge to a union decision, would have been treated in the same way and subject to at least the same sanctions as applied in this case. (Emphasis added)

The appeal

40. The claimant describes the central questions in the appeal as being:

> a. **Whether the ET erred in law by failing to approach its task under s. 65(5) TULRCA correctly; and/ or**
>
> **b. Whether the ET's conclusion on the s. 65(5) point was adequately reasoned; and/ or.**
>
> **c. Whether the ET's decision on the s. 65(5) point can properly be characterised as perverse.**

The tribunal's determination on section 65(5) TULR(C)A 1992

41. There are a number of elements of Mr Dracass' submission with which we agree:

(1) The employment tribunal found that the "predominant" reason for the Union imposing the disciplinary sanctions on the claimant was the fact she had participated in the "use of union branch funds to take legal action against the union";

(2) The tribunal assessed this as "reason b" ("having funded (or participated in the funding of) the legal action using union funds") with, as a secondary component "reason c" (lack of proper governance by the claimant during the meeting of 8 September 2016, the nature of the mandate given to Mr Johal and Mr Gill and/or her supervision over their exercise of that mandate); and

(3) The tribunal's focus had to be on the Union's reason for disciplining the claimant and whether the Union would have disciplined her absent the protected component of the conduct.

42. Mr Dracass agreed that the core of his argument was that the tribunal had substituted its analysis for that which the Union would have applied, in determining what would have happened absent the protected component of the conduct.

43. We do not consider that the tribunal's approach of considering a number of possible reasons for the discipline, and then seeking to fit the actual reasons into one or more of them, was helpful. It would have been simpler to determine the Union's reason, or reasons, for the discipline without having pre-defined categories. One of the possible reasons the tribunal defined, reason (b), "Her having funded (or participated in the funding of) the legal action using union funds" included two elements that require separation; namely, (1) using the Union's money to fund litigation and (2) the fact that the litigation was against the Union. This is because the reference to "the legal action" must be to the legal action that was taken against the Union.

44. The parties agreed that the most illuminating comparison is between what would have happened if the claimant had participated in the use of Union funds to bring legal proceedings against a party other than the Union (there might be many examples - but a public law challenge in respect of the operation of the airport could be apposite) as opposed to using Union funds to fund a legal challenge brought against the Union itself.

45. The parties also agreed that a useful framework for analysing section 65(5) is as follows:

(1) What was the reason, or were the reasons, for the discipline. The tribunal must determine the union's reason, and not substitute its own reason;

(2) Was that reason, or one of those reasons, conduct (constituting the relevant statements, acts and omissions for the purposes of section 65(7)) that would be protected, absent section 65(5);

(3) Can the conduct can be separated into components;

(4) If so, is there a component of the conduct for which the member would have been subject by the union to the same disciplinary sanction, absent the component that would otherwise have resulted in the conduct being protected. The determination must be of what the union would have done in such circumstances and, again, the tribunal must not substitute its reasoning for that the union would have applied.

46. The determination of what the union would have done absent the protected component is difficult. In some cases, there may be evidence about what the union has done in similar circumstances that may be of key importance in determining how the union would have acted in the circumstances under consideration. In other cases, the tribunal may have to assess the evidence of a witness who answers the hypothetical question, would the member have been subject to the same disciplinary sanction absent the protected component of the conduct for which the member was disciplined. However, considerable care needs to be taken in assessing such evidence. As Lindsay J, noted in **Chief Constable of West Yorkshire Police v Vento** [2001] IRLR 124:

> **Another permissible approach is to ask witnesses how the hypothetical case that requires to be considered would have been dealt with, although great care has to be exercised in assessing the answers to questions such as that, because the witness will be aware that it will be next to impossible to disprove any answer to a hypothetical question and also witnesses will know, by the time of the tribunal hearing, what sort of answer is convenient or helpful to the side that they might wish to support.**

47. The tribunal reached a clear finding of fact about the reasons why the Union disciplined the claimant; it was because of her role in allowing the use of Union funds to sue the Union which included, to a subsidiary degree, a lack of proper governance in so doing. That was conduct that absent section 65(5) applying would be protected. The conduct could be separated into components; most obviously (1) using Union funds to bring legal action (with an element of lack of proper governance) and (2) the legal action being against the Union.

48. In dealing with the hypothetical question we reluctantly conclude that the employment tribunal has fallen into a substitution mindset:

(1) At paragraph 115 the tribunal referred to "looking at the claimant's actions as a whole". When read in context it seems clear that it is the tribunal looking at the claimant's action as a whole, rather than assessing how the Union would have looked at the conduct in the hypothetical comparison;

(2) At paragraph 116 the tribunal states "we have a scenario in which a branch secretary has been party to and endorsed a loosely expressed mandate from the branch which appears to authorise unlimited spending". This is the analysis of the tribunal rather than that which the Union would have applied absent the protected element of the conduct;

(3) At paragraph 116 the tribunal states "the expenditure is on something which can be costly and notoriously difficult to keep within limits (legal fees)". That is the tribunal's reasoning. The Union's witness did not rely on this factor in answering the hypothetical question;

(4) At paragraph 117 the tribunal held "We go further than that and find that the expenditure in question was not one which the branch was entitled to make under rule 17.3." The tribunal sets out its own assessment;

(5) The tribunal goes on to state "We do not accept the claimant's suggestion that this payment was made on account of "members … who have suffered misfortune"" and "We do not consider that money spent on legal challenges to the actions of another part of the union are a "worthy cause"". Again, it is the tribunal rejecting the claimant's argument.

A

49. We have given a good deal of thought to the question of whether, having proper regard to the considerable care the employment tribunal obviously gave to its judgment, we are being over fastidious in our analysis. Mrs Fraser Butlin submitted that on a fair reading of the judgement as a whole it was clear that the employment tribunal did ask and answer the correct question in a manner that was open to it on the evidence that it heard. We have considered paragraph 119 in which the tribunal states "As is set out in the note of the decision, the key consideration here was the use of union funds to sue the union, but the significance of that in this case was the use of union funds in this manner, not the fact of suing the union" and whether this shows that the tribunal was, in reality, looking at what the Union would have done in the hypothetical situation. However, the note of the decision shows that the key decision was, indeed, "the use of union funds to sue the union" but not that "the significance of that in this case was the use of union funds in this manner, not the fact of suing the union". That vital coda was added by the tribunal and does not appear in the note. The tribunal in the same paragraph also states "We are satisfied that anyone who had used union funds in comparable circumstances, but not involving a legal challenge to a union decision, would have been treated in the same way and subject to at least the same sanctions as applied in this case". However, that analysis follows on from the sections in which the tribunal sets out its own analysis, rather than that which the Union would have applied in these hypothetical circumstances.

B

C

D

E

F

50. We have also considered with care the analysis the employment tribunal applied to the evidence of Mr Reay and, in particular their finding at paragraph 87: "He was clear about this, and we accept it as being correct. The respondent's focus (as will appear below) has always been on the use of union money to bring the legal challenge, not the legal challenge itself. If the claimant had used her own money to fund the legal action by Mr Johal and Mr Gill she would not have been disciplined. Reason (a) was not a part of the decision to discipline her, either at the

G

H

original stage or at the appeal stage." It does not follow from the finding that Mr Reay would not have objected to the claimant using her own money to sue the Union that he did not object to her using the Union's money to sue the Union, to a greater extent than if she had used the Union's money to sue another party. The Tribunal must have decided that the fact that the money was used to sue the Union was a component of the conduct that formed a reason for the discipline, otherwise the conduct would not have been protected at all, irrespective of section 65(5).

51. We conclude that overall, given a fair reading, the tribunal's reasons demonstrate that it made its own assessment that the same disciplinary action would have been appropriate absent the protected component of the conduct, rather than determining whether the Union had shown it would have applied the same sanction in the hypothetical circumstances.

52. We do not consider that the perversity or **Meek** grounds add anything of significance. Particular care should be taken in relying on the change to rule 17.3 of the Union's rules as supporting any argument as to the approach that the Union would have taken absent the component of the conduct that was protected, because the change to the rule postdates the time at which the claimant was disciplined.

53. We do not consider that it can be said that there is only one possible answer to this issues. Proper consideration of **Jafri v Lincoln College** [2014] IRLR 544 requires a remission.

54. In his skeleton argument, Mr Dracass, suggested that the remission should be to a differently constituted employment tribunal. In his oral submissions he accepted that remission to the same tribunal might be appropriate. We consider remission to the same tribunal is the

appropriate course of action because, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

(1) The employment tribunal made a number of key findings that have not been subject to the appeal;

(2) Remission to a new tribunal would require a rehearing, so would not be proportionate;

(3) The matter should be capable of being determined on the basis of evidence already heard, the parties' submissions and consideration of this judgment, without the need for further evidence; although whether brief further evidence should be permitted is a case management decision for the employment tribunal; and

(4) The tribunal clearly took great care with this decision that concerned provisions that are not considered regularly – we have no doubt that they will adopt a professional approach on remission.

55. As is done in some cases, this judgment was sent to the parties on embargoed terms so that they might suggest corrections to typographical errors and the like. A standard letter sent asked that Counsel liaise as to the proposed form of order and state "whether they need to be heard further as to disposal". The latter point is to deal with circumstances in which disposal has not already been determined and should not have been included in the letter sent in this case. Mr Dracass has asked that he should have an opportunity to make further submissions in respect of disposal. Mr Dracass dealt with the disposal of the appeal in his skeleton argument and in oral submissions, and we have made our determination. We consider that there is no proper basis to reopen our determination that the matter be remitted to the same employment tribunal.