Neutral Citation Number: [2018] EWCA Civ 1358

Case No: A2/2017/0102

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Slade J

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2018

Before:

LORD JUSTICE UNDERHILL
LORD JUSTICE BEAN
and
LORD JUSTICE IRWIN

- -

Between:

STEPHEN MORRIS	**Appellant**
- and -	
METROLINK RATP DEV LTD	**Respondent**

- -
- -

Mr Changez Khan (instructed by **Tilbrook's**) for the **Appellant**
Dr Edward Morgan (instructed by **Prosperity Law**) for the **Respondent**

Hearing date: 26 April 2018

- -

Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. This is an appeal against a decision of the Employment Appeal Tribunal (Slade J sitting alone) dated 15 December 2016, allowing an appeal against the decision of an Employment Tribunal sitting in Manchester (Employment Judge Slater sitting alone) that the Claimant, the Appellant before us, was unfairly dismissed. The ET's finding was not only of "ordinary" unfair dismissal under section 98 of the Employment Rights Act 1996 but also of "automatic" unfair dismissal for taking part in trade union activities under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992. We were told that at a subsequent remedy hearing the Appellant was awarded compensation in the sum of (in round terms) £39,000.

2. The Appellant was represented before us by Mr Changez Khan and the Respondent by Dr Edward Morgan, both of counsel, both of whom appeared in both the ET and the EAT.

THE FACTS

3. The Appellant was employed by the Respondent company, which at the relevant time operated the Metrolink system in Manchester, from 2000 until his dismissal on 17 December 2014. Latterly he was employed as a supervisor. He was the North West England Representative of a small independent trade union called the Workers of England Union. Although the Respondent had no recognition agreement with the Union, it dealt with it informally in relation to issues affecting its members.

4. In June 2014 Metrolink carried out a restructuring exercise under which changes were to be made to the role of supervisor and the number of supervisors would be reduced. All those within the scope of the exercise underwent what is called in HR jargon an "assessment centre", being an exercise carried out on a single occasion to assess their suitability for potentially different roles in the restructured organisation. It was apparently understood that their line managers would not be involved in the process. The outcome of the assessment centre was that five supervisors were put at risk of redundancy. Four of them were already members of the Union, and the fifth joined shortly thereafter. They included a Mr Armsden.

5. On 31 July 2014 the Appellant in his capacity as representative of the Union lodged a collective grievance on behalf of the employees who were at risk of redundancy, taking various points about the conduct of the assessment. There was a meeting with the Respondent's HR Director, Ms Daley, on 6 August, at which it seemed that a satisfactory resolution had been reached under which other roles would be found for all of the employees affected, with a degree of pay protection.

6. On 12 August 2014 Mr Armsden was told by one of the other supervisors that a colleague called Liam Kennedy had a photograph of part of a diary kept by a Mr Lord-Jones. Mr Lord-Jones was the line manager of some of those whose job was affected by the restructuring, and it appears that following the assessment centre he was briefed by his superior, Ms Crighton, about how the other candidates had performed and had made notes of that conversation in his work diary. It was those notes that had been photographed: it is not known by whom or how, but it is common

ground that it was without Mr Lord-Jones's consent. Although the ET had a copy of the photograph (and indeed was shown the original diary) it did not record the details of what was said about the candidates: however, it is clear that in respect of the five "unsuccessful" supervisors the comments were adverse. Mr Armsden, who did not appreciate that the comments had come from Ms Crighton, took the notes to be evidence that Mr Lord-Jones had had a role in the assessment, contrary to the announced procedure. He told the Appellant about the photograph and the Appellant asked him to forward it to him. (Although literally accurate, it is clumsy to continue to refer to a "photograph": I will from now on simply say "copy").

7. At the time that he received the copy of Mr Lord-Jones's notes the Appellant was on holiday. Shortly after his return he went to the HR department. Ms Daley was herself on holiday but he spoke to a Ms Huthwaite. The Judge found, at para. 46 of the Reasons:

> "… [T]he claimant explained to Ms Huthwaite that the main reason he wanted to meet Marie Daly related to the assessment centre and the successful and unsuccessful candidates. He told her that he had images on his phone of Graham Lord-Jones' diary that he was going to use as evidence and showed these to her. He said he wanted to know why Graham Lord-Jones had this information as he had not been at the assessment centre. He said that he thought the comments in the diary were detrimental to the unsuccessful candidates. The claimant said he felt that Mr Lord-Jones had a hand in the decisions made in terms of unsuccessful candidates from the assessment centre."

The Judge found that Ms Huthwaite did not regard the conversation as particularly significant and did not report it to Ms Daley on her return (see para. 60 of the Reasons).

8. On 7 September 2014 the Appellant, in his capacity as union representative, sent Ms Daley a letter on Union headed paper referring to the apparent agreement reached on 6 August but saying that there were "ongoing concerns" as a result of which the Union wished to proceed with the grievance. A number of points were then set out in summary form, followed by four items which were being raised "additionally". The second of these read:

> "We wish to raise the issue of Graham Lord-Jones 2013 diary, and the personal comments made about our members and their assessment day."

The copy of the notes was not attached nor was anything else said about the contents. The letter concluded:

> "I hope that this collective grievance and the new items can be heard at the earliest opportunity."

The item about Mr Lord-Jones's diary was included in the letter as a direct result of an e-mail sent the previous day by Mr Armsden to the Appellant identifying a number of issues which he wanted the Union to raise.

9. Two days later the Appellant was suspended because of an issue about tweets posted by his wife which contained material which the Respondent believed was confidential. Eventually no action was taken, but the episode forms part of the background to the issue before us.

10. On 19 September 2014 Ms Daley asked Ms Huthwaite if she knew anything about the reference in the letter of 7 September to Mr Lord-Jones's diary. Ms Huthwaite told Ms Daley about her conversation with the Appellant the previous month, which she described as "something and nothing". Ms Daley told Mr Lord-Jones that the Appellant had a copy of part of his diary. He confirmed that he had not given anyone permission to copy it, and she decided that there should be an investigation. The result of the investigation was that disciplinary proceedings were initiated against the Appellant on the charge that:

> "You have stored and have shared private and confidential information that is the property of a manager within [Metrolink]."

11. There was a disciplinary hearing on 1 December 2014 before the Respondent's Head of Network Operations, Mr Phillips. On 17 December Mr Phillips wrote to the Appellant informing him that he was summarily dismissed. The letter is carefully drafted but I need not set it out in full. Although various other matters are referred to in the letter the ET found that the reason for the dismissal was the two matters specifically identified in the charge, namely the "storing" of the copy of Mr Lord-Jones's diary (by retaining a copy on his computer) and its "sharing" (by referring to it in the letter of 7 September).

12. The Appellant appealed unsuccessfully against his dismissal, but the details are immaterial for our purposes.

THE BACKGROUND LAW

13. Section 152 (1) of the 1992 Act reads (so far as material):

> "For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee —
>
> (a) …
>
> (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time
>
> (ba)-(c) … ."

14. There has been a limited amount of case-law on section 152 of the 1992 Act and its statutory predecessors. The leading cases are the decisions of the EAT in *Lyon v St. James Press Ltd* [1976] ICR 413 and of this Court in *Bass Taverns Ltd v Burgess* [1995] IRLR 596. I take them in turn.

15. In *Lyon* the employers dismissed two employees for soliciting colleagues to join a trade union. They claimed that they had been unfairly dismissed by reference to

paragraph 6 (4) of Schedule 1 to the Trade Union and Labour Relations Act 1974, which was (so far as relevant for present purposes) in the same terms as section 152 (1) of the 1992 Act. The industrial tribunal found that the case fell outside the terms of paragraph 6 (4), partly at least because the employer was entitled to take objection to various aspects of the way in which the applicants had solicited their colleagues (including the fact that they had not told the employer what they were doing). The EAT allowed the employees' appeal. Phillips J acknowledged the possibility of distinguishing between a dismissal for carrying out trade union activities and a dismissal for misconduct occurring in the context of such activities. He said, at p. 418 B-D:

> "The marks within which the decision must be made are clear: the special protection afforded by paragraph 6 (4) to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."

He went on to say that on the facts of the instant case the employees could not be said to have been guilty of any misconduct. He concluded, at p. 419C:

> "We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair."

16. In *Bass Taverns* an employee who was a shop steward was invited by the employer to give a presentation at an induction course for new employees at which they could be encouraged to join the union. In the course of the presentation he made some highly-coloured critical remarks about the management's attitude to health and safety which he later accepted were "over the top". He was demoted. He claimed that his demotion constituted a constructive unfair dismissal for taking part in trade union activities, contrary to section 58 of the Employment Protection (Consolidation) Act 1978 (which was, again, in substantially the same terms as section 152 (1) of the 1992 Act). The industrial tribunal dismissed his claim in that regard but its decision was overturned by the EAT. This Court dismissed the employer's appeal. Pill LJ, with whom Balcombe LJ and Sir Ralph Gibson agreed, quoted with apparent approval the passages from Phillips J's judgment in *Lyon* which I have set out above. He said that in making the remarks in question the employee was plainly taking part in trade union activities and that he "[found] nothing [in what had been said] beyond the rhetoric and hyperbole which might be expected at a recruiting meeting for a trade union" – see para. 12 (p. 598); and that his admission that he had gone over the top "could [not] form the basis for a conclusion that in law the contents of the speech were outside the scope of trade union activities" – see para. 13 (p. 599). In support of that conclusion he emphasised that neither dishonesty nor bad faith were suggested. He observed, however, at para. 14 (p. 599) that:

> "I am very far from saying that the contents of a speech made at a trade union recruiting meeting, however malicious, untruthful or

> irrelevant to the task in hand they may be, come within the term 'trade union activities' in s.58 of the Act."

17. In *Mihaj v Sodexho Ltd* [2014] UKEAT 0139/14/2305 the EAT allowed an appeal against the decision of an employment tribunal in interim relief proceedings that it was not likely that the claimant trade union representative would be found to have been dismissed for taking part in trade union activities "as opposed to the way in which [they were] carried out". I need not summarise the facts. So far as the relevant principles are concerned, Slade J, at para. 17 of her judgment, said that *Bass Taverns* established that

> "… the way in which trade union activities are carried out is immaterial to the decision as to whether they are in fact trade union activities unless the way in which they are carried out is such as to be dishonest, in bad faith, or carried out for some other organisation or cause so as to remove them from the scope of what can properly be called trade union activities".

She said at para. 20 that that approach was to be followed rather than that in *Lyon* "if and insofar as there is any relevant inconsistency between [them]"; but she did not herself point to any specific inconsistency.

18. In *Azam v Ofqual* [2015] UKEAT 0407/14/1903 the claimant employee, who was a trade union representative, was dismissed for disclosing to her members confidential information with which she had been supplied by the employers in the course of negotiations on an expressly confidential basis. The EAT upheld the decision of the employment tribunal that the dismissal was not for taking part in trade union activities. HH Judge Eady QC directed herself by reference to *Bass Taverns* and *Mihaj*.

19. In my view the principle underlying these cases is – as so often – most clearly stated by Phillips J. If Slade J in *Mihaj* intended to suggest that there was some difference between his approach in *Lyon* and that taken by this Court in *Bass Taverns* I would respectfully disagree. At the risk of simply repeating less succinctly what Phillips J says in the passages which I have quoted, there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of section 152 (1), because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and his reference to acts which are "wholly unreasonable, extraneous or malicious " seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive (any more than Slade J's formulation in *Mihaj*); but the point which it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is genuinely separable. *Azam* is a good illustration of such a case: the employee's deliberate breach of confidence could fairly and sensibly be treated as a reason for dismissal distinct from the fact that it occurred in the context of trade union activities.

20. However, as Phillips J points out, this distinction should not be allowed to undermine the important protection which the statute is intended to confer. An employee should not lose that protection simply because something which he or she does in the course

of trade union activities could be said to be ill-judged or unreasonable (NB that Phillips J, I am sure deliberately, says "*wholly* unreasonable"). *Bass Taverns* is a good illustration of this: the employee was held to fall within the scope of the section even though he had gone "over the top".

21. It is worth noting that similar distinctions have been made in analogous contexts – see *Bolton School v Evans* [2006] EWCA Civ 1653, [2007] ICR 641, (protected disclosure); *Martin v Devonshires Solicitors* [2010] UKEAT/86/10, [2011] ICR 352, (victimisation); and *Panayiotou v Kernaghan* [2014] UKEAT 0436/13/1604 (protected disclosure).

THE ET PROCEEDINGS

22. At a preliminary hearing on 27 October 2015 it was decided that there should be a single hearing to determine both liability and remedy. The issues were summarised under six heads, which I need not set out at this stage. It is sufficient to say that, as already noted, the Appellant claimed to have been unfairly dismissed both by reference to section 98 of the 1996 Act and by reference to section 152 of the 1992 Act.

23. The claim was heard over seven days in November 2015. The parties agreed that, notwithstanding the earlier direction, "only liability and the *Polkey* and contribution issues" should be determined. The Appellant also made it clear that he relied only on head (b) of section 152 (1). Counsel made both written and oral closing submissions.

24. The Judge's reserved Judgment and Reasons were sent to the parties on 9 December 2015. They are full and carefully structured. At paras. 10-141 she sets out her findings of fact. At para. 142 she refers to but does not summarise counsel's submissions (a practice which has caused no problems in this case but which I think should be adopted only with caution). At paras. 143-148 she summarises the applicable law, referring both to *Lyon v St James Press* and *Burgess v Bass Taverns*. She gives her conclusions at paras. 149-164, by reference to the issues identified at the preliminary hearing. I take them in turn.

25. At paras. 150-156 she considers what was the principal reason for the Appellant's dismissal. That was obviously the correct starting-point since it would be decisive of the claim under section 152 and was the necessary first question under section 98. At paras. 152 and 154 she concludes that Mr Phillips' reason for the dismissal decision was that the Appellant was guilty of gross misconduct by having "stored and shared the diary information" in the sense noted at para. 11 above, namely that he had retained a copy of Mr Lord-Jones's diary on his phone and referred to the information in it in the letter of 7 September: she finds that Mr Phillips did not regard the Appellant's initial receipt of the information from Mr Armsden, nor his mentioning it to Ms Huthwaite on 28 August, to be gross misconduct. At para. 155 she goes on to consider whether that reason falls within the terms of section 152 (1) (b). She says that the reason why the Appellant had retained the copy of the diary and deployed it in the collective grievance letter of 7 September was that members were concerned that it showed an irregularity in the assessment process, namely that Mr Lord-Jones had been involved when he should not have been. She continues:

> "Whilst the collective grievance does not perhaps explain as clearly as it might the concerns raised by the information in Mr Lord-Jones' diary, it is clear that the concerns relate to the fairness of the assessment process. The reference to the diary entry cannot be detached from the rest of the grievance. The claimant was taking part in the activities of an independent trade union by storing the information and raising this on behalf of members. … The claimant was dismissed because of this storing and sharing of information. The reason for dismissal was because the claimant had taken part in the activities of an independent trade union at an appropriate time and the dismissal was automatically unfair."

She goes on at para. 156 to say that the two appeals did not alter the position. Since there is no issue on that point I need not set out what she says. At para. 157 she says that that conclusion means that it is unnecessary for her to deal with the issue of unfair dismissal under section 98 but that she will do so for completeness.

26. The second issue (relevant, as the Judge said, only to "ordinary" unfair dismissal) was whether the Respondent genuinely believed that the Appellant was guilty of the conduct for which he was dismissed – the "storing and sharing" – and had reasonable grounds for that belief. At paras. 158-159 the Judge finds that it did and had: as she notes, the basic facts were not disputed.

27. At paras. 160-162 the Judge addresses the question whether it was reasonable to dismiss the Appellant for that reason. She finds that it was not. She starts by finding that Mr Phillips had allowed himself to be influenced in his decision by a belief that the Appellant had been involved in the original copying of the diary, despite the fact that that was not what he had been charged with, and by the incident involving tweeting by his wife. She continues:

> "161. I conclude that dismissal for storage of the information alone would be outside the band of reasonable responses. If it had not been for the trade union context, some sort of warning for storing and not deleting the information might have been appropriate, but dismissal for storage alone would be outside the band of reasonable responses.
>
> 162. The only 'sharing' relied on by Mr Phillips was the reference in the collective grievance of 7th September. Since this did not even attach the photo or refer specifically to the contents of the diary entry, I conclude that dismissal for this sharing would be outside the band of reasonable responses."

28. At para. 163 the Judge finds that there was no procedural unfairness in the dismissal.

29. At para. 164 the Judge addresses "the issue of *Polkey* and contribution". She says:

> "Given my conclusion that the complaint under section 152 TULRCA 1992 is made out, I do not consider that the *Polkey* issue falls to be considered. In the light of this conclusion, I also do not believe that there was culpable and blameworthy conduct on the part of the claimant that contributed to his dismissal for this reason."

THE DECISION OF THE EAT

30. Slade J's reasons for allowing the Respondent's appeal appear at paras. 44-49 of her judgment, which was delivered orally. At paras. 44-45 she sets out the terms of section 152 and refers briefly to the case-law which I have discussed at paras. 14-20 above. At paras. 46-47 she discusses the nature of the Appellant's conduct in keeping a copy of the photograph of Mr Lord-Jones's diary, and whether the information in question could properly be described as "stolen". She concludes:

> "[A]t the very least, the information retained and stored by the Claimant was information that was private, confidential and unlawfully obtained."

She then proceeds:

> "48. In my judgment, as a matter of principle, dismissal for the retention of unlawfully obtained information for trade union activities in general does not enjoy the protection of section 152. Mr Khan contends that that conclusion must depend on the facts. If the unlawfulness played a small part in the activities which an individual engages in on behalf of a trade union, or if the unlawfulness element is not deliberate, it may be that storing and sharing unlawful material may not lead to the loss of protection under section 152. To that extent, the decision as to whether or not section 152 protection is lost is fact-sensitive. However on the facts of this case the Claimant well knew that what he had retained and stored was unlawfully obtained, was confidential information belonging to Mr Lord-Jones and was his private information. It is fanciful to say, as has been contended, that the Claimant acted properly by going to HR with the shots that he had been sent of Mr Lord-Jones' diary. The Claimant should not have asked for it, which he agreed that he did in the first place, and, if he had received it, he should have deleted it. It is also fanciful to say that the only thing he could have done was to go to HR and that he took the proper course of action.
>
> 49. In my judgment, the Employment Judge failed to apply section 152 TULRCA. The Employment Judge did not consider the real issues in the case in the conclusions section of the Judgment. She failed to consider whether the dismissal for the wrongful or unlawful retention of confidential information for trade union purposes enjoyed the protection of section 152. The appeal against the finding in favour of the Claimant of his claim of automatic unfair dismissal under section 152 is allowed. It follows that the finding that there was an unfair dismissal under section 98(4) ERA, which depended on the erroneous conclusion under section 152, also falls, and the appeal in that regard is also allowed. It is plain from paragraph 158 that the conclusion in relation to the ordinary unfair dismissal claim depended entirely on the erroneous conclusion under section 152."

31. It appears that the judgment as delivered orally stopped at that point, and there was evidently a doubt as to whether the effect of the reasoning was that the claim should

be dismissed or that it had to be remitted to the ET. Having, I infer, heard submissions about that, Slade J said the following, which appears as para. 50 in the transcript:

> "I have had a request to substitute a decision of this Employment Appeal Tribunal for that of the Employment Tribunal and dismiss the claim under section 152. Reference has been made to *Jafri v Lincoln College* [2014] ICR 920 CA, in particular to paragraphs 44 and 45 in the judgment of Laws LJ. In the circumstances of this case and on the findings of fact in the conclusions section of this Judgment, which must in any event stand, this case comes very close to a case in which on a proper application of the law there can be no other possible answer than to say that the reason for the dismissal was not for the Claimant taking part in trade union activities but for the gross misconduct in retaining unlawfully obtained confidential and private information. I am on the verge of making an order for substitution, and it is difficult to see in the circumstances of this case how more than one outcome on proper application of the law is possible. However, there would be a very small percentage chance that the outcome would be different on remission, and, having regard to paragraph 45 in *Jafri*, I am not going to make an order for substitution. However, I would like it noted that in the Judgment that if on a remitted hearing the Claimant fails in his claim the Tribunal should consider very carefully whether a costs order should be made against him."

32. That reasoning needs a little unpacking. Reading paras. 48-50 as a whole, it is clear that the essential reasoning is at the beginning of para. 49, namely that the Employment Judge failed to consider "the real issues in the case", and specifically "whether the dismissal for the wrongful or unlawful retention of confidential information for trade union purposes enjoyed the protection of section 152". That was an error of law which, applying the principles in *Jafri*, required the case to be remitted unless there was only one possible outcome on the facts as found. Slade J held, albeit very reluctantly, that that was not the case. That being so, a question arises as to the effect of the views on the facts which she expresses in the second half of para. 48, which she says in para. 50 "must in any event stand" on the remittal. What I take her to mean is that the only possible conclusion on the evidence, and the ET's findings of primary fact, was that the Appellant had acted culpably in the respects that she identifies and that the fact that he went to HR on the occasion referred to at para. 7 above did not excuse his conduct; so that the only question for the ET on remittal was whether that misconduct was sufficiently serious to take him outside the protection of section 152.

33. I should add that, while it might appear from the opening sentence of para. 48 if read in isolation that Slade J intended to hold that the retention of unlawfully obtained information necessarily and in all circumstances fell outside the scope of section 152, it follows from the remainder of the paragraph and the succeeding reasoning that she accepted Mr Khan's submission that there was no absolute rule and that the question was "fact-sensitive".

THE APPEAL

34. It is certainly true that the Judge's Reasons do not anywhere contain an explicit consideration of the essential issue in the case, i.e. whether the Appellant's conduct as regards the copy of Mr Lord-Jones's diary was fairly separable from the context in which it occurred. Slade J's decision that her decision was on that account flawed is thus on the face of it well-founded. However, Mr Khan drew our attention to the statement in para. 152 of the Reasons that "the reference to the diary entry cannot be detached from the rest of the grievance". He submitted that, in context, that was plainly intended as a finding that the Appellant's conduct did not cross the *Lyon/Bass* threshold. He was constrained to accept that, if so, it was decidedly opaque in its expression, but he said that it was important to read that single sentence in the context of the submissions made, which had directly addressed this issue, and of the fact that the Judge had in the preceding paragraphs explicitly summarised the effect of both *Lyon* and *Bass*: it was inconceivable that she would in those circumstances simply have failed to address the crucial issue in the case.

35. Dr Morgan submitted that it was not possible to read the sentence relied on by Mr Khan as being addressed to the crucial issue; and that even if it was the reasoning was wholly inadequate. He contended that the Employment Judge was doing no more than making the point that the reference to the information derived from the copy of the diary was an integral part of the grievance letter, and thus of the appellant's trade union activities, which was fine as far as it went but stopped short of addressing the *Lyon/Bass* issue. If the issue was not addressed there it was certainly not addressed anywhere else.

36. I was at first attracted by Mr Khan's submission, but in the end I do not think I can accept it. It is simply not possible to read the words in the sense for which he contends. It is not just that the language is inapt: the whole context in which the sentence appears is directed to establishing that the Appellant's reference to the copy diary (or, rather, to information derived from it) occurs in the context of a trade union activity. If the Judge had been intending to address the *Lyon/Bass* issue the sentence in question would have appeared in, so to speak, its own right. It would also have had to refer not only to the "sharing" but also to the "storing" of the copy diary, which was equally part of the misconduct relied on. I would accordingly agree with Slade J that the ET's decision is to that extent legally flawed.

37. However, that is not the end of the matter. Mr Khan also submitted that it is clear from the Reasons read as a whole that the Judge had found that the Appellant had not behaved in any way culpably as regards the "storing and sharing" of the copy of Mr Lord-Jones's diary. There is an explicit finding to that effect in para. 164 of the Reasons, where the Judge is addressing the issue of "contributory conduct" (see para. 29 above); but Mr Khan relied also on her finding that dismissal for the conduct in question was outside the band of reasonable responses, which is inconsistent with any grave culpability. If the Appellant's conduct was indeed not culpable, or in any event not seriously so, it was impossible to treat it as fairly separable from his trade union activities for the purpose of the *Lyon/Bass* issue. If that submission is well-founded the deficiencies in the Judge's expressed reasoning are immaterial.

38. I would broadly accept those submissions, but it is slightly unsatisfactory to rely simply on what the Judge said (or implied) about culpability in the context of the

section 98 and contributory conduct issues (particularly as we were told that she heard no submissions on the latter); and I would prefer to base my conclusion on the actual facts of the case as established in her primary findings. I would make the following points about those facts:

(1) There was no finding that the Appellant had anything to do with the copying of Mr Lord-Jones's diary. He was simply a recipient of a copy made by someone else without his knowledge or approval.

(2) The reason that he asked to be sent a copy when he was told about the information that it showed was that it appeared to reveal a potentially serious irregularity in the conduct of the assessment centre, which might affect the interests of his members.

(3) He told HR as soon as possible after he had received the copy: see para. 7 above. I do not place great weight on this point because his approach does not appear to have been on the basis that he was in an awkward position and wanted advice as to how to proceed. (I think this is why Slade J said that she regarded it as "fanciful" to say that that made his conduct alright.) But it does mean that he did not himself act in any underhand manner.

(4) There is no suggestion that he made any other copies, still less circulated them to anyone else.

(5) The only use that he made of the copy was to refer to the information that it contained in a letter to the Respondent itself, whose information it ultimately was (it could not of course belong to Mr Lord-Jones personally). The reference was in indirect and general terms (though since the Respondent had the diary itself it is hard to see that it would have mattered if it had been more explicit).

(6) Although what was copied was Mr Lord-Jones's diary, it was a work diary, and the information copied did not relate to him personally but concerned the assessments of the aptitude and ability of the Union members whom the Appellant represented: to the extent that it was confidential it was their interests rather than that of the business that were primarily affected.

I wish it to be clearly understood that none of those points – including the last – is intended as justification of the conduct of whoever copied Mr Lord-Jones's diary. It is possible, though this aspect was not explored before us, that the employees whose information was recorded in the diary would have had a right in some circumstances to be given that information; but that does not in any way justify its surreptitious copying. I am doing no more than identifying the extent of the relevant conduct on the part of the Appellant.

39. It cannot be uncommon for a union representative to be given, without soliciting it, information which he realises has been obtained without the owner's consent, whether orally or in the form of a copy document – to be, in other words, the recipient of a leak; and of course that can occur in other contexts too. Such a situation can be invidious for the recipient because it involves competing interests, and how to behave is not always straightforward. A strict moralist might say that the only correct course is to decline to receive the information in the first place or, if it is too late for that, to

make no use of it whatever and destroy any record. Slade J seems to have thought that that was what the Appellant should have done here. There may be circumstances where that is indeed the only right course (as it generally is, for example, when a lawyer is offered, or given, confidential information that he or she knows has been obtained without the owner's consent); and perhaps that would, by the highest standards, have been the correct way for the Appellant to respond in this case. But we are not here concerned with an ethics seminar. Regrettably (in hindsight), neither the ET nor the EAT sat with lay members, and I am reluctant to give any general guidance about what good industrial relations practice would require in such a case. But the question here is more specific, namely whether the very limited way in which the Appellant made use of the leaked information, which directly concerned his members as individuals and which it was in their interest for him to follow up, was a sufficient departure from good industrial relations practice to take his conduct outside the scope of "trade union activities" for the purpose of section 152.

40. As to that, I cannot believe that it was. The Judge's statement at para. 162 of the Reasons that, at most, "some sort of warning for storing and not deleting the information might have been appropriate" accords with my own view of the level of culpability of such fault as there may have been. I accept Mr Khan's reminder that the Court must be astute not to find that the *Lyon/Bass* line has been crossed wherever there has been an error of judgment or lapse from the highest standards, because that would undermine the important protection which Parliament has enacted for employees taking part in trade union activities.

41. Dr Morgan essentially adopted the stern view of the facts taken by Slade J, emphasising the importance of protecting confidential information and that the Appellant was a senior employee from whom high standards of behaviour should be expected. But for the reasons which I have given I do not, with respect, believe that Slade J's view can be justified on the basis of the findings of primary fact made by the Judge.

42. Dr Morgan also sought to rely on the decision of the EAT in *Azam*: see para. 18 above. I have no doubt that that case was rightly decided, but the facts were quite different. The union official's conduct consisted, as I have said, of the disclosure of confidential information to employees in deliberate breach of an explicit embargo: see para. 4 of Judge Eady's judgment.

43. There was a certain amount of discussion in the skeleton arguments about whether or in what way the taking of the original copy and its subsequent transmission to, and retention by, the Appellant constituted a breach of data protection legislation. The point was not pursued in the oral submissions, and rightly so since I do not see how that question could have any significant bearing on the essential issue as I have analysed it above.

44. I should add for completeness that Mr Khan submitted that even if Slade J was right to reverse the decision of the ET on the section 152 claim it did not, as she held at the end of para. 49, follow that its decision on ordinary unfair dismissal was undermined. There may be force in that submission, but in view of what I have said already I need not pursue the point.

DISPOSAL

45. I would allow the appeal and restore the decision of the Employment Tribunal that the Appellant was unfairly dismissed by reference to both section 152 of the 1992 Act and section 98 of the 1996 Act, which would mean that the judgment on remedy is also restored.

Lord Justice Bean:

46. I agree.

Lord Justice Irwin:

47. I also agree.