The scope of protection provided by s146 TULR(C)A 1992

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***University College London v Mr T Brown* UKEAT/0084/19/VP**

This case is a reminder that, where the activities of trade union officers are concerned, employers should take particular care before interceding.

Factual background

R had for many years permitted the use of a particular group email address; emails sent using that group email address would be received by all staff in the relevant department (100 plus staff). It was not possible for staff to "opt out"; like it or not, all such emails reached their inbox.

This group email address had, over time, been used by many people for many communications of various types, some more important than others.

C was an employee, and trade union officer; C had, like others, used the group email address in question. It was, for C, a useful communication mechanism, enabling messaging not solely to union members, but to all staff in the department.

R came to the conclusion that the group email address, as it was, should come to an end. R decided to replace it with two things: (1) a similar group email address, with all department staff included, but in respect of which all emails would be "moderated" before despatch was allowed; and (2) another group email address, unmoderated, but into which staff would need to "opt in" before they would be included.

C was discontent with this plan. One imagines that he may not have wanted his communications as a trade union officer being subject to "moderation" by R; and presumably he may have viewed the "opt in" group email address as being at risk of a much narrower circulation.

C took it upon himself to arrange for a new group email address to be set up. IT did as he requested; it then fell to C to populate that group address with individual email addresses. C

did so (it is unclear from where he sourced the relevant email address data).

R was not happy with C's approach; and R instructed C to delete the new group email address. C refused to do so. Given C's refusal, R proceeded to delete the group email address itself.

A disciplinary process was commenced; it was alleged: "you wilfully disobeyed a reasonable management request to delete …..". Further to that process a disciplinary sanction was applied, namely a formal oral warning.

The claim and the issues

C presented a claim under s146 TULR(C)A 1992 with respect to the warning given.

In accordance with the legislation, the claim turned on the following question:

- Was the sanction (the warning) given for the sole or main purpose of preventing or deterring C from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so?

In the circumstances of the case, the key issue seems to have been: by way of his conduct, was C taking part in the activities of an independent trade union?

The ET

The ET heard evidence from various witnesses; when it came to submissions R raised for the first time the question of whether C's conduct had breached data protection laws. R's point appears to have been that, if C's conduct was unlawful, then surely it cannot have been protected by s146.

The ET seems to have had little difficulty in deciding that, by way of his conduct, C had been taking part in trade union activities. That pertained both to his setting up of the group email and his refusal to act on R's instruction to delete it.

As to the issue of the "sole or main purpose" of the sanction, it appears that at ET R argued that the act (the refusal to delete) could be treated as separable from the "manner" of the act; that "manner" was said to be "flagrant defiance of a lawful management instruction".

The ET concluded that C had done enough to raise a prima facie case in respect of his s146 claim, which R had failed to rebut. In the circumstances the ET upheld the claim.

The ET addressed the issue of a possible data protection breach, despite R raising the matter

only in closing submissions. In essence the ET pointed out that it remained unclear what the alleged breach was and how C had in fact undertaken the process of populating the group email (i.e. "whether the claimant had used existing lists or the rather more laborious process of using public access data"). In the circumstances the data protection breach argument did not assist R.

The EAT

R appealed on various grounds, including arguments about data protection issues.

The EAT took the view that the ET had made findings of fact by virtue of which the core elements of the claim were made out. C was sanctioned for his refusal to delete the list; and in refusing to delete the list he had (on the ET's findings) been taking part in trade union activities.

As to data protection issues, given that R had not raised the matter until closing submissions, the EAT indicated that "the ET would have been entitled not to entertain these arguments". Nevertheless, the ET had done so; and in the circumstances (including lack of evidence/details of any breach) and bearing in mind the ET's express reference to relevant authorities (including *Morris* – as to which see below), the EAT could see no error of law in R's arguments on the point being rejected.

Comment

We are left in the dark about the source of the email address data used by C and as such whether C may have (whether knowingly or not) breached data protection law, or similar, in populating the group email address. If he did, would that have placed his activity outside the scope of protection?

Strictly speaking the sanction with which this case was concerned arose from C's refusal to delete the group email address, rather than the way he set it up or populated it. However, even if the sanction had covered that wider territory, and even if the way in which C had undertaken that process had been a breach of data protection law (or similar), it seems he probably would have been protected by s146 in any event.

As noted by the EAT, the ET referred to the guidance given by the Court of Appeal in *Morris v Metrolink RATP DEV Ltd* [2018] EWCA Civ 1358, which includes:

> 19. ……. 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 [Phillips J's] 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.
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> 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".

The ET's view, having considered *Morris* and other guidance, was as follows: "Even if the manner in which the Claimant peopled his alternative email list remains ambiguous and even supposing that it may have in some way short circuited strict compilation procedures, there is nothing in the evidence before the Tribunal, which indicates illegality, dishonesty, maliciousness or bad faith, as defined by the relevant case law, such as to place his actions and/or the manner of carrying them out out-with the protection of section 146 of the Act."

The EAT made no criticism of the ET for its views in that regard.

It seems therefore that s146 (and s152) TULR(C)A may well provide protection to cover at least some types of unlawful conduct, so long as that conduct forms part of "taking part in the activities of an independent trade union at an appropriate time".

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