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EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Brown	**AND**	University College London

Heard at: London Central **On:** 22 & 23 May,19 & 20 July 2018 (and 29-30 August 2018 in Chambers)

Employment Judge: Ms A Stewart

Members: Ms T Breslin
Ms G Gillman

Representation
For the Claimant: Mr S Keen of Counsel
For the Respondent: Ms N Cunningham of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's complaint that he was subjected to detriment, contrary to section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992, is well-founded and succeeds.

REASONS

Introduction

1. The Claimant, Mr Tony Brown, complains to this Tribunal that he has been subjected to detriment, namely; that he was disciplined, issued with a formal oral warning and had his appeal against this sanction rejected, because he took part in trade union activities, contrary to **section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992.** He has been employed by the Respondent since 5 March 2007 and continues in that employment.

2. The Respondent denies that the Claimant was subjected to detriment on account of taking part in union activities and contends that he was disciplined by way of an oral warning for wilfully disobeying a reasonable management request/instruction.

3. The Tribunal heard evidence from the Claimant himself and from the following witnesses on behalf of the Respondent: Mr James McCafferty, Director of IT Service Delivery and Deputy Chief Information Officer of the Information Service Division ("ISD") for the Respondent; Mr James Andrew Grainger, Director of Estates for the Respondent and the disciplining officer; and Ms Helen Fisher, Faculty Manager at the Faculty for the Built Environment and hearer of the Claimant's appeal against the disciplinary sanction.

Conduct of the Hearing

4. On day three of the Hearing it came to the Tribunals notice that there was a potential conflict of interest arising in relation to one of the Tribunal panel members, Ms Gillman, in relation to the investigating officer, Bella Malins' family whom she may have known some years ago. On day four of the Hearing, Miss Gillman explained the details, to the best of her knowledge, to Counsel for both parties whom, upon taking instructions from their clients, then informed the Tribunal that neither party had any difficulty with the circumstances outlined and, since the circumstances were in the past and also very tenuous and distant, the parties both consented to Ms Gilman continuing to sit and deliberate as a member of the Tribunal.

The Issues

5. As a result of a Preliminary Hearing held on 21 December 2017 the agreed list of issues to be determined by this Tribunal were as follows:

1. Did the Claimant's creation of an email distribution list amount to 'taking part in the activities of an independent trade union at an appropriate time' within the meaning of **section 146(1)(b) of the TULRC Act 1992,** as interpreted in light of **Article 11 of the ECHR?**

2. It is agreed that the Respondent's decision to discipline the Claimant by way of issuing a formal warning and rejecting his appeal against this sanction was 'detrimental treatment' within the meaning of **section 146(1) of the 1992 Act.**

3. Was the 'sole or main purpose' of this detrimental treatment to prevent or deter the Claimant from taking part in the activities of an independent trade union (the UCU) at an appropriate time, or to penalise him for doing so, contrary to **section 146(2) of TULRCA 1992,** as interpreted in the light of **Article 11 of the ECHR?**

4. If so, what remedy should be ordered by the Tribunal within the provisions of **section 149(1) of the Act?**

The Facts

6. The Respondent is one of London's leading multi-disciplinary universities with over eleven thousand staff and about thirty nine thousand students. The Claimant started his employment as an IT Systems Administrator on 5 March 2007 in the Information Services Division ("the ISD"). This division provides the whole Respondent University with centralised IT services. The Claimant became active in the University and College Union (UCU) at a time when redundancies were proposed as part of a reorganisation in 2009 and the Claimant was elected as one of four UCU representatives in the ISD Division. He was elected to the Unions Executive Committee in June 2009 and has held branch officer positions, initially as President and then as Secretary, since 2011. The Respondent recognises the UCU, together with two other trades unions, UNITE and UNISON.

7. Prior to 20 January 2016 ISD had one all-staff emailing list, ISD-ALL, which was un-moderated, and used for official departmental correspondence, unofficial correspondence between members of staff and ISD Trade Union correspondence. This was a long established situation, going back to at least 2002, and all departmental staff were automatically subscribed to the list. The UCU used this list for the purposes of communicating with all UCL employees generally, for example campaigning about issues affecting all staff and recruiting for non-union members to join the union

8. The Claimant's direct line manager was Mr Adrian Barker, who reported to Andrew Dawson. Mr Dawson reported to Mr James McCafferty, who joined the Respondent in August 2015 and Mr McCafferty reported to Mike Cope the ISD Director.

9. The Tribunal had before it email exchanges in September and October 2014 which appeared to exemplify a potential pattern. Mr Cope put out in the ISD email newsletter proposed changes to the administration service to which Iain McKay, another UCU ISD representative, replied, in his personal capacity, using the ISD-ALL emailing list, in which he set out objections to the proposed changes in a challenging, confrontational and forthright tone. Mr Cope then replied, again on the ISD- open list, expressing his disappointment that "Iain's approach continues to involve emailing all staff while representing only a partial picture with selective quoting. Such communications about ongoing discussions within the consultation process are not appropriate and so we will not respond to them". Another example of this pattern took place in October 2018 regarding an update to the extended support scheme which called forth a detailed and challenging response from Mr McKay.

10. Within a few months of joining the Respondent in August 2015 Mr McCafferty became aware of the open ISD-ALL email list and mentioned to Mr Cope and Mr Chris Moos, Head of the Communications Team at ISD, that he felt it was strange that such an open reply-all list existed. They confirmed that the list was unmoderated and that anyone could use it to communicate with everyone on the list. By late November/early December management discussions were taking place regarding the need for moderation of the list. On 25 November a member of staff had contacted Mike Cope asking if the number of senders to the ISD-ALL

email list could be locked down because she felt some of the posts were really disruptive or not appropriate, for example union emails or emails about 'ending world violence towards women day'. Mr McCafferty said that three or four members of ISD staff had mentioned to him that they were distracted by the inappropriate emails that were being sent to the ISD-ALL list, for example regarding raffle tickets, lost keys, or violence against women and children. Mr McCafferty's evidence was also that he regarded the very strong views stated by Mr McKay to be inappropriate to be sent to the all staff list, whilst acknowledging Mr McKay's right to voice his views critical of management proposals.

11. On 17 December 2015, after Mr McCafferty had expressed a desire to tighten up the open email list, Mr Moos circulated to the senior management team (including Mr Cope, Mr Speller and Mr McCafferty) proposed changes by applying moderation controls and restricting access to ISD staff only because; ' (i) Non ISD UCL people have been able to post to the lists often without knowing it would go to four hundred plus staff; (ii) We want to reduce the reply to all occurrences that annoy staff; and (iii) We want to stop the channel being used for "venting" to all staff or sending content that is only appropriate to be sent to a much smaller group.'

12 The proposal was therefore that the old all-ISD open list would be replaced by a new ISD-ALL list, which would be restricted so that only management and web coms could post to the list, whereas all other ISD staff and organisations wishing to post to the list would go in to a 'moderation queue' to be reviewed by the ISD web coms team. To enable other, wider, inter staff communication a separate ISD-conversation email list would be set up, to which staff could opt in, if they so wished.

13 On 20 January 2016 the ISD web coms team sent an email to all ISD staff setting out and explaining the proposed changes to the ISD email list system, seeking any comments on the new arrangements and promising a review after three months. Mr McKay replied to ISD-ALL immediately and in critical terms, his email beginning: "Fellow workers! If in doubt clamp down on freedom of speech of staff..." He urged people to make their objections clear. Later in the day Mr McKay sent another open email objecting to 'this very clear attempt to censor staff', referring to the 'Orwellian nature' of the proposals and urging management to reverse their decision. Mr Cope replied to Mr McKay, personally, saying "I made the decision so rather than berate colleagues in web coms you should talk to me, I am quite happy to meet to discuss". Mr McKay replied that the initial email sought comments from staff on the new arrangements and that he had simply responded to this request.

14 The documents before the Tribunal showed that other staff members made what may perhaps be described as more moderately expressed, reasoned responses objecting to the changes. A Mr Phillip Riebold of the UCL web and mobile services said in his email of 20 January that as far as he could remember there had been only perhaps three or four protracted email exchanges which should have been handled off line and that introducing moderation would stifle the exchange of ideas and free communication. Another staffing manager emailed that it seemed a backward step for the IT division, which had worked so

hard to have a single sign-on for all apps. Another member of staff suggested moving away from distribution lists altogether, as it was a little dated, and suggested an ISD all group on Office 365 'which offers far great collaboration tools'. Another member of staff asked 'what is the actual problem that this change is meant to resolve? It's not as if ISD-ALL has been awash with inappropriate messages of late, this looks rather like change for changes sake'. Another member of staff proposed making an opt-out rather than an opt-in list, 'as opting in gives it a much higher barrier to entry and means that some members may not discover it at all'. Another member of staff, Jo Lampard, a Senior Research IT Services Facilitator, said that she was 'dismayed, as the traffic has not been bothersome in either quantity or content and I really cannot see why it is has been necessary to restrict. It does not sit well as it smacks of censorship, please may we have a full explanation for the decision?' Other members of staff expressed like concerns about the proposed changes.

15 On 22 January the ISD web coms team replied to the comments received from staff on the proposed changes, defending the rational for the proposals: 'It is important that ISD-ALL is only used for direct messages that are appropriate for the vast majority of ISD staff... It is inappropriate that ISD staff should be able to email five hundred plus staff whenever they want... It is not the place for conversation, so a separate space had been created for this, denying that there was stifling of exchange of ideas and stating that web coms would be the primary moderator and would consider the appropriateness of the use of the ISD-ALL list for each post. A review was again promised after three months.

16 On 24 January 2016 Mr McCafferty emailed to Mr Cope and Eileen Harvey of HR stating that he had had his second monthly catch up meeting with UCU on Friday 22 January and that the first twenty-five minutes had been spent discussing the proposed email list changes. The union had said that it sent a clear signal that ISD management did not want open dialogue and that it amounted to censorship. Mr McCafferty said that he had defended the changes and had said that a review would take place in three months. This email also reported that the Claimant had said at the meeting that he was minded to set up a brand new distribution list, open to all ISD staff and that Mr McCafferty had "strongly urged him not to misuse UCL resources". Mr McCafferty continued that he would ask Adrian to keep an eye on that "if he does try to create some mischief".

17 Also on 22 January the Claimant contacted the IT service desk and requested the registration of a new 'mailman' list entitled 'ISD-discussion'. The Claimant told the Tribunal that any member of staff could request a new mailing list and that he bespoke the new list name at the earliest opportunity because he was not sure how long the process of granting it might take, perhaps up to several weeks. In the event, the service desk granted this (as yet unpeopled) list title on 25 January. Mr Moos told Mr Cope on 27 January that he had no objection to their proposed list being opt-out rather than opt-in. On 28 January Mr McCafferty contacted Liz Holden, asked whether a list request had been submitted by the Claimant and required that any further requests from staff for large group distribution lists now required his or Mr Cope's approval prior to

being set up. Ms Holden apparently told Mr McCafferty about the Claimant's request.

18 On 3 February 2016 there was a UCU union meeting at which the members voted to have a new open list and after this vote the Claimant set about populating his new mail list with the email addresses of all staff. On 19 February 2016, at 11.04 am, all six ISD UCU reps, including the Claimant, sent out an email on the newly created open ISD – discussion list, to all staff, welcoming colleagues to the new list and stating that it had been created following the management decision to restrict access to the ISD-ALL mailing list. This welcoming email then set out detailed instructions for two different methods of opting out of the list, should any member of staff wish to do so, and the email ended with a call upon the Director of ISD to reverse the decision regarding the ISD-ALL mailing list being moderated, stating that there was no objective evidence which had been provided supporting this decision, which the signatories considered to be against UCL's values of openness and inclusiveness and which was a disproportionate and inappropriate response to alleged past mis-use, which would be better addressed with an individual approach to participants.

19 On the same day, 19 February, Andrew Dawson emailed the Claimant "to confirm our earlier conversation, I have asked you to delete the ISD-discussion mailing list, please could you action this by 5pm today". At 17:29 on the same day the Claimant replied to Mr Dawson stating that he was writing in his capacity as a UCU rep and was copying his other UCU rep colleagues in to the email, inviting Mr Dawson to set out in writing why UCL believed that the discussion list should be deleted and undertaking for the representatives to consider his request in consultation with the membership. The email also stated that when they had met informally earlier in the day he had explained that the decision to create the new list had been taken by a meeting of the UCU and that in creating the list "I was acting in my capacity as Trade Union Representative" and that this had been clear from the first message sent to the list. Mr Dawson then forwarded the Claimant's email to Mr McCafferty saying 'this is Tony's response to my request to delete the list'.

20 On 22 February the Claimant, who was beginning a week's annual leave, conducted a detailed analysis over the weekend of all email traffic on the ISD-ALL email list, from April 2010 to date, a period of about six years, which he sent to his fellow UCU representatives and a copy of which was before the Tribunal. His conclusions showed: a total of 762 messages sent; that the large majority of emails had been from the ISD Director or Group Manager grade staff, thirty-nine from Mike Cope and sixty-three from web coms, mainly ISD newsletters; that Iain McKay had sent a total of fifteen messages, all in his personal capacity and none of them signed as UCU rep; that the longest threads and the most obviously inappropriate use of ISD-ALL related to the announcement and discussion of the ISD poster policy, which involved twenty-four messages, and 'international end violence against women day', which entailed six messages in all. He concluded that these latter 'inappropriate' thirty messages represented just over four percent of all messages sent. He then analysed that there were a total of eighteen messages, including the messages by Iain McKay, concerning

the admin services reorganisation in September 2014. He concluded "at the most generous definition, therefore, we have forty-eight arguably inappropriate messages or just over six percent of the total". He concluded that on the basis of the evidence, there were a small number of messages which had been arguably inappropriate sent to this wide distribution list and that 'a sense of perspective was necessary' and concluded "the revised policy restricting access to the ISD-ALL list is about restricting the content of messages not the volume of traffic by e.g. moderating message threads deemed inappropriate by ISD senior management team. It is fair comment to suggest that the main target is future messages from the UCU or any message that might be viewed as dissenting".

21 On 22 February at 13:10 hours Mr Dawson emailed the Claimant saying 'As you have failed to follow management instruction to remove this list and are now on annual leave, this will be actioned in your absence. The primary concern regarding the list is that all ISD staff were subscribed to it without their prior consent.'

22 On 29 February 2016 Mr McCafferty emailed the Claimant, copying in his line manger, Adrian Barker, confirming their conversation that afternoon that he had been presented with evidence "that you wilfully disobeyed reasonable management instruction in setting up and not closing down the ISD-discussion distribution list. I think this warrants an investigation. The investigation manager will be in touch in due course".

23 On 1 April 2016 Ms Bella Malins, who had been asked by Mr McCafferty to act as investigation manager, made contact by email with the Claimant informing him that the allegation being investigated is that "you wilfully disobeyed a reasonable management request made to you by Andrew Dawson, specifically you failed to take down an email distribution list that you had set up following an ISD senior management decision to make changes to the ISD-ALL email distribution list. You are invited to respond to this allegation in writing but as part of the investigation I would also like to meet with you". The email then offered the right to be accompanied, referred to the availability of the Respondent's disability policy and procedure on the intranet, (providing a link), and set out available hours for a meeting with the Claimant.

24 Mr McCafferty told the Tribunal that it was he who had asked for an investigation to take place but that he did not decide on any formal disciplinary action as that decision must have been taken by Jeremy Speller or Andrew Grainger, the senior management team at UCL. He added that as he was to be a witness he therefore did not Chair the disciplinary. He told the Tribunal that it was he who eventually received the investigation report and that he passed it on to HR, who made all of the subsequent arrangements. On 14 April 2016, just after the Claimant had returned from sick leave, Ms Malins again wrote to him, adding that in order to establish all of the necessary facts on the matter under investigation, she anticipated that her investigation and subsequent report may need to cover the context of setting up the email distribution list and, as such, he may wish to comment on that aspect also.

25 Between 20 January and 18 April 2016 an open web page letter was created, addressed to Mr Cope, from sixty-two union members asking him 'to reconsider the decision, taken without any prior consultation and without objective evidence of misuse, to moderate the ISD-ALL list.' They also asked him to stop the disciplinary action against the Claimant, who as a union representative, had been implementing the UCU decision to create an alternative list, and invited him instead to 'engage with the normal industrial relations processes of negotiation and consultation, in order to resolve what was in fact a dispute regarding the long established custom and practice, amounting to a contractual right, to send messages, unmoderated, to all staff'. They requested the restoration of this right.

26 Ms Malins, as part of her investigation, interviewed Mr McCafferty on 21 March 2016, Mr Dawson on 6 April and Mr Barker on 19 April. Ms Malins also conducted email correspondence with Liz Holden and the Claimant provided a written statement by email on 10 June, from all six UCU trade union representatives, claiming joint responsibility for the decision, who expressed their disappointment and concern that the Claimant had received an invitation to participate in a disciplinary investigation. This statement included that the unilateral withdrawal, without consultation, of the ISD-ALL unmoderated list by management had motivated the creation of the ISD-discussion list and that this matter required resolution using normal industrial relations processes and that a meeting had been requested with Mr Cope. The statement also refuted the assertion that the request from Mr McCafferty to close down the ISD discussion distribution list was therefore 'a reasonable instruction' and that the Claimant had not 'refused' in any event because he was acting under a mandate from the ISD UCU members to create an unmoderated list. The statement concluded that if the Respondent chose to pursue the matter further any action "will necessarily include all UCU ISD representatives". The Claimant confirmed to Ms Malins that the union reps email constituted his statement for the purposes of the investigation and that he had nothing further to add, which Ms Malins accepted on 17 June.

27 On 18 April 2016 Mr McCafferty wrote an email to Mr Cope and HR reporting on his monthly catch up meeting with UCU and UNITE which had taken place that day at which the Claimant and other representatives were present. He reported; that the UCU team only wanted to talk about the ISD-ALL distribution list and the investigation into the Claimant's behaviour. He stated that the UCU reps had handed him the open letter to Mike Cope with further signatories (sixty-one) and had said that the investigation could be regarded as corporate bullying. He commented; "some interesting names on this list". At the meeting, Mr McCafferty had defended the Respondent's position on the distribution list and had refused to comment on the individual investigation which was under way. He reported that the Claimant had said that he could easily email all of ISD by using a non UCL platform e.g. Gmail, and could even download email addresses from their externally visible directory entries, so that he was not using UCL's IT in any way. "I very explicitly told him not to". "After more than thirty minutes of this discussion going nowhere I said we needed to move on to other items but the Claimant said they were not going to discuss anything else until the distribution list issue was resolved and they were not going to attend any other catch ups

with me until that time". At that stage the Claimant and the other UCU representatives left the meeting.

28 On 25 July 2016 Ms Malins produced her investigatory report setting out three conclusions:

- That in setting up the two new mailing lists the management team have not limited communication of colleagues in the ISD division who wish to partake in such activities. Comments had been invited and a review promised.
- That the Claimant had set up a new ISD-discussion list and was subsequently given a clear management instruction to remove it. In choosing not to remove it the Claimant had disobeyed the management instruction, which can be considered reasonable as provision for Division wide communication was in place through the managements' two new mailing lists, as were plans to review the decision after three months.
- That the Claimant had at all times indicated that he was acting on collective decision making from the UCU representatives but it was not evident that this was the case when the list was first created on 22 January. However, it is evident that communications regarding the mailing list were made on behalf of UCU representatives.

29 Ms Malins attached to her report the notes of all of her investigation meetings, amongst which the Tribunal noted Mr Dawson having commented that some discussions on the previous open list might be considered inappropriate adding; "The list was being used by the unions for messaging to all ISD which left ISD management unable to present the other side". Also, Mr Barker told Ms Malins that there was no instruction from senior colleagues directly to the Claimant regarding the email list which he created.

30 On the 19 August 2016 Mr Cope sent an email to Eileen Harvey in HR, copied to Mr McCafferty, offering an update on the Claimant disciplinary situation in which he stated that once the invite to a disciplinary went out to the Claimant - "we expect two things to happen. Firstly, the UCU will send a broadcast email to all ISD staff with suitably inflammatory content. The email will be sent from an anonymous external address and will be signed by all reps. This will seek to show our restrictions are futile and challenge us to take action against all reps. Secondly, they will seek to organise an overtime ban at a time when we need staff to work outside normal hours for start of session. So we need to plan for this before that email is sent.
"The key issue around which the UCU will get traction on is having a discussion channel that is unmoderated and is opt-out (rather than opt-in).
"Our strategy is to neutralise enough of their case so less people will support an overtime ban and their anonymous email seems irrelevant.
"We intend to do this by implementing a new discussion board before James sends the email to the Claimant. This will replace the ISD-conversation email distribution list. It will be more functional than the existing email distribution list and importantly will be opt out. We can do that because the discussion board will offer digests and a way to look back over previous threads easily. We may also survey staff on whether they want the new discussion board to be opt-out or opt-in.

"This means that it will be about two to three weeks before James can send the email to the Claimant. Sorry about this and I should have thought this through more before. Hope that's ok."

31 Mr McCafferty explained to the Tribunal that he was concerned that any union action could have had a detrimental impact on the Respondent's ability to run IT services during the most business critical time of year, the start of session, when all the new students join the university. In this context, it was also noted by Mr McCafferty that there was a delay of over a year between the Claimant's action on 19 February 2016 and the Disciplinary Hearing which took place on 1 March 2017. This appeared to be due to a combination of various peoples' sick leave, annual leave, diary availability and, latterly, a request from the Claimant in January 2017 that the initially proposed Chair be replaced by somebody wholly unconnected with the department. The academic Christmas and summer holidays also may have played some part, as did the delay decision in paragraph 30 above.

32 On 14 October the ISD October newsletter was sent out with an introduction written by Mr Cope celebrating the great success of the start of session period, during which about 41,000 students had been enrolled, and including a proposal from Mr Moos for the use of yammer for ISD conversation.

33 On 15 November 2016 HR wrote to the Claimant convening a formal Disciplinary Hearing to consider the following charge of misconduct: " That on 19 February 2016 you wilfully disobeyed a reasonable management request to delete the email distribution list ISD-discussion". The investigation report was enclosed, there was a link to the disciplinary policy, the Claimant was offered the right to be accompanied and the meeting was convened for 9 December 2016, to be chaired by Jeremy Speller, Learning and Technology and Media Services Director)

34 On 23 November 2016 the Claimant wrote to the Interim Director of HR complaining that he was being victimised for his trade union activities and for raising a grievance on 8 January 2015 to address his being victimised for trade union activities. He requested that the disciplinary process be paused, pending a review of the entire case. This initial grievance referred to by the Claimant, which related to alleged detrimental changes to his job role, had been delayed because HR had refused to acknowledge that Mr Cope should be a respondent and had insisted that the panel should include a direct report of Mr Cope, which the Claimant stated was inappropriate. The Claimant rehearsed the rather contorted history of the grievance and asserted that he was then immediately finding himself facing a disciplinary charge which "continues the pattern of victimisation for trade union activities". He requested that the disciplinary charge either be dropped or set aside pending the hearing of his grievance against Mr Cope.

35 On 12 December 2016 HR replied; setting out in detail the process of the previous grievance from the Respondent's perspective, culminating in the Claimant's withdrawal of the grievance initially lodged and confirming on 11 November that he wished to raise an informal grievance against Mr Cope instead. However, that no such informal grievance had, to HR's knowledge,

since been raised. HR stated that it did not see how the current disciplinary matter was related to the previous grievance but that, if he felt that he had any concerns, that those should be raised as part of his response to the charge of misconduct.

36 On 16 December 2016 HR wrote to the Claimant rescheduling his Disciplinary Hearing to 10 January 2017. On 2 January 2017 the Claimant's UCU representative in the disciplinary matter, Professor Nicola Countouris, Professor of Labour Law, asked for the disciplinary meeting to be deferred in order for him to prepare proper representation and also because the Claimant was unwell. He also sought the replacement of Mr Speller as Chair with someone from outside ISD, in order to obtain complete impartiality and independence from the department. The Claimant was off sick from the 3 – 10 January 2017. The Respondent agreed to postpone the Disciplinary Hearing and the Claimant submitted a data subject access request.

37 On 7 February 2017 the Claimant submitted a seven/eight page detailed Submissions document, drafted by Professor Countouris, for the consideration of the disciplinary panel in advance of the Hearing, then scheduled for 14 February 2017. Both the Claimant and Mr McCafferty were unwell during this period and following further delays the Disciplinary Hearing eventually took place on 1 March 2017, chaired by Mr Andrew Grainger.

38 The Submissions drafted by Professor Countouris for the purposes of the Claimant's disciplinary hearing present as a cogently reasoned document of exemplary lucidity, commensurate with his status as professor of Labour Law and a specialist in EC Law. He firstly elaborated the legal framework, both statutory and case authority. Thereafter, his fundamental submissions were that the Claimant's action, in setting up the new mailing list, amounted to a lawful, reasonable and protected trade union activity, that the instruction to take it down did not therefore, or for any other reason, constitute a 'reasonable' management instruction and that the Respondent, in penalising the Claimant for refusal to obey, was engaging in conduct proscribed by **section 146 TULRCA 1992.**

39 The disciplinary hearing on 1 March 2017 lasted for 1 hour and 12 minutes and was chaired by Mr Grainger. The Claimant was represented orally by Professor Countouris. Ms Malins presented the management case and said that she had been given a narrow remit to investigate whether the Claimant had failed to follow a management instruction, and that her report was clear. It was contended by and for the Claimant that that he had been acting on behalf of the union, not in his individual capacity, and that the list was established for the 'appropriate and lawful union activity of communicating with union members, potential members and other members of staff' and that recruitment was a lawful union activity under European Human Rights Law. Professor Countouris stated that it was clear that this was an industrial relations dispute and not a matter for individual disciplinary process.

40 Mr Grainger sent the disciplinary outcome letter on 8 March 2017, upholding the disciplinary charge and issuing the sanction of 'a formal oral warning which will normally lapse 6 months after issue.' His rationale was that

he had focused explicitly on the charge made against the Claimant, who accepted that he had fully understood the clear request to take down the list; that management had provided a rationale for the changes it had proposed to the emails lists; that the only material difference was that the old list was opt-out and the new discussion list was opt-in and that none of the lists, old or new, were set up specifically or exclusively for the purpose of trade union communication. He ended by saying; 'I do not consider your submission in defence of your action that you were acting in your capacity as a TU representative to be relevant in these circumstances.' He offered the right to appeal.

41 It was apparent from the email exchange which took place between Mr Grainger and Craig Orr, HR Business Partner, after the meeting, that Mr Orr created the first draft of the outcome letter and that Mr Grainger at one point had considered upping the sanction to a written warning. Mr Orr's first draft made no mention whatever of the Claimant's trade union defence and Mr Grainger professed himself 'a little uncomfortable not making any reference to the (long) defence case.' Mr Grainger's evidence before this Tribunal was that he did not agree that the Claimant could defy management instruction simply because he was a trade union rep who felt that his actions were protected and that it was not for the Claimant to decide whether or not an instruction regarding staff mailing lists was reasonable or otherwise. This was a decision for management to make. He also stated that he had reflected that he would be very unlikely to agree to an unmoderated email list in his own department of Estates. He said that he had decided upon the minimum sanction because, although his actions had no disastrous effects, the Claimant had undermined the authority of management in ISD and that a message had to be sent that he had behaved in an unacceptable way.

42 On 15 March 2017 the Claimant appealed against his sanction on the ground; that the evidence did not support the conclusion reached; that the evidence presented at the hearing was that a legitimate trade union activity was being pursued; and that it was not open to the Respondent as his employer to dismiss his defence as 'irrelevant' but that it must be engaged with and addressed.

43 On 27 March Ms Helen Fisher was asked to chair a panel of 3 to hear the Claimant's appeal and the appeal meeting was set for 12 June 2017. She told the Tribunal that this was her first and, to date, last appointment in such a role.

44 On 8 June Professor Countouris' detailed appeal submissions, both legal and factual, were submitted to the Respondent in advance of the meeting. He reiterated the law **surrounding sections 146 and 148 of TURL(C)A 1992 and the case of Dahou v Serco Ltd [2016] EWCA Civ 832 CA.** He also noted that the Respondent had initially failed to send to the Appeal panel the Claimant's original submissions and witness statements from the disciplinary hearing, a matter remedied having been pointed out on the Claimant's behalf.

45 The appeal meeting took place on 12 June and lasted for 52 minutes. Professor Countouris urged the panel to engage with the Claimant's defence that he had been engaging in legitimate trade union activities on behalf of the union

and not acting as an individual. Mr Grainger replied that the Claimant's job role enabled him to set up and populate lists, which a union rep would not typically be able to do, hence he was either going beyond the grounds of his union, or employee, role.

46 The Tribunal found Ms Fisher's conduct of the appeal in general to be thorough, including that she took the decision to engage with the arguments advanced by the Claimant on the issue of trade union activities. She was being advised by Gemma Andrews, HR Business Partner.

47 On 15 June 2017 Ms Fisher wrote to the Claimant saying that the panel had decided to uphold the disciplinary sanction because it believed that the evidence available in the disciplinary hearing did support Mr Grainger's conclusion. She continued: "The panel considered the evidence related to whether the instruction to delete the email list was reasonable". Having considered all of the material, including the Claimant's submissions and his and his representative's responses to panel questions, "we concluded that Mr Grainger did fully consider the issue and did have sufficient evidence to conclude that the deletion of the email list did not prevent a protected trade union activity. The panel was of the view that there was sufficient evidence available to Mr Grainger that there were other options for communication between ISD trade union representatives and ISD staff members, such that the existence of the email list in itself did not constitute a protected trade union activity. We also agreed that Mr Grainger had sufficient evidence that ISD management had made it clear that the previous open email list was considered unsuitable for communications prior to the launch of ISD-discussion and therefore it could be inferred that a similar new list would not be considered desirable. Given this background, we concluded that Mr Grainger had sufficient evidence that the instruction to delete the email list was reasonable."

48 The Claimant presented his complaint to the Tribunals on 15 September 2017.

49 The Tribunal had before it an email exchange between 20 and 24 May 2016 illustrative of the new email moderation process. On 20 May the 6 UCU representatives sent an email to web comms asking for a notice entitled "Support our strike action on 25 and 26 May" to be sent to all staff on the ISD-ALL email address list. This notice set out the reasons for the strike action as: loss in value of our pay, pay inequality, casualisation and significant increase in vice-chancellors' and principals' pay. It urged staff to join the union in fighting for a fair deal for higher education staff. On 24 May, Chris Moos, as webcomms team leader sent an email in reply; "It would not be appropriate to send this to all-isd unless you can show any UCL-Union agreements which provide for this. In the meantime we would highlight you are welcome to send to the isd-conversation list and of course you will have your own UCU lists."

The Law

50 As to the law, the Tribunal directed itself as follows:

50.1 **Section 146(1) of the Trade Union and Labour Relations (Consolidation) Act 1992** provides that a worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer, if the act or failure takes place for the sole or main purpose of ..... (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so.

50.2 **Section 146(2) of TULR(C)A 1992** provides that "an appropriate time" means a time outside the workers working hours or a time within his working hours at which, in accordance with arrangements agreed with his employer, it is permissible for him to take part in the activities of a trade union.

50.3 **Article 11 of the European Convention of Human Rights** provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interest of national security or public safety .....

50.4 By virtue of **section 3 of the Human Rights Act 1998**, the scope of **section 146 of TULR(C)A 1992** should be interpreted so as to be compatible with **Article 11 of the ECHR.**

50.5 **Article 12 of the EU Charter of Fundamental Rights** provides that everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

50.6 **Section 148 of the 1992 Act** provides that on a complaint under **section 146** it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

50.7 **The ACAS Code of Practice on Time Off for Trade Union Duties and Activities** includes the following provisions ..... at paragraph 46; employers should, where practicable, make available to union representatives the facilities necessary for them to perform their duties efficiently and communicate effectively with their members, colleague union representative and full-time officers. Where resources permit these should include access to telephone and other communication media used or permitted in the work place such as email, intranet and internet. Paragraph 47; when using facilities provided by the employer for the purposes of communication with their members or their Trade Union, union representatives must comply with agreed procedures both in respect of the use of such facilities and also in respect of access to and use of company information. The agreed procedures will either be those agreed between the union and employer explicitly or comply with general rules applied to all employees in the organisation. Paragraph 48: Union representatives will have legitimate expectations that they and their members are entitled to communicate without intrusion in the form of monitoring by their employer. ...

50.8 The Tribunal was referred in argument to the following principal cases: **Morrish v Henleys [1972] ICR 482; Post Office v Union of Post Office Workers [1974] ICR 378; Brennan v Ellward (Lancs) Ltd [1976] IRLR 378; Dickson v West Ella Developments [1978] ICR 856; Lyon v St James Press [1976] ICR 413; Zucker v Astrid Jewels Limited [1978] ICR 1088; Fitzpatrick v British Railways Board (CA) [1992] ICR 221; Lyons and anor v St James Press Ltd [1976] IRLR 215; Port of London Authority v Payne (EAT) [1993] ICR 30; Bass Taverns v Burgess [1995] IRLR 596; Wilson and NUJ v United Kingdom [2002] IRLR 568; Bolton School v Evans [2007] ICR 641; SNP v ICO [2006] EAT 2005/0021; Yewdall v Secretary of State for Work and Pensions [2005] EWCA CIV 1549 UK EAT/0071/05/TM; Gallacher v Dept of Transport [1994] ICR 967 CA; British Gypsum v Thompson UK EAT 0115/11; Martin v Devonshires [2011] ICR 352; Miller v Interserve Industrial Services [2013] ICR 445; Mihaj v Sodexo Ltd UK EAT 0139/14/2305; Azam v Ofqual UK EAT 0407/14; Reynolds v CLFIS [2015] ICR 1010; Hale v Brighton and Sussex University Hospitals UK EAT 0342/16; Jet 2.com v Denby [2018] ICR 597; Morris v Metrolink RATP Dev Ltd [2018] EWCA CIV 1358.**

Conclusions

51 Did the Claimant's creation of an email distribution list amount to 'taking part in the activities of an independent trade union at an appropriate time', within the meaning of **section 146(1)(b) of TULR(C)A 1992,** as interpreted in the light of **Article 11 of the ECHR**?

51.1 The Claimant contends that, as a matter of common sense, and judged by an objective standard, his actions, undertaken in his capacity as a UCU representative and for the purpose of retaining well established, un-moderated, email communication with staff, both union members and non—members, were plainly trade union activities falling within the section.

51.2 The Respondent contends:

(i) that **section 146** does not extend to simply anything condoned by an independent trade union, but is restricted to activities characteristic of a trade union or within its function as such; no other interpretation makes sense of the definition of "an appropriate time" in **section 152(2)** ('the adjectival point'):, further or alternatively
(ii) Even if 'the activities of an independent trade union' is to be interpreted more widely than that, it must be taken to exclude acts that are tortious or in breach of contract or otherwise unlawful (such as an offence under statute), ("the unlawfulness point"); and the Claimant's act was unlawful because; a) it was in breach of his contract and b) it was contrary to Data Protection law: further or alternatively -
(iii) Even if the act for which the Claimant was disciplined potentially falls within **section 146**, the *manner* in which he did the act – in flagrant defiance of a lawful management instruction - took him beyond the protection of the section. The manner was 'separable' from the act itself. ("the manner point"); further or alternatively -

(iv) There is no evidence, apart from the Claimant's bare assertion, that the Respondent's sole or main purpose in issuing the warning was the prohibited reasoning under the section.
(v) In any event, there was no interference with the Claimant's **Article 11** rights by any of the Respondent's actions.
(vi) This case, inter alia, raises far reaching questions concerning the balance to be struck between the protection of trade union rights and the rights of managers to manage.

52 The Tribunal found unanimously that, on the face of it, communicating with the whole staff body, including both union members (even though there was also a separate union members email list) and non-union members, regarding matters of legitimate concern to all staff, such as pay, pensions and working conditions and disputes with management relating to workplace arrangements, must form part of what can reasonably and objectively be described as a core trade union activity. The Tribunal further accepted the Claimant's contention that campaign communications, including those regarding potentially lawful industrial action on matters of dispute between staff and management, constitute a potentially powerful tool for the recruitment of new members of a trade union. Recruitment is also a legitimate trade union activity, within the spirit of **Article 11 ECHR**.

53 The Tribunal concluded that the Respondent's changes to the existing un-moderated email list ISD-ALL, which had existed for a period of at least 14 years, fundamentally changed the landscape in terms of the UCU's communication access to all staff, including non-union members. It is fanciful and naive to suggest that flyers on desks and notices on notice-boards would achieve an alternative and equivalent reach to all staff, in an age where electronic communication has become overwhelmingly the norm and where there is rapidly increasing IT enabled remote working. It is also self-evident that, in real life, an opt-in list has radically less take-up than an opt-out list, requiring, as it does, both knowledge of the opt-in list and proaction as opposed to passivity. The Claimant cited an example of an opt-in of about 120 out of 500 staff.

54 Thus, (subject to the unlawfulness issue dealt with below), the Tribunal concluded unanimously, for the following reasons, that the Claimant was undertaking trade union activities in setting up a replacement open email list and in refusing to take it down, in order to preserve the free flow of communication on behalf of the union which had pertained for at least the previous 14 years.

- His actions, within 2 days of the Respondent's announcement of the intended changes, were a direct result of the Respondent management's decision to replace the existing un-moderated email list with a moderated list plus a separate open, but opt-in, discussion list.
- There is no exhaustive list of what does or does not constitute trade union activities. However, communicating officially with all staff must reasonably be taken to be included in any objectively definition of legitimate union activities, for the reasons set out above in paragraph 52 of these Reasons.
- He first raised his intention to set up such a list on 22 January 2016, in the context of a union catch up meeting with Mr McCafferty, at which all the union reps were present (paragraph 16 of these Reasons).

- Whilst there may not have been a *formal* union resolution authorising the Claimant prior to his bespeaking the title of the new list on 22 January, it was clear that he had formal union authorisation before peopling the list and before any message was sent out to all staff. This is not in dispute.
- His, and all union reps' consistent message to Respondent management throughout, has been that this was an act done on behalf of the union.
- Although not definitive, necessary nor sufficient in itself, the Claimant was, in fact, at all material times an elected trade union representative.
- There was no benefit in it for him, personally, although he may have been the best placed among the 6 UCU reps to set up the new list, given the IT knowledge and experience inherent in his role.

55 As to the "manner point" contended for by the Respondent, the Tribunal took the view that this contention, in part, begs the question of whether or not the management instruction was 'lawful' or not lawful, for example in the sense of contravening the Claimant's rights under **section 146(1).** In remainder, it merges with the 'unlawful' contention dealt with below.

56 Turning to whether the Claimant's acts in themselves, or in the manner in which he carried them out, were sufficiently 'unlawful', so as to place him out-with the protection of **section 146**: the Respondent did not define precisely in what manner the Claimant is alleged to have acted in breach of his contract of employment, save that it is contended that his refusal to take down the list was 'deliberate insubordination' in the face of a reasonable management instruction and therefore constitutes 'wholly unreasonable conduct'. This formulation, however, depends on whether management instruction was in fact reasonable.

57 As to the allegations of data protection breaches; during the Hearing, the Claimant's Counsel strongly objected that the Respondent had only raised illegality due to alleged breaches of the **Data Protection Act 1998 (DPA)** or the **Privacy and Electronic Communications Regulations 2003 (PECR)** "at the eleventh hour" and that this had not formed any part of its pleaded case, nor the witness statements, documentary evidence nor either party's cross-examination during the Tribunal hearing. Counsel nevertheless contended that, in any event, the Respondent's contentions in that regard were misconceived and made submissions to that effect.

58 The Tribunal clarified during the Hearing that the issue as to the Respondent's motivation in taking disciplinary action against the Claimant was to be determined on the basis of evidence of what was actually in the mind of the Respondent at the time, particularly in the persons of the disciplining officer/appeal officer. Data Protection considerations had only been raised to the very limited extent set out below, during the disciplinary process itself, and the Respondent conceded that DPA breaches had not been present to the minds of those taking disciplinary action at the time.

59 As to the increasingly developed argument put forward by the Respondent in submissions before this Tribunal on the issue of whether any alleged illegality put the Claimant out-with **section 246(1),** the Tribunal considered this issue on the basis of the submissions of both parties, both oral

and written, whilst mindful that it had not been explicitly part of the case as initially pleaded and that therefore there had been no evidence on the matter before the Tribunal. An adjournment was not sought for further evidence to be produced, nor did it appear to the Tribunal to be in the interests of justice, nor consistent with the over-riding objective, to consider one appropriate at this stage, noting that both parties have had professional legal representation throughout.

60 Data Protection awareness at the material time, on the evidence:

- On 28 January 2016 Mr Cope mentioned in an email to Mr McCafferty that the Claimant would need explicit permission from anyone he wanted to add to any distribution list.
- On 22 February 2016 Mr Dawson, in his email to the Claimant about having failed to follow a management instruction to take down the list, said that the primary concern 'is that all ISD staff were subscribed to it without their prior consent'.
- Mr Dawson's statement to the disciplinary investigation on 14 November 2016 included that he was unsure how the staff data was sourced for this particular list.
- The Claimant was not asked about how he had sourced the email addresses for his list, nor was this matter followed up at any time prior to, or during, the disciplinary process, at any stage.
- Mr McCafferty said in oral evidence on day 2 of the Tribunal Hearing that he had been under the impression that the Claimant had compiled the list from other email lists. It remained unclear whether the Claimant had used existing lists or the rather more laborious process of using public access data, to 'people' his new list.
- Mr Grainger stated that he had felt at the time that the Claimant had the tools, ability and knowledge to allow him to create the new list because of his position in ISD and that he felt that this was an abuse of his position. However, he accepted that this was not in his decision letter, although he asserted that it had been in his mind at the time. He did not refer to data protection issues in this regard.
- It was clear that this aspect of Mr Grainger's thinking had formed no part of the management disciplinary case against the Claimant. In fact, when Mr Grainger said in an email to Mr Orr in HR during the drafting of the disciplinary outcome letter, "Tony knew exactly what he was doing and was using his TU role inappropriately", Mr Orr replied; "the last line about being a TU rep, I would be inclined to leave that out – it was not mentioned in the charge and it wasn't the focus of the management case. We don't really want to get into that."
- In the disciplinary letter Mr Grainger states that he had "focussed explicitly on the charge made against you."
- It was not in dispute that it was open to any member of staff, in any department, to bespeak a new group email list from webcoms.

60 The Tribunal considered very carefully the extent to which 'unlawful' conduct by a Claimant might properly vitiate the protection for otherwise legitimate union activities afforded by **section 146(1)** and found the recent **Court of Appeal case of Morris v Metrolink** (**Judgment of LJ Underhill**) of

considerable assistance, reappraising, as it does, the previous leading cases on this issue.

60.1 Lord Justice Underhill said the underlying principle was most clearly stated by **Phillips J in the Lyon case:** 'the special protection afforded 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.' ... '*wholly unreasonable, extraneous or malicious* acts done in support of trade union activities might be a ground for dismissal which would not be unfair.' Lord Justice Underhill quoted the italicised words as seeming 'to capture the flavour of the distinction' for example; in the **Azam case** the employee's deliberate breach of an explicit embargo of confidentiality could be treated as a genuinely separable reason for dismissal distinct from the fact that it had occurred in the context of trade union activities, whereas 'over the top', ill-judged and even wholly unreasonable behaviour in carrying out union activities, without any suggestion that there had been 'dishonesty or bad faith', (the **Bass Taverns case**) did not lose the protection of the statute.

60.2 Lord Justice Underhill further said that there was no material difference between the formulation of Phillips J and the approach taken by the **Court of Appeal in the Bass Taverns case.**

60.3 Lord Justice Underhill, in deciding that Mr Morris' 'very limited use of leaked information' directly concerning individual union members was not sufficient to take his conduct outside the scope of "trade union activities" for statutory purposes said; 'We are not here concerned with an ethics seminar ... 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.'

61 Having careful regard to all of the evidence, submissions and authorities, the Tribunal concluded unanimously that the Claimant's actions were not such as to remove him from the protection afforded to trade union activities within the meaning of **section 146(1),** because:

61.1 It is not clear in precisely what way the Claimant's actions are alleged to have been in breach of data protection legislation. This was not raised with the Claimant at the material time, although the Respondent management had sufficient awareness of a potential issue to have been in a position to follow it up, had they chosen to do so. Equally, precise allegations were not put to the Claimant during this Tribunal hearing, so as to enable him to respond or refute.

61.2 The Claimant contends that it would be 'remarkable' to assert that staff sending emails to each other amounted to an infringement of the **DPA.** The Respondent submitted that **PECR** forbids the use of email on a 'public electronic communications service' for 'direct marketing purposes' which, it is contended, includes promoting an organisations aims and ideals.

61.3 The Tribunal, without having heard evidence or cross-examination, is not in a position to determine such issues as; what was the alleged 'data'; how it was alleged to have been unlawfully processed; whether an ISD staff email list constitutes a 'public' service, nor the ambit of 'marketing' in this context.
61.4 Further, there was insufficient evidence as to how, in fact, the Claimant did 'people' his new email list – to what extent from existing email staff lists or otherwise.
61.5 It is clear that the Claimant did not act in a covert or underhand way – he told Mr McCafferty, openly, at a union catch-up meeting on 22 January 2016 that he was minded to create a new list, the same day upon which he in fact bespoke the new list title from webcoms. His dealings thereafter were also openly conducted as between himself/his fellow union reps and management. There was nothing malicious or dishonest in the Claimant's conduct.
61.6 His refusal to take down the list was not an abrupt, defiant refusal but a nuanced and reasoned refusal, asking the Respondent to elaborate its reasons for the new email arrangements so that the union could consider them and make a reasoned response (paragraph 19 of these Reasons). There had been no consultation prior to the Respondent's changes.
61.7 It is trite law that any refusal to obey an instruction which the management considers 'reasonable' is not, per se, sufficient to constitute misconduct. An instruction may be found to be unreasonable, despite the belief of the management in question. In this context, the case law cited provides a variety of examples of the interface between management's view of gross misconduct and the ambit of protection provided for lawful trade union activities by **section 146(1).**
61.8 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.**
61.9 This was not disobedience to an explicit confidentiality embargo as in the **Azam case.** It was disobedience to a request to take down an email list, which the Claimant had created in order to preserve a long existing un-moderated channel of communication with all staff, on behalf of his union. The Tribunal is not satisfied that his manner of peopling the list with staff email addresses partakes of that degree of grave and separate misconduct sufficient to deprive his actions of the protection of the statute and, on all the evidence, the Respondent did not discipline him for his manner of peopling the list but for his deliberate insubordination in refusing to obey the instruction to take it down. There was no extraneous element here. Mr Grainger stated that it had been 'in his mind' (although not in his decision letter) that the Claimant had gone beyond trade union activity using 'the tools, ability and knowledge' inherent in his job role in ISD in order to enable him to create the new list. However, his email correspondence with HR show that he accepted HR's advice 'not to get into that' since it was 'not mentioned in the charge and wasn't the focus of the management case' against the Claimant.

62 Accordingly, the Tribunal's unanimous conclusion is that the Claimant's actions, both in setting up the list and in refusing to take it down, were 'taking part

in the activities of an independent trade union' within the ambit of **section 146(1)(b) of TULR(C) 1992** and were protected as such. It was not contended nor alleged that that his actions were not 'at an appropriate time'.

63 Given that the parties agreed that disciplining the Claimant constituted detrimental treatment within the meaning of **section 146(1),** the Tribunal then turned to consider the Respondent's 'sole or main purpose' in disciplining him.

64 Was the sole or main purpose of disciplining the Claimant to 'prevent or deter' him from taking part in the activities of an independent trade union at an appropriate time or 'penalising him for doing so', contrary to **section 146(2) of TULR(C)A 1992, as interpreted in the light of Article 11 of the ECHR?**

65 Whose mind? After the Claimant objected to Jeremy Speller as chair of the disciplinary, he was replaced by Mr Grainger, from an independent department. It is Mr Grainger's mind, as disciplining officer, as well as that of Ms Fisher, hearer of the appeal against the sanction, with which the Tribunal is concerned. However, it is clear from the evidence before the Tribunal that HR was consulted by both of them throughout the process and that HR advice was influential, perhaps especially so because neither of them had chaired such a panel previously. For example, in the email exchange with Mr Orr referred to in paragraph 41 of these reasons Mr Grainger said at one stage, "If you think it is inappropriate then I accept your advice" regarding the TU rep point which he had inserted. It is not alleged here that either Mr Grainger or Ms Fisher were biased.

66 However, there was clearly also broader senior management engagement surrounding this disciplinary. It was Mr McCafferty, together with Mr Cope and Mr Moos who initially formulated the senior management decision to moderate the original ISD-ALL email list (paragraph 10 of these Reasons); Mr McCafferty was consequently vigilant for signs of the Claimant 'creating some mischief' in setting up a new list (paragraphs 16 and 17 of these Reasons) and Mr McCafferty initiated the investigation into the Claimant's misconduct (paragraph 24 of these Reasons). Mr Cope, ISD Director, by email of 19 August 2016 to Eileen Harvey in HR, copied to Mr McCafferty, procured the delay of the letter inviting the Claimant to a formal disciplinary hearing, lest union objections to it interfere with the smooth running of the student registration period (paragraph 30 of these Reasons). This email includes the phrases; 'we need to plan for this' ... 'our strategy' ... and 'we intend to do this by ... 'this means it will be about 2 – 3 weeks before James (McCafferty) can send the email to TB' (the Claimant).

67 Mr Grainger was well aware of this wider context. He told the Tribunal that the ACAS Code providing for trade union email use "where resources permit" was not only a matter of financial cost but that 'the impact can have considerable cost' and was significant and that elsewhere in UCL there had been 'strong management desire to get better control of emails'. He also stated 'I would be very unlikely to agree to have an un-moderated distribution list in Estates.'

68 Mr Grainger stated that he had upheld the disciplinary charge against the Claimant because there was 'clear insubordination and wilful disobedience' to a

management instruction on a matter which Mr Grainger regarded as being within management's sole authority to decide, namely the control of emails. He considered it important that a message be sent that the Claimant had behaved in an unacceptable way – that he had done something wrong - so some sanction was necessary, although he did not fear that the Claimant would repeat his wrongdoing. He said that he decided upon the minimum level of sanction which he was able to give because there were "other factors at play", namely that the Claimant believed that he was undertaking trade union activities.

69 This, without more, is a clear statement by Mr Grainger that his intention in issuing a formal oral warning to the Claimant was to penalise him for refusing to take down the email list, which the Tribunal has in fact concluded, for the reasons set out above, was a trade union activity protected by statute.

70 However, it is clear from the **Gallacher case** that 'for the purpose of' in **section 146(1)** connotes an "object which the employer desires or seeks to achieve" and that there is a close link between 'purpose' and 'reason'.

71 Therefore, and in accordance with **section 148 of the Act** and the **Yewdall case**, the Tribunal first asked itself whether, on all the evidence before it, the Claimant had succeeded in establishing a prima facie case of impermissible purpose in the mind of the Respondent, particularly in the persons of Mr Grainger and/or Ms Fisher.

72 The Tribunal concluded unanimously that the following findings, cumulatively, gave rise to the reasonable suspicion that an impermissible purpose related to trade union activities was present to the mind of the decision makers at the material time:

72.1 Mr Grainger's obdurate and deliberate self-limiting of his consideration of the disciplinary decision before him to the Claimant's wilful disobedience to a 'reasonable management instruction', including his remarkable insistence that the Claimant's entire trade union defence was 'irrelevant'. This was simply not a credible position for a senior manager to take, in the Tribunal's view, in the face of; the entire union context; the Claimant's role as a TU rep and his colleagues' insistence throughout that the Claimant was acting on their behalf; Ms Malins' investigatory Report which placed the Claimant's actions squarely in the context of both the trade union and the Respondent's action in closing the open-all email list (paragraph 28 of these Reasons); the cogent defence submissions advanced by Professor Countouris, a recognised authority on the very areas of law underlying the defence advanced, with which Mr Grainger refused to engage in any meaningful way and to which he closed his mind, telling the Tribunal that he had had not had so much time to read them in advance, although he had of course heard the oral submissions at the disciplinary hearing.

72.2 Mr Grainger himself revealed his awareness of the wider context, for example: (i) during the drafting of the outcome letter he professed himself 'uncomfortable' about making no reference whatever in his decision letter to the (long) defence case (paragraph 41 of these Reasons); (ii) he stated that although he had focussed on this specific disciplinary charge he 'also considered that the setting up of the distribution list, after clear instruction not to, also constituted misconduct. One action clearly follows from the other ...', thereby

himself acknowledging the wider context; (iii) he effectively admitted the Claimant's defence position through the back door by awarding the lowest possible sanction because 'other factors were at play'- ie the Claimant's belief that he was carrying out union activities. Yet Mr Grainger failed to address the substantive defence contentions directly on the principal issue of guilt, whilst allowing them to mitigate the level of sanction. This fudged the issue.

72.3 Even Ms Fisher's appeal panel could not accept Mr Grainger's view that the trade union defence was 'irrelevant'. She said that it was relevant and attempted to address it in her outcome letter. She told the Tribunal that they took HR advice on the trade union defence and went on to form their own view.

72.3 There was, in the Tribunal's view, a remarkable disconnect between the detail and care with which the Claimant's defence submissions were advanced and argued on appeal (and indeed the care with which the appeal process itself was conducted) and the cursory nature of how the appeal outcome letter dealt with these issues. The letter (cited at paragraph 47 of these Reasons), states that Mr Grainger did fully consider the issue ... and then inserts the appeal panel's own findings that there was sufficient evidence available to Mr Grainger to conclude that the deletion of the email list did not prevent a 'protected trade union activity'. This directly contradicts Mr Grainger's insistence that he had confined himself to the disciplinary charge and that the trade union defence was 'irrelevant'. When pressed about this in Tribunal Ms Fisher said "it is possible that we were saying that Mr Grainger had reached the same conclusion as us" but on different grounds as "we had taken account of advice we had received as well." This appeared to the Tribunal to be another fudging of the issue.

72.4 HR was heavily involved in advising both Mr Grainger and Ms Fisher, neither of whom had, either before or since, chaired a disciplinary or appeal hearing. It must be assumed that HR was well aware of senior management's agenda in relation to the curtailment of un-moderated email lists and union resistance.

72.5 The wider agenda of 'getting better control of the email system' was evident, on all the evidence before this Tribunal. The Tribunal noted that: there was no consultation whatever before announcing the management changes to a moderated email system plus opt-in discussion list. Although a 3 month review was promised on at least three occasions, there was no evidence that any attempt was ever made to instigate this review, up to the date of this Tribunal hearing. Further, the Tribunal noted that Mr McCafferty had been aware that the Claimant had bespoken a new email list since 28 January 2016 and yet, surprisingly, made no effort to have an informal conversation with him about its undesirability and the possible consequences up to 19 February, the date of the first union email to the new list.

72.6 The Tribunal formed the view that senior management were fully determined to cease the old un-moderated email list and were not going to allow any impediment to this overriding intention. This must be taken to include consultation with the unions, which Mr McCafferty knew, from his meetings with union representatives, were dead against the changes.

72.7 As to the reason for this management decision to replace the old un-moderated email list; on the evidence before it (paragraphs 14 and 20 of these Reasons) the Tribunal concluded unanimously that the nuisance and inconvenience problems caused by the original ISD-ALL list being un-moderated were in fact very minor and of low volume over the years and could very

effectively have been addressed by taking up those rare occasions of abuse directly with the sender and by inserting an opt-out provision for those few staff who wished to avail themselves of it.

72.8 The Tribunal concluded unanimously, on a balance of probabilities, on all the evidence before it, that the real irritant and the principal motive for changing to a moderated list to which only management could freely post, was to stem the free "venting" (paragraph 11 of these Reasons) on disputed issues between management and unions, in particular by such forthright trade union voices as Iain McKay, then a union rep, although posting his strongest emails in his personal capacity. Mr McKay's emails tended to be couched in inflammatory terms, which management may have considered generated more heat than light, especially if they concerned matters currently the subject of negotiation between management and unions. From the union point of view, and indeed according to some of the feedback regarding the new arrangements from the wider staff body, moderation smacked of censorship and the shutting down of any dissenting voices in an institution of higher education dedicated to debate and the free flow of ideas. This was an important, ongoing and difficult matter for management as well as staff and unions, to the extent that there was a potential threat to industrial relations.

72.9 It might be argued that the decision to switch to a moderated list, without consultation, was a sledge hammer to crack a nut. A more reasonable course of action might have been to address Mr McKay's more extreme manifestations directly and personally with him and to agree a rule with all of the recognised trade unions that matters under current closed negotiations would not be the subject of email commentary by either side via the open email system, pointing out that management felt that it could not answer back to the jeopardy of ongoing negotiations.

72.10 It was wholly unrealistic to attempt to separate the disciplinary process against the Claimant from this wider context. It was entirely artificial and not credible for Mr Grainger to try to carve out a single act of disobedience to a reasonable management instruction by the Claimant from its surrounding context. The Claimant was explicitly acting as a union representative at the time of his refusal to take down the list. Whether or not the instruction to take down the list was 'reasonable' or not must necessarily entail a consideration of the substantive question raised by his defence; in refusing to take down the list, was he taking part in the activities of an independent trade union and therefore protected by **section 146**? Mr Grainger wilfully refused to engage with this issue. It is remarkable for any senior manager sitting as a disciplining officer to cast aside a cogently argued defence to a disciplinary charge, particularly when argued by an acknowledged expert in the field, as 'irrelevant', without providing reasons for so deciding. The fact that Mr Grainger did so, and the fact that Ms Fisher then added a contradictory, but still relatively cursory, gloss in upholding his decision, all apparently upon the advice of HR, gives rise to the inference that the issue of trade union activities was being deliberately and consciously sidelined, discounted and then overridden without proper consideration, even at appeal in the determination to see the Claimant punished.

73 The Tribunal therefore concluded unanimously that the burden of proof fell upon the Respondent to show what was the sole of main purpose for disciplining the Claimant and for upholding that decision on appeal.

74 The Tribunal is mindful that, whilst **section 148** may be regarded as a parallel provision to the reverse burden of proof provision in the discrimination legislation, this differs in that it is not necessary for the Respondent to satisfy the Tribunal that the impermissible purposes played no part whatever in its disciplining of the Claimant. It is sufficient for the Respondent to satisfy the Tribunal, on a balance of probabilities, that its sole or main purpose was not the impermissible purposes, but some other.

75 The Tribunal is also mindful that great care must be taken not to impute tainted reasoning of others in the organisation to an innocent decision maker (the **Reynolds v CLFIS case).**

75 The Tribunal scrutinised very carefully the explanations offered by Mr Grainger and Ms Fisher for their actions in disciplining and in upholding the disciplinary sanction. It concluded unanimously that the Respondent has failed to discharge the burden of satisfying the Tribunal that the main purpose of disciplining the Claimant was not to penalise him for having taken part in trade union activities, to which the prima facie case gives rise, because:

75.1 The Tribunal did not find credible that Mr Grainger, a senior manager and advised throughout by an extensive HR resource, could genuinely have ignored as 'irrelevant', without reasoning, the entire trade union activities defence case advanced by an eminent professor of labour law in his own university, at a disciplinary hearing against a trade union representative whose actions were being asserted throughout as those of all 6 union representatives.

75.2 If he had genuinely formed the view that it was indeed 'irrelevant', due to his own inexperience in chairing disciplinary panels, it is equally incredible that a professional HR department could have supported him with advice to that effect, in the absence of an alternative management agenda. The Tribunal noted that the first draft of the outcome letter, drafted by HR, omitted all mention of the trade union issue.

75.3 Ms Fisher, at appeal, unsurprisingly concluded that the trade union defence was indeed relevant, and yet went on to uphold Mr Grainger's decision on grounds which were not his, and which indeed directly contradicted his reasoning. This also, apparently, on the basis of HR advice.

75.4 It was clear to all concerned in the process that the Claimant's disobedience was directly related to, and intended to remedy, the Respondent's removal of the open-all email list which had existed for some 14 years and was the union's only electronic channel of un-moderated communication with all staff. Mr Grainger himself considered the Claimant's setting up of the list in the first place, and not simply the refusal to take it down, to be misconduct. Ms Fisher's appeal outcome letter included that "the deletion of the list did not prevent a protected trade union activity" – a conclusion arrived at apparently without full consideration of the evidence. The Claimant's actions were simply not separable, in anybody's mind, from their context of a trade union taking action against management steps to 'get better control' of the email system and Mr Grainger was punishing the Claimant for this act. Wilful blindness in these circumstances is neither convincing nor credible and the reasoning upholding that punishment in Ms Fisher's outcome letter does not bear scrutiny.

75.5 Mr Grainger was intent upon punishing the Claimant for his actions - upon putting down a marker. In doing so, the lively context of explicit trade union

resistance to management moves to take better control of the email system, of which Mr Grainger was well aware, was unavoidably present to his mind, despite his attempt to carve out a single act of disobedience from its wider context.

75.5 The Respondent has failed to rebut, on a balance of probabilities, the prima facie case raised on the evidence before the Tribunal that the main purpose of disciplining the Claimant was to penalise him for taking part in trade union activities.

76 Accordingly the Claimant's complaint succeeds and the parties are requested to collaborate in agreeing the issues for a Remedy Hearing, the listing required, allowing time for Tribunal deliberations and the delivery of a Remedy Judgment, as well as the hearing of evidence and submissions, and to contact Listing with a view to fixing a date.

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Employment Judge Stewart

Dated:. 7 November 2018
Reasons sent to the parties on:

9 November 2018

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For the Tribunal Office