Published on *The National Law Review* https://natlawreview.com

Representative's Reprimand for Clear Misconduct Enlawful, Says EAT (UK)

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The Employment Appeal Tribunal has recently handed down a judgment which serves as a useful reminder for employers of the risks of taking disciplinary action against union representatives for behaviour which may look like misconduct but which actually constitutes union activity.

By way of background, section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that a worker has the right not to be subjected to any detriment by his employer **for the sole or main purpose of preventing or deterring him from, or penalising him for, taking part in union activities**.

In **Brown v UCL**, the University's IT function had for some time been part of a mailing list which allowed emails to be sent to the entire group without moderation. The list was used for a variety of purposes, ranging from charity appeals to communications from the various recognised unions (which would be sent to all members of staff, regardless of their union membership). Complaints were raised with UCL's management that some of the communications were inappropriate and disruptive, not least because of the perennial problem of people on the list elevating their own business into everyone else's by the unthinking use of Reply All instead of just Reply. As a result, the University introduced an alternative system based on two separate mailing lists: a moderated list from which staff could not opt out for semi-official communications, and an unmoderated list for the all other stuff to which staff needed to opt into expressly. UCL introduced the new system on the basis of an initial three-month trial period, explaining the reasons for the change in their announcement. All pretty reasonable steps for the employer to take, you might think.

The union for which Mr Brown was a rep took a different view, however, and objected to the change, because it meant that the union no longer had unrestricted access to all those on the original list, members or not. It was obliged either to have its emails moderated before sending via the official list or to send what it wanted via the unofficial list, but only to people who had expressly chosen to listen. Stats considered in the hearing showed that the number of people who would voluntarily opt in to such a mailing list was far smaller than those who would tolerate it without asking to be taken off it, so giving people the right to opt in was not a substitute for having them on it in the first place . This issue was discussed at various meetings between the University and the union over several months. At one such meeting, Brown said he was setting up a new unmoderated mailing list including the entre IT function, largely replicating the original email system which had just been withdrawn for what the

University clearly (and seemingly quite reasonably, in view of the complaints received from staff) saw as good reason. UCL warned him not to do so, and indicated that it considered that this would amount to misuse of the University's resources.

Wholly undeterred, Brown nevertheless created a new mailing list on the same day he was warned not to do so to which he added the entire IT function. He proceeded to send emails to that group encouraging employees to object to the new split-list system. When the IT Head asked him to remove the mailing list, he refused. UCL then deleted the mailing list anyway and Brown was issued with a formal warning for failing to follow a reasonable management instruction.

Had Brown not been a union rep, it would have been difficult to deny that his actions amounted to insubordination meriting disciplinary action, and the warning a reasonable sanction. However, because he was, he said that this was a detriment contrary to s. 146(1)(b) TULRCA, because the creation of and refusal to take down his new mailing list were in pursuance of union activities. The Tribunal found unanimously that on the face of it, communicating with the whole staff body, including non-union members, regarding matters of legitimate concern to staff (such as pay, pensions, working conditions and disputes with management regarding workplace arrangements) must form part of what can reasonably and objectively be described as a core trade union activity, as is activity to recruit new members. The claim that the warning for his refusing to deny himself the means to carry out such activities was therefore an unlawful detriment was upheld by the Employment Tribunal.

On appeal, the EAT declined to overturn the decision, seeing no reason to disturb the Tribunal's findings of fact that both the creation of and refusal to take down the mailing list amounted to protected union activities. As there was no dispute that UCL's sole or main motive in imposing the warning was to discipline Mr Brown for refusing to delete the mailing list, these finding that this amounted to union activity was enough to make good his claim.

What lessons can employers learn from this case? None very attractive, unfortunately.

1. Primarily, before subjecting a union rep to disciplinary action, consider whether the alleged conduct in question could amount to union activity protected by s. 146. If so, then taking disciplinary action in relation to that conduct, even if such action would be perfectly reasonable in relation to any other employee, may well amount to an unlawful detriment.

2. Second, treat the conduct of union officials in the pursuit of their union duties as akin to whistleblowing or discrimination allegations – it is possible in law to draw a line between why something is done and how, but the how will have to be quite extreme before it justifies disciplinary action its own right without that being seen as an attack on the why. We are talking about something malicious or wholly improper, not just the ordinary resistance, obstruction or unreasonableness of collective representation.

3. Next, keep an eye on whether the official's conduct is genuinely, even if tenuously, related to his/her union duties. If Brown's email list had been used by him to attack individuals within the management, to make threats against non-members or to incite unlawful acts, or were in breach of normal principles around the appropriateness of email content, that would begin to take him outside those protections. In such a case the employer would sensibly issue an instruction to clean up his act first, and take action only if he failed to do so. But the line is a thin one. It is unclear whether the outcome would have been different had Brown been disciplined for bombarding the recipients of the list with repeated unsolicited requests for non-members to join the union, for example. One ground of the University's appeal was that the

changes to the mailing list system were to protect the data subject rights of the recipients. On the facts, that ground failed on the basis that UCL had not adduced any evidence that Brown had actually breached data privacy law. It is possible that if, for example, a union rep continued to send unsolicited recruitment communications to recipients who had expressly asked to be removed from a list, a Tribunal could find that the recipients' data subject rights had been breached and that the rep's activity therefore did not merit the protection of s. 146.

Whilst that would on the face of it appear to be a sensible and reasonable approach to take, it is not clear that such a decision would sit comfortably in relation to the wording of s. 146 as drafted.

National Law Review, Volume XI, Number 19