United Kingdom Employment Appeal Tribunal

Appeal No. UKEAT/0188/1

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 25 & 26 October 2011
Judgment handed down on 22 February 2012

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

MR D EVANS CBE

MR J MALLENDER

UNISON APPELLANT

(1) MR G KELLY
(2) MR O KASAB
(3) MR B DEBUS
(4) MS S MUNA RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTONY WHITE (One of Her Majesty's Counsel) & MR DESHPAL PANESAR (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
For the Respondent	MR NICHOLAS DE MARCO (of Counsel) Instructed by: Harriet Burge Solicitors Broadview Mickfield Suffolk IP14 5LP

SUMMARY

TRADE UNION RIGHTS - Action short of dismissal

The Respondents are members of Unison. The Tribunal found that they were unjustifiably disciplined b union contrary to s.64 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. They were banned from holding office in the union for three-five years.

The restrictions on trade union discipline imposed by s.65(2)(c) do not amount to an unlawful contraventi Article 11 **ECHR**. Members of unions have a right to hold their unions to account for breaching union where the members act in good faith. **ASLEF v UK** [2007] IRLR 361 distinguished.

No issue estoppel arose from earlier tribunal proceedings where the issue was whether the decision to h disciplinary investigation was made on the grounds of the Respondents' political beliefs.

The words "would be disciplined" in s.65(5) mean would have been disciplined as the relevant individual w fact disciplined.

The Tribunal's finding that in the absence of the allegation that the union's Standing Orders Committee contravening union rules the Respondents would not have received the disciplinary sanctions that they di having caused unintentional racial offence was not perverse.

No error of law was made by the Tribunal in the application of s.65(6). The Tribunal, having found tha Respondents genuinely believed the assertion to be true and that it was made in good faith, was entitl consider it was not necessary for it to decide whether the assertion was in fact true or false.

Appeal dismissed.

THE HONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. On 27 January 2011 an Employment Tribunal sitting at London Central, chaired by Employment J Grewal, found that the Respondents were unjustifiably disciplined by the Appellant contrary to section 64 o **Trade Union and Labour Relations (Consolidation) Act 1992** ("TULR(C)A"). The Respondents had banned from holding office in Unison. Mr Kelly and Mr Kasab were banned for three years, Ms Muna for years and Mr Debus for five years.

2. Mr Antony White QC and Mr Deshpal Panesar appear for the Appellant, Mr Panesar having appeare his own below. The Respondents are represented by Mr Nick De Marco, who did not appear below. W grateful for the assistance we received from counsel.

The facts and Tribunal's findings on liability

3. The disciplinary proceedings against the Respondents which were found to have been unjustified a out of their actions at the Appellant's National Delegate Conference in June 2007. The supreme governme the union is vested in the National Delegate Conference which meets annually and decides the campaig priorities and policies of the union.

4. The Appellant is the UK's largest public services trade union with more than 1.3 million members. governed by its Rule Book which, amongst other things, sets out its aims and objectives, defines its structure membership and policy making process and the obligations of members. In order to ensure union democrac aims and objectives include "*to promote and establish a member-led union and to carry out and fulfil deci made by members in a spirit of unity and accountability*" and "*to promote and safeguard the right of membe have an adequate opportunity to participate in the initiation and development of policy making, thr meetings, conferences, delegations or ballots, and to encourage the maximum democratic debate, together the right to campaign to change policy, while at all times acting within the rules and agreed policy.*" (Rule and 2.5). Rule B4.6 of its Aims and Objectives provides, "*to seek to ensure that members, acti representatives and staff are treated with dignity and respect at all times when participating in the un democratic structures.*"

5. Prior to the National Delegate Conference each branch is entitled to submit motions to be voted up the Conference. In 2007 Mr Kelly was the branch secretary of the Bromley Local Government branch. Debus was chair of the Hackney branch. Ms Muna was the branch secretary and staff side secretary housing corporation (now known as the Tenants Services Authority). Ms Kasab was the branch secretary o Greenwich Local Government branch.

6. Prior to each National Delegate Conference the Standing Orders Committee ("SOC") sends t branches guidance on submitting motions to the Conference, and it did so in early 2007. The branches su their motions before the Conference and if their motions are rejected the SOC writes to the branch and gi one line reason for ruling the motion out of order. The branch has the opportunity if it does not agree wit decision to make further representations in writing. If the SOC does not change its decision, the delegates the branch who attend the Conference can meet with the SOC and try to persuade it to change its decision.

7. The Respondents' branches had eight motions refused by the SOC.

8. Some time in late May 2007 the four Respondents attended the London Regional Local Govern Conference. In the course of conversation, they discussed the motions that had been submitted by respective branches and had been ruled out of order. They did not accept that their motions had been in br of the union rules and felt that they had been rejected because the SOC and the Appellant did not want the be a debate on certain issues. They discussed producing some kind of a leaflet to campaign for the motions put back onto the National Delegate Conference Agenda.

9. Paragraph 32 of the Tribunal's reasons ("the Reasons") states:

> **"Following this discussion Ms Muna, who is a cartoonist, designed a leaflet. The leaflet is an A4 document and bears a Unison logo on the top left corner. There appears at the top of the leaflet a cartoon, drawn by Ms Muna, depicting three monkeys, one of whom is covering its ears, another its eyes and the third its mouth. It is obvious to anyone looking at the cartoon that it is meant to represent the well-known image of the three wise monkeys who see no evil, hear no evil and speak no evil. The words 'Standing Orders Committee' are written immediately below the cartoon. There is then the headline 'Whose conference'. The following text appears below the headline:**
>
> ***'This year the Standing Orders Committee (SOC) rejected an unprecedented 60+ motions submitted by branches representing nearly 1/3 of all motions submitted.***
>
> ***The motions covered important and controversial issues such as organising industrial action, the election of union officials and New Labour's attacks on public services.***
>
> ***At appeal against rejections, as soon as one SOC objection was effectively rebutted, another was immediately introduced.***
>
> ***Were these motions rejected because they were controversial?***
>
> ***Our Conference has a right to discuss union democracy and member controls of a fund, disputes and branch support structures.'***

> **The words '*Let Branches decide*' are set out in large bold font in the bottom one third of the leaflet on the left, and on the right there is a picture of three hands holding up ballot papers containing the words '*Union Democracy*', '*Election of Officials'* and '*Our Motions*' with a 'X' after each one. It states at the bottom of the leaflet '*Vote to return these motions to the agenda*' and '*Supported by Housing Corporation branch, Hackney LG, Greenwich LG, and Bromley LG*'."**

10. On 8 June 2007 Ms Muna circulated the leaflet by e-mail to all members of the Housing Corporat branch committee. At about the same time she also sent the leaflet to Mr Debus who circulated it to his br committee and to the individuals who were to attend the Conference and sought their agreement to distribut leaflet at Conference. Mr Debus also circulated the leaflet to about twenty other individuals, includin Kasab and Mr Kelly, in twelve other branches, asking them if their branches would like to be included supporting branch. None of the individuals responded. No one indicated to Mr Debus that the leaflet shoul be used as it could cause racial offence. Mr Debus telephoned Mr Kelly and Mr Kasab and they both agre have the names of their branches included on the leaflet. Mr Kasab had not seen the leaflet and Mr Debus the text out to him; Mr Kelly had seen the text but not the cartoon.

11. At paragraph 36 of the Reasons the Tribunal made the following finding:

> **"All four Claimants are committed anti-racists and have fought against racism. They quite reasonably assumed that anyone who saw the leaflet would understand the cartoon to be saying that the SOC was out of touch and closing its mind to and ignoring issues that concerned the membership. The cartoon was not a pictorial depiction of the members of the SOC (of whom there are … 15) but a representation of its attitude towards motions that were submitted to it. It never occurred to them that anyone would take it out of context and consider it to be racially offensive because one member of the SOC, the Chairman, was a black man. Such a possibility was never raised with them by any of the individuals who saw the leaflet."**

12. The National Delegate Conference in 2007 took place between Tuesday 19 June and Friday 22 Jun was preceded by the National Local Government Conference that took place on the Sunday and Monday, 17 18 June. The Respondents printed about 1,500 copies of the leaflet and these were distributed from Su onwards.

13. On the evening of 18 June 2007 Mr Malcolm Cantello, the President of Unison and Chairman o National Delegate Conference, told Mr Kevan Nelson, Head of Democratic Services, that he had received s complaints from branches about the leaflet. On the evening of 18 June letters were drafted to be given t branch secretaries of the four branches whose names appeared on the leaflet. The letter said that Un considered the document to be offensive, contrary to Unison's aims and values as set out at Rule B and in br of the guidelines for Conference delegates set out at paragraph 4.15 of the Unison Conference guide. Parag 4.15 provides that all delegates are expected to behave in a courteous manner and that aggressive, offensi intimidatory language or behaviour will not be tolerated. On the evening of 18 June Mr Nelson asked Ms L

Perks, Regional Secretary of Greater London Region, to investigate the provenance of the leaflet. On morning of 19 June Ms Perks interviewed each of the branch secretaries (Messrs Kelly, Kasab and Waterfal branch secretary of the Hackney branch, and Ms Muna) and gave them the letter.

14. Shortly after the Conference formally began on 19 June Ms Bev Miller, Chair of the National B Members Committee, said that she wanted to raise a point of order. She said that three branches had thou witty to use monkey caricatures to poke fun at the Standing Orders Committee. She continued that the Cha the SOC was a proud black man and that to him and to her the joke was not funny. It belonged in the past Bernard Manning. Black members and all other decent anti-racist trade unionists who understand the his and racist denigration of black people did not find the joke funny and that the leaflet was offensive and ra She wanted to know what action the NEC proposed to take. Mr Cantello responded that he had receiv number of complaints and he had authorised an investigation with immediate effect. Mr Williams then rep as Chair of the SOC. He said in the course of that that the SOC did not expect to be insulted in the liter distributed to Conference delegates. They took their responsibilities seriously and thought that they deserve respect of the Conference for those judgments.

15. On the same day all four Respondents wrote a letter to the SOC. In the letter they said that there been concerns among the delegates that motions were being unfairly and unjustly ruled out of order, and t was that fact alone that had motivated them to produce the leaflet. The letter concluded that whilst categorically refuted the charge of racism against their branches and branch officers if the use of the cartoon caused any unintentional offence they would apologise to all members of the SOC and Conference deleg On 21 June 2007 the Respondents wrote to all members of the National Black Members Committee. The repeated the points that had been made in the letter to the SOC and continued,

> **"The use of the Asian Bhudist proverb cartoon 'see no evil, hear no evil and speak no evil' is a widely used image of political satire to express a view of not being heard, it is not in any shape or form connected with an intent to imply an attack on someone's race, as such I hope you would accept that there was no intent whatsoever to cause offence. Indeed we do not believe for a moment that BME members from the branches would have sanctioned the leaflet and distributed it, had it had any hint of that connotation.**
>
> **However we acknowledge that unintentionally we may have caused offence and therefore offer our sincere apologies."**

16. Ms Perks produced a short report on 21 June 2007 which dealt not only with the provenance of the le but also with whether there was a prima facie case against the Respondents and Mr Waterfall of being in br of the union's rules. She recommended that there was a prima facie case against all five individuals.

17. On 27 June 2007 Mr Nelson wrote individually to the four Respondents and Mr Waterfall to advise they were the subject of a complaint and allegations relating to the production and distribution of the leaflet offensive and potentially discriminatory content at the Conference. The Chairperson and the N Development and Organisation Committee had given authority to conduct a disciplinary investigatio accordance with Rule 1.5. The investigation would be conducted by Ms Gloria Mills and Mr John Freeman its purpose would be to establish whether there was a prima facie case to answer.

18. All five individuals were interviewed and what they said is summarised at paragraphs 52-56 o Tribunal Reasons ("the Reasons"). Ms Bev Miller was also interviewed (see para 57 of the Reasons).

19. Prior to 11 December 2007 Mr Freeman drafted five draft versions of the report which he sent t Mills to seek her agreement. The conclusions and recommendations section of the report had five sub-headi These were "racist intent", "content of the leaflet", "production of the leaflet", "lack of financial contr Hackney branch" and "possible misuse of Unison funds". Paragraph 60 of the Reasons states:

> **"Under 'racist intent' the conclusion was that there had been no racial intent in the use of the cartoon, and that Messrs Kelly and Kasab had not seen the cartoon before giving their endorsement to the leaflet. It pointed to a lack of care in the process used to give their branches endorsement to the cartoon and in failing to consider how the cartoon might be regarded by some members, not least black members. The authors of the report also found regrettable the arrogant denial and defence of their position when they could have apologised immediately in their responses to the preliminary enquiry. That seems to have completely overlooked that the four Claimants had immediately apologised to the SOC and the National Black Members Committee when they realised that some individuals had found it racially offensive. The recommendation was that these matters be drawn to the attention of the five (the four Claimants and Mr Waterfall) and that they be invited to attend training on racial awareness. What is clear from that recommendation is that the authors of the report did not consider the racial aspect of it serious enough to merit disciplinary action or sanction."**

20. Mr Freeman sent a sixth draft version to Ms Mills on 11 December 2007. As paragraph 64 o Reasons notes,

> **"There was a significant change in the conclusions and recommendations in this version. Under 'racist intent' the recommendation was changed to that disciplinary action should be taken against the four branch officers for the lack of care exercised by them leading to the production of the leaflet giving racist offence to some members and that the five be invited to attend training of racial awareness. The four referred to the first part of the recommendation, although not specified, were the four Claimants. There was no explanation of why the position had changed for the four Claimants and not for Mr Waterfall."**

21. Paragraph 65 of the Reasons continues:

> **"It would appear that Ms Mills sought an explanation of why this recommendation had changed. The response from Mr Freeman in an e-mail dated 18 January 2008 was that following a discussion with Kevan Nelson he had realised that the only way to enact their recommendation was by referring the matter to a disciplinary panel. The only meaning that can be attributed to that Mr Nelson advised him that their recommendations, namely that their observations be drawn to their attention and that they be invited to attend training on racial awareness, could not be implemented unless disciplinary action was taken on this count. If that is correct (and it is difficult to see how else to interpret it) the change in the recommendation was not due to a change in the view of the severity of that particular complaint, but in order to enable their recommendations to be implemented. However, no change was**

> **recommended in the case of Mr Waterfall who was not facing disciplinary action for attacking the integrity of the SOC."**

22. On 26 March 2008 Mr Nelson wrote to the four Respondents that the NEC at its meeting on 13 Febr had agreed to bring charges against them in accordance with Rule 1 of Unison's Rules. There were disciplinary charges against them. These were:

> **"Allegation 1 – that your role in the production of the leaflet 'Whose conference' that gave racist offence to members showed disregard for the union's aims and objectives and was in breach of Rule B4.6 (and Rule 12.6).**
>
> **Allegation 2 – that your attack of the integrity of the members of Standing Orders Committee was in breach of Rule B4.6 and Rule 12.3 and Rule 12.1.**
>
> **Allegation 3 – that your responsibility for the production and distribution of the leaflet to campaign against decisions of a democratic body with Unison; instead of using the democratic processes defined in Unison rule and standing orders were in breach of Rule G4.2.4 and Rule 12.1."**

23. Mr Debus had additional charges against him in relation to using funds to produce the documents.

24. Ms Mansell-Green, who is an elected member of the Appellant's NEC, was appointed chair of the p to hear the disciplinary charges against the Respondents. The other members of the panel were Mau Merrinell and Mark Clifford, who were also NEC members at the time. The hearing took place over nine da 14-16 May 2008, 18-20 March 2009, 21 April 2009 and 16-17 July 2009. At the start of the session on 21 2009 the Chair of the panel said that after considering the evidence that had already been submitted the p had decided to strike out allegation number 3. Mr Freeman, in summing up the union's case, accepted that had been no racist intent on the part of any of the four Respondents. The panel found that allegations 1 a were proved. In respect of allegation 1 the panel concluded that by producing a leaflet that had given r offence the Respondents had been in breach of the union's aims and objectives and rules which provide th members are to be treated with dignity and respect. Ms Mansell-Green's evidence before the tribunal was the Respondents were not racist but that they had been careless. It was accepted that there had been no r intent on their part. The tribunal made a finding that

> **"It is clear from the evidence that was before the disciplinary panel and us that the Claimants had never been unwilling to accept that some people did find it offensive, and as soon as they became aware of that they had apologised immediately for any offence that had been caused." (Para 74 of the Reasons).**

25. Ms Mansell-Green also said that if Mr Freeman and Ms Mills had not made a recommendation in re of this charge it would never have gone to a disciplinary hearing and there would have been no sanction. (74 of the Reasons).

26. In respect of allegation 2 that concerned the attack on the integrity of the SOC, the panel concluded the leaflet had caused upset to the SOC and had involved a pre-meditated campaign to attack the SOC. Mansell-Green said that the panel had taken the leaflet as alleging that the SOC made decision about motio be accepted or rejected on political grounds depending on whether they were controversial. In the Tribu view, that would in effect amount to an assertion that the SOC was acting in breach of the union rules (para the Reasons).

27. On 17 July 2009 the Respondents put forward their mitigation. At paragraph 77 of the Reason Tribunal said:

> **"In deciding the appropriate sanction to impose Ms Mansell-Green's evidence was that the panel could only impose one of the three penalties listed at Rule 18(4)-(6), namely suspending the Claimants from any benefits, barring them from holding office or expelling them. She said that any form of educational or organisational resolution (which would include racial awareness training) was not available under Rule 18. We do not understand Rule 18 to be limiting the NEC to only those three penalties, but simply to be stating those as penalties that may be imposed. If Rule 18 is limited in that way, the advice given by Mr Nelson to Mr Freeman makes no sense. Ms Mansell-Green's evidence was that the proven charges were serious and merited a more serious sanction than suspension of benefits. She said that they were particularly concerned at the attacks on the integrity of the SOC. It was quite clear from the tenor of Ms Mansell-Green's evidence that that was regarded far more seriously than the unintentional and inadvertent causing of racial offence."**

28. The Tribunal also heard evidence of other occasions when individuals had inadvertently caused r offence, used monkey cartoons inappropriately, and not treated their colleagues with respect or dignity. In of these cases was any disciplinary action taken against the individuals concerned (see para 79 of the Reason

The legal framework

29. Section 64 of TULR(C)A provides, so far as is material:

> **"64 Right not to be unjustifiably disciplined**
>
> **(1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.**
>
> **(2) For this purpose an individual is 'disciplined' by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that—**
>
> **(a) he should be expelled from the union or a branch or section of the union,**
>
> **(b) he should pay a sum to the union, to a branch or section of the union or to any other person;**
>
> **…**
>
> **(d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,**
>
> **…**
>
> **(f) he should be subjected to some other detriment; …**

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

30. Section 65 of TULR(C)A provides, so far as is material:

"65 Meaning of 'unjustifiably disciplined'

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

(a) conduct to which this section applies, or

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

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

(2) This section applies to conduct which consists in—

(a) failing to participate in or support a strike or other industrial action (whether by members of the union or by others), or indicating opposition to or a lack of support for such action;

(b) failing to contravene, for a purposes connected with such a strike or other industrial action, a requirement imposed on him by or under a contract of employment;

(c) asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law; …

(d) encouraging or assisting a person—

(i) to perform an obligation imposed on him by a contract of employment, or

(ii) to make or attempt to vindicate any such assertion as is mentioned in paragraph (c);

(e) contravening a requirement imposed by or in consequence of a determination which infringes the individual's or another individual's right not to be unjustifiably disciplined.

(f) failing to agree, or withdrawing agreement, to the making from his wages (in accordance with arrangements between his employer and the union) of deductions representing payments to the union in respect of his membership,

(g) resigning or proposing to resign from the union or from another union, becoming or proposing to become a member of another union, refusing to become a member of another union, or being a member of another union,

(h) working with, or proposing to work with, individuals who are not members of the union or who are not members of another union,

(i) working for, or proposing to work for, an employer who employs or who has employed individuals who are not members of the union or who are or are not members of another union, or

(j) requiring the union to do an act which the union is, by any provision of this Act, required to do on the requisition of a member.

(4) This section also applies to conduct which consists in proposing to engage in, or doing anything preparatory or incidental to, conduct falling within sub-section … (3).

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

(6) An individual is not unjustifiably disciplined if it is shown—

(a) that the reason for disciplining him, or one of them, is that he made such an assertion as is mentioned in subsection (2)(c), or encouraged or assisted another person to make or attempt to vindicate such an assertion,

> **(b) that the assertion was false, and**
>
> **(c) that he made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith,**
>
> **and that there we no other reason for disciplining him or that the only other reasons were reasons in respect of which he does not fall to be treated as unjustifiably disciplined."**

31. Article 11 of the **European Convention on Human Rights** provides

> **"1. 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.**
>
> **2. 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 interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…"**

The appeal

32. Mr White submits that the Tribunal erred in law in five respects. First, the Tribunal failed to find tha restrictions on trade union discipline imposed by sections 64 and 65 TULR(C)A amount to an unla contravention of Article 11 ECHR. Second, the Tribunal failed to regard themselves as estopped fron opening issues that were res judicata, having been determined as a necessary ingredient of the determinatio the Respondents' earlier claims and therefore the subject of issue estoppels. Third, the Tribunal applie incorrect test under section 65(5) TULR(C)A. Fourth, the Tribunal incorrectly applied section 6 TULR(C)A. Fifth, in finding that the Respondents would not have been subjected to the discipline they subjected to regardless of whether the leaflet referred to a matter protected by ss.64 and 65, the Tribunal ar at a conclusion that no reasonable Tribunal properly directing itself as to the law could have arrived at. We deal with each in turn.

Ground 1: whether the restrictions on trade union discipline imposed by TULR(C)A ss.64 and 65 contravene ECHR Article 11

33. The Tribunal's decision on this issue is contained in paragraph 80 of the Reasons:

> **"… We are not satisfied that section 64 violates Article 11(1), but if it does we are satisfied that that state intervention in respect of it complies with the requirements of Article 11(2). Article 11(2) permits state intervention in trade union affairs where such intervention is prescribed by law and is necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others. Thus unions are subject to all the discrimination legislation, that prevents them discriminating against potential and actual members by not allowing them to join, expelling them or subjecting them to discipline on a variety of prescribed grounds. It also prohibits them from victimising individuals who complain of discrimination. Section 64… prevents them victimising against their members on the grounds that the members have alleged that they are not acting within the Rules. We see that as being necessary to protect the rights and freedoms of the members to challenge their unions if they believe that the union is acting ultra vires or unlawfully. We do not think that section 64 is incompatible with Article 11 or that it is necessary to read into the section the words that we were asked to [by] the Respondent in order to make it compliant with Article 11."**

34. Mr White submits that the Tribunal erred in law in that in so holding it wrongly failed to give effe the ruling of the European Court of Human Rights in **ASLEF v UK** [2007] IRLR 361. In that case the Euro Court held that section 174 of TULR(C)A represented an unjustified interference with the Article 11 righ ASLEF to administer its own affairs and in particular to decide questions concerning admission to and expu from the union. In reaching that conclusion the Court approved and followed the conclusions of the Euro Committee of Social Rights of the Council of Europe in respect of Article 5 of the European Social Chart the effect that section 174 constituted an excessive restriction on the rights of the trade union to determi conditions for membership and went beyond what is required to secure the individual right to join a trade un Mr White relies on the fact that the Committee has repeatedly reached the same conclusion in relation to se 65 TULR(C)A. He submits that the reasoning of the Committee and of the Court applies directly to section 65 TURL(C)A.

35. In **ASLEF** the Court summarised the general principles relating to Article 11 as follows:

> **"37. The essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected. The right to form and join trade unions is a special aspect of freedom of association which also protects, first and foremost, against State action. The State may not interfere with the forming and joining of trade unions except on the basis of the conditions set forth in Article 11(2) (see *Young, James and Webster v United Kingdom*, Commissions report of 14 December 1979, para 162, Eur. Court HR, Series B No. 39, p45).**
>
> **38. The right to form trade unions involves, for example, the right of trade unions to draw up their own rules and to administer their own affairs. Such trade union rights are explicitly recognised in Articles 3 and 5 of ILO Convention No. 87, the provisions of which have been taken into account by the Convention organs in previous cases (e.g. *Cheall v United Kingdom*, No.10550/83, Comm. Dec. 13.5.85, DR 42, p178; *Wilson and the National Union of Journalists and others v United Kingdom* [2002] IRLR 568, para 34). Prima facie trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member.**
>
> **39. As an employee or worker should be free to join, or not join a trade union without being sanctioned or subject to disincentives (e.g. *Young, James and Webster v United Kingdom* [1981] IRLR 408, mutatis mutandis, *Wilson and the National Union of Journalists and others,* cited above), so should the trade union be equally free to choose its members. Article 11 cannot be interpreted as imposing an obligation on associations or organisations to admit whosoever wishes to join. Where associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership. By way of example, it is uncontroversial that religious bodies and political parties can generally regulate their membership to include only those who share their beliefs and ideals. Similarly, the right to join a union 'for the protection of his interests' cannot be interpreted as conferring a general right to join the union of one's choice irrespective of the rules of the union: in the exercise of their rights under Article 11(1) unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union (*Cheall,* cited above; see also Article 5 of the European Social Charter and the Conclusions of the European Committee of Social Rights, Relevant International Materials), ...**
>
> **…**
>
> **41. Accordingly, where the State does intervene in internal trade union matters, such intervention must comply with the requirements of Article 11(2), namely be 'prescribed by law' and 'necessary in a democratic society' for one or more of the permitted aims. In this context, the following should be noted.**
>
> **42. First, 'necessary' in this context does not have the flexibility of such expressions as 'useful' or 'desirable'...**

> **43. Secondly, pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'... Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. For the individual right to join a union to be effective, the State must nonetheless protect the individual against any abuse of a dominant position by trade unions… Such abuse might occur, for example, where exclusion or expulsion from a trade union was not in accordance with union rules or where the rules were wholly unreasonable or arbitrary or where the consequences of exclusion or expulsion resulted in exceptional hardship. …**
>
> **44. Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued. …**
>
> **45. Fourthly, where there is a conflict between differing Convention rights, the State must find a fair and proper balance. …**
>
> **46. Finally, in striking a fair balance between the competing interests, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention… However, since this is not an area of general policy, on which opinions within a democratic society may reasonably differ widely and which the role of the domestic policy-maker should be given special weight, … the margin of appreciation will play only a limited role."**

36. In **Demir v Turkey** [2009] IRLR 766 the Grand Chamber reviewed the evolution of case-law as t substance of the right of association enshrined in Article 11 and stated that:

> **"145. From the Court's case-law as it stands, the following essential elements of the right of association can be established: the right to form and join a trade union… and the right for a trade union to seek to persuade the employer to hear what it has to say on behalf of its members…**
>
> **146. This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human rights…"**

The Court held, having regard to the developments in labour law, both international and national, and t practice of contracting states in such matters, the right to bargain collectively with the employer has, in princ become one of the essential elements of the right to form and to join trade unions for the protection of interests.

37. In the light of the jurisprudence of the European Court of Human Rights Mr De Marco accepts that

> **"there may be arguments that can be made that those parts of sections 64-65 that prevent a trade union from disciplining its members for not supporting industrial action constitute an infringement of Article 11(1) (whether or not they can be justified under Art.11(2). There is an arguable case that just as the right to collective bargaining is an essential element of the right to form and join a trade union deserving protection under Article 11, so too is the right to take collective industrial action, and thus the right of a union to discipline any member who fails to support a democratically and lawfully made decision of the union to embark upon industrial action."** (Written submissions on the Article 11 issue, para 5).

However this is not the case before this Tribunal. We agree with Mr De Marco that there is an impo distinction to be drawn between s.65(2)(c) which protects a union member from being unjustifiably discip

for alleging a breach of the union's rules or the law more generally and preventing, by legislation, a union being able to determine for itself its rules and membership criteria.

38. Professor Ewing in his article *The Implications of the ASLEF case* (2007) Industrial Law Journal 42 which we have been referred, specifically singles out section 65(2)(c) as a possible exception to his view sections 64-65 TULR(C)A could be said to infringe Article 11 generally. Having noted that the concerns o ILO Committee of Experts have related specifically to those aspects of ss.64-65 that "prevent trade unions disciplining members who refuse to participate in lawful strikes and other industrial action or who see persuade members to refuse to participate in such action", Professor Ewing concluded:

> **"There are… questions about the compatibility of TULR(C)A, ss.64-67, with Article 11, especially with regard to the restrictions on the right of trade unions to take disciplinary action against members who refuse to participate in lawful industrial action called in accordance with the procedures of the union. It does not follow, however, that all of the provisions of ss.64 and 65 could not be justified under Article 11, with one possible exception (and there may be others) being s.65(2)(c) (whistle-blowing by a member). Although it may be possible to argue that a restriction on disciplinary action for drawing attention to unlawful conduct could be justified under Article 11(2), it may also be argued that such justification would exist only where the allegations were neither malicious nor ill-founded."**

39. Further support for this distinction is to be found in the initial Report of the ILO Committee of Ex on the Application of Conventions and Recommendations (which was then repeated over many years), when following findings were made as to the legislation that preceded s.65:

> **"(b) 'Unjustifiable discipline' and section 3 of the 1988 Act**
>
> **The Committee considered that section 3(3)(c) of the 1988 Act, which states that trade unions may not discipline members who, in good faith, assert that their union has breached its own rules or the law of the land, was not incompatible with Article 3 of the Convention. It had, however, concluded that those parts of section 3 which deprive trade unions of the right to discipline their members who refuse to participate in lawful strikes and other industrial action or who seek to persuade fellow members to refuse to participate in such action, constituted an impermissible incursion upon the guarantees provided by Article 3."** (Report III (part 4A) (1991) at pp.219-220)

40. Mr White referred us to the recent decision of the Court in **Palomo Sanchez v Spain** [2011] IRLR where there was a brief reference to Article 11. The case concerned the question of whether the dismiss trade union members by their employer for publishing offensive material breached their Article 10 righ freedom of expression and their Article 11 rights. The Court found that the decisive reason for dismissal o applicants was for publishing the offensive material and not for their membership of the trade union, and t was therefore appropriate to consider the facts under Article 10 (see para 52 of the judgment). The Court f that the material in issue went beyond that usually attracting protection under Article 10.

41. Mr White argues that **Sanchez** has particular relevance in the present case where the Respondents disciplined for material found to be offensive and derogatory. He submits that "it is clear that, as in **San**

such actions, over-stepping the limits of admissible criticism, is a permissible matter for disciplinary a within the terms of both Article 10 and 11 of the Convention".

42. However the present case is not about whether or not the cartoon of the three wise monkeys ought protected by Article 10 or Article 11. The Respondents were disciplined for their assertion that the Stan Orders Committee had breached union rules. In our view **Sanchez** does not assist with the determination o issue as to whether s.65(2)(c) TULR(C)A is compatible with Article 11 of the Convention.

43. We agree with Mr De Marco that there is an important public interest in section 65(2)(c); rather threatening the right of trade unions generally to administer their own affairs, it protects from maladministration of union affairs contrary to the union's own rules or the law.

44. We consider that the Tribunal was entitled to find that Article 11(1) was not violated. Further, in view, the Tribunal was entitled to find that even if the sub-section infringed Article 11(1), it would be just under Article 11(2). We accept Mr De Marco's submission that the Tribunal was correct to find that it necessary in a democratic society to protect the rights of members of unions to hold their unions to accoun breaching the union's own rules, where the members act in good faith. The right to freedom of expre entitles a union member to reasonably express his opinions on internal union matters generally and the rig freedom of association must entitle members of the union to influence the policies and actions of their un The disciplinary measures that were imposed on the Respondents preventing them from holding any offi their union plainly had a serious effect on the exercise of their freedom of expression and their freedo association and that of their members who voted for them.

45. As for Mr White's submission that to be compliant with Article 11, s.65(5) TULR(C)A must be down by the addition of words at the end of s.65(5), namely "or is contrary to a rule of the trade union o objective of the trade union", we consider that there is no infringement of Article 11 by s.65(2)(c) accordingly there is no requirement, or indeed entitlement, to read any words into s.65(5).

Ground 2: issue estoppel

46. The Respondents had previously brought a claim in the Central London Employment Tribunal (Nos. 2203854-7/08) complaining that the Appellant's decision to initiate and pursue disciplinary proceed against them arising out of their production and distribution of the leaflet amounted to direct discrimin

and/or harassment under Regulations 3(1) and 5(1) of the **Employment Equality (Religion or Be Regulations 2003**. This claim was dismissed by the Tribunal in a reserved judgment sent to the parties o January 2010. In that judgment, when considering the reason why the Appellant initiated and pur disciplinary proceedings against the Respondents arising out of their production and distribution of the le the Tribunal held that once the Chairman of the union's Standing Orders Committee, the Chair of the un National Black Members' Committee and union members considered that the leaflet was racially offensiv was not an option for [the union] to do nothing", and that the disciplinary investigation, the disciplinary cha and the disciplinary proceedings were brought for that reason (see paras 163, and 219).

47. Mr White submits that the Tribunal in the present case ought to have held, and erred in law by faili hold, that this finding of fact in previous litigation between the same parties created an issue estoppel w determined against the Respondents the issue under s.65(5) TULR(C)A as to whether the Appellant had sh that the act, omission or statement of the Respondents (their production and distribution of the leaflet) was in respect of which individuals would be disciplined by the union irrespective of whether it was in conne with conduct falling within s.65(2).

48. There is common ground between the parties as to the principle of issue estoppel. In **Arnold v Nati Westminster Bank plc** [1991] 2 AC 93 Lord Keith at 105 said:

> **"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."**

49. Mr White referred to the case of **Smith v Chelsea Football Club plc** [2010] EWHC 1168 (QB) w Cox J found the approach adopted by Fox J in **Green v Hampshire County Council** [1979] ICR 861 help In that case, the claims of two employees for unfair dismissal were dismissed by the industrial tribu Subsequently, the employees issued proceedings in the Chancery Division, contending that their dismissals illegal, *ultra vires* and void. These were claims that clearly could not be brought in the tribunal, but Fox J st out the proceedings on the grounds of issue estoppel and abuse of process. He said, at 865-866:

> **"… Essentially this case, and in particular the allegations made under paragraphs 5, 6, 7 and 9 is just re-litigation of the matters decided by the industrial tribunal in May 1973. The matter is to some extent differently presented and some new arguments have been added, but essentially it is the old dispute all over again."**

50. The claimant in **Smith** was a former employee of the defendant football club. He was dismissed o July 2007. He brought a claim in the employment tribunal in October 2007 raising a number of compla

which were all determined after a three day hearing. The tribunal's reserved judgment was promulgated reasons on 11 August 2008. He did not appeal against those complaints which were dismissed. Subsequent 16 September 2009 the claimant commenced proceedings in the High Court in respect of his employment the defendant. Before the tribunal the claimant claimed compensation for unfair dismissal and an awar alleged unlawful deductions from his wages. Before the High Court he claimed, inter alia, underpaid sa underpaid bonus and non-payment of benefits. The claim for these sums was advanced on two alternative b that no remuneration was expressly agreed at the commencement of his employment and it was therefo implied term of the contract that the claimant would be paid reasonable remuneration; or alternatively, th was entitled to a quantum merit in respect of the work done during his employment. In addition there w claim in wrongful dismissal in relation to underpaid salary and non-payment of bonus and employment bene Cox J held the fact that the claimant was seeking to advance entitlement to sums under the heading of an im contractual term, alternatively a quantum merit, was irrelevant. Issue estoppel applied to prevent him advancing matters which had already been determined by the employment tribunal. (Para 63).

51. Mr White submits that similarly the present case involves different causes of action, but they arise o identical facts. Both the Tribunal claim under the **Employment Equality (Religion or Belief) Regula 2003** and the present claim involved a "reason why" issue (see **Shamoon v Chief Constable of the R Ulster Constabulary** [2003] ICR 337 at [7]-[8] and [11]).

52. Mr White submitted, by reference to the material paragraphs in the judgment of the first Tribunal, th determining the Respondents' claims of discrimination the Tribunal determined issues of fact which include following:

i) the extent of the Respondents' involvement in the production of the leaflets and their degr culpability in that regard (it being the Respondents' case that their involvement was no more others, and that the sole reason for their different treatment was their Marxist Trotskyite belie

ii) that the leaflet was offensive, did cause offence, was reasonable to take offence to on the gro of race (it being the Respondents' case that this was not true and that the reason for their treat was their Marxist Trotskyite belief).

iii) that it was reasonable to initiate a disciplinary investigation (it being the Respondents' case t was not reasonable and that the reason for doing so was their Marxist Trotskyite belief).

iv) that in relation to a large number of comparators (including all of those referred to in the se Tribunal judgment) that behaviour of the comparators was neither the same or similar or of e seriousness of culpability to that of the Respondents who asserted that their different treat was due to their beliefs.

53. At paragraph 223 of the judgment of the first Tribunal there is reference to the charges that were de from the report by Mr Freeman and Miss Mills: "They related to the unintentional offence caused by perception of race discrimination by use of the cartoon, the insult to the SOC and their approach to the pr discharge of their function…". Allegations 1 and 2 set out at paragraph 66 of the judgment of the se Tribunal correspond, Mr White submits, to "the unintentional offence caused by the perception of discrimination by use of the cartoon" and "the insult to the SOC and their approach to the proper discharg their function" respectively.

54. Adopting the approach of Cox J in **Smith** Mr White submits that the second Tribunal should not embarked on consideration of the "reason why" issue. The first Tribunal had concluded that "it was reason for [Ms Miller] and the [union] to consider the perception of those who considered there had been discrimin on the ground of race, to address it and to investigate it. The [union] has a policy of equal treatment. We fi was not an option for the [union] to do nothing, and the conducting of an investigation by Ms Perks appropriate on this ground alone" (para 163, and see para 219).

55. The judgment of the second Tribunal at paragraph 15 under the heading "Application of issue estopp the present case" states, so far as is material, as follows:

> **"It is clear that there is a link between the previous Tribunal case between the same parties and the case before us. Both relate to the same leaflet and the involvement of the Claimants in its production and distribution. However, the issues in the two cases … are very different. In summary, the issue in the previous case was whether the action taken up to the conclusion of the disciplinary hearing had been taken on the grounds that the Claimants had Marxist/Trotskyite beliefs and were members of the Socialist Party. The issue in the case before us was whether the Claimants had been banned from holding office for periods of three to five years because they had asserted that the Standing Orders Committee had been acting in breach of the union rules or because of the manner in which they had done it. The two cases deal with different periods of time and different decisions made by different individuals. Different witnesses gave evidence in the two cases. … We accept that we are estopped from deciding and reaching any different conclusions on the issues that were determined by the previous Tribunal. We do not, however, accept that we are bound by every finding of fact made by that Tribunal. It is for us, having heard all the evidence, to make the findings [of] fact we think are relevant to the issues that we have to determine."**

Mr White submits that this passage does not do justice to the doctrine of issue estoppel as it should be appli the present case. We disagree.

56. In our view the critical point is, as Mr De Marco submits, that the two decisions are dealing different conduct by the Appellant. The first Tribunal is concerned with the decision whether to hav investigation or not; the second Tribunal is concerned with the outcome of the investigation. Further the before the first Tribunal was whether the decision to hold the investigation was made on the grounds o Respondents' Marxist/Trotskyite beliefs. The issue before the second Tribunal was whether the Respon were banned from holding office because they asserted a breach of union rules.

57. The conclusion of the first Tribunal that the Respondents' specific political views did not constit religion or belief for the purposes of the statutory protection under the Regulations was plainly not releva the decision of the second Tribunal.

58. The first Tribunal dismissed all the claims of the four Respondents on the basis that the Tribunal ha jurisdiction. However in case they were wrong in their decision on the matter of jurisdiction they went consider the other issues on liability.

59. The claim before the second Tribunal arose from the findings and conclusions of the investig committee. The issue for the Tribunal was whether the Appellants were unjustifiably disciplined, contra s.64 TULR(C)A.

60. It is clear that the first Tribunal was aware that the second set of tribunal proceedings had comme and were to be determined. At paragraph 83 the first Tribunal noted that "it is not the outcome o disciplinary actions we are concerned with but the treatment of the Claimants to the date of the Claim Form the proceedings before them.

61. We conclude that issue estoppel has no application in the present case.

Ground 3: application of incorrect test under s.65(5) TULR(C)A

Ground 5: perversity in finding that s.65(5) TULR(C)A does not apply

62. We consider these two grounds concerning the application of s.65(5) TULR(C)A together. The ma parts of the Tribunal judgment state:

> **"84. The Respondents' case in essence is that the Claimants would have been banned from holding office for periods ranging from three to five years, regardless of any assertions they made that the SOC was not acting in accordance with the Union's rules, because they had produced a leaflet that had caused racial offence, even though they had never intended such offence and had apologised immediately to those who had been offended by it. …**

> **85. We considered very carefully whether the Claimants would have been banned from holding office for three to five years for the unintentional racial offence. Having done so, we are not satisfied that, in the absence of the allegation that the SOC was contravening the union rules, the Claimants would have been banned from holding office for such lengthy periods. Our reasons for reaching that conclusion are as follows.**
>
> **…**
>
> **91. The combination of all those factors [set out in paragraphs 86-90 above] led us to the conclusion that it had not been shown that the Claimants would have received the disciplinary sanctions that they did for having caused unintentional racial offence by the use of the cartoon in the absence of the assertions against the SOC."**

63. Mr White submits that (1) the Tribunal erred in law in paragraph 85 by asking itself whether the u would have imposed precisely the same disciplinary sanctions on the Appellants irrespective of whether production and distribution of the leaflet was in connection with conduct falling within s.65(2) (Groun alternatively (2) the Respondents would have been subjected to the discipline that they were subjecte regardless of whether the leaflet referred to a matter protected by ss.64 and 65 and in finding that that was n the Tribunal arrived at a conclusion that no reasonable tribunal, properly directing itself as to the law, could arrived at. (Ground 5).

64. Mr White contends that the Tribunal put an impermissible gloss on the statutory wording which req the Tribunal to consider whether the act, omission or statement of the Claimant is one in respect of w individuals would be disciplined by the union, not whether precisely the same disciplinary sanction woul applied. S.64(2) should be read with s.65(5). S.64(2) provides that an individual is disciplined determination is made by an official of the union that the person is deprived to any extent of the ben services or facilities of the union (s.64(2)(d)) or subjected to some other detriment (s.64(2)(f)). S.64(2) sit submits, uneasily with s.65(5) if s.65 requires the Tribunal to consider whether the union would have imp precisely the same disciplinary sanctions on the Appellants irrespective of whether their production distribution of the leaflet was in connection with conduct falling within s.65(2). He submits that the test ap by the Tribunal is one which a trade union is unlikely to be able to satisfy, is not required by the wordi s.65(5), and is incompatible with Article 11 of the Convention (on the assumption that the challenge u Ground 1 fails and ss.64-65 are otherwise compatible with Article 11).

65. We reject Mr White's submissions. We agree with Mr De Marco that the words "would be discipli in s.65(5) mean would have been disciplined as the relevant individual was in fact disciplined. As Mr De M observes, if an employee who had been expelled from his union for alleging a breach of the union's rule producing a satirical leaflet could not rely on the statutory protection because an employee who produc

similar satirical leaflet which did not allege a breach of rules would have been subjected to an oral wa under a disciplinary procedure then the statutory protection would have no real meaning or effect.

66. An individual is unjustifiably disciplined if "one of the reasons" for disciplining him is attributable t actual or supposed conduct to which s.65 applies (s.65(1)). If a member of a union says or does somethin which members would normally be disciplined anyway, independently of the fact that the conduct is connected with a protected act, then it is not unjustifiable to discipline the member in question for that co (s.65(5)). Paragraph 2892 in *Harvey on Industrial Relations and Employment Law* gives the following exan

> **"… suppose a union leader, haranguing a mass meeting, urges members to come out on strike. Joe Just is opposed, and expresses his opposition by throwing a bad egg at the orator. According to the blacklist it is 'unjustifiable' to discipline a member for indicating opposition to a strike; but if it is shown that members who throw missiles at union officials are usually disciplined for, say, bringing the union into disrepute, then Joe can be justifiably disciplined for throwing the egg, even though it would be 'unjustifiable' to discipline him for opposing the strike."**

Accordingly the Respondents cannot be disciplined for the allegations they made against the SOC; on the hand they could be justifiably disciplined for causing racial offence by the cartoon. However the Tribunal entitled to conclude that the discipline that was in fact imposed was as a result of what the Respondents about the SOC and that they would not have been banned from holding office for such lengthy periods fo unintentional racial offence.

67. We agree with Mr De Marco that s.65(5) does not assist the Appellant. In our view the Tribunal di err in finding that the Respondents were unjustifiably disciplined for the allegations they made against the S

68. We can deal with Ground 5 shortly as Mr White, we think understandably, did not press this grou his oral submissions. We have regard to the authorities, in particular **Stewart v Cleveland Guest (Enginee Ltd** [1994] IRLR 440 and **Yeboah v Crofton** [2002] IRLR 634 as to the proper approach to be taken by tribunal to appeals on the ground of perversity. We are satisfied for the reasons given in paragraphs 86-90 o Reasons that the finding made by the Tribunal at paragraphs 85 and 91 that in the absence of the allegation the SOC was contravening union rules the Respondents would not have received the disciplinary sanctions they did for having caused unintentional racial offence, is not perverse. (See also para 77 of the Reasons).

Ground 4: incorrect application of s.65(6) TULR(C)A

69. Mr White submitted that the Tribunal erred in law in paragraph 92 of the Reasons when considerin issue whether the Respondents made a false assertion that the SOC had contravened a requirement impose

or under the rules of the union in the belief that the assertion was false or otherwise in bad faith, by faili consider and determine the Appellant's contention that the assertion was clearly and manifestly false.

70. If the assertion was clearly and manifestly false the Tribunal would have had to consider whethe was or should have been known to the Respondents. This would, Mr White submits, have "shed light" o issue whether the Respondents believed the assertion was false or otherwise acted in bad faith (see para 20 c Notice of Appeal).

71. In paragraph 92 the Tribunal made a finding that the Respondents "genuinely believed that their mo were not in contravention of the union's rules for the reasons that they gave when they appealed and to evidence" and "[t]hey, therefore, believed that the reason for rejecting them were that these were controve matters that the union and the SOC did not want debated". The Tribunal found that the Respondents mad assertion that they did about the SOC "believing it to be true" and they were satisfied that the Respon "made the assertion in good faith and that they had no ulterior motive for making it".

72. S.65(6) TULR(C)A prevents an individual from relying on the statutory protection where the asserti has made was false and he made the assertion in the belief that it was false or otherwise in bad faith.

73. In our view the Tribunal, having found the Respondents genuinely believed the assertion to be true that it was made in good faith, was entitled to consider it was not necessary for it to decide whether the asse was in fact true or false. There was no error of law made by the Tribunal in the application of s.65(6).

Conclusion

74. For the reasons we have given we uphold the decision of the Tribunal that the Respondents unjustifiably disciplined, contrary to section 64 of the **Trade Union and Labour Relations (Consolidation 1992**. Accordingly this appeal is dismissed.