EMPLOYMENT TRIBUNALS

Claimant: Mr R Latchman

Respondent: Department for Work and Pensions

Heard at: Birmingham Employment Tribunal (by CVP)

On: 20, 21, 22 and 23 April 2021
Two further days were listed for deliberations without the parties in this case, those being 02 June 2021 and 29 July 2021.

Before: Employment Judge Mark Butler
Ms W Ellis
Mr P Talbot

Representation
Claimant: Mr O Isaacs (Counsel)
Respondent: Mr D Maxwell (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing.

JUDGMENT

The claims of automatic unfair dismissal pursuant to s.152 Trade Union Labour Relations (Consolidation) Act 1992, and victimisation pursuant to s.27 of the Equality Act 2010 are ill-founded and dismissed.

The claim of unfair dismissal pursuant to Part X of the Employment Rights Act 1996 succeeds.

This case will now be listed for a remedy hearing.

REASONS

INTRODUCTION

1. The claims in this case arise following the presentation of a claim form on 01 August 2018. The claimant brought complaints of unfair dismissal, wrongful

dismissal, race discrimination and detriment/victimisation/automatic unfair dismissal by reason of trade union office or membership.

2. The claim of race discrimination was withdrawn by the claimant by email dated 13 March 2019. I have not seen a dismissal judgment in relation to this withdrawal, and so for completion purposes we dismiss this part of the claim on withdrawal here.

3. The claimant made an application to amend his claim on 22 April 2021, which was day 3 of this hearing, to include a claim for victimisation. This was following the evidence of Mr Jordan. This amendment application was granted having heard the submissions of both parties and having applied the balance of hardship and injustice test. Reasons for this decision were given on that day, and are not repeated here. The respondent was given permission to update their grounds of resistance in light of this decision.

4. This case was initially listed for 8 days by Employment Judge Housego in a Telephone Case Management Hearing on 10 December 2018. However, this listing was reduced to 4 days when the matter came before Employment Judge Miller at a Preliminary Hearing on 01 June 2020. This listing was for the case to be heard on 20, 21, 22 and 23 April 2021.

5. Unfortunately, the case was not completed within the four day listing. We had only just managed to complete the evidence, and even this required some late sittings by the tribunal. Having enquired as to dates of availability, and having heard representations from both sides, the tribunal made the decision that it would receive written submissions in this case, and seek to deliberate shortly after the date laid down to exchange and sent to tribunal those written submissions. Written submissions were directed to be exchanged with one another and sent to tribunal by 14 May 2021, with a right of reply on the law by 28 May 2021. The tribunal was listed for deliberations on 02 June 2021, which did not yield a decision. The tribunal was listed for deliberations again on 29 July 2021. This is the decision that came out of those two days of deliberations. We apologise to the parties for the delay in getting this decision to them.

6. We were assisted in this case by a bundle that contained some 730 pages and a supplementary bundle that contained 110 pages.

7. There were also 14 pages of additional relevant documents that were disclosed to the tribunal on 22 April 2021. Having heard submissions from Counsel for both sides, the tribunal made the decision to allow these documents in. Although we do make criticism of the respondent for disclosing what appears to be relevant documents so late in the proceedings.

8. The claimant gave evidence on his own behalf and called Mr Martin Cavanagh and Mr Sidharth Anard as a witness. Mr Cavanagh was the claimant's PCS Union Representative. Mr Sidharth Anard was a colleague of the claimant, and had various roles alongside the claimant with the PCS Union, including being Co-Branch Secretary.

9. The respondent called the following witnesses:

    a. Mr Sonia Ghaleb, who acted as Investigating Officer tasked with investigating two allegations of misconduct made against the claimant.
    b. Ms Judi Blacow, who acted as Decision Maker in relation to the two allegations of misconduct made against the claimant.
    c. Mr Glenn Jordan, who acted as the Appeal Manager in the claimant's appeal against the decision to dismiss him from his employment with the

respondent.

10. We thank both representative for the way that they presented their case in these proceedings. And for their persistence in ensuring that all of the evidence was heard in 4 days that were allocated. But further, for the concise written submissions we received in closing.

ISSUES

11. The parties provided the tribunal with an agreed list of issues. These stood as the issues to be determined in this case (although following the amendment application on 22 April 2021, this was expanded to include a claim for victimisation, which is recorded below). The list of issues in this case was as follows:

Complaints of ordinary unfair dismissal (s. 98 ERA 1996) and automatically unfair dismissal (s. 152 TULRCA 1992)

1. What was the reason for dismissal?

2. Was it a potentially fair reason?

3. If so, was it reasonable in all the circumstances for the Respondent to treat it as a sufficient reason for dismissal?

4. If the dismissal was unfair, should the Claimant's compensation be reduced to reflect the likelihood that he would have been dismissed in the absence of any unfairness?

5. If the dismissal was unfair, should the Claimant's basic award and/or compensatory award be reduced to reflect any contributory conduct?

Wrongful dismissal

6. Did the Claimant commit gross misconduct?

12. In terms of the victimisation claim, the specific wording of this was recorded as follows: *The Claimant avers that Mr Jordan believed that the Claimant had done a protected act pursuant to s27(1) and (2) Equality Act 2010, namely that Mr Jordan believed that the Claimant had alleged that his line manager (reflects- I) had discriminated against him (the Claimant) on the grounds of race. The Claimant avers that he was victimised and subjected to a detriment contrary to s27 and s39(4) Equality Act 2010 in that his appeal against dismissal was dismissed because he had done a protected act.*

CLOSING SUBMISSIONS

13. The tribunal were assisted by both a written opening note presented on behalf of both the claimant and the respondent, as well as detailed written closing submissions presented on behalf of both parties. We do not repeat those submissions here, however, note that all four documents have been considered and taken into account when reaching this decision.

LAW

14. The tribunal was taken to a range of case law in the closing submissions of Mr Isaacs and Mr Maxwell. Each of which were relevant for the issues that we had to determine, and as such have been considered when reaching this decision. We set out the relevant law below.

    (i) Automatic Unfair Dismissal

15. Protection from dismissal on trade union grounds is contained at section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), which provides that:

> (1) For purposes of **[**Part X of the Employment Rights Act 1996**]** (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
>
> > (a) was, or proposed to become, a member of an independent trade union, . . .
> >
> > (b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .
> >
> > **[…]**
>
> (2) In subsection **[**(1)**]**"an appropriate time" means—
> (a) a time outside the employee's working hours, or
>
> (b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union **[**or (as the case may be) make use of trade union services**]**;
>
> and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.

16. Mr Isaacs submitted the following relevant case law:

    a. **Royal Mail Group v Jhuti (2020) IRLR 129**, with particular reference to the approach to be adopted where a manager has some responsibility for the conduct of the disciplinary inquiry. With a need on the tribunal, in certain circumstances, to look beyond the reasons given by the appointed decision-maker. And where the real decision is concealed from the decision-maker, the Supreme Court at paragraph 20 gave the following guidance:

> "*If a person in the hierarchy of responsibility above the employee (here … Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of*

responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

b. **Brennan v. Ellward (Lancs) Ltd [1976] IRLR 378**, where the EAT held that the critical question is whether using common sense, the acts in question constitute the activities of an independent trade union.

c. **Port of London Authority v Payne [1993] ICR 30**, with the determination to be judged against an objective standard.

d. **Dixon v West Ella Developments (1978) ICR 856**, which held that the word "union activity" must not be narrowly interpreted, although there is a need for the activity in question to have some connection with the Union.

e. **Lyon and Anor v St James Press Ltd (1976) ICR 413**, where the EAT decided that Shop Stewards and other union officials may lose protecton where they are found to have acted wholly unreasonably or malisciously in carrying out their functions, whilst stating that union activity should not operate '*as a cloak or an excuse for conduct which ordinarily 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, and extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair'.*

f. **Bass Taverns v Burgess (1995) IRLR 596**, where the Court of Appeal considered that a Union official had been unfairly (constructively) dismissed when he resigned after being demoted for having made derogatory remarks in a union related presentation which his employer had consented to. However Lord Justice Pill stated that '*I am far from saying that contents of a speech made at a trade union recruiting meeting, however malicious, untruthful or irrelevant to the task in hand they may be, come within the term "trade union activities"*'.

g. **British Gypsum Lyd v Thompson UKEAT/0115/11**, where the EAT held that shop steward was not acting on a "frolic of his own" when he voiced personal views rather than views of members.

h. **Morris v Metrolink RATP Dev Ltd (2019) ICR 90**. When considering whether an employee loses protection under s.152 because of doing something ill-judged or unreasonable, the issue is whether the behaviour is genuinely separabl. In this respect Underhill LJ at paragraph 19 states:

> "*In my view the principle underlying these cases is – as so often – most clearly stated by Phillips J. If Slade J in Mihaj intended to suggest that there was some difference between his approach in Lyon and that taken by this Court in Bass Taverns I would respectfully disagree. At the risk of simply repeating less succinctly what Phillips J says in the passages which I have quoted, there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of section 152 (1), because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and his reference to acts which are "wholly unreasonable, extraneous or*

malicious " seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive (any more than Slade J's formulation in Mihaj); but the point which it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the (principal) reason for the dismissal but some feature of them which is genuinely separable. Azam is a good illustration of such a case: the employee's deliberate breach of confidence could fairly and sensibly be treated as a reason for dismissal distinct from the fact that it occurred in the context of trade union activities."

17. Mr Maxwell included the following legal submissions:

    a. The burden of proof in cases where an employee with the required continuity of service to bring an ordinary unfair dismissal claim alleges they were dismissed for an unlawful reason was addressed by the Court of Appeal in **Maund v Penwith District Council [1984] ICR 143**. Per Griffiths LJ:

        "*If an employer produces evidence to the tribunal that appears to show that the reason for the dismissal is redundancy, as they undoubtedly did in this case, then the burden passes to the employee to show that there is a real issue as to whether that was the true reason. The employee cannot do this by merely asserting in argument that it was not the true reason; an evidential burden rests upon him to produce some evidence that casts doubt upon the employer's reason. The graver the allegation, the heavier will be the burden. Allegations of fraud or malice should not be lightly cast about without evidence to support them.*

        But this burden is a lighter burden than the legal burden placed upon the employer; it is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that raises some doubt about the reason for the dismissal. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal."

    b. Submissions on **Morris v Metrolink RATP Dev Ltd** (2019) ICR 90, noted above, were also made.

(ii) Ordinary Unfair Dismissal

18. The burden of proof rests on the employer to establish that the claimant was dismissed for a potentially fair reason, that being conduct.

19. The Court of Appeal in **Abernethy v Mott [1974] ICR 323**, per Cairns LJ, laid out the correct approach to identifying the reason for the dismissal (although this must now be read against **Jhuti**, see above):

        "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.*"

20. Where the employer satisfies this burden in respect of establishing a potentially fair reason, the tribunal must then apply the statutory test contained within s.98(4)

so as to consider whether the dismissal was fair or unfair, which is expressed in the following way:

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> >
> > (b) shall be determined in accordance with equity and the substantial merits of the case

21. Where the reason for dismissal is conduct the Tribunal will take into account the guidance of the EAT in **BHS v Burchell [1978] IRLR 379** and must be satisfied:

    a. that the respondent had a genuine belief that the Claimant was guilty of the misconduct;

    b. that such belief was based on reasonable grounds;

    c. that such belief was reached after a reasonable investigation.

22. The test requires that the tribunal reviews the reasonableness of the employer's decision, rather than substituting its own view. The question the tribunal must ask itself is whether the decision to dismiss the claimant fell within the band of reasonable responses: **Iceland Frozen Foods v Jones [1983] IRLR 439 EAT**.

23. According to the Court of Appeal in **Sainsbury's Supermarkets v Hitt [2003] IRLR 23**, the range of reasonable responses test applies equally to the Burchell criteria as it does to whether the misconduct was sufficiently serious to justify dismissal. The more serious the allegations the more detailed the investigation: **Salford NHS Trust v Roldan (2010) ICR 1457**.

24. The range of reasonable responses also applies to procedure. And part of this is considering the nature of the disciplinary charge: **Strouthos v London Underground (2004) EWCA Civ 402**.

25. Where an appeal hearing is conducted then the **Burchell** criteria must be applied at that stage, in accordance with the decision of the House of Lords in **West Midlands Co-operative Society v Tipton [1986] IRLR 112** and the speech of Lord Bridge:

> "*A dismissal is unfair if the employer unreasonably treats his real reason as a sufficient reason to dismiss the employee, either when he makes his original decision to dismiss or when he maintains that decision at the conclusion of an internal appeal.*"

26. After an appeal, the question is whether the process as a whole was fair; see **Taylor v OCS Group Limited [2006] IRLR 613 CA**, per Smith LJ:

> "*46. […] In our view, it would be quite inappropriate for an ET to attempt such categorisation. What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.*

> *47. […] The use of the words 'rehearing' and 'review', albeit only intended by way of illustration, does create a risk that ETs will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if ETs realise that their task is to apply the statutory test. In doing that, they should consider the fairness of the whole of the disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine and subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the*
> *thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage.*"

27. Mr Isaacs also took the tribunal to the following case law:

    a. **Uddin v LB Ealing EAT 0165/19**, where it was submitted that the principles of Jhuti applied equally to the reasonableness of the dismissal as they did to the reason itself.

    b. **Hill v Great Tey Primary School Governors (2013) ICR 691**, where it was submitted that as the claim was brought against a public body, the tribunal has to weigh the impact of the dismissal on the Claimant's Convention rights. In every case the Tribunal must come its own view as to whether the imposition of the sanction of dismissal involved a disproportionate and unjustified interference with Claimant's convention rights so as to take dismissal outside the range of reasonable responses. In weighing up this impact, MR Isaacs submitted that the ET must consider (a) the aim which the restriction sought to serve and (b) satisfy itself that the restriction imposed in the light of that aim was one prescribed by law and (c) to consider if the restriction was one which was "necessary in a democratic society." That involves considering whether the measure was appropriate to the legitimate aim, and whether the interference to the exercise of the right was proportionate to the importance of the particular aim it sought to serve.

    c. **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09**, with particular reference to the following paragraphs:

> "*109. …Assuming that is a breach of Trust policy, it still remains to be asked – how serious a breach is that? Is it so serious that it amounts to gross misconduct? In our judgment that is not a question always confined simply to the reasonableness of the employer's belief. We think two things need to be distinguished. Firstly the conduct alleged must be capable of amounting to gross misconduct. Secondly the employer must have a reasonable belief that the employee has committed such misconduct.*
>
> *110. … What is at issue is the character of the act. The character of the misconduct should not be determined solely by, or confined to, the employer's own analysis, subject only to reasonableness. In our judgment the question as to what*

is gross misconduct must be a mixed question of law and fact and that will be so when the question falls to be considered in the context of the reasonableness of the sanction in unfair dismissal or in the context of breach of contract. What then is the direction as to law that the employer should give itself and the employment tribunal apply when considering the employer's decision making?

113. … we think that the Employment Tribunal was quite correct to direct itself at paragraph 27.1.4(b) (see page 18 of the bundle) that "gross misconduct" involves either deliberate wrongdoing or gross negligence."

d. **Brito-Babapulle v Ealing Hospital NHS Trust (2013) IRLR 854**, which is authority for a finding of gross misconduct not automatically justifying that a dismissal was within the range of reasonable responses.

(iii) Victimisation

28. Protection from victimisation is provided for in section 27 of the Equality Act 2010 (EqA). With a protected act for the purposes of victimisation defined within section 27(2) EqA:

" Each of the following is a protected act:

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act. "

29. Section 27(3) EqA provides that making a false allegation will not be protected if it is done in 'bad faith', with guidance on the issue provided by the EAT in **Saad v Southampton University Hospitals NHS Trust (2019) ICR 311**.

30. The crucial question in victimisation complaints often relates to causation: was any detriment because of the protected act? Importantly, in **Nagarajan v London Regional Transport 1999 ICR 877**, it was held that if the protected act has a "significant influence" on the employer's decision-making, discrimination will have been proved.

31. The question of separability also applies to victimisation complaints. In that an individual may lose protection from victimisation under the EqA if the detriment is not inflicted because they carried out a protected act but because of the manner in which they have carried it out. In this regard both Mr Isaacs and Mr Maxwell made legal submissions on the case of **Martin v Devonshires Solicitors [2011] ICR 352 EAT**, whilst Mr Isaacs also brought the case of **Gillingham Football club Ltd v McCammon EAT 0560/12** to the attention of the tribunal.

32. Useful guidance on the issue of separability was provided by Underhill P (as he then was) in the **Martin** case:

"*22. We prefer to approach the question first as one of principle, and without reference to the complex case law which has developed in this area. The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint. Take the case of an employee who makes, in good faith, a complaint of discrimination but couches it in terms of violent racial abuse of the manager alleged to be responsible; or who accompanies a genuine complaint with threats of violence; or who insists on making it by ringing the managing director at home at 3 am. In such cases it is neither artificial nor contrary to the policy of the anti-victimisation provisions for the employer to say "I am taking action against you not because you have complained of discrimination but because of the way in which you did it". Indeed it would be extraordinary if those provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint. (What is essentially this distinction has been*
recognised in principle–though rejected on the facts–in two appeals involving the parallel case of claims by employees disciplined for taking part in trade union activities: see Lyon v St James Press Ltd [1976] ICR 413 ("wholly unreasonable, extraneous or malicious acts": see per Phillips J at p 419C—D) and Bass Taverns Ltd v Burgess [1995] IRLR 596.) Of course such a line of argument is capable of abuse. Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to "ordinary" unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."

(iv) Wrongful dismissal

33. The burden rests on the employer to establish that it was entitled to dismiss the claimant without notice. Mr Isaacs submitted the following two useful cases:

    a. **Neary v Dean of Westminster (1999) IRLR 288**, with the submission that the conduct must so undermine the trust and confidence that the employer must no longer be required to retain the employee; and

    b. **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09**: The employer would need to establish either deliberate wrongdoing or "gross negligence."

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

(i) General Findings

34. In or around 23 December 2016, the claimant submitted a grievance of harassment, discrimination and bullying against Mr Cornfield (pp.88(i)-88(ii)). This concerned a number of issues that took place in or around 06 December 2016. This included that:

    a. He felt that Mr Cornfield was subjecting him to discrimination because of his trade union activities
    b. That Mr Cornfield raised a complaint to the HEO concerning events around this date, which the claimant describes as a fabrication to ty and get him into trouble
    c. That these events have made him feel 'extremely stressed out and uncomfortable in the classroom with him sitting directly behind' the claimant.

35. Between 23 December 2016 and 20 January 2017, the claimant contacted Mr Stuart Hayden on up to 3 separate occasions to chase up a response into the grievance that he had raised (see p.89).

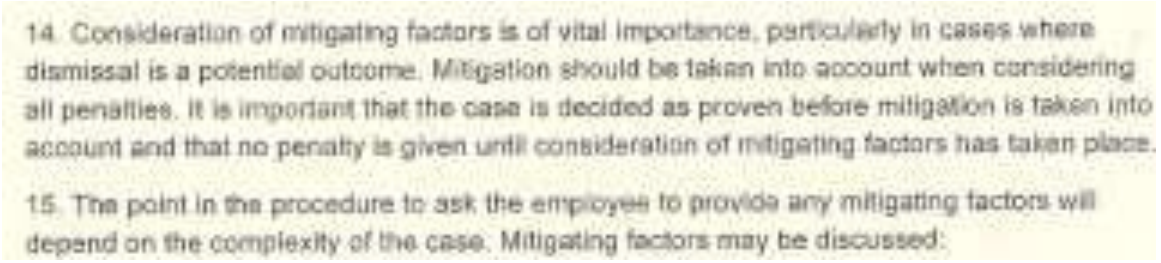
36. The claimant withdrew his grievance against Mr Cornfield in February 2017. This is described as a reluctant withdrawal by the claimant. This withdrawal was not conditional on any further actions (see p.109).

37. The respondent applied various policies/guidance in place which is to be applied to and for its workforce. The claimant was aware that these policies, and their principles contained within each document respectively, applied to him during his employment. The following parts of these policies/guidance documents relevant to matters in this case, that applied to the claimant and/or the investigation concerning him, are as follows:

    a. The Grievance Policy (p.414), which states that:

> 10. Depending on the available evidence, the investigator may need to interview both the employee whose behaviour is being investigated and appropriate witnesses (who are required to attend a meeting when called upon by the investigator) and obtain any other required evidence such as relevant correspondence. For grievance cases, Grievance Model

    b. How to: Assess the level of misconduct and decide a discipline penalty, which states that:



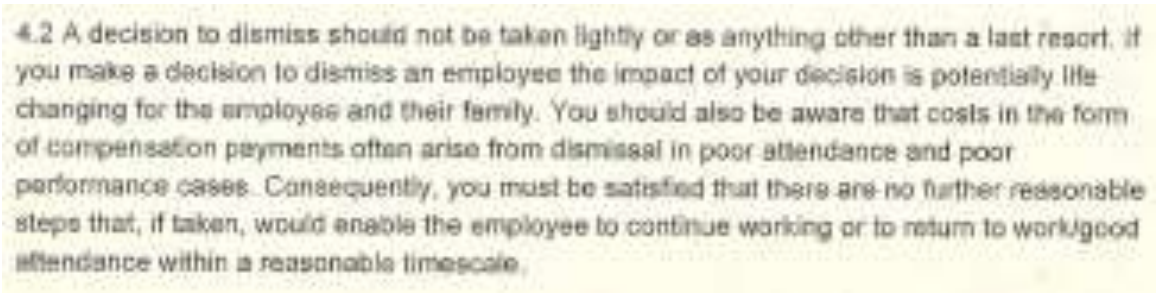
14. Consideration of mitigating factors is of vital importance, particularly in cases where dismissal is a potential outcome. Mitigation should be taken into account when considering all penalties. It is important that the case is decided as proven before mitigation is taken into account and that no penalty is given until consideration of mitigating factors has taken place.

15. The point in the procedure to ask the employee to provide any mitigating factors will depend on the complexity of the case. Mitigating factors may be discussed:

c. And in that same document, the respondent provides examples of penalties for misconduct (p.430). This is against different grades of seriousness of offence.

   i. The respondent describes minor misconduct (pp.430-431) as being 'An isolated example of misconduct which falls short of the standards expected. First offence and minor in nature'. Examples provided include being rude to colleagues. An informal discussion is recorded as the possible outcome for such incidents.
   ii. The respondent provides for more serious minor misconduct. The examples provided include 'Minor breaches of the Civil Service Code or Standards of Behaviour such as inappropriate behaviour on social media sites or in public where the department can be identified' and 'Short duration of unauthorised absence'. The normal penalty is describes as being a First Written Warning.
   iii. The respondent describes serious misconduct (p.432) as being either being repeated minor offences of significant breaches of the standards required. Examples provided include 'Abuse of sick leave provisions' and 'offensive personal behaviour, for example, abuse of a colleague (verbally or by email or social media)'. The normal penalty is described as being a first written warning, unless such a warning has already been given.
   iv. The respondent describes gross misconduct as being serious enough to destroy the working relationship between the employee and employer and the likely sanction is dismissal. The examples of this conduct provided by the respondent include '…more serious cases of bullying, harassment and discrimination', 'working without permission for another employer while on sick leave', '…significant breach of the Civil Service Code or Standards of Behaviour policy' and 'very offensive behaviour'.

d. HR Decision Maker's Guide (pp.437-445). Which includes the following:



4.2 A decision to dismiss should not be taken lightly or as anything other than a last resort. If you make a decision to dismiss an employee the impact of your decision is potentially life changing for the employee and their family. You should also be aware that costs in the form of compensation payments often arise from dismissal in poor attendance and poor performance cases. Consequently, you must be satisfied that there are no further reasonable steps that, if taken, would enable the employee to continue working or to return to work/good attendance within a reasonable timescale.

4.3 Bullying or harassment

All grievances which allege bullying or harassment should be dealt with via Management Investigation. In these cases it is not only about whether the perpetrator of the acts intended them or not, but also about the impact on the individual recipient and how it makes them feel. The Decision Maker will have to consider whether or not the conduct in question has the purpose or effect of:

- violating the individual's dignity, or
- creating an intimidating, hostile, degrading, humiliating or offensive environment for the individual.

In deciding whether the conduct in question has such purpose or effect the Decision Maker will take into account:

- the perception of the individual recipient;
- the other circumstances of the case;
- whether it is reasonable for the conduct to have that effect.

e. Annual leave policy (pp.455-472). This included the following:

12. Taking annual leave during sickness absence

12.1 Employees can ask to take annual leave during periods of sickness absence. They should apply to their manager, in advance, in the usual way. The annual leave and sickness absence will run concurrently – the period of annual leave will not break the sickness absence.

…

12.5 When a period of annual leave during sickness absence has been approved, the manager should notify Employee Services of the period of leave and the number of days to be paid via form XAL1 attached to a Service Request. Any sick pay, SSP or SPPR in payment will be offset against the annual leave payment. Payment for the annual leave period will be made with salary in the month in which the leave was taken or the next available month if the payroll closedown date is missed.

…

- You **must** obtain permission from your line manager to carry out any outside occupation (including unpaid occupations and voluntary work) when you are on sick leave. Failure to do so may result in dismissal.

(at p.468)

f. Sick Leave Procedures for Managers (pp.473-487), which provides guidance for managers where an employee becomes ill. This includes the following:

Working whilst on Sick Leave

6.10 Employees who are on Sick Leave should not engage in any activities, whether occupational, voluntary or recreational, that may retard their recovery and delay their return to work. Employees should obtain permission from their managers to carry out any outside occupation (including unpaid and voluntary occupations) when they are on Sick Leave. This includes weekends and public and privilege holidays, except when these fall at the beginning or end of the sick period. Failure to do so may result in dismissal.

6.11 The manager should record their decision about the outside occupation on the Attendance Management Plan (AMP). Advice can be sought from the Occupational Health Service if the manager is unsure whether continuing with the outside occupation may retard the employee's recovery and delay their return to work.

Taking annual leave whilst on sick leave

6.13 Employees can ask to take annual leave during periods of sickness absence. They should apply to their manager, in advance, in the usual way. The annual leave and sickness absence will run concurrently – the period of annual leave will not break the sickness absence and the half pay and nil pay dates are not affected.

g. Discipline procedure (pp.504-515, which includes:

14. In serious cases of misconduct, suspension or restriction of duties may be appropriate whilst the alleged misconduct is investigated. Line managers should not use either as a penalty. It should be made clear to the employee that the suspension/restriction is not disciplinary action and does not assume any guilt on behalf of the employee being suspended / restricted. The period should be as brief as possible and kept under regular review by the line manager.

16. As suspension is a serious decision, an HR Expert should be consulted before any suspension action is taken. The Counter Fraud and Investigation team should be consulted for advice on whether suspension is appropriate where internal fraud is suspected. Circumstances when suspension may be appropriate could include where:

- there has been a serious breakdown in the relationship between the employee and the department
- there is a risk to other employees, property or customers
- there is a risk that the employee may tamper with evidence required for the investigation and/or influence witnesses.

17. Suspension may be appropriate immediately following an incident or later in the process, for example, at a point during or after the fact-gathering or investigation when evidence comes to light. In all cases the employee must be informed in writing on the day of the suspension that they are being suspended. The manager should either hand the employee a letter or post it to the employee's home address.

h. Standards of Behaviour Procedures (pp.518-539), which includes the following:

19. When ill, you must agree arrangements with your manager for making regular contact with them while not attending work. You must obtain permission from your line manager to carry out any outside occupation (including unpaid occupations and voluntary work) when you are on sick leave. Failure to do so may result in dismissal.

51. It is a personal decision whether or not to join a Trade Union but the Civil Service encourages employees to join an appropriate Trade Union and to play an active part within it. You do not need permission to take part in Trade Union activities in your own time, but you will still be bound by the rules on disclosure of information.

75. You must not approve your own notifications using the Department's Resource Management system unless a specific policy permits you to do sc Disciplinary action will be considered if you fail to follow policy guidance. Delegated access to approve notifications can only be made in line with Resource Management guidance. You must be mindful of the following standards, among other things, when using the Internet or e-mail facilities:

- You must not send e-mails that contain offensive messages or content, either from within or into the gsi network. The Department reserves the right to routinely scan for potentially offensive and inappropriate material and to review e-mails you send within or into the Department's systems

i. Standards of Behaviour Policy (pp.540-545), which includes the following:

1. Mutual trust is the foundation of the employment contract between the Department and its employees. The Standards of Behaviour policy provides direction on how to behave to avoid any action that could compromise this trust.

5. The consequences of failing to comply are serious and attract penalties up to and including dismissal.

Q13 Are TU reps allowed to use DWP facilities when engaged in their TU activity?

Trade union representatives are allowed use of departmental facilities when engaged in their Trade Union activities to the extent described in the DWP Employee Relations Framework.

This includes the use of premises, notice-boards and E-Mail, but they must comply fully with the provisions of the Department's Electronic Media Policy and Standards of Behaviour and use is limited to:

- communications with managers on employee relations issues

TU representatives must not use facilities to:

- distribute or display literature or information that:
  - is not officially sanctioned by the Trade Union and/or is not reflective of official union policy;
  - in management's view is offensive, abusive, derogatory or illegal or encourages or publicises industrial action or political opposition to Government policy. It is important to remember that in determining whether something is offensive, the test is how the article is received, not how it was intended. As this is unavoidably subjective representatives are therefore advised to err on the side of caution. An article will be classed as abusive if it employs insulting or excessive language or if it names or enables identification of any individual or group being singled out for criticism or condemnation.
- circulate material to non - union members or to staff who have not asked to receive it, though this does not preclude use of a notice board.
- conduct activities proscribed by the facilities agreement

38. The purpose behind the approach adopted in the annual leave policy, where annual leave is taken/requested during a period of sick, is to ensure that either the employee in question does not engage in an activity which may retard their recovery, or, to ensure that they are not engaging in an activity which would contradict their leave for sickness reasons (that is to avoid questions over why they could engage in one activity but remained too ill to work). To ensure that this policy achieved the intended outcome, it was applied broadly to include any work-related activities, rather than occupations or work in the narrow sense.

39. The claimant misunderstood the annual leave policy, and did not consider that this required him to request leave whilst on sick leave, for attendance at a trade union conference, which does not fall under the term occupation in the narrow sense. This was a reasonable misunderstanding on the part of the claimant. Mr Jordan appeared to accept this under cross-examination.

40. Ms Ghaleb, Ms Blacow and Mr Jordan were all supported by Human Resources throughout the disciplinary and dismissal process. However, for the avoidance of doubt, this was in the form of advice and guidance, rather than mandatory direction. Each of these three individuals reached decisions independently, having considered the advice given to them from Human Resources.

(ii) The two allegations

41. The claimant did not request annual leave from Mr Hayden before he went on sick leave in April 2017.

42. The claimant commenced a period of sick leave in April 2017.

43. The respondent does not treat attendance at Trade Union Conferences as work. Nor is it treated as an occupation or as voluntary work.

44. The respondent does not allow workers to attend such conferences in working time. In order to attend a trade union conference, an individual ordinarily takes annual leave to enable them to attend.

45. Between 22 May 2017 and 25 May 2017, the claimant attended a Trade Union Conference.

46. On or around 28 June 2017, Sonia Ghaleb agreed to investigate the claimant in relation to conference attendance. (p.94). The reason for the investigation was that the claimant allegedly attended the PCS Conference in works time whilst on long term absence without advising/discussing with his line manager, applying for annual leave or other time off. The level of disciplinary action being considered was recorded as gross misconduct (see pp 93 and 95). Although within the email sent by Mary Chadwick on p.94 it is expressed that '…the allegation is also regarding his TU position', we are satisfied that in the context of this email, and consistent with the email on p.93 and the record of a potential disciplinary case on p.95, and the witness evidence we read and heard, this is referring to the context of his attendance, being a TU conference which the claimant attended in his position as co-chair of the branch, rather than being the reason for any action.

47. The fact that it was attendance at a trade union conference had no bearing on the decision to investigate the claimant.

48. Mary Chadwick advised Ms Ghaleb that this matter should be investigated as gross misconduct (p.93). Ms Gahleb did not consider that this was a matter that should have been investigated at the level of gross misconduct, although she did investigate it at this level.

49. On 05 July 2017, Ms Ghaleb further discussed the matter with a member of HR called David. Ms Ghaleb was given the following advice:

> As I advised if the MOS is off work on sick absence then by going to the TU conference he is not necessarily using up extra official work time to go on the conference as he is on sick leave however the real issue here is the fact that the MOS is in effect working during sick absence but yet is deeming himself otherwise not fit enough to return to work in his normal work role. Under the discipline policy working without permission for another employer whilst on sick leave is an example of Gross Misconduct.
>
> In this case whilst the MOS is not working for another employer he was in fact working for the Trade Union which is still working in another role and not in his usual work role. Therefore as we agreed today the question that could potentially arise is why was the MOS working in TU activities for a week if he has been deemed not fit to work by his GOP and if he felt well enough to work in the TU role for a week then why has he not explored the option of returning to his normal official work role even on reduced duties if applicable and why has he not informed you as his line manager that he was fit enough to attend the TU conference. This however can only be answered upon interviewing the member of staff.

50. As part of the same email, David from HR also gave advice in terms of the level of the offence:

> As to whether the matter is actually Gross Misconduct is debatable and a lower level may be appropriate however the final level will depend on what arises fom the investigation. As we discussed the investigation could be started at Gross Misconduct especially if there is a break down of trust however after investigation if the matter is not deemed as Gross then it could be reduced and the level confirmed by the Independent Decision Maker who must be of SEO grade or above.

51. On 16 July 2017, Ms Ghaleb wrote to the claimant to inform him that she was investigating him following an allegation that he had attended the PCS conference in works time whilst on long term absence. And that he did so without advising/discussing with his line manager, applying for annual leave or other time

off. And that this was being treated as gross misconduct. The investigation process was explained to the claimant in that letter. There was no expression or suggestion in this letter to the effect that the claimant's failure to follow the proper procedures had led to a breakdown of trust and confidence between the claimant and the respondent (pp.100-101).

52. On 24 July 2017, the claimant sent an email to a number of different recipients, with the subject matter as 'Craig Cornfield- Co Option'. The claimant made an error in who he sent this email to. Which resulted in the claimant sending this email to two individuals who were not members of the union. The claimant was careless in typing in names to whom the email would be sent, especially with common names such as 'John Smith', simply assuming that it would be sent to the correct person. The claimant was at fault, which led the email being sent to a wider distribution list than intended.

53. The email contained the claimant's views of Mr Cornfield, and in particular he expresses that:

    a. I took out a grievance against [Mr Cornfield] in December 2016 for him trying to bully me by stopping me from completing union activities during 2012 training. His manager Stuart Hayden refused to investigate the grievance I had submitted…
    b. … has applied to join the BEC has just 6 months ago attempted to bully me because I was doing my TU duties
    c. Hence I find it morally indefensible that a bully like [Mr Cornfield] be allowed to join the BEC.
    d. By allowing him to join we would be condoning his deplorable and morally offensive behaviour rather than condemning it. By allowing him to join we would be giving management the green light and telling them its ok for them to harass and intimidate our reps as we will still be happy for the bullies to join our BEC.
    e. I feel that the Branch are sending a message to management that if a non-ethnic manager bullies or intimidates a black or ethnic minority rep or Branch Official, then the Branch are willing to accept this.

54. The email was sent from the claimant's personal computer, and did not include a disclaimer or confidentiality warning.

55. Any email sent by an employee of the respondent, including the claimant at the time, into the respondent's network is then subject to the respondent's policies and rules (referenced above).

56. This email was reported to management by a third party.

(iii) Investigations

57. Ms Chadwick provided Ms Ghaleb, the investigating officer with Human Resources advice during the process. On 01 August 2017 at 08.36, Ms Chadwick sent an email to Ms Ghaleb in relation to the second complaint. This also expressed that Ms Chadwick had already spoken to Employee Relations who agreed that the contents of the email were unacceptable and that there were additional concerns that it had been sent outside of the Department. Ms Ghaleb was advised that the

two incidents, attendance at the TU conference and the email, could be investigated together. It was further advised that the invitation to interview should reflect the higher level of misconduct (ie gross misconduct) and that this could be reduced/mitigated down depending on the evidence (p.113). Ms Gahelb followed this advice.

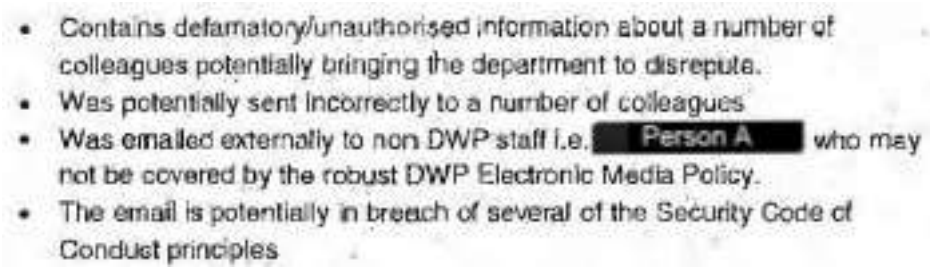
58. On 01 August 2017 at 18.06, Ms Chadwick emailed Ms Ghaleb and suggested to her that she should take a statement from Mr Haydyn on whether the claimant had asked for and was granted leave for conference attendance, before he left the employ of the respondent. In addition, Ms Chadwick inserted part of the Policy that refers to 'Working whilst on Sick Leave'. Before asking the question as to whether conference attendance could be construed as 'voluntary' within that policy (see p.122).

59. On 02 August 2017, as part of her investigations into the claimant's attendance at the TU conferenece, Ms Ghaleb held an informal meeting with Mr Haydyn. Mr Haydyn in that meeting confirmed that the claimant had not requested annual leave to attend the TU conference the week commencing 22 May 2017. There was no ambiguity in the response given by Mr Haydyn (p.124). The tribunal accepted Ms Ghaleb's evidence on this matter. And this is consistent with the holiday leave records, and that the claimant later sought retrospective leave for the dates in question (see below). Further, it would have been expected that the claimant would have followed up any such oral request with a written confirmation; there is no such written confirmation.

60. After having returned to work in August 2017, the claimant had his leave for the week commencing 22 May 2017 retrospectively approved by his line manager. (p.92). However, the claimant did not inform his line manager that the status of his leave for that period was subject to a disciplinary investigation.

61. Despite having a policy to provide guidance at to when suspension can be considered (seep.506), which includes for circumstances where there is an alleged serious breakdown in the relationship between the employee and the department, the respondent at no point decided to suspend the claimant.

62. On 23 August 2017, Ms Ghaleb wrote a letter to the claimant (see pp.139-140). This informed the claimant that she was now investigating two allegations: first, the claimant's attendance at the PCS conference during the week commencing 22 May 2017. And, secondly, the email sent by the claimant on the 24 July 2017. In relation to the email it was explained it:



- Contains defamatory/unauthorised information about a number of colleagues potentially bringing the department to disrepute.
- Was potentially sent incorrectly to a number of colleagues
- Was emailed externally to non DWP staff i.e. Person A who may not be covered by the robust DWP Electronic Media Policy.
- The email is potentially in breach of several of the Security Code of Conduct principles

No further detail in relation to the email was provided to the claimant at this point, including what aspects of the email were defamatory or unauthorised information. There was no suggestion in the letter that the claimant's conduct had caused a breakdown of trust and confidence.

63. It was further explained by Ms Ghaleb in this letter that the purpose of her investigation was to gather an present evidence in a report, which will include a decision on whether there was a case to answer.

64. The investigatory meeting held by Ms Ghaleb with the claimant took place on 21 November 2017. Mr Cavanagh was present, as the claimant's TU representative, and Ms Andrea Homer was present as note taker. The notes of that meeting are at pp.174-179. There was no mention in this meeting that Ms Ghaleb had informally interviewed Mr Haydyn. Nor was the allegation concerning defamatory information furnished with further details. The claimant responded to the allegation as follows:

    a. Allegation 1: the claimant initially focused on wanting to know who reported his attendance at the conference to management. Before expressing that he had requested annual leave to Mr Haydyn. And finally, the claimant focused on challenging the respondent's guidance/policy.
    b. Allegation 2: the claimant disagreed that any of the content of the email was defamatory, that the email was sent to non-trade union members in error, and that as it was a Trade Union matter then this was a matter for the trade union and not the respondent.

65. On 5 December 2017, Ms Ghaleb held an investigation meeting with Mr Cornfield. Ms Homer was again present as a note taker. The notes of that meeting are at pp.207-208. This meeting lasted circa 10 minutes.

66. A second investigation meeting held by Ms Ghaleb with the claimant took place on 17 January 2018. Mr John Smith attended as the claimant's TU representative, and Ms Homer again attended as note taker. The notes of this meeting are at pp.224-227.

67. On 22 January 2018, Ms Ghaleb wrote a letter to Mr Cornfield, informing him of her decision in relation to the grievance he raised against the claimant. Ms Ghaleb informed Mr Cornfield that she reached a decision to uphold his grievance. The grievance that was upheld was expressed in that letter as being:

    - Ricardo sent an email on 24th July 2017 to PCS members about your application for co-opting. The email was also sent to your peer who has no connection with your union co-option.
    - You felt that the email was incorrect, a personal attack on you as an individual and designed to coerce other individuals to vote against you.
    - The email left you feeling bullied, intimidated and that it affected your health.

68. The investigation report was release by Ms Ghaleb on 24 January 2018. This report is at pp.234-243. The decision was that the claimant had a case to answer in respect of the two allegations.

(iv) Decision Making

69. The claimant's case was referred to Ms Blacow, who was appointed to make a decision on what disciplinary action would be applied to the claimant.

70. Ms Blacow held a Decision Maker Interview with the claimant on 15 February 2018. Mr Cavanagh was present, as the claimant's TU representative, and Ms Gina Collins was present as note taker. Notes of the meeting are at pp.249-258 (although there are earlier versions of the notes in the bundle). In this meeting, the following was discussed/raised, amongst other things:

    a. The claimant raised concerns about the process
    b. That there were flaws in providing the claimant with all the necessary evidence
    c. The claimant repeated that he had asked for leave for the conference from Mr Haydyn
    d. The claimant questioned whether attending a conference was 'working'
    e. It was raised by the claimant that the data owners of the email was the union, and not the respondent and therefore should not have been investigated by it

71. Ms Blacow released her decision to the claimant on 01 March 2018. A record of Ms Blacow's decision is at pp.296-301, and a copy of the completed Decision Maker's template is at pp.302-306. Ms Blacow decided the following:
    a. That both the allegations were potentially in breach of the respondent's policies
    b. That appropriate and reasonable investigations had been conducted
    c. That disciplinary procedures had been followed appropriately
    d. That the appropriate level against which this behaviour should be considered was gross misconduct
    e. That the claimant was given the opportunity to put forward mitigation
    f. That allegation 1, attendance at the trade union conference, demonstrates a breakdown of trust between the claimant and the respondent.
    g. In respect of allegation 2, the email, that the email had an impact on Mr Cornfield in that it made him feel bullied and intimidated, and that it did contain offensive, derogatory and unsubstantiated statements with the clear intention of damaging the reputation of Mr Cornfield. With the allegation being proven.
    h. Ms Blacow concluded that both allegations were proven. And that the level of misconduct was serious enough to have destroyed the rleatoknship between the claimant and the department. And having considered mitigation, that the claimant would be dismissed without notice.

72. Ms Blacow made the decision that either of the two incidents alone would have justified dismissal without notice (which was Ms Blacow's oral evidence), but that he was being dismissed for a combination of the two. Ms Blacow honestly believed the claimant was guilty of the misconduct in question.

73. The claimant was sent a letter confirming his dismissal dated 01 March 2018 (pp.307-308).

74. The claimant appealed the decision to dismiss him by letter dated 14 March 2018. The appeal was made on the basis that there was a failure to follow procedure (see p.319).

75. Following a number of delays, an appeal meeting was held with Mr Jordan on 21 August 2018 (notes of this meeting are at pp.367-373).

76. As part of the process Mr Jordan sought guidance from Human Resources (see pages G, H and I). However, Mr Jordan reached his own conclusion based on the evidence before him and having considered the guidance he had received. This is clear form the content of the emails; they are merely advisory.

77. Mr Jordan's appeal decision (undated) is at pp.374-377. Importantly, having considered the claimant's appeal with respect the attendance at the trade union conference allegation, in particular accepting that the claimant was not aware that he required permission to attend the conference and the ambiguity around the relevant policies, Mr Jordan decided that this allegation would not justify dismissal on its own, and that had it been the only allegation then this would have been reduced to a Final Written Warning.

78. However, Mr Jordan concluded that the email allegation was well founded and that there was sufficient evidence to support a finding of Gross Misconduct. The decision to dismiss the claimant was upheld.

CONCLUSIONS

79. In terms of both of the allegations that led to the claimant's dismissal, they are both acts of misconduct that are properly separable from the Trade Union activities, as per **Morris v Metrolink**. Although both involved events that had a close nexus to trade union activities, the reason for the dismissal was the actions that the claimant did, that being attending an event whilst on sick leave without first gaining permission and the sending of an email using excessive and damaging language about a colleague to a group of fellow employees, not all recipients being trade union members, that caused the treatment complained of, rather than the trade union activity itself.

80. In short, had the claimant attended any event, whether paid or voluntary, whilst on sick leave and without permission from his line manager in the form of annual leave, we find that the claimant would have been subjected to the same investigation and sanction. In this judgment, the event being a trade union event was irrelevant, and therefore the misconduct is properly separable from the trade union activity. Similarly with the email. Those investigating and determining the claimant's case perceived the email as containing wording which made allegations, none of which had been substantiated, that on the face of it could damage the reputation and standing of Mr Cornfield in his employment, and which had been sent to an audience that was beyond the trade union membership. This is a matter that the respondent can have a legitimate interest in. It is the wording, the impact and the audience reach which was of clear concern to the respondent. This conduct is also separable from the trade union context.

81. Consequently, the claimant's claim for automatic unfair dismissal fails. He was not dismissed for reasons connected to trade union activity.

82. Turning to the claim of ordinary unfair dismissal.

83. It is clear that the decision makers in this case were Ms Blacow, who made the initial decision to dismiss the claimant, and Mr Jordan, who made the decision in relation to the claimant's appeal. Although both sought and considered Human Resource advice, both acted independently and reached their own decisions based on the evidence that was before them. Having considered their evidence, we find that the respondent has satisfied the burden placed on it in establishing that the reason for the dismissal was that of misconduct.

84. Once the claimant accepted that he had attended the conference and that he had sent the email in question, there was little required of the respondent in terms of investigation, other than to determine whether the acts in question amounted to misconduct and the severity of any such misconduct, which in turn would assist the respondent in determining the appropriate sanction to be applied. Although the claimant wanted to know who had reported his attendance at the conference to management, this became an irrelevant matter once the claimant accepted that he did attend. Likewise with the email, the identity of the individual who informed management of the existence of the email was irrelevant once the claimant accepted responsibility for its creation and subsequent distribution.

85. The claimant developed an argument in this hearing that the respondent should have investigated the allegations that he was making in the email, to determine whether there was any substance to them, before then deciding whether what he had said in it was a misconduct issue. However, not undertaking such investigation, in our judgment, falls within the band of reasonable responses. This is against the backdrop of the claimant having initially raised a grievance against Mr Cornfield before then withdrawing it, not pursuing any grievances subsequent to this withdrawal, and then not raising that his allegations needing determined in order to properly assess the content of the email in either the disciplinary process or his appeal; instead he focused on the email being a matter that the respondent could not investigate as it was a Trade Union matter. Had the claimant presented evidence to the respondent of the treatment that he refers to in his email, then this would have been a material factor to consider in our analysis as to whether this decision not to investigate this matter further fell outside of the band of reasonable responses; however, he did not.

86. In relation to attendance at the trade union conference. Given the purpose of the sick leave policies, the respondent did have reasonable grounds to conclude that the claimant had breached the rules which applied to engaging in outside activities during sick leave, without permission. And that this was based on all reasonable investigation needed in the circumstances. The claimant accepted he was in attendance, and the respondent made all reasonable enquiries required of it to determine whether the claimant had sought and been granted annual leave to cover the period of the conference, which we have made the finding that he had not. It is important to note here that the policy in question (see p.468) is worded in mandatory terms and makes it clear that a failure to comply with the rules may result in dismissal.

87. In relation to the email. The respondent did have reasonable grounds to conclude that the claimant had sent an email containing highly damaging and unsubstantiated allegations about Mr Cornfield to numerous internal and external recipients, which was in breach of its internal rules. And this was based on all reasonable investigations necessary in the circumstances. The claimant accepted he sent the email, and that it was sent to internal and external recipients, not all of which were trade union members. The claimant interviewed Mr Cornfield, the primary subject of the email. Mr Jordan made enquiries as to whether the allegations in the email made by the claimant against Mr Cornfield were substantiated. And the respondent was in receipt of the email in question. Those are the reasonable investigations necessary by the respondent, in the judgment of this tribunal.

88. However, although we accept that the respondent has satisfied the tribunal that the reason for the claimant's dismissal was misconduct, and we have found that the respondent had reasonable grounds to consider that the claimant had engaged in misconduct, and that this was following reasonable investigation, this tribunal,

having considered all of the matters in this case, concludes that the decision itself to dismiss the claimant for the reason of the misconduct in these circumstances does not fall within the band of reasonable responses. And this is in respect of either allegation separately, or if both were taken together.

89. The respondent's own findings do not support a finding of gross misconduct within its own policies.

90. There was no suggestion that attendance at the trade union conference by the claimant was an abuse of the sick leave provisions, nor is it working for another employer whilst on sick leave (which was confirmed by Mr Jordan). At its height this was undertaking an activity that the claimant should have sought permission for whilst on sick leave, which the claimant failed to do as he did not understand that there was such a need. Against circumstances where had the claimant asked for leave for the conference period in advance he would have been granted it, and for which he was later given retrospective leave. This would more likely than not have fallen within the respondent's definition of 'More Serious Minor Misconduct', being a short duration of unauthorised absence, which would have led to, in normal circumstances, a first written warning. Dismissing for this reason, we say, clearly falls outside of the band of reasonable responses. Albeit, we note here, that Mr Jordan, to a degree, overturned this decision for dismissal on appeal.

91. In relation to the email allegation, again, at its height, this matter does not appear to fall within those categorised as gross misconduct by the respondent. Although this is not conclusive, it is a useful indicator for the tribunal. Furthermore, the respondent did not see the actions of the claimant as being such that it necessitated a suspension of the claimant, and therefore this action falls short of destroying the relationship of trust and confidence between the claimant and his department. Dismissing an employee in circumstances where there has been a simple error in the distribution list (there was no allegation of deliberately distributing this email beyond the trade union members list), is a one off incident, where the purpose of the email is clearly for external matters and for conduct that the respondent does not appear to classify as gross misconduct in its own policies, in our judgment would fall outside of the band of reasonable responses.

92. A combination of the two would also fall outside of the band of reasonable responses.

93. In these circumstances, the claimant's claim for unfair dismissal in the ordinary sense succeeds.

94. Considering that above, we make a finding that here is no evidence to support a *Polkey* reduction. Although we note that the clamant is seeking re-engagement.

95. Given our conclusions above, the respondent has not established that the claimant's conduct had caused a breakdown of trust and confidence, nor that he had acted in a manner that could be properly described as a repudiatory breach of his contract. Consequently, the claim for wrongful dismissal succeeds.

96. Turning to the victimisation complaint. The claimant was not was not subjected to any detriment because of having done a protected act, and in particular, Mr Jordan did not uphold the decision to dismiss him because of the protected act. Similar to our conclusion above in relation to the automatic unfair dismissal complaint, the reason for upholding the decision to dismiss him is separable from the protected act. The decision to uphold this part of the decision was due to the potentially damaging words to Mr Cornfield, which was distributed to persons outside of the trade union. In these circumstances the claim for victimisation is dismissed.

97. Given that the claim for ordinary unfair dismissal has succeeded, we will now be seeking an appropriate date to list this case for remedy.

Employment Judge **Mark Butler**

Date_18 August 2021____

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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