EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111447/2019

Hearing Held by Cloud Video Platform (CVP) on 4, 5, 7, 10, 11, 12 and 13 May 2021

Employment Judge A Strain

Mr G McIrvine	**Claimant** **Represented by:** **Mr Jay Lawson** **Solicitor**
Scottish Police Authority	**Respondent** **Represented by:** **Ms Elise Turner** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

(1) the claimant was unfairly dismissed by the respondent;

(2) the Tribunal makes a **Basic Award** of Nine Thousand, Six Hundred and Forty Six Pounds and Eighty Seven Pence **(£9,646.87)** and **Compensatory Award** of Twelve Thousand, Four Hundred and Twenty Four Pounds and Thirty Four Pence **(£12,424.34)** in favour of the claimant and orders the respondent to pay him that amount.

REASONS

Background

1. The claimant was represented by Mr Jay Lawson, Solicitor. He asserted claims of Unfair Dismissal under section 98 of the **Employment Rights Act 1996** (**ERA 1996**).

2. The respondent was represented by Ms Elise Turner, Solicitor.

3. The parties had lodged an Agreed Joint Bundle of Documents with the Tribunal along with an Agreed List of Facts and List of Issues.

4. The respondent led evidence from Mr Steven McKinnon, Ms Jackie Kydd, Mr Sean Scott and Ms Mary Pitcaithly. The claimant gave evidence on his own behalf.

Findings in Fact

5. Having heard the evidence of the claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:

    1. The claimant's dates of service with the respondent were 8 September 1986 to 29 May 2019.

    2. The claimant was employed by the respondent as a Criminal Intelligence Analyst.

    3. Since around January or February 2010, the claimant was on full-time secondment to Unison as a Trade Union representative.

    4. The claimant was employed on annualised hours and had no normal or set hours/days of work.

    5. The claimant held the position of Branch Secretary and Labour Link Officer within Unison. His election to these posts formed the basis of his selection to be seconded by the respondent to Unison. The respondent were aware that he was elected into these posts and

that was the basis of his selection for secondment (Document 66). The claimant was seconded into these posts.

6. His duties as Branch Secretary and Labour Link Officer included representing the Unison membership at conferences, activities and events. It also included liaising with the Labour Party in his capacity as Labour Link Officer.

7. The claimant received no job description or letter of engagement from the respondent in respect of his secondment. He received nothing from the respondent other than confirmation that he was to be seconded into these posts.

8. In fulfilment of his duties on secondment the claimant attended various conferences, activities and events duly authorised by Unison. He did so from the date of his initial secondment and the respondent were aware of this.

9. The claimant was a member of the JNCC which was a consultative committee formed between the respondent and the recognised Trade Unions.

10. The claimant never sought any authorisation for attending trade union activities, conferences or events during the entirety of his secondment.

11. There is a Recognition and Procedural Agreement (RPA) in place between the respondent and Unison and Unite the Union (Document 29).

12. The RPA at section 6 and 7 details the duties of trade union representatives and the right to paid time off from employment to carry out trade union duties/activities. It also details the process for obtaining approval for paid time off.

13. Section 6 and 7 do not specifically refer to full time seconded employees.

14. The RPA at section 6 (i) refers to an agreed list of standard meetings that require Trade Union attendance. No such list has been agreed between the trade union and the respondent.

15. Following a change in legislation the respondent introduced a time recording requirement for all employees on secondment. The time sheets were drafted by the respondent and did not have the agreement of the trade unions.

16. No training, guidance or direction was provided to the claimant in the completion of such timesheets.

17. The claimant recorded his time in timesheets (Document 19). He did so retrospectively and from reference to his online diary in March 2018.

18. There were five columns in the timesheet: Date, Category of Work Undertaken, Time Spent, Overtime Hours (if any) and Comments.

19. The claimant indicated his non-working days by including a comment in the Comments column (e.g. "Rest Day" or "Annual Leave"). On non-working days the "Category of Work Undertaken" column was blank.

20. The claimant attended the following events (Events):

    23 - 26 April 2017: STUC Conference in Aviemore
    30 April 2017: May Day rally, Glasgow
    5 - 7 July 2017: Labour Link Conference, Liverpool
    10 - 13 September 2017: TUC Conference, Brighton
    18 November 2017: attendance at the election of Scottish Labour Leader event and subsequent attendance at a public house
    25 November 2017: Glasgow Green demo, Glasgow

21. Time for each of the Events (other than 18 November 2017) was recorded on the claimant's timesheet.

22. The claimant populated the "Category of Work Undertaken" column by selecting from a pre-populated drop down menu. The categories in the drop down menu included:

    "Travel time for agreed TU purposes"; and
    "Agreed Training and conference attendance".

23. The claimant considered the term “agreed” to mean agreed by Unison.

24. The claimant recorded all time spent by him on trade union duties, activities and attending events. Such recording of time was not an attempt to secure payment for his time rather than simply to account for his time.

25. Following submission of his timesheets the claimant was placed on precautionary suspension on or around 5 July 2018. At this time, the claimant was notified that an investigation would be carried out into the following disciplinary allegations:

    a. Falsification of claims in respect of paid facility time;
    b. Serious breach of SPA/PSoS values;
    c. Abuse of authority or position;
    d. Potential breakdown of trust and confidence, including damage to the reputation of SPA/Police Scotland; and
    e. Breach of the Recognition and Procedural Agreement between Police Scotland and Unison.

26. On or around 12 July 2018, Inspector Steven McKinnon was appointed as Investigation Officer.

27. The claimant was notified of the following further disciplinary allegations on or around 20 August 2018:

    a. Undertaking other paid employment without the permission of Police Scotland;
    b. Undertaking other paid employment whilst on sickness absence and receiving Occupational Sick Pay from Police Scotland;

c. Breaching the legacy Tayside Police Additional Work by Police Officers and Police Staff Policy and Guidance document; and

d. Breaching the Police Scotland Business Interests & Secondary Employment SOP (published 3/7/2018).

28. On 24 October 2018, the claimant attended an Investigatory Interview with Steven McKinnon. The claimant was accompanied by his Trade Union representative, John Gallagher of Unison. An HR representative (Sandra Drinkeld) and a note-taker (Laura Stewart) were also in attendance.

29. The claimant was not given advance notice of the Events in respect of which it was alleged constituted the allegations in 23(a) to (e).

30. During the Investigatory Interview, the claimant confirmed that he had carried out and been paid for a 5 day induction with a charity called CornerStone while he was on sick leave. He agreed he had not notified the respondent. The claimant explained that he had been considering leaving the respondent's employment due to personal circumstances and the impact these personal circumstances had on his mental health. He attended the induction to become a care worker for the charity. In the end of the day he decided not to go ahead with this.

31. Notes of the Investigation Interview with the Claimant were produced (Document 25).

32. The Investigation Officer obtained witnesses statements from the following witnesses:

Michelle Brewster, Deputy Branch Secretary of Police Scotland Unison branch

Lucille Inglis, Chair of Police Scotland Unison branch

Nicky Page, Head of People and Development for the respondent

David Malcolm, Interim Deputy Secretary of Police Scotland Unison branch

Tom McMahon, Director of Business Integration for the respondent

Brian Hamilton, HR Business Partner for the respondent

33. Three of the witnesses (Michelle Brewster, Lucille Inglis and David Malcolm) (Brach Witnesses) were seconded trade union officials with Unison. These witnesses were asked to provide opinion on whether or not the claimant should have been attending the Events.

34. Detective Chief Superintendent Sean Scott (Mr Scott) was appointed Disciplinary Officer.

35. Mr Scott had little or no knowledge of trade unions, secondments, trade union duties, activities or events or the roles of Branch Secretary/Labour Link Officer.

36. The claimant was invited to attend a Disciplinary Hearing by letter dated 2 April 2019 from Sean Scott. The claimant's Trade Union representative responded to this letter by email confirming he was not available to attend on 25 April 2019 and suggested an alternative date of 9 May 2019.

37. The claimant was invited to attend a Disciplinary Hearing scheduled for 9 May 2019 by letter dated 25 April 2019 from Mr Scott (Invite Letter).

38. The Invite Letter stated the allegations against the claimant were:

    a. Falsification of claims in respect of paid facility time;
    b. Serious breach of SPA/PSoS values;
    c. Abuse of authority or position;
    d. Potential breakdown of trust and confidence, including damage to the reputation of SPA/Police Scotland;
    e. Breach of the Recognition and Procedural Agreement between Police Scotland and Unison;
    f. Undertaking other paid employment without the permission of Police Scotland;

g. Undertaking other paid employment whilst on sickness absence and receiving occupational sick pay from Police Scotland;
h. Breaching the legacy Tayside Police Additional Work by Police Officers and Police Staff Policy and Guidance document; and
i. Breaching the Police Scotland Business Interests & Secondary Employment SOP (published 3/7/2018).

39. The Invite Letter stated that the possible outcome(s) from the disciplinary meeting could be: no action, informal action, verbal warning, written warning, final written warning, action short of dismissal or dismissal.

40. Documents and statements gathered as part of the investigation were enclosed with the Invite Letter, as well as a record of the claimant's Trade Union duties submitted for the period April 2017 - March 2018 and copies of:

a. The Recognition and Procedural Agreement between Police Scotland and Unison;
b. Police Scotland values;
c. Police Scotland Code of Conduct;
d. Legacy Tayside Police Additional Work by Police Officers and Police Staff Policy;
e. Police Scotland Business Interests & Secondary Employment SOP; and
f. Police Scotland Disciplinary SOP.

41. The Invite Letter noted that the claimant's Trade Union representative had requested that the 3 Branch Witnesses interviewed attend the hearing and confirmed that Mr Scott had determined that there was no requirement for them to do so. The claimant was requested to submit in writing to Mr Scott any points of clarification he required from any of the witnesses.

42. The Invite Letter confirmed that the claimant had the right to be accompanied to the Disciplinary Hearing.

43. On 7 May 2019 Mr Scott emailed the claimant. The email stated that as he had not received a response to his correspondence of 25 April 2019, he had postponed the Disciplinary Hearing to 17 May 2019. The email confirmed that the claimant had a further opportunity to submit any questions for the witnesses by close of business on Wednesday 8 May 2019. The email also stated that, alternatively, the claimant was free to contact the witnesses and call them to attend the Hearing if he wished.

44. The claimant's Trade Union representative wrote a letter to the respondent dated 7 May 2019. Mr Scott acknowledged receipt of this letter by email dated 9 May 2019. In this email, Mr Scott noted that he had received no questions for any witnesses from the claimant but that he could still arrange for questions to be put to the witnesses ahead of the hearing if received by 1200 hours on 10 May 2019.

45. Mr Scott emailed the claimant's Trade Union representative on 13 May 2019 noting that he had received no response to his email of 9 May 2019 and asking for confirmation that there were no outstanding matters ahead of the Disciplinary Hearing scheduled for 17 May 2019.

46. The claimant's Trade Union representative emailed Mr Scott on 14 May 2019 attaching questions for three of the witnesses interviewed as part of the investigation: Michelle Brewster, David Malcolm and Lucille Inglis. He also confirmed that a written Statement of Case and supporting documents would be submitted on behalf of the claimant ahead of the hearing, including witness statements from Unite Trade Union representatives.

47. The claimant's Trade Union representative emailed Mr Scott on 15 May 2019 attaching a Statement of Case and supporting documents on behalf of the claimant.

48. Mr Scott emailed the claimant's Trade Union representative on 15 May 2019 attaching responses to the questions for witnesses Michelle Brewster and David Malcolm as well as evidence from Nicky Page, Head of People and Development. He confirmed that Lucille Inglis was on annual leave and she would be spoken to upon her return.

49. Mr Scott emailed the claimant's Trade Union representative on 16 May 2019 confirming he had tasked the Investigating Officer with further enquiries following receipt of the claimant's Statement of Case. This email confirmed that the hearing scheduled for 17 May 2019 would be postponed to allow the claimant to digest new material. Mr Scott asked the claimant's Trade Union representative to confirm availability for a rescheduled hearing to take place on either 28 or 29 May 2019.

50. The claimant's Trade Union representative emailed Mr Scott on 17 May 2019 confirming availability for a rescheduled hearing to take place on 29 May 2019 subject to time to consider any fresh evidence.

51. Mr Scott emailed the claimant's Trade Union representative on 20 May 2019 attaching a summary of supplementary evidence prepared by Steven McKinnon with relevant documents embedded within. In this email, the rescheduled Disciplinary Hearing was confirmed for 29 May 2019.

52. Point 7 of Steven McKinnon's summary of supplementary evidence was a note that Appendix 5(2) referred to in the claimant's Statement of Case was not attached for consideration.

53. Mr Scott emailed the claimant's Trade Union representative on 27 May 2019 seeking a copy of Appendix 5(2) referred to within the claimant's Statement of Case.

54. The claimant's Trade Union representative emailed Mr Scott on 28 May 2019 attaching Appendix 5(2) referred to within the

claimant's Statement of Case, a new Appendix 6 and an example of a Facility Time Policy and Procedure from NHS Scotland.

55. The Disciplinary Hearing took place on 29 May 2019. In attendance were:

    a. Sean Scott as Chair;
    b. the claimant;
    c. the claimant's Tade Union Representative;
    d. Steven McKinnon as Investigating Officer;
    e. Sonia Fitzgerald as HR representative; and
    f. Stefanie Moffat as note-taker.

56. The Disciplinary Hearing commenced at approximately 10am and concluded at approximately 6.50pm.

57. Following an adjournment, Mr Scott confirmed his decision at the end of the Disciplinary Hearing. The claimant was dismissed summarily for gross misconduct. The claimant was notified of his right to appeal.

58. Mr Scott concluded that the claimant's timesheet entries in respect of the Events were "on the balance of probabilities, illegitimate". In reaching this finding, Mr Scott relied upon:

    Witness evidence of Ms Brewster, Ms Inglis and Mr Malcolm (Branch Witnesses);
    Witness and written evidence of Ms Page and Mr Malcolm (P&D Witnesses);
    The wording of Section 7 of the RPA; and
    The Category of Work selected by the claimant on his timesheet.

59. In reaching this decision Mr Scott took into account:

    The claimant's position that he had Unison approval for attendance at the Events. Mr Scott did not believe this was supported by the RPA or the fact that the claimant was paid by the respondent.

The lack of clarity in the RPA in relation to requesting time off. Mr Scott considered this could be clearer but believed the evidence from Branch Witnesses indicated others had a clear understanding of what activities should be undertaken in their own time.

That the claimant and Mr Livingstone had a different view from the Branch Witnesses. Mr Scott considered the evidence from the Branch Witnesses was supported by evidence from P&D Witnesses and the RPA.

The claimant's concerns regarding the reliability of the Branch Witnesses. Mr Scott considered these witnesses were experienced in the workings of the Unison branch and their evidence was supported by the P&D Witnesses and the RPA.

60. Mr Scott did not take into account that the claimant had received no formal training, guidance or direction from the respondent with regard to his duties and responsibilities whilst on secondment.

61. Mr Scott did not take into account that the timesheets had been unilaterally introduced by the respondent and had not been agreed by the trade union. Further, he did not take into account that the claimant had received no training, guidance or direction with regard to the completion of timesheets and that this was a new requirement.

62. Mr Scott did not personally interview any witnesses. Mr Scott placed considerable reliance on the witnesses' interpretation of the RPA which they accepted as "vague" and the "expert" evidence of other full time secondees with the trade union – whose evidence differed in a number of respects as to what were events that should be attended and whether or not consent should be obtained. Ms Brewster's evidence was that the requirement to request paid time off did not apply to the claimant.

63. Mr Scott did not find that the timesheet entries were "false" rather he found that attendance at the Events were not Events at which the claimant should have been attending on paid time.

64. Mr Scott rejected the claimant's position that his time sheet did not constitute a claim for payment but was simply an account of his time.

65. Mr Scott did not compare the claimant's time sheet entries with anyone else's.

66. Mr Scott rejected the claimant's position that the RPA did not apply to full time seconded trade union officials; that there was no requirement for such employees to seek permission and that the claimant had attended such Events since 2010 without obtaining prior consent from the respondent.

67. The claimant had attended such Events without prior permission from the respondent since 2010.

68. There was no process under the RPA for full time secondee's to request paid time off.

69. Mr Scott did not know what the duties and responsibilities of the claimant as Branch Secretary and Labour Link Officer were.

70. Mr Scott concluded that the claimant had deliberately misrepresented the time he recorded on 18 November 2017. In reaching this finding, Mr Scott relied upon:

    Evidence of differing accounts of that date having been given by the claimant between the Investigation Interview and the Disciplinary Hearing;

    His own experience of the claimant during the Disciplinary Hearing;

    The claimant's recorded time; and

    Mr McKinnon's account of the evidence provided by witness Angela Feeney.

71. Mr Scott rejected the claimant's explanation that he had made no attempt to hide his attendance at the election meeting or the public house, that his attendance was in his own time, the dates and times had been provided from a calendar dump made retrospectively in

March 2018, he had been given no advance notice of the Event to be discussed at the Investigation Interview and was recalling from memory.

72. Mr Scott considered the claimant's explanation as to the family and personal issues that had led him to consider leaving the respondent and taking up employment with Cornerstone but found that this did not excuse his breach of the respondent's policy on secondary employment.

73. Mr Scott considered his findings regarding the Events, the secondary employment and the date of 18 November 2017 demonstrated a lack of integrity and honesty on the part of the claimant. He considered this, together with the senior, trusted position held by the claimant and concluded the allegations had been made out.

74. Mr Scott emailed the claimant on 3 June 2019 attaching a letter confirming the outcome of the Disciplinary Hearing.

75. A record of the disciplinary hearing was issued to the claimant by email on 5 June 2019.

76. The claimant's Trade Union representative submitted an appeal on the claimant's behalf by email on 7 June 2019.

77. There was a delay in fixing an appeal hearing due to new members having been appointed to the respondent's appeal committee, the need to train the members and availability.

78. An appeal hearing was fixed for 31 March 2020.

79. The claimant was notified by letter dated 25 March 2020 from Jackie Kydd, HR Specialist, that the Appeal Hearing scheduled for 31 March 2020 would be postponed due to Coronavirus.

80. The Appeal Hearing took place, in person, on 21 September 2020.

81. The claimant provided appeal documents for consideration ahead of the Appeal Hearing.

82. The claimant's appeal was heard by the Scottish Police Authority Legal Action, Claims and Appeals Committee consisting of: Mary Pitcaithly (Chair), Martin Evans and Caroline Stuart. The claimant was accompanied to the Appeal Hearing by his Trade Union representative. Jackie Kydd was in attendance as HR representative. Mr Scott was in attendance and gave a statement regarding his disciplinary decision.

83. Mary Pitcaithly wrote to the claimant by letter dated 28 September 2020 confirming that his appeal was not upheld.

84. Ms Pitcaithly confirmed that if the only matter for consideration at a disciplinary hearing was the allegations of secondary employment then the claimant would not have been dismissed.

85. The claimant' secondary employment with Cornerstone contributed to the decision to dismiss him.

86. The claimant did not apply for alternative employment until August 2019.

87. The claimant secured employment on a part-time basis with Hearing Voices Network on 26 August 2019.

88. The parties agreed a Schedule of Loss.

The Relevant Law

6. The claimant asserts unfair dismissal.

Unfair Dismissal

7. Section 94 of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reasons) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of an employee,

(c) is that the employee was redundant, or

(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.

(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."

8. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

9. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.

10. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer

at this stage. The matter is at large for determination by the Tribunal under section 98(4).

11. Where an employee has been dismissed for misconduct, ***British Home Stores v Burchell [1980] ICR 303***, sets out the questions to be addressed by the Tribunal as follows:

Whether the respondent believed the individual to be guilty of misconduct; Whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct; and whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

12. The Tribunal must also consider whether the respondent carried out a fair procedure taking into account the terms of the ACAS Code of Practice. In that regard, any procedural issues identified by the Tribunal should be considered alongside the other issues arising in the claim, including the reason for dismissal (***Taylor v OCS Group Ltd [2006] EWCA Civ 702, paragraph 48)***.

13. Lastly, the Tribunal requires to consider whether the decision to dismiss was a reasonable sanction, given the misconduct found to have taken place. This means the Tribunal is required to consider whether the dismissal fell within the "band of reasonable responses" that a reasonable employer might have adopted.

14. This approach to the question of reasonableness was approved by the Court of Appeal in ***British Leyland (UK) Ltd v Swift 1981 IRLR 91***). "The correct test is: Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair."

15. In determining whether dismissal fell within the band of reasonable responses, a Tribunal is not to approach the matter by effectively substituting its own view for what it would have done if it had been the employer, but to apply the objective standards of a reasonable employer (***Iceland Frozen Foods Limited v Jones [1982] IRLR 439***). There is an

area of discretion within which management may decide on a range of disciplinary sanctions, all of which might be considered reasonable and it is not for the Tribunal to ask whether a lesser sanction would have been more reasonable.

Mitigation of loss

16. A claimant is under a duty to take reasonable steps to mitigate loss. The onus of proving that a claimant has failed in the duty to mitigate is upon the employer. The Tribunal can obtain guidance on the approach to be adopted from awards made under section 123 of ERA.

17. The case of ***Cooper Contracting Ltd v Lindsay [2016] ICR D3; UKEAT/0184/15/JOJ*** provides a valuable overview of the duty to mitigate loss. Langstaff, J summarises the law under nine (overlapping) principles (paragraph 16):

(1) The burden of proof is on the wrongdoer; a claimant does not have to prove that he has mitigated loss.

(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of ***Tandem Bars Ltd v Pilloni UKEAT/0050/12***, Judgment in which was given on 21 May 2012. It follows from the principle - which itself follows from the cases I have already cited - that the decision in **Pilloni** itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) What has to be proved is that the claimant acted unreasonably; he does not have to show that what he did was reasonable (see **Waterlow**, **Wilding** and **Mutton**).

(4) There is a difference between acting reasonably and not acting unreasonably (see **Wilding**).

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see **Waterlow**, **Fyfe** and Potter LJ's observations in **Wilding**).

(8) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

(9) In a case in which it may be perfectly reasonable for a claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

18. In the case of ***Glasgow City Council v Rayton UKEATS/0005/07/MT*** at paragraph 14 the EAT quotes from ***Savage v Saxena [1998] ICR 357; [1998] IRLR 182*** at paragraph 23. There it is said that a Tribunal is required to –

> *"(1) identify what steps should have been taken by the applicant to mitigate his loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned."*

19. The recent EAT case of ***Hakim v Scottish Trade Unions Congress UKEATS/0047/19/SS*** is also of assistance.

Contributory Conduct

20. Section 122(2) of the Employment Rights Act 1996 and Section 123(6) of the Employment Rights Act 1996 enable the Tribunal to reduce both the basic and compensatory award.

21. The case of ***Hollier v Plysu Limited [1983] IRLR 260*** provides guidance on the appropriate level of deduction:

> "*first when the employee was wholly to blame and the reduction could be 100%, second when the employee was largely responsible and in that case said the Judge that nobody would quarrel with the figure of 75%. Third there was the case in which both parties were equally to blame and that was obviously his view when he gave his opinion that the reduction should be 50%. The fourth category was the one into which the majority of the Appeal Tribunal put this case, namely the case in which the employee is to a much lesser degree to blame."*

22. The Tribunal's discretion under s122(2) is wide.

23. ***Nelson v BBC (No 2) 1980 ICR 110, CA***. set out that there are three factors which the Tribunal must be satisfied of in order to find contributory conduct:

a. The conduct must be culpable or blameworthy.
b. The conduct must have actually caused or contributed to the dismissal.
c. It must be just and equitable to reduce the award by the proportion specified.

Submissions

24. Both parties lodged written submissions and spoke to them.

Discussion and Decision

Observations on the Evidence

25. There was no material conflict on the evidence rather it was the interpretation of that evidence and weight attached to aspects of it which were called into question.

26. The Tribunal generally found the witnesses to be credible and reliable.

27. The Investigating Officer and the Disciplinary Oficer were serving Police Officers who had little or no understanding of trade unions, trade union

duties/activities and the role and function of an employee on secondment to a trade union. For that reason they had sought “expert evidence” from three other seconded trade union officials and also from their own internal P & D department.

28. The decision taken had been made on the basis of accepting that evidence in preference to that of the claimant, interpreting it and the RPA. They rejected the evidence of the claimant and his trade union representative and also their interpretation of the role of the claimant and the RPA and what the claimant had done in practice since his secondment in 2010.

Reason for dismissal

29. It was accepted by the parties that the reason, or principal reason for dismissal, at the point when the claimant was dismissed was misconduct. This is a potentially fair reason under section 98(1).

30. The Tribunal then went on to consider whether or not the dimissal of the claimant was fair under section 98(4). In this regard both parties had referred the Tribunal to the well known case of ***Burchill*** and agreed the tests set out in that case should be applied here. The Tribunal addressed each in turn.

Whether the respondent believed the individual to be guilty of misconduct

31. The Tribunal accepted the respondent’s witnesses evidence that they believed the claimant to be guilty of misconduct.

Whether the respondent had reasonable grounds for believing the individual was guilty of that misconduct

32. The Tribunal considered the allegations levelled againt the claimant by the respondent. In essence allegations (a) to (e) were all interelated and interdependent. They centred on allegations (a) and (e) which were alleged falsification of claims and breach of the RPA. The respondent’s belief of misconduct was based on their interpretation of the RPA and their understanding of the roles, duties and responsibilities of the claimant whilst on secondment. The Tribunal but did not accept that the respondent had

reasonable grounds for believing that the claimant was guilty of misconduct. The Tribunal's reasoning for this was as follows:

a. The respondent knew that the claimant was on full time secondment to Unison in his roles of Branch Secretary and Labour Link Officer.

b. The respondent did not know what the duties and responsibilities of the Branch Secretary and Labour Link Officer were.

c. It was accepted that the claimant had no job description, guidance or direction as to what his duties were to be whilst fulfilling that secondment from the respondent.

d. The claimant undertook duties, activities and attended events that were agreed to and supported by Unison for whom he was working on secondment. He had undertaken such duties, activities and attended such events since his initial secondment in 2010.

e. The RPA sections 6 and 7 were clearly distinct from the position of an employee on full time secondment. Any reasonable interpretation of these sections would be that they referred to employees of the respondent who needed time off from their normal duties with the respondent to attend to trade union duties, activities or events. There was a specific process including an application form for this to be done. The assertion by the claimant that he was on full time paid secondment and there was clearly no requirement for him to seek permission for paid time off when that had already been granted by virtue of the secondment was rejected out of hand. The respondent eroneously interpreted sections 6 and 7 of the RPA as applying to the claimant.

f. The respondent placed considerable reliance on the witnesses' interpretation of the RPA which was accepted as "vague" and the "expert" evidence of other full time secondees with the trade union – whose evidence differed in a number of respects as to what were events that should be attended and whether or not consent should be obtained. For example, Ms Brewster's evidence was that the requirement to request paid time off did not apply to the claimant. The tribunal conidered it unreasonable to have done so.

g. Mr Scott did not personally interview the Witnesses in order to assess their credibility and reliability. This was of particular significance with regard to the Branch Witnesses whose evidence was disputed. Mr Scott had no proper basis for preferring and accepting their evidence to that of the claimant without having assessed their credibility or reliability.

h. The respondent proceeded on the basis that the timesheets submitted by the claimant constituted a claim for paid time. In this respect it was found to be a “falsification” of claims.The timesheets were simply an account of the activities undertaken by the claimant and not a claim for payment or paid time. The timesheets detail all of the events and activities the claimant claimant undertook. The claimant did not seek to hide the fact of attendance at such events nor were the entries false. They could not, on any reasonable basis, be interpreted as a claim for paid time

i. The respondent did not take account of the lack of training or direction on completion of the time sheets or the lack of agreement by the trade union to the content.

j. It was asserted by the respondent that consent ought to have been obtained to attend the Events from the JNCC. The minutes of any JNCC meetings at which consent had been obtained for others were not produced.

k. Mr Scott placed considerable reliance on the claimant’s attendance at the election of labour leader event on 18 November 2017 and alleged inconsistencies in his account from the investigation stage to the disciplinary hearing. Mr Scott rejected the claimant’s account that at investigation stage the claimant was unaware of the specific events that he was to be asked about and was responding from memory. The claimant accepted he had attended this event in a personal capacity and had attended a public house thereafter. He had nothing to hide. There was no reasonable basis to find that the claimant was being dishonest about activities undertaken in his personal time and disclosed on his timesheet. Mr Scott also failed to take into account and had no reason not to accept the claimant’s explanation that the

timesheets had been completed by him on March 2018 by way of a calander dump.

33. The Tribunal then considered the allegations (f) to (i) levelled against the claimant by the respondent which centred on the attendance by the claimant at an induction course for Cornerstone for which he received payment whilst on sick leave. The Tribunal accepted that the respondent had reasonable grounds to believe that the claimant was guilty of misconduct in this regard. The claimant accepted this breach and explained why he had attended the induction course.

Whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances

34. Whilst the Tribunal considered and found that the respondent did not have reasonable grounds to form the belief of misconduct the Tribunal considered that aspects of the investigation were deficient.

35. Mr Scott ought to have heard evidence from the three Branch Witnesses in order to assess their credibility and reliability in circumstances where their evidence was being challenged by the claimant. The respondent failed to carry out as much investigation as was reasonable in the circumstances as a consequence of that.

36. The respondent should have investigated the claimant's assertion that he had attended Events without prior authorisation from the respondent since 2010 and obtained greater undertsanding of his roles.

37. The respondent should have compared the claimant's time sheet entries with that of other secondees.

38. The respondent should have obtained minutes of any JNCC Meetings at which attendance at Events for secondees were considered and either approved or rejected.

Whether the dismissal fell within the "band of reasonable responses" that a reasonable employer might have adopted.

39. The Tribunal then considered whether or not dismissal was within the band of reasonable responses. The Tribunal was well aware that it could not substitute its own view for that of the respondent.

40. It was significant that Ms Pitcaithly confirmed in her evidence that the conduct complained of as (f) to (i) (relating to the secondary employment) would not have meritted dismissal on its own.

41. The Tribunal considered and found that no reasonable employer would have dismissed in the circumstances of this case. Dismissal was outside the band of reasonable responses.

Was a fair procedure adopted and followed by the respondent

42. The claimant raised a number of objections to the process adopted. These principally involved an alleged failure by Mr Scott to call the three Branch Witnesses to give evidence and delay in the matter reaching an appeal hearing.

43. The Tribunal did not accept that the respondent ought to have called the Branch Witnesses purely to allow cross-examination as asserted by the claimant. The Tribunal does, however, consider that it would have been reasonable for Mr Scott to have heard from the Branch Witnesses to assess their credibilty and reliability in circumstances where that was being challenged by the claimant.

44. The Tribunal did not accept that there had been unreasonable delay or prejudice to the claimant in holding the Appeal Hearing.

45. It was entirely understandable in the circumstances explained by the respondent that a new Appeal Committee had been formed, the members required training, there were delays due to availablity on both sides and the intervening Pandemic all played a part in delaying matters.

Did the claimant's conduct contribute to the dismissal such that any award should be reduced

46. The Tribunal consider that it had not been established that the claimant's conduct as alleged in (a) to (e) was culpable or blameworthy. It does

however accept that his conduct in relation to the secondary employment allegation was. The secondary employment allegation on its own would not have justified dismissal as was confirmed by Ms Pitcaithly.

47. The Tribunal did not accept the submission that any difference in the accounts by the claimant of the events on 18 November 2017 amounted to contributory conduct.

48. The Tribunal accept that the claimant's conduct (notwithstanding the background of the personal circumstances explained by him) caused or contributed to the dismissal. The Tribunal does consider that it would be just and equitable to reduce any award of compensation. The Tribunal considered and found that (following the guidance in ***Hollier v Plysu Limited [1983] IRLR 260)*** the claimant was to a much lesser extent to blame for the dimissal than the respondent. The Tribunal accordingly reduced any compensation by the amount of 25% on the basis of contributory conduct. The Tribunal considered it just and equitable that any reduction should apply to both Basic and Compensatory Awards under sections 122 and 123 of **ERA 1996**.

Did the claimant fail to mitigate his loss

49. The respondent accepted that the claimant made efforts to find another job and was ultimately successful in securing a part time role commencing on 26 August 2019. The respondent submitted that it would have been reasonable for the claimant to start applying for jobs earlier than August 2019.

50. It was also submitted it would have been reasonable for the claimant to continue looking for a full time position, at least up until March 2020 at which point the respondent accepts that the job market changed due to the COVID-19 pandemic.

51. The Tribunal consider that it was not unreasonable for the claimant to have waited until August 2019 to start applying for other jobs. The claimant's appeal was pending and did not take place until 21 September 2020 (when the respondent's own policy required it to take place within 28 days). The

claimant was seeking reinstatement. He had been a long term employee of the respondent.

52. The Tribunal considered ***Cooper Contracting Ltd v Lindsay [2016] ICR D3; UKEAT/0184/15/JOJ; Glasgow City Council v Rayton UKEATS/0005/07/MT***; ***Savage v Saxena [1998] ICR 357; [1998] IRLR 182*** and the recent EAT case of ***Hakim v Scottish Trade Unions Congress UKEATS/0047/19/SS***.

53. The onus of proving that a claimant has failed in the duty to mitigate is upon the respondent. The Tribunal considered that the respondent had failed to discharge that onus. The claimant had secured part-time work relatively quickly following termination of his employment. The respondent accepted that by March 2020 the job market had changed adversely.

54. The Tribunal were satisfied that the claimant had mitigated his losses in all the circumstances of the case.

Remedy

(a) Unfair Dismissal

Basic Award

55. The parties were agreed that the claimant's entitlement to a basic award was **£12,862.50**.

Compensatory Award

i. Financial Loss

56. The parties were in agreement that subject to any arguments relating to mitigation or deduction for contributory conduct the Schedule of Loss provided was accurate.

57. The Tribunal considered that the claimant should be awarded 13 weeks' net pay in respect of his period of unemployment from the date of termination until the date he secured new employment in the sum of **£5,614.18**.

58. It was agreed between the parties that the claimant gained new employment on the 26 August 2019 at a rate of pay of £262.83. The Tribunal award compensation for the following 39 weeks at a rate of £169.03 which is the differential between the claimant's previous pay with the respondent and his new pay with his new employer in the sum of **£6,592.17**.

ii. Pension Loss

59. The claimant's pension loss was agreed to be calculated at 52 weeks' loss at £90.47 which is a total of £4,427.28.

60. The claimant received £567.84 in pension contribution from his new employer. The claimant's pension loss was agreed to be **£3,859.44**.

iii. Loss of statutory rights

61. The parties agreed an award of **£500**.

iv. Recoupment

62. The claimant has claimed no benefits. The Recoupment Regulations do not apply.

v. Reduction for contributory conduct

63. The Tribunal reduce the Basic Award from £12,862.50 by 25% **= £9,646.87**

64. The Tribunal reduce the Compensatory Award from £16,565.79 by 25% = **£12,424.34**

Employment Judge:	**Alan Strain**
Date of Judgment:	**08 June 2021**
Date sent to parties:	**08 June 2021**