Case Nos. 1300625/2017
1300652/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**AND**	**Respondent**
Mr B O'Toole Mr S Rohan		DHL Services Limited

JUDGMENT
OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 10, 11, 12 May 2017
7 June 2017 (in chambers)

EMPLOYMENT JUDGE Gilroy QC
MEMBERS: Mr N Forward
Mr P Deneen

Representation

For the Claimants: In person (Mr Rohan conducting on behalf of both Claimants)
For the Respondent: Miss Barney (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Claimants' claims of automatic unfair dismissal contrary to s.152 of the Trade Union and Labour Relations (Consolidation) Act 1992 are dismissed.

2. The Claimants' claims of unfair dismissal contrary to s.94 of the Employment Rights Act 1996 are dismissed.

REASONS

Introduction

1. The Claimants were formerly employed by the Respondent as LGV/HGV drivers, based at the Respondent's Jaguar Land Rover ("JLR") Automotive site

at Hams Hall, Coleshill, Birmingham. Each of the Claimants was dismissed and brought claims of automatic unfair dismissal contrary to s.152 of the Trade Union and Labour Relations (Consolidation) Act 1992, "TULR(C)A" (dismissal on grounds related to union membership or activities) and of unfair dismissal contrary to s.94 of the Employment Rights Act 1996, "ERA". The Respondent admitted dismissal in each case, denying that either dismissal was automatically unfair on the grounds of trade union membership and further denying the claims of "non-automatic" unfair dismissal.

Evidence and Material before the Tribunal

2. Oral evidence was given on behalf of the Respondent by Stephen Nee (Head of Employee Relations, Automotive Division of DHL supply chain), Chris Dockree (Vice President First Tier within the DHL Automotive Division), and Stuart Carlyon (Vice President Operations, Fuels and Chemicals, DHL TEMEC Division). The Claimants gave oral evidence and evidence was given on their behalf by Dominic Hinks (Organiser with the GMB trade union), and Mark Gorman (former senior steward for Cross-Dock - sometimes referred as "Xdock" - at Hams Hall, working for the Respondent). The Claimants also produced a witness statement in the name of Michael Whitehouse (former shop steward of Unite the Union). The Tribunal explained that in view of Mr Whitehouse's non-attendance at the Hearing, with the result that the Respondent was unable to cross-examine him, it would only attach such weight to his statement as it considered appropriate.

3. The Respondent provided a Proposed List of Issues, a written Chronology, written Closing Submissions upon the conclusion of the evidence, and copies of the following authorities: ***Drew v St Edmundsbury Borough Council [1980] IRLR 459 (EAT)***; ***Chant v Aquaboats Limited [1978] ICR 643 (EAT)***; ***Chairman and Governors of Amwell View School v Dogherty [2007] ICR 135 (EAT)***, ***British Waterways Board (t/a Scottish Canals) v Smith (UK EATS/0004/15/SM)***, and ***Game Retail Limited v Laws (UK EAT/0188/14/DA)***. The Claimants also provided joint written Closing Submissions.

4. The Tribunal was provided with witness statements on behalf of all the witnesses who gave live oral evidence. Reference is made, however, to paragraph 7 below in this regard.

5. The Tribunal was provided with an agreed bundle of documents **[R1]**. In addition, the Claimants provided a small number of other miscellaneous documents throughout the course of the Hearing.

6. The Claimants also produced some video footage of an internal meeting of employees at (it is believed) Hams Hall. It was agreed between the parties that the Tribunal would view this material privately. The footage essentially depicted the nomination of GMB shop stewards. Both Claimants featured in the footage, Mr Rohan being particularly prominent.

7. During the course of these proceedings, directions were given for the parties to exchange witness statements in advance of the substantive Hearing. The

Claimants failed to serve statements in their own names. The Tribunal declined the Respondent's application at the beginning of the Hearing that in the light of their breach of the Tribunal's directions, the Claimants should be refused permission to give oral evidence. The Tribunal used the first morning of the Hearing as reading time and directed that the Hearing should resume at 2 pm at which time the Claimants would provide short written statements outlining their respective cases. The Claimants complied with that direction.

8. During the course of closing submissions, Mr Rohan made reference to the Respondent having allegedly acted in breach of the Regulation of Investigatory Powers Act 2000, "RIPA". As the Hearing was to be adjourned to a later date for the Tribunal's deliberations, it was directed that the Claimants provide particulars of their case under the RIPA, and that the Respondent serve a reply to those particulars. The parties complied with that direction and the Tribunal had sight of each side's written position on this issue before commencing its deliberations.

The Basis of the Claims under s.152 of the TULR(C)A

9. S.152 of the TULR(C)A provides as follows:

"152. Dismissal of employee on grounds related to union membership or activities.

(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 propose 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;

(b)(a) had made use, or propose to make use, of trade union services at an appropriate time;

(b)(b) had failed to accept an offer made in contravention of Section 145A or 145B, or

(c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member".

10. It was established on the first day of the Hearing that the Claimants based their case under s.152 of the TULR(C)A on s.152(1)(b), and that the *"activities"* in question were seeking to recruit members to the GMB, and seeking the resignation of members of Unite.

Findings of Fact

11. The Tribunal made the following findings of fact:

The Claimants

(1) The First Claimant began working for the Respondent on 14 May 2012, the Second Claimant on 10 June 2004. The Claimants were both dismissed with effect from 10 October 2016, in each case "the effective date of termination". Prior to the events which gave rise to the dismissal of the Claimants, they both acted as shop stewards for Unite the Union, in respect of staff employed by the Respondent at its Hams Hall site.

The Respondent

(2) The Respondent is a logistics provider to various customers throughout the UK and Ireland. It is part of the Deutsche Post DHL Group, which encompasses the DHL group of companies. The Respondent is a substantial concern, employing some 6,500 people across the JLR contract alone (in addition to a further 1,500 workers).

The Claimants' Terms and Conditions of Employment and Company Policies

(3) Under the terms of Mr O'Toole's most recent contract of employment (dated 26 April 2012), Clause 13 provided as follows:

"13.0 POLICIES AND PROCEDURES

13.1 At all times you will be subject to the Company's prevailing policies, schemes and procedures as may be amended by the Company from time to time. Failure to comply with these provisions may lead to disciplinary action"

(4) On 2 May 2012, Mr O'Toole signed the final page of his contract, confirming as follows:

"I have read and understood the enclosed Company Policies enclosed with this Contract of Employment. I understand that by signing the Contract of Employment I am agreeing to abide by the Policies and Procedures detailed. I confirm that I accept these terms and agree to work in accordance with these terms and the Company's prevailing Policies and Procedures".

(5) On 12 May 2012, Mr O'Toole signed a form indicating that he had been provided with a copy of the DHL Diversity & Respect at Work Policy, had completed the policy briefing and had read and understood the contents of the Policy.

(6) The Respondent's Diversity & Respect at Work Policy contained the following material provisions:

"2. AIMS

....the Company is committed to providing equality of opportunity for all employees. Furthermore we aim to ensure our workplaces are free from discrimination, victimisation and harassment and that not only employees but also our customers are treated fairly and with dignity and respect. We will

ensure that equality of opportunity maintains a high profile in our organisation in our aim to become an employer of choice. We will continue to promote equal opportunity issues internally and will demonstrate these aims when dealing with customers and third parties.

3. POLICY STATEMENT

The underlying principle of this Policy is to ensure we create an environment in which all colleagues can fulfil their potential without barriers and in which the team is made stronger by the diverse backgrounds, experiences and perspectives of individuals……..the Company will operate a zero tolerance approach to discrimination, harassment and bullying…samples of the types of conduct and behaviour that will not be tolerated can be found later in this Policy.

8. RESPECT AT WORK

Respect at work is about developing and encouraging an environment where colleagues support one another and value difference, where harassment of any kind is known to be unacceptable and individuals have the confidence to complain without fear of reprisals or victimisation. No one in our business is expected to endure offensive, intimidating or bullying behaviour.

8.1 Harassment

Broadly speaking, harassment is unwanted conduct which affects the dignity of men and woman in the workplace. It may be related to a person's age, sex, disability, religion, nationality or any personal characteristic and may be a persistent or isolated incident. The conduct may violate the person's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment. There is no need for the 'harasser' to intend to offend by his conduct.

The Company will take any allegation of harassment, bullying or improper conduct seriously and will deal with matters in an appropriate way and according to the circumstances of each case.

The following are examples of conduct which contravenes this Policy. This is not an exhaustive list:

…Verbal Conduct-…. Abusive language which denigrates or ridicules a person….

8.2 Bullying

……bullying might include:

Encouraging others to exclude, ignore, ridicule or otherwise demean or humiliate a person.

10. SANCTIONS

Sanctions for incidents of discrimination, bullying or harassment or other improper conduct may include one or more of the following (this list is not exhaustive)

Disciplinary Action in accordance with the Company's Disciplinary Procedure"

(7) The Respondent's Email, Internet & Databases Policy contained the following relevant provisions:

"1. SCOPE

This policy applies to all employees of DHL Supply Chain ("the Company")….

8.2 Protecting DHL's Reputation

Employees must not post disparaging or defamatory statements about:

Other employees
…….

Other affiliates and stakeholders

Employees should avoid social media communications that might be misconstrued in a way that could damage out business reputation, even indirectly.

…..Employees are personally responsible for what they communicate in social media. Remember that what you publish might be available for a long time to a potentially large and varied audience including the organisation itself, future employers and social acquaintances. Keep this in mind before you post content.

8.4 Respecting Colleagues, Clients, Partners and Suppliers:

Do not post anything your colleagues or our customers, clients, business partners, suppliers, vendors or other stakeholders would find offensive, including discriminatory comments, insults or obscenities.

Do not post anything related to your colleagues or our customers, clients, business partners, suppliers, vendors or other stakeholders without their written permission".

(8) The Respondent's Disciplinary Policy contained the following relevant provisions:

"6. DISCIPLINARY RULES AND CATEGORIES OF CONDUCT

It is not practical or desirable to set out every example of conduct or performance which may lead to disciplinary action. It should be understood by all employees, however, that the disciplinary procedure may be invoked as a result of:

- *A failure to observe the Company's rules or procedures including those set out in this Policy or in any part of their Contract of Employment.*

- *Any other instance of conduct or performance, which the Company believes should properly be dealt with under the Disciplinary Procedure.*

It is impossible to produce an exhaustive list of all instances of misconduct or performance giving rise to disciplinary action, and it is also impractical to state which category of disciplinary action will be applied to; however, unsatisfactory conduct or performance will fall into one of the following categories:

- *Unsatisfactory Conduct/Misconduct.*

- *Gross misconduct.*

6.1 Examples of Acts of Gross Misconduct.

Employees are liable to summary dismissal (i.e. without notice) for the following conduct: (this is not an exhaustive list)

- *Discriminatory conduct, or harassment or other action contravening the Diversity & Respect at Work Policy.*

9. DISCIPLINARY ACTION

9.1 Level of Action to be taken.

The level of disciplinary action taken will depend on the seriousness of the matter. The procedure does not have to be followed from beginning to end in every case, particularly in matters of a serious nature.

Disciplinary Action may take the form of:

- *Dismissal without Notice".*

(9) The Tribunal was not provided with a copy of any contract of employment between the Respondent and Mr Rohan but was provided with a copy of his contract dated 17 May 2005 with an earlier employer, NYK Logistics (UK) Manufacturing & Retails Limited, "NYK". At some point, Mr Rohan's employment transferred from NYK to the Respondent by means of a relevant transfer under the Transfer of Undertakings Regulations.

Events leading to the dismissal of the Claimants

(10) As stated above, the Claimants worked for the Respondent on the JLR contract, based at Hams Hall.

(11) The Respondent has a longstanding recognition agreement with Unite the Union in relation to warehouse operatives, team leaders and drivers across the JLR contract for the purposes of collective bargaining.

(12) The GMB are recognised in other parts of the wider DHL business but there is no desire on the part of the GMB to be recognised, for example at Hams Hall, notwithstanding that some of the Respondent's employees at that location were actively encouraging recruitment for the GMB. This was confirmed by Mr Hinks (GMB Organiser) in the written and oral evidence he provided to the Tribunal on behalf of the Claimants.

(13) The Respondent's position is that it is entirely neutral as to whether any employee wishes to join a trade union, and, if so, which union.

(14) The Claimants were both formerly shop stewards at Hams Hall for Unite the Union.

(15) Over the course of time, the Respondent fell into dispute with the Unite shop stewards at Hams Hall and by way of example, by letter dated 2 June 2015, Stephen Nee, Head of Employee Relations at DHL Automotive, Hams Hall, wrote to Gerard Coyne, the then Regional Secretary of Unite for the West Midlands, stating as follows:

"Dear Mr Coyne,

Re: Unite the Union & DHL JLR Freight Contract, Hams Hall

I am taking the unusual step of writing to you personally in order that I can bring to your attention the grave concern that this company has over the way our local Unite branch (DHL JLR contract - drivers) conduct its affairs.

Normally I have no interest in the internal business of Unite, however over the past few years we have seen in-fighting and point scoring among shop stewards where the fall out manifests itself at the workplace and directly impacts on how we run our business and how our managers spend their time.

We really don't have the time to pick up the pieces when shop stewards publicly fall out with each other and start posting defamatory notices about each other on our notice boards. I enclose a letter I wrote to Bob Shaw more than two years ago setting out my concerns over the shop stewards behaviour and one shop steward in particular (Mr Steve Rohan) who is without fail always at the centre of things. Nothing has changed since my letter.

I would welcome the opportunity to discuss the matter in person but I will highlight below some specific areas of concern where I believe shop stewards have misused the privileges afforded them by virtue of their position as shop stewards:

- *Two separate groups have recently fallen out amongst themselves resulting in complaints and counter-complaints, which are being investigated by Mr Malbasa. History teaches us that when these fall outs happen the party that*

is still aggrieved at the end will take sick leave or seek a transfer. So the Company pays the price for a Unite internal row.

- *An apparent coordinated attack on the well-being of a DHL manager by raising grievances. This manager is in fact a former TGWU shop steward.*

- *Refusal of local shop stewards to recognise a National Recognition & Procedural Agreement made with Unite.*

- *Mr Rohan was suspended by Unite members of our National Negotiating Committee (NJNCC) for his behaviour at that forum. The local stewards refused to send anyone in his place with the result that 200+ drivers in the Midlands went unrepresented for two years.*

- *At National level, Unite & DHL agreed to jointly participate in an IR culture change programme. 70 shop stewards from across the account and 70 managers all participated in the programme which will hopefully drive a new behavioural contract and an Improved Culture. Jim Mowatt, Paul Davies and Matt Draper were instrumental in devising the programme. The Hams Hall shop stewards boycotted it against the wishes of the National Union.*

- *Earlier this year Mr Rohan was returned to the NJNCC but was again suspended indefinitely by the other representatives for his behaviour and so, we begin again. We fully expect briefing to recommence against the NJNCC as they engage in our current pay talks.*

- *A DHL H&S manager (also a Unite member) had a professional difference with Mr Rohan and Shane Edwards (who at the time was a Unite Convenor on the account). The manager used to do volunteer work on H&S Consultancy occasionally for Unite in his own time. The opprobrium the manager was publicly subjected to resulted in his long-term sickness absence and eventually his employment was terminated. He has since raised a personal injury claim where he places the blame for his illness squarely at the door of the behaviour of those stewards towards him.*

- *Most of the collective issues we face are based around payment or facility time for shop stewards - despite this being already generously provided for and raising no concerns of substance elsewhere on the account - very little effort appears to be invested in furthering the interests of members.*

There are unfortunately many more examples and, as I said earlier, I would welcome a discussion with you to see what we can do separately or together to foster a better environment with this particular branch. Ultimately, what we are looking for is Unite regionally to do whatever is necessary to get this branch functioning effectively and in tandem with the National Union".

(16) Mr Nee did not meet up with Mr Coyne or speak to him by telephone by way of follow-up to his letter of 2 June 2015. Enclosed with that letter was an earlier letter Mr Nee had sent on 7 May 2013 to Bob Shaw, Regional Industrial Organiser for Unite, based in Birmingham. The letter

was similar in content and general tenor to the letter Mr Nee sent to Mr Coyne in June 2015.

(17) On 24 July 2015, Emily Vincent, an employee of the Respondent, was summarily dismissed for gross misconduct for acting in breach of the Respondent's Email, Internet & Databases Policy. She was found to have posted offensive and racist comments on her Facebook page. The Respondent was made aware of the posting as an anonymous complaint had been made to Birmingham City Council who had contacted the police. The relevant Facebook account identified the Respondent as the relevant employee's employer with the result that the police attended the Respondent's premises to investigate whether a possible racist hate crime had been committed.

(18) This was one of a number of incidents of inappropriate social media postings by employees of the Respondent in the summer of 2015, resulting in the Respondent sending a generic letter/memorandum to all employees working on the JLR account to reinforce the Respondent's policy on social media. The letter/memo was from Bill Bacon, Managing Director of DHL Automotive, and read as follows:

"12 August 2015

DHL Supply Chain & Social Networking Sites

As a result of the increasing number of social networking sites which are being developed and the subsequently increasing number of people who are using these sites, we are sending this correspondence to all employees and contractors at DHL Supply Chain on the Jaguar Land Rover contract to confirm that care should be taken if any reference to DHL Supply Chain, or indeed any part of Deutsche Post DHL, or our customer - in this case Jaguar Land Rover, is used in any post.

The company's policy on the use of social media can be found in section 8 of the Email, Internet & Databases Policy, which can be obtained from your line manager. The policy states that employees are personally responsible for what they communicate in social media. In particular, employees must not post disparaging or defamatory statements about:

- *Other employers.*
- *Our organisation.*
- *Our customer or their employees, contractors or suppliers.*
- *Suppliers and vendors.*
- *Other affiliates and stakeholders.*

This applies even when posted onto a "closed" or private medium. Since other people can forward posts or personal information onto others, no person can expect that anything posted on social media is truly private. Employees should avoid social media communications that might be misconstrued in a way that could damage our business reputation, even indirectly…………

If you disclose your affiliation as an employee of our organisation, or as a contractor you must ensure that your profile and any content you post are consistent with the professional image you present to clients and colleagues.

Do not post anything your colleagues or our customers, clients, business partners, suppliers, vendors or other stakeholders would find offensive, including discriminatory comments, insults or obscenity.

Breach of our policy by employees may result in disciplinary action up to and including dismissal. Disciplinary action may be taken regardless of whether the breach is committed during working hours or not, and regardless of whether DHL equipment or facilities are used for the purpose of committing the breach…..

If you are in doubt about any element of using social networking sites in relation to your work, employer, supplier or customer, please contact your Line Manager or alternatively, HR Business Partner who can provide any necessary advice.

Finally, please be mindful that misunderstanding, confusion or ignorance of these requirements will not be sufficient mitigation in any investigation or disciplinary matters".

(19) Notwithstanding that the Tribunal was not provided with evidence in the form of Mr Rohan having acknowledging receipt of the Diversity & Respect at Work Policy, there was no serious challenge by the Claimants to the proposition that they were both fully acquainted with the Respondent's policies and procedures, and in particular the Diversity & Respect at Work Policy, given their standing as experienced shop stewards. The Claimants did maintain that this Policy did not apply to them, but that is a separate issue.

(20) Later in 2015, Unite conducted a Regional Inquiry in relation to the actions of certain union officers within DHL, and by letters dated 1 December 2015, the Claimants were each informed by Mr Coyne that the Inquiry Team had made recommendations that the Claimants and others had been engaged in an attempt to recruit members to another union in direct breach of the objectives laid down in Rule 6.8 paragraph 2 of Unite's Rule Book, and that for this and other breaches, including the conduct of Mr Rohan in failing to deal with the breakdown in relationships between shop stewards, and the actions of Mr O'Toole and one other relating to intimidatory conduct in breach of Rule 27.17, the Inquiry Team found that there was sufficient evidence for the Claimants and others to have their workplace credentials completely withdrawn and that they should be barred from holding office with the union for a period of at least three years from the date of that decision.

(21) It would appear that both Claimants surrendered their membership of Unite upon having their credentials withdrawn, and in an e-mail circulated to various addressees, including a number of prominent former or existing Unite members, on 3 December 2015, under the

heading *"Resignation as a Member of Unite"*, Mr Rohan stated, amongst other things:

"No one has won in this matter & the operation of representing our colleagues cannot continue with the clowns who Unite will provide via election. Unite has never provided support for our wishes, will never do so.

I've copied Chris & John into this e-mail in the hope that things can be confined to history and we can move forward together to create a better union that serves us all.

I have now resigned as a member of Unite (no further sanction can ever be taken against me, they are history).

I will approach, and join GMB, and carry out the recruitment of new members within Xdock and Drivers.

From that we will demand recognition, as already operating at TyreFort to which DHL have already conceded.....

The sense of freedom is wonderful, we built a union once before, we can do it again ? GMB would love to back us, and I'm going to take every opportunity to express my views to our colleagues, who are already queuing at the doors……

Feel free to distribute my comments, ain't really scared of Unite, or any other version of a corrupt, purile (sic) *& ineffectual clowns that stand in my way".*

(22) The Claimants maintained that they were perceived by Respondent to be thorns in the Respondent's side. They cited as an example that they were encouraging union members/employees not to agree on "full contractual flexibility", an aspiration of the Respondent which was said to be an issue of particular concern to Mr Nee. Mr Nee maintained that full contractual flexibility had been achieved by September 2016. Be that as it may, for the purposes of the s.152 claim the Claimants contended that they had been dismissed because of their "activities" in seeking to recruit for the GMB and procure resignations on the part of members of Unite.

(23) The Claimants produced an undated statement from Michael Whitehouse, a former Unite steward, who, as stated above, did not attend the Tribunal Hearing.

(24) In his statement he said that on 4 July 2016, he had been present at the DHL Pay talks, on which occasion Mr Nee said to him:

"How are them 2 behaving ?"

which he knew was a reference to the Claimants.

The statement continued:

"I said they still the same recruiting for GMB. SN then said if there's any more issues with them for me to contact Jenny Ebrey and he would sort them out. Which I took to mean he would look at ways to discipline and take action against them.

"…….(Shaun Anderson and Jason Hogan) said I should look at ways to (put) complaints in against (the Claimants) to the Company as the sooner they were gone the better it would be for Unite".

(25) Mr Whitehouse also prepared a statement (dated 23 September 2016) for the purposes of the Claimants' disciplinary hearings. In that statement he gave a similar account to that set out above, but omitted the second paragraph quoted above.

(26) There were two further noteworthy aspects of Mr Whitehouse's statement of 23 September 2016. Within it, he admitted to having previously submitted a false grievance against Mr O'Toole, and secondly, he stated that the Respondent had dismissed this grievance.

(27) In May 2016, Mr Coyne contacted Mr Nee, and during the call mentioned that there was in existence an online Facebook forum where employees of the Respondent were making derogatory remarks about Unite. Following the call, Mr Nee looked at the forum and observed that its primary focus seemed to be Unite rather than the Respondent. The forum was called *"Xdock & Drivers Open Forum"* and bore the following statement:

"Xdock & Drivers Open Forum that opposes corruption within Unite & DHL JLR".

(28) The following statement was published on the forum:

"This group is open to all in Xdock, Satellites & All drivers.

It is unrestricted and posts will not be deleted or edited unless clearly offensive.

……

You are reminded that these posts may be seen by others, and you are asked to refrain from comments that others may find to be offensive.

This is a democratic forum, where free debate is encouraged by all.

Only posts that are clearly unlawful, or aimed at any party with the intent to cause harm with respective bullying, harassment, discrimination on the grounds of any 'protected characteristic' will be removed".

(29) At some point, the forum bore the following statement:

"Public group

Anyone can see the group, its members and their posts".

(30) Mr Nee was able to gain access to the forum because it was public in nature. He was therefore able to review the posts on his own personal computer.

(31) The forum was set up by Mr Rohan. Mr O' Toole and his wife Julie were subsequently added as Administrators. It was the Respondent's case, and the Tribunal accepted, that when a Facebook forum group is closed the Administrators can choose exactly who can view the content of the forum whereas when it is public they have no control over who may view or share its content.

(32) Over the course of the summer of 2016, a number of grievances and complaints were received from employees of the Respondent who were Unite shop stewards. On 15 July 2016, Jason Hogan, a senior steward based at Solihull, made such a complaint, stating that his e-mail was intended as a grievance and it was treated as such by the Respondent. Mr Hogan's complaint was against Mr Rohan for:

"Breaching my dignity & respect by making references against myself and my family via social media with the intent to bully, harass, intimidate & victimise myself and family".

(33) Mr Hogan attached to his grievance e-mail a posting from Mr Rohan on the Xdock forum. The post included the following passages:

"... they've already indicated that they've also had enough of this garbage from the Hogan Clowns.

I'm quite moved you the messages & comments of support, however being up against such a lying imbecile is not really a challenge ? And it will be dealt with easily.

I can't even see Unite supporting this moron, I know what the blokes think ... he's just an embarrassment to all ....

The reference to *"the Hogan Clowns"* was a reference to Jason Hogan and his brother, Paul. At the time of Jason Hogan's complaint, Paul Hogan had recently been appointed as a Unite steward at Hams Hall.

(34) On 18 July 2016, Shaun Anderson, Chair of the NJNCC and National Convenor for Unite, based at Halewood, also made a complaint by e-mail about comments made about him on the Xdock forum. Mr Anderson attached a number of screenshots to his e-mail, under the heading *"Threats and deformation"*, stating that he found *"most if not all of the content"* to be *"vile"* and *"threatening"*, and observing that it also included a picture of him. Mr Anderson stated:

"I am concerned as to possible next steps from those involved in the emails all of which makes me feel threatened, intimidated and causing me and my wife great stress and would ask that immediate action be taken from DHL

management to not only stop this slanderous and sickening behaviour as I'm sure you would agree that as my picture has been now "posted" to all and (sundry) it becomes even easier for those who would like to take this a step too far will do so without hesitation or thought of consequence to me and my family.

I would appreciate if you could deal with this as swiftly as possible".

(35) The posts attached to Mr Anderson's e-mail contained a dialogue between various forum members on the subject of the Respondent's Sickness Absence Management Policy which had been agreed by certain Unite officers. One of the posts was from an Ian Harman, another of the Respondent's employees, who enquired of Mr Rohan in one post:

"What is this moron's name and where can he be found ? Just so people can ask him politely why he's fucked an entire work force over. I would personally like to congratulate him and shake him warmly by the throat".

(36) Mr Rohan replied to the above post in the following terms:

"His name is Shaun Anderson, Unite convenor at Halewood MLS, and self appointed Chair of the National committee representing ALL sites, all areas. He obtained his position via the support & manipulation of the position by Shane Edwards".

(37) Mr Harman came back:

"How the fuck can he pull this off without any kind of vote? This prick has set the unionist movement back 50 yrs. I can hear the Tolpuddle martyrs turning in their graves".

(38) Mr Rohan responded:

"He's been corrupt right from the start, so like Sep (sic) *Blatter it's unreal".*

(39) Mr Harman then posted a photograph of Mr Anderson on the forum, stating:

"This is the cunt if anyone is interested".

(40) On 19 July 2016, Roy Morrell, a Unite steward, made a complaint to the Respondent via e-mail about comments made about him on the Xdock forum, stating:

"I am most upset to find that there are public postings on Facebook denigrating my character these postings have been a Steve Rohan and [Bernie O'Toole] amounts to nothing more than cyber bulling and as such I would expect the company to take the appropriate action please respond as to your intention".

(41) In the postings complained of by Mr Morrell, Mr Rohan was quoted as saying:

"By the way, drove into Castle Bromwich today …. can't Roy Morrell (sic) *(snr Unite steward) run fast.*

Thought he was going to put me right on a few things? Not running away at that speed he won't !"

(42) Mr Morrell subsequently formalised his complaint into a grievance on 21 July 2016. At a meeting convened in order to initiate that grievance on that date, Mr Morrell was noted as saying:

"These comments were made in an attempt to belittle me, undermine my character and credibility on site. I believe this is clearly bullying behaviour from someone who wants to intimidate me. …

Once this is read by people it is then cascaded verbally, as the comments made about me have which could undermine my character. This is out of order and by singling me out this is clearly bullying. It is clear in the social media briefings what is and isn't acceptable and I regard this a very serious offence".

(43) In view of the above complaints, it was decided that an independent senior manager from outside the JLR contract, Steve Andrews, Account Director from the TEMEC Division, would investigate the grievances together.

(44) On 20 July 2016, Mr Nee sent an e-mail to various managers, summarising the position regarding the grievances and the background. He stated that disciplinary proceedings could result. He intended to forward this e-mail to an HR manager but inputted the incorrect address and sent it to the Claimant Mr O'Toole instead. After trying unsuccessfully to recall the e-mail, he e-mailed Mr O'Toole to confirm that he had sent it in error and Mr O'Toole responded immediately to say that he had deleted the e-mail without reading it. It later transpired that Mr O'Toole had retained the e-mail and indeed had circulated it to others.

(45) Mr Andrews investigated and (in early September 2016) upheld the various grievances and recommended that there was potentially a disciplinary case for *"those concerned"* to answer regarding some of the comments posted on the Xdock forum.

Disciplinary Proceedings

(46) By letters dated 6 September 2016, the Claimants were invited by Dave Pearce, Compliance Manager, who had been appointed as Investigation Manager for the purposes of potential disciplinary proceedings against the Claimants (and at least one other), to attend investigatory meetings on 9 September 2016 in connection with allegations that had been made of breaches of the Respondent's Diversity & Respect at Work Policy and the Internet, Email and IT Policy, by the making of derogatory comments about work colleagues via social media.

(47) The Claimants duly attended their respective Investigation Meetings on 9 September 2016.

(48) At his Investigation Meeting, Mr O'Toole was generally dismissive of the allegations against him. For example, when it was pointed out to him that he had called Paul Hogan a liar, he stated that Mr Hogan was indeed a liar. He was asked how he would perceive a comment made whereby trade union representatives were called corrupt and liars to which he responded *"it depends on the context"*. He stated that he was *"not attacking ... protective* (sic) *characteristics"*.

(49) At his Investigation Meeting, Mr Rohan stated that there was *"no illegal* (presumably legal) *definition on what bullying is"* within the Respondent's Diversity & Respect at Work Policy. He was asked if he had seen the Email, Internet & Databases Policy, to which he responded *"possibly"*. He said *"I don't use DHL systems"*. He said that he remembered the letter dated 12 August 2015 counselling staff in relation to their use of social media.

(50) A theme of Mr Rohan's position throughout his Investigation Meeting (and indeed subsequently) was that he had the right to privacy and to make comments on Facebook in private. He read out Article 8 of the European Convention on Human Rights, "ECHR" (the right to a private and family life). He was asked how a colleague might feel when being called *"corrupt"*, to which he responded: *"Nervous, caught out"*. He was asked whether he thought that this was a derogatory remark, to which he responded: *"No. It's fact"*.

(51) He admitted referring in a post to *"the Hogan Clowns"* and that this was a reference to Paul and Jason Hogan. He accepted that he had called Paul Hogan a *"lying imbecile and a clown"*. He said: *"Jason I called a clown and a joke. Paul I called a clown, joke and a moron and a lying imbecile"*. He seemed very concerned that what he regarded as private communications had been provided to his employer, and is noted as stating:

> *"You been advised by me that you require my written (consent) to do with my private life, you have complaints that are not covered by protected characteristics. As you have gone through the complaints they are all members of unite union and full time shop stewards. I have asked you to show me a warrant as they are in my personal life"*.

Again, Mr Rohan referred to Article 8 of the ECHR.

(52) At the conclusion of their respective Investigation Meetings, the Claimants were each suspended on full pay by Mr Pearce. This was confirmed by Mr Pearce in the case of each Claimant by letter of the same date. In that correspondence the Claimants were informed that they would be suspended until an investigation had been concluded and that

the matters being investigated were very serious and could constitute gross misconduct for which the sanction could be anything up to and including dismissal without notice.

(53) By letters dated 12 September 2016, Mr Pearce invited each of the Claimants to disciplinary hearings to be conducted on 27 (in the case of Mr Rohan) and 29 (in the case of Mr O'Toole) September 2016 where consideration would be given to whether they had committed gross misconduct by breaching the Diversity & Respect at Work Policy and the Email, Internet & Databases Policy by making derogatory comments about work colleagues via social media. Each Claimant was informed that their disciplinary hearings would be presided over by Chris Dockree (Vice President First Tier within the DHL Automotive Division), and relevant documentation was provided.

(54) By letter dated 15 September 2016, Mr O'Toole reiterated to Mr Pearce that he had made a number of requests of the Respondent including a request for sight of the *"lawful authority/warrant" "to commence covert monitoring of my (private) life"*. Mr Pearce responded to Mr O'Toole's requests on 19 September 2016, observing, amongst other things, that issues of Data Protection and Human Rights did not arise, stating that he had taken internal legal advice and had been advised that the comments made by Mr O'Toole on the Facebook forum had been made in the public domain with the result that there had been no unlawful monitoring or convert surveillance by the Respondent.

(55) Mr O'Toole wrote again to Mr Dockree on 21 September 2016, raising a grievance to the effect that he wished to have an independent investigation of the charges which had been brought against him. Also on 21 September 2016, Mr Rohan sent what appears to have been an identical letter to Mr Dockree. This correspondence essentially made points which constituted contentions for the purposes of the disciplinary proceedings. For that reason, the Tribunal will not deal with those points as separately constituted grievance issues.

(56) On 22 September 2016, Mr O'Toole wrote to Matt Mecrow (HR Resolution Manager, West Midlands Region, DHL People Services) making further observations with regard to data protection, and the "Deutsche Post Data Privacy Policy", and observed that he had been directed to make a complaint to the Information Commissioners Office.

(57) On the same date the Claimants duly submitted a joint complaint to the Information Commissioners Office, essentially complaining the Respondent had breached their rights to privacy, and had engaged in unlawful monitoring and covert surveillance.

Disciplinary hearings

(58) Mr Rohan's disciplinary hearing duly took place on 27 September 2016, Mr O'Toole's two days later. The Claimants were both represented at their disciplinary hearings by Dominic Hinks, GMB Organiser.

(59) Prior to the disciplinary hearings, Mr Dockree reviewed the investigation materials, including the evidence concerning the Xdock forum and the complaints which had been made. At each of the disciplinary hearings the Claimants again raised the matters of complaint which had formed the basis of their correspondence dated 22 September 2016 to the Information Commissioner.

(60) Following his disciplinary hearing, Mr Rohan made further posts on the Xdock forum, commenting on his own disciplinary hearing, referring to a disciplinary hearing concerning another employee, referring to responses to evidence, and making allegations of corruption between the Respondent and Unite.

(61) By this stage, the forum had been "closed". This occurred following the Claimant's suspension on 9 September 2016, and the information had been supplied to the Respondent's management via screenshots by a member of the forum group who asked to remain anonymous.

(62) After the disciplinary hearings, Mr Dockree undertook further investigations, including interviewing Mr Pearce, and Mr Whitehouse, and seeking additional information from Mr Nee, the Marketing and Communications team and Unite.

Dismissal

(63) The disciplinary hearings reconvened on 10 October 2016. Mr Dockree upheld the allegations against both Claimants, and each was summarily dismissed for gross misconduct. Also dismissed at the same time was Mr Harman, the author of the XDock comments referred to at paragraphs 11(35), 11(37) and 11(39) above. Mr Dockree confirmed his decision to dismiss each Claimant by respective letters dated 14 October 2016.

(64) In each case, Mr Dockree structured his letter under a number of headings, distilling the points raised by or on behalf of the Claimants (setting out the common factors as well as those which applied uniquely to each Claimant in each letter).

(65) The matters covered in the letter to Mr O'Toole were as follows.

1. Overview of the allegation.
2. Complaint to the Information Commissioners Office.
3. Subject access request.
4. Concerns as to Mr Dockree's impartiality.
5. Concerns re: the Investigation Meetings with David Pearce.

6. Querying the source of the Facebook screenshots.
7. An allegation that the Facebook screenshots were provided via website/password hacking by one "Jamie" who allegedly worked in the IT department at Unite.
8. Alleged collusion between the Respondent and Unite.
9. The contention that the "XDock" forum was a closed/private Facebook group.
10. Whether the Email, Internet & Databases policy was applicable (to the Claimants).
11. The applicability and interpretation of the Respondent's Diversity & Respect at Work Policy.
12. The contention that neither DHL time nor DHL systems had been used for the purposes of making Facebook posts.
13. Breach of Human Rights by the obtaining of evidence from Facebook for the disciplinary process.
14. A request for an explanation as to why the Facebook group was being monitored.
15. A request for an explanation as to why Stephen Nee was monitoring the site prior to the complaints being made.
16. "Joke" on the Facebook forum.
17. The contention that the online comments were not derogatory or offensive.
18. Other factors.

(66) Mr Dockree made particular note of the following posts which had been made by Mr O'Toole:

"... corrupt self-serving lying bastards"

"who the fuck is Shaun Anderson..."

"So I ask again, who [the] fuck is he?"

"I thought most of the MLS reps were fucking morons !!!! Still do".

(67) He observed that the complaint to the Information Commissioners Office was a matter for the Respondent's legal department. He stated that Mr O'Toole's subject access request would be dealt with separately and independently of the disciplinary process. In terms of his alleged impartiality, Mr Dockree pointed out that he had had no involvement with any of the previous "history" concerning Unite, or members of Unite, or officers of that union.

(68) He said that he had been aware (ie prior to his involvement in the matters which formed the basis of the disciplinary case against the Claimants) that there was an investigation regarding Facebook allegations, but he had not been involved in the investigation process and he was of greater seniority than anyone else who Mr O'Toole had named regarding "previous issues".

(69) Mr Dockree itemised and dealt with 12 separate concerns which had been identified in relation to the Investigation Meeting between Mr O'Toole and Mr Pearce.

(70) Mr Dockree stated that the Facebook screenshots had come from a number of sources, including the DHL Marketing and Communications team, in addition to material which had been sent in by those who had made complaints in the summer of 2016.

(71) Mr Dockree explained that "Jamie" or "James" was the Facebook user name of one James Hextall from the Respondent's Marketing and Communications team and was not a "Jamie" who worked in Unite's IT department.

(72) Mr Dockree dealt with 8 separate points which Mr O'Toole said suggested that collusion had existed between the Respondent and Unite. Mr Dockree dismissed those concerns, pointing out, for example that the fact that a complainant may be a Unite shop steward did not prevent such an individual from making an internal complaint through the Respondent's processes.

(73) Mr Dockree rejected the contention that the Xdock forum was a closed/private Facebook group.

(74) Mr Dockree observed that the Email, Internet & Databases Policy applied to Mr O'Toole, as did the Diversity & Respect at Work Policy, and that even if he did not understand the policy, if derogatory statements were made about another employee on the internet and in particular the types of comment Mr O'Toole had made it would be quite logical that this should be treated as a work related conduct issue.

(75) Mr Dockree stated that he regarded the issue of whether Mr O'Toole had made his posts during or outside working hours to be irrelevant.

(76) Mr Dockree rejected the suggestion that the Human Rights Act, "HRA" applied to the matter in hand, observing that the Respondent is not a "public authority" and that there was no right to privacy on a public Facebook forum.

(77) Mr Dockree explained that the Facebook group had been monitored because of the complaints which had been received. He explained that Mr Nee had monitored the site after Mr Coyne had contacted him to inform him that a Facebook group was posting insulting material about Unite.

(78) Mr Dockree rejected the suggestion that the Facebook comment: "*I though most of the MLS reps were fucking morons!!!! Still do*" was a "joke".

(79) As to the suggestion that the online comments made by Mr O'Toole were not derogatory or offensive, Mr Dockree stated:

"You have shown no remorse for your actions and offered no apology for the comments you have made about other DHL employees. In my opinion the comments you have posted on the Facebook group "XDock & Drivers Open Forum are derogatory to other DHL employees and are of a highly offensive nature. In my opinion, you have breached the Diversity & Respect at Work Policy and Email, Internet & Databases Policy, by making derogatory comments about work colleagues via social media"

(80) Mr Dockree stated that he had taken into account Mr O'Toole's lengthy service and contributions he had made to the Respondent over a significant period of time but also stated his belief that Mr O'Toole's actions were so serious that he could not reduce the overall sanction. He informed Mr O'Toole that he was being dismissed summarily with effect from 10 October 2016 and informed him of his right of appeal.

(81) Mr Rohan's dismissal letter was in large part identical to Mr O'Toole's.

(82) The points of difference in Mr Rohan's letter were as follows.

(83) Mr Dockree made particular note of the following posts which had been made by Mr Rohan:

"… garbage from the Hogan clowns"

"… being up against such a lying imbecile is not really a challenge"

"I can't even see Unite supporting this moron…"

".. He's just an embarrassment to all, the company think he (& his brother in MLS) are a joke

"He's been corrupt right from the start, so like Sep (sic) *Blatter it's unreal…"*

"Paul Hogan, in light of the above. You have lied, as did Shane Edwards before you…"

(84) Mr Rohan raised as an issue that whilst he had been sent the Respondent's Disciplinary Policy in preparation for his disciplinary hearing, the relevant policy in his case was (no doubt on the basis of the matters referred to at paragraph 11(9) above) the NYK policy. Mr Dockree said that he was happy to follow the disciplinary policy of NYK where practicable. Mr Rohan had asked for a copy of the NYK Email, Internet & Databases Policy. Mr Dockree stated in his outcome letter that there was no such NYK policy and that therefore the Respondent's policy prevailed.

(85) In Mr Rohan's case, Mr Dockree also considered the Facebook postings he had made following the disciplinary hearing on 27 September 2016,

stating that as well as being a breach of the terms of his suspension, this specific point had given him very little trust and confidence that Mr Rohan was likely to change his online behaviour, regardless of Mr Dockree's discussions with him and how serious the matter was being viewed by the Respondent.

(86) Mr Dockree took into account the fact that there were between 100 and 200 members of the Facebook forum that comprised of employees of the Respondent and employees of other organisations. Accordingly, regardless of Facebook settings, Mr Dockree could not accept that in such an environment the Claimants could genuinely have believed that their postings would remain personal or private.

Appeals against Dismissal

(87) Both Claimants duly exercised their rights of appeal by identical letters dated 20 October 2016.

(88) The basis of the appeal in each case was said to include the following:

- Breach of ACAS Code.
- Breach of ERA.
- Breach of TULR Act.
- Breach of ICO guidance for employers.
- Breach of Data Protection Act.
- Breach of the principles of fair treatment and the Right of a fair and impartial hearing, underpinned by the provisions enshrined within the Human Rights Act and incorporated into UK law.
- Failure by the company to operate a fair, impartial policy to all employees, singled out for 'special treatment' based upon my union activity in recruiting workers into the GMB Union.
- Failure by the Respondent to consider all available, and supplied, evidence, impartiality.
- Failure to comply with the provisions of a fair Grievance complaint by myself.
- The Respondent acting in collusion with its *"stated affiliate"*, Unite the Union, in order to facilitate a *"closed shop"* and bring about the dismissal of workers who oppose such actions and wish to exercise their right to join a union which is not an *"affiliate"* of DHL, but independent as lawfully required.
- Unfair application of policies that were unconnected with my disciplinary hearing.
- Disproportionate sanction applied to any offence that may have (been) found to have been committed.
- Unlawful dismissal.

(89) By letters dated 31 October 2016, the Claimants were each informed that their disciplinary appeals were to take place before Stuart Carlyon, Vice President Operations Fuels & Chemicals, on 7 November 2016 in the

case of Mr O'Toole and 11 November 2016 in the case of Mr Rohan. As matters transpired, both appeals were conducted on 29 November 2016.

(90) The division in which Mr Carlyon is employed is entirely separate from the division in which the Claimants worked. The Fuel and Chemicals sector is another area within the DHL's Supply Chain where there is a significant amount of union membership and recognition and so Mr Carlyon had a considerable amount of experience of interacting with the trade unions and dealing with trade union issues over the years.

(91) The Claimants were again both represented by Mr Hinks at their respective disciplinary appeals.

(92) At the appeals the Claimants rehearsed much of the arguments they had advanced at their disciplinary hearings.

(93) Before reaching his conclusions, by e-mail dated 1 December 2016, Mr Carlyon summarised to Sandra Tyldesley set out what he considered to be the *"key areas for further investigation"*. The Tribunal does not recite those key areas here but they run to approximately one page of bullet points. Mr Carlyon gave consideration to each of these points when reaching his decision in relation to each appeal.

(94) Mr Carlyon decided to uphold the original decision to dismiss in each case, confirming the same by separate letters dated 21 December 2016.

(95) Mr Carlyon could find no fault in the conclusions which had been reached at the original disciplinary hearings, namely that the Facebook comments had been posted by the Claimants and in so conducting themselves they had breached company policy in a manner which merited disciplinary action. He took account of the fact that the Respondent's position on the use of social media had been clearly communicated to all employees on the JLR contract and employees had been informed that breach of these standards could result in disciplinary action up to and including dismissal. Much was made in the appeals before him about the fact that the comments were made outside of work time and that the Claimants believed that the Respondent should not have been viewing the Facebook forum, but Mr Carlyon had no issue with Mr Dockree's conclusions that where such comments involved DHL employees and breached DHL policies, disciplinary action could be taken. He also noted that other cases involving the use of social media outside work had resulted in a summary dismissal for gross misconduct (for example, Philip Turner, who was dismissed by letter dated 24 September 2016 for posting the comment *"Dick Head Logistics lol"* on his social media website using his mobile).

(96) During the two appeals many and varied points were taken but Mr Carlyon considered that in the main these revolved around two areas:

(1) the legality of the process from numerous angles, and

(2) the fact that this was a union matter and that it therefore did not involve the Respondent as the Claimants' employer.

(97) On the first point, Mr Carlyon took advice from the internal legal team who considered that the process was lawful, and on the second point, Mr Carlyon was confident that these issues could not be separated from the Claimants' employment and as such needed dealing with under the Respondent's disciplinary process.

(98) Mr Carlyon focused on whether the appropriate sanction had been issued in the circumstances, and expressed the view that it was unlikely that there was an entirely innocent party amongst the union infighting and that this had seemed to have escalated over time to an untenable level. He therefore concluded that the comments did not amount to isolated incidents but were made in the context of a much wider and long running inter-union dispute.

(99) During his appeal hearing, Mr O'Toole acknowledged that there had been *"tremendous animosity"* between himself and Mr Jason Hogan. Mr Carlyon concluded that Mr O'Toole did not seem to appreciate that all concerned were employees of the Respondent and that the Respondent had a duty of care to all concerned.

(100) In Mr Rohan's appeal, Mr Hinks stated that both Mr Rohan and Mr O'Toole wanted to come back to work but acknowledged that there were issues that needed to be resolved between the two unions and Mr Rohan had stated that he and Mr Anderson were *"mortal enemies"*.

Appeals dismissed

(101) Mr Carlyon reviewed the decisions of Mr Dockree and considered whether any flaws had been made in the decisions reached. In the final analysis Mr Carlyon could not fault Mr Dockree's decision in the case of either of the two Claimants. He also considered what would happen if he decided to reinstate the Claimants given that there appeared to be no real remorse because they felt they had not broken any company policy. Mr Carlyon was also concerned that the dispute was only likely to get worse rather than better because at no stage had he heard anything that indicated that it had been resolved and he was clearly concerned as to what the future impact could be on any or all involved.

Miscellaneous

(102) In due course, the Information Commissioners Office notified the Respondent that on the basis that the information processed about Mr O'Toole was from a public forum and that he had been advised that such information may be used in disciplinary proceedings, it appeared that the ICO had no evidence to support the suggestion that the Respondent had failed to comply with the DPA when processing this information.

Essentially, the ICO took no action as result of the joint complaint lodged with it by the Claimants.

(103) In addition to the Claimants and the other employees of the Respondent mentioned above who were disciplined for the inappropriate use of social media, by letter dated 5 May 2016, another of the Respondent's employees, Adrian Putson, was informed that he was being summarily dismissed for gross misconduct, principally because of his inappropriate use of social media, including offensive and abusive remarks about third parties. A similar fate befell another of the Respondent's employees, Jonathan Millward. He was summary dismissed for gross misconduct for (amongst other things) posting defamatory and/or derogatory comments regarding members of the Respondent's management on Facebook. Mr Harman, who was the author of the comments referred to at 11(35), 11(37) and 11(39) above, was also summarily dismissed for gross misconduct by letter dated 14 October 2016, and by letter dated 29 November 2016 another of the Respondent's employees, Michael Hill, was notified that he was being summarily dismissed for gross misconduct for posting inappropriate comments onto a Facebook forum, and that in doing so, he had acted in breach of the Email, Internet & Databases Policy and the Diversity & Respect at Work Policy.

(104) During the course of Mr Rohan's cross-examination, the Employment Judge asked an open question of the parties about a manuscript entry at the top of the first page of the letter of 12 August 2015 to staff from Mr Bacon warning about the use of social networking sites. The manuscript entries stated as follows: *"ONLY - Steve & Bernie use only"*. Upon the Employment Judge raising the issue, Mr Rohan stated that he had been told by Mr Pearce (who was responsible for the initial investigation into the Claimants' alleged misconduct) that this manuscript entry signified the fact that the Claimants were being singled out for punishment in relation to the use of this letter.

(105) Mr Hinks, GMB Organiser giving evidence on behalf of the Claimants, said in his Tribunal witness Statement that the GMB had informed both Claimants that it did not support any UK Freight employees (the Respondent's employees at Hams Hall came under this description) joining the GMB, and that they should look to resolve their issues with Unite, and further that the GMB had also informed both Unite and the Respondent that it was not involved in any activities which supported UK Freight employees switching unions, and was not seeking recognition in respect of this group on the contract.

Submissions

For the Respondent

12. Ms Barney submitted that the s.152 claims fell at the first hurdle because the *"activities"* relied upon did not amount to taking part *"in the activities of an*

independent trade union" as required by the statute. The Claimants' activities were done *"off their own bat"*, without GMB support and indeed contrary to the advice given by the GMB, as to which she relied upon the statement of Mr Hinks.

13. In any event, Mr Dockree and Mr Carlyon were categorical that the reason for dismissal in each case was misconduct and that the decisions in each case were wholly unaffected by any of the Claimants' attempts or otherwise to recruit for the GMB. Mr Dockree had only been at the Respondent for a period of months before he was allocated the role of disciplinary officer and was unknown to the Claimants. Mr Carlyon was drafted in from an entirely different division to hear the appeal. Neither Mr Dockree nor Mr Carlyon had any *"baggage"* with the Claimants.

14. The target of the s.152 claim was Mr Nee. He had given evidence that the recruitment or otherwise of members to the GMB was of little concern to him, and that he had no influence on or involvement in the decisions to dismiss, or to reject the appeals. The Claimants had advanced no evidence to suggest that he had placed any undue pressure on Mr Dockree or Mr Carlyon.

15. Mr Nee had been frank as to his disquiet towards Mr Rohan, but such disquiet stemmed from Mr Rohan's alleged behaviour/abuse of position and was wholly unconnected to any attempt by Mr Rohan to recruit members to the GMB. The Claimants' own union had held such disquiet resulting in their (Unite) withdrawing the Claimants' workplace credentials completely and barring them from holding office for a period of three years.

16. The Respondent had produced ample evidence of similar sanctions being imposed on other employees for misconduct relating to social media postings. Indeed, Mr Harman had been dismissed by the Respondent at the same time for similar offences to those committed by the Claimants, and he had had no involvement in seeking to recruit members to the GMB.

17. In terms of the claims of "non-automatic" unfair dismissal, the reason for dismissal in each case was patently conduct, a potentially fair reason within the meaning of ss.98(1) and 98(2) of the ERA. Alternatively, each dismissal was for the potentially fair reason of "some other substantial reason", or "SOSR", namely the breakdown in trust and confidence in the Claimants.

18. The Respondent held a genuine belief that the Claimants had committed acts of gross misconduct. That belief was held on reasonable grounds, following a reasonable investigation, and the decision to dismiss had fallen within the band of reasonable responses.

For the Claimants

19. Mr Rohan maintained that the Email, Internet & Databases Policy did not apply to him or to Mr O'Toole, and that the Respondent had orchestrated claims against himself and Mr O'Toole because of their union activities.

20. Mr Rohan submitted that the Respondent had acted in breach of the RIPA, the ECHR, and the HRA.

21. The Respondent had acted disproportionately.

22. The comments made in the Facebook posts were *"not derogatory, discriminatory or defamatory"*. They were *"legitimate criticism of the actions of a representative accountable within the role and privileged of being mandated by election in a democratic union environment where critics must be allowed"*.

23. The complaints the Respondent had received in relation to the Xdock postings were *"vexatious"* and *"designed for another agenda, other than genuine hurt felt"*. *"No reasonable person could have felt harm or injury as a result of these words, used in their correct context"*. The Claimants' explanations were either deliberately ignored or not examined during any part of the process despite the Claimants raising these issues by way of written grievances.

24. There had been *"no examination of the claims"* despite *"ample opportunity for the (Respondent) to do so"*.

25. The Claimants were actively and successfully recruiting for the GMB as an alternative representative body whilst also *"capable of leading and creating viable opposition to the imposition of 'Full Contractual Flexibility'"*, which was *"an essential aspiration of Mr Stephen Nee ... and his wish to provide a fully compliant workforce within the Respondent's wish to gain renewal of the JLR contract"*.

26. The Respondent had shown continued opposition to the activities of shop stewards *"opposed to their 'preferred' type"*.

27. The Respondent has supported a *"campaign"* mounted by Unite stewards and *"gave preference to their 'stakeholder' representatives whilst denying the same privileges to the emerging GMB membership"*.

28. The Claimants had substantial influence within the driver and Xdock community which was of high union density, giving the Respondent every incentive to dismiss them.

29. The Claimants had a high degree of respect within Hams Hall, as demonstrated in the video footage they had provided to the Tribunal.

30. The screenshots from complaining colleagues were minimal.

31. The claims by the Respondent of breaches of its Email, Internet & Databases Policy were *"not supported by the policy document which covers DHL equipment only"*.

32. A breach of the Dignity & Respect at Work Policy *"can only occur either within the workplace, its contractual jurisdiction or an area within which the company*

has control, liability, or interest or a responsibility placed upon them by obligation".

33. Criticism was levelled by the Claimants at what was said to be he Respondent's failure to investigate alleged historical attempts to submit false grievances against the Claimants, alluded to in the statement of Mr Whitehouse.

The Tribunal's approach

Automatic Unfair Dismissal

34. In ***Drew v St Edmundsbury Borough Council [1980] IRLR 459***, a dismissed employee had repeatedly made complaints about health and safety matters. At the relevant time he did not have the requisite continuous service for the purposes of complaining of unfair dismissal. He claimed that he had been dismissed for an inadmissible reason, namely taking part in trade union activities and in particular he argued that his complaints about health and safety were part of a "go slow" ordered by his union. The Tribunal dismissed his complaint and the EAT dismissed his appeal, holding that the Tribunal had been correct to find that the appellant employee was not taking part in *"the activities of an independent trade union"* when he made complaints to his employers about health and safety matters, because those complaints were not for an inadmissible reason under the predecessor to s.152 of the TULR(C)A. Despite the fact that matters of health and safety are capable of being part of the activities of an independent trade union, the Tribunal had been entitled to hold on the facts that the appellant, who was not a union representative, was carrying out his own activities when he made his complaints to his employers, and was not carrying out the activities of an independent trade union. The argument that his complaints were made in accordance with a union directive to "go slow" was rightly rejected. The Tribunal had also correctly held that had the employee's health and safety complaints been part of the "go slow", he would then have been taking part in industrial action and not taking part in union activities. Parliament intended there to be a distinction for the purposes of a claim for automatic unfair dismissal between what is an activity of an independent trade union and taking part in industrial action.

35. ***Chant v Aquaboats Limited [1978] ICR 643***, is EAT authority for the proposition that the phrase *"activities of an independent trade union"* within the meaning of the predecessor to s.152 of the TULR(C)A does not include an individual's independent activities as a trade unionist. In ***Chant***, the employee in question claimed that the organising of a petition was a trade union activity. The Tribunal disagreed and the EAT upheld the Tribunal's conclusion.

36. The Tribunal accepts Miss Barney's submission that as far as the "activities" relied upon by the Claimants are concerned, namely a recruitment drive for the GMB, combined with attempts to secure the resignations of Unite members, the Claimants were acting on their own initiative. As a side issue, they were acting contrary to the advice and indeed the desires of the union they were seeking to recruit for, namely the GMB, but on the basis of the Tribunal's finding that

neither Claimant was dismissed because he had taken part, or proposed to take part, *"in the activities of an independent trade union at an appropriate time"*, each of the claims of s.152 automatic unfair dismissal must fail.

37. If the Tribunal was wrong to reach the above conclusion on the application of the relevant legal principles, however, it found, as a matter of causation, that the reason Mr Dockree concluded that dismissal was appropriate in each case, and the reason Mr Carlyon rejected the Claimants' appeals, related to the Claimants' conduct and had nothing to do with any recruitment drive on their part on behalf of the GMB, or their efforts in seeking to persuade Unite members to resign from that union.

38. The Tribunal concluded that, contrary to the Claimants' assertions, the Respondent took some care to ensure that the disciplinary officer and the appeal officer were impartial. Mr Dockree had no previous history with either of the Claimants and Mr Carlyon came from an entirely different division of the Respondent.

39. The Tribunal rejected the suggestion that Mr Nee was motivated by bad faith, prejudice or bias against the Claimants in seeking to engineer some form of disciplinary process against them, and the Tribunal further rejected any notion that Mr Nee either placed any undue pressure on Mr Dockree or Mr Carlyon or that either the dismissing officer or the appeal officer was in any way receptive to such pressure.

40. The Tribunal concluded that the dismissing officer and the appeal officer acted in good faith based upon the evidence presented to them and were in no way influenced on the basis that the Claimants had been conducting "activities" on behalf of an independent trade union whether on the basis alleged by the Claimants for the purposes of their s.152 claims or otherwise.

41. In any event, the Tribunal had been provided with substantial evidence of other employees with no apparent union connection (or any connection with seeking to recruit members to the GMB) having been dismissed for inappropriate behaviour in relation to social media postings. It could be said that some of those employees had been dismissed for lesser offences than those committed by the Claimants. Whether that is correct or not, however, the fact that a significant number of other employees were dismissed for the same category of offence as the Claimants provides strong corroboration for the Respondent's contention that the Claimants were dismissed for conduct reasons and not for any reason connected to their having taken part in the activities of an independent trade union, or indeed because they had any form of connection with a trade union.

<u>Unfair Dismissal</u>

42. In relation to the claim of unfair dismissal, the Tribunal approached this case with the following six broad propositions in mind:

(1) It was for the Respondent to show the reason (or, if more than one, the principal reason) for dismissal and that such reason (or reasons) was (were) "potentially fair" within the meaning of ss.98(1) and 98(2) of the ERA, ("conduct" and "some other substantial reason" ("SOSR") being such reasons).

(2) If the Tribunal was satisfied that the dismissal was for a potentially fair reason, it would then consider the reasonableness of the decision to dismiss (s. 98(4) of the ERA).

(3) Where an employer purports to dismiss an employee on the grounds of conduct, it is not the function of the Tribunal to determine whether the employee was guilty of the conduct complained of, rather the Tribunal asks itself whether, at the time the decision was taken to dismiss: (i) the employer genuinely believed that the conduct complained of had taken place; (ii) that belief was based upon reasonable grounds, and (iii) the decision was made after a reasonable investigation. Treating a dismissal as an "SOSR" dismissal rather than a dismissal for conduct does not relieve the employer of the need for the above three stage test.

(4) In the context of its consideration of the reasonableness or otherwise of the decision to dismiss, it is not the function of the Tribunal to substitute its own view for that of the employer, rather the Tribunal has to determine whether the employer's decision fell within the range of reasonable responses.

(5) In so far as there was any "procedural unfairness" in the dismissal, would the Claimants have been dismissed in any event if a fair procedure had been followed?

(6) If dismissal was unfair, did the Claimants contribute to their dismissal within the meaning of s.123(6) of the ERA ? In that regard the Tribunal asked itself two questions, namely (i) whether there was in fact blameworthy conduct which caused or contributed to the dismissal, and (ii) if the Tribunal answered the question (i) in the affirmative, to what extent had that conduct caused or contributed to the dismissal?

43. The Tribunal was satisfied that in each case, dismissal was for the potentially fair reason of conduct. The Tribunal accepted the evidence of Messrs Dockree and Carlyon, the two principal decision makers, in this regard.

44. The Tribunal was satisfied that the Respondent had a genuine belief that the Claimants had been guilty of misconduct when the decision to dismiss was made in each case. The Tribunal was satisfied that the Respondent had reasonable grounds to reach that conclusion, having conducted a reasonable investigation. The Claimants were each invited to initial investigatory interviews and given every opportunity to comment on the postings that they had made. There was no issue about the authorship of the postings. The Claimants admitted that they had made them and were wholly unrepentant about having done so.

Indeed, throughout the disciplinary process (and the Tribunal proceedings) they maintained that there was no basis for legitimate complaint. They were suspended at the conclusion of their respective investigatory interviews and the investigation continued. They were provided with all relevant evidence prior to their respective disciplinary hearings. The issues were investigated in depth at those disciplinary hearings, at which they were each represented by an experienced trade union officer of their choice. The dismissing officer adjourned those hearings to consider and reflect on the evidence in each case, and provided each Claimant with comprehensive reasoning in support of his decision to dismiss. Each Claimant was given the right to appeal. The appeal in each case was lengthy and detailed. Upon the conclusion of the appeal hearing in each case, the appeal officer adjourned to give detailed consideration to the issues arising and provided, in writing, fully rationalised grounds for dismissing the appeals.

45. The Tribunal was satisfied that in each case dismissal fell within the band of reasonable responses (***Iceland Frozen Foods Ltd v Jones [1983] ICR 17***).

46. In ***Game Retail Ltd v Laws UK EAT/0188/14***, the EAT, in November 2014, declined to lay down fresh guidance for future unfair dismissal cases involving alleged misuse of social media. The EAT held that such cases were likely to be fact-sensitive and the relevant test would continue to be that laid down in ***Iceland Frozen Foods***. This was subsequently approved by a separate division of the EAT sitting in Scotland in August 2015 in ***British Waterways Ltd v Smith UK EATS/0004/15***.

47. The Tribunal was fully cognisant that it must not substitute its own view for that of the Respondent. The decision to dismiss patently fell within the reasonable band. The Claimants were well placed to understand their obligations under the Diversity & Respect at Work Policy and the Email, Internet & Databases Policy. They were experienced shop stewards. Their repeated suggestion, which they maintained throughout the Employment Tribunal Hearing, that the Respondent had somehow breached their rights to privacy was simply wrong. They chose to post offensive, abusive and derogatory remarks about other employees of the Respondent in a medium which was publicly available.

48. The conduct in question in each case merited the sanction of dismissal. Even if the position had been that it was a close call between dismissal and for example, the imposition of a final written warning, such a sanction would have been futile, given (a) the Claimants' implacable denials that they had been guilty of any misconduct of any kind, or breach of any of the Respondent's policies, and (b) their complete lack of remorse for their actions.

49. Despite the ICO taking no action against the Respondent, the Claimants persisted in the argument that the Respondent had committed all manner of statutory breaches in obtaining and relying on the Facebook forum posts in support of disciplinary action against them.

50. The Tribunal agreed with the Respondent that throughout the disciplinary process, the appeal process and indeed the Tribunal process, the Claimants adopted tactics of deflection and diversion.

51. In summary, there was no breach of the ACAS Code, the ERA, the TULR(C)A, the HRA, the ECHR, the DPA, any ICO guidance for employers, or any principle of fair treatment.

52. These and many other obstacles were placed in the paths of Messrs Dockree and Carlyon when they came to examine the merits of the disciplinary case against each of the Claimants.

53. The Claimants had been afforded a fair and impartial disciplinary hearing, and a fair and impartial appeal hearing. The Claimants were not singled out for "special treatment". Other employees who had had nothing to do with any recruitment drive for the GMB were dismissed at or about the same time for precisely the type of conduct for which the Claimants were dismissed. The Respondent gave thorough consideration to the available evidence. There was no unfairness by failing to investigate any grievance. The grievances initiated by the Claimants raised issues which properly formed the basis of (and were considered as part of) the disciplinary process. There was no *"collusion"* between the Respondent and Unite. Unite was not the Respondent's *"stated affiliate"*. The Respondent had not sought to achieve a *"closed shop"* or bring about the dismissal of workers who opposed such actions and wished to exercise their right to join a union which was not an *"affiliate"* of the Respondent. The sanction of dismissal was, in each case, entirely proportionate.

54. The suggestion that in order for the Diversity & Respect at Work Policy to be engaged there had to be some of adverse treatment based on a protected characteristic was simply (and obviously) wrong.

55. The Claimants did not help themselves during the disciplinary process. But one example of this was the posting by Mr Rohan of inflammatory comments on the forum immediately following his initial disciplinary hearing. The Claimants also did not help themselves during the Tribunal Hearing. But one example of this was the opportunistic account offered by Mr Rohan as to the relevance and meaning of the manuscript entry at the top of the first page of the letter of 12 August 2015 to staff from Mr Bacon warning about the use of social networking sites. If Mr Rohan had truly been told by Mr Pearce that this manuscript entry signified the fact that the Claimants were being singled out for punishment in relation to the use of this letter, it defies explanation that Mr Rohan would not have raised this point at his disciplinary hearing, in his grievance letter, his grounds of appeal against dismissal or at his appeal hearing.

56. The Tribunal formed the view that the addition to Mr Whitehouse's statement referred at paragraphs 11(23) to 11(25) above was an embellishment, which undermined the Claimants' case.

57. In the final analysis, this was a simple and straightforward case of gross misconduct, a case which was much complicated by unnecessary and irrelevant distractions.

Conclusions

58. For all of the above reasons, the Tribunal concluded that neither Claimant was automatically unfairly dismissed within the meaning of s.152 of the TULR(C)A, or unfairly dismissed within the meaning of s.94 of the ERA.

59. If the Tribunal had concluded that there was any “procedural unfairness” in relation to either dismissal, it would have concluded that the Claimants would have been dismissed in any event if a fair procedure had been followed.

60. Had the Tribunal concluded that either dismissal was unfair (procedurally or otherwise), it would have held that each of the Claimants contributed to their dismissal to the extent of 100%.

Employment Judge Gilroy

Judgment entered in register and copies sent to parties on
24 July 2017

For the Secretary to the Tribunals