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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Keating**

Respondent: **United Road Transport Union ("URTU")**

Heard at: **East London Hearing Centre**

On: **15-17 August 2018 and in chambers on 11 September and 18-19 December 2018**

Before: **Employment Judge C Hyde (sitting alone)**

Representation
Claimant: Ms A Ahmad (Counsel)
Respondent: Ms K Newton (Counsel)

RESERVED THIRD REMEDY JUDGMENT

The judgment of the Employment Tribunal is that: -

(1) The Claimant's application to be reinstated is refused.

(2) The Respondent is ordered to pay to the Claimant compensation for unfair dismissal in the sums to be agreed in accordance with this reserved Judgment.

REASONS

1 Reasons are given in writing for the above judgment as the judgment was reserved. In accordance with case law and the requirements of the overriding objective in the Employment Tribunals Rules of Procedure 2013, these reasons are set out only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so.

2 All facts were found on the balance of probabilities.

Third remedy hearing

3 The purpose of this remedy hearing was to consider for the second time whether to order reinstatement of the Claimant, the first such order having been made in February 2018. If it was not appropriate to order reinstatement of the Claimant by the Respondent, then the Tribunal was to determine compensation.

4 The Tribunal sets out in outline the history of the hearings of this case.

5 On 18 December 2017, the Tribunal sent to the parties the reserved liability judgment following a hearing between 30 August and 15 September 2017 (four days with the parties and one day in chambers). By that judgment the Tribunal determined that the Claimant had been unfairly dismissed. The remedy hearing was listed for 2 February 2018. On that occasion the Claimant confirmed that he sought reinstatement. The Tribunal made an order, in principle, that reinstatement should take place but resumed on 22 February 2018 to identify the terms in respect of payment to the Claimant in relation to that order.

6 The first remedy judgment in relation to the hearing on 2 February 2018 was sent to the parties on 19 February 2018. The order in relation to the sums payable to the Claimant were in effect agreed as to their calculation although the Respondent clearly did not accept that the Tribunal had been right to order reinstatement. The details of those payments were very helpfully encapsulated in a document prepared by Counsel for the Respondent which was later sent by email to the Tribunal and then incorporated into the second remedy judgment. That judgment was eventually sent to the parties on 1 October 2018.

7 When the Tribunal made the reinstatement order in February 2018, it directed the Respondent to inform the Tribunal by 7 March 2018 what its decision would be in respect of reinstatement.

8 Incidentally, the Respondent requested written reasons for the second remedy judgment by a letter or email to the Tribunal sent on 3 October 2018. The reasons for that judgment are set out in these paragraphs. The calculation was agreed. The substantive reasons for the order for reinstatement had already been set out in the judgment in the first remedy judgment sent on 19 February 2018. No further reasons therefore will be provided.

9 Finally, the Respondent declined to reinstate the Claimant on the date ordered, 23 March 2018. In those circumstances therefore, a third remedy hearing was listed for mid-August 2018 at which it was agreed the Tribunal would need to determine whether the final order in relation to reinstatement was that it was indeed appropriate. If it were, then there were consequences in terms of the financial remedy available to the Claimant. If it were not, then the Tribunal also had the figures available for the most part in order to determine the compensation to the Claimant. The most significant difference was that there would be a cap on the award if reinstatement were deemed not to be appropriate at this second stage.

10 The hearing in the event took all three days which had been allocated to it. Closing submissions were not completed until half past four on the last day. Thus, the Tribunal had to reconvene in chambers to determine the issues.

Evidence presented

11 Bundles had previously been prepared for the remedy hearings in February 2018. These were supplemented by further bundles marked respectively [FR1] and [FC1]. [FR1] was prepared by the Respondent and duplicated for the most part, the first part of the previous remedy bundle but contained further documents from pages 312 to 540. Thus, the remedy bundle produced by the Respondent for this third hearing was in a lever arch file and an A4 ring-binder. The Claimant also produced further documents which were for the most part duplicates of the additional documents provided by the Respondent. As is often the case the parties' ability or otherwise to liaise about the presentation of a joint bundle to the Tribunal is a function of their relationship in the litigation. Contrary to the interests of both parties, failure to agree a similarly numbered bundle makes the Tribunal's job more difficult, and usually causes delay in the process.

12 The Tribunal recommends to the parties and their representatives that if they are ever in a similar situation in terms of successive hearings in the same case for which additional bundles are prepared but in respect of which they may need to refer to the original documents, the successive bundle should be paginated continuously from the end of the previous bundles. This avoids potential confusion with the noting of page numbers.

13 In addition, there were some approximately 20 pages which needed to be added to the bundle which were in neither the Claimant's nor the Respondent's bundles for the third remedy judgment. Some of these were to be added with page numbers prior to 312. Page 312 was where the pagination in the Respondent's second remedy bundle commenced.

14 The Respondent adduced four witness statements and the Claimant adduced a further witness statement for the August 2018 remedy hearing. On behalf of the Respondent Mr Brian Hart, National Officer with the Respondent, gave evidence [FR2]; as did Mr Eric Drinkwater, Vice President and Acting President in effect of the Respondent [FR3]; as did Mr Paul Gallaher, Administration Manager [FR3A]; and Mr Robert Monks, General Secretary of the Union [FR4].

15 The Claimant's witness statement was marked [FC2].

16 The Tribunal also had access to all the documents previously adduced in the liability hearing and in the previous remedy hearings.

17 Further, at the outset of the hearing on 15 August 2018, Ms Newton on behalf of the Respondent presented outline submissions [FR1] which ran to some 12 pages. She further produced for the Tribunal a copy of the Employment Appeal Tribunal judgment in the case of *Selfridges Ltd v Mr N Malik* (EAT/1352/96). This supplemented and substantiated her very helpful submissions on the effects of the cap where a reinstatement order is made.

18 At the close of the third remedy hearing on 18 August 2018, Ms Ahmad presented written closing submissions which the Tribunal marked [FC3] and which ran to some nine pages. Both Counsel supplemented their written submissions orally.

Relevant law and Issues

19 It was agreed that the central issue in this case was whether or not it was practicable for the Respondent to comply with the reinstatement order. If not, then the issue was what level of compensation the Claimant should be awarded. The next question was whether there should be an additional award, and if so, what should the award be?

20 If any compensation was awarded, should there be an uplift on grounds of an alleged failure to follow the ACAS Code? If so, how much?

21 Finally, the Tribunal had to decide whether the Claimant was entitled to any other heads of loss/compensation as particularised in his schedule?

22 The issues referred to above were helpfully set out in paragraph 4 of Ms Newton's opening outline submissions. Ms Ahmad also set out the relevant statutory provisions in relation to reinstatement and compensation.

23 The Tribunal was also grateful to Ms Newton for setting out the relevant legal framework in section 5 of her outline submissions and citing the relevant authorities at paragraphs 6-12 of [FR1]. As the statement of law was not disputed by Ms Ahmad and also both parties were represented by experienced Counsel, the Tribunal did not consider it either necessary or proportionate to repeat those provisions here. Suffice it to say that the relevant statutory provisions were sections 113 -117 of the Employment Rights Act 1996 ("the 1996 Act") and the main authority governing the Tribunal's consideration of the issue of practicability and how to approach it in a reinstatement case was the case of *Port of London Authority v Payne* [1994] IRLR 9.

24 The dispute was not about the applicable law but the application of that law to the circumstances of the case.

Findings of fact and conclusions

25 It was not in dispute that the Respondent was a small union employing only five regional officers. The Tribunal does not repeat the factual background to this case as it was set out in considerable detail in the reasons for the previous judgments.

26 The Respondent's central contention was that there had been a significant and fundamental breakdown of trust and confidence such that it was not practicable for the Respondent to comply with a reinstatement order. The Respondent relied on the fact of the Claimant having made very serious allegations against both Mr Monks who would be his second line manager if he were to return to work and Mr Hart who would be his first line manager. This was a reference to the Claimant having alleged serious impropriety on their part - a matter which was considered by Professor Lewis. The Tribunal's findings on this issue were set out in the previous reasons and were not

adverse to the Claimant.

27 The suggestion had been made that Mr Gallaher could line manage the Claimant instead as he had not been implicated in any way in the matters between the Claimant and the Respondent. His only involvement had been to write the letter to the Claimant summoning him to a disciplinary hearing, as the General Secretary, Mr Monks, could not do this at the time. The Respondent submitted that it would be wholly inappropriate for Mr Gallaher to line manage the Claimant because he lacked the knowledge and experience to do this, and that the suggestion had alarmed him and caused him anxiety.

28 The Respondent also relied on a matter which had been a "running sore" between these parties, namely the dispute between them about the possession and control of the car which the Claimant used when he was employed. Ms Newton relied on the ongoing dispute in relation to this in support of her contention that the Claimant had further harmed the relationship with the Respondent. She further relied on the Claimant having set up a rival union ("Nexus Union") and that the Claimant had become General Secretary of it. She contended that the Claimant had been actively seeking to persuade current URTU members to relinquish their membership of the Respondent in favour of joining yet another union called Community.

29 She referred to the Claimant having used derogatory epithets about Mr Monks and Mr Hart in correspondence (pp.327-328).

30 Ms Newton then addressed the issue of compensation under section 123 of the 1996 Act. The Respondent's position was that there had been a wholesale failure on the part of the Claimant to mitigate his loss in this case.

31 It was not in dispute that the Claimant was in the workplace until the end of May 2016 and that he was declared fit to work from January 2017 (p.137) and that he had failed to work for a single day in the last year. He was no longer on any medication after April 2017. The Respondent submitted that his attempts to find work had been insufficient. Ms Newton relied on the fact that the Claimant held himself out as having a Class 1 licence and that there was a significant shortage of drivers with that qualification. There was an issue as to whether the Claimant had held himself out to be a Class 1 driver. In any event, it was not in dispute that he held a Class 2 licence. There was no evidence, she contended that the Claimant had applied for Class 2 driving jobs. This the Respondent contended amounted to an unreasonable failure to mitigate his losses.

32 Also in relation to compensation, the Respondent took the Tribunal to section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA"). This provision in effect gave the Tribunal the power, where it found that the employer had failed to comply with the relevant ACAS Code of Practice in relation to the matter that the Tribunal was determining, and that the failure was unreasonable, to increase any award made to the employee by up to 25% if it considered it just and equitable in all the circumstances to do so.

33 She submitted, and the Tribunal accepted, that by virtue of section 124A of the 1996 Act any adjustment made in accordance with section 207A applies to the

compensatory award only i.e. not to any basic award.

34 Ms Newton further submitted that the judicial guidance which emerged from the Court of Appeal judgment in the case of *Credit Agricole Corporate and Investment Bank v Wardle* [2011] IRLR 604 in a case involving uplifts under the previous statutory scheme were relevant. She set out the principles emanating from that judgment at paragraphs 14 to 16, 19, 24, 25, 27 and 28 to 29 of the Court of Appeal's judgment. The Tribunal does not repeat the content but makes reference to relevant principles below. Once again, the Tribunal did not disagree with Ms Newton's submission that this was the relevant and applicable law.

35 She further submitted that the Tribunal's findings previously in relation to the Respondent being wrong in terms of increasing the sanction on appeal did not constitute a breach of the ACAS code since that was not part of the code itself, only the ACAS guide. That matter therefore, she submitted, should not be taken into account in relation to any uplift because it did not constitute a breach of the code.

36 Her final submission in relation to this matter however was that to the extent that any breaches occurred they were not unreasonable. If the Tribunal was against the Respondent in that respect then she submitted that any uplift should not exceed 10%. The 20% uplift would apply in a case where the Respondent followed no procedure and did not comply with any part of the ACAS code. This she submitted was not the case here.

37 The next aspect of the compensation was whether there should be an additional award. The Respondent submitted that it was not practicable to comply with the reinstatement order and therefore there should be no additional award. In the alternative if the Tribunal determined that such an award should be made, she argued it should be no more than 26 weeks in accordance with the guidance in the case of *Mabirizi v National Hospital for Nervous Diseases* [1990] ICR 281. In that case Mr Justice Knox had stated in the Employment Appeal Tribunal that the purpose of the additional award is not to provide a "precisely calculated substitute for financial loss" but rather to provide a general solatium to be fixed depending upon the merits of the case. She also referred the Tribunal to the further elaboration on this point set out in Harvey on Employment Relations in section F1(2)(b) paras 2435-6. She asked the Tribunal to take into account that the Respondent had a genuine belief that trust and confidence had broken down.

38 In relation to compensation that was being sought due to loss of use of the car, she submitted that all issues relating to the car were outside the jurisdiction of the Tribunal.

39 It was not in dispute that there was a County Court judgment in place under which the Claimant was ordered to pay the Respondent more than £8,000. She submitted that the Claimant could not use the Tribunal proceedings to seek to get around his debts to the Respondent in this regard. The Claimant had applied to set the order aside but his application had not yet been listed.

40 The Tribunal had stated to the parties at virtually every hearing that this also was its view of the position. The County Court proceedings which were ongoing

displaced the Tribunal's jurisdiction. It would, in any event, be extremely undesirable to have two separate courts dealing with the same matter differently. To that extent the Tribunal was disappointed that the Claimant nonetheless adduced considerable documentation about the issue of the car. There appeared to have been some misunderstanding about a comment made about this by the Tribunal at an earlier hearing. Further County Court Orders had been made. The Tribunal could not displace those Orders.

41 However it was relevant and appropriate to consider the main disputes in relation to the car and its contents as this affected consideration of the reinstatement application. The Respondent argued that it was relevant to determination of the practicability of the reinstatement and the trust and confidence issue. Apart from the issue of how much money was due to the Claimant in respect of it or otherwise, there was the question of whether the Claimant had been a proper custodian of the work documents which were in the car when he last worked. In short, the Respondent produced photographic evidence of what they said was the state of the documents after the car was repossessed in early April 2018 from premises either at or near the Claimant's home, where he had left the vehicle. The car was repossessed by bailiffs executing a judgment in respect of the vehicle. The Respondent pointed to this in support of their contention that trust and confidence had been breached.

42 In summary, the background to the dispute about the car was that in or around September 2013 the Claimant came to an arrangement with the Respondent (directly with Mr Monks) whereby Mr Keating personally contributed £5,000 to the purchase of a new company vehicle. That was not in dispute. There was a dispute however about the terms on which he made that contribution and the circumstances and level of any reimbursement in the event of termination of his employment. The Tribunal has dealt in great detail with this issue in the earlier judgment so will not repeat that detail here. Unfortunately, there was no written agreement specifically addressing the arrangement reached with Mr Monks.

43 In addition, the Respondent's case was that at the time the vehicle was recovered there was extensive damage to it, both internally and externally (para 20 of Mr Monks' witness statement, [FR4]).

44 The Respondent's case was that as of April 2018 the vehicle was independently valued at £6,000 (p.356).

45 After the retrieval of the vehicle the County Court proceedings continued and before the hearing in August 2018, the most recent order was made on 22 June 2018 that Mr Keating was to pay a sum just in excess of £6,000 in respect of the costs of recovering and repairing the vehicle and a further sum of just over £2,000 in respect of the costs of the Respondent.

46 The Tribunal has already expressed its view about the proportionality and good sense of the Union pursuing the proceedings in the way they did against Mr Keating in relation to the vehicle. The Tribunal noted earlier in these proceedings that Mr Monks was legally trained, and as General Secretary, he was in overall charge of the operation of the Union. Despite that, contrary to maintaining good order, and as set out above, there was no written document setting out the terms of the bespoke

arrangement that was reached with Mr Keating. It therefore appeared to the Tribunal that there had been a valid basis for Mr Keating to have disputed the actions being taken by the Respondent in relation to recovery of the car and the amount of money to which he was entitled in that event. That action was not in itself something which indicated a breach of trust and confidence by the Claimant. However, matters were superseded by the various County Court orders and as this Tribunal has said, it did not consider it appropriate to reach any different view from that which has already been determined in the County Court. Suffice it to say that in respect of a vehicle which was recently valued at £6,000, costs of over £8,000 had been incurred through recovery proceedings. The Tribunal did not consider that it was appropriate given the somewhat complicated legal and factual history relating to the car to put that issue in the balance against the Claimant in terms of the reinstatement.

47 The Tribunal considered that the issue of the handling of the personal data of the trade union members was more significant in this context.

48 The Claimant had in effect retained approximately two black bin bags full of membership records, membership data and confidential papers relating to the union's activities on behalf of its members, since about May 2016. There was no good reason why those documents had not been returned to the Respondent at the very latest when the Claimant's employment was terminated, albeit unfairly.

49 The Respondent contended that the Claimant had not looked after the documents properly and that they had been damaged due to being exposed to the elements whilst in his care.

50 The Claimant denied that this was the case. He relied on the document that he was given by The Sheriffs Office about the state of the Respondent's property when the vehicle was collected and which did not suggest that there were any problems with the documents.

51 On the other hand, the Tribunal considered that the Respondent was reasonably entitled to be concerned about the Claimant being in a similar position going forward, given that he had retained custody of these documents for something approaching two years, against the Respondent's wishes.

52 The Tribunal considered the Respondent's contention that the Claimant had set up a rival trade union called Nexus. Findings have already been made about this. It appeared to me that in the circumstances the Respondent could not on the one hand criticise the Claimant for not mitigating his loss by finding new employment but on the other hand criticise him for getting involved after this period of time in a type of work which was similar to that in which he had previously been involved. However, neither in relation to Nexus nor in relation to the other trade union with which the Claimant accepted that he was involved, namely Community, did the Tribunal find that Mr Keating was involved in either "poaching" or attempting to "poach" members of URTU. The evidence relied on by the Respondent to assert this was neither substantial nor specific.

53 Mr Monks (para 35) said that he was concerned that Mr Keating's activities were seeking to undermine the Respondent with whom he was seeking reinstatement and

that Mr Monks "strongly suspected" that this had led to the Respondent losing members. There was no evidence whatsoever of any connection or indeed any details of lost members.

54 The Tribunal was under no illusion whatsoever that there was no love lost between the parties and in particular between Mr Monks and Mr Keating. The Tribunal approached this matter throughout in relation to the Respondent, on the basis of how it would expect a reasonable employer, who is to be assumed to act lawfully, to conduct itself. That was also the background and expectation against which the first reinstatement order was made.

55 The Tribunal was somewhat disappointed that one of the numerous points made by Mr Monks in opposition to the reinstatement application was a reference to an email sent by the Claimant on 16 July 2016 to another member of the NEC in which Mr Keating referred to Mr Monks as "little sod" and to Mr Hart as "the deaf, dumb and blind man". The Tribunal did not dismiss the contention on behalf of Mr Monks that these comments were offensive and indicative of Mr Keating's mindset. However, the Tribunal considered that they were said by Mr Keating at a time which was right in the middle of a very difficult time between the Claimant and the Respondent as referred to in the previous judgment. Court proceedings were current at that time. The two camps were jostling for confirmation as the controlling body of the NEC. The Claimant was aligned with one camp and Mr Monks with the other. The substance of that dispute was never determined but proceedings in relation to it were settled as set out above in the Autumn of 2016 and continuing proceedings then only related to the issue of the car and the other Union property. Further the original dispute about Mr Keating's entitlement to stand for General Secretary, which was also unresolved at that point, was ultimately decided in Mr Keating's favour.

56 The Tribunal considered that it was entitled to assess whether there were matters which a reasonable employer might be entitled to rely on as indicating that they did not have trust and confidence in the Claimant returning to work for them, at this stage.

57 It was also important to note that even after the Claimant had brought these proceedings during which he was legally represented, in September 2017, he did not return the documents to the Respondent. The initial legal proceedings had included an application for the documents to be returned by him as well. The Claimant had no legal basis for retaining custody of them.

58 The Claimant's schedule of loss was prepared in respect of the position as at February 2018 and was at pages 84a-d of the bundle. An amended schedule of loss, setting out the claim in August 2018 was at pages 84e-i.

59 The amended schedule of loss was divided into two sections. The first was on the basis of the normal compensation to which the Claimant would be entitled and the second section was on the basis that the Respondent should have complied with the order. There were some further submissions made by the Respondent about the schedule of loss.

60 First, in relation to the basic award, given that the date of dismissal was 8 July

2016, the Respondent submitted, correctly it appeared to the Tribunal, that the maximum week's pay for calculation of the basic award was £479 not £489. There is no dispute about the multiplier of 7.5 therefore the Tribunal accepted that the figure should be **£3,592 for the basic award**.

61 The Tribunal then moved to the compensatory award. The net loss of earnings claimed from the termination date to 15 February 2018 was the sum of £48,460.78. The second period was from 16 February 2018 to 22 March 2018. The date on which reinstatement was ordered.

62 At the end of the hearing it was agreed that the Tribunal would decide all the necessary issues in principle in relation to the Claimant's entitlement to compensation and that the parties would do the actual calculations themselves. To assist with this exercise, the Tribunal has underlined in bold the text setting out the relevant decisions in these reasons.

63 The Tribunal was confident that Counsel were aware of all the issues that needed to be taken into consideration in making the necessary calculations.

64 The Tribunal accepted the Claimant's submission that the Respondent had had an "entrenched and negative stance" to the prospect of the Claimant being reinstated. The Tribunal considered that one example of this, although there were many, was the suggestion that Mr Gallaher was anxious about having to line manage the Claimant. There was no evidence that line managing the Claimant as a task was particularly demanding. Indeed, it was the nature of the work of a regional officer that they were fairly self-contained in their work.

65 Mr Gallaher was a chartered accountant who had been qualified since 1985. He had worked for two large firms of accountants in that time, namely PKF (UK) LLP between 1985 and 2013 and from 2013 to 2014 for BDO LLP. He himself described that his experience included "generally managing staff" involved in the delivery of accounts and audit services to a range of clients. The Respondent's case in the witness statement was that those roles required entirely different skills and experience to managing issues relating to trade union matters within the workplace, collective bargaining etc.

66 The Tribunal considered that the Respondent had immediately taken the most negative stance towards the suggestion of Mr Gallaher line managing the Claimant. There were certain generic aspects of line management which Mr Gallaher accepted in evidence that he could do and the Tribunal had no reason whatsoever to believe he could not do.

67 As to issues relating to union practices etc, there was no evidence that the Respondent explored whether, to the limited extent that such issues arose for supervision in relation to Mr Keating's work, other routes could not be developed. The Tribunal had made a finding previously, and nothing that the Tribunal heard in this hearing undermined that finding, that Mr Hart and Mr Monks were people who respected rules. The Tribunal would expect them, and any reasonable employer, to take reasonable steps to explore whether an order for reinstatement could be complied with, not to focus on the difficulties of doing so.

68 Mr Gallaher was not involved in that earlier finding, in part because he had not given evidence. Given his professional background in blue chip accountancy firms and his profession as an accountant and his lack of experience of the Claimant because he had only come on board relatively shortly before the Claimant was dismissed and the very limited contact that he had with the Claimant by nature of his job as administrative manager during that timeframe, the Tribunal once again thought that there was no good reason why he could not have taken the role of at least generic management of the Claimant i.e. managing matters such as holidays etc.

69 In making this suggestion in the earlier judgment, the Tribunal also took into account that it was already part of Mr Gallaher's role within the Respondent to manage the team of six members of staff in his administration department.

70 As stated above, there was no consideration as far as the Tribunal could determine of, for example, whether this was something that could be done on an interim basis to assist with the Claimant's re-entry into the workplace.

71 The Tribunal did not consider that any weight should be attached to this objection to the Claimant's re-entry into the workplace.

72 One of the points that Mr Gallaher relied upon in his written submission to the NEC in support of his contention that he could not take on management responsibility for the Claimant if reinstated (pp.324-326) was that his remuneration package was lower than the Claimant's would be and that although their gross pay was the same, the Claimant's remuneration package would be higher because of the fact that by virtue of his position he had the use of a union vehicle and a mobile phone etc.

73 The Tribunal found that Mr Gallaher must have reached his views about the merits or otherwise of managing the Claimant based on information provided to him by Mr Hart and Mr Monks. He accepted in evidence, although there was no indication of this in his statement or indeed in the submission to the NEC, that he could action holiday requests, issues relating to sick notes, attendance issues and absence issues. He indicated that he had been in a formal management position since 2004. Although he had not been given any training on diversity throughout his career, he had had experience of working with two to four people on assignments, and directly line managing seven to eight members of staff. These had included women and members of different ethnic minorities. He had not had to deal with any issues relating to pregnancy or disability or diversity.

74 In the course of answers to the Tribunal he indicated that there was another manager working for the Respondent at the same level as himself called James Bower. He was the Respondent's marketing manager.

75 He also gave the impression when he was giving his evidence that he believed that the Tribunal could force him to take on management responsibility of the Claimant. This also suggested that the proposal had not been explained to him dispassionately.

76 In cross-examination he stated that he would always strive to be a good manager. He then described an appropriate way by which for instance he might deal

with a grievance. These were generic approaches and were not specific to an accountant or a union officer.

77 During this cross-examination Ms Newton clarified that it was never the Respondent's case that Mr Gallaher was incapable of dealing with sickness requests for such matters. She indicated that their case was that he was not able to step into the role of a national officer i.e. to be a substitute for Mr Hart.

78 When he was asked about this in cross-examination he confirmed that there had been "not a huge amount of discussion" about what might be entailed in the Claimant being reinstated. He told the Tribunal that he was told about the situation and that there was a suggestion that he could manage the Claimant. His evidence was that his reaction to that was that this was "preposterous!" He believed that this came across as a bad suggestion.

79 The Tribunal also did not consider that Mr Gallaher was independent of Mr Monks. When in private practice Mr Gallaher had done work for the Union and had worked directly with Mr Monks or to Mr Monks. When the vacancy arose in relation to the administration manager position, Mr Gallaher became aware of it and was in the event put into position without there having been a competitive process or an external advertisement. The Tribunal was quite satisfied that he owed his position within the Union to his professional connection with Mr Monks. He held an FCCA qualification and also had obtained a degree in politics and history at Bachelor's level.

80 It was also not in dispute that Mr Gallaher had access to legal advice and that he could seek legal assistance if a specialist trade union issue arose in the course of his work.

81 The Tribunal contrasted his apparently immediate reluctance to get involved in facilitating the reinstatement of the Claimant with his involvement in writing to the Claimant by letter dated 24 May 2016 at the express behest of Mr Drinkwater to summon the Claimant to a disciplinary hearing on 4 June 2016. The Tribunal has already set out above and in previous judgments that effectively the person with the control of this Union was the General Secretary. Mr Monks is an intelligent and experienced man with a legal background. Mr Drinkwater is by trade a full-time lorry driver. For the majority of the time this Tribunal was concerned with, Mr Drinkwater was Vice President and acting President because the position of President was vacant and under the constitution he then took on those duties. The Tribunal was satisfied that Mr Drinkwater did not take any actions of substance as Vice President of his own initiative.

82 The Tribunal did not thereby suggest that Mr Monks did not follow the correct procedures but the Tribunal was equally satisfied that Mr Drinkwater and probably many of the other NEC members looked to Mr Monks for direction in respect of any important issues. An example of this was the effectively rubberstamping of the recruitment of Mr Gallaher. It was also consistent with the constitution and the relative experience of the NEC members as compared to the General Secretary.

83 There was no attempt on the Respondent's part to reassure those who expressed any concerns about the Claimant's reinstatement, nor indeed did Mr Monks

prepare a briefing paper to the NEC before the meeting at which they were going to consider whether they believed reinstatement was practicable or not, setting out for example the pros and cons of matters which may need to be undertaken, and summarising the Tribunal's judgment and suggestions. This was something which he accepted the General Secretary might have been expected to have undertaken, if necessary with legal help, in order to assist the NEC.

84 Similarly in the letter that Mr Gallaher sent to the Claimant on 24 May 2016 telling him about the disciplinary action and charges, he stated that he had been advised that the General Secretary would normally be involved in the determination of whether the Claimant was guilty of misconduct alleged under the Officer's Agreement but that because the Claimant had recently raised a number of grievances against Mr Monks and to ensure that a fair process was adopted he had been instructed to write to the Claimant.

85 The Tribunal considered that if Mr Gallaher was seen as someone who could administer a disciplinary process fairly then due consideration could be given to him fulfilling a line management role at least for a short time in relation to the management of the Claimant (p.233 original liability bundle).

86 In assessing the reasonableness of Mr Gallaher's expressed anxiety and horror at having to potentially facilitate a reinstatement of the Claimant even for a limited time in a limited role, the Tribunal also took into account his evidence about his concern that a source of alarm was the fact that he believed the Claimant had taken out "multiple grievances".

87 The Tribunal has already dealt with this issue in the earlier judgment and it did not appear to the Tribunal this was a good basis for arguing that trust and confidence had been lost in an employee who had done what they were fully entitled to do under their employment and who in the event had been found, in relation to the fundamental dispute, namely being barred from standing to be General Secretary, to be in the right.

88 In terms of his involvement with the union, Mr Gallaher first became involved with helping with the Union's year end accounts in January 2015, having been made redundant from BDO in October 2014. He thus worked for the Union on a freelance basis for a period of four to five months. Mr Monks then brought him in to work for the Respondent in October 2015. He had been Audit Manager in respect of the Respondent at PKF for eight years from about 2010. He had had contact therefore with Mr Monks throughout this period and with the office manager within the Respondent. The latter was his main point of liaison but he also had contact with Mr Monks for more high level and complicated matters. His understanding was that his employment with the Respondent was a result of a decision made by Mr Monks, albeit this decision would have gone to the NEC for ratification. He was unaware that the Claimant was putting in a challenge to Mr Monks as General Secretary before he joined the Respondent but he knew about it shortly after he arrived in October 2015. This was of course the timeframe in which the challenge occurred. He then worked alongside the office manager who was due to depart, Brenda Irvine, for a period of eight months.

89 Mr Monks brought the Tribunal up-to-date in terms of the judgment sum which

the Claimant owed. The Claimant had apparently paid this money to the trade union. The sum of £8,000 odd was increased because of the cost of enforcement proceedings. He understood however that the Claimant was seeking to have the Manchester County Court judgment set aside.

90 Similarly, the Tribunal accepted the Claimant's submission that Mr Drinkwater did not have a proper basis for resisting the reinstatement order. Given his position within the Union, he would have had very little to do with the Claimant directly. Further, given his role as Vice President, he should have been concerned about ensuring that the organisation acted in a way which was consistent with good employment practice. He expressly and the Tribunal considered, frankly, described that he only skimmed the Tribunal's liability judgment and then deferred to Mr Monks who he described as "the most senior man in the union". He referred in his evidence to all the money that the Claimant had cost the union and that members were "gob smacked" at the prospect of reinstating him. Once again, the Tribunal records that the dismissal was found to have been unfair, and in the parallel proceedings in relation to the Claimant standing as General Secretary, he was found to have been in the right. There were further costs incurred in relation to recovering the vehicle and the documents but the Tribunal has already dealt with these above. The impression that Mr Drinkwater had was that all the costs that the union had incurred were because of improper action on the part of the Claimant. The Tribunal did not consider that this was by any means an accurate characterisation.

91 In relation to the suggestion that mediation might have assisted with reinstatement, he appeared rather bemused.

92 In relation to the condition of the documents as opposed to the fact that they remained in the Claimant's custody for so long, there was no confirmation that at the time the papers were handed over they were in the condition which was captured in the photograph. There had also been a time lapse between the recovery of the car and the taking of the photographs. They were taken by Mr Monks sometime after the car had been recovered from the Claimant.

93 Further the Tribunal took into account the content of the letter dated 25 May 2018 (p 363) sent to the Claimant by The Sheriffs Office in respect of the recovery of the vehicle in the first week of April 2018, as follows:

> "*We confirm attendance of our Agent to the enforcement address. Our Agent found the vehicle parked outside between 10 and 10a Carterfield EN9 1JD, upon which our Agent waited for the defendant and at 6:30 called him to see where he was. The defendant was parked in another vehicle. Our Agent had to fill out a form sign and confirm that the defendant showed me the vehicle, laptop and iPhone and other documents belonging to the claimant company, lot of documents in the rear of the vehicle which was locked. Our Agent also placed the laptop and phone under the rear seat, the vehicle is a Nissan, Our Agent gave the defendant a copy of the form, the removal truck came at 6.50am…..*"

94 The Tribunal adjourned at 1:20 for approximately an hour on the last day of the hearing having heard Ms Ahmad's closing submissions. When the parties returned

after the lunch break they notified the Tribunal of an agreed fact between them, namely that on 3 February 2018 at 8:47am Mr Keating had sent a document to Mr Bailey at Thomas Needham, the solicitors dealing with the issue of the car. Pages 541-542 were then added to the bundle at that stage. A response came from the Respondent by email on 10 August 2018 at 17:53.

95 On the basis of the evidence adduced on this issue, the Tribunal did not find on the balance of probabilities that the documents had been damaged because of the way in which the Claimant retained them. The Tribunal's finding against the Claimant was in relation to his retention of the documents and the other disputed items, apart from the car itself, at all. This was a reflection of his inability to distinguish between the areas of dispute, namely in relation to the ownership of the car and a legitimate demand by his former employer for the return of the documents.

96 In assessing the evidence, the Tribunal took into account that this was a trade union and the nature of the Claimant's job. However, the Tribunal considered that this worked against both parties. They were both in a position where they were meant to be working for the benefit of their trade union members and operating in a way which was consistent with good employer and employee practice.

97 It was not in dispute that the burden of proof as to whether or not it was reasonably practicable for the Claimant to be reinstated, lay on the Respondent.

98 In summary, I rejected virtually all the Respondent's objections to reinstatement, on the basis that they were not rational reasons for believing that trust and confidence had been breached and/or I did not conclude on the basis of those points that reinstatement was not practicable.

99 Given that this was the second stage of the assessment of practicability, it appeared to me that more weight could be attached to the undisputed evidence about the Claimant's own actions which meant that his return to the workplace working with Mr Hart and Mr Monks even to the limited extent that was required by his job, was not feasible. Whilst they did not have trust in him on the grounds which the Tribunal thought did not justify refusing to reinstate him, it was also apparent that he did not have trust in them and indeed there were elements of his case which suggested that he would not be able to put matters in the past to one side despite his protestations to the contrary.

100 It was accepted that relevant questions were whether the reinstatement could work and whether it could be successful for this Claimant with this Respondent.

101 In closing, Ms Ahmad acknowledged what was obvious, namely that both the Claimant and Mr Monks had "strong personalities".

102 The other respect in which the Tribunal considered that there was evidence that the Claimant would not be able to put matters behind him was in relation to the negative points that were made during the remedy hearings about Mr Gallaher. Mr Gallaher could have been seen by him as a bridge to returning and indeed the Tribunal accepted that submission in terms of the first and second remedy orders. However, even in closing submissions at the end of the third remedy judgment, submissions

were made on behalf of the Claimant with a view to attacking Mr Gallaher's credibility. Whilst there may have been evidence which led down that path, the Tribunal did not consider that following those points was consistent with a picture of the Claimant being prepared to return to work and put past matters behind him when this was a point being made in relation to a manager who had not been involved in the previous history.

103 The Claimant also attacked Mr Monk's credibility in the August 2018 hearing. The Tribunal was not satisfied that this was a necessary course for the Claimant to follow in seeking to undermine the points being put forward by the Respondent.

104 The Claimant asked the Tribunal to award as compensation in these proceedings, the legal costs incurred in resisting the County Court claim. The Tribunal declined to do so. Any argument about that needed to have taken place within the County Court proceedings.

105 The Tribunal also could not disregard at this stage the evidence that the Claimant had been slow to approach the Respondent after the finding in his favour in December 2017 until after the Tribunal gave a very strong indication in the first February 2018 hearing that this was a failing on both parties' sides.

106 In relation to the issue of breach of the ACAS Code, the Tribunal has already said that the issue of the breach of the Guide in relation to the imposition of the sanction was to be disregarded for the purposes of considering the uplift. That however left the other breaches which were itemised in the judgment. The Tribunal took into account that the Respondent was a trade union and that the breaches of the Code had taken place against the background which involved allegations of serious misconduct on the part of the Claimant. I considered that the failure of this Respondent to follow the ACAS code constituted unreasonable behaviour, given the nature of the business of the Respondent.

107 Ms Ahmad adopted the Respondent's points as to the applicable law, including the case law set out by Ms Newton. She urged the Tribunal to award 25%.

108 The breaches of the ACAS Code which fell to be considered in relation to the uplift were set out in the Tribunal's reasons as follows:

a. In para 203, that the Claimant was unfairly dismissed because, inter alia, an unfair procedure had been followed, including the "lack of a reasonably prompt investigation" – in breach of Clause 5 of the Code; and
b. That there had been a "failure to provide details of the disciplinary matters to the Claimant in good time before the disciplinary hearing" – in breach of para 9 of the Code.
c. In para 201, that the Claimant was provided with a "nugatory" right of appeal, in breach of para 26 of the Code.

109 In relation to breaches of the ACAS Code by the Respondent, the Tribunal decided that **the Claimant's compensation should be increased by 10%**.

110 The Tribunal also accepted Ms Newton's proposition that the ACAS uplift was not to be applied to the additional award, only to the compensatory award. The compensation needed to be calculated in the normal way without regard to the order of reinstatement. Thus, the first cap to be applied in relation to the calculation of the ordinary compensatory award in this case, including the basic award, was the cap on a week's pay. The second cap was on the total global award.

111 Of the points made by the Respondent in resisting the return to work they relied as well on the fact that the Claimant had been expelled from the trade union in February 2017 after the matter was assessed by an independent barrister.

112 This Tribunal did not have to make a determination about issues relating to the Claimant's membership of the Union. The fact remained however that he had indeed been expelled from the Union, and this was still the position at the time of the remedy hearings. The Tribunal considered that that was a compounding feature in the picture and rendered it less likely that matters would proceed smoothly if the Claimant were to return to work, given the nature of the job that he held.

113 The Tribunal has already addressed in its earlier findings that the points about the Claimant covertly recording Mr Hart and other matters relating to the initial difficulties between the Claimant and the Respondent were not material or rational bases for the objection to the reinstatement.

114 In relation to the point being made that the Respondent had not put into practice the recommendation of Professor Lewis, the Tribunal accepted that the context in which Professor Lewis had suggested mediation was no longer applicable by the time the issue of reinstatement arose. However, as the Tribunal has set out above, an employer acting in accordance with the spirit of the reinstatement order would have considered that as a possibility to facilitate the return to work. Similarly, the fact that the Claimant had refused mediation apparently at the end of 2015 was to be seen in the context of the dispute which was very new and raw at the time about whether the Claimant was entitled to stand as General Secretary. That was not directly an employment issue.

115 The submission that the Tribunal was requiring mediation as a pre-requisite to reinstatement was a misunderstanding of the position. The Tribunal saw the Respondent's reactions and omissions as indicative of our finding that they had turned their face against any sensible consideration of how reinstatement might work.

116 I have already made findings that Mr Hart's objections to the Claimant returning were not rational in all the circumstances.

117 The Tribunal was not satisfied that Mr Hart would actually have refused to manage Mr Keating if Mr Keating were reinstated. This finding about Mr Hart was consistent with his evidence that if his employer told him that he needed to attend mediation then of course he would have attended it.

118 The Tribunal also reminded itself that it was not just the car that the Respondent sought recovery of but also an iPhone and laptop as well as the documents already referred to. By virtue of the agreed fact, the first time that the Claimant showed any

willingness to return the documents was in the email of 3 February 2018. It appeared that Mr Bailey wrote to the Claimant's solicitors, OH Parsons, who were dealing with the issue on 5 February 2018 requesting two dates on which the Claimant would be available within seven days and OH Parsons did not respond.

119 The Claimant's evidence about his custody of the documents was that the day after the dismissal he put them into black bin liners which he said he stored until February 2018. Then between February to April 2018 he said that the documents were sitting in a friend's car park in the Nissan truck unattended for a period of two months. The Tribunal agreed that these latter arrangements were not adequate arrangements for the storage of personal data or property belonging to a third party. The Tribunal could not conclude from all the evidence however on the balance of probabilities that the documents had been damaged in that time frame.

120 The Tribunal also took into account when making findings about whether the documents had been damaged in the Claimant's possession that the Claimant was only made aware of this contention by the Respondent well after the Respondent said they discovered the documents in that condition. He therefore had not had a fair opportunity to address this matter at the time.

121 The next point raised by the Respondent was that the Claimant had failed to mitigate his loss. He was declared fit for work from January 2017 and there was no medical evidence before the Tribunal to say that he was not able to work and as set out above, the evidence was that he had not been on medication after April 2017. The Respondent contended that the Claimant could have walked into any HGV Class 2 job.

122 The Tribunal reminded itself about the case law about who the burden lies on in establishing a failure to mitigate by an employee in this situation, and what standard should be applied to the Claimant.

123 In terms of determining the issue of mitigation of loss, the Tribunal considered the evidence of the applications made by the Claimant, the evidence of his work for a trade union (pp 191-202); and his non-trade union work (pp 183-190).

124 Ms Ahmad also argued, correctly in the Tribunal's view, that the Claimant was entitled to seek congenial roles. This made it reasonable for the Claimant to have applied for a range of jobs which fitted that description, rather than to take non-congenial employment immediately.

125 The Tribunal however decided that this could only be indulged for a reasonable period of time. Mr Keating having impressed as a sensible and hardworking man, the Tribunal believed he would have found other employment before the date of the remedy hearings, if he had not been looking to the employer to compensate him.

126 The Claimant produced details of numerous jobs which he said he applied for. Ms Newton's further point was that they started from a year after the effective date of termination. She argued that if the Claimant's current position as at the hearing was that he was being offered jobs starting at £48,000 upwards then it was likely he would have no problem at all being re-employed. She submitted however that he should have done the HGV Class 1 qualification earlier and that he could have attained

employment at a similar rate of pay earlier also. The Respondent argued therefore in essence that the Tribunal should award no compensation past February 2017.

127 In assessing the argument about whether the Claimant had failed to mitigate his loss, the Tribunal accepted and the previous judgment had made findings to the effect that this job was a very important one to the Claimant. Apart from his statements to that effect the Tribunal considered that his almost unblemished record and his desire to stand as General Secretary of the Union were also evidence of that.

128 His failure to take other employment of a less congenial nature than his role with the Respondent was not unreasonable.

129 The Tribunal also took into account that, quite reasonably, Mr Keating was likely to have felt unable to pursue the job hunt in what was a very narrow field given his belief that his employment had been unfairly terminated. This belief was subsequently held to be valid.

130 Given the range of skills which Mr Keating clearly had, including driving a Class 2 vehicle, the Tribunal considered that **he should have been able to find work at about 50% of the rate to which he was entitled on full pay from a month after the expiry of his last sicknote**. **He was entitled to 100% loss of earnings until that point.**

131 The Tribunal awarded **continuing loss of earnings at that rate until a month after the conclusion of the liability hearing in September 2017**. The Tribunal had very much in mind that the Claimant had sought reinstatement. However, finding alternative employment to mitigate his loss, once the hearing was out of the way, would not have prejudiced his reinstatement application in anyway.

132 In relation to the next head of claim for compensation in respect of the company car, the Tribunal considered that Ms Newton's point was well made that the Claimant had use of the company car up to the reinstatement date. That exceeded the whole period that the Tribunal had said that the Claimant should be compensated for. There was therefore no additional compensation to be awarded in respect of loss of use of the car. The Tribunal had already indicated also that there was no jurisdiction to award compensation in respect of the £5,000 that the County Court had awarded against the Claimant.

133 The parties had agreed some additional sums due to the Claimant in relation to the car as follows:

a. Insurance - **£1300.73**
b. Reimbursement of receipted expenses - **£5421.45**
c. March 2018 expenses (p84 l] - **£283.63**

134 The Respondent acknowledged in closing that there were expenses which had been verified by supporting documentation and which they accepted that they were due to repay to the Claimant.

135 The Tribunal having made the necessary findings in relation to the loss of earnings timeframe, the parties accordingly are to calculate what the award should be.

136 If the award for loss of earnings is the subject of a Tribunal Order, and not for example part of an agreed overall settlement of remedy, the Tribunal will need to have the necessary information to make a recoupment order.

137 The next head was a figure the Claimant claimed in relation to training. The Tribunal rejected that as a recoverable head of loss. There was really no basis for saying that the Claimant needed to undertake this training and it had certainly not led to any employment that the Tribunal was aware of.

138 In respect of loss of statutory employment rights given that the Claimant was in employment for some five years and having regard to all the other circumstances, the Tribunal considered that it was appropriate to award the sum of £958.

139 The Respondent's contention was that the figure awarded should be £200 rather than the £350 originally claimed in the Claimant's schedule of loss. This was yet another area of unreasonable dispute, it appeared to the Tribunal. In this Tribunal's experience, the conventional sum is currently upwards of £350. Since the issue of loss of statutory employment rights was not agreed, the Tribunal had to decide it.

140 The issue of the level of awards for loss of statutory employment rights was most recently canvassed in the case of *Countrywide Estate Agents v Turner* UKEAT/0208/13. Birtles HHJ held as follows:

> *"Ground 4: The Tribunal's decision to award £860 for loss of statutory rights was an error of law/perverse.*
>
> 26. Mr Cordrey submits that the award was made without any reasoning despite the fact that the Claimant had just one year's continuous service at the time of dismissal and by the time of the Remedy Hearing he had secured stable full-time employment.
>
> 27. I agree with Mr Hodson that the Employment Judge made the award to compensate the Claimant for the fact that he no longer had any protection for unfair dismissal for the first two years of any new employment. The award of two weeks' gross pay capped at the statutory maximum is entirely within the discretion of the Employment Judge and cannot be described as perverse. The decision of Lady Smith in **Superdrug Stores plc v Ms J Corbett** (UKEATS/0013/06/MT 12 September 2006) is distinguishable on the basis that in that case the Employment Tribunal made an award at what was then ten times the basic net salary. That is a long way from two weeks gross pay.

141 In all the circumstances, it was appropriate to award the Claimant compensation under this head of two weeks gross pay = **£958.**

142 The Claimant had claimed a new car at a cost of £7,000. The Tribunal reiterated its finding that the Claimant had had full use of the previous car up to the reinstatement date. Subsequent expenditure fell outside the period that he was to be

reimbursed for.

143 There was no need to trouble with grossing up because of the incidence of the cap on the compensatory award.

144 The Tribunal was grateful to both Counsel for the detail that they addressed in this case.

Employment Judge Hyde

9 January 2019