Case Number: 2303478/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
Ms J Forecast
Mr M Walton

BETWEEN:

Ms K Rogers **Claimant**

AND

Picturehouse Cinemas Limited **Respondent**

ON: **8 – 10 January 2019 and 24 and 25 January in Chambers**

Appearances:

For the Claimant: Mr R O'Keeffe (Union Representative)

For the Respondent: Mr T Croxford QC (Counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant was automatically unfairly dismissed pursuant to s152(1)(b) Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA");
2. The Claimant was not subjected to a detriment pursuant to s 146 TULRCA.

REASONS

1. By a claim form presented on 28 November 2017 the Claimant, Ms Rogers, presented to the Tribunal claims of:

a. Detriment in breach of s 146(1)(a) and/or (b) Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA");
b. Unfair dismissal under s 152 TULRCA; and
c. Ordinary unfair dismissal under Part X Employment Rights Act 1996 ("ERA");

arising from her dismissal for gross misconduct. She seeks reinstatement and compensation for injury to feelings.

2. The Claimant gave evidence on her own behalf at the hearing and called as a witness Edd Bauer, who at the material time was an employee at Hackney Picturehouse, although the Tribunal was able to reach its findings of fact and conclusions without placing any real weight on the evidence of Mr Bauer. The Respondent's evidence was given by James Vandyke, the investigating officer and general manager at Brixton Ritzy; Cormac O'Connor, the dismissing officer who was the Respondent's regional manager at the material time and Shaun Jones, vice president of operations UK and Ireland for Cineworld Cinemas, the Respondent's parent company, who heard the Claimant's appeal against her dismissal. We gave appropriate weight to the statement of Debbie Cairns, acting head of people and training at the time she made the statement. The statement was made for the purposes of another case to which the Claimant was not a party and Ms Cairns did not attend the hearing to give evidence. All of the witnesses had produced written statements which we read before the start of the oral evidence and there was a bundle of documents containing 441 pages. References to page numbers in this judgment are references to page numbers in that bundle.

The issues

3. The Tribunal was presented with an agreed list of issues at the start of the hearing. The issues relating to liability were as follows:

Trade union activity: Sections 146 and 152 Trade Union and Labour Relations (Consolidation) Act 1992 ('the 1992 Act')

1. Were the activities described at paragraphs 8, 11 and 12 of the Particulars of Claim activities of an independent trade union within the meaning of s146 and s152 of the 1992 Act?

Detriment: Section 146 of the 1992 Act

2. Whether the Respondent's sole or main purpose in suspending the Claimant (and continuing the suspension) pending the outcome of disciplinary proceedings was to:

(a) prevent or deter the Claimant from being a member of an independent trade union, or penalise the Claimant for doing so, contrary to s146(1)(a) of the 1992 Act; and/or

(b) prevent or deter the Claimant from taking part in the activities of an independent trade union at an appropriate time, or penalise the Claimant for doing so, contrary to s146(1)(b) of the 1992 Act?

Automatic unfair dismissal: Section 152 of the 1992 Act

3. Whether the Respondent's principal reason for the Claimant's dismissal on 6 July 2017 was that:

(a) the Claimant was a member of an independent trade union, contrary to s152(1)(a) of the 1992 Act; and/or

(b) the Claimant had taken part in the activities of an independent trade union at an appropriate time contrary to s152(1)(b) of the 1992 Act?

Ordinary unfair dismissal: Section 98 ERA1996

4. What was the Respondent's principal or main reason for dismissal?

5. Did the Respondent act reasonably in all the circumstances in treating that reason as a sufficient reason for dismissal (in other words was the decision to dismiss within the range of reasonable responses) in accordance with s98(4) of the ERA 1996?

6. Did the Respondent follow a fair procedure?

7. If the Respondent is found to have unfairly terminated the Claimant's employment can the Respondent rely on Polkey v A E Dayton Services Ltd [1987] ICR 142 to reduce the compensatory award to nil to reflect the fact that the Claimant would have been dismissed in any event?

The relevant law

4. Section 152 (1) TULRCA provides:

"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) …

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time

(ba)-(c) … ."

5. Section 146 TULRCA provides:

"Detriment on grounds related to union membership or activities.

(1)A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, . . .

(2)In subsection (1)] "an appropriate time" means—

(a) a time outside the [worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with

or consent given by his employer, it is permissible for him to take part in the activities of a trade union..;

and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work."

6. We were also referred to a number of authorities on the meaning of trade union activities, which we refer to in our conclusions.

7. Ordinary unfair dismissal: it is for the Respondent in an unfair dismissal case brought under s 98 ERA to establish that it had a potentially fair reason to dismiss the Claimant. In this case the Respondent relied on the Claimant's misconduct. Misconduct is a potentially fair reason to dismiss under section 98(2)(b) ERA. The question of whether the Respondent is entitled to rely on the alleged misconduct to dismiss the Claimant fairly involves consideration of the test in ***British Home Stores v Burchell [1980] ICR 303,*** that is whether the Respondent at the time of the dismissal had a reasonable belief in the employee's guilt based on reasonable grounds after conducting such investigation as was reasonable in the circumstances. The standard to be applied to the investigation carried out by the Respondent in a misconduct case is also a standard based on what a reasonable employer might have done (***Sainsbury's Supermarkets v Hitt [2003] IRLR 23***).

8. Further issues then arise under section 98(4) ERA which provides that the question of whether the dismissal was fair or unfair involves considering of whether, having regard to the reasons shown by the Respondent, in all the circumstances of the case, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating the reason relied on as a sufficient reason for dismissing the Claimant. The question must be determined in accordance with equity and the substantial merits of the case. In accordance with the case of ***Iceland Frozen Foods v Jones [1982] IRLR 439*** the Tribunal must not in reaching a decision on the reasonableness of the Respondent's decision to dismiss substitute its own view as to what it would have done in the circumstances but must instead consider whether the Respondent's response fell within a band of responses which a reasonable employer could adopt in such a case.

9. In order to meet the test in section 98(4) the Respondent must also follow a procedure that is fair in all the circumstances. That will ordinarily involve compliance with the provisions of the ACAS code of practice on grievances and discipline and with the Respondent's own written procedures.

10. In a case in which a dismissal is found to be procedurally unfair consideration must also be given to the principles in the case of ***Polkey v A E Dayton Services [1988] ICR 142*** and if it appears that the Claimant would have been fairly dismissed in any event had a fair procedure been followed then any compensation awarded must be reduced to reflect the percentage chance of that being the case.

11. In a case in which the Claimant is found by the Tribunal to have been unfairly dismissed for misconduct the Tribunal must, if it has found that the Claimant has to any extent caused or contributed to her own dismissal reduce any

compensation by such amount as the Tribunal considers just and equitable having regard to that finding (section 123(6) ERA). A finding of contributory fault can only be made if the Tribunal forms the conclusion that the Claimant has on the balance of probabilities been guilty of misconduct alleged.

Findings of fact

12. We make the following findings of fact and reach the following conclusions based on the witness statements, the witnesses' oral evidence, the documents and the parties' submissions.

13. The Respondent is a cinema operator which at the time the proceedings were commenced had 23 cinemas across the UK and employed just under 1000 staff. The Claimant began work for the Respondent in its Cambridge Cinema on 6 July 2015 and transferred to the Ritzy Cinema in London in September 2015 where she remained employed as a customer service assistant until her dismissal for gross misconduct on 6 July 2017.

14. The Claimant joined BECTU in 2014 whilst working for a previous employer. She became a BECTU representative in that role and within a few weeks of transferring to the Ritzy she was elected as a representative by that branch. BECTU was the recognised union at the Ritzy but not at other Picturehouse Cinemas. After strikes in 2014 a pay deal had been arrived at involving a 26% pay rise and a no strike agreement for two years. The Respondent committed during that period to work towards implementing the real Living Wage (which is referred to in London as the London Living Wage and involves a higher rate of pay than elsewhere in the UK).

15. There were regular meetings between the Claimant, the other BECTU representatives and Mr Vandyke and regular members' meetings. In May or June of 2016 the Claimant became actively involved in a new pay claim which renewed the call for the London Living Wage and sought additional benefits such as sick pay and maternity pay. A meeting took place between the union and senior managers from the Respondent and Cineworld at which it became clear that the Respondent did not intend to implement the London Living Wage or discuss the additional demands.

16. Following a members' meeting the union balloted for industrial action at the Ritzy. There was sufficient indication of support and the local representatives therefore agreed to give formal notice of strike action. They gave forewarning of the notice to Mr Vandyke. BECTU itself was not closely involved but the representatives sought its advice from time to time. However the Claimant maintained that the representatives had considerable latitude to make decisions independently of the union and we find that that was the case.

17. A number of strikes of varying lengths took place between September 2016 and May 2017. Other Picturehouse cinemas joined the campaign over that period and strike action proliferated and was co-ordinated across cinemas, principally in London. The Claimant played an active part in the campaign, travelling to other cinemas with the aim of recruiting members to the union and supporting picket

lines when there were strikes at other cinemas.

18. In or around February or March 2017 the Claimant had discussions with Edd Bauer about a practice which the Claimant later came to refer to as "cyber picketing", a term that we will adopt in the remainder of this judgment. Edd Bauer was a BECTU representative at Hackney Picturehouse and he and the Claimant had been friends for some time. The idea originated with Mr Bauer and consisted of arranging for individuals (who may have been colleagues or members of the public) to make block bookings of cinema tickets that they did not intend to purchase thereby making them unavailable for up to an hour at a time to other potential purchasers, whether they were trying to purchase tickets online or physically at the cinema. Mr Bauer garnered support for the idea at Hackney Picturehouse and promoted it amongst community and supporter groups. His evidence that he soon realised that it was not a particularly effective tactic and his fellow members at Hackney did not take it particularly seriously was not challenged, but was at odds with his continued efforts to promote it.

19. The Claimant did not become involved in promoting the practice until April 2017. A strike had been arranged for 15 April at East Dulwich Picturehouse, the first to take place at that cinema. BECTU was fully aware of the strike and there was a BECTU official, Naomi Taylor, on the picket line. According to the letter at page 379 (to which we return below) she was approached on the picket line by Clare Binns, the Respondent's Director of Programming and Acquisitions and a conversation ensued during the course of which Ms Binns asked Ms Taylor if she was aware that there had been activity on the Picturehouse website that made it difficult for customers to book tickets. According to the letter Ms Taylor had been unaware of the practice and BECTU stated in the letter that the practice was not authorised or condoned by it.

20. The Claimant organised the first all members' meeting involving representatives from the five striking cinemas to coincide with the strike at East Dulwich. After the industrial action was finished the meeting convened in a local pub for the purposes of which a member of the local community had booked a room. There were thirty to forty people present from all striking cinemas. The meeting was relatively informal with no written agenda. The Claimant acted as chair. The meeting discussed further strike days and other potential actions and it was in that context that the possibility of cyber picketing was raised by Mr Bauer and supported by the Claimant who asked those present whether they agreed to it or whether they objected. The Claimant said in her witness statement:

> "**As the Chair I believe that I expressly asked people to agree to it, whether that was by hands-up vote or whether asking if there were any objections I cannot remember, but I believe it was the latter. For me, the purpose of the meeting was to get a series of things agreed so I wouldn't have allowed agenda items just to pass by without agreement. Overall, 'cyber picketing' didn't create a big stir and was agreed without much discussion".**

In his witness statement Mr Bauer said:

> **"The idea of cyber picketing was raised in the context of that broader discussion with community/supporter based engagement. Although the community picketing and**

community engagement generally were contested, cyber picketing did not produce any strong reaction at all, other than some laughs. Nia did not speak against that in particular. The resounding result was that everyone was in support of our ideas for broadening community support and getting people to do more direct action … I personally think there was a consensus."

Nia Hughes was present at the meeting. She was a part time employee of Picturehouse and was also employed by BECTU as a part time union organiser and the accounts given by the Claimant and Mr Bauer suggest that she did not raise any specific objection to the proposal but was much more concerned about the potential for community picketing to be hijacked by outside groups with their own agendas. We find as a fact that Nia Hughes engaged in a discussion about community participation.

21. The implication was that it was left to the Claimant and Mr Bauer to take the matter forward. They talked to some individuals in the pub who had been involved in cyber-picketing before and told them that more cyber picketing had been agreed. In cross examination the Claimant confirmed that that was all the action that was necessary to make it happen.

22. Shortly after the meeting, on 18 April, the Claimant sent the email at page 408 from branchemail@bectu.org.uk. The Claimant was acting branch secretary at the time and therefore had use of the email address. The names of recipients were not disclosed. The text of the email was as follows:

"Hello everyone!
Thank you to everyone who came down to the strike on Saturday – it was a huge success and East Dulwich have come away really enthused and ready to go out again!
A few things: NEXT STRIKE. Next strike will be May first! Put it in your diary. We're joining again with all the other sites and heading to the May Day Rally in Trafalgar Square. More details coming soon!
For those of you who couldn't make it on Saturday and didn't make it to the All Members Meeting – here's an overview of what was agreed. Please do come and talk to one of the reps for a more detailed account if you want –
1. All the sites are hoping to start building up momentum a bit more and strike a bit more regularly and we are planning a four day long strike, either over the final bank holiday weekend in May or over the Sundance Festival in early June. We will be thinking of ways to make this spectacular – so any ideas of what we can do in Brixton, or elsewhere, please let us know!
2. Over the next few weeks because it seems likely that our pickets will be limited to only a few hours or will be unable to picket the [Ritzy] at all, we're hoping to start cutting into our community support and setting up a community support group that could hold protests, or leaflet customers and advocate a boycott on our behalf. This has already started happening at Hackney quite successfully. Obviously we will need to be working closely with them over this and we will be in control of what leaflets they hand out for us. With that in mind, if anyone wants to help with this – please get in touch! It will be good fun, very outward looking and a really important thing in building up our presence in Brixton.
3. We are also going to start pushing cyber pickets, where supportive members of the public who can't come down to a picket line spend their day block booking seats and keeping them in the online basket, so they can't be sold on tills or online. It makes the strike much more effective when they keep cinemas open on strike days – and Hackney had managed to keep their cinema pretty much empty this way!"

23. What the Claimant was saying in the final paragraph was an expression of an

intention to start promoting a new kind of activity to increase the effectiveness of traditional forms of industrial action, including conventional picketing, on strike days. It did not say that the activity had been undertaken or that any member of staff had undertaken it. The intention was to encourage members of the community to engage in the activity but no specific plan for doing so was set out.

24. The email came to the attention of Mr Vandyke on 27 April after one of the duty managers left their inbox open on a laptop at the Ritzy. Although later realising that this might create a trust issue with the individual concerned (email page 298 from Mr Vandyke to Mr Swartland) Mr Vandyke was concerned at what he saw, took a photo of the email on his phone and forwarded it to Neil Gardhouse, then Head of Operations at Picturehouse, Gabriel Swartland, Director of Communications at Picturehouse and Clare Binns and Debbie Cairns of Picturehouse HR. Clare Binns' comment in response was "Think they have shot themselves in the foot". The matter was referred to Picturehouse's lawyers Mishcon de Reya who on 28 April wrote the letter at page 376 to BECTU, saying "Our client has been the subject of malicious activity on its website (particularly at the Hackney cinema) during days when strikes took place." The letter went on to refer to the email sent by the Claimant and to ask BECTU for various assurances as to the origin of that email and whether or not BECTU had endorsed it or encouraged similar action.

25. BECTU responded on 3 May with the letter at page 379 from Gerry Morrissey, Head of BECTU sector of Prospect. It included the following paragraphs:

> **"We note your assertion that this attachment [the email of 18 April] was sent by our Ritzy BECTU representatives, Kelly Rogers and [redacted name]. If this email was sent as you assert, then it was not authorised by BECTU and we will be prepared to write to all our members at the Ritzy accordingly….**
>
> **BECTU has not nor have its officials and nor have its representatives at other Picturehouse cinemas sent communications encouraging similar action;**
>
> **BECTU has not encouraged any member of the public to take such action by way of email, social media post or other electronic communications, nor have posters, pamphlets or other documents been distributed to this end."**

26. On the same date, Mr Morrissey wrote the email at page 410 to BECTU members at the Ritzy. It stated:

> **"Picturehouse dispute**
>
> **It has been brought to our attention that you may received an email in which BECTU apparently encourages you to be involved in cyber picketing of Picturehouse's website.**
>
> **Please not that this kind of activity is not endorsed by BECTU. It is potentially unlawful and BECTU will not provide assistance to members who are involved in unlawful activity."**

27. Also on the same date Sofie Mason of BECTU wrote to the Claimant (page 67) as follows:

> **"Hi Kelly,**
> **I hope I see you tomorrow outside Central because I need to ask you about the email attached. Mishcon sent it to Gerry on Friday alleging that you and [redacted name] sent it encouraging cyber-picketing. Because of the way it is cropped, we can't see and cannot be sure who signed or where it was sent from. Do you recognise it? Don't bother emailing me an answer – let's discuss when we meet. Gerry needs to talk to Thompsons about it on Tuesday. Cheers!"**

28. The Claimant was on holiday when she received that email and informed Ms Mason accordingly. She was instructed not to do anything for the time being but to wait for a meeting at BECTU conference. The meeting took place sometime between 3 and 9 May and was attended by all BECTU Picturehouse reps attending the conference from striking sites and Gerry Morrissey, Sofie Mason, Naomi Taylor and a representative from Thompsons. The Claimant gave an account of what had happened and was then informed by the Thompsons representative that she expected a formal investigation to follow as the Claimant's actions potentially amounted to gross misconduct.

29. The Claimant and Mr Bauer told the Tribunal that in the interests of her colleagues and BECTU itself the Claimant was encouraged during the disciplinary proceedings that followed to present her actions as "rogue" and not condoned by BECTU. The Claimant said that she agreed to do this in the interests of her colleagues. The statements made by the Claimant at the start of the disciplinary investigation meeting and during the disciplinary meeting itself tend to support the Claimant's evidence on this. Both she and Mr Bauer said that they were also told to lie about Nia Hughes' presence at the meeting on 15 April. The Tribunal concluded that it was not necessary to make a finding of fact as to whether the Claimant was told to lie in either respect in order to determine the issues in the case.

30. The Claimant returned to work on 9 May and was called into a meeting with Mr Vandyke at which Debbie Cairns of HR took notes. Mr Vandyke had taken the view that either the Claimant or [*redacted name*] had been responsible for the email as they tended to take the lead amongst the BECTU reps at the Ritzy. The Claimant's requests to be accompanied and for the meeting to be postponed were declined. Minutes of the discussion were set out at pages 71-74. Early in the meeting the Claimant said "You've got the email. I've nothing else to add. I've discussed this with my officials because I was expecting this. As far as we are concerned the fact that I wrote it is the only thing relevant to a fact finding meeting". The Claimant was untruthful at the meeting about a number of matters, including where the idea for cyber-picketing came from, who at Hackney had been responsible for it and whether anyone at Hackney would have encouraged the practice. Mr Vandyke would not however have been aware of that at the time. At the end of the meeting she complained about the meeting having been sprung on her on a double shift.

31. The Claimant was suspended the next day (letter page 77). The reason given was that she had been responsible for sending an email which sought to damage the interests of the Respondent and that disciplinary proceedings would follow. The Tribunal found nothing to criticise in the content of the letter. It was also an appropriate action in the factual context given the Claimant's admission at the

start of the meeting that she had sent the email. Mr Vandyke had concluded on the basis of the Claimant's responses that disciplinary action was appropriate. The Claimant submitted that the suspension was a detriment under s 146 TULRCA and we return to that point in our conclusions.

32. The Claimant was invited to a disciplinary meeting originally scheduled for 25 May that was then postponed until 27 June because the Claimant was unwell and on sick leave. The disciplinary invitation letter, written by HR (page 81), in consultation with Mr Vandyke, set out the allegations as follows:

> **1. That you were responsible for sending an email to BECTU members at the Ritzy which sought to damage Picturehouse Cinemas Limited (the 'Company') by inciting others to attack the Ritzy's website (by block booking cinema seats in an online basket without any intention to purchase the tickets, preventing genuine sales), as supported by your admission that you sent the email during the investigatory meeting on 9 May 2017 (the 'Investigatory Meeting');**
> **2. that you were aware that individuals had been carrying out such attacks on the website at the Hackney Cinema, that you did not disclose this to the Company (or indeed to your union, BECTU); and**
> **3. that during the Investigatory Meeting on 9 May 2017, you were not open and transparent in your responses to questions and, in fact, that you were dishonest in respect of some of your answers. Whilst we appreciate that you may well have been trying to protect other employees, the attacks on the Company's website are a very serious matter and, as an employee, we would expect you to provide and honest responses to questions during an investigation."**

At that point Mr Vandyke's belief that the Claimant had sent the email was reasonably held in light of the Claimant's admission at the investigation meeting. He also reasonably held a belief, based on the content of the email, that she was aware that there had been cyber-picketing at Hackney. Whilst it became clear during the Tribunal hearing itself that the Claimant had not been truthful at that meeting, the basis on which Mr Vandyke held a belief at the time that she had been dishonest in her answers is less clear.

33. The disciplinary hearing was chaired by Mr O'Connor. Debbie Cairns took the notes and the Claimant was accompanied by Sarah Ward, trade union representative. The meeting took one hour and 45 minutes. The Tribunal was given three versions of the notes, but have relied on and referred to the notes at pages 134 – 143 which contained the Claimant's comments. The Tribunal was satisfied that all three of the allegations in the invitation letter were explored during the course of the meeting.

34. The following points emerge from the meeting notes:

    a. Mr O'Connor's questioning was robust. He wanted to know who had been involved in cyber-picketing and repeatedly returned to that question – in fact it formed the bulk of his questioning at the meeting. The Claimant resisted answering it and continued to claim that the idea had come from a member of the public, even though by the time of the Tribunal hearing it was clear that that was not true;

    b. The Claimant took the position that she had not realised when she sent the

email that cyber-picketing might be unlawful. She said that by the time of the disciplinary hearing she knew that it was wrong, but previously she had seen it as a protest activity akin to boycotting or picketing;

c. The Claimant expressed clear regret at having sent the email (page 136);

d. Mr O'Connor expressed the view that cyber-picketing was unlike other forms of activity because it deprived customers of a choice. The Claimant expressed the view that strike action that has the effect of closing the cinema has the same impact. Mr O'Connor insisted that striking was legitimate activity whilst cyber-picketing was not. He also started to use the word 'cyber-attack' part way through the meeting.

e. Mr O'Connor persisted in trying to persuade the Claimant to reveal the names of colleagues who had been involved. The Claimant persisted in not doing so and trying to protect their identity, noting that three individuals had already been dismissed in connection with the activities referred to in the email.

35. Following the meeting Mr O'Connor reached the decision to dismiss after discussion with HR. We found no evidence to suggest however that the decision was not his or based on anything other than his findings at the meeting. The dismissal letter at page 147-8, gave the following reasons for upholding all three allegations and the decision to dismiss:

"You accept that you attended a meeting on 15 April 2017 where you discussed attacks that had been undertaken against the company's Hackney cinema and discussed planned attacks against the company's Ritzy cinema. You stated that you spoke positively about this at the meeting because you thought it was a good idea at the time. Following that meeting you also sent an email to BECTU members at the Ritzy which sought to damage the company by encouraging others to attack the Ritzy's website (by block booking cinema seats in an on line basket without any intention to purchase the tickets, preventing genuine sales). You also accepted this but stated that the word 'encouraging' should be taken in the loose sense.

The content of the email relating to 'cyber picketing' is extremely serious and is intended to clause damage to the company. The company's business is based on ticket sales at its cinemas. Without this the business would not be able to survive. Therefore, any plan to undertake a cyber attack in relation to ticket sales goes to the very core of the company's business. It is also clear from the email that the cyber attack was likely to occur. You state in the email that 'we are also going to start pushing cyber pickets' and it also states that 'Hackney have managed to keep their cinema pretty much empty this way'. Therefore, the email confirms that attacks had apparently already taken place at the company's Hackney cinema. The fact that you did not disclose to the company (or indeed to your union, BECTU) (i) that attacks have already taken place at Hackney; and (ii) that cyber attacks were planned at the Ritzy, and that you did not take any steps to prevent those attacks, is quite remarkable.

You admit that you also then sent the email as you have to take ownership and responsibility for that. In my view you should not have sent the email and now you accept this. In addition, after you had sent it, you should have reported it to the company or to BECTU. You had ample time to report the email but you did not do this. Your position at the disciplinary meeting was that there 'was no intention to go and act on this stuff' and that you did not appreciate that you were breaking any rule. I do not find this to be credible and I do not accept it. Contrary to your position, such a planned

attack on your employer is extremely – and obviously – serious. However, I do accept your position that you now regret sending the email.

This is not just my view: BECTU also fully appreciated the seriousness of the email and have made that clear to you. In short I do not believe your explanation. I believe that you knew how serious it was, but that you were, at best, indifferent to the harm it would do to the company and, at worst, wished to harm the business by encouraging cyber attacks.

In addition to my findings above I do not believe that you have been completely open and honest about the matter. This was James' opinion during the investigatory meeting and it is also my view during the disciplinary meeting. Whilst I believe that you were willing to discuss the allegations to a greater degree at the disciplinary meeting, I still not believe that you were being completely open and honest. For example, at the start of the meeting, I asked you who else was present at the meeting on 15 April 2017. You stated that you could not 'remember to be honest. That's the truth, it was a long time ago'. However, after an adjournment to our meeting called by your BECTU representative, you changed your position and said that you did remember other individuals that were present but that you were choosing not to name them because you were concerned that disciplinary action may be taken against them. Irrespective of your concerns, your initial position was utterly untruthful.

Given the seriousness of the matter, I believe the company can no longer trust you and have confidence in your acting in its best interests."

36. We find that the reasons for dismissal operating on Mr O'Connor's mind were, in summary:

    a. That the Claimant had sent an email that encouraged a practice that the Mr O'Connor considered to be potentially highly damaging to the business, namely cyber-picketing. The seriousness with which he regarded it is shown by his re-designating it as a "cyber-attacking" part way through the hearing – a term that was used in the outcome letter;

    b. That the Claimant had not reported the activity of sending the email to the Respondent or BECTU;

    c. That the Claimant had not reported to the Respondent or to BECTU that there had been cyber picketing (described as "attacks") at Hackney and that it was planned at the Ritzy. He described these omissions as "quite remarkable";

    d. That the Claimant had been told by BECTU that the email was a serious matter. (We note that BECTU did not make its position clear until after the email of 18 April had been sent);

    e. That the Claimant "knew how serious it was, but that you were at best indifferent to the harm it would do to the Company and, at worst, wished to harm the business by encouraging cyber-attacks". The Tribunal does not consider that Mr O'Connor had reasonable grounds for that belief, a point that we return to in our conclusions;

    f. That the Claimant had changed position after the adjournment of the meeting. Having begun by maintaining that she did not remember who was

present at the meeting on 15 April, she then changed her explanation and said that she knew the identity of some of those present but was choosing not to name them because of the potential consequences for them. He concluded from that that the Claimant was untruthful and lacking in openness and honesty. We return to that point in our conclusions as we had concerns about the line of questioning adopted by Mr O'Connor;

g. That although he acknowledged that the Claimant now regretted sending the email, he had formed the belief that the Respondent could no longer trust her and have confidence in her acting in its best interests.

37. The Claimant was advised of her right of appeal and appealed by letter dated 13 July 2017 (page 149-50). Her grounds of appeal were in summary:

a. That the terms of the email of 18 April had not amounted to incitement or encouragement to cyber-picketing, but was intended to promote further discussion about it. We considered that ground to be disingenuous;

b. That she considered that activity to be legitimate protest activity not obviously any more serious than striking, picketing your work place or calling for a boycott, all of which legitimately seek to "damage" the profits of the company. The Claimant put this forward as her reason for not having reported the activity to the Company or BECTU. We consider that last point also to be disingenuous but return in our conclusions to the nature of the activity;

c. That Mr O'Connor's conclusion that she had been indifferent to harm to the business or had actively intended harm through "cyber-attacks" was unjustified;

d. That his conclusions about her honesty were not well-founded being based on responses to questions that she gave with the intention of protecting the identity of colleagues and/or were not relevant to matters of her own conduct;

e. That the Respondent's true purpose was to undermine and discourage BECTU membership and trade union activity and that her dismissal amounted to victimisation for trade union activities. She sought reinstatement.

38. The Appeal Meeting took place before Shaun Jones on 7 August 2017 (pages 155-167). The Claimant was accompanied by Sofie Mason and Peter Phillips took notes for the Respondent. The hearing was structured by reference to seven grounds of appeal which Mr Jones set out at the beginning of the meeting as follows (the inconsistencies between the second and third person appear in the notes):

"Ground 1:
In relation to Cormac's finding that Kelly 'also didn't send an email to BECTU members at the Ritzy which sought to damage the company by encouraging others to attack the

Ritzy's website', your position is that the email neither intended nor served to encourage people to engage in cyber-picketing, it was only to further the discussion and ultimately no action was taken.
Ground 2:
In relation to Cormac's finding that 'It is … clear from the email that the cyberattack was likely to occur' your position is that this is a mere assumption and that no plans were in place and no attacks took place.
Ground 3:
In relation to Cormac's statement that 'Such a planned attack on your employer is extremely – and obviously – serious', your position is that you believed it was a legitimate protest activity and that it is not obvious but it is more serious than any other act that legitimately seeks to damage the profits of a company, for example, with strikes and boycotts. In addition, you raised the point that the Ritzy frequently closes on strike days.
Ground 4:
In relation to Cormac's finding that 'I believe that you knew how serious it was but that you were, at best, indifferent to the harm it would do to the company and, at worst, wished to harm the business by encouraging by cyberattacks', you state that this is a malicious allegation of which there is no evidence.
Ground 5:
In relation to Cormac's finding that Kelly was 'not open and transparent in [her] responses to questions and in fact, that you were dishonest in respect of some of your answers', she denies this and makes specific reference to her change of position (before and after the adjournment) regarding remembering who was present at the meeting on 15 April 2017. Further, you believe that you are fully justified in refusing to provide the names of who was present at the meeting.
Ground 6:
In relation to Cormac's finding that PH 'Can no longer trust you and have confidence in you acting in its best interest', you refer to her clean disciplinary record the fact that she is hardworking and had a good working relationship. In addition, you state that this matter is a misunderstanding and that you were not acting out of malicious.
Ground 7:
In light of the above, you believe that you are being victimised because of her trade union activity. Kelly specifically references the fact that the only other people disciplined are trade union representatives."

39. Ms Mason questioned the use of the term "cyber-attack" at the start of the hearing and Mr Jones agreed to desist from using it and to use the term "cyber-picketing" instead. The meeting dealt with each of the grounds and the Claimant was given full opportunity to express her views. However Mr Jones appeared at times to have formed a view before hearing what the Claimant had to say. Furthermore he was still probing for further information about who was participating in the meeting – the Tribunal did not understand the relevance of that question to the Claimant's appeal. There was an extensive discussion of the meaning of legitimate trade union activity and all three participants appeared to be of the view that cyber-picketing fell on the wrong side of the line. On the question of trust and confidence Mr Jones queried how a company can trust an employee who encourages customers not to buy tickets. Ms Mason pointed out that by that criterion it would be impossible to trust any union member.

40. Mr Jones chose not to uphold the appeal. The letter communicating his decision (pages 168-170) was sent to the Claimant on 16 August 2017. Mr Jones:

    a. Reiterated that the Respondent's business was based on ticket sales;

b. Used the term "cyber-attack" on page 169, despite agreeing not to do so;

c. Based his decision in part on the possibility that the plan "may have been to block-book tickets during subsequent days at the Ritzy or to block-book tickets at cinemas that remained open on strike days". In the Tribunal's view there was no evidence that that had ever been the Claimant's intention and it is not clear on what basis he reached that view, which appears to have been speculative. The email of 18 April expressly refers to action on strike days;

d. Agreed with Mr O'Connor in relying on the Claimant's failure to disclose that there had been cyber-picketing at Hackney and that it was planned at the Ritzy was "quite remarkable";

e. Agreed with Mr O'Connor that the Claimant's "change of position" at the disciplinary hearing regarding her knowledge of who was present at the meeting on 15 April represented dishonesty and undermined the Company's trust in her. He said "Your ultimate position remained the same in that you were not willing to tell the Company who was present at the meeting. That is your decision". This appeared to the Tribunal to amount to a finding on the part of Mr Jones that the Claimant was dishonest because she had not been willing to reveal the identity of other union members who had been present at a union meeting. We return to that point in our conclusions.

41. Mr Jones upheld the finding of gross misconduct and the sanction of summary dismissal.

Submissions

42. We were grateful to both Counsel for their detailed and helpful submissions. For the Claimant Mr O'Keeffe submitted:

a. That on a close examination of the evidence given by Mr Vandyke the Tribunal ought to find that the sole or principal reason for the Claimant's suspension was expressly to penalise the Claimant for voicing support for cyber-picketing and failing to report the incidence of cyber-picketing at Hackney to management;
b. That the Claimant's conduct in voicing support for cyber-picketing and failing to report the incidence of cyber-picketing at Hackney to management amounted to taking part in the activities of an independent trade union (or were incidental to trade union membership). In making that submission Mr O'Keeffe relied on ***Morris v Metrolink RATP Dev [2018] IRLR 853***, to which we return in our conclusions. He also submitted that the facts showed that:
    i. That trade union activity can take a great many forms and advocating direct action was an activity undertaken by BECTU;
    ii. That BECTU gave its representatives authority to conduct their own campaigns and that representatives had considerable delegated powers as shown by the correspondence documented at pages 62.6

– 62.11 and 62.18 – 62.19;

iii. The Claimant advocated cyber-picketing at a trade union meeting within the meaning explored in British Airways Engine Overhaul Ltd v Francis [1981] IRLR 9 and that the campaign for which purpose the possibility of cyber-picketing was discussed was a campaign for the London Living Wage that was supported by BECTU;

iv. The activity proposed may have been unlawful or tantamount to a fraud, but it was not the case that it was undertaken contrary to declared union activity and BECTU in fact only dissociated itself from the activity after the event;

v. That the maintenance of confidence regarding discussions with fellow trade union members about, in particular campaign strategy and actions in support of an industrial dispute, is done in the course of trade union activity and could fall outside the scope of the protections in ss146 and 152 TULRCA in only exceptional circumstances. Otherwise candid communication amongst trade union members regarding matters affecting their interests would be rendered impracticable and potentially bring members and representatives into conflict with the rules of the union. However the Claimant accepted that there would have to be limits on the circumstances in which the protection could be claimed.

c. There was no express or implied duty on the Claimant to disclose the activity to the Respondent and the Claimant was encouraged by BECTU not to make full disclosure during the disciplinary proceedings. Furthermore the threat to the Respondent from cyber-picketing was limited and the background was a lengthy industrial dispute;

d. That the failure to disclose and lack of candour arose from the Claimant's duty of confidentiality as regards discussions with other trade union members and were therefore incidental to the Claimant's trade union membership and amounted to an "outward and visible manifestation" of it (***Discount Tobacco and Confectionery Limited v Armitage [1995] ICR 431*** and ***Wilson and Ors v United Kingdon [2002] IRLR 568***);

e. That the reasons for which the Claimant was dismissed as evidenced by the questions put at the disciplinary hearing, the evidence of Mr O'Connor and the evidence of Mr Jones, were the three matters referred to in the invitation to the disciplinary hearing;

f. That these reasons, including the Claimant's lack of candour, fell within the scope of s152 TULRCA;

g. That in reaching its decision the Tribunal ought to take into consideration the right to freedom of association in Article 11 of the ECHR which is engaged when the matters forming part of a disciplinary case against an employee include a failure to disclose the content of discussions at a trade union meeting;

h. That the dismissal was also unfair under s98 ERA – the Claimant was

dismissed for more than one reason and it was not within the band of reasonable responses to dismiss her for failing to report her knowledge of the past and future activity of cyber-picketing.

43. For the Respondent Mr Croxford QC presented the Tribunal with an account of the facts (Respondent submissions paragraphs 1-30) that in a number of respects do not accord with the Tribunal's own findings. In particular Mr Croxford drew attention to the discrepancies between the Claimant's account of her actions at the disciplinary hearing and at the Tribunal. It is true that there were marked differences. However the focus of the Tribunal has been on the conduct of the Respondent, the beliefs held by its officers and the reasons prevailing on the mind of Mr O'Connor when it took the decision to dismiss. Whilst aspects of the Claimant's conduct may have relevance to the appropriate remedy in this case the Claimant's account of herself to the Tribunal was in our judgment of no real relevance to the reason for her dismissal. He then submitted that:

    a. the email of 18 April disclosed conduct that was tantamount to a conspiracy to misuse and modify the data on the Respondent's IT systems as to the number of tickets available for sale with the intention of causing harm to the Respondent;

    b. Such conduct is outside the scope of the statutory immunity in tort granted to lawful industrial action;

    c. The meaning of trade union activities had been considered in ***Morris v Metrolink, Lyons v St James Press [1976] IRLR 215*** and ***Azam v Ofqual UKEAT/0407/14***;

    d. The Claimant's suspension had been by reason of prospective disciplinary action in relation to apparently serious allegations and had been unrelated to trade union activities; furthermore that the decision to suspend was separable from the decision to dismiss and a finding that the conduct for which the Claimant was dismissed was protected would not automatically mean that the decision to suspend was also for a protected reason;

    e. That for the purposes of a claim under s 98 ERA Mr O'Connor had held a genuine belief in the Claimant's misconduct, including a belief that the Claimant had not been open and honest with him;

    f. The type of activity under discussion at the meeting on 17 April was of a nature that the participants could have had no legitimate expectation of confidentiality.

Conclusions on the issues

44. The first issue we were required to decide was whether the activities described at paragraphs 8, 11 and 12 of the Particulars of Claim were activities of a union within sections 146 and 152 TULRCA. Those paragraphs were as follows:

    "**8. On Saturday 15 April 2017 following a day of strike action and in their own time a**

BECTU members meeting was held at the pub, The Lordship. This was an all members meeting so there were members present from various sites. There was no agenda for this meeting nor were any minutes taken. There was no chair of the meeting. Again a discussion was held about the next strike date and other campaigning activities. This meeting was a trade union meeting and therefore both attendance at the meeting and everything it discussed constitutes trade union activities (Per Miller v Rafique [1975] IRLR 70).

11. Following that meeting the Claimant sent an email on 18 April to BECTU members at the Ritzy to their private email addresses making reference to the next strike date and other campaigning ideas. The email was signed 'Much love – the Reps X'.

12. In any event this was a private and/or otherwise confidential trade union communication to its members. The writing of the email, the knowledge of its contents, and the choices made by the Claimant as to what she did with the information contained in the email each constitutes trade union activities at the appropriate time."

45. The Tribunal's conclusion is that the activities described in those paragraphs were activities of the union for the following reasons:

    a. The meeting on 15 April was an all members meeting for union members across striking sites. It was arranged as such in advance (a room was booked for the purpose) and it is referred to as a meeting in the email of 18 April. The sending of the email to summarise the discussion that took place adds credence to the argument that it was a genuine union meeting as the Claimant, who was acting branch secretary at the time, considered that she ought to make a record of what was discussed for the benefit of those not present and proceeded to do so by means of the email. The meeting followed a day of strike activity and there is no argument that it did not take place at an appropriate time. There was a BECTU official present (Nia Hughes) who actively contributed to a discussion about the merits and demerits of community participation. At the disciplinary hearing the Claimant sought to emphasise the meeting's informality, but the Tribunal concluded that even if Mr O'Connor had thought the meeting to have been informal rather than formal, this was not incompatible with his being aware that the activity being carried out was a trade union activity. The discussion at the disciplinary hearing suggests that he was well aware that there had been a gathering of union members after the strike at East Dulwich Picture House.

    b. It follows that the email that summarised the discussion at the meeting was also an activity of the trade union. It was sent from the branch email address by a person who was the acting branch secretary and signed the email on behalf of the branch representatives. The purpose of the email was clear – it was to provide information to those who had not been present about a new strike date and what had been agreed at the all members' meeting.

    c. There is nothing in the email that does not relate to activities of the union. It seems to us that it cannot be the case that a trade union meeting and a record made of it by the branch secretary for the purposes of those not present cease to be trade union activities by virtue of the fact that something has been discussed that may not be acceptable to the employer, or that it

records something that is potentially unlawful. We took into consideration the fact that BECTU did not condone the activity of cyber picketing, but the Claimant did not know that at the time she wrote the email. We also took into account the evidence we heard of the somewhat loose arrangement between BECTU and its branches, the evidence being that BECTU gave its branches considerable autonomy but would also make it clear from time to time that a particular activity was not endorsed. We did not think it could be the case that the activity of a branch would lose protection simply because BECTU, or the employer, might not sanction everything that had been discussed. Branch meetings would be bound to touch on difficult or controversial topics from time to time. It is important to distinguish between the record of a discussion and the action of putting a discussion into effect. The expression used in s152 TULRCA is "the activities of an independent union" – a wide definition. The activities concerned do not have to be organised by the union: ordinary members behaving as such may be engaging in the activities of their union even though the activity has not been initiated or organised by the union itself (*Dixon and Shaw v West Ella Developments Ltd[1978] IRLR 151, [1978] ICR 856, EAT; British Airways Engine Overhaul Ltd v Francis[1981] IRLR 9, [1981] ICR 278, EAT*).

d. The Respondent's case is that the email contained evidence that the Claimant intended to do something that was potentially damaging to its business and encourage others to do so. The method proposed by the Claimant was novel and not an activity that could be described as traditional trade union activity. The Tribunal put questions about this to the Respondent's witnesses and during its deliberations discussed at length whether the method proposed was qualitatively different in its effect on the Respondent of traditional forms of trade union activity such as strikes, pickets and boycotts. The Claimant was suggesting only that the action took place on strike days. It would have inhibited tickets sales on those days, but no more so in our view than the closing of a booking office because the cinema premises were closed because of a strike. It might be said that the activity was a response to the technological advances in the way that tickets are sold.

e. The Claimant's union, BECTU, however and ultimately the Claimant herself accepted by the time of the disciplinary hearing that the proposed activity was unlawful. The Tribunal was not shown any legal advice that had been received on this issue (and such advice may have been privileged) but the Respondent sought to persuade us that the proposal activity would have amounted to an unlawful means conspiracy. Ultimately we took the view that we did not need to make a definitive finding as to whether 'cyber-picketing' could constitute a legitimate form of trade union activity or was an illegitimate activity that amounted to unlawful means conspiracy or some other tortious act, although we saw the force of the Claimant's suggestion that it was hard to distinguish its effect from forms of activity that are legitimate. What seemed to us important was the fact that the Claimant did not engage in cyber-picketing – she merely suggested it in an email summarising the discussion at a trade union meeting and then, having been told by the union that it was potentially unlawful and not condoned, she took

no further steps to make it happen.

f. That being the case, we concluded that what the Claimant actually did remained within the scope of s 152(1)(b) TULRCA. In reaching that view we had regard to all the authorities to which we were referred and in particular the Court of Appeal decision in ***Morris v Metrolink [2018] IRLR 853***. We considered the facts of this case in light of the guidance set out in paragraph 19 of the judgment of Lord Justice Underhill:

> **'At the risk of simply repeating less succinctly what Phillips J says in the passages which I have quoted, there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of trade union activities as falling outside the terms of Section 152(1), because the things in question can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred; and his reference to acts which are 'wholly unreasonable, extraneous or malicious' seems to me to capture the flavour of the distinction. That precise phraseology should not be treated as definitive (any more than [Slade J's] formulation in Mihaj); but the point that it encapsulates is that in such a case it can fairly be said that it is not the trade union activities themselves which are the principal reasons for dismissal but some feature of them which are genuinely separable. Azan is a good illustration of such a case: the employer's deliberate breach of confidence could fairly and sensibly be treated as a reason for dismissal distinct from the fact that it occurred in the context of trade union activities.'**

g. On the question of whether the actions of a union member fall outside the scope of "trade union activities" and thus outside protection by the Act because of the nature of those activities, for example that they were unlawful, or because of the way they were done, the words of Phillips J in ***Lyon and Scherk v St James Press Ltd [1976] IRLR 215***, provide a good starting point. In that case Philips J said: "The marks within which the decision must be made are clear: the special protection afforded by s 152 to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate." Paragraph 40 of the judgment in Lord Justice Underhill in ***Morris*** also reminds Tribunals that they "must be astute not to find that the *Lyon/Bass* line has been crossed wherever there has been an error of judgment or lapse from the highest standards, because that would undermine the important protection which Parliament has enacted for employees taking part in trade union activities." In our judgment the Claimant's conduct in sending the email of 18 April was better characterised as an error of judgment than an act that was "unreasonable, extraneous or malicious", but at the time she had not understood the implications and had not appreciated that BECTU considered the activity unlawful. As we have observed above, it is not self-evident that cyber picketing would be an unlawful activity. In our judgment the Claimant's action in sending the email cannot be characterised as "unreasonable, extraneous or malicious", such as to remove it from the scope of protection conferred by s 152(1)(b).

h. We also considered the relevance of the question of whether or not the activity in question would have attracted the statutory immunity set out in section 219 TULRCA and whether we needed to make a finding as to whether the statutory immunity was engaged. We came to the conclusion that we did not, as the two sections serve entirely distinct purposes, are part of separate schemes of statutory protection and neither refers to or is dependent on the other.

46. The next issue was whether the sole or main purpose of suspending the claimant was to prevent or deter the Claimant from taking part in the activities of a trade union at an appropriate time or penalise her for doing so. As noted in our findings of fact the reason for the Claimant's suspension as set out in the letter at page 77 was that the Respondent believed following an admission from the Claimant that she had been responsible for sending an email which Mr Vandyke believed sought to damage its interests and that disciplinary proceedings would follow. At that point the nature of the activity in question appeared to Mr Vandyke to constitute potential gross misconduct that ought to be considered further at a disciplinary hearing. That was the reason for the suspension. We have found that at that point he had reasonable grounds for two of the reasons for the Claimant's suspension and whilst we were less clear about the basis on which he had formed the view that he was being dishonest, that lack of clarity does not point to the reason for the suspension being a prohibited one under s146. The status of the activity had not been fully discussed or determined and it was not unreasonable for Mr Vandyke to take the action he did. We considered the Claimant's careful submissions on this point but did not accept the Claimant's analysis. At that point in the proceedings, on these facts as we have found them it cannot be said that Mr Vandyke's sole or main purpose was to prevent or deter the Claimant from taking part in the activities of a trade union or to penalise her for doing so. It was to take to the next stage an interrogation of some genuinely held suspicions and to allow the Claimant to respond to them in a disciplinary hearing. It would have been different if, for example, he had suspended her for merely attending the meeting on 15 April. The Claimant's claim of detriment under s146 TULRCA therefore fails.

47. We turn to the reason for the Claimant's dismissal and whether this fell with the scope of section 152 TULRCA. Our conclusions are based on considering whether the Respondent's reasons fell within the ambit of section 152(1)(b). The Claimant submitted that s 152 (1)(a) was also engaged in relation to the Claimant's unwillingness to disclose information concerning trade union activities and the identities of those involved, but we concluded that this was more naturally framed as an issue concerning trade union activities than trade union membership as such. It is sufficient for either subsection to be engaged for the Claimant to be protected.

48. We have considered what our findings of fact indicate about what was in the mind of Mr O'Connor when he took the decision to dismiss. We have found that there were a number of reasons in his mind which we have set out above at paragraph 36. We considered these in turn:

a. *That the Claimant had sent an email that encouraged a practice that the Mr*

O'Connor considered to be potentially highly damaging to the business, namely cyber-picketing. The seriousness with which he regarded it is shown by his re-designating it as a "cyber-attacking" part way through the hearing – a term that found its way into the outcome letter. We have concluded that what the Claimant actually did in sending the email after the union meeting amounted to a trade union activity within s 152(1)(b). This is not a matter of Mr O'Connor's subjective belief – it was clear that his belief was that there had been illegitimate activity that placed the revenues of the Respondent in jeopardy. But the Tribunal, having considered the facts, has concluded that the sending of the email was a trade union activity. Whether dismissal was for the reason that an employee had taken part in trade union activities at an appropriate time is an objective question, not dependent on the subjective belief of the dismissing officer – any other approach would easily undermine the protection conferred by s 152(1)(b). The fact that this reason prevailed on the mind of Mr O'Connor means that this part of the reasons for the dismissal fell within the scope of s152(1)(b).

b. *That the Claimant had not reported the activity of sending the email to the Respondent or BECTU.* It follows from our conclusion that the sending of the email was protected by s152(1)(b), that it is doubtful that the Respondent could have any legitimate expectation that the Claimant should have reported it to her employer at all. But even if such a duty arose, if the failure to report it formed part of the reason for dismissal, it must follow from our reasoning so far that that part of the reason for dismissal fell within the scope of s152(1)(b). Whether the Claimant should have reported the sending of the email to BECTU is a separate question that was a matter between BECTU and the Claimant. That was of no concern to the Respondent and ought to have had no impact on her employment or formed any part of the decision to dismiss her.

c. *That the Claimant had not reported to the Respondent or to BECTU that there had been cyber picketing (described as "attacks") at Hackney and were planned at the Ritzy. He described these omissions as "quite remarkable".* The parties approached this issue from radically different standpoints. In the mind of Mr O'Connor, the activity was so hostile to the Respondent's interests that he could not conceive how a loyal employee would not raise the matter immediately on discovering its existence. The Claimant perceived cyber-picketing entirely differently – as another method of putting pressure on the Respondent within the context of an industrial dispute over pay and benefits. The question for us was whether the Claimant's failure to report was sufficiently closely bound up with her engagement in union activities at the appropriate time that dismissing her for it fell within the scope of s 152(1)(b). We can see the force of the Respondent's argument that in some circumstances an employee has a duty to make known to the employer knowledge of an activity that would be harmful to its interests, but there will be other circumstances in which that duty is outweighed by other considerations. We think that this was such a case. Applying the guidance in the authorities we have discussed at paragraphs 45 (f) and (g) above, we conclude that the Claimant's failure to report her knowledge of the activity arose from her genuinely held

understanding that the activity had formed part of the furtherance of the industrial action in which BECTU was engaged at the time. It also arose from her position and responsibilities as a trade union representative and the conflict of loyalties that would have arisen had she decided to report the matter. Her omission to report her knowledge of the activities at Hackney was therefore an aspect of her engagement in trade union activities. It may have involved a lapse of judgment on her part about where the dividing line lay between activities that were lawful and those that might not be, but in that respect the step she ought to have taken and did not take was to raise the matter with BECTU. Her failure to take that step however did not alter our conclusion that the omission to report was an aspect of her trade union activities. Mr O'Connor sought to characterise the Claimant's approach as reckless or even deliberate. The Tribunal did not accept that there was any basis for that conclusion – we return to that point in paragraph 48(e) below. We therefore conclude that the Respondent's reliance on the Claimant's failure to report the activities at Hackney as a reason to dismiss also falls within the scope of s152(1)(b).

d. *That the Claimant had been told by BECTU that the email was a serious matter.* We note that BECTU did not make its position clear until after the email of 18 April had been sent. The Respondent was therefore unreasonable in relying on what BECTU had said in its disciplinary case against the Claimant. We took account of the evidence that the Claimant was inclined to act independently at times and was at times frustrated by the cautious approach adopted by BECTU but there was no evidence before the Tribunal that BECTU had ever instructed her or anyone else not to undertake the activity of cyber-picketing prior to its email on 3 May or that she was deliberately flouting an instruction from the union. Nor was there any evidence before us that Mr O'Connor could have formed a reasonable belief at the time that the Claimant had been instructed by the Union prior to the email of 18 April that it did not condone cyber-picketing. We note again that Nia Hughes had been present at the meeting on 15 April and there is no evidence that she took any steps to restrain the Claimant from sending the email, or to raise the issue with the union after the meeting. Whether or not this part of Mr O'Connor's reasons could logically have been said to relate to the Claimant's trade union activities as such, on the principles applicable to an ordinary unfair dismissal case the chronology of events placed his reliance on it outside the band of reasonable responses.

e. *That the Claimant "knew how serious it was, but that you were at best indifferent to the harm it would do to the Company and, at worst, wished to harm the business by encouraging cyber-attacks".* The Tribunal does not consider that Mr O'Connor had reasonable grounds for that belief. The Claimant's responses during the disciplinary hearing indicated quite clearly that the Claimant had not appreciated the implications of including an encouragement to cyber-picketing in her email. There was evidence of an intention to encourage the undertaking of a limited form of activity on the Respondent's website on strike days. We have treated with circumspection the Respondent's reliance, in its submissions, on the position taken by the Claimant in her evidence to the Tribunal. What we were concerned with for

the purposes of the liability hearing was what was in the mind of Mr O'Connor at the time he decided to dismiss the Claimant. The Tribunal asked Mr O'Connor to explain the impact of the cyber-activity at the Hackney Picturehouse. It emerged from his evidence that the Respondent had not undertaken any analysis of the damage caused to Hackney's revenues. Hence it appeared to the Tribunal that at the time of the disciplinary action the Respondent had sought to characterise cyber-picketing an aggressive action that could potentially destroy its business without analysing the potential impact. In his witness statement Mr O'Connor said "The clear purpose of the cyber-attacks was to shut down Picturehouse's business". This was not a reasonable approach in the Tribunal's view and involved Mr O'Connor jumping to conclusions. When questioned by the Tribunal Mr O'Connor appeared to accept that the purpose of the cyber-activity would have been limited to sales during industrial action. We considered whether Mr O'Connor's approach on this aspect of his decision to dismiss fell within the scope of s152(1)(b) TULRCA. In our judgment it involved a mischaracterisation of trade union activity proposed by the Claimant and attributing to it a wider scope and different purpose from that evidenced by the Claimant's responses in the disciplinary hearing. We conclude that this part of the reason for the dismissal fell within the scope of s152(1)(b) TULRCA.

f. *That the Claimant had changed position after the adjournment of the meeting. Having begun by maintaining that she did not remember who was present at the meeting on 15 April, she then changed her explanation and said that she knew the identity of some of those present but was choosing not to name them because of the potential consequences for them. He concluded from that that the Claimant was untruthful and lacking in openness and honesty*. Ordinarily an employer is entitled to draw conclusions about the honesty and openness of an employee who changes position about their knowledge of certain facts part way through a disciplinary hearing. In this instance the Respondent's entitlement to draw those conclusions was in our view qualified by the context and the nature of the questions being put. Mr O'Connor raised questions about who was at the meeting on 15 April at the very start of the disciplinary hearing (page 134) and repeatedly put various versions of the same question throughout the meeting. The Claimant eventually made her discomfort with this line of questions clear after the adjournment (page 138) when she said:

> **"I felt very uncomfortable with this question. Three of my colleagues had been dismissed, I believe unfairly. One of them wasn't even in the country when the series of events in question took place. I have been open and honest from the beginning about my role in these events, and as far as I can see, that's the only relevant information to the allegations against me – under discussion in this hearing. The only reason why you would want me to name other individuals, as far as I can see, is so you can take disciplinary action against them – which I can't risk. I've been tormented the impact my email has had on my colleagues. So I am sorry – I want to answer fully, but it's not relevant to my case".**

Mr O'Connor's response to that was that the Claimant was therefore choosing not to answer. On page 139 he returned to the same question, this

time saying "I take it you are not going to tell me" and the Claimant replied:

> **"'This is a genuine question – are you allowed to use this hearing to interrogate me over the actions of my colleagues? I thought we were here to discuss a certain set of allegations against me, but I feel like this hearing is being used to procure other information instead. I believe you have stepped over the bounds of this hearing."**

Her union representative Ms Ward also intervened at that point and said:

> **"I want it written, we think it is an overstep in your investigation. She's been very clear on the potential consequences. She is not going to name others as she can have no confidence based on her experience of how you will use that information."**

Mr O'Connor persisted nevertheless, posing different versions of the same question and attempting to elicit information about the involvement of other BECTU reps in discussions about potential cyber-picketing.

g. Whilst it was in our judgment not ideal that the Claimant resisted these questions by telling some untruths and obfuscating at times rather than simply declining to give answers to questions she thought inappropriate, there was a clear connection between the posing of these questions and the Claimant's trade union activities. The Claimant was being asked to disclose information about the activities of other trade union members. We were concerned by the tenor of the questioning by both Mr O'Connor and later, at the appeal hearing, Mr Jones and their persistent efforts to persuade the Claimant to disclose the names of those members who had participated in the discussion of cyber-picketing. It was unreasonable for them to expect her to do so, both because the discussions at union meetings are confidential and because they ought to have realised that it was oppressive to expect her to names colleagues who were trade union members and representatives and who could well then face disciplinary action and dismissal. We considered the Respondent's submission that there could have been no expectation of confidentiality in this case because the activities under discussion were unlawful. We rejected that submission for the same reasons that brought us to the conclusion that the Claimant's proposal that cyber-picketing might be promoted was an aspect of her trade union activities – in summary, it was not self-evidently an unlawful activity and the union itself had not taken a clear position on it at the time. It seemed to us that it cannot be the case that the expectation of confidentiality is lost merely because matters are discussed at a trade union meeting that might not be approved of by the employer, or even, as in this case, the union itself. We accept that there will be limits to this proposition, if for example there is clear evidence of a conspiracy to commit a criminal act. But we did not think that threshold was crossed in this case.

h. *That although he acknowledged that the Claimant now regretted sending the email, he had formed the belief that the Respondent could no longer trust her and have confidence in her acting in its best interests.* This conclusion on Mr O'Connor's part also resulted from his belief that the

Claimant was acting contrary to the interests of her employer in a way that fell outside the scope of trade union activities. We have found that the Claimant was acting within the scope of trade union activities in relation to the matters for which she was subjected to disciplinary action. The Claimant had readily assumed responsibility for sending the email. Her lack of openness at the time of the disciplinary hearing was limited to matters in which she considered that her duties and responsibilities as a trade union representative were engaged, including her responsibilities to her colleagues. In our judgment Mr O'Connor's approach also brings this aspect of his decision to dismiss within the scope of s 152(1)(b). There was no evidence of any dishonesty on the part of the Claimant in relation to her carrying out her employment duties and responsibilities such as to cause a reasonable employer to lose trust and confidence in her.

i. The Claimant also submitted that we ought to have regard to Article 11 of the ECHR. The Respondent did not reply to this part of the Claimant's submission. We saw the force of the Claimant's argument and accept that in principle Article 11 is engaged when a trade union representative is disciplined and dismissed and part of the reason relied upon is the representative's unwillingness to name other trade union members who might have engaged in, discussed or promoted activities that (as we have found in this case) were activities of an independent trade union. It was not submitted by the Respondent that its actions represented a proportionate interference with the right to freedom of association – it made no submission at all on this issue. In the absence of submissions from the Respondent we consider that Claimant was correct to submit that Article 11 was engaged and that the Respondent's reliance on her non-disclosure as a reason to dismiss represented an interference with the right to freedom of association. That fortifies our conclusion that the reasons for dismissal relied upon by Mr O'Connor fell within the scope of s152(1)(b) TULRCA.

49. As regards the appeal, in the main Mr Jones simply endorsed the approach adopted by Mr O'Connor. He continued to push for information about the union meeting, for example by his questioning on pages 161 and 162. There was nothing in his decision letter that in our judgment removed the reasons for dismissal from the scope of s152(1)(b) TULRCA. On the contrary the terminology used in Mr Jones' letter and particularly the passage: "*Your ultimate position remains the same in that you were not willing to tell the company who was present at the meeting. That is your decision. However, you should have told the truth about the reason for that decision and you simply did not. Cormac found that you were not being completely honest and open with him and I also uphold that finding*", suggests that the key factor for him in upholding a sanction of summary dismissal was the Claimant's unwillingness to disclose the identity of those present on 15 April and the lack of truthfulness she demonstrated when questioned about those present. What was uppermost in Mr Jones mind was an issue that we have already found was inextricably bound up with the Claimant's participation in trade union activities – that is her refusal to disclose the identity of others involved in those activities in order to protect them from reprisals.

50. Our findings as to the reasons for the Claimant's dismissal are set out above at

paragraph 36. Our analysis of those reasons in paragraph 48 has led us to conclude that the majority of Mr O'Connor's reasons for dismissal involved the Claimant's participation in the activities of an independent trade union at an appropriate time. Our conclusion is that the Claimant's dismissal was therefore automatically unfair.

51. In case we are wrong about our finding that that Respondent's decision was automatically unfair we have gone on to consider briefly what our conclusion would have been if we had not found that the principal reason for dismissal fell within section 152(1)(b). The potentially fair reason relied upon was misconduct. Stripped of its context of union activity the Claimant's sending of the email and/or engagement with others with a view to undermining the Respondent's revenue stream from ticket sales could have reasonably been characterised as gross misconduct, as could her failure to report the existence of the activity at other venues once she became aware of it. However we would have had reservations about whether a reasonable employer would have pressed an employee to the extent that the Respondent did to divulge the names of colleagues. If that had been the principal reason for dismissal we would have found a dismissal for failure to disclose the names of colleagues involved in the activity, in the absence of an express duty to do so, to be outside the band of reasonable responses. The fairness of the dismissal would also have been vitiated by Mr O'Connor having leapt to conclusions about the Claimant's intentions (paragraph 48 (e)) and his having relied on the Claimant not having reported her activity to BECTU, which in our judgment was not a matter that a reasonable employer could have relied upon in reaching a decision to dismiss. As the reason for the Claimant's dismissal contained all of these elements, including those that a reasonable employer could not have relied upon, we would also have found that the dismissal was unfair under s98 ERA.

52. The case will now need to be listed for a remedy hearing at which the matters listed in paragraphs 8 -12 of the agreed list of issues can be determined.

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Employment Judge Morton
Date: 19 February 2019