EMPLOYMENT TRIBUNALS

Claimant: Mrs T Coxhill

Respondent: Unite the Union

Heard at: Reading **On:** 17-19 July 2019
23 July 2019 (chambers)

Before: Employment Judge Anstis
Mr JF Cameron
Mrs A Gibson

Representation:
Claimant: Mr T Dracass (counsel)
Respondent: Mrs S Fraser Butlin (counsel)

RESERVED JUDGMENT

The claimant was not unjustifiably disciplined by the respondent.

REASONS

A. INTRODUCTION

1. The claimant is a long-standing employee at Heathrow Airport, employed as a security officer. However, for many years up to the date of her claim she worked full time on her trade union duties while remaining employed by the airport. She was branch secretary of her local Unite the Union branch (branch 562, sometimes referred to as LE/562) and held many other elected positions within the union. In the terminology of the union, she was a "lay official" working under rule 6 of the union's rules.

2. In her claim form, submitted on 7 January 2018, the claimant made many allegations against various other union employees and officials, including allegations of sex discrimination and bullying and harassment. By the time of this hearing, those allegations had been narrowed down to one point of alleged unjustifiable discipline under section 64 of the Trade Union and Labour Relations (Consolidation) Act 1992.

3. We heard evidence and submissions from the parties over three days from 17–19 July 2019, with the tribunal then meeting for discussions in chambers on 23 July 2019.

4. We heard oral evidence from the claimant, with Gary Reay and William Green giving evidence on behalf of the respondent. They were respectively the chair of and a member of the disciplinary and appeal panels that were commissioned by the union to decide on the allegations against the claimant. We were assisted by the work done on behalf of the parties by their representatives, who at the hearing were Mr Dracass for the claimant and Mrs Fraser Butlin for the respondent.

B. MATTERS ARISING AT THE HEARING

5. The following applications were made during the hearing:

The claimant's witness statement and supplementary bundle

6. As set out in her opening note, at the start of the hearing Mrs Fraser Butlin made an application to strike out large parts of the claimant's witness statement (and to refuse to admit the material referred to in her supplementary bundle) on the basis that it was either irrelevant or referred to privileged material. In the alternative, Mrs Fraser Butlin sought an adjournment to reply to this material.

7. At Mr Dracass's suggestion, we adjourned in order that he could discuss the matter with the claimant, and later Mrs Fraser Butlin, while we read into the bundle and the respondent's witness statements. On resuming the hearing, large parts of the disputed material had been resolved by agreement between the parties, leaving only a section of around 15 paragraphs at the start of the witness statement in issue. As there had not been agreement on this, Mrs Fraser Butlin pursued her application to strike this out.

8. By this time there were observers (including members of the press) at the hearing and Mrs Fraser Butlin sought a private hearing of her application under rule 50. Having heard from her and Mr Dracass (who did not oppose the application) and also given any observers the opportunity to make comments on the application (no comments were made) we decided to hear the application in private as at that point we were essentially dealing with matters of case management that would typically be dealt with in private. The nature of the application would require discussion of the disputed paragraphs. If we found that those paragraphs were admissible then they would be available in a public hearing. If we found they were not admissible then there would be prejudice to the respondent and/or the individuals named in them in allowing them to be discussed in open tribunal without the them being able to properly respond to them.

9. Mrs Fraser Butlin said that following case management the claimant had accepted her claim was only about unjustifiable discipline, but the witness statement contained further instances of alleged poor behaviour on the part

of her colleagues (including allegations of sex discrimination) which the union had understood to be no longer a relevant issue for the case and so which it was not in a position to respond to at this hearing. Mrs Fraser Butlin pointed to the risk of considerable damage to the union's reputation if such matters were considered or ruled upon by us without the union being given an opportunity to reply.

10. Mr Dracass responded to the application saying that the matters referred to were important matters of background that the claimant relied upon for setting the scene for what followed, and her motivations for acting as she did. He said this was important for rebutting the respondent's argument that the claimant had acted in bad faith.

11. Having been assured that nothing in the disputed passages raised matters of privilege, we took time to review the disputed passages. We decided that the disputed passages should be struck out. As indicated by the parties, the disputed passages raised issues of poor behaviour by the claimant's union colleagues. These were not directly in issue in our case. We accepted Mrs Fraser Butlin's argument that considerable damage could be caused to the union and the individuals these allegations were made against if these were considered as part of the claimant's case or ruled upon by us, but we considered that it would be disproportionately costly to the parties and the tribunal to allow an adjournment and thereby delay the final hearing by perhaps a further year. The points made were at best of marginal relevance to the question of bad faith, but that could in any event be dealt with by us adopting what we understood to be not in dispute between the parties: that there had been a long history of disputes within the union at Heathrow, and between union lay and employed officials. Whatever the rights and wrongs of those disputes, they had led the claimant to be suspicious of motives of others within the union.

12. In consequence of this decision the parties agreed for a handful of documents from the supplemental bundle to be added to the full bundle for the hearing.

Further disclosure by the respondent

13. On the final day of the hearing, Mrs Fraser Butlin applied to introduce further evidence. She said that overnight one of her witnesses had identified that there was an online system through which branch officials could identify their current membership. She had brought with her details of how to access the system, along with some records which she said showed that the chair of branch 562 had accessed the system on the morning of the meeting of 8 September 2016. She said the records showed that the claimant herself had not accessed the system for several weeks before then.

14. Mr Dracass opposed the application to introduce this late evidence, saying that it should have been disclosed earlier, and that this late disclosure left the claimant with no proper time to answer the evidence. He said that it appeared that this evidence of itself would be of limited assistance to the tribunal, in that as he understood it it did not show exactly what had been

accessed by the branch chair nor did it show what the records would have shown at the time they were accessed by the branch chair.

15. We retired to consider the position, and refused the respondent's application to introduce this evidence.

16. There did not appear to be any good reason why this evidence had not been disclosed earlier, as required by the tribunal's case management orders. While the witness had only identified this overnight, both the respondent's witnesses were branch secretaries and therefore would have had access to and known about this system. It had long been the respondent's case that the claimant either knew or ought to have known that the new branch had already broken away by the time of the September meeting. Essentially there was no good reason for this late production other than that the documentation had only just been identified by the respondent.

17. We accepted Mr Dracass's position that the late production of this evidence had left the claimant in some difficulty in properly replying to it. It was not said that it was her who had accessed the records. It was the branch chair. The claimant would be in a difficult position to say what the branch chair had or had not seen at the time. In any event, the fact that there was an online system through which membership could be viewed added little to what we had already understood to be the position: that the claimant could have identified her branch membership at the time of the meeting – for instance, by communication with the regional office – but had not done so.

C. THE LAW

18. As both Mr Dracass and Mrs Fraser Butlin were at pains to remind us, "unjustifiable discipline" is a statutory concept governed by the provisions of ss 64-67 of the Trade Union and Labour Relations (Consolidation) Act 1992, which provide a statutory code setting out what is unjustifiable discipline within the jurisdiction of the employment tribunal.

19. Sections 64-66 read, so far as is relevant in this case, as follows:

> *"**64. Right not to be unjustifiably disciplined***
>
> *(1) An individual who is … a member of a trade union has the right not to be unjustifiably disciplined by the union.*
>
> *(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official of the union or a number of persons including an official that:*
>
> *…*
>
> *(f) he should be subjected to some other detriment;*
>
> *and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65.*

(4) … the remedies for infringement of the right conferred by this section are as provided by sections 66 and 67, and not otherwise.

65. Meaning of "unjustifiably disciplined"

(1) An individual is unjustifiably disciplined by a trade union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is:

(a) conduct to which this section applies, or

(b) something which is believed by the union to amount to such conduct;

but subject to subsection (6) (cases of bad faith in relation to assertion of wrongdoing).

(2) This section applies to conduct which consists in:

…

(c) asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law;

(d) encouraging or assisting a person:

…

(ii) to make or attempt to vindicate any such assertion as is mentioned in paragraph (c);

(3) This section applies to conduct which … involves any person being consulted or asked to provide advice or assistance with respect to a matter which forms, or might form, the subject-matter of any such assertion as is mentioned in subsection (2)(c) above.

(4) This section also applies to conduct which consists in proposing to engage in, or doing anything preparatory or incidental to, conduct falling within subsection (2) or (3).

(5) This section does not apply to an act, omission or statement comprised in conduct falling within subsection (2), (3) or (4) above if it is shown that the act, omission or statement is one in respect of which individuals would be disciplined by the union irrespective of whether their acts, omissions or statements were in connection with conduct within subsection (2) or (3) above.

(6) An individual is not unjustifiably disciplined if it is shown:

(a) that the reason for disciplining him, or one of them, is that he made such an assertion as is mentioned in subsection (2)(c), or encouraged or assisted another person to make or attempt to vindicate such an assertion,

(b) that the assertion was false, and

(c) that he made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith,

and that there was no other reason for disciplining him or that the only other reasons were reasons in respect of which he does not fall to be treated as unjustifiably disciplined …

66. Complaint of infringement of right

(1) An individual who claims that he has been unjustifiably disciplined by a trade union may present a complaint against the union to an employment tribunal.

(2) The tribunal shall not entertain such a complaint unless it is presented:

(a) before the end of the period of three months beginning with the date of the making of the determination claimed to infringe the right, or

(b) where the tribunal is satisfied:

(i) that it was not reasonably practicable for the complaint to be presented before the end of that period, or

(ii) that any delay in making the complaint is wholly or partly attributable to a reasonable attempt to appeal against the determination or to have it reconsidered or reviewed,

within such further period as the tribunal considers reasonable.

(2A) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

(3) Where the tribunal finds the complaint well-founded, it shall make a declaration to that effect."

20. Section 67 goes on to provide for an application for compensation or some other remedy to be made by a claimant in certain circumstances, but that is not a matter for us at this hearing.

21. While this is a code which operates independently and without direct relation to any of the provisions in the Equality Act 2010, it was helpful for the purposes of discussion during the hearing to adopt some of the language

used in Equality Act 2010 cases, with the conduct to which section 65 applies being described as a "protected act".

22. Mr Dracass emphasised to us, and it was not in dispute between the parties, that:

    a. The "protected act" described in section 65(2)(c) is substantially widened by the additions in sections 65(2)(d), (3) and (4), and

    b. it is enough to satisfy these requirements if the protected act is one of the reasons for the disciplinary sanction. It does not need to be the sole or main reason for the act.

23. The parties referred in their submissions to the case of Unison v Kelly [2012] IRLR 442 from which we note the following:

    Para 65:

    > *"… the words 'would be disciplined' in s65(5) mean would have been disciplined as the relevant individual was in fact disciplined"*, and

    Para 66:

    > *"If a member of a union says or does something for which members would normally be disciplined anyway, independently of the fact that the conduct is or is connected with a protected act, then it is not unjustifiable to discipline the member in question for that conduct (s65(5)).."*

24. While accepting that we were bound by the point at para 65 of Kelly, Mrs Fraser Butlin did not accept that it was a correct statement of the law and expressly reserved her client's right to argue that it was wrongly decided if that opportunity arose.

25. On the question of bad faith under section 65(6) Mr Dracass pointed out that Saad v Southampton University Hospitals NHS Trust [2018] IRLR 1007 appeared to take a much narrower view of the question of bad faith than the questions of negligence or perhaps recklessness raised by Mrs Fraser Butlin in her submissions (see below). In particular, at para 50 HHJ Eady QC said (in the context of bad faith under the Equality Act 2010), "*when determining whether an employee has acted in bad faith … the primary question is … whether they have acted honestly in giving the evidence or information or in making the allegation.*"

26. While acknowledging there may be exceptional situations in which this is not the sole consideration, HHJ Eady QC continued: "*the focus should be on the question whether the employee was honest when they gave the evidence or information or made the allegations in issue.*"

27. Further guidance is given in para 50 of Saad, which we have considered but will not set out in full in these reasons.

D. THE ISSUES

28. The parties had helpfully agreed a list of issues ahead of the hearing, which read as follows:

Liability

1. Was the Claimant (C) "disciplined" by the Respondent trade union (R) within the meaning of s. 64 (2) (a)- (f) of TULRCA 1992 by reason of the one (or both) of the following matters:

a. The determination made, or purportedly made, by the disciplinary panel on 27 July 2017 (conveyed in a letter to C from Peter Kavanagh, Regional Secretary, dated 8 August 2017) to uphold each of the three disciplinary charges brought against C and to impose the following sanctions:

i. Withdrawal of C's credentials with immediate effect and bar her from holding any rule 6 lay office position for the remainder of the current electoral term and the following electoral term of 2018- 2021.

ii. Barring C on an indefinite basis from holding any lay office or representative position which involves any financial responsibilities (to include Branch Secretary, Treasurer, Auditor or signatory to any branch account).

b. The determination made, or purportedly made, by the appeal panel on 5 September 2017 (conveyed in an email to C from Adrian Weir, Assistant Chief of Staff, dated 7 September 2017) to uphold the disciplinary panel's decision in respect of the three disciplinary charges brought against C, and to modify the sanction imposed as follows:

i. Withdrawal of C's workplace representative and branch officer credentials for the remainder of the current triennial period (until end of March 2018).

ii. Requiring C to attend appropriate union representative training before again taking up lay office.

2. In respect of paragraph 1 a) above, was the Claimant's ET1 presented in time?

a. The Claimant's claim was presented more than 3 months after the date of the determination. Therefore, the tribunal must decide whether she can rely on s66(2)(b)(ii): namely, "that any delay in making the complaint is wholly or partly attributable to a reasonable attempt to appeal against the determination or to have it reconsidered or reviewed"

b. If the Claimant can rely on s66(2)(b)(ii), was the claim brought within such further period thereafter as the tribunal considers reasonable?

3. If C was disciplined under s. 64, was the discipline "unjustifiable discipline" as defined by s. 65 TULRCA 1992?

a. Does the conduct, or supposed conduct, which constituted the reason (or one of the reasons) for C being disciplined as set out above fall within the terms of s. 65(2)(c) ((namely, "asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law" - to be read in conjunction with s. 65 (3) and (4)?

b. If it did, can R establish that either of the provisos contained in s. 65(5) and/or s. 65(6) apply? (If not, C's claim must succeed):

i. In respect of s65(5): can R show that the act, omission or statement comprised in conduct falling within s. 65 (2), (3) or (4) is one in respect of which individuals would be disciplined by the union irrespective of whether their acts or statements were in connection with conduct within subsection (2) or (3) above?

ii. In respect of s65(6): can R show that (a) the reason for disciplining C, or one of them, is that she made such an assertion as is mentioned in s. 65(2)(c), or encouraged or assisted another person to make or attempt to vindicate such an assertion, (b) that assertion was false, and (c) that she made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith.

29. At the start of the hearing:

a. Mrs Fraser Butlin indicated that the respondent accepted that the matters referred to in para (1) of the list of issue had occurred and were detriments, but not that the appeal decision amounted to a "determination" within the meaning of s64(2).

b. Mr Dracass said (without there being any objection by Mrs Fraser Butlin) that the claimant wished to rely on s65(d)(ii) as well as s65(c) – in both cases as read with s65(3) & (4).

E. THE FACTS

Background and context

30. At the relevant time the claimant was branch secretary of branch 562, which had a membership of around 5,000, comprising a large part of the union's membership at Heathrow Airport.

31. As we have mentioned before, relationships between various union officials (both lay officials and employed union staff) were not good at Heathrow. This was not a new issue, but one which had a lengthy history, including at least in part a move in 2013 to break up the union branch at the airport into new branches based at the different terminals of the airport. This had led to a full vote of members based at the branch, following which members at Terminal 4 had formed a new branch but the airport branch (562) remained otherwise intact. We are not concerned with the rights and wrongs of these disputes, or their origin, but they lead to a position in which there were strong personal loyalties in parts of the airport to local leaders, along with a suspicion of the motives of other leaders or would-be leaders.

32. The claimant was a long-standing and experienced branch secretary. A colleague, Natalia Saccar, had become chair of the branch only six months before.

33. Another position at the branch was that of Treasurer. The Treasurer of branch 562 resigned her position on 6 October 2016. The effect of this is that there was no branch treasurer at the time of two of the three payments referred to.

34. The position of union branches is dealt with in rule 17 of the union's rules, which includes the following:

> *"17.3 Branches shall have direct access to a proportion of membership subscriptions … These funds may be used to meet the cost of administering the branch; for recruitment and other campaigns … for local affiliations; to assist members or their dependents who have suffered misfortune; or for other worthy cause, subject to any provisions elsewhere in these rules, and that no general purposes funds should be used for political objects …*
>
> *17.9 The branch chair shall preside over all meetings of the branch and shall ensure that business is conducted in accordance with the rules and branch standing orders … The branch secretary shall be responsible for the general administration of the branch including maintaining the branch membership, financial and other records in the manner required by the executive Council, taking in preserving branch minutes and conducting all correspondence on behalf of the branch.*
>
> *17.10 The branch treasurer shall be responsible for dealing with financial transactions concerning the branch, ensuring that all*

> *payments are made in accordance with the rules of the union … He/she shall provide the branch secretary with a record of all financial transactions and ensure they are accurately recorded in the branch records and that all monies are dealt with in accordance with the rules and the instructions of the executive Council."*

35. Since these events, rule 17.3 has been amended by the addition of the following wording:

> *"Branch funds shall not be utilised to assist a member or former member in obtaining legal advice, assistance or representation in respect of any court, tribunal or other proceedings brought against (or intended to be brought against) the Union."*

36. The union's rules are supplemented by guidance and standing orders given by the executive council. In a section headed "Branch Financing" these say:

> *"From a legal and financial perspective, it is important to recognise that these monies in all cases are the property of Unite and therefore can only be used for legitimate union purposes …"*

37. It was the position of the respondent's witnesses that the branch secretary had the primary responsibility for ensuring that the branch's business was conducted in accordance with the union's rules. We do not accept this, as the rules themselves are clear that it is the responsibility of the chair to "*ensure that business is conducted in accordance with the rules and branch standing orders*". However, no point at issue in this case depends on precisely which official is responsible for ensuring compliance with the rules. Each officer is potentially accountable for a breach of the rules by the branch, and it was not suggested by the claimant that she had been operating in reliance on guidance given by the branch chair or was otherwise not responsible for the arrangements she participated in as branch secretary.

38. Both parties made submissions that the evidence of their witness or witnesses was obviously preferable to that of the witness or witnesses for the other side, based on general references to their consistency and inherent credibility.

39. It would be a rare case in which we are persuaded that we should wholeheartedly prefer one side's witness or witnesses to the other. This is not one of those cases. Our general impression of each the witnesses (including the claimant) was they were giving an honest account of events as they saw them, albeit that for each of them on occasion their view and recollection had been somewhat clouded by an emphasis on what they understood to be the best line for them to take in support of their respective cases. We set out below our primary findings on the disputed areas of fact.

The breakaway or attempted breakaway by Terminal 3 members

40. In an email dated 15 August 2016, a putative leader of the new Terminal 3 branch wrote to Wayne King), the respondent's Regional Co-ordinating Officer (with copies sent to several people including Mr Johal and Mr Gill but not the claimant or Dr Saccar), to say:

> *"We, the Terminal 3 Unite reps have for a while been contemplating leaving branch 562 and seeking to have our own branch.*
>
> *After recent events that have taken place at Heathrow we conducted a ballot between ourselves and can confirm that the feeling from the reps are a reflection of the shopfloor of who they represent have voted by a huge majority to seek separation from branch 562.*
>
> *The numbers are 21 in favour to leave, 3 to remain and 3 abstained.*
>
> *Please can you look into how we progress with attaining our own T3 branch."*

41. Mr King forwarded this email to Peter Kavanagh, the union's regional secretary, and Vince Passfield, Deputy Regional Secretary, asking, "*can you advise on the next steps?*"

42. We did not hear any evidence as to how this vote had come about, and while the claimant and her colleagues at branch 562 disputed the extent of this as a proper democratic mandate it does not seem to be disputed that in fact 21 of the Terminal 3 shop stewards voted to form their own branch.

43. The formation of a new branch at Terminal 3 would have resulted in branch 562 losing a large number of members.

44. On 25 August 2016 Mr Kavanagh wrote a letter to the claimant, saying:

> *"I am writing to advise you that a number of members will be transferring from the 562 branch into a new branch. This is as a result of a formal request following a vote by elected representatives in Terminal 3 and is in line with executive council policy for the establishment of workplace branches. The number of members* [718] *who will move from your branch is listed …"*

45. The claimant says that she never received that letter. We will deal with that point later.

46. In the meantime, the new leadership at Terminal 3 had produced a number of newsletters in respect of this change. There are two dated August 2016. The first refers to the vote and says, "*we have emailed Unite advising them of* [the vote] *and are awaiting a response as to what our next steps will be in order to gain control of our own future.*" The second says, "*we have been given the go-ahead, our very own T3 branch is now being set up and our branch number will be 1961 …*". At the foot of the page it says, "*We have our own branch! 1961*".

47. The only evidence before us as to when the new branch was officially consituted is in an email which was obtained as part of the disciplinary investigation in which a union official refers to the members as having been transferred to the new branch on 31 August 2016. There were no entries produced from the respondent's official records to show this, nor did we see any correspondence that may have been sent to members to record the official date when their membership of the new branch started.

The meeting of 8 September 2016

What occurred at that meeting?

48. The attendance register shows eight members in attendance at the meeting of branch 562 on 8 September 2016. That number includes the chair, the claimant and Mr Johal and Mr Gill, who were two of the three dissenting shop stewards from Terminal 3. No one else from Terminal 3 is recorded as having attended the meeting.

49. The claimant was responsible for taking the minutes of the branch meeting on 8 September 2016. It is not disputed by the respondent that these are an accurate record of what occurred at the meeting, and the relevant extracts are as follows:

> *"T3 members advised branch of the following which they have written to Unite about but had no response:*
>
> *Irregular steps have been taken by T3 Chair to split from Branch 562 without any democratic or fair conduct or correct process of authority. T3 representatives have been informed that this unprecedented move has been sanctioned by the region. There has already been a consultative ballot of the membership and the T3 members voted to remain with branch 562 which is the current mandated position of all representatives in T3 and as a democratic body they have no right to ignore the membership. It was felt that this action was being pursued by the Chair of T3 for his own selfish gain which has no relevance whatsoever to the T3 membership. There is significant opposition and outrage to this aggressive move and the actions have been taken in secret without any knowledge of branch secretary or chair of branch 562 who should have been consulted. T3 membership are requesting that this move should be halted with immediate effect as any such move can only be achieved through a proper consultative ballot of the membership as was the case, process and precedent set in 2013. T3 membership have requested a response by Unite by 9 September 2016 and have stated that they will seek legal advice if no response or direction is given.*
>
> *Branch secretary stated that there has been no official communication in regard to this matter. Branch chair stated the same. Branch secretary stated that it was also the case in 2013 when she was not consulted …*

> *Sam Johal made a request to branch for funds to seek legal advice on this matter.*
>
> *It was pointed out from floor that there was already a sum set side left over from previous attack for legal advice which could be contributed to this. Sam felt that this would be insufficient and it was put to floor that in line with previous cases this should be topped up. Branch had previously funded legal cases. It was agreed he would keep branch updated and informed of any further requirement."*

The minutes then record Mr Johal as making the following proposal, which was unanimously approved:

> *"To fund legal advice and potential action against further split of Branch 562 without proper consultation of membership."*

It is later recorded that:

> *"Imposition of new branch on membership should be stopped. Objections raised to all parts of process regarding split and elections."*

50. Many times during her evidence the claimant appeared to suggest that her subsequent actions as secretary amounted to no more than carrying through the actions agreed (or mandate given) at that meeting. If this was intended to suggest that she had no personal interest or desire to halt the breakaway by Terminal 3, we do not accept that. As she herself acknowledged, she was as wholeheartedly committed to preventing the new branch at Terminal 3 as anyone else at that meeting was.

51. It is striking that the proposal (which when approved became known as the "mandate") appears to be open-ended, to have no financial limits or requirement for accountability in the use of funds and is without any requirement for further approval by the branch before legal action is taken. The claimant in her evidence to us said that she felt that this mandate was sufficient for the legal proceedings that were eventually taken by Mr Johal and Mr Gill, albeit that it appeared from some of the investigation notes that the claimant and Dr Saccar only learnt after the event that Mr Johal and Mr Gill had actually started legal proceedings. The claimant in her evidence did not see anything wrong with a mandate in these terms. It was described in argument as being a "blank cheque" given to Mr Johal and Mr Gill. The claimant rejected that characterisation, but it does appear to us that it came close to that. The claimant's view appeared to be that with that mandate having been approved it was then for Mr Johal and Mr Gill to carry it through as they saw fit, without further question or limits, and for her to provide the funds for them to do this. This seems to us to be at the least very poor practice in managing the branch's money.

What did the claimant know at or before that meeting?

52. In her written submissions, Mrs Fraser Butlin says that at that meeting "*the claimant was well aware that the new branch had already been established*". In saying this, she relies upon:

    a. The letter of 25 August 2016,

    b. Mr Johal and Mr Gill being aware of (and indeed copied in on an email recording) the result of the ballot at Terminal 3, and having shared that knowledge with her, and

    c. The newsletters produced by the new Terminal 3 branch.

53. Mrs Fraser Butlin also said that the claimant knew that it was not necessary to have a full membership ballot to set up a new branch.

54. One consequence of this, if true, is that the claimant would have known that Mr Johal and Mr Gill were in no position to propose a motion at the branch 562 meetings and they were at the time members of the new branch and not branch 562.

55. We do not accept that the claimant knew that the new branch had been established by the time of the 8 September 2016 meeting. There are several reasons for this:

    a. First, we accept the claimant's evidence that she never received the letter of 25 August 2016. It is obvious from the materials before us that the claimant felt very strongly about any question of a breakaway from branch 562, and it is inconceivable to us that the claimant would have received that letter and then not taken immediate action of some sort by way of protest to regional or national leadership within the union.

    b. Second, there is no clear distinction in the materials from the time between the fact that a vote had been taken and a new branch would be established (which was clearly known and was the basis on which the 8 September 2016 meeting proceeded) and the actual establishment of the new branch. Indeed, there is no contemporary material before us that identifies on what date the new branch was established. The best we have is an email obtained in the course of the later investigation. Even the letter of 25 August does not say when the new branch will take effect from. The newsletters that Mrs Fraser Butlin refers to all refer to the vote and the fact that a new branch is to be established, but there is nothing in there that expressly states that the branch has been established. The best that Mrs Fraser Butlin pointed to is a reference to the new branch number, but this of itself does not mean that the new branch is up and running and has members.

    c. Third, if the claimant knew that the new branch had already been established, in supporting legal action to prevent the establishment of this new branch she was supporting action that she herself knew

to be fundamentally flawed and which could not possibly succeed. Whilst undoubtedly the claimant felt very strongly about the establishment of the new branch at Terminal 3 we do not see what she could possibly gain by supporting legal action that she knew to be completely flawed.

d. Fourth, we do not accept that the claimant should have known that a full membership ballot was not necessary for the establishment of a new branch. On 23 September 2016 Andrew Murray, the union's chief of staff, who we understand to be responsible for internal governance of the union, wrote to the claimant saying that the establishment of a new branch "*would have to be preceded by a proper secret ballot of all the members*". As Mrs Fraser Butlin points out, he also says that establishment of a new branch is a matter for the regional administration, but for reasons that have never been explained to us he clearly shared the claimant's view that a full secret ballot was necessary. If that was what the chief of staff thought, we do not see that the claimant can be criticised for thinking it too.

56. We find that the claimant did not know at the time of the meeting that the new branch had already been established.

Subsequent events and the High Court application

57. Mr Johal and Mr Gill launched a High Court action against various union officials. This was issued on 12 September 2016. It appears the application was initially made on a without notice basis, but the judge on that occasion (which appears to be 21 September 2016) ordered the adding of the respondent as a party and the relisting of the application for an on-notice hearing.

58. There was an emergency meeting of branch 562 held on 30 September 2016. The minutes give an indication of the strength of feeling at the meeting, being headed "*attack on branch 562*" and continuing "*… this was not only an attack on the Branch but an attack on the Branch Officers who were being defamed in communications authorised or written by* [the leader of the new branch]". The legal action is not mentioned in these minutes.

59. In the meantime, the claimant was protesting against the breakaway of the new branch by communications with the union's leadership.

60. The matter came before Mr Justice Collins on an on-notice basis on 5 October 2016, when it was dismissed with an order that Mr Johal and Mr Gill pay £1,000 costs to the union.

61. While we do not think it was ever admitted as such by the claimant, the evidence we heard was overwhelmingly (and our finding is) that the formation of a new workplace branch was a matter for the union's regional office and that the ballot of shop stewards at Terminal 3 had been legitimately accepted by the regional office as sufficient for formation of a new branch. A full ballot of members was not necessary for such a step –

albeit that the regional office may occasionally require that it is done. Accordingly, the claim by the claimant and other members of branch 562 that the formation of the new branch was against union rules and legal requirements was in fact incorrect.

The payments

62. Following the failure of the legal action, Mr Johal and Mr Gill requested three payments from the branch in respect of legal fees, by short notes which read as follows:

> *"30/09/2016*
>
> *Dear Tracy/Natalia*
>
> *Can you please pay the outstanding legal fees for legal advice and action, as agreed at branch 562 meeting on the 8th September.*
>
> *Total: £1021.65*
>
> *Kind regards*
>
> *S Johal*
>
> *18/10/2016*
>
> *Dear Natalia/Tracy*
>
> *Can you please pay the outstanding legal fees as agreed at branch 562 on the 8th September*
>
> *Total £1700*
>
> *Kind regards*
>
> *Taranjit Gill*
>
> *18/10/2016*
>
> *Dear Natalia/Tracy*
>
> *Can you please pay the outstanding legal fees as agreed at branch 562 on the 8th September*
>
> *Total £5400*
>
> *Kind regards*
>
> *SS Johal"*

63. These payments were promptly made by the claimant and Dr Saccar from branch funds to the individuals concerned. The total paid was £8,121.65.

64. There were in the tribunal bundle three invoices for legal advice. These were:

    a. For £700, from the West London Legal Centre, for "injunction and High Court hearing" dated 22 September 2016, addressed to the branch secretary for £700.

    b. For £700, from the West London Legal Centre, for "injunction and High Court hearing" dated 5 October 2016, addressed to Mr Gill.

    c. For £5,400, from Andrew McGrath (counsel) for work done on 3 October 2016, dated 5 October 2016, addressed to Mr Johal.

65. These invoices totalled £6,800. There are further receipts for court fees, postage and travel expenses £321.65. Adding in the £1,000 of the union's costs which Mr Johal and Mr Gill were ordered to pay comes to the total of £8,121.65.

The investigation

66. On 26 October 2016 Peter Kavanagh wrote to the claimant saying that the branch was being taken into "Regional Administration" and as such the claimant and other branch officers were suspended from their positions (but without affecting any other offices she held in the union). This action was said to be taken "*as a precautionary measure while investigations are undertaken into reported misuse of branch funds*".

67. An investigation into the payments commenced. Separate investigations commenced in respect of the actions of Dr Saccar and Mr Johal and Mr Gill. The union dealt with the complaints against the claimant and Dr Saccar together, and those against Mr Johal and Mr Gill together with each other but separately from those against the claimant and Dr Saccar.

68. Although the claimant made various points at the time it is not suggested by her in this hearing that the investigation was improper or that the way in which it was conducted added to her case on unjustifiable discipline, so we will say no more on this other than to note that the union appears to have carried out a comprehensive investigation into the conduct of the claimant or Dr Saccar.

69. On 19 December 2016 Peter Kavanagh wrote to the claimant saying that he had received the investigation report and referred the matter to a formal disciplinary hearing. In that letter he says:

> *"In outline, it is alleged that as a branch officer, you have taken part in and had oversight of decisions that amount to an inappropriate use of union funds. It appears that significant sums of LE/562 branch*

funds have been used to obtain legal advice and then to commence High Court action against the Union.

The charges that will be considered against you at the hearing are as follows:

27.1.1 Acting in any way contrary to the rules or any duty or obligation imposed on that member by or pursuant to these rules whether in his/her capacity as a member, a holder or a lay office or a representative of the union.

27.1.2 Being a party to any fraud on the union or any misappropriation or misuse of its funds or property.

27.1.5 Bringing about injury to or discredit upon the union or any member of the union including the undermining of the union, branch or workplace organisation and individual workplace representatives or branch officers."

The disciplinary hearing and decision

70. For reasons which do not concern us, there was a delay in the disciplinary panel convening. It ultimately proceeded on 27 July 2017 as a panel comprising Gary Reay (chair) and Joanne Harris. Comprehensive notes of the panel's conclusion were produced by Vince Passfield and addressed to Peter Kavanagh on 7 August 2017. Having attended the opening of the hearing with her representative, the claimant and her representative both left following a complaint by her representative that the panel was not properly constituted and took no further part in the hearing.

71. We note the following extracts from the panel's findings, as recorded in the notes of the decision:

a. At the 8 September 2016 meeting both Mr Johal and Mr Gill knew that they were members of the new branch and therefore not entitled to make proposals or vote at a meeting of branch 562.

b. *"In October 2016 significant sums were paid to the Unite T3 reps (Johal and Gill) from the LE/562 accounts, through the branch administration of LE/562, which was authorised by the branch secretary … and chair …"*

c. The vote by shop stewards to form a new branch at Terminal 3 was sufficient to constitute the new branch and there was no need for a separate ballot of members.

d. There was no note of any legal advice obtained by Mr Johal and Mr Gill before starting their legal action, nor had the claimant or Dr Saccar ever seen such legal advice.

e. *"The only information relating to evidence that payments have been made are hand-written A4 sheets from Johal and Gill claiming costs for legal fees relating to the motion of 8th September for 'legal advice and action'"*

f. The claimant's position as branch secretary "*carries obligations to uphold the rules of the union and the trust of the membership who elected her*".

g. The claimant's assumption that the Terminal 3 members remained in her branch was "*inexplicable*".

h. There was no wider support from the Terminal 3 members for the move against the new branch.

i. By the meeting on 30 September (at the latest) the claimant was aware that Mr Johal and Mr Gill were no longer members of her branch.

j. The claimant and Dr Saccar had attended the High Court hearing on 5 October 2016 and so "*felt a level of ownership towards the action undertaken*".

k. In making the payments based on the written requests from Mr Johal and Mr Gill there was "*a total lack of due diligence and acceptance of any fiduciary responsibility*".

72. In noting the panel's conclusions, Mr Passfield records:

a. "*The Panel's key consideration was whether Union funds had been used to take High Court action in an attempt to prevent the Union from carrying out its own Policy in accordance with … guidance around branch reorganisation.*"

b. The claimant "*made no attempt whatsoever to ensure that any legal advice received was considered and actually supported the decision to proceed to take legal action … the absence of any scrutiny, led the panel to believe* … [the claimant] *had supported and overseen the spending of branch money to seek the injunction*".

c. The claimant had the opportunity to seek clarity from the region about the new branch but did not do so.

d. *"Whilst the Panel recognises it is the right of any representative body to question the legitimacy of any Unite decision made on behalf of those they represent, such should however be progressed through the respective appeal process … What is in question is the propriety of appropriating union (branch) funds to support High Court action when no Union Rules have been broken … and … the member ship transfer had already taken place with an overwhelming majority of*

the … accountable representatives of workers elected from T3 in favour of the new branch."

73. On 8 August 2017 Peter Kavanagh wrote to the claimant saying that the panel had upheld all three disciplinary charges and imposed the following sanctions:

> *"1. Withdraw your credentials with immediate effect and bar you from holding any rule 6 lay office for the remainder of this term and the following electoral term of 2018 - 2021.*
>
> *2. Bar you on an indefinite basis, from holding any lay office or representative position which involves any financial responsibilities. This would include Branch Secretary, Treasurer, Auditor or signatory to any branch account."*

The letter also notified the claimant of her right of appeal.

74. Although she did not receive the outcome of the hearing until some time after the hearing, the parties agreed that the relevant date for the purposes of any time limits was the date of the determination, not the date on which it was communicated to the claimant, and that the date of determination was the same as the date of the hearing: 27 June 2017.

The appeal hearing and decision

75. The claimant appealed against the disciplinary sanction. The sanctions imposed by the disciplinary panel were not implemented pending the appeal. The claimant remained subject to the terms of her original suspension.

76. An appeal panel was convened and met on 30 August and 5 September 2017. The appeal panel upheld the original panel's findings that there had been a breach of each of the three cited rules, but by a majority substituted the following disciplinary sanction:

a. Withdrawal of the claimant's workplace representative and branch officer credentials until the end on June 2018.

b. That the claimant must attend training again before taking up lay office.

77. The appeal panel's decision was subject to ratification by the executive council. It was considered by the executive council on 6 September 2017 alongside similar appeals by Dr Saccar and Mr Johal and Mr Gill. We have seen the minutes of the executive council from which it is evident that there was considerable debate about the matter, with around 2/3^{rds} of the council voting to uphold and adopt the appeal panel's decision and 1/3rd voting against.

78. If the appeal amounts to a determination, then the relevant date for that determination is 6 September 2017 – the day on which the executive council ratified it.

79. Adrian Weir, the respondent's Assistant Chief of Staff, wrote to the claimant by email on 7 September 2017 notifying her of the decision and the new sanctions (we note that in that email the period for which her credentials were withdrawn was to March 2018, not June 2018, but nothing seems to depend on that difference for the purposes of this claim). The appeal panel's sanction took effect. The disciplinary panel's sanction had never taken effect, having been not implemented pending the outcome of the appeal.

80. It was originally the claimant's contention that the first element of the appeal panel's decision was more punitive to her than the first element of the disciplinary panel's decision. However, on consideration during the hearing she accepted that the scope of the sanction was identical except that the sanction imposed by the appeal panel was limited to up to March 2018 when the disciplinary panel's sanction had extended to 2021.

81. At the start of Mr Green's evidence it was agreed that, except for one point on the question of whether the claimant acted in bad faith, and except in disagreeing on the sanction to be imposed, the appeal panel had adopted the same view of matters and reasoning that the disciplinary panel had. Accordingly, it was agreed that the questioning of Mr Green could be limited and there was no need for him to explain the reasons for his panel's decision, which could be taken to be the same as those for the original disciplinary panel. In the section that follows, we will concentrate on the reason for the original disciplinary sanctions, but our reasoning is equally applicable to the appeal panel's decision.

The reason for the claimant being disciplined by the union

82. It was suggested during the hearing, and later adopted by the parties during their submissions, that there were three potential reasons for the claimant being disciplined. We will call them reasons (a), (b) and (c). They were:

    a. The fact of her support for the legal action by Mr Johal and Mr Gill against the union.

    b. Her having funded (or participated in the funding of) the legal action using union funds.

    c. The lack of proper governance by the claimant during the meeting of 8 September 2016, the nature of the mandate given to Mr Johal and Mr Gill and/or her supervision over their exercise of that mandate.

83. Mr Dracass submitted that any of these three reasons offended the rule against unjustifiable discipline, and that the reason was as set out in the note of the disciplinary panel's findings, particularly where they said that the "key consideration" was whether union funds had been used to take High Court action.

84. Mrs Fraser Butlin said that only reason (a) would be caught by section 65, and that the reasons for the discipline were reasons (b) and (c), but primarily reason (c).

85. On being invited by Mrs Fraser Butlin to say what she thought the reason for the disciplinary sanction was, the claimant said that she was unable to say what the reason was.

86. When Mr Reay was asked whether the claimant would have been disciplined had she spent her own money on the litigation by Mr Johal and Mr Gill (effectively reason (a)) he immediately and without hesitation said that she would not.

87. He was clear about this, and we accept it as being correct. The respondent's focus (as will appear below) has always been on the use of union money to bring the legal challenge, not the legal challenge itself. If the claimant had used her own money to fund the legal action by Mr Johal and Mr Gill she would not have been disciplined. Reason (a) was not a part of the decision to discipline her, either at the original stage or at the appeal stage.

88. In cross-examination, Mr Reay gave both (b) and (c) as reasons for the discipline. He said that the claimant had been wrong to use union money to fund the legal action when there were other internal routes available for resolution of the dispute. He said that as branch secretary she had a responsibility to exercise "due diligence" in the spending of union money and in ensuring compliance with the rules.

89. When asked directly what the claimant had done wrong, he said that it was using union money to take the union to court, but that there were also other factors (which we take as a reference to the governance points). He agreed that what was written in the notes about the 'key consideration' was correct. He did not accept that the payment of money for legal action against the union amounted to either a "*worthy cause*" or being for the benefit of "*members who have suffered misfortune*" as the claimant had said in her evidence.

90. He said that if the claimant's governance had been perfect (thus removing reason (c)) she would still have been disciplined, and that if she had applied this money to some other cause (for instance, the family fun day we heard evidence about) but with a similar lack of proper governance over the use of the money she would have been disciplined and the same sanction would have been applied.

91. While Mrs Fraser Butlin and to some extent Mr Reay in the tribunal sought to characterise the decision as being one based on reason (c) this does not match with the evidence given or the material from the time. The note of the decision records that the 'key consideration' was the use of the union funds to take High Court action against the union. Mr Reay did not disagree with this. A reading of the materials from the time (extracts from which are set out above) show that it was this use of the union's money that was central

to the decision to discipline the claimant, and not any consideration of her lack of governance in respect of the decision or the subsequent spending of the money. We accept that the governance question was a factor in the decision to discipline the claimant, but it was secondary to the 'key consideration' which was that the union's money had been used to sue the union.

92. The reasons for the disciplinary sanctions were reasons (b) and (c), with reason (b) being the predominant reason.

93. As explained above, it is not necessarily to set out a separate analysis of the appeal decision, and our findings as to the reason for the original disciplinary sanctions are equally applicable to the reason for the appeal sanctions.

Facts in relation to time limits

94. The original disciplinary panel made its determination on 27 June 2017. The executive council made its determination (if that is what it is) on the appeal on 6 September 2017. The claimant notified ACAS under the early conciliation provisions on 26 November 2017 and the early conciliation certificate was issued on 26 December 2017. The claimant lodged her complaint with the tribunal on 7 January 2018.

95. When questioned about this, the claimant said that she had not submitted her claim earlier because she was first waiting for the appeal to be dealt with, and then later looking after her father (who was unwell) as well as herself being unwell, which she attributed to the stresses and strains of the disciplinary process and its outcome.

96. We accept that the claimant initially delayed submitting her claim because she was awaiting the outcome of the appeal process. That is a sensible approach for anyone to take, and internal resolution of such matters is typically encouraged as being preferable to tribunal proceedings.

97. We also accept, while making no comment on the cause of her difficulties, that the claimant was in a difficult personal situation following the appeal hearing, dealing both with caring for her father and with the personal and practical consequences of the outcome of the disciplinary proceedings against her.

F. DISCUSSION AND CONCLUSIONS

The appeal as a determination

98. It was Mrs Fraser Butlin's case that the executive council's decision on the appeal could not itself be considered a "determination" within the meaning of section 64(2). In support of this, Mrs Fraser Butlin pointed to s66(2)(b)(ii) (the provision in relation to time limits) which refers to "*a reasonable attempt to appeal against the determination*". She says:

"*Where there is an outcome to an appeal, it would be wholly illogical to find that this constituted a further determination because if that were invariably the situation, there would be no need for the provision in s66(2)(b)(ii). This is all the more so, where the appeal outcome is of an equivalent or lesser sanction than the original determination because in those circumstances the outcome has not subjected the claimant to any further detriment.*"

99. Mr Dracass opposed this, pointing out, amongst other things, that it was only the appeal decision that was actually implemented in this case, with the original disciplinary sanction never having been implemented.

100. While we accept in principle that not every appeal outcome will amount to a determination (for instance, a decision simply to uphold the original decision and sanction may not amount to a determination) it is also our view that there is nothing in the legislation that prevents an appeal decision being a determination in just the same way as a first instance decision can be a determination. The reference in s66(2)(b)(ii) is not simply to an appeal, but also to an application to have a decision reconsidered or reviewed, which may just as well apply to an appeal decision as a first instance decision.

101. The question is simply whether there has been a "*determination … that* [a member] *should be subject to some other detriment*". In the circumstances of this case, that can apply equally to the original decision and to the appeal. Both decided that the claimant should be subject to a detriment – albeit that the appeal decision at least partly moderated the extent of that detriment. The effect and consequences of such a moderation at the appeal stage may be something a tribunal has to consider on any application for a remedy under section 67, but that does not prevent it being of itself a detriment. We find that the appeal decision was a "determination" within the meaning of section 64(2).

Time limits

102. We have set out above our findings of fact on points relevant to time limits.

103. Section 66 provides as follows:

> *"(2) The tribunal shall not entertain such a complaint unless it is presented:*
>
> *(a) before the end of the period of three months beginning with the date of the making of the determination claimed to infringe the right, or*
>
> *(b) where the tribunal is satisfied:*
>
> *(i) that it was not reasonably practicable for the complaint to be presented before the end of that period, or*
>
> *(ii) that any delay in making the complaint is wholly or partly attributable to a reasonable attempt to appeal*

against the determination or to have it reconsidered or reviewed,

within such further period as the tribunal considers reasonable.

(2A) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

104. As Mrs Fraser Butlin points out in her submissions, any complaint by the claimant in respect of the original disciplinary determination is brought outside the primary time limit of three months from the date of the matter complained of.

105. In response, Mr Dracass relies on subsection 2(b)(ii). As we set out above, we accept that the delay in making the complaint is wholly or partly attributable to a reasonable attempt to appeal against the determination. What remains is the question of whether the claim was brought within such further period as the tribunal considers reasonable.

106. The appeal was determined on 6 September 2017, at which point any delay was no longer attributable to the claimant attempting to appeal against the original determination. She then waited 2½ months before starting early conciliation. As set out above, we accept that the claimant had personal difficulties and commitments during this period. She submitted her claim very shortly after the conclusion of early conciliation (taking into account the Christmas and New Year holiday period). In those circumstances we find that her claim in respect of the original disciplinary decision was submitted within a reasonable time, and her complaint in respect of the original disciplinary determination is one that we have jurisdiction to consider.

107. Both the original disciplinary decision and the appeal decision were "determinations" and we are able to consider both.

Was the reason for the discipline within s65(2)-(4)?

108. We accept Mr Dracass's submission that section 65(2)(c) (when read with subsections (2)(d), (3) and (4)) is very widely drawn.

109. The question section 65 is addressing is what conduct amounts to a 'protected act' for the purposes of the rules on unjustified discipline. To start at subsection (4), that applies to, "*conduct which consists in … doing anything preparatory or incidental to … conduct falling within subsection (2) or (3)*". Subsection (3), in turn, covers "*conduct which involves any person being consulted or asked to provide such advice or assistance with respect to a matter which forms … the subject-matter of …* [an] *assertion … mentioned in subsection 2(c) above*". Subsection 2(c) relates to "*asserting (whether by bringing proceedings or otherwise) that the union … has contravened or is proposing to contravene a* [legal] *requirement*".

110. By following that legislative chain, we can see that conduct consisting of the assertion that the union has contravened a legal requirement is protected, as is conduct in asking someone to advise on such a matter and "*anything preparatory or incidental to*" such a matter.

111. Plainly this is capable of covering reason (a) but we find that it also covers reason (b) and (c), since the funding of the legal advice (regardless of the source of the funds) and any formal steps taken to endorse or encourage the taking of legal advice can be caught by being "*preparatory or incidental to*" such an assertion. Where the union says that such actions are disciplinary matters in their own right, the answer for the union is in a consideration of section 65(5), not that such steps are not covered by section 65(2)-(4) in the first place (see para 66 of Kelly cited above).

Has the respondent shown that the claimant would have been disciplined in any event (s65(5))?

112. Section 65(5) provides that:

> *"This section does not apply to an act … if it is shown that the act … is one in respect of which individuals would be disciplined by the union irrespective of whether their acts … were in connection with conduct within subsection (2) or (3) above."*

113. We accept Mr Dracass's submission that the wording "*if it is shown that*" requires the union to prove that this subsection applies.

114. There was some discussion at the hearing about what actual or hypothetical comparator the union could point to in support of its case that anyone else would have been disciplined for these actions even if they had not been in connection with a legal challenge to the union. We heard some evidence and argument to the effect that the claimant and her branch had authorised payments for the family fun day in much the same way as they had for the legal action (a 'mandate' with no budget and with bills being paid as submitted by various individual members). No disciplinary action had been taken in respect of that but (i) it does not appear that this ever came to the attention of anyone within the union with authority to propose disciplinary action, and (ii) both the respondents' witnesses considered that such an activity would fall within the activities for which branch funding could be made available, being a "*worthy cause*".

115. The answer to this depends on looking at the claimant's actions as a whole, and then removing the protected element of support of legal action against the union.

116. In that case we have a scenario in which a branch secretary has been party to and endorsed a loosely expressed mandate from the branch which appears to authorise unlimited spending by branch members, with them having no accountability for budgeting or any requirement for further authorisation of their actions by the branch. Not only that, but the expenditure is on something which can be costly and notoriously difficult to

keep within limits (legal fees) when other avenues were available (such as an internal complaint) to achieve the desired outcome.

117. We go further than that and find that the expenditure in question was not one which the branch was entitled to make under rule 17.3. We do not accept the claimant's suggestion that this payment was made on account of "*members … who have suffered misfortune*". That provision is not designed to assist members who are aggrieved at a decision that another part of the union has made. That only leaves expenditure on "*worthy causes*". We do not consider that money spent on legal challenges to the actions of another part of the union are a "*worthy cause*", and especially not when this is done without having previously taken any steps to resolve the matter internally. The end result of this was, of course, a loss of around £8,000 to the union.

118. What we thus have is a serious failure of governance and the spending of branch money outside the scope permitted by the union's rules. The union was not able to point us to any comparable situations – perhaps because, as we were told during submissions, anyone faced with such an allegation would normally resign their union position. However, it appears to us to be inevitable that someone in such a situation would face serious disciplinary action, and we are satisfied that sanctions arising from this would at least equal to that which the claimant was subject at the initial disciplinary stage.

119. As is set out in the note of the decision, the key consideration here was the use of union funds to sue the union, but the significance of that in this case was the use of union funds in this manner, not the fact of suing the union. We are satisfied that anyone who had used union funds in comparable circumstances, but not involving a legal challenge to a union decision, would have been treated in the same way and subject to at least the same sanctions as applied in this case.

Bad faith (s65(6))?

120. Section 65(6) disapplies the usual protection where the allegation is false and the individual "*made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith*".

121. We have found above that the assertion that the formation of the new branch was contrary to the union's rules or other binding law was false. The question that follows was whether the claimant knew that the allegation was false or provided the assistance "*otherwise in bad faith*".

122. The question of whether the claimant knew that the assertion was false is tied up with the question of whether she knew that the branch had already broken away and that a full ballot of members was not necessary for a new branch to be properly constituted. For the same reasons as set out under our sub-heading "*What did the claimant know at or before that meeting?*" we find that the claimant did not know that the allegation was false.

123. In her written submissions, Mrs Fraser Butlin said that the claimant's actions were in bad faith as:

> *"… she had failed entirely to conduct any due diligence, still less that which would be expected of an experienced representative. In particular, the claimant had failed to ask anyone at a regional level whether the branch had already been established, whether there had been a vote by the lay representatives or the basis in the rules for the establishment of the new branch. Has she so questioned, it would have been readily apparent that she was wrong in her views. Her failure to do so was because she was so blinded by the history of the branch, and that failure constitutes bad faith."*

124. We take it from the extracts from Saad set out above that the central question on whether the claimant acted in good faith is whether she acted with an honest belief that the union was acting against its rules or other legal requirement. We find that she did. As before, our reasons for this are essentially those set out under the sub-heading "*What did the claimant know at or before that meeting?*" – but particularly the third element of this. If the claimant had not believed that this breakaway was against union rules we do not see that she had anything to gain by committing union money and her personal support to a legal action that she must (on that premise) have known was bound to fail. She did not act in bad faith.

Summary and conclusion

125. The claimant was not unjustifiably disciplined. While her actions and the subsequent disciplinary action are ostensibly within the scope of section 64-65, the respondent has shown that this discipline would have followed irrespective of her actions being in connection was a legal claim against the union. This means that section 65(5) applies and the disciplinary action was not unjustified.

Employment Judge Anstis
24 July 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS