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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr J Leach	**AND**	**Birmingham City Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT **Birmingham** **ON** **17 18 19 20 (half day) 21 24 June 2019 and 25 26 June and 19 August 2019 (in Chambers**

EMPLOYMENT JUDGE **Woffenden**
MEMBERS **Mr Kelly**
Mrs L Ford

Representation
For the Claimant: **In Person**
For the Respondent: **Mr Meichen of Counsel**

RESERVED JUDGMENT

1 The claims of detriment on grounds related to trade union activities pursuant to section 146 Trade Union and Labour Relations (Consolidation) Act 1992 are dismissed save for the claim at Issue 2.1.17 .

REASONS

1 The claimant (a driver team leader employed by the respondent since 1 April 1996 and a former trade union representative) presented a claim on 16 April 2018 in which he complained that as a trade union representative he had been subjected to detriment.

Agreed List of Issues

2 The claimant having withdrawn any complaint about suspension, the agreed list of issues was as set out below:

2.1 Did the respondent act or deliberately fail to act by:
2.1.1 the taking of disciplinary action commencing in February or March 2017. The claimant says it was alleged that he had obtained confidential information related to a collective grievance by Unite the Union, but that non-Unison members were treated differently in this respect:
2.1.2 the commencement of disciplinary action without any official complaint;
2.1.3 the commencement of disciplinary action without a preliminary investigation;
2.1.4 the claimant having to deal with vague and unclear allegations-the claimant says that he has not been told what confidential information he is alleged to have used for his own advantage, nor how he is alleged to have used it for his own advantage, nor how he is said to have used it; and also has been accused of potentially interfering with an ongoing investigation, although that investigation had been completed;
2.1.5 a delay until April 2017 before the claimant was informed that he was under investigation;
2.1.6 the failure by the respondent to offer mediation;
2.1.7 being subject to investigation by a person who is not employed by the respondent (Jill Rothwell)-the claimant says this placed him at a disadvantage because the investigator was not aware of the relevant policies and procedures;
2.1. 8 failing to choose an internal investigation officer from a different directorate and instead choosing Lesley Ariss, who the claimant says, combined the roles of investigation officer, presenting officer and witness, to his disadvantage.
2.1.9 the involvement of Darren Share, who combined the roles of investigation officer, presenting officer and witness, to his disadvantage; the claimant says that both he and Lesley Ariss should have excluded themselves due to conflict of interest, due to their prior involvement in earlier cases;
2.1.10 the failure of the respondent's human resources department to take a neutral stance but instead presenting the case against him. The claimant complains that in particular Russell Johnson should not have been involved in this way;
2.1.11 the fact that the claimant says he was not given a case number for his investigation, which he also says is evidence of a prohibited purpose;
2.1.12 the refusal to transfer the claimant following his request in December 2017;
2.1.13 the claimant says he was placed at a disadvantage by number of procedural irregularities; or example, the claimant says that although he was given an outcome to the disciplinary process in September 2018, he has never been given an appeal, and the investigation and disciplinary process were not carried out within fair and reasonable timescale;
2.1.14 the respondent has not offered the claimant adequate support from human resources; in particular, the claimant says he has had no contact about

his welfare, and that he should have been kept informed of the delays and the reasons for them;
2.1.15 the notes of the disciplinary hearing were inaccurate, with, the claimant says, key points omitted;
2.1.16 the claimant says that he has still not received written confirmation of the outcome of the disciplinary process;
2.1.17 issuing of a written warning effective for 2 years as a result of the disciplinary process.
2.2 In respect of each alleged act or failure to act numbered 2.1.1 to 2.1.17 above the tribunal should ask itself:
2.2.1 has there been an act or deliberate failure to act on the part of the respondent?
2.2.2 have those acts or omissions caused detriment to the claimant?
2.2.3 were those acts or omissions in time? In order to determine if the acts or omissions are in time the tribunal should consider whether the complaint was lodged within 3 months beginning with the date of the act or failure to act to which the complaint relates, or:

a. Where the act or failure is part of a series of similar acts or failures within 3 months of the last of them (s.147 (1) (a)),
b. where the act extends over a period within 3 months of the last day of that period (s.147 (2) (a)),
c. where it was not reasonably practicable to bring the claim within the 3 month time limit was the complaint lodged within such further period within such further period as the tribunal considers reasonable (s.147 (1) (b)).

2.4 In relation to those acts proved to be within the time limit and which cause detriment has the claimant established a prima facie case that they were committed for a purpose proscribed by s. 146 (1) (a) or (b) or (ba)?
2.5 If the claimant establishes such a prima facie case can the respondent show that its sole or main purpose of acting or deliberately failing to act was not one proscribed by s. 146 (1) (a) or (b) or (ba)?

Evidence

3 On behalf of the claimant we heard from:
The claimant;
Mr D Kilgallon, a Unison trade union representative at the respondent's Lifford Lane depot;
Ms S Francis an assistant bereavement officer and a Unison Trade Union representative;
Ms C Johnson, a Day Centre Officer and Unison Branch Secretary; and
Mr M New, a Unison Regional Organiser.

4 On behalf of the respondent we heard from;
Ms Alison Harwood, former Acting Director of Regulation and Enforcement;
Ms L Ariss, Head of Business Improvement and Support Services assigned to the Place Directorate;

Mr D Share, former Acting Director, Waste Management, Place Directorate;
Mr R Johnston, former Human Resource Business Partner to the Place Directorate; and
Mr R James, Acting Corporate Director of Place Directorate.

5 There was an agreed bundle of documents of 451 pages. The tribunal asked for and received from the claimant a legible copy of page 231.It also sought disclosure from the respondent of an email dated 31 January 2017 sent to Mr Share which resulted in the inclusion of pages 229 A B and C in the agreed bundle. The respondent also sought to rely on a Supplementary bundle 25 pages to which the claimant did not object and was admitted into evidence. The claimant also sought to rely on a Secondary Bundle of 104 pages to which the respondent did not object and was admitted into evidence. On 20 June 2019 a further bundle of documents (65 pages) was disclosed by the respondent in relation to the claimant's attendance at the respondent's meetings with trade unions and that too was admitted into evidence. We also included in the agreed bundle a copy of The Manuscript Collective Grievance with all signatures redacted save for that of Unite Member 1 (page 110A B and C). We have considered only those documents to which we were referred in witness statements or under cross-examination. It has taken considerable time and effort on the tribunal's part to unravel the narrative, a task which both parties' approach to the preparation of witness evidence and disclosure made unnecessarily difficult.

Facts

6 From the evidence we saw and heard we make the following findings of fact:

6.1The claimant is a driver team leader in the respondent's Waste Management Department and has been employed by the respondent since 1 April 1996. There was no evidence before us of any previous disciplinary record.

6.2 At the time of the events in question the claimant worked at the respondent's Redfern depot ("Redfern").

6.3 There were approximately 300 employees at Redfern and 4 recognised trade unions (Unison Unite UCATT and GMB). Some employees were members of more than one union because for example Unite paid members while on industrial action, but Unison was perceived to provide better representation for members.

6.4 The claimant was a Unison member and long-standing senior steward. He was responsible for about 150 employees in the Waste Management Department over more than one depot.

6.5 Historically the unions had had a good relationship with each other and would work collaboratively for common goals. However, this changed when a new Unite union convenor and in the latter part of 2016 (at a time when there was discussion of a proposed restructure of the Department by the respondent) the claimant and other Unison representatives told the Unison Branch Secretary, Caroline Johnson, they felt they were being treated differently from Unite and excluded from meetings to which Unite were invited.

6.6 On 21 November 2016 a Unite member was transferred from Redfern to another depot and removed from his driving position following his failure to comply with a recently introduced health and safety policy at Redfern imposed by local management. That member raised a grievance that day alleging a culture of bullying at Redfern.

6.7 Shortly after that grievance had been raised, Unite representatives arranged a meeting for the entire workforce at Redfern to which Unison representatives were not invited and following which Unite collected signatures on a manuscript document dated 25 November 2016 from 77 of the total Redfern workforce of 80 employees including Unison and Unite members.

6.8 The manuscript document read as follows:
'*We the undersigned are employees within waste management at the Redfern Road depot. We wish to lodge a collective grievance against the depot management in Ref Col for the intimidation and bullying culture that is present towards us from the management.*
We also wish to lodge a vote of no confidence in the Ref Col management at Redfern Road" ('The Manuscript Collective Grievance ').

6.9 On 2 December 2016 Mr Share received an email from the Unite convenor saying that around 70 members of waste management had signed a collective grievance and on that day Mr Share suspended one of the local managers concerned (a Unison member) for failing to obey his reasonable instruction to reinstate the employee in question pending an investigation.

6.10 On 5 December 2016 a collective grievance was submitted on a 'People Solutions' form (People Solutions being an HR system used by the respondent's HR department) with that same Unite convenor stated to be the representative of the 76 employees at Redfern on whose behalf it was raised. It read '*We the collective workforce wish to protest against the treatment of [name] We feel it is harsh and excessive. We also wish to protest against the culture of bullying and intimidation towards us from the Ref Col management we are entitled to be treated with dignity and respect*" ('The People Solutions Collective Grievance'). Darren Share received that document from People Solutions on 9 December 2016. Although it referred to '*the collective workforce'* he did not know the signatories included Unison members and assumed because it had come from Unite it was a Unite grievance. It is plain that the People Solutions Collective

Grievance differs from the Manuscript Collective Grievance in that the latter does not include any reference to the treatment of the Unite member in question. A collective grievance was very unusual, and a complaint made by over 70 employees about the behaviour of management was considered to be a significant issue by the respondent's corporate director who asked Mr Johnson to get involved. He was a direct report to the respondent's HR Director Claire Ward.

6.11 In early December 2016 Alison Harwood was appointed by Russell Johnson as the Commissioning Officer in relation an investigation into the Unite member's grievance. We found her to be a reluctant and reticent witness who was unable to provide salient detail. She attributed the latter to the passage of time since the events in question (she retired from the respondent on 31 December 2017) and said she had only received a copy of the agreed bundle of documents the day before the hearing began (although her witness statement which had been prepared and exchanged [in January 2019] mentioned paginated documents from it which were relevant to her evidence). Her witness statement was far from a complete account of the part she had played in material events nor was she overly concerned to assist the tribunal in clarifying that evidence.

6.12 On 14 December 2016 Ms Harwood commissioned Ms Ariss (who she had already commissioned to carry out an investigation into the Unite member's grievance) to widen her investigation to include matters raised in The People Solutions Collective Grievance. She was also investigating the allegation that the local manager had failed to comply with the instruction issued by Mr Share that the Unite member be reinstated. On both occasions Russell Johnson and Mr Share asked her to commission Lesley Ariss as investigating officer, someone with whom she had worked for many years.

6.13 Mr Share had decided (after discussion with Russell Johnson) that Lesley Ariss should be allocated the investigation of the People Solutions Collective Grievance because it was linked to her investigation into the Unite member's grievance. She was now investigating 3 matters: the local manager's disciplinary investigation; the Unite member's grievance and The People Solutions Collective Grievance.

6.14 After signatures on the Manuscript Collective Grievance had been collected some Unison members contacted Shelley Francis because rumours about the purpose of the document and its subject matter were circulating at Redfern and they wanted to remove their names.

6.15 On 13 January 2017 Ms Francis accompanied the local manager (who was a Unison member) to an investigatory interview with Ms Arris and during that interview told her that she had received phone calls from Unison members telling her they wanted to withdraw from what they understood to be a petition which they had been asked to sign by a Unite representative because what they signed was not what was submitted to management. We accept her evidence that Ms

Ariss told her that if Unison members wanted to withdraw their names then they must put it in writing and be given to her to be included in her investigation.

6.16 After her discussion with Ms Arris (but without having seen either the Manuscript Collective Grievance or the People Solutions Collective Grievance) Ms Francis contacted Mark New and sought advice. Mr New expected Unite the Union to have approached Unison if it was going to get its members to sign a collective grievance. He advised her to draft a statement for signature by Unison members to withdraw their names. It was his expectation that those Unison members who had contacted her would be asked to sign it, not that Unite members would be approached.

6.17 Ms Francis prepared a typed document which said "*We the undersigned wish to state that we had no idea that a "grievance" had been submitted against Management of Redfern depot from Unite Trade Union. We signed what we believe to be a petition to get our colleague [name] back to work at Redfern depot. This was allegedly spoken about in a Unite only meeting and we were asked by a Unite Representative to "sign petition."*
I am not aware or have I been given a copy of this "grievance" from that Unite Representative, therefore I wish to remove my signature from the original document submitted to BCC." She sent it to Mark New who approved it after consultation with Caroline Johnson.

6.18 Ms Francis sent a copy to the claimant. She expected that he would contact Unison members to see if they wanted to withdraw their names and having done so give it to Lesley Ariss. The claimant was off-site and very busy at the time and on 26 January 2017 he took it to Martin Rafferty a fellow employee who acts as a Unison member workplace contact to take it round at Redfern. Mr Rafferty had also been speaking to Ms Francis and was aware that he would be taking the document round the workplace. The claimant had one copy and Mr Rafferty had another. The latter carried on taking his copy around Redfern in the absence of the claimant.

6.19 On 30 January 2017 the Unite convenor had received an email from another Unite convenor who had organised the meeting referred to in paragraph 6.7 above in which he said "*I'm getting concerned about rumours in regard to Redfern Road and the recent troubles that are now subject to an investigation. Our office are (sic) hearing of a person approaching members who signed the initial grievance, and asking them to sign a counter grievance. This is correct then it does raise serious issues as you would be no doubt aware, such as, who has knowledge of the signed list and showed this person it, trying to undermine clear issues that have been stated and are now subject to investigation.*
I am told but cannot at this time confirm a Unite member was told to sign this paper in front of management. I ask you to look into this matter Asap, and I'm concerned about how this could inflame an already tense situation."

6.20 The first Unite convener replied in an email of the same day (copied to Mr Share) saying "*I have just been sent a picture (attached) of the wording of the mentioned grievance/statement& I would also like to add that today the individual who is circulating the document (GR4 DTL) instructed one of our members whilst in the refuge collection office to sign it as he had signed the Unite grievance originally'*
He said this was done in the presence of two of the Redfern managers and that he was also *'very concerned how the signatures of Unite's grievance have become public knowledge. Only myself the local rep and the investigation officer have plus HR have copies of it. I too feel this issue will exacerbate an already tense situation*." These emails refer to Martin Rafferty, not the claimant.

6.21 The claimant did not return to Redfern until 1 February 2017 when he attended a Unison membership campaign there

6.22 On 1 February 2017 the Unite convenor sent another email to Mr Share which read "*Further to my email yesterday in relation to the document that is being circulated at Redfern Rd that Unite members are being asked to sign so the names can be removed from Unite's collective grievance I can confirm that J Leach (unison rep) is at Redfern today as part of a unison membership campaign is circulating that document asking our members to sign it*
This is a fundamental attempt by unison to undermine Unites grievance for what purpose I'm unsure
But our grievance has nothing to do with them
Unisons actions are totally inappropriate and are exacerbating an already tense situation
*I also wish to add that [*a manager*] approached a unite member [*who he named*] this week and asked him if he had signed Unites Grievance and why he had done so*
how [the manager]is aware that [the member] signed the grievance I don't know but he should not be approaching Unite members in this manner
I have spoken to [the member] who is willing if required? To be interviewed."
The manager in question was the manager referred to in paragraph 6.15 above. Mr Johnson regarded this email as a complaint made by Unite about Unison but singling out Mr Leach as the perpetrator of the activity complained about. In our judgment the complaint concerns not the way in which the claimant was approaching Unite members but the fact he was doing so which Unison considered an attempt to undermine its grievance. It also raised a query about how the claimant knew the Unite member in question had signed the grievance (although on the Unite convenor's own account the claimant was asking if the member had signed it which indicated that he did not know this).

6.23 Mr Share had been on his way to Nottingham at the time of receipt and had also received a request that he call the claimant .On arrival he did so and, having discussed another matter which the claimant wanted to discuss with him,

mentioned the email he had received from the Unite convenor and asked him about it.

6.24 After their conversation Mr Share sent the claimant an email in which he said '*Concerning the comment about the collective grievance. This is subject to a current investigation. The content of the grievance has not been shared with anyone outside the investigation. I am concerned you may be getting involved in an ongoing investigation, and therefore this must stop until the investigation is concluded*." The claimant replied by email to Mr Share the following day. He gave an account of their conversation about what Mr Share had described as the collective grievance. He said "*You then said what is going on down at redfern I replied I had been contacted by my members and other staff and what I had gathered from there I would deal with today by that I meant I would give information to the investigating officer, that is still my intention, I have not seen the grievance and I don't think I will, but I need to know how you feel I would be interfering with an ongoing investigation please as that is not in my nature and I am upset that is the picture you have of me, I am feeling as I said on the phone frustrated as to the way as a unison rep we are being treated less favourably than other organisations. As a matter of urgency I need a response please*".

6.25 Mr Share did not reply to that email but did meet the claimant and Ms Francis in a corridor after a trade union meeting on 3 February 2017. Mr Johnson was present during part of that discussion and sent an email to the claimant Ms Francis and Mr Share headed "*summary of meeting*". He said:
"*Further to our meeting earlier this morning concerning a collective grievance that has been presented by Unite and is linked to the suspension of one of their members. I informed you that a number of employees who have signed the collective grievance have come forward to state that they are being pressurised or encouraged to withdraw their signature. The investigator will of course look into those allegations as a serious breach of conduct.*
We discussed concern that a document is allegedly being circulated by John who is asking employees to be removed from the collective grievance and that this may well be undermining a live investigation. You have confirmed that you have not circulated such a document or approached members of staff asking them to sign such a document; that it was the other way round with Unison Members approaching you. Unison intention being simply to pass details of those approaches to the investigator concerned without discussion over the content.
To remind you that whilst investigations continue there is clearly a tense situation and the content of the collective grievance remains the subject of an investigation and is clearly confidential and not for general debate. May I also take this opportunity to thank you for explaining the position to Darren and I with a view to helping clarify matters and would ask that you let Leslie know what has been reported to you soonest."

6.26 Having taken advice from Mr. New ,Ms Francis replied to that email on 6 February 2017. She said "*Again may I reiterate that neither myself or John Leach*

have not and will not discuss the investigation that is taking place regarding Redfern Depot. In fact John gleaned more from yourself and Darren to the context of the investigation than he knew before we had our chat.
When Unison members approach us saying they have been "cajoled and bullied" into signing a document by a Unite Representative, it is my role to advise them what to do. I informed the investigating officer of this and I will be speaking with her again today to advise her of what has taken place.
Unison stewards would never and have never "cajoled or bullied" anybody into signing any documents and anything that staff at Redfern depot have signed was by the staff's own volition."
No action was taken by the respondent about her allegation that Unison members had been cajoled and bullied signing a document by Unite.

6.27 That same day the Unite convenor contacted Mr Share and Mr Johnson by email to give them the names of 2 Unite members who had been approached by Mr Leach and asked to sign "*the petition*". He also mentioned that one of them had been asked to sign it by a fellow GR4 DTL. This referred to Martin Rafferty. The Unite convener also forwarded that information to Ms Ariss suggesting that she might need to interview one of the individuals concerned.

6.28 On the advice of Mr Johnson Mr Share took it upon himself to ring that Unite member on 7 February 2017. He made no notes of that conversation but recalled asking the individual ('Unite Member 1') if he felt under pressure and being told he had not felt overly intimidated, but the claimant had been persistent in asking him to sign. Mr Share felt this warranted further investigation. He asked Ms Arris when she was going to interview Unite Member 1 and asked her to confirm with him what he had said to Mr Share on the phone so it was put down in writing. Ms Ariss was due to see Unite Member 1 on 13 February 2017 under the respondent's Disciplinary Policy and Procedure ('the disciplinary policy') in connection with the allegations made in the collective grievance. She had asked the Unite convenor who she should interview in this regard and he had put names forward which had included Unite Member 1.

6.29 We found Ms Arris at times a disingenuous witness; Like Ms Harwood her witness statement was far from a complete account of the part she played in material events. It implied Unite Member 1 had spontaneously raised with her the conduct of the claimant and Mr Rafferty when she interviewed him on 13 February 2017 .When she met with him (accompanied by the same Unite convenor that had sent the original email to Mr Share) she used the meeting not (as might be expected) to ask open questions so he could provide his own account of any interactions with Mr Rafferty and the claimant but instead to recite to him verbatim the version of events which had been provided to her by Mr Share and then ask him some supplementary questions as if the account with which she had been provided was already accepted as accurate . At no time did Unite Member 1 say he felt intimidated by the claimant ;he described how the claimant had been standing outside the office set up by Unison within earshot

of a Unite representative when he had said what he said ('*Get your rep to show you the grievance properly* ') and it made him feel uncomfortable. He did not know how the claimant had found out who had signed but said it would be '*interesting to find out*'.

6.30 The typed notes record that during that meeting Unite Member 1 confirmed he had signed the Manuscript Collective Grievance and said he had been spoken to about this by Martin Rafferty and the claimant and it was not right they knew he had signed it. Martin Rafferty had told him the claimant said he had to sign the removal of signature document .He was then approached by the claimant in the office who told him the collective grievance has not been worded correctly and the removal of signature document was the new one to be signed but he had refused to do so and left the office .He had been followed by the claimant who had again asked him to sign it .He had refused again and was called a sheep and a follower. The claimant asked him again to sign it in the locker room and this time he did so. He had felt '*pressurised*' but '*not intimidated*' into doing so. Ms Arriss then prepared a note of that interview and as agreed sent it (not to Unite Member 1) but to the Unite union convenor.

6.31 Lesley Ariss' evidence in chief was that on an unspecified date she then passed on her concerns about what had been said to her to Alison Harwood, her justification being she was responsible within her role as investigating officer to raise any secondary concerns which arose outside the terms of reference with the Commissioning Officer. Ms Harwood in her evidence in chief was similarly unable to identify a date on which this occurred but said it was shortly after the investigation commissioned by her on 14 December 2016 had commenced .That plainly cannot be correct since it could not have taken place before 13 February 2017.Her evidence was Ms Arris told her that she had been informed by those she had interviewed (not just Unite Member 1) that the claimant had been interrogating members of the Unite union and attempting to get them to remove their names from the document they had signed by signing a '*counter grievance*.' Under cross examination she said Lesley Arris had met with her at the end of January and said Unite Member1 had told her he was harassed by the claimant asking him to sign a document and she was concerned the claimant was interfering in an ongoing investigation which she thought was primarily to do with Unite Member 1. She had then knocked on Mr Share and Mr Johnson's door to share those concerns and they said they needed to speak to Mr New as Regional Officer a detail wholly absent from her witness statement. We find that there was no such meeting between Ms Harwood and Ms Arris. We find on the balance of probabilities that Ms Arriss simply passed on what

6.32 It is common ground no disciplinary investigation was ever initiated against Mr Rafferty. The respondent's amended response said at paragraph 11 that two employees had alleged the claimant had intimidated them for signing the collective grievance and coerced them into signing a counter grievance but 'no evidence of such wrong doing' was found against him and therefore no formal

action was taken against him but we heard no evidence to support that pleading such as when or how or by whom such a decision was taken.

6.33 The claimant was absent from work from 3 February 2017 till 13 February 2017 and on 14 February 2017 attended a meeting with Mr Share Mr Johnson Caroline Johnson and Mark New. By this time in Mr Share's opinion the situation between Unison and Unite was really tense and everyone was annoyed with each other.

6.34The disciplinary policy states that '*formal disciplinary action will not be taken against an accredited union steward and the case has been discussed with the appropriate full time official*'. It also states that a Commissioning Officer (if appointed) can arrange for an independent investigating officer to carry out an investigation into the facts of the case and that the investigating officer should not have had any previous involvement in the misconduct issue.

6.35 The purpose of the meeting on 14 February 2017 was to tell the claimant that he was to be the subject of disciplinary action and propose that the claimant be suspended. It follows that that decision the claimant would be the subject of disciplinary action had preceded the meeting .Mr New and Ms Johnson did not agree to the latter and asked that alternatives be considered. No decision to suspend was taken at that meeting. It was agreed that there would be a preliminary investigation. In fact (and unbeknown to the claimant) the only 'preliminary' investigation which ever took place had already been conducted (and indeed concluded) by Ms Ariss when she met with the individual on 13 February 2018. Ms Ariss was adamant that despite Mr Share's evidence to the contrary and the chronology of events prepared by Ms Rothwell as part of her report which showed such an investigation had been carried out by her from 15 February 2017 to March 2017 she had not carried out any preliminary investigation. We accept that evidence and find the claimant's representatives were led to believe a preliminary investigation would ensue. We did not find Mr Share a consistently credible witness. His witness evidence was conspicuously selective about the part he had played in ensuring Ms Arris discussed the claimant's conduct when she interviewed Unite Member 1 on 13 February 2017 and how the meeting on 14 February 2017 had come about and inexplicably inaccurate about the preliminary investigation he said was carried out by Ms Arris. We find on the balance of probabilities that Ms Arriss (not Ms Harwood) passed to Mr Share the outcome of her interview with Unite Member 1 and he and Ms. Ariss together decided that disciplinary action should be commenced against the claimant. That is what Mr Share subsequently told Mr James at the claimant's disciplinary hearing .That decision must have been taken on 13 February 2017, thus necessitating the meeting on 14 February 2017.

6.36 The disciplinary policy provides that "*Where Gross Misconduct is alleged or suspected an employee may be suspended on normal pay pending further investigations and, where necessary, until the Disciplinary Hearing'.* It contains a

non- exhaustive list of offences which are normally regarded as gross misconduct. These include*:*

"*theft or fraud*
physical violence or bullying
deliberate and serious damage to property
serious misuse of an organisation's property name
deliberately accessing Internet sites containing pornographic, offensive or obscene material serious insubordination
unlawful discrimination or harassment
bringing the organisation into a serious dispute
incapability at work brought on by alcohol or illegal drugs
causing loss, damage or injury through serious negligence
a serious breach of health and safety rules
a serious breach of trust and confidence."

6.37 On 22 February 2017 Ms Ariss contacted Ms Francis about the email she had sent to Russell Johnson on 6 February 2017, having been contacted by him to ask her to confirm if she had received the information which Unison had said they were planning to give her because he understood she was concluding her '*collective grievance investigation'* and '*it will be important to ensure we have a full picture?*' Lesley Ariss asked Shelly Francis to provide any information she felt was relevant by 24 February 2017 as she was '*close to concluding the investigation regarding the collective grievance*'.

6.38 Shelly Francis did not contact Lesley Ariss. She contacted Caroline Johnson. On 24 February 2017 Caroline Johnson told Lesley Ariss that Unison members had been told to contact her directly if they wanted to complain about being included in a collective grievance when they had been told they were signing a petition in support of a colleague. She said '*many members*' had approached Unison over the issue. Ms Francis and the claimant had been trying to assist their members and her investigation, *'by collecting the names of members for you, as you had requested, however due to the actions of senior managers and HR we have taken a decision to ask members to approach you directly*.'

6.39 Lesley Ariss told Caroline Johnson in an email of the same date she had not made any such request and gave a different account of the investigation meeting Shelly Francis had attended as an employee's representative. She said in view of what Shelley Francis was reported to have said to Russell Johnson on 3 February 2017 she had contacted Shelley Francis and asked for any information by 24 February 2017, but she had not heard from her. Neither Lesley Ariss nor Caroline Johnson made any further contact with Lesley Ariss. They were becoming concerned at the way things were going and decided not to do so fearing making things worse for the claimant.

6.40 In her witness statement Ms Arris said she was not involved in the subsequent investigation. She failed to say that she had prepared draft terms of reference for the investigator. On 2 March 2017 she emailed Alison Harwood (copied to Russell Johnson) sending her a draft letter of instruction and terms of reference for an investigation into the claimant. She said in the email that because the allegations are "*potentially gross misconduct, there is reference to John Leach being removed temporarily from his union duties as an alternative is to suspension.*
In a meeting with Jacqui yesterday when I updated her regarding the investigations I'm undertaking, she stated that she and Claire Ward had had a conversation re my findings re John Leach and that Claire Ward suggested he should be removed from his union duties while the investigation is undertaken; Jacqui supported this stance; hence why this has been included in the letter and TOR." She said that she would send her separately information in support of the commissioning of the disciplinary investigation.

6.41 That same day Russell Johnson sent an email to Alison Harwood and Claire Ward (copied to Lesley Ariss) in which he referred to a conversation with Mark New the previous evening. He reported that he had advised Mark New that "*action short of suspension might include suspending JL from Union duties*" and that an external investigator would be used. Mr New's response was recorded as "*liked an external inv (sic) but was not happy with suspending union duties*."

6.42 Alison Harwood sent a letter dated 6 March 2017 to the claimant in which she said the further preliminary investigations which it had been agreed on 14 February 2017 would take place had now "*progressed*". This was plainly inaccurate. Mr Share and Mr Johnson had told her there had been such further investigations and that she should progress matters to a disciplinary investigation. Her letter advised the claimant that a disciplinary investigation would be undertaken to consider the following allegations against him:
"*1 It is alleged that you have obtained confidential information you are not entitled to receive and used it for personal advantage; that you have used your position by seeking information which you did not need to know to carry out your duties.*
2 It is alleged that by your actions you have failed to treat others with courtesy and respect and have harassed other employees.
3 It is alleged that you have potentially interfered with an ongoing disciplinary investigation.
4 It is alleged that by your actions you are in breach of the City Council's Code of Conduct.
These allegations are seen as potential gross misconduct and, if proven, may lead to formal disciplinary action being taken against you." He was warned this might lead to the termination of his employment if proven. No explanation was given as to why these allegations were considered to potentially amount to gross misconduct. The letter went on to say that "*given the nature of the allegations and that these are potentially gross misconduct, consideration has been given to your suspension on normal pay whilst the investigation is undertaken. However,*

before a decision to suspend is taken, alternatives must be considered first and taking account of this and the fact that you are currently on sick leave, it has been decided that you will not be suspended." A copy of the terms of reference for the investigation as drafted by Ms Arris was enclosed. The claimant had been absent from work due to work related stress from 15 February 2017. It had been Mr Share's decision not to suspend the claimant not Ms Harwood.

6.43 Those terms of reference were (purportedly) signed by Alison Harwood on 7 March 2017 and said "*Whilst undertaking a disciplinary investigation, the investigating officer interviewed a number of employees, one of who made a statement that John Leach, a Driver Team Lead at Redfern Depot and a union steward had approached him about a grievance he had signed and questioning why he had signed it.*
Following concerns raised by the investigating officer to the commissioning officer regarding these allegations, the decision was taken, that as an alternative to suspension, John Leach should temporarily be removed from his union duties and that a separate disciplinary investigation should be undertaken'.
Ms Harwood could not explain why the terms of reference she had signed erroneously referred to a decision having been taken to remove the claimant from his trade union activities other than to say it was an oversight.

6.44 The stated purpose and scope of the investigation was to
'*Determine whether John Leach's actions and behaviours have breached Birmingham City Council's Code of Conduct.*
Determine whether John Leach has potentially interfered with an ongoing disciplinary investigation.'
The putative investigator was not told what confidential information it was alleged the claimant had obtained to which he was not entitled or how he had used that information to his personal advantage or what his position was or how he had used it by seeking information he did not need to carry out his '*duties*' which were unspecified. The '*others*' it was alleged he had not treated with courtesy and respect and the '*employees*' he had harassed were not identified nor were the date or dates on which it was alleged this had taken place. No information was provided about the '*ongoing disciplinary investigation'* or how and when the claimant had '*potentially*' interfered with it. The salient alleged breaches of the respondent's Code of Conduct' were not identified. Despite Ms Harwood's seniority and managerial experience, she found no fault with the terms of reference or the wide ranging and vague formulation of the allegations generated by the interview conducted by Ms Arris on 13 February 2017.

6.45 The respondent's Code of Conduct first sets out general principles to be upheld by its employees and then tells employees they must not in their official capacity:
'*Allow their personal interests to conflict with Birmingham City Council' requirements.* or

Use their position improperly to confer an advantage or disadvantage on any person' or '*disclose information given to them in confidence, or information acquired which is of a confidential nature, without the consent of a person authorised to give it*'.
Under the heading '*General Confidentiality* 'in the context of an employee having obtained confidential information employees they must not' *Pass on any information received or obtained through their employment to anyone who is not entitled to that information* 'or '*use information for personal advantage'* nor must they misuse their position by seeking information which they did not need to know '*to carry out your duties*.' Examples given of '*abuse of confidence'* include' *Ill- considered gossip whether with colleagues or outsiders which may be misconstrued and re-quoted'*.
Under the heading '*Discrimination, Harassment, and Victimisation'* employees are told:
'*You must treat all employees with courtesy and respect, and must not make any remarks or gestures relating to the protected characteristics'* as defined in the Equality Act 2010 '*which may cause offence'* .They are warned any complaint of discrimination, harassment or victimisation, or complaints made on the ground of any of the protected characteristics would be taken seriously and the subject of a thorough investigation.

6.46 The claimant never received Ms Harwood's letter of 6 March 2017. He was still absent from work with work related stress.

6.47 On 9 March 2017(having first discussed the costs implications with Jacqui Kennedy) Mr Johnson appointed Jill Rothwell as an external investigator. She was one of a pool of contractors available to the respondent through its contract with West Midlands Employers. Invoices are addressed to the respondent from West Midlands Employers.

6.48 The claimant returned to work on 3 April 2017 .While absent he had sought clarification of his position and on that date it was confirmed to him that he was under investigation and that a commissioning officer and an investigating officer had been appointed and that he should have had written notification of this. Ms Harwood had not known he had not received that letter. The claimant had not been told or had not understood that an external investigator was to be external to the respondent rather than external to the Waste Department. It took Alison Harwood a further six weeks to write to the claimant on 27 April 2017 and tell him that Jill Rothwell had been appointed. She also said in that letter she had considered the question of suspension further and decided that because his return to work appeared to have been effectively managed and there had been no further allegations made or concerns raised suspension was not required; this did not however detract from the seriousness of the allegations. She also provided amended terms of reference because the allegations were not '*detailed fully in the section headed Purpose and Scope of Investigation*.' It was her

secretary (not Ms Harwood) who spotted this section covered only two of the four allegations and therefore required amendment.

6.49 Arrangements were made for Ms Rothwell to interview Unite Member 1 and another Unite member identified by the Unite convenor. Shortly before those interviews on 4 May 2017 the Unite convenor emailed Mr Crump (an HR manager who was supporting Ms Rothwell) saying they did not want to attend. Although he was not happy about their change of heart in coming forward he said he had to respect their opinions despite the reassurance he had provided. The email was copied to Mr Johnson and Mr Share but not Ms Rothwell. Mr Johnson (in Mr Crump's absence) responded that '*Staff will appreciate however that management have taken the allegations very seriously and have acted accordingly*' and the witnesses '*must*' attend the scheduled interviews. He would ensure there was no victimisation and asked that the Unite convenor '*encourage witnesses to both attend the interview and provide a full account of events*.'

6.50 The interviews proceeded on 8 May 2017 and both individuals were accompanied by the Unite convenor. He (not the individuals) answered many of the questions posed by Ms Rothwell without any objection or intervention by her. Reference was made to the role of Martin Rafferty in approaching individuals to sign the removal of signature document .The Unite convenor said he was not pleased about it as it was undermining what he described as the collective grievance. Unite Member 1 now described having felt '*pressurised* 'by the claimant who was very persistent and that he had signed the removal of signatures document. He identified the date Mr Rafferty had approached him as 7 February and the claimant had approached him 3 times on the same day 2 or 3 days later. When asked by Ms Rothwell he said he understood the claimant was asking him as a Unison representative rather than as management to sign the removal of signatures document. He had been surprised the claimant knew he had signed anything. Ms Rothwell took no steps to interview Mr Rafferty.

6.51 Ms Rothwell interviewed the other Unite member ('Unite Member 2') .He described the claimant having asked him on the Unison membership day if he had signed what he described as a petition. Unite Member 2 said he had told him it had been a grievance. He had asked the Unite Member 2 to sign a paper which said they had been tricked into signing and he had refused. He felt the claimant was undermining their grievance. He thought he was acting as a '*Unison rep when he approached me. He was Johnny Leach, Unison. Not Johnny Leach 'one of the lads*''. He expressed the view the claimant was one of the manager's trade union representative so by asking them to withdraw their names he was helping his members not the Unite member who had been transferred . Ms Rothwell also interviewed a Unite shop steward who told her that three staff members had approached him on 1 February 2017 and told him that the claimant was standing outside the canteen and asking everyone to sign his document which they had found intimidating. .He had watched members from outside the foyer glass doors

being asked by the claimant to sign his form and emerging very annoyed and had overheard an angry exchange between Unite Member 2 and the claimant.

6.52 When the claimant realised that an external investigator had been appointed, he nonetheless cooperated with the disciplinary investigation and was interviewed on 9 June 2017 accompanied by Mr New. Ms Rothwell did not explain to the claimant what disciplinary investigation was in train or identify the individual it was said the claimant had allegedly approached. The accounts given to her by the Unite Members 1 and 2 and the Unite shop steward were not put to him so he could comment on them. He said he had never seen the collective grievance. She did not clarify with him whether he was referring to the Manuscript Collective Grievance or the People Solutions Collective Grievance. He explained that everyone had thought they were signing a grievance about the bad treatment of the Unite member who had been transferred and thought they were asking for his reinstatement, but this had changed over the next couple of days and it was then about management. He had been told they had been asked to sign a blank piece of paper. Unite and Unison members were confused. He had not approached people; they had come to him; he had just stood there with a clipboard. He had acted with the backing of his assistant secretary and regional officer and had not known an investigation was going on. He agreed he had suggested to other team leaders/drivers that they would be affected by the grievance as they were '*management*.' Ms Rothwell took no steps to interview either the assistant secretary or Mr New although Mr New made it clear during the claimant's interview that on reflection had he been aware a messy situation was developing and known how it would blow up he would have done things differently but that he and the claimant were acting in good faith and the initial response had been to prepare the removal of signature document .Unison's advice had changed in response to the respondent saying it was causing problems. He repeated if Unison had known such a messy situation would develop they would have done things differently which was why Ms Johnson had said members should raise their concerns individually. Of course an investigating officer should also investigate evidence of exculpatory or mitigating circumstances not just that which points to guilt .The claimant had put forward two witnesses to give evidence to Ms Rothwell .They said the claimant in his capacity as a Unison representative was asking people as they came in if they knew about a petition about a staff member which he had on a clipboard and if they would sign it. Some agreed and some would not. There were no harsh words or people raising their voices.

6.53 Ms Rothwell prepared a report for Alison Harwood dated 23 July 2017.In it she described the claimant as having been a trade union representative over 20 years and that he dealt with local issues at the depot as a Unison trade union representative and over the last 2 to 3 years had taken on a broader role across the Place Directorate.

6.54 Ms Rothwell concluded in relation to the first allegation that it related to '*the collective grievance submitted by Unison in December 2016*' i.e. The People Solutions Collective Grievance. She went on to say at paragraph 7. 45 that: "*It is clear from the evidence submitted that it was common knowledge at the depot that the Collective Grievance have been submitted and that it related to the treatment of [name] and the culture of bullying and intimidation by depot management. It is also clear that direct knowledge of who had signed a collective grievance was limited to Lesley Arris and the Unite representatives. Those who have signed it would have had indirect knowledge in terms of observing of the signatures. It is highly likely that the signatories discussed and shared some knowledge of its content and who had signed it. It is also clear that the nature and content of the grievance was the subject of widespread gossip and speculation. This gossip and speculation were shared with Mr Leach and it would appear that Mr Leach has been party to and involved in spreading some of the misinformation that was circulating as to the nature and content of the grievance*." She went on to say:
"*Mr Leach explains his conduct as responding to his members' concerns. However, Mr Leach is a very experienced trade union representative and would have been aware of the somewhat febrile atmosphere at the depot that the collective grievance had produced. If as he stated, he believed that he, as a Driver/Team Leader was directly affected by the grievance, then he was also acting in his own self interest by seeking to challenge the legitimacy of the collective grievance. It is also possible that he was using information he obtained as a Trade Union representative to the advantage of some of its members who are directly affected by the collective grievance."*
The allegation is that Mr Leach obtained confidential information that he was not entitled to receive and that he uses for personal advantage and that he used his position by seeking information, which he did not need to carry out his duties. There is no evidence to support the view that Mr Leach had sight of the documents submitted as part of the collective grievance. However, the evidence from [Unite member 1 , the Unite shop steward and [Unite member 2] is compelling in that Mr Leach was party to and was using uninformed gossip to his own advantage in relation to speculation as to the nature and process by which the collective grievance was produced and submitted. This is in regarded (sic) by a City Council's Code of Conduct as an abuse of the use of confidential information." She recommended that the matter be considered by a stage three disciplinary hearing to consider the alleged breach of the respondent's Code of Conduct.

6.55 As far as the second allegation was concerned Ms Rothwell having referred to the injunction under the respondent's Code of Conduct that employees treat each other with courtesy and respect concluded that harassment was defined in '*the dictionary*' as '*to trouble or annoy constantly'* and the claimant's actions on 1 February 2017 were such that he was in breach of the City Council Code of Conduct to treat staff with respect and that his actions in repeatedly approaching

the individual amounted to harassment. Again, she recommended that a disciplinary hearing be convened.

6.56 As far as the third allegation was concerned Ms Rothwell described the issue of The People Solutions Collective Grievance as clear '*to protest at the treatment of [name] and to protest against the culture of bullying and intimidation towards them from REF COL management*'. She went to say The Manuscript Collective Grievance was '*equally clear, that the undersigned wish to lodge a collective grievance against the depot management for the intimidation and bullying that is present towards them*'. The fact that the former specifically mentioned the Unite member who had been transferred as one of the two issues which were the subject matter of The People Solutions Collective Grievance but The Manuscript Collective Grievance (the only document signed by employees) did not, and raised one issue namely the conduct of management appears to have passed her by. She said '*the collective grievance formed part of the terms of reference of two disciplinary investigations being carried out by Lesley Ariss'*. Those terms of reference were not included in the appendices to her report nor did she interview Lesley Ariss. The two disciplinary investigations had been identified in the Context section of the Investigatory Report as being that relating to the local manager's disciplinary investigation conducted by Leslie Ariss (which was concluded by 9 February 2017) and a '*further investigation into the conduct of the two Service Managers* ' which was '*underway*' but *'not yet complete'* . The investigating officer was not identified. Ms Arris' evidence to this tribunal was that the disciplinary investigation she undertook was into the allegations against the local manager.

6.57 Ms Rothwell described the removal of signature document as appearing '*to misrepresent the collective grievance*' in that it '*clearly questions the actions of Unite in submitting the collective grievance and suggests that those who signed it were misled as to its nature and purpose'*. Those who signed it were removing their signatures from the original thereby '*undermining the validity of the collective grievance and it forming part of the terms of reference of 'two disciplinary investigations*.**'** She then turned to the motivation of the claimant in seeking signatures for the removal of signature document. She accepted that the claimant had not continued to collect signatures after the email from Mr Share on 1 February 2017.Although she records that the production of the document was '*discussed and agreed with the regional officer'* she referred to the claimant's email to Mr Share in which he said he would pass on information to the investigating officer which she says *'can only be described as an attempt to influence the outcome of 'the disciplinary investigations* ' though she does not explain why. She said that the explanation for Unison's actions in seeking signatures for its '*counter grievance'* was '*somewhat undermined*' by the fact it was not submitted to Ms Ariss ;she observed Unison did not pass on any information about their members' concerns and no individuals contacted Lesley Ariss. However, she did not take steps as part of her investigation to obtain a signed copy of the document herself or ask Unison to provide information about

who had contacted Unison to establish what they thought they had signed and when and why they had contacted Unison. She concluded nonetheless that this undermined the claimant's rationale for his actions which was that the branch had been' *inundated with complaints and further action was required*'. The claimant did not assert in his interview with Ms Rothwell the branch had been inundated. He had described how some members had contacted him asking him if they could get their names off the petition or could he draft something that said they had signed something they were not aware of and others had contacted Shelley Francis. Nonetheless Ms Rothwell concludes that the most plausible explanation for his actions was to '*discredit and undermine the validity of the Collective Grievance submitted by Unite and hence to interfere with an ongoing disciplinary investigations'* although she accepted both that he did not draft the document and was acting in accordance with the advice of both his assistant branch officer (Ms Francis) and regional officer (Mr New). She said '*However Mr Leach is a highly experienced Trade Union Official who was best placed to judge the mood of the work force at Redfern road .He would have been aware that his actions would be viewed* (though she des not say by whom) *as a direct challenge to the grievance submitted by Unite and that by choosing to seek signatures on a day that a Unison Membership Information day was taking place was seeking maximum exposure for both Unison and his document*.'

6.58 Ms Rothwell concluded therefore that the claimant '*by his actions*' in promoting and seeking signatures for the '*counter grievance*' was potentially interfering with '*an ongoing disciplinary investigation*.' It seems to us that she wholly failed to consider the proposition that if signatures had been obtained on The Manuscript Collective Grievance through a misunderstanding by or ignorance of or misrepresentation to the signatories it would be entirely right that their names be removed and this could be done without impeding the subsequent investigation of The People Solutions Collective Grievance in any way. She did not find the claimant had interfered with a disciplinary investigation, only that his actions had the potential to do so but she made no findings about whether at the time of his actions he knew that any disciplinary investigation was underway and if so what it was about or whether any potential interference was inadvertent or deliberate. Suffice it to say the tribunal did not find the Investigation Report an impressive example of such a document.

6.59 Ms Harwood received Ms Rothwell's report on 24 July 2017. On 27 July 2017 she wrote to the claimant advising him that the disciplinary investigation had concluded. She said having considered the report and '*all available evidence'* there was a disciplinary case to answer and that he would be invited to a disciplinary hearing. The allegations against the claimant remained unchanged from those in her letter to him dated 6 March 2017.Despite the fact that she too was a senior and experienced manager and (on her evidence to us) had spent about six hours reading the report ,her evidence was that she had no concerns about its contents. She undertook no qualitative analysis of Ms Rothwell's report on the basis it was for the chair of the disciplinary hearing or the claimant to raise

any queries about it. Her letter did not inform the claimant that the allegations against him were considered to be gross misconduct.

6.60 On 13 September 2017 Ms Ariss wrote to the claimant to invite him to attend a disciplinary hearing on 10 October 2017. She said the purpose was to consider the following allegations of "*gross misconduct*":
1 That Mr Leach obtained confidential information that he was not entitled to receive and used it for personal advantage; that he used his position by seeking information, which he did not need to know to carry out his duties.
2 That by his actions, Mr Leach failed to treat others with courtesy and respect and has harassed other employees.
3 That Mr Leach has potentially interfered with an ongoing disciplinary investigation.
She omitted any reference to an allegation that the claimant was in breach of the respondent's Code of Conduct nor did she explain why the allegations were considered to amount to gross misconduct.

6.61 Mr New was not however available to represent the claimant until the beginning of November 2017, so the disciplinary hearing was rearranged for 13 November 2017. However, on 9 November 2017 Miss Ariss emailed the claimant to rearrange the hearing for the 15 or 18 December 2017 but Mr New was unavailable for either date and remained available until January 2018.

6.62 On 7 November 2017 Mr New wrote to Jacqui Kennedy on behalf of the claimant to ask her to intervene in his case. He said "*I am very clear that John faces disciplinary action directly as a result of him carrying his trade union duties for UNISON. He was acting under the guidance of the UNISON Assistant Branch secretary, Shelley Francis. Both activists had rightly taken advice from Caroline Johnson,UNISON Branch Secretary and from me as a Regional Official. The actions that John undertook were intended specifically to represent what he saw as the interests of his members and the Union. I acknowledge that with hindsight the Union might have acted differently in regards to the specific situation and I furthermore would be happy to have that discussion outside of the disciplinary process with a view to avoiding the development of similar situations going forward.*
If the City takes any kind of disciplinary action the Union will regard it as the individual victimisation of an activist carrying out actions on a collective basis and will seek redress with a claim to the employment tribunal. I refer you to the case FW Farnsworth Ltd v McCoid (1999) IRLR.
Furthermore, the UNISON branch may move to seek to defend John by registering a trade dispute and balloting for industrial action. I am sure you appreciate that this is not what the Union or the City wants at this sensitive time for industrial relations in Fleet and Waste and across the City.
The matter is also unusual in that it arises out of complaints about John's actions in response to a collective grievance submitted by another trade union, Unite. Despite my requests to allow UNISON to address's actions in discussion with the

other union, the City is proceeding to single out John for what is a collective action in response to another collective action. The original collective action by Unite involved UNISON members and the union had to act to understand and represent those members. John acted on behalf o (sic) the Union." He went on to raise a number of what he described as "*procedural irregularities*" in the way the matter had been dealt with.

6.63 On 14 December 2017 Dawne Baker (the claimant's trade union representative) raised a written grievance on his behalf. The first point she raised was that of detriment related to trade union membership or taking part in trade union activities under section 146 TULR (C) A. Ms. Baker said "*UNISON is absolutely no doubt that John is facing disciplinary action as a direct result of him carrying out his trade union duties. Furthermore, his actions were under the guidance of senior officers within the Birmingham UNISON Branch*.' She described the claimant as "*a very well respected and effective UNISON representative who regularly has to challenges management team in order to defend the terms and conditions of his members and also to protect their health and safety whilst at work. This has made him extremely unpopular with certain managers who he believes have led the disciplinary action currently facing him. It is also worth pointing out that no statements were taken from UNISON members during the investigation into John's case.UNISON members would have been able to corroborate John's trade union duties and therefore verify his version of events.'* It was no coincidence that,*" UNISON members have been excluded from the investigation*." She too complained of numerous procedural irregularities in particular she pointed out that the Unite convenor had answered a large proportion of questions on his members' behalf. However, the investigating officer had not raised any objections to this which demonstrated flaws in the way the investigation was carried out. Ms Baker also said that "*Given that it was [*the Unite convenor*] who submitted the complaint which led to the case against John; this could be construed as him interfering with the investigation*." She went on to say that the claimant wanted to challenge the statements but had been told by the presenting officer that the witnesses would not be called at his hearing. She said this was denying him the right to question witnesses about their statements which was' *completely unfair'*. She referred to Mr New's letter to Jacqui Kennedy dated 7 November 2017 in which he had "*attempted to resolve these matters*." She said that as the claimant's grievance related to flaws in the disciplinary procedure and the motives behind bringing the disciplinary hearing she requested the suspension of the disciplinary process until the grievance was fully investigated and that it be investigated by a senior manager from another directorate with no previous involvement in the claimant's case.

6.64 No investigation into the claimant's grievance took place.

6.65 On 18 January 2018 the claimant emailed his Operations Manager to ask for his (2 day per week) union facility time to revert to refuse collection duties,

having informed Unison members he would be ‘*standing down* ‘as trade union representative.

6.66 Mr Share (who described himself in the letter as Commissioning Officer following the departure of Alison Harwood) wrote to the claimant on 9 April 2018 in response to his grievance and said that as its contents appeared to relate to the application of the respondent’s disciplinary procedure, arrangements were being made for to be considered as part of that process, “*that is the matter will be heard at the rearranged disciplinary hearing. I will therefore ensure that the chair of the hearing has the relevant copies of the document.*”

6.67 On 12 March 2018 the claimant emailed the respondent to give his new address from 15 March 2018 and ask for an answer to his transfer request to the Perry Barr depot and was told by return of email this would be followed up with the Operations Manager the next day. His request was initially turned down because of the need to find a replacement driver for his round first but was agreed once the Service Managers found someone to replace him .The transfer took effect in April 2018.His change of address meant the Perry Barr depot was more convenient for him. He had expressed the view in his email to the respondent dated 18 January 18 2018 that he might have to look at his position at Redfern because of a ‘*strange atmosphere’* between the workforce and was told by return that if he felt a move (temporary or permanent) would be beneficial he should let the respondent know.

6.68 On 26 March 2018 Claire Ward told Russell Johnson that Unison had confirmed the claimant was no longer a trade union representative.

6.69 Mr Crump’s letter to the claimant dated 11 April 2018 invited him to a disciplinary hearing on 26 April 2018 and reinstated the allegation of the alleged breach of the respondent’s Code of Conduct. It also told him his grievance would be considered as part of the process and that the hearing would be chaired by Mr James.

6.70 On 16 April 2018 the claimant presented his claim to the Employment Tribunal.

6.71 The disciplinary hearing eventually took place on 6 June 2018. The claimant was represented by Dawne Baker. Mr James heard the claimant’s grievance on that day. He undertook no further investigation into the matters raised. Mr James is a very long serving and highly experienced member of senior management with a BA Honours degree in Government and Politics. He had held a number of senior management roles as a result of which he has gained experience of working with trade unions and their representatives. Although he subsequently went on to determine the disciplinary allegations against the claimant and had therefore evidently decided that (despite its subject matter) it had no impact on them he did not announce his decision about the grievance at the hearing itself

or explain why he had reached that conclusion. We did not find Mr James' oral evidence that he had nonetheless first determined the grievance and resolved that it would not quash the disciplinary against the claimant credible.

6.72 The disciplinary hearing then proceeded on 8 June 2018. Mr Crump (who had hitherto been the HR technical advisor appointed to assist Ms Rothwell) presented the management case supported by Jill Rothwell. Mr Share had been asked to attend as a witness by Jill Rothwell. When asked about the meeting on 14 February 2017 and how the formal disciplinary decision had been arrived at Mr Share's oral evidence was he had spoken to Ms Ariss and they had decided that there was enough evidence to warrant '*a formal disciplinary'*. He was asked by Ms Baker how the claimant could have known that there was an ongoing investigation and replied that he had told him he was interfering with an ongoing investigation when he spoke to the claimant at Redfern. In contrast to what the Unite Member 1 had told Lesley Arriss and Ms Rothwell during their investigation meetings with him he told Ms Rothwell at the disciplinary hearing he had felt harassed intimidated and pressurised, commenting he was in Unite and the claimant was in Unison. He confirmed he had not made a complaint and Mr Share confirmed he had approached Unite Member 1 after getting the Unite convenor's email. When questioned by Ms Baker, Unite Member 1 replied he could not remember to 12 out of the 20 questions she posed. The Unite steward reiterated the evidence he had given to Ms Rothwell. The investigation meeting notes made by Ms Arris on 13 February 2017 were not contained in the disciplinary pack, so neither the claimant nor Mr James were in a position to challenge any specific inconsistencies. However, Ms Baker did not put to Unite Member 1 on the claimant's behalf that he was mistaken or lying in his account of his interactions with the claimant. Unite Member 2 said he had raised his voice in his conversation with the claimant and confirmed he had not been pressurised by the claimant to sign the removal of signature document and said the claimant had approached him as union representative for one of the managers and was trying to get names removed to help his friend who was a manager.

6.73 The hearing then had to be postponed because the Unite steward would not continue without being accompanied by the Unite convenor as his representative. It resumed on 10 September 2018. By this time Jill Rothwell was not well enough to attend. The Unite steward attended and seven other witnesses attended on behalf of the claimant. At the conclusion of the hearing Mr James told the claimant he would notify him of his decision within a week.

6.74 However it was not until 4 October 2018 that Mr James sent an email to Dawne Baker to which he attached the outcome letter of the same date. He had not written to the claimant to tell him there would be a delay in the provision of the outcome due to pressure of work at the time.

6.75 The letter failed to deal with the claimant's allegations in his grievance about trade union activities; it addressed only the procedural complaints

Mr James' witness statement provided no explanation for having not addressed the claimant's allegations about trade union activities and did not explain what conclusions he had reached from the evidence he said he had carefully considered or why he had decided to impose a final written warning other than to say he had accepted the claimant was a long serving employee and that there had been no further incidents in the time taken to reach the outcome to the process. We find that Mr James simply ignored the claimant's grievance as far as trade union activities were concerned. It was the 'elephant in the room.'

6.76 In the absence of clear witness evidence the tribunal therefore turned to his letter of outcome to ascertain the basis Mr James had reached his decision. In the letter of outcome Mr James said he decided that the first allegation was '*partially upheld'* .He said: "*There is some question as to the confidentiality that was applied to the information relating to the collective grievance and associated matters. I accept that over time the information was probably shared from a number of sources. I heard evidence that you have indicated to colleagues that the original grievance was related to wider management including Drivers and Team Leaders, the group of staff of which you are a member. I also heard evidence that you had approached people directly about the document for which she was seeking signatures. I am concerned that you would appear to have been party to and involved in spreading some of the misinformation that was circulating as to the nature and content of the grievance.*
I also accept that you were an experienced trade union representative and that you would have been aware of the atmosphere at the Depot. I would therefore have expected you to try to address matters in a more conciliatory manner than that which you adopted."

6.76 Mr James then addressed the second allegation which he decided was upheld. He said "*I have taken the view that irrespective of the number of staff who you may have felt were distressed the fact remains that I was presented with evidence that supports the allegation. In respect of the witnesses presented on 10 September 2018, while I have no reason to believe they would not tell the truth, it is unfortunate that their evidence was not available earlier and I therefore prefer the evidence of the witnesses who were prepared to support an independent investigation at a time that was close to the incident. These witnesses confirmed that they felt harassed by you with specific evidence from [Unite Member 1] confirming that you had approached him on a number of occasions and had persistently and repeatedly asked to sign a counter document and that you have referred to him as a "a sheep and a follower". [Unite Member 1] stated that he had felt harassed, intimidated and pressured by you. Other witnesses confirm that people have felt intimidated and that they had not been treated with courtesy and respec*t."

6.77 As far as the third allegation was concerned it too was upheld. Mr James said "*There was an investigation into the treatment of an employee that resulted in a number of the disciplinary investigations. The counter grievance had the*

potential effect of undermining due process, as ineffective called into question the basis upon which they have commenced. However, in mitigation I accept that you did not produce the document but you did willingly circulate this document and as indicated in allegation 2 staff felt that you harassed, intimidated and pressured them into signing this counter grievance. I am disappointed that as an experienced trade union representative you have a rapport with management and was experienced in approaching management with this use on a regular basis that you did not simply raise your concerns directly with management at the time. In addition, the failure to respond to request of the relevant information at the time was compounded this matter. I am also concerned that you indicate that this relates to a lack of trust and confidence in management colleagues. It was raised in the hearing that your motivation behind this act was the real matter of dispute and your comments related to trust and confidence support. Based on the information presented I find that your motivation behind your actions was to interfere with due process."

6.78 Lastly Mr James turned to the fourth allegation. He found it partially upheld. He said "*The confidential nature of the information and what was shared by whom is in dispute. However, I find that you were party to and engaged in uninformed gossip to your own advantage in relation to speculation as to the nature and process by which the collective grievance was produced and submitted. You are a Driver/Team Leader and were suggesting to colleagues that this group were included. It is therefore reasonable to conclude in accordance with the City Council's Code of Conduct that this was an abuse of the use of confidential information as I heard evidence that supported that you that discussions between trade unions were considered to be confidential.*
I also find you breached the following General Principles of the Code of Conduct:
Integrity*-by your actions you placed yourself in a situation where you compromised your position.*
Accountability*-you have not taken accountability of your actions and failed to acknowledge the impact of your actions on others.*

1. ***Leadership****-you were an experienced trade union representative and also a Driver/Team Leader and would therefore be expected to lead by example. By your actions in this situation you have not acted appropriately and you have failed to lead by example.*

Respect*-based on my findings to allegation 2 you have failed to treat others with respect*." He then turned to the sanction to be imposed and said that "*Gross Misconduct" was a consideration in this matter*". However accepting the claimant's long service and that there had been no further incidents he decided to issue the claimant with a final written warning. We observe that the breaches of the Code of Conduct he found proven do not feature in Ms Rothwell's Investigatory Report and appear to be entirely new.

6.79 The disciplinary policy provides that after a disciplinary hearing the chair of the hearing "*may share the decision at the end of the hearing and will confirm it in writing without unreasonable delay setting out the nature of the misconduct (if*

found), the required change in behaviour, how long any warning will remain current, the consequences of further misconduct and the employee's right to appeal against the decision.' Final written warnings remain live for 24 months from the date of issue. Mr James' letter of outcome gave no guidance to the claimant as to the required change in behaviour going forward.

6.80 When the tribunal sought to explore his reasoning and on what evidence it was based as set out in his letter Mr James' evidence became very unclear and lacked credibility .He professed understanding of the import of each of the allegations against the claimant despite their manifest want of detail. We found this inexplicable in a manager of his experience and seniority. His evidence was that he had received advice in the drafting of the letter from HR though he could not remember from whom and we infer that HR played more of a part in its contents and the reasoning contained in it than he was willing to admit. The one thing he was clear about (albeit under re-examination) was that the evidence of Unite Member 1 had been important and integral to his decision to issue a final written warning to the claimant. We find on the balance of probabilities that what made him issue that warning was the claimant's conduct as set out in paragraph 6.76 above.

6.81 Mr James also dealt with the disciplinary cases which had been initiated against the Redfern managers (also Unison members) and also issued to them a final written warning of two years duration.

6.82 On 8 October 2018 the claimant sent an email to Claire Ward in which he said he wished to appeal though he had not yet been informed '*officially*' of the outcome and would give the grounds of appeal when he saw the 'official 'outcome letter.

6.83 Mr Crump wrote to the claimant on 14 November 2018. He explained that the outcome letter had not arrived at the claimant's address because the letter was not franked. He noted however from the claimant's email dated 8 October indicating his intention to appeal the outcome that the claimant had attached a copy of that letter which had been sent to him by email within 30 minutes of being dispatched from Mr James' office. He asked that any further information to support the claimant's appeal be sent by the methods contained in the outcome letter no later than 23 November 2018. If further assistance was needed the claimant should contact him. Mr Crump extended the deadline to 30 November 2018 but on that date the claimant emailed him to say "*I wish to not forward anything prior to my appeal as it may have an impact on my tribunal, but I would like you to forward to my rep all the notes from my hearing, the investigation dates from start to finish that were carried out by Lesley Ariss (including preliminary investigations) as we were promised regarding the other staff, also the notes of the investigation that was conducted regarding Martin Rafferty, who appointed the external investigator and when*." The claimant accepted under

cross examination that he had received the outcome letter on 12 November 2018.

6.84 Mr Johnson's oral evidence to the tribunal (which we accept) was case numbers were not invariably given to investigations and that the respondent did not offer mediation when there were allegations of gross misconduct and that in those circumstances the claimant's expectation that mediation would be offered by the respondent was unrealistic .

6.85 The claimant's witness statement contained no evidence about the alleged inaccuracies in any notes of the disciplinary hearings nor was he able under cross examination to identify any inaccuracies. He said Dawne Baker had taken this up with Mr James but he had done nothing about it .However he did not challenge Mr James about this in cross examination. We find there were such no inaccuracies.

6.86 As we found in paragraph 6.72 above the claimant's representative did not challenge the veracity of the individuals who gave evidence at his disciplinary nor did the claimant do so in his witness evidence although he had denied approaching anyone at his investigatory interview with Ms Rothwell. It was not until he was cross examined that he robustly and unequivocally accused all the individuals of lying and described their evidence as a pack of lies and asserted he had only approached Unison members. He said he did not and would not have approached Unite Member 1about the removal of signatures document and as far as he was concerned that individual had not signed it. It was put to him that it would have been straightforward for Dawne Baker to refute that individual's evidence by producing the removal of signatures document which would not therefore have that individual's signature on it. He was unable to shed any light on the whereabouts of the removal of signatures document had gone save to say he believed Shelly Francis had it. We accept her evidence that she gave it to Ms Baker. The claimant has gone to strenuous efforts to obtain and put before the tribunal relevant documentary evidence .This is a document which contained relevant evidence on an important point which the claimant could have obtained without apparent difficulty. In those circumstances, his failure to do so in our judgment entitles us to draw an adverse inference about the claimant's credibility as far as his denial he had approached the individual concerned and got him to sign the document in question is concerned.

6.87 There are nonetheless a number of inconsistencies in Unite Member 1's evidence in the investigation meeting with Ms Ariss Ms Rothwell and at the disciplinary hearing. However in our judgement the version of events he gave to Mr Share on 7 February 2017 and Ms Arris on 13 February 2017 is to be preferred because they are the closest to the events in question. We find on the balance of probabilities that on 1 February 2017 the claimant attended at a Unison membership campaign day in the foyer at Redfern standing near a manned Unison stall .He did not know who had signed The Manuscript

Collective Grievance. He had with him the removal of signatures document and took the opportunity to ask people who passed if they would sign it. He had been given the task of securing signatures to that document which had been drafted by Ms Francis .No instructions had been given to him about how to go about it although it was expected he would approach Unison members. He approached Unite Member 1 and said he had to sign the removal of signature document .He approached him again in the office and told him the collective grievance had not been worded correctly and the removal of signature document was the new one to be signed. Unite Member 1 declined and left the office .He followed the Unite Member 1 and again asked him to sign it .He had refused again and the claimant called him a sheep and a follower. The claimant asked him again to sign it in the locker room and this time he did so and had felt pressurised but not intimidated by the claimant. The claimant also asked Unite Member 2 on that day if he had signed what he described as a petition .Unite Member 2 said it had been a grievance. He had asked Unite Member 2 to sign the removal of signatures document which he said he had been tricked into signing and he had refused. He was neither pressurised nor intimidated by the claimant and had raised his voice in his conversation with him. Unite Member 1 and 2 had thought he was acting as a Unison representative when he approached them.

The Law

7 Under section 146 Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR (C) A'):

'(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, . . .

(ba)preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, '

8 The time limits for proceedings are set out in section 147 TULR (C) A. They provide that:
' An employment tribunal shall not consider a complaint under section 146 unless it is presented—

(a)before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them , or

(b)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

(2) For the purposes of subsection (1)—

(a)where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

(b)a failure to act shall be treated as done when it was decided on.

(3) For the purposes of subsection (2), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—

(a)when he does an act inconsistent with doing the failed act, or

(b)if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.'

9 In **Arthur v London Eastern Railway Ltd [2006] EWCA 1358** it was held the claimant must show that there is some relevant connection between the acts within the three month period and those outside it which makes it just and reasonable for them to be treated as in time and for the claimant to be able to rely on them, the necessary connections being they were part of a 'series' and that they were acts which were 'similar' to each other. It is possible depending on the facts, for 'a series of apparently disparate acts' to be " shown to be part of a series ought to be similar to one another in a relevant way by reason of them all being on the ground of (what was in that case) a protected disclosure. In order to determine whether there is any link between the acts occurring within the 3 month period and those occurring outside of it, it is necessary for a tribunal to hear evidence and make findings of fact about the acts or failures in question. All the circumstances surrounding the acts should be looked at, including the connection, if any, between the alleged perpetrators, whether their actions were organised or concerted in some way, and their reasons for doing what was alleged. Furthermore, for a claim to be in time, the act or failure to act from which time begins to run must be actionable i.e. the act or deliberate failure must be proved to have been done for the main or sole purpose of preventing or deterring trade union activities. In the case of **Royal Mail Group Ltd v Jhuti UKEAT/0020/16** (again a case of whistleblowing detriment) SimlerJ said "*In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s 48 (3) (a) ERA. Acts relied on but on which the claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant to these purposes*."

10 Under section 148 (1) TULR (C) A it is for the employer to show what was the sole or main purpose for which he acted or failed to act. However, it is necessary for a claimant to advance some evidence which brings the issue of the respondent's purpose being trade union activities into play by showing there are matters requiring investigation which could establish that was the purpose. If he/she does so and the respondent fails to show its non trade union purpose the tribunal will determine what the real purpose was for its acts or failures which could be neither what the claimant nor the respondent argued for.

11 '*For the purpose of* 'has been held to connote an object which the employer desires or seeks to achieve **(Department of Transport v Gallacher [1994] ICT 967).** Tribunals must distinguish between the purpose and the effect of the employer's action.

12 It is a question of fact for the tribunal whether an act can fairly be described as an activity of a trade union, but it must specify the conduct concerned. It is also a question of fact for the tribunal whether an employee's activities were in some sense done for and on behalf of the union or whether he was acting independently on his own account. They do not have to be activities which have been organised by the trade union.

13 In **Morris v Metrolink Ratpdev Ltd [2018] EWCA Civ 1359** Underhill LJ reviewed the case law in relation to section 152 (unfair dismissal). He said at paragraph 19 "In my view the principle underlying these cases is-as so often-most clearly stated by Phillips J. If Slade J in *Mihaj* intended to suggest that there was some difference between his approach in *Lyon* and that taken by this Court in *Bass Taverns* I would respectfully disagree. 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 the 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 which 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) reason for the dismissal but some feature of them which is genuinely separable. *Azam* is a good illustration of such a case: the employee' 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." He went on to say at paragraph 20: "However, as Phillips J points out, this distinction should not be allowed to determine the important protection which the statute is intended to confer. An employee should not lose that protection simply because something which he or she does in the course of trade union activities could be said to be ill judged or unreasonable (NB that Phillips J, I am

sure deliberately, says "*wholly unreasonable"). Bass Taverns* is a good illustration of this: the employee was held to fall within the scope of the section even though he had gone "over the top." He also said at paragraph 40: "I accept Mr Khan's reminder that the Court must be astute not to find that the *Lyon/Bass* line has been crossed wherever there has been an error of judgement 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."

14 Paragraph 30 of the ACAS Code provides that "Where disciplinary action is being considered against an employee who is a trade union representative the normal disciplinary procedure should be followed. Depending on the circumstances, however, it is advisable to discuss the matter at an early stage with an official employed by the union, after obtaining the employee's agreement." A failure to follow the Code does not, in itself, make a person or organisation liable to proceedings. However, tribunals take the Code into account when considering relevant cases. Tribunals are also able to adjust any awards made in relevant cases by up to 25% for unreasonable failure to comply with any provision of the Code.

15 The ACAS Guide which accompanies the Code (but is not part of it) says that although normal disciplinary standards apply to their conduct as employees, disciplinary action against a trade union representative can be construed as an attack on the union if not handled carefully.

16 We remind ourselves it is the act of which complaint is made and no other that the Tribunal must consider and rule upon. It the act of which complaint is made is found to be not proven, it is not for the tribunal to find another act of which complaint has not been made to give a remedy in respect of that other act **(Chapman -v- Simon [1994] IRLR 124).**

17 In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL** it was held that in order for a disadvantage to qualify as a 'detriment', it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance will not be sufficient to constitute a detriment.

Submissions

18 Mr. Meichen made succinct oral submissions. He did not refer the tribunal to any relevant authorities. He submitted there was one fundamental point: was the claimant being penalised for taking part in trade union activities when he was disciplined by the respondent? When he had approached Unite members, he did so outside of legitimate trade union activities and crossed the line into serious

misconduct. The evidence the tribunal had heard from Unison witnesses was that if he had been approaching Unite members that was not a trade union activity. It was their expectation he would approach Unison members not approaching Unite members and pressurizing them. That was not the purpose of the removal of signatures document when it had been drafted. The way the claimant got the document signed went outside what Unison activists expected it to be used for and that was relevant to whether he was taking part in trade union activities.it was a plain indicator that the claimant was acting outside trade union activities that they would expect the respondent to take action. The respondent's purpose in talking disciplinary action and issuing the disciplinary warning was not to penalize him for taking part in trade union activities but for clear misconduct .He referred us to the evidence of Unite Member 1 which was integral to Mr. James ' decision to issue such a warning.

19 The tribunal inquired where it was pleaded in the respondent's response that the claimant had not been taking part in trade union activities because of the way he carried them out. Mr Meichen referred the tribunal to paragraph 40 of the response which read as follows:
"*The decision to commence disciplinary proceedings against the Claimant has nothing whatsoever to do with his participation in trade union activities but solely relates to the Claimant's alleged misconduct [gross] and for contravening the Respondent's policies and standards of behaviour is expected under the Respondent's Code of Conduct; this is unconnected to his trade union activities*."
We did not find that a persuasive submission.

20 He submitted the claimant had not established a prima facie case that the acts or failures complained of were committed for a proscribed purpose. The evidence was that the sanction had not been imposed for legitimate trade union activities; he had gone outside what he was authorised to do. Unison witnesses had said if he had done that, it was nothing to do with them. The tribunal inquired whether what was being submitted was akin to an argument that an employee was not acting in the course of his employment; the claimant was not acting in the course of his Unison trade union duties. Mr Meichen agreed and said if so, how could a tribunal conclude anything other than this was his own responsibility and outside trade union activities?

21 He then turned to the tribunal's fact-finding task. The claimant had denied what he did. However what mattered was the respondent's purpose in acting as it did -it acted on the evidence before it so its purpose remained the same -to penalise him for the misconduct believed to have taken place .The claimant's last minute denial of the allegations was incredible. There was a clear and substantial body of evidence about what the claimant did; the Unite convenor's contemporaneous evidence and that of Unite Member 1 in the interview with Lesley Arris on 13 February 2017 and to Jill Rothwell and what was said to her by the Unite steward Unite Member 1 and Unite Member 2 which was repeated at the disciplinary hearing. This was clear evidence that the claimant had

approached them and acted as described. The claimant put forward no credible reason why they would lie. He said it was a 'pack of lies' but he did not challenge the evidence at the hearing at all. There was a very late development in the claimant's case about the removal of signatures document. It was within the claimant's gift to expose Unite Member 1 as a liar because he had the evidence. It was mysterious where it had gone; it was either in his possession or that of his representative but either way it had not been produced. The three Unison witnesses did not accuse the Unite witnesses of having lied; they did not seem to know that that was what the claimant was saying had taken place.

22 As far as those factual allegations which remained in issue were concerned, he submitted that only two were of substance: the commencement of the disciplinary procedure and its outcome. The rest were a series of procedural complaints which did not fit well in such a claim as this which (he reminded the tribunal) was not of unfair dismissal. The claimant had to show a prima facie case in relation to those allegations and had failed to do so. He selected as an example 2.1.7 above - there was no prima facie case. The purpose (to remove any suspicion of collusion) was clear. The exception was 2.1.13 above the transfer which stands alone and outside the disciplinary process. There was not much evidence about it and it was not addressed in the claimant's witness statement but what evidence there was showed the claimant was moving house in March 2018.He transferred in April 2018 and it is therefore difficult to see what detriment he suffered .If the request was made in December 2017 there is no evidence to show it was for a proscribed purpose. The evidence about the lack of appeal had not emerged before this hearing. He made no specific submission about the application of time limits.

23 The claimant chose to make his submissions in writing (22 pages).

Conclusions

24 Although it seemed to us it would have been open to the respondent to have contended that events which post-dated the presentation of the claim ought properly to have been the subject of an amendment application in the absence of which they are not part of the claimant's case, Mr Meichen made no such submission from which we have assumed the respondent has no objection to their inclusion and we have addressed them in our conclusions.

25 Issue 2.1.1, 2.1.2 and 2.1.3 .We have concluded on the balance of probabilities that Mr Share and Ms. Ariss together decided that disciplinary action should be commenced against the claimant on 13 February 2017. In our judgment Ms Harwood's role as Commissioning Officer was that of form not substance. She was used to formalise the ventilation of the allegations about the claimant and obscure the part Mr Share had played in this. The taking of disciplinary action is capable of causing detriment if it was not justified or made for an ulterior motive. We acknowledge there was no complaint made by the

Unite Member 1 but Unite did put its concerns about the claimant in writing on 1 February 2017 and on 13 February 2017 Unite Member 1 was interviewed by Ms Arriss and notes were made of what he alleged the claimant had said and done. The claimant was made aware of the concerns raised by Unite in his phone call with Mr Share and their meeting in the corridor on 3 February 2017. We acknowledge there was no preliminary investigation carried out after 14 February 2017 despite the agreement at the meeting on that date that there would be one. The disciplinary policy does not require that if a complaint is made it has to be done in any particular way or that any preliminary investigation is carried out before disciplinary action is commenced. However there is no evidence before us from which we could conclude that the respondent's failure to act in this regard was a deliberate one and the claimant has failed to prove that commencing disciplinary action without an official complaint or preliminary investigation caused him any detriment whatsoever.

26 Issue 2.1.4 The allegations against the claimant were both vague and unclear. However the claimant did not have to deal with such allegations in the sense of being compelled to do so by the respondent. He was an experienced trade union representative and was himself represented at the investigation grievance and disciplinary hearings .There was no evidence of any request for clarification of the allegations being made or of any impediment on his ability (or the ability of those who represented him) to do so. He did not seek a postponement but participated in all of the meetings he attended. The claimant has failed to prove the respondent acted as alleged.

27 Issue 2.1.5 It was not confirmed to the claimant that he was under investigation until 3 April 2017 but this could not have come as a complete surprise to him after the discussions at the meeting on 14 February 2017. There was no evidence that the delay in providing confirmation of the position until 3 April 2017 was a deliberate failure to act by the respondent; Ms Harwood had sent him the letter of 6 March 2017 and was not aware it had not been received.

28 Issue 2.1.6 The respondent did not offer mediation to the claimant but there was no evidence that this was a deliberate failure to act by the respondent or that it caused any detriment to the claimant.

29 Issue 2.1.7 the claimant was subject to investigation by Jill Rothwell who was not employed by the respondent but the claimant has failed to prove that this caused any detriment as alleged.

30 Issue 2.1. 8 Ms Arris undoubtedly played several roles during the long drawn out disciplinary procedure against the claimant but she was not the investigation officer .The claimant might have preferred that there be an internal investigation officer from a different directorate but as we have already concluded in paragraph 28 above he has not proved the appointment of Jill Rothwell placed

him at any disadvantage as alleged nor has he proven that Ms Arris' subsequent roles as presenting officer and witness, was in any way to his disadvantage.

31 Issue 2.1.9 Mr Share was not an investigation officer. He was Commissioning Officer after Ms Harwood's departure officer and a witness at the disciplinary hearing (at the request of Jill Rothwell) but the claimant has not proved that this caused him any detriment.

32 Issue 2.1.10 The claimant has failed to prove that the respondent's human resources Department was not neutral as alleged .Mr Crump became presenting officer by necessity after the ill health of Ms Rothwell and Russell Johnson was not a presenting officer at all.

33 Issue 2.1.11 The claimant was not given a case number for his investigation but there is no evidence that there was a deliberate failure to do so and the claimant has failed to prove that this caused him any detriment.

34 Issue 2.1.12 We conclude on the balance of probabilities that the claimant did not make a request to be transferred in in December 2017; his request was made on or around 12 March 2018, precipitated by his move to a new address and was granted when the respondent was in a position to facilitate it.

35 Issue 2.1.13 The claimant was not been given an appeal by the respondent because he chose not to provide any grounds for it. There is no evidence of any deliberate failure to act by the respondent in this regard.
We conclude the investigation and disciplinary process were not carried out within a fair and reasonable timescale; however there is no evidence that this was a deliberate failure to act on the part of the respondent.

36 Issue 2.1.14 The claimant may feel dissatisfied with the support he had received and that he should have been kept informed of the delays and the reasons for them; however there is no evidence of any such deliberate failure to act by the respondent.

37 Issue 2.1.15 and Issue 2.1.16 We have found the notes of the disciplinary hearing were not inaccurate and that the claimant received the outcome letter on 12 November 2018.

39 Issue 2.1.17 We have found the claimant was given a written warning effective for 2 years as a result of the disciplinary process. It goes without saying that the imposition of such a warning would cause detriment to the claimant.

40 We accept Mr Meichen's submission that in relation to Issues 2.1 2 to 2.1.11 and Issues 2.1. 13 (in relation to delay only) and 2.1.14 the claimant has failed in any event to advance any evidence whatsoever to bring the issue of the respondent's purpose being trade union activities into play.

41 However in relation to Issue 2.1.1 in our judgment the claimant has discharged that burden. Mr Share initiated no action as far as Mr Rafferty or the manager referred to in the complaints made by Unite even though they were of a similar nature to those made against the claimant. The only material difference was that unlike the manager and Mr Rafferty the claimant was a trade union representative. It indicates the claimant was being singled out for this reason. The suggestion that as an alternative to suspension (which was resisted by his representative) the claimant be removed from his trade union duties came from the respondent and the terms of reference drafted by Ms Arris state that such a decision had been taken. They almost immediately focused on the removal of the claimant from his trade union duties if he was not to be suspended.

42 Mr Share and Ms Arriss did not address in their witness statements why they decided to commence disciplinary action against the claimant on 13 February 2017 .We conclude that the respondent has failed to show their sole or main sole or main purpose was not to deter the claimant from taking part in Unison's activities at an appropriate time .Mr Share was not even handed in his approach to the two unions whose relationship was known by Mr Share to be fractious at this time ; no steps were taken to investigate let alone take disciplinary action in relation to the allegations raised by Ms Francis that Unison members were cajoled and bullied into signing the Manuscript Collective Grievance in the first place. Mr Share did not want to inflame an already difficult situation between the unions when the situation at Redfern was complex and tense and decided to throw his weight behind Unite by ensuring that in the short term at least the claimant was removed as a source of conflict by being subject to the initiation of disciplinary action. Ms Arris and Mr Share were conveniently pointed in the direction of Unite Member 1 by the Unite convenor and having got what they regarded sufficient evidence from him to warrant the decision to commence disciplinary action acted immediately, giving the misleading impression that a preliminary investigation would then ensue when it had already taken place.

43 In relation to Issue 2.1.17 in our judgment the claimant has again discharged the burden on him. The contents of the letter of outcome dated 4 October 2018 alone with its references to the claimant being an experienced trade union representative who was expected to address matters in a conciliatory manner and to lead by example and the expression of disappointment that he had failed as such a representative to approach management with his concerns at the time indicate that Mr James had the claimant's activities as a trade union representative at the forefront of his mind when reaching his decision. Further the unexplained lack of any indication (in breach of the disciplinary policy) as to the required change in behaviour going forward tends to show that the purpose of the warning was penal rather than to genuinely provide guidance and secure a desired change.

44 We conclude that the respondent has failed to show Mr James' sole or main purpose in issuing to the claimant a written warning effective for 2 years as a result of the disciplinary process was not to penalise him from taking part in the activities of an independent trade union at an appropriate time but for conduct unconnected with those activities. In our judgment on 1 February 2017 the claimant was acting for and on behalf of Unison. He was attending a Unison membership day and as Mr New said in his letter to Jacqui Kennedy was acting under the guidance of Ms Francis. He had not drafted the removal of signatures document himself .It was provided for him. The claimant did not confine himself to securing the signatures of Unison members. We have no doubt that in approaching Unite Member 1 and 2 he was not acting as he was expected to do by Mr New and Ms Francis and that there was an element of tit for tat in his doing so, because he was irritated that as he understood it Unison members had signed a misleading document following a meeting to which Unison representatives were not invited and concerned about what this might mean for those Unison members who were managers. He was guilty of persistence (but not intimidation) in his pursuit of Unite Member 1 and disrespectfully cast doubt on his independence of thought and action. Unite Member 2 was not in the least intimidated by the claimant. Even they thought he was acting as a trade union representative. In our judgment the claimant acted in an ill judged way on 1 February 2017 but he could not be said to have acted wholly unreasonably extraneously or maliciously such as to amount to a feature of his trade union activities which was genuinely separable. The conduct for which he was punished was inextricably linked with his trade union activities as a trade union representative. We conclude that the claim in relation to Issue 2.1.17 succeeds.

45 However the decision to take disciplinary action against the claimant was taken in February 2017 and is manifestly out of time having regard to the date of presentation of the claim. The claimant has not provided any evidence of connection between the decision of Mr James on 4 October 2018 to impose a final written warning of two years and Mr Share and Ms Arriss' decision to take disciplinary action against him on 13 February 2017 ; the decisions were taken by two different people and there is no evidence on which we could conclude or infer that they colluded with each other or that their actions were organised or concerted in some way. The claimant put forward no evidence that it was not reasonably practicable for him to have presented a claim in relation to Issue 2.1.1 in time. He is an experienced trade union representative and was of course represented by Unison at all material times. That claim is therefore dismissed because it has been made out of time.

46 The parties have 28 days to agree remedy in relation to issue 2.1.17 .If they are unable to do so there will have to be a remedy hearing.

Signed by: Employment Judge Woffenden
Signed on: 23 September 2019

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