EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Embery	**v**	Fire Brigades Union

Heard at: Norwich

On: 22, 23, and 24 February 2021
25 February 2021 (Discussion Day – no parties in attendance)

Before: Employment Judge Postle

Members: Ms E Deem and Mr K Mizon

Appearances
For the Claimant: In person
For the Respondent: Mr O Segal (QC)

RESERVED JUDGMENT

1. The claimant was an employee of the respondent.

2. The claimant was unfairly dismissed under the Employment Rights Act 1996.

3. The claimant does have philosophical belief in National Independence under the Equality Act 2010, but the claimant did not suffer a detriment in being dismissed for that belief.

REASONS

1. There are claims for ordinary unfair dismissal under the Employment Rights Act 1996, the respondents defend this claim on the grounds the claimant was not an employee of the respondents but an elected member of the respondent's Executive Council and in fact employed by London Fire Brigade who was on full time release from his firefighting duties to the Union. There is also a claim under the Equality Act 2010 for the protected

characteristic of having a philosophical belief and his dismissal was for that reason, the philosophical belief being national independence. Again the respondents defend this on the grounds that national independence is not capable of constituting a philosophical belief.

2. The respondents will also say even if the Tribunal determine the claimant was an employee the reason for dismissal was conduct and had nothing to do with any alleged protected characteristic, namely believing in national independence.

3. In this Tribunal we heard evidence from the claimant through a prepared witness statement.

4. For the respondents we heard evidence from:-

   4.1 Miss D Christie a fire fighter in the Scottish Fire and Rescue Service and one of the delegates to the FBU Recall Conference at Blackpool on 3 July 2019 which dealt with the claimant's appeal against dismissal and exclusion as a Trade Union Official of the FBU.

   4.2 Mr French member of the FBU Executive Council elected official based in the South West, another member who sat on the Union disciplinary hearing on 12 June 2019.

   4.3 Mr I Murry elected President of the FBU who attended the disciplinary hearing but did not vote.

5. The Tribunal also had the benefit of a bundle of documents consisting of 621 pages.

6. There were also skeleton arguments on behalf of the claimant and written submissions prepared by the respondent's counsel Mr Segal QC.

The Facts

7. There are few primary facts in dispute.

8. The claimant was employed as a Fire Person with London Fire Brigade on 24 November 1997 and remains an employee of the fire brigade in London following his dismissal and expulsion as an elected official of the respondents.

9. On 17 April 2008 the claimant was elected to the position as Regional Official for the London region of the Union. From the 30 September 2008 the claimant was released from his duties as a day to day fire person to begin working full time at the London Fire Brigade Union regional office. At the time of the claimant's dismissal he was serving as the region's representative on the Union National Executive Council.

10. It is clear the claimant in his capacity as a full time paid Union Official is required to devote his working week, 5 days minimum to carrying out Trade Union work and represent its members.

11. There clearly was a requirement the claimant would devote a normal average working hours per week to that role. Had the claimant not done so, then it would be surprising if the claimant was not brought to task as to why he was not devoting his time full time to that work. He clearly was not required to do any fire fighting and no doubt questions would be asked if the claimant was seen working for another organisation during the normal working week, Monday to Friday. He was therefore clearly accountable to Union President and Vice President.

12. The work involved; representing members in any negotiations, problems with the London Fire Brigade, to ensure the Union was organised in the London area, attend branch union meetings, campaigning on behalf of the Union about pay and conditions, reporting to the London Regional Committee and to act upon mandates and instructions given to the claimant by the Committee, which would involve communications to members, calling emergency meetings with London Fire Brigade to take certain stances in negotiations, discipline, grievances and reduced pay appeals, writing and circulating regional bulletins. It clearly required attention to detail and such a person devoting their working week to such tasks.

13. In addition to the above responsibilities and duties, members of the Regional Executive were assigned particular remits which were approved by the London Regional Committee. These could include and the claimant had from time to time been involved in representing the Union at the Regional TUC, co-ordinating the Union's response to the London Fire Brigade's Integrated Risk Management Plan. Representing non-uniformed employees of the London Fire Brigade, representing the Union at local pensions board and the Urban Search & Rescue User Working Group. Furthermore the claimant would act as the Regional Political Officer organising FBU members working on London Fire Brigade control room, fairness at work officer. The claimant was also responsible for delivering training courses to fellow FBU Officials within the region.

14. All of the above suggests full time work for the Union at their request and a requirement to be available for those duties throughout the working week with absolutely no requirement in the meantime to act as a fire fighter.

15. It would appear there is an agreement between the London Fire Brigade and the respondent, that although London Fire Brigade continued to pay the claimant's salary they are in fact reimbursed by the Union and the Union provides the claimant with additional sums of money each year as a top up to carry out duties. Expenses can also be paid by the Union for officials provided they are properly incurred. The claimant's salary for the tax year ending 5 April included an additional sum paid to the claimant by way of a salary of £6,904.95 (page 616) on top of the claimant's base

salary (the equivalent to a fire fighter). The pay slips from the respondent were provided in respect of this sum and an annual P60 statement showing the tax deducted by the respondent from the claimant's additional pay.

16. The equipment provided to the claimant to undertake his role all came from the respondent as did an office in which the claimant carried out his duties. In the office the respondent provided computers, the claimant was provided with a mobile phone, the Union paid the bill in full. The claimant was also paid his travel costs from Norwich to the London regional union office by the respondents.

17. By May 2017 the claimant was elected Fire Brigade Union Executive Council Member for London. As a result of this the claimant took on additional duties for example he became the line manager to the Office Manager in the London regional office, and further became responsible for authorising monthly expense claims for all officials including lay officials in the region. With this role came further additional duties including the allocation of specific duties to fellow members of regional executive, assisting the Union's National Treasurer and Accountant on setting the annual budget for the London region.

18. It is clear with the above additional duties the claimant was working long hours to such an extent it was necessary on some occasions to sleep on a sofa at the regional office in London rather than travel home. Mr Noble Vice President of the Union did refer to the claimant's role as "so demanding that it is clearly a full time position" (page 312). Clearly the role is a full time role. By the time of the claimant's dismissal his additional topped up salary from the respondents was £7,784 on top of his annual salary that would be paid to a fire fighter.

19. It is also clear this additional sum of money was paid to the claimant as a salary to use as he would wish. There was no regulations on what that money was to be used for. There certainly were no receipts or evidence required from the Union as to how that money was used. There was a separate well established procedure for officials to reclaim the costs of genuine work related expenses such as mileage, subsistence and postage whereby such costs were reclaimed on a monthly basis which were clearly unrelated to the salary paid to officials.

20. The claimant was expected to attend many internal functions/events and would represent the Union at external events and functions. Clearly the claimant could not and would not have been expected to send someone in his place to carry out his day to day work or to those events. The claimant was expected to perform the work personally on behalf of the Union. It is worth noting after the claimant's disciplinary the Union Executive Council published a policy (page 622-623) expressly prohibiting officials in certain positions including the one held by the claimant from undertaking any paid work elsewhere.

21. The claimant was also at the time of his dismissal subject to precisely the same disciplinary procedure within the Union's rule book that was applied to the most senior recognised employees of the Union including the General Secretary, Assistant General Secretary and National Officer. Lower ranking officials including genuine lay officials and ordinary members were subject to a separate procedure.

22. The claimant had for many years been in favour of leaving the European Union. The reason being the claimant's deep seated belief in national independence. The claimant was of the view that many of the European Union's regulations and directions were anti-unions and against democracy. The claimant has always been quite open about his views and was the National Organiser for Trade Unions Against the EU. A fact which was well known to his brothers in the Union particularly the leadership and any such activities connected with the view was always carried out in the claimant's own time not the Union's time.

23. Following the Conservative Government's announcement in 2015 that a Referendum would be held during the parliamentary term the decision whether to stay or leave the European Union became a major public debate. In the lead up to 2016 the claimant did give a number of media interviews and wrote a number of articles advocating Britain leaving the EU. Indeed they are a matter of public record, examples at pages 498 and 504-510. The claimant has also written a book which apparently sets out the case against the European Union from a left-wing point view with a complete chapter advancing the concept of democracy and an independent state (pages 569-600).

24. It is clear the claimant's stance on leaving the EU was well known within the FBU and no doubt many within disagreed with the claimant's stance and viewpoint. However, it is clear prior to the claimant's dismissal no one within the Union requested the claimant desist from his activities, commentaries or his viewpoint.

25. The General Secretary Mr Wrack and his assistant Andy Dark apparently whilst the claimant worked with them in the London region were of the view that members and officials should be free to express their views freely and openly even where those views might not be in accordance with the official Union line.

26. Indeed in an extract from the forward to the General Secretary's book, Fighting Fires – One Hundred Years of the Fire Brigades Union 2018 to celebrate the FBU centenary (page 539) an extract reads:

> "To address the huge challenges our movement faces today, we need to build a culture of debate and democracy which accepts that there will be different views and sometimes sharp differences of opinion. Democracy must include the right to express those differences."

27. There were clearly numerous examples of Union officials articulating their views of issues which did not coincide with official Union policy at the time:-

    27.1 Pages 479-484 - various editions of the official bulletin produced by the London region edited by the current General Secretary.

    27.2 Pages 485-489 - postings on a popular internet forum for fire fighters by the General Secretary and Assistant General Secretary at a time when they were both senior officials in the London region, postings which conflict with official Union policy and appear to criticise the Union leadership.

    27.3 Pages 165-166 - an open letter signed by a number of senior officials of the Union circulated both internally and externally which was criticising the FBU's existing policy regarding voting rights on committees.

    27.4 Pages 149 and 163 - Assistant General Secretary and senior official in the London region expressing severe criticism of the then leadership of the Union over the handling of the national dispute, much of which was in direct conflict with official Union policy at the time as decided by the Executive Council.

28. It appears no disciplinary action was ever taken against these individuals involved in the above commentaries.

29. In January 2016 5 months before the Referendum in the United Kingdom (pages 182-185) the General Secretary presented a paper to the Executive Council Members entitled 'Debating Europe' which set out his thoughts on how the debate should take place inside the Union. That paper acknowledged there was a wide range of views on the issue among members and Trade Union officials. The paper amongst other things makes it clear:

> "The FBU is a democratic Union:-
>
> We also champion the right to discuss and disagree."

30. It goes onto conclude "members be given the opportunity to argue different views on the topic in the Union's in-house magazine". The claimant wrote an article in this magazine articulating his pro-Brexit views (page 188).

31. On 11 April 2019 there was a circular from the General Secretary addressed to the FBU Brigade Secretaries which contained details of a policy that had been agreed by the Executive Council which stated:

> "The FBU supports freedom of speech and expression including the right of individuals to disagree with the agreed policies of the Union."

32. On 12 May 2016 delegates at the FBU Annual Conference voted to support a policy which recommends a Remain Vote in the European Union Referendum.

33. The claimant on 15 September 2016 emailed the General Secretary (page 217) to inform him that he was to speak at a fringe meeting at the Labour Party Conference on 'Why Brexit must mean Brexit'. The General Secretary responded by email (page 217) thanking the claimant for letting him know and was looking forward to seeing the claimant at the conference. There was no suggestion at that stage the claimant was contravening any Union rules.

34. It is clear the claimant when carrying out media interviews or writing articles would endeavour to ensure that he was speaking in his personal capacity rather than an advocate for the Union. Furthermore the claimant continued campaigning activities following the FBU's decision at conference with the knowledge of the Union and openly discussed his stance with senior officials and colleagues.

35. It was shortly before the Referendum the claimant received a call from the then President of the FBU, Mr McLean [although aware of the claimant's personal activities around the Referendum Campaign and accepting the claimant was not in breach of any Union rules], who advised the claimant he needed to ensure he was not seen representing the Union when he spoke about the Referendum.

36. Following the Referendum and after the claimant was elected in 2017 to a position on the Executive Council [the member for London], the claimant continued to argue very publicly that the result of the Referendum should be accepted by all. It would also appear the claimant was advocating for a democratic and independent nation state. As can be seen from pages 536-538, 540-542, 544-546 and 604-605.

37. The FBU's position now appeared from the General Secretary's video (page 303) and a circular (pages 300-301) on behalf of the Executive Council that irrespective of the fact the Union supported Remain given the result of the Referendum democracy had supported a Leave and this position should be respected and implemented.

38. Relations between the General Secretary and the claimant appeared to have become somewhat strained throughout 2018/2019 particularly in an Executive Council meeting on 17 January 2019 where the General Secretary disagreed over the Brexit issue and the claimant was accused of siding with the far right. It is clear feelings were running high between the two individuals. So much so the claimant became aware via a WhatsApp exchange the Assistant General Secretary (page 543):-

> "He is looking for things to be angry about ….. but he will come again and soon:-
>
> I think you should have the heads up …..

bottom line he is fixated on you …..

But you need to be aware."

39. Then towards the end of March 2019 the claimant had been invited to speak on a platform rally in Parliament Square organised by the Non-Partisan Pro-Brexit Campaign Group Leave Means Leave. The event was to take place on 29 March. The central message from the speakers was democracy must be upheld and it was wrong to have agreed to delay triggering Article 50. The 29 March was the day the UK was scheduled to leave the European Union. The claimant in accepting an invite to speak made it clear to the organisers of the rally that he should be introduced as National Organiser for the Trade Unions Against the EU and not as a FBU official as confirmed in an email to the organisers (pages 268-269).

40. The rally was to be addressed by speeches from across the political spectrum including speeches from Labour Kate Hoey MP.

41. In the afternoon prior to the rally the claimant was advised by the President Ian Murry who was apparently a close ally and friend of the General Secretary via WhatsApp messages that the claimant should not speak at the proposed rally on 29th, as he thought that this may be seen as breach of the policy statement passed by the Union's Annual Conference back in 2016. In particular a statement prohibiting FBU officials campaigning jointly with political opponents in the Referendum. The claimant thought the President was wrong and the policy was no longer relevant given the Referendum had now taken place. The claimant therefore felt it was ok to address the rally which he did and the claimant was introduced as National Organiser of Trade Unions Against the European Union. From the text of the claimant's speech it is clear there is no mention of the claimant's role within the FBU or as an official of the Union at any time during his speech. The transcript of the speech is at page 226.

42. On the evening of 29th the General Secretary without informing the claimant issued a public statement referring to the claimant and others from the left who had spoken at the rally as "disgrace to the traditions of the labour movement" (page 547-548). It is clear from this moment in time the claimant's future as a Union official was likely to be short-lived. When the claimant requested a meeting with the General Secretary that was declined.

43. On 11 April at a meeting of the Union Executive Council attended by the claimant he was informed by the Vice President a complaint had now been received about the claimant attending the rally and the claimant's attendance was to be investigated.

44. On 15 April the claimant received a letter from Mr Noble (page 257) stating:

> "Further to our short discussion on Thursday at FBU head office I am writing to formally confirm that I have been requested to undertake a preliminary enquiry under Rule G3 of the Union's Rule Book.
>
> The concerns leading to this request arise as a consequence of your attendance as a contributor to the above event and that in doing so you may have breached elements of Rule G1.
>
> I'll be in touch in due course to arrange a meeting where we can discuss the issues which have been raised."

45. On 29 April the claimant attended an investigation interview with the Vice President. Notes of that meeting are at pages 259-265. The area of investigation as set out by Mr Noble was as follows:-

> "1 Deliberately and knowingly breached a policy agreed by FBU Conference.
>
> 2. Deliberately and knowingly ignored advice from the Union's President that to attend and speak at the rally would breach Conference policy.
>
> 3. There may be other ways in which you have broken policy or acted against the interests of the Union arising from the events of the day."

46. At that meeting it appears the claimant responded to the allegations in particular stating that an impartial reading of the policy statement referred to no one would conclude that its terms were intended to apply beyond the Referendum Campaign. Furthermore the General Secretary had issued a circular the morning after the Referendum that:

> "Yesterday the people of the UK voted to leave the European Union the Westminster Government must respect that outcome and take action to implement it."

47. The claimant expressed the view that any restrictions placed upon FBU officials expired the moment the Referendum Campaign was over particularly given the policy statement related specifically and exclusively to the Referendum Campaign. The question then was whether the claimant's appearance breached the 2016 Policy Statement his view was it clearly did not.

48. Following the investigation interview the claimant became concerned by the exchange of correspondence he had with the Vice President over requests for information appeared to the claimant to be no more than a fishing expedition.

49. Following the investigation by the Vice President the claimant was notified by letter of 20 May (pages 293-296) from the Assistant General Secretary Mr Dark that the claimant had a case to answer in connection with the following six complaints:-

> "1. PE committed an offence contrary to Rule G1(1)(ii) wrongly or fraudulently receives or misapplies Union funds in that he used physical FBU resources to whatever limited extent for the purposes preparing and writing articles for which payment was received.
>
> 2. PE has committed an offence contrary to Rule G1(1)(ii) wrongly or fraudulently receives or misapplies Union funds in that he used non-physical FBU resources i.e. FBU paid time to whatever limited extent for the purposes preparing and writing articles for which payment was received.
>
> 3. PE has committed an offence contrary to Rule G1(1)(vii) acts in a way prejudicial to the interests of the Union in that PE has undermined the FBU's argument and justification for full time release being a 24/7 responsibility potentially jeopardising Trade Union release agreements in London and/or more widely.
>
> 4. Has committed an offence contrary to Rule G1(1)(vi) acts contrary to or fails to carry out or comply with the policies and/or rules of the Union that brother Embery breached the FBU Conference Policy by sharing the platform with individuals who fell into the category of those with whom there should be no shared platform.
>
> 5. PE has committed an offence contrary to Rule G1(1)(vii) acts in anyway prejudicial to the interests of the Union in that brother Embery breached the FBU Conference Policy by sharing the platform with individuals who fell into the category of those with whom there should be no shared platform.
>
> 6. PE has committed an offence contrary to Rule G1(1)(vii) acts in anyway prejudicial to the interests of the Union in that PE when criticising all those in the movement opposed to the Leave position by not making exception of the FBU in his speech, has undermined and publicly condemned and criticised our democratic decision made by Conference in agreeing the 2016 Policy and the 17 January EC policy."

50. The letter went on to inform the claimant that he was suspended. Furthermore a meeting was to be convened of the Executive Council to consider the complaint which was to take place on Wednesday 12 June in York.

51. The hearing was to be conducted in accordance with Rule G1(6):-

> "(i) The complainant shall be the Vice President who made the complaint.
>
> (ii) The Executive Council shall consider firstly the disciplinary complaints against you and shall make a resolution in accordance with Rule G3(3)(iii)(a) or (b). If the Executive Council should find the complaints justified the penalties are those as set out in Rule G3(3)(iii).

> Rule G3(2)(ii) requires that the claimant is informed that proceedings may result in being permanently de-barred from holding office in the Union."

52. The letter went on to explain how the meeting would be conducted, again in accordance with the Union Rules.

53. The meeting of the Executive Council duly took place on 12 June and the minutes of that meeting are at page 305-345.

54. All parties prior to the hearing on 12 June received the report carried out by the Investigation Officer Mr Noble (pages 347-358) and his recommendations (page 359).

55. It appears the meeting was very long starting around 10.00 am and went on until late in the evening. The President opened the meeting and explained the process. The claimant was able to represent himself. Six charges were put to the claimant. The Vice President Mr Noble presented the Investigation Report and played the YouTube video of the claimant's contribution at the Leave Means Leave rally on 29 March.

56. The claimant then presented his case, thereafter Mr Noble summed up the Union's case and the claimant responded.

57. The decision of the Executive Council was:-

    57.1 To dismiss Complaint 1 for lack of evidence.

    57.2 Complaint 2 was dismissed for lack of evidence.

    57.3 Complaint 3 was upheld and the claimant would be fined 40% of his Fire Fighters weekly pay.

    57.4 Complaint 4 sharing the platform was upheld and seemed to turn on whether the 2016 Conference Policy has still applied in March 2019 or had ceased to apply once a Referendum had taken place. The general view seems to have been that the Policy did apply particularly the President thought the policy about sharing cross party platforms was live.

    57.5 In relation to Complaint 5 which is very similar to Complaint 4 that was upheld.

    57.6 And finally, Complaint 6 which was deemed the most serious and the Executive Council's debate seemed to surround whether the claimant on this public platform had in fact criticised the Policy and the democratic decision making process of its own Union both in terms of the FBU Policy adopted by Conference in 2016 and in terms of the Executive Council's decision made in January 2019 to oppose a No Deal Brexit. That complaint was found justified and

the decision of the Executive Council by a majority of 6 to 3 decided the punishment should be that the claimant was banned from holding office for a period of 2 years.

58. The outcome was confirmed to the claimant in a letter of 14 June signed by the Assistant General Secretary Mr Dark (pages 363-367).

59. The claimant appealed by letter of 27 June to Mr Dark (pages 398-402). In summary the grounds of the Appeal were:-

a. Perverse and illogical the Executive Council's decision particularly in the wording of allegation that the claimant was de-barred from office for the content of his speech was not de-barred for attending the event or was he de-barred on account of the politics of the other speakers at the event? The fact that the claimant was supported by the Labour Party and other Trade Unions. The fact that Tommy Robinson had no involvement with the event. The fact that the claimant was speaking in his capacity of Trade Unionist Against the EU and not as a representative of the FBU. Footage of the event confirmed there was no mention of the FBU. The claimant's speech was conciliatory and reasonable, the need for unity between those who voted Leave and those who voted Remain.

60. The Appeal hearing was to take place at Blackpool as what is known as a Recall Conference, to take place on 24 July.

61. Delegates taking part in the Appeal process received the following documents:-

61.1 Guidance Notes for the conduct of the Appeal Hearing.

61.2 Notice of the Appeal submitted by the claimant.

61.3 Minutes of the Disciplinary Hearing on 12 June.

61.4 The investigators report.

62. The hearing duly took place with the President Mr Murry reading out the text of the relevant complaint and the penalty. The claimant addressed the Conference (page 441-446). Under the Rules there was no opportunity to question the claimant.

63. The Appeal was not successful as members felt the claimant had publicly criticised parts of the Trade Union movement including the FBU. Particularly expressed views critical of the FBU's democratically determined policies publicly at an event.

64. Members of the Appeal Hearing would have been aware in the Minutes of all the other allegations and the sanctions and whether upheld or not despite not being relevant for the Appeal.

The Law

65. The starting point is of course s.10 of the Equality Act 2010 religion or belief – this section provides:-

> "…
>
> (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
>
> (3) In relation to the protected characteristic of religion or belief—
>
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
>
> (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

66. It would appear, s.10 of the Equality Act 2010 consciously mirrors that in the European Convention on Human Rights, particularly Article 9 which provides:

> "1. Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2 Freedom to manifest ones religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

67. Pursuant to the Convention, the freedom to hold the manifest belief is to be enjoyed without discrimination as defined by Article 14 of the ECHR:-

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any grounds such as religion, political or other opinion."

68. Pursuant to s.3 of the Human Rights Act 1998 domestic legislation must be read insofar as possible to give effect to convention rights save where a construction would run counter to a fundamental feature of the legislation: Ghaidan v Godin-Mendoza [2004] 2AC557. Where the inclusionary language of s.10 mirrors that in Article 9, it would be both bizarre and by reason of s.3 of the Human Rights Act 1998 unlawful if a belief were recognised under the Conventions but not under the Equality Act 2010.

69. Freedom of thought, conscience and religion is one of the foundations of a democratic society within the meaning of the Convention. In its religious dimension, it is one of the most vital elements that goes to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.

70. It follows that beyond an evidential enquiry into whether a belief is genuinely held, an individual is free to believe as he or she wishes. Per Lord Nichols at (22) in R(Williamson) v Secretary of State for Education and Employment [2005] 2AC246, paragraph 22 of that Judgment provides:-

> "It is necessary first to clarify the Courts role in identifying a religious belief calling for protection under Article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the Courts will enquire into and decide this issue as a question of fact. This is a limited enquiry. The Court is concerned to ensure an assertion of a religious belief is made in good faith: neither fictitious nor capricious and that it is not an artifice … but, emphatically, it is not for the Court to embark on an enquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant finds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual … religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some however surprising …"

71. Article 9 is not, however, combined to the freedom to hold a belief:-

> "It includes the right to express and practice ones belief without this (the freedom) would be emasculated." (Per Lord Nichols at 16)

72. In the context of expression or manifestation an evaluative filter is necessary. Per Lord Nichols at (23-24):-

> "Paragraph 23
> Everyone therefore is entitled to hold whatever belief he wishes. But when questions of manifestation arise as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirement. These threshold requirements are implicit in Article 9 of the European Convention and comparable guarantees in other Human Rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involves subjecting others to torture or inhumane punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in a sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less,

rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention."

"Paragraph 24
This leaves on one side the difficult question of the criteria to be applied in deciding whether a belief is to be characterised as religious. The question will seldom, if ever, arise under the European Convention. It does not arise in the present case, in the present case it does not matter whether the claimant's beliefs regarding the corporeal punishment of children are categorised as religious. Article 9 embraces freedom of thought, conscience and religion. The atheist, the agnostic and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the atheist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract the protection under Article 9 a non-religious belief as much as a religious belief, must satisfy the modest threshold requirements implicit in this article. In particular for the manifestation to be protected by Article 9 a non-religious belief must relate to an aspect of human life or behaviour comparable importance to that normally found with religious beliefs. Article 9 is apt, therefore, to include a belief such as passivism: Arrowsmith v United Kingdom [1978] 3EHRR218. The position is much the same with regard to the respect guaranteed to parents religious and philosophical conventions under Article 2 of the first protocol: see Campbell & Cosans v United Kingdom 4EHRR293."

73. Therefore, since Grainger plc v Nicholson [2010] ICR 360 EAT and the Equality and Human Rights Commissions Code of Practice on Employment 2011 particularly paragraphs 2.55 to 2.61, particularly paragraph 2.59 where it sets out for a philosophical belief to be protected under the Act:

"• It must be genuinely held;

• It must be a belief and not an opinion or viewpoint based on the present state of information available;

• It must be a belief as to weighty and substantial aspects of human life and behaviour;

• It must attain a certain level of cogency, seriousness, cohesion and importance: and finally

• It must be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others."

74. We have to remind ourselves the claimant is relying on the philosophical belief National Independence.

75. The claim is pursued as a direct discrimination claim under s.13 of the Equality Act which states:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

76. That requires the claimant to establish some form of detrimental action in this case dismissal.

77. The Tribunal would have to consider whether the claimant has been treated less favourably than an actual or hypothetical comparator.

Ordinary Unfair Dismissal under the Employment Rights Act 1996

78. The starting point is s.98(1) of the Employment Rights Act which provides that it is for the employer to show what was the reason for dismissing the employee. In this respect the respondent relies upon the claimant's conduct.

79. Conduct is a potentially fair reason under s.98(2)(b).

80. S.98(4) provides that:

> "…, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)–
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

81. Following the principles in the well-trodden case of British Home Stores Ltd v Burchell [1980] ICR 303 EAT the Tribunal needs to consider:-

> "1 What was the reason for the dismissal?
>
> 2 Did the respondent carry out a reasonable investigation into the claimant's alleged conduct?
>
> 3 Did the respondent have reasonable grounds for its belief that the claimant had allegedly committed gross misconduct?
>
> 4 Was dismissal within the band of reasonable responses that was available to the respondent?
>
> 5 Was the dismissal in all the circumstances fair?"

82. The Tribunal reminds itself it is not their role to put themselves in the position of the reasonable employer that is to substitute its own view as to what they would have done on the facts.

83. The question arises as to whether the decision to dismiss falls within the range of reasonable responses.

Employee/Official

84. For the claimant to prove that he is an employee the starting point is to establish whether there is a contract at all between the claimant and the respondent.

85. Once the existence of a contract is established whether express or implied, the next question is whether the contract is a contract of employment or a contract for services (or indeed of some other sort). There are three essential elements that must be present to establish a contract of employment. These form the irreducible core of the contract of employment, without which a contract of employment will not arise:-

    a. The contract must impose an obligation on a person to provide work personally;

    b. There must be mutuality of obligation between employer and employee; and

    c. The worker must expressly or impliedly agree to be subject to the control of the person for whom he works to a sufficient degree.

86. If any of these three elements is not present the contract is not a contract of employment. If each element is present the contract may be a contract of employment. Whether or not it is will depend on an assessment of all of the other circumstances of the case.

87. In order to determine, once the irreducible minimum requirements are present, whether the contract is a contract of employment, it is necessary to paint a picture from the accumulation of all the relevant details. This means not only looking at specific matters but also standing back and considering the overall picture. This approach is derived from Hall (Inspector of Taxes) v Lorimer [1994] 1ALLER250 1994 IRLR 171, the matters that are capable of being relevant are numerous. They may include payment of wages or salary, whether a worker provides his own equipment, whether he is subject to the employers disciplinary and grievance procedures, receipt of sick pay or contractual holiday pay, provision of benefits traditionally associated with employment such as a pension scheme, health care or other benefits, whether the worker is part of the employers business, whether there are restrictions on working for others.

88. Another distinction may be identified between employees who are employed under a contract of employment and office holders who may not be employees who have the rights of employees (such as the right to complain of unfair dismissal) in Johnson v Ryan [2000] ICR 236 the worker was a local authority rent officer appointed pursuant to the Rent Acts 1977. It was argued that as an office holder the worker was not entitled to present a claim of unfair dismissal. The EAT identified three categories of office holder:

    88.1 First those whose rights and duties are defined by the office they hold and not by any contract.

    88.2 Second, persons who are called office holders but who in reality are employed under contract of service.

    88.3 Third, those who are both employees and office holders.

89. In determining whether a worker who is described as an office holder is an employee, the factual situation must be considered. Relevant matters include whether the worker receives a salary, whether salary is fixed and whether the worker duties are subject to close control by the employer or whether the worker worked independently. The EAT held that the rent officer was an employee. In doing so it noted that the recent approach of the appellant courts had been to take an inclusive approach to employee protection.

90. The Tribunal had the benefit of written submissions on behalf of the claimant and written submissions on behalf of the respondent. As they are in writing for all to see no disrespect to either the claimant or to Mr Segal QC the Tribunal does not repeat those submissions.

Conclusions

Employee/Official/Office Holder

91. What is clear in this case is that the claimant worked full time for the Union in return for substantial remuneration which was fixed in advance. That remuneration was a top up on the claimant's normal fire fighter's salary which the Union reimbursed to the London Fire Brigade together with an additional sum of approximately £7,000 also paid by the Union of which the claimant did not have to account how that money was spent.

92. It is also clear that the Union exercised a sufficient degree of control over the claimant's work. The claimant would inevitably have been removed from his office if his duties were not performed satisfactorily. The claimant could not simply send someone to meeting in the claimant's place. The claimant's work had to be performed personally. It is clear that there was a requirement that the claimant worked exclusively for the Union and provided attendance daily at the office in

London if he were not involved in meetings elsewhere or attending conferences. The Union paid the claimant travel costs from Norwich to London. They provided a mobile phone, an office in London and the equipment for the claimant to use in that office. It was a full time job working for the Union.

93. It is also clear that the respondent exercised a degree of control over the claimant in what was required of him in his role as a full time Union Official.

94. In addition, the claimant was provided with a car allowance from the respondent in order to conduct the Union's business in attending meetings, it matters not how much the claimant used the vehicle and the claimant would also be reimbursed by the Union for other lawfully incurred expenses.

95. The claimant clearly was under the control and answerable to the Union, abiding by the Union's policy and rules and clearly if he failed to abide by those rules a process was in place which would lead to the claimant effectively being dismissed as indeed happened in this case.

96. Clearly the claimant was entitled to annual leave and it is unlikely he would simply take that leave without informing appropriate Trade Union Officials as to his absence.

97. Taking all matters into account, there was clearly a mutuality of obligation in that the claimant was expected to provide his time on a full time basis, week to week performing a function for the Union. The way that was carried out would be controlled by the Union in that the claimant was expected to undertake a number of roles in his capacity as a Union Official. Furthermore he could not simply send someone in his place to a meeting, conference or in negotiations with relevant fire brigades.

98. Whatever the Union dresses it up as the claimant received a salary from the Union which although paid in two parts, one as a fire fighter's payment from the London Fire Brigade this would be reimbursed by the Union together with an additional sum of around £7,000 as no doubt a sweetener to encourage people into full time Union roles. It was a salary covered by the Union.

99. It is clear during the time the claimant was working for the Union he was not under the control and direction of the London Fire Brigade and therefore logically he was under the control and direction of the Union.

100. The Tribunal therefore concludes that the claimant is an employee and is entitled to the protection of the Employment Rights Act and to bring a claim for ordinary unfair dismissal.

Claim under the Employment Rights Act 1996 – Unfair Dismissal

101. It is noted that the claimant had no previous warnings from the Union, the Union had advocated free speech on a number of occasions and the Union had accepted that from time to time there would be differences of opinion.

102. It was not a secret that the claimant had openly campaigned for Brexit and prior to his speech on 29 March the claimant had not been disciplined or warned about his campaigning or writings.

103. It is clear that the decision made at Conference as to the Union's stance on Brexit no longer applied in March 2019. Indeed the Union had advocated at that stage the decision had been made to leave Europe and democracy must allow that to proceed.

104. It would appear right from the start of the investigation process conducted by the Vice President that there was an agenda to have the claimant removed.

105. The Tribunal noted that the investigation started with "Deliberately and knowingly breached a policy agreed by the FBU Conference". Clearly that policy was no longer in force as the UK had made a decision to leave the EU. A fact which had been accepted and acknowledged by the Union as the Union had since said that the decision following the Referendum should be accepted.

106. Turning to the second part of the investigation, "Deliberately and knowingly ignoring advice from the Union's President that to attend and speak at the rally would breach Conference Policy". Once again the claimant had previously attended many Brexit meetings, campaigned for Brexit with the knowledge of the Union and the meeting on 29 March was cross party platform and by any objective assessment looking at the transcript of the claimant's speech he does not criticise the Union movement or the FBU and was not speaking in his capacity as an FBU Official.

107. The third part of the investigation rather bizarrely was "There may be other ways in which you have broken policy or acted against the interests of the Union arising from the events of the day", that to the Tribunal looked like no more than a witch hunt, a fishing exercise in the hope of finding something else which may add some weight to an investigation to support disciplinary action. The ambit of the investigation when looking at the facts was bizarre, the Tribunal had the feeling that it was pre-determined given the animosity between the Union hierarchy and the claimant. The Tribunal concluded that the ambit of the investigation in the first instance was flawed.

108. Turning to the disciplinary hearing. The first complaint referred to earlier in this Judgment was dismissed through lack of evidence, the second complaint was dismissed through lack of evidence, complaint 3 was upheld and the claimant would be fined 40% of his weekly pay, that was in respect of a charge the claimant having been said to undermine the Union's agreement and justification for full time release being a 24/7 responsibility potentially jeopardising Trade Union release agreements in London or more widely. Quite how the claimant had breached that rule is a mystery to the Tribunal.

109. Charges 4 and 5 were upheld, similar in nature in that the decision being that the 2016 Conference Policy not to leave Europe still applied in March 2019. That clearly is a nonsense because the Referendum had decided to leave Europe which effectively makes the 2016 Conference Policy irrelevant. A fact which was acknowledged by the Union in that they openly encouraged members to accept the Referendum and accept democracy and move forward.

110. Finally the complaint that was deemed the most serious, "Whether the claimant on the public platform on the 29 March had in fact criticised the Union policy adopted at Conference in 2016", that was the complaint where the claimant was barred from holding office. Again, when one looks at the transcript of what the claimant said at the meeting he does not criticise the FBU's policy adopted at Conference in 2016, what he does do is advocate that following the Referendum one should move on and if necessary, have a 'No Deal' Brexit. For that the claimant was effectively dismissed. Where is the gross misconduct? How could any fair minded member come to a reasonable belief on the facts that the claimant had committed any form of misconduct?

111. To the Tribunal's mind on the one hand the Union advocates free speech, was aware that the claimant had openly campaigned for many years, written many articles and attended media functions expressing his views without any prior disciplinary action taken against him. Others in the Union had also advocated differing opinions as was accepted by the Union hierarchy from time to time there would be differences of opinion.

112. The Tribunal repeats, starting with the investigation the ambit was flawed the Tribunal overwhelmingly felt the matter was pre-determined. That the decision on the facts was not a reasonable response that a reasonable employer would or should make on the history of the claimant's campaigning with the open knowledge of the Union.

113. To suggest that the claimant's conduct was in some way prejudicial to the Trade Union and would have amounted to gross misconduct is difficult to understand on the facts and clearly does not fall within the band of a reasonable response of a reasonable employer and therefore the claimant's dismissal was unfair.

Philosophical Belief

114. The claimant's advanced philosophical belief is National Independence.

115. Clearly the claimant holds a genuine belief in National Independence, that belief is well advanced, argued and long held. Clearly it is not just an opinion nor viewpoint. The Tribunal also takes the view that the belief is of some weight. The hope of National Independence does have a level of cogency, seriousness and importance and is clearly worthy of respect in a democratic society. It is not incompatible with human dignity and it is not in conflict with the fundamental rights of other members of society. The Tribunal therefore conclude it is capable of being a philosophical belief.

116. Having said all that, what the Tribunal are not convinced of is although the respondent knew of the claimant's pro-Brexit view they were not aware of his philosophical belief. Clearly, that was not the reason for his dismissal so that part of the claim under the Equality Act is not well-founded.

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Employment Judge Postle

Date: ……21.07.2021.

Sent to the parties on: ....4.08.2021.
THY
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For the Tribunal Office