EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs K Mills	v	Unite the Union

PRELIMINARY HEARING

Heard at: Watford **On**: 27-28 May 2021

Before: Employment Judge Bedeau
Members: Mr A Scott
Mrs A Brosnan

Appearances
For the Claimant: Mr M Duggan, Queen's Counsel
For the Respondent: Mr B Cooper, Queen's Counsel

RESERVED JUDGMENT ON REMEDY

1. The tribunal has jurisdiction to hear and determine the claimant's application for compensation under section 67 Trade Union and Labour Relations Act 1992.

2. The tribunal has jurisdiction to hear and determine the claimant's application for compensation for injury to feelings and aggravated damages.

3. The total sum awarded to the claimant for being unjustifiably disciplined is £38,654.

4. The respondent is ordered to pay the claimant's costs in the sum of £2,500.

5. The total sum awarded to the claimant is £41,154.

REASONS

1. The tribunal in a reserved judgment on liability, held that the claimant was unjustifiably disciplined by the respondent. A remedy hearing was listed to take place on 29 January 2020.

2. On the day of the hearing, Mr Cooper QC, on behalf of the respondent, submitted that the tribunal did not have jurisdiction to hear and determine the claimant's application for compensation as she had not presented a claim form in accordance with the provisions of section 67, Trade Union and Labour Relations (Consolidation) Act 1992, "TULR(C)A".

3. As Mr Bheemah, counsel for the claimant, was not prepared to respond in detail to Mr Cooper's submissions, the case was adjourned to 15 May 2020. The claimant was ordered to send her submissions on the jurisdictional issue to the respondent and the tribunal by not later than 4.00pm 13 May 2020. Her application for costs following the hearing having to be adjourned, would be determined at the conclusion of the remedy hearing.

4. Due to the Covid-19 pandemic the hearing could not proceed on 15 May 2020 and was relisted for 2 days on 27 and 28 May 2021.

The issues

5. The issues are as set out in paragraph 2 of Mr Cooper's written submissions. We, however, supplement them. They are as follows: –

    5.1 has the application been properly instituted;

    5.2 does the minimum award under section 67(8A) TULR(C) apply;

    5.3 does the tribunal have power to make an award in respect of injury to feelings, or other non-financial loss, under section 67; and

    5.4 having regard to the answers to questions 5.1 and 5.2, what is the appropriate award in this case?

    5.5 Should the tribunal award a sum for aggravated damages?

    5.6 What is the extent of the claimant's loss of earnings?

5.7 Whether the tribunal should award costs for the hearing on 29 January 2020 having been adjourned?

The evidence

6. The tribunal heard evidence from the claimant. No oral evidence was called on behalf of the respondent. The parties adduced a joint bundle of documents comprising of 99 pages. In addition, there was a combined authorities bundle.

Findings of fact

7. The respondent's treatment of the claimant stemmed from her request to see the full branch accounts as a member of the BASSA branch and had a statutory right of access. She felt that the respondent's members should know exactly how their money was being spent, but her requests for access were repeatedly ignored, and she was left with no option but to refer the matter to the Certification Officer who found in her favour, allowing her access to the branch accounts. The respondent's appeal to the Employment Appeal Tribunal, "EAT", was dismissed. She still has not been provided with the full accounting information she is entitled to see.

8. The respondent unfairly considered her as the person responsible for the damaging publicity against it following the Certification Officer's decision and the outcome of the EAT judgment. She also had been subjected to an ongoing campaign of bullying and harassment which had the effect of isolating her from the membership. The respondent's actions were motivated by a desire to sully her name, impugn her motives and her mental health. The emails sent by it from 3 March 2017 onwards, were false and an attempt to dehumanise her. She had no means of countering the false narrative and no ability to defend herself against the smears. Her fellow union members began to display coldness and even contempt towards her. She felt like a pariah in the membership.

9. There were negative conversations on Facebook about her which escalated to a level she described as viral. She was portrayed as a villain whose motive was to destroy the union. She could not believe that people were discussing her in such terms. She stated that it was terrifying to witness the viral spread of such views of hatred and hostility towards her. Colleagues she had known for over 30 years, joined in malicious discussions about her. She had no one to protect her or the resources to negate the damage done to her previously unblemished reputation.

10. She began to fear for her personal safety and visited at either the end March or early April 2017, Hounslow Police Station, where she spoke to a sergeant and provided him with copies of the 10 emails the respondent had sent. She described to the sergeant the effect the emails had on her and that she feared for her own personal safety. She was given a crime reference number and told to keep her mobile phone with her at all times,

ensuring that it was fully charged. She was advised to refer the matter to her employer, British Airways, "BA", as it had a duty of care towards her and is obligated to protect her well-being while at work. Despite lodging a grievance at work, she said that her employer failed to prevent the bullying and harassment she had been subjected to. We do not make any findings of fact on this as BA was not a party in these proceedings.

11. The change to the respondent's BASSA constitution in April 2017, was to prevent her from speaking freely about the accounting records. On 7 April 2017, Mr Adrian Smith, shouted at her and demanded that she should sign a letter confirming her agreement to the change in the constitution, which she refused to do. She was wrongly accused by him of talking to the media about the accounts. She told the tribunal that she felt "the high levels of animosity" towards her during the meeting, and was "shocked and distressed at the lengths to which the respondent had gone in order to try and silence me."

12. From 3 March 2017, the respondent sent a series of emails to its membership at large, 10,000 individuals, frequently referring to the claimant by name in derogatory and unpleasant terms. She had no way of defending herself against the repeated smears and character assassination. Her name became infamous at work. She had previously been an ordinary employee going about her job in the usual way under relative anonymity. As a result of the emails, she described there being a "whispering campaign" against her at work. Crew members would sometimes touch her name badge and say things, such as, "oh, you're Karen Mills?" "How do you spell your name, or should I leave out the Mills?" "How does it feel to be the Judas of the Union?" "Are you tempted to change your name." " Why did you feel the need to question the Union?" " Why don't you do the honourable thing and leave the Union." " What were your motives?" " Did you get what you were looking for then?" Such comments left her feeling exposed, vulnerable and depressed. The bullying and negative comments became relentless and she no longer felt part of a team at work, and had lost the camaraderie that she had once enjoyed with her work colleagues.

13. She named other individuals who had taken steps to isolate her by alleging that she was on a mission to destroy BASSA and one tagged her ensuring that she got that person's communications. That individual, according to the claimant, perpetuated a lie that she was part of an extreme left-wing activist group called, 'Workers Power' which uses violence and endorses armed uprising by the working class.

14. She told the tribunal that her ordeal continues to this day. She has kept her full name on her name badge because, she said, this is the requirement of BA. There is no way for her to escape recognition at work as her name appears on rosters 28 days before flying. Her name also appears on crew briefings and on general declaration forms. Her personal details are stored in the respondent's computer systems. She has refused to change her name on her name badge as suggested, she said, by her manager. To this day she is still asked questions by colleagues once they

see her name on her badge. This has the effect on her of feeling nervous and vulnerable. She has a constant fear that someone motivated by malice may place something in one of the bags under her charge and would regularly check the bags to ensure that they are still in the same state as she had left them.

15. In order to reduce the risk of reprisals, she had to request a 'No-fly' in respect of every union representative she knew to be involved in sending the emails. She is unable to identify all of those involved and is in a constant state of high alert, worrying about who amongst her colleagues may do her ill. She feels that she would be looking over her shoulder until she retires. The 'No fly' has affected her ability to swap shifts freely. An App is used to arrange such things like shift swaps but with 15 thousand crew members having signed up to the App, it has significantly restricted her ability to change her rota.

16. In relation to her home life, although her husband knew about the problems she was experiencing at work, she had not told him the full extent of it. He had seen a couple of emails the respondent sent but she hid everything else from him, including the online attacks and bullying. This had left her feeling alone and depressed in her own home.

17. Her eldest daughter came across a tweet by the respondent that contained a link to a derogatory email about her, the claimant. It was circulated to all 10,000 BASSA members and would have been available to all of Unite's members, about 1,000,200 people. Her daughter commented on the tweet and began to ask questions about it. This was unfortunate as the claimant had been trying to shield her from the problems she was experiencing at work. She then had to tell her daughters about her work issues who were very upset and concerned for her. They had, inadvertently, been drawn into her workplace issues and were worried about her. They wanted the claimant to leave her job and move to a new work environment but it was not easy for her to simply switch jobs because she is a single mother with financial commitments and this has been the only career she has known. They also had to cope with her divorce from their father. She said that her eldest daughter had to attend counselling as she was so upset about everything that had happened. (108-108)

18. As regards the impact on her marriage, because of the toxic environment at work causing her to become stressed and unwell, it affected her relationship with her husband, who found it difficult to cope with the fact that she had become withdrawn and depressed. They began to argue a lot, and she felt as if each argument pushed them a little further apart. The marriage irretrievably broke down on or around February 2018. She is unable to say whether the issues at work were the sole cause of the breakdown, but she firmly believes that the respondent's actions were a significant contributory factor.

19. To add to her problems, her mother was involved in a major accident which left her tetraplegic. This had a significant impact on the family. The respondent's actions increased the pressure she was under to the point that she felt it was unbearable. It never considered that its actions may impact on her home and family life. She stated that she felt as if she was living in a pressure cooker because she had so many things on her plate**.**

20. Her health has suffered as a direct consequence of the respondent's actions. It was extremely difficult for her to deal with the isolation and attacks at work. Colleagues are now distant, whereas previously she would be invited to go for meals, drinks or on shopping trips. Such invitations now a few and far between. Many people now avoid her company as a direct result of the respondent's actions. She was on sick leave due to stress from 15 to 21 April 2017 and from 21 May to 16 June 2017, five weeks. We were not referred to any medical reports. She found it difficult to return to work knowing that the whispering campaign against her was continuing. She did not think about submitting a fit note. She told BA at an Absence Review Meeting, on 9 January 2018, that the reason why she was off work was stress. She realises that nothing would be the same again for her. She lodged a grievance citing the behaviour of four employees. Three were upheld. The fourth, concerning Ms Louise Elliott, was not upheld.

21. Flying Allowance would be given depending on the country flying to. She said that for a five day trip she could get about £400 in allowances. She is a Cabin Service Leader on a 50% full-time contract. Her gross annual salary is £22,904.

22. She asserted that the respondent has turned her life upside down by pressing a few buttons on a computer keyboard.

23. She has been a paid-up union member for 34 years but no longer has any confidence that it will protect her when needed. She stated that, effectively, her union dues of £21.44 per month are worthless.

24. The respondent had not been in contact with her to either revoke or reverse the determination, and there has been no apology.

25. In the claim form, she claims "compensation or damages as the court sees fit". (41)

26. In paragraph 164 of the liability judgment, the case was set down for a hearing on remedy on a day convenient to the parties. (33)

27. On 6 December 2018, after receiving the judgment sent on 5 September 2018, the claimant sent her request for a remedy hearing to the respondent's representatives and the tribunal citing section 67(1) 1992 Act. (68)

Submissions

28. As the issues raised by the respondent goes to jurisdiction and if its arguments are correct, it would change the way in which claimants and Employment Tribunals approach the issue of remedy in such a case. We have replicated, substantially, the written skeleton arguments of Mr Cooper QC and Mr Duggan QC below. As they were converted from Pdf to Word, the formatting is not strictly in accordance with their layouts.

The respondent

29. Mr Cooper submitted the following:

"Introduction

1. *This is the hearing of a purported application by the Claimant for an award of compensation under section 67 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A'), in respect of unjustified discipline contrary to s66, to which the Tribunal found she was subjected by the Respondent in a Judgment and Reasons sent to the parties on 5 September 2018 (the 'Judgment').*

2. *The following questions arise for determination:*

   (1) Has this application been properly instituted?

   (2) Does the minimum award under s67(8A) apply?

   (3) Does the Tribunal have power to make an award in respect of injury to feelings (or other non-financial loss) under s67?

   (4) Having regard to the answers to questions (1) and (2), what is the appropriate award in this case?

The legislative scheme

3. *In order to consider some of the issues of law and statutory interpretation that arise, it is necessary to consider TULR(C)A, s67*

within the overall legislative scheme governing unjustified discipline by a trade union:

3.1. Section 64 defines what constitutes being 'disciplined' by a trade union and it is relevant to note that a number of the categories of 'discipline' may clearly give rise to financial loss:

> ***64. Right not to be unjustifiably disciplined***
> *(1) An individual who is or has been a member of a trade union has the right not to be unjustifiably disciplined by the union.*
>
> *(2) For this purpose an individual is "disciplined" by a trade union if a determination is made, or purportedly made, under the rules of the union or by an official[1] of the union or a number of persons including an official of the union or a number of persons including an official that –*
>
> *...*
> *(b) he should pay a sum to the union, to a branch or section of the union or to any other person,*
>
> *(c) sums tendered by him in respect of an obligation to pay subscriptions or other sums to the union, or to a branch or section of the union, should be treated as unpaid or paid for a different purpose,*
> *(d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the union, or a branch or section of the union,*
> *...*
> *and whether an individual is "unjustifiably disciplined" shall be determined in accordance with section 65.*

3.2. Section 65 then deals with the circumstances in which a member who has been disciplined as defined in s64 is treated as having been unjustifiably disciplined. It is not necessary to rehearse those

provisions for present purposes: the Tribunal has already determined that the Respondent's disciplining of the Claimant fell within those provisions.

3.3. Section 66 provides for a right for a union member who claims they have been unjustifiably disciplined to complain to an employment tribunal, and for the primary remedy to be a declaration:

> ***66. Complaint of infringement of right***
> *(1) An individual who claims that he has been unjustifiably disciplined by a trade union may present a complaint against the union to an employment tribunal.*
> *…*
> *(3) Where the tribunal find the complaint well-founded, it shall make a declaration to that effect.*

3.4. Where a complaint under s66 has been upheld and a declaration made, it is then necessary for the member to make a further application to an employment tribunal under s67 in order to claim compensation:

> ***67. Further remedies for infringement of right***
> *(1) An individual whose complaint under section 66 has been declared to be well-founded may make an application to an employment tribunal for one or both of the following –*
> *(a) an award of compensation to be paid to him by the union;*
> *(b) an order that the union pay him an amount equal to any sum which he has paid in pursuance of any such determination as is mentioned in section 64(2)(b).*
>
> *(3) An application under this section shall not be entertained if made before the end of the period of four weeks beginning with the date of the declaration or after the end of the period of six months beginning with that date.*
>
> *…*

(5) The amount of compensation awarded shall, subject to the following provisions, be such as the employment tribunal considers just and equitable in all the circumstances.

(6) In determining the amount of compensation to be awarded, the same rule shall be applied concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law in England and Wales or Scotland.

(7) Where the employment tribunal finds that the infringement complained of was to any extent caused or contributed to by the action of the applicant, it shall reduce the amount of the compensation by such proportion as it considers just and equitable having regard to that finding.

(8) The amount of compensation calculated in accordance with subsections (5) to (7) shall not exceed the aggregate of—

(a) an amount equal to 30 times the limit for the time being imposed by section 227(1)(a) of the Employment Rights Act 1996 (maximum amount of a week's pay for basic award in unfair dismissal cases), and

(b) an amount equal to the limit for the time being imposed by section 124(1) of that Act (maximum compensatory award in such cases);

(8A) If on the date on which the application was made –

(a) the determination infringing the applicant's right not to be unjustifiably disciplined has not been revoked; or

(b) the union has failed to take all the steps necessary for securing the reversal of anything done for the purpose of giving effect to the determination,

the amount of compensation shall be not less than the amount for the time being specified in section 176(6A).

4. *The scheme of the legislation is therefore to provide for a finding and declaration of liability under s66 as the primary form of relief.*

5. *A claim for compensation under s67 may not then be presented until 4 weeks after the declaration under s66 and must then presented within 6 months of that date (s67(3)). This is to afford the union an opportunity to consider what (if anything) can be done in order to revoke the unjustifiable discipline and/or take steps to reverse anything done to give effect to the unjustifiable discipline.*

6. *After that period, the member may then make a further application to an employment tribunal under s67 and, if the union has not taken steps which it could have done to revoke and/or reverse the unjustifiable discipline, the statute provides for a minimum award (ss67(8A) & 176(6A)). The applicable minimum if that were to apply in this case would be £8,939[2].*

7. *Any award of compensation under s67 is also subject to a maximum calculated in accordance with s67(8). The applicable maximum in this case is £14,370 plus 1 year's gross annual salary at the rate which applied in the 2016-17 financial year[3].*

(1) Has this application been properly instituted?

8. *In the course of making final preparations for this hearing, the Respondent's leading counsel requested copies of the claim form and response for the claim under s67. As a result of those enquiries, it has become apparent that in fact no new claim form has been presented: the Claimant sent an email on 6 December 2018* ***[xx]*** *purporting to apply for an award under TULR(C)A, s67 and thereafter the Tribunal has listed this hearing. In light of this – and since the Tribunal is a creature of statute with a limited jurisdiction – it is necessary to raise the question whether this application has been properly instituted such that the Tribunal has jurisdiction to hear it, in order to ensure that the Tribunal does not act outside its jurisdiction.*

9. *As noted above, the legislative scheme requires a fresh application to be issued. This is not an application within the existing proceedings (to 'the' employment tribunal which heard the s66 claim) but a fresh application to 'an' employment tribunal.*

10. *The rules in this regard are clear:*

    10.1. Pursuant to section 7(3ZA)(a) of the Employment Tribunals Act 1996, tribunal procedure regulations may prescribe requirements in relation to any form which is 'required… to be used for the purpose of instituting… proceedings before employment tribunals';

    10.2. Rule 1 in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 'Tribunal Rules') defines a 'complaint' as:

    > *'anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal.'*

    10.3. A claim 'claim' is defined as 'any proceedings before an Employment Tribunal making a complaint'.

    10.4. Pursuant to rule 8, any claim 'shall' be started by presenting a claim using a prescribed form and pursuant to rule 10(1) a claim 'shall' be rejected if it is not made on a prescribed form or contain the specified information.

    10.5. For the purposes of the Tribunal Rules, therefore, there is a distinction between something which is referred to as an 'application' in an enactment which confers jurisdiction on the Tribunal, and an 'application' within existing proceedings under rule 30. The former is a 'complaint' which must be presented as a 'claim' in accordance with rule 8; the latter is an

application in existing proceedings which may be made either in writing or in a hearing and for which there is no particular prescribed form.

10.6. There can be no doubt that TULR(C)A, s67 is the former. Not only is that apparent from the face of the statute, but it is also consistent with the scheme of the legislation and makes good sense: the right to claim compensation is a separate right (akin to a protective award under TULR(C)A, s192) which is dependent upon the later factual circumstances which pertain after 4 weeks following the initial declaration on unjustifiable discipline after the union has had an opportunity to consider what can be done to revoke/reverse the measures in question or their effects. It is right that there should be a need for the Claimant to plead the new claim by reference to those circumstances, and a requirement for the union then to respond setting out what it has done to revoke/reverse the effects of the discipline and/or why it has not been possible to do so. If an application under s67 were to be treated as simply a case management application within the existing proceedings – even if that were not contrary to the plain meaning and effect of the Tribunal Rules – the difficulty is that there would be no prescribed elements of the application at all and no necessary opportunity (or requirement) for the union to respond prior to a hearing.

11. An application under s67 therefore had to be instituted by way of presenting a fresh claim, on the prescribed form. The Claimant has not done that and accordingly the Tribunal has no jurisdiction to entertain her application. Moreover, there is no power under s67(3) to vary or extend the 6-month limitation period for any reason, nor does the discretion to waive or vary procedural irregularities under rule 6 apply in respect of the requirement to issue a claim on a prescribed form under rule 8(1). Therefore, the Tribunal has no jurisdiction to hear this

application, no power to waive or vary the applicable rules and requirements and option but to dismiss it.

(2) Does the statutory minimum apply in this case?

12. In this case, the nature of the acts which the Tribunal held amounted to unjustifiable discipline is such that it is not in practice possible to 'revoke' them or 'reverse' their effects. The communications and steps in question have in fact been made or done and have taken effect. History and facts cannot be re-written. Indeed, anything that might be done to address those matters publicly would in fact simply draw further attention to them.

13. There is, therefore, a question of statutory interpretation to be considered: is subsection 67(8A) to be construed as meaning that the minimum applies because steps have not been taken to revoke and/or reverse the measures in question even where it is not in practice possible to revoke or reverse them, or is it to be construed as applying only where there are steps which would in practice revoke and/or reverse the effects of the measures which the union has failed to take?

14. The latter is the better interpretation. It is indicated by the fact that the two limbs of subsection 67(8A) are alternatives and by the fact that the second alternative is qualified by the reference to 'all steps necessary', i.e. –

14.1. the union is required either to revoke the measure in question or to reverse its effects, indicating that the focus is on what is practicable in order to row back the measure; and

14.2. if it is not practicable to 'revoke' the determination under alternative (a) (because it has already been carried into effect) then the union must take 'all steps necessary' to reverse its effects, but

a step cannot be 'necessary' if it is in fact impossible: Parliament cannot be taken to have legislated for the impossible.

15. *Therefore, the better interpretation of subsection 67(8A) is that the minimum award only applies if there are steps which would in practice revoke and/or reverse the effects of the measures which the union has failed to take.*

16. *Since it would in practice be impossible to revoke and/or reverse the effects of the measures in this case, the minimum award under subsection 67(8A) does not apply.*

(3) Does the Tribunal have jurisdiction to make an award for injury to feelings or other non-financial loss under s67?

17. *Pursuant to subsection 67(5) the amount of compensation shall (subject to the other provisions of s67) be such as the Tribunal considers just and equitable in all the circumstances. It is clear, therefore, that the award must be of compensation, not simply at large. Like the term 'loss' that term is capable of embracing both narrower and wider meanings and what it covers is an exercise of statutory interpretation having regard to the particular context (cf Dunnachie v Kingston Upon Hull City Council [2004] ICR 1052, HL, 1060D-E per Lord Steyn).*

18. *The language of subsection 67(5) mirrors, so far as it goes, both*

18.1. the language of unfair dismissal compensation under section 123 of the Employment Rights Act 1996 ('ERA'), which has been held not to cover non- pecuniary loss (Dunnachie), and

18.2. the language of unlawful detriment and other similar provisions (e.g. TULR(C)A, s149; ERA, s49), which has been held in some circumstances to cover

non-pecuniary loss (e.g. Brassington & others v Cauldron Wholesale Ltd [1978] ICR 405, EAT, 413E-141D per Bristow J; Cleveland Ambulance NHS Trust v Blane [1997] ICR 851, EAT, 858E-859G per HHJ Peter Clark) and in others not (e.g. Santos Gomes v Higher Level Care Ltd [2018] ICR 1571, CA, paras 61-66 per Singh LJ).

19. *However, subsection 67(5) differs from both of those formulations in that it contains neither the reference to 'loss' which was the focus of the House of Lords' decision in Dunnachie, nor the reference to the 'infringement' complained of which has been one basis for suggesting that non-pecuniary loss is covered (see Blane).*

20. *Moreover, the question of whether non-pecuniary loss is recoverable under TULR(C)A, s67 (or its predecessors) was expressly left open by the EAT in Bradley & others v NALGO [1991] ICR 359, EAT, 368E-G per Wood J. (It was assumed that such loss is recoverable in Massey v Unifi [2007] IRLR 902, CA, but the point was not argued.)*

21. *Therefore, there is no authority binding on this Tribunal on the question, and it must be approached from first principles as a matter of statutory construction.*

22. *The better construction is that compensation under TULR(C)A, s67 does not cover non-pecuniary loss, for the following reasons:*

    22.1. The phrase 'just and equitable' is not a catch-all phrased that is apt to bring non-pecuniary loss within scope: Dunnachie, paras 23-6 per Lord Steyn; Santos Gomez, para 64 per Singh LJ.

    22.2. These compensation provisions are most closely based on the unfair dismissal provisions: adopting the same maximum awards. Since union rules are fundamentally contractual in nature this jurisdiction is also closely related to breach of contract. In such claims, the normal position and most

natural
interpretation is that compensation does not cover non-pecuniary loss (Dunnachie,
paras 16-18 per Lord Steyn; Santos Gomez, paras 31-33 per Singh LJ).

22.3. Unlike in employment 'detriment' claims, where if non-pecuniary loss could not be compensated there may be no effective remedy (cf Santos Gomez, para 66(v) per Singh LJ), here Parliament has expressly provided for a minimum award which applies if the union does not revoke/reverse the effect of the unjustifiable discipline. Thus, the way the statutory scheme works is that the primary (effective) remedy is a declaration followed by revocation/reversal. If that is not done then a statutory minimum amount of compensation is payable. In any event, if there is financial loss in addition, that may be recovered under s67. There is no need for non-pecuniary loss to be recoverable for there to be an effective remedy.

22.4. The reference to the 'infringement' complained of, which are the basis on which non-pecuniary loss has been held to be covered in (some) 'detriment' claims (see Blane) are absent from s67. Therefore, there is no basis for extending what would otherwise be the more natural, narrower meaning.

22.5. Similarly, there is no express conferral of the power to award injury to feelings as under the Equality Act 2010 (cf Santos Gomez, para 65 per Singh LJ): again reinforcing the proposition that the default for employment tribunal in the absence of specific language conferring a power to make an award for injury to feelings or other non-pecuniary loss is that such losses are not within the scope of recoverable compensation.

(4) What is the appropriate award?

23. The following general points are to be noted:

*23.1. The Tribunal has no jurisdiction to rule upon, or award compensation in respect of, any alleged failure to afford the Claimant access to union records that she is entitled to see (to which references are made in the Claimant's statement for this hearing **[C remedy w/s, paras 2-3]**): those are matters for the Certification Officer, if anyone, and in fact the CO has decided that there is nothing further to investigate in that regard.*

23.2. No medical evidence or even medical records have been served in support of the Claimant's assertion that she was made unwell as a result of the unjustified discipline to which she was subjected. If that claim were to be advanced, the Claimant ought (as a matter of fairness) to have made that clear and sought directions for the service of evidence in support, which the Respondent would then have a reasonable opportunity to consider and decide whether to ask questions of the expert or seek its own evidence in rebuttal. That not having been done, the Tribunal is in no position to make proper findings on questions of causation, injury or prognosis.

23.3. Any award must be for injury caused by the actual acts of unjustified discipline upheld by the Tribunal. The Respondent is not liable for the acts of third parties which break the chain of causation.

24. Turning, on that basis, to the particular heads of loss claimed, since causation and injury have not been established no sums can be awarded for alleged injury or financial loss alleged to arise from sickness absence (during which the Claimant would in any event have received sick pay from her employer).

25. If (contrary to the submissions above) the Tribunal holds that it does have power to make an award for injury to feelings, the relevant updated[4] bands are:

25.1. Lower band: £800 to £8,400

25.2. Middle band: £8,400 to £25,200

25.3. Upper band: £25,200 to £42,000

26. The appropriate award in this case is at the lower end of the middle band. (Compare this case with the much more serious discipline and impact in Massey, for which an award at the upper end of the middle bracket was made.)

27. As to aggravated damages, if (contrary to the submissions above) the Tribunal determines that it does have power to make an award for non-pecuniary loss, the following principles apply when determining whether any award in respect of aggravated damages should be made at all and, if so, how to assess any such award:

27.1. Aggravated damages are an aspect of injury to feelings compensatory not punitive and may be awarded where the manner in which the unlawful act was done, the motive for doing it, or the subsequent conduct of the respondent in relation to the unlawful act were particularly high handed, malicious, insulting, oppressive or otherwise contumelious, such that they aggravated the distress to the claimant (Commissioner of Police for the Metropolis v Shaw [2012] ICR 464, EAT, paras 15-16 & 20-22 per Underhill J)

27.2. Since they are an aspect of injury to feelings and compensatory not punitive, any assessment of aggravated damages must take account of the overall award for injury to feelings and ensure that it is proportionate to the totality of the suffering caused to the claimant (Shaw, para 23 per Underhill J). The Tribunal must take care to ensure that it assesses the overall award by reference to the injury to the Claimant and not by reference to what it thinks is appropriate by way of punishment or in order to give vent to

its indignation at the Respondent's conduct (Shaw, para 24 per Underhill J).

27.3. It may not, therefore, be necessary for the Tribunal to award aggravated damages as a distinct head of loss at all, and if it does so it is generally desirable to formulate the award as an overall amount for injury to feelings, incorporating an identified amount of aggravated damages and identifying the specific aggravating or mitigating factors to which the Tribunal has attached particular

weight. This approach will help to focus attention on the proper, compensatory purpose of the award and 'reduce the risk of the tribunal being seduced into introducing a punitive element by the back door'. It will also help to ensure that the proportionality of the overall award for non-pecuniary loss is properly considered (Shaw, paras 25 & 27-8 per Underhill J).

28. The Tribunal has held that the Respondent was fundamentally entitled to defend itself in relation to allegations and rumours that were circulating ***[Judgment, paras 152 & 154]****, but that it went too far in specifically naming the Claimant as this led to her being identified and isolated by colleagues* ***[Judgment, paras 153, 154, 158, 162]****. Those factors are therefore inherent in the core finding of unjustifiable discipline and its effects on the Claimant: there is nothing extra which requires a separate or additional award in order to compensate the Claimant.*

29. The appropriate approach in this case (subject to the question of whether the Tribunal has power to make an award in respect of non-pecuniary loss at all) is therefore simply to assess a single sum in respect of the impact on the Claimant of the unjustified discipline. As set out above, the appropriate level of award is at the lower end of the middle band.

30. As it happens, that broadly coincides with the minimum award, so if the Tribunal decides that it does have jurisdiction to make an award for

injury to feelings but accepts power middle band as the appropriate level, it may be that it will not need to determine the issue concerning the application of the statutory minimum.

Conclusion

31. For the reasons set out above, the Tribunal is obliged to dismiss this purported application because it has not been properly instituted as a claim under rule 8.

32. Alternatively, the Tribunal is invited to hold that the minimum award under subsection 67(8A) does not apply and that it has no power to make any award in respect of non- financial loss. Therefore, no compensation should be awarded under s67.

33. In the further alternative, an award of or in the region of the minimum award is the appropriate sum."

30. The following are Mr Cooper's footnotes:

"[1] 'Official' is defined in TULR(C)A, s119 and it is accepted that the BASSA Branch officials and workplace representatives fall within this definition.

[2] The 'appropriate date' for determining the relevant sum for the purposes of an application under TULR(C)A, s67 is the date of the determination infringing the applicant's right (see SI 2017/175, art. 4(2)(a)). The relevant determinations which the Tribunal held amounted to unjustifiable discipline occurred prior to 6 April 2017 **[Judgment, paras 151-8 & 162]**. Therefore, the applicable sum is £8,939, set by SI 2016/288, art. 3 & sched. 3, para 3.

[3] As set out in footnote 2 above, the relevant statutory caps are those set by SI 2016/288, art 3 & sched. 3. The applicable limit on a week's pay under Employment Rights Act ('ERA'), s227(1)(a) is therefore £479 and 30 times that limit is £14,370. The applicable limit on unfair dismissal compensatory awards under ERA, s124(1) is 52 weeks' pay (uncapped). The relevant date for calculating a week's pay is not clear: under ERA, s226(3) & (6), for the purposes of s124 in an unfair dismissal claim it would be the EDT, but of course there is no EDT in this case. However, that being the date when the cause of action accrued, the equivalent date for present purposes must be the date when the unjustifiable discipline occurred. Thus the relevant sum under s124(1) is 1 year's gross salary for the year 2016-17. This is still to be confirmed.

[4] *Presidential Guidance: Employment Tribunal awards for injury to feelings and psychiatric injury*
following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, para 10

The claimant

31. Mr Duggan QC submitted on behalf of the claimant that the assertion by the respondent that the tribunal does not have jurisdiction to hear remedy is based on a "fallacious" interpretation of sections 64 to 67 of the ERA, the Employment Tribunals Act 1996 ('ETA 1996') and the schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'). A proper construction of these enactments demonstrates that the tribunal does have jurisdiction.
Moreover, it is instructive to compare the way in which TUL(C)RA 1992 deals with cases where it is necessary for there to be a second action and compare this with section 67.

32. He submitted that given that section 66 is a new claim, the conciliation provisions apply. They do not apply to section 67.

33. He considered sections 64 to 67 and submitted that the whole point of section 67 is that it provides further remedies, in particular, where the union has failed to revoke the determinations or to take any steps necessary to reverse what had been done. The Claimant must wait for four weeks to see if the union, in this case Unite, takes steps to reverse the wrongdoing and thereafter can make an application for compensation. In the present case Unite have made no effort to take any "steps" so that the compensation must be the amount, as a minimum, specified in section 176(6A) of £9787, as well as the other compensatory claims that are made. He continued,

> *"11. It is apparent from the original section 67 that there was the anomalous position that the claim for compensation had to be brought before the Employment Appeal Tribunal. Since there were no proceedings instituted in the EAT an application would have to made separately to the EAT. Once the jurisdiction of the EAT was revoked and the Employment Tribunal having dealt with the issue of declaration, could the deal with remedy; there is no need for separate proceedings since the claim has already been instituted in the tribunal.*
>
> *12. As Harvey notes at Unjustifiable Discipline* ***B-2895*** *and* ***B-2911:***

The remedy for a member or former member unjustifiably disciplined by the union is by way of complaint to an employment tribunal for a declaration (TULR(C)A 1992 s 66). Initially that is his only remedy. He must then wait at least four weeks to give the union time to consider its position. Thereafter he may return to the tribunal seeking money compensation or reimbursement of any fine or penalty paid, or both (TULR(C)A 1992 s 67). ***B-2895***
Having obtained his initial declaration, the claimant may, if he so wishes, return to the tribunal seeking an order for money compensation or the repayment of any 'unjustifiable' fine or penalty (TULR(C)A 1992 s 67(1)). He may not apply for such an order until four weeks after the initial declaration (s 67(3)), so as to give the union time to consider its position and to react to the declaration. He must, however, apply before the end of the period of six months beginning with the date of the initial declaration (s 67(3)). Those are absolute time limits. There is no power to vary them. ***B-2911***

13. It is submitted that there is no need to issue fresh proceedings when the complaints are in the original ET1 and the Claimant has waited the requisite 4 weeks after a declaration has been made. The whole point about this unique procedure is that it is to give the Union the opportunity to rectify, in some way, its wrongdoing and if this is not done, as in this case where Unite has lamentably failed to make any effort to rectify the position, the Claimant can then return to the Tribunal to seek compensation.

14. The use of the phrase "an employment tribunal" in section 76 [67] is neither here nor there. Indeed, there is no reason why the Tribunal originally granting the declaration would have to deal with compensation; though that would be usual.

The Employment Tribunals Act 1996 and the Rules

15. Unite refers to section 7(3ZA)(a) of the ETA 1996. This is merely the enabling section. It casts no light on the use of the words "application to an employment tribunal". However, it should be noted that the phrase "an employment tribunal" is used in other contexts where there are already proceedings. For example, section 7 refers to rules "for enabling an employment tribunal on the application of any party to the proceedings before it" to order disclosure. There is no significance in the use of the prefix "an" and opposed to "the".

16. Nor do the Rules dictate the outcome that Unite contend for.

16.1. Rule 1 does not contain a definition of an "application".

16.2. "claim" is defined as "any proceedings before an Employment Tribunal making a complaint".

16.3. "complaint" is defined as "anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal."

16.4. By regulation 8 a "claim" may be started by presenting a completed claim form and regulation 10 sets out the requirements, including an early conciliation number. Unite's argument ignores the fact that the claim form contains all the prescribed elements, including an early conciliation number. If Unite were correct that separate proceedings had to be issued, it would be necessary to refer the second claim to ACAS and seek a conciliation certificate/number. There is no such requirement.

16.5. The provision for case management orders in Rule 30 states that "an application by a party or a particular case management order may be made either at a hearing or presented in writing to ***the Tribunal.*** *It should be noted that the phrase "the Tribunal" is used throughout the Rules, whether or not a particular tribunal will have been seised of the case. There is no difference between the phrase "an Employment Tribunal" and "the Employment Tribunal" or "the Tribunal". The point made by Unite at paragraph 9 does not have any weight.*

17. There is no need for a fresh complaint to be made, as would have been the case when the EAT had jurisdiction so that the matter could be put before the higher tribunal. In a case such as the present the application which was made at ***page 68*** *was sufficient.*

18. That this is the correct approach is strengthened when one considers other areas in TULCRA 1992 where there actually is a need to make a fresh complaint.[2] In particular, Part IV demonstrates that where a fresh set of proceedings had to be issued, this was kept well in mind by the legislature:

Disclosure of information for the purpose of collective bargaining

18.1. By section 183(1) a trade union may present a complaint to the CAC that an employer has failed to disclose certain information. By section 183(5) if the CAC find the case to be well founded it may make a declaration

*and specify a period within which the employer ought to disclose the information (183(5)(c)). After the expiration of the period referred to in section 183(5)(c), under section 184 "**the trade union may present a further complaint...The complaint must be in writing and in such form as the Committee may require".***

Procedure for handling redundancies

18.2 Section 189, provides that, in the case of a failure to collectively consult under section 188, or to make arrangements for elected representatives, a complaint may be presented to an employment tribunal. The tribunal may make a declaration and a protective award (189(2)(3)). The protective award is in respect of "one or more descriptions of employees".

18.3. Unite assert that the right to claim compensation for a protective award under section 192 is a separate right. However, the whole point of section 192 is that it gives the individual the right to bring a claim "on the ground that he is an employee of a description to which a protective award relates and that his employer has failed wholly or in part to pay him remuneration under the award." The whole point is that there is a need for a second action where the individual was not a party to the first action or where the employer asserts that the person does not fit into the description of employees declared by the tribunal. In the present case, KM was a party to the claim, the whole point is that it was her rights that were infringed, and the tribunal has expressly declared that she has been wronged. She was a party from the outset unlike a section 189 claim, where the employee bringing a section 192 claim may not have been a party to the first claim.

32.4. It should also be noted that there is a three month limitation period and there is the requirement to conciliation under section 192; the latter being plainly because the complaint is a fresh action, whereas under section 67 there is no conciliation provision since the section 67 claim is a continuation of the action.

19. The above examples show the legislature had in mind when there was a need for fresh proceedings, which also triggered the conciliation provisions in the case of collective consultation. Conversely, the disclosure of information provisions refer to a <u>further</u> complaint but that only need to be made in writing. Section 67 is more akin to the latter.

20. It is submitted that, on a proper and sensible construction of section 67, once there has been a declaration under section 66, is that it is only necessary to make an application in writing for compensation. There is no new party before the Tribunal (as is likely to be the case in a section 192 claim) nor is the application going to be heard by a body that has not already been seised of jurisdiction (as was the case when the EAT had jurisdiction) so that there is simply no need for a fresh application to be issued. That the conciliation provisions are not brought into play (as they are with section 192 claims) is a further point that the 'application' under section 67 is not to be by way of new proceedings.

21. It is submitted that this opportunistic application by Unite should be dismissed as having absolutely no merit and that the Tribunal should hold that it has jurisdiction.

Compensation

22. At paragraphs 12 to 30 of its Skeleton, Unite make various comments about compensation, which will be dealt with in these submissions. It is asserted that:

22.1 The statutory minimum award cannot apply.

22.2 The Tribunal does not have jurisdiction to make an award for injury to feelings or other non-financial loss.

22.3 If compensation for injury to feelings is awarded it should be at the bottom of the middle band.

These submissions will be dealt with but it is first important to have in mind the findings by the Tribunal on liability.

Liability

23 The relevant findings of liability are as follows:

> *152…We are, however, satisfied that* ***a determination was made on or around 3 March 2017 that she should suffer a detriment, in that the she would be identified and blamed for the consequences to the union and the union movement in having taken her case to the Certification Officer and the consequences for the union and officials considering the EAT judgment.*** *The email of 3 March, the Twitter tweet and the subsequent emails referred to above specifically referred to the claimant by name rather than as a member of the Branch or of the union. We, therefore, have come to the conclusion that the claimant had been unjustifiably disciplined in respect of the email communications from the branch. Each communication sent to the membership followed a discussion by the union officers and amounted to a determination. As such section 64(2)(f) is satisfied and the claimant was unjustifiably disciplined. Paragraph 2a(i) of the List of Issues in relation to the specific correspondence referred to above, is well-founded. 153. If we are in*

error in concluding that the above communications constituted determinations and the claimant was unjustifiably disciplined, we do conclude, in the alternative, that a determination was made on or around 3 March 2017, when the Branch Committee decided that it was time to address the rumours and negative publicity by referring to the claimant in their communication with the membership. The subsequent communications referred to above, directly followed on from the decision taken on or around the 3 March. In that respect she was unjustifiably disciplined.

155. The "unspecified commentary in social media at page X" paragraph 2a(ii) of the List of Issues, while the tribunal accepts that posts on social media websites can generally be said to represent an individual's point of view, we note that Ms Marie Louise Elliott, Worldwide Fleet Elected Representative for the BASSA Branch, consistently used the pronoun "we" and used information she was privy to in her capacity as a union representative. She was most anxious to put over the Branch's points of view in her posts during discussions. ***We, therefore, conclude that these posts were determinations made by a union official acting in that capacity under s.64(2). The posts were detriments in that they increased the claimant's isolation from her colleagues and attributed bad motives to her in bringing the Certification Officer case.***

157. We have concluded that the claimant was unjustifiably disciplined in relation to Ms Elliott's commentary.

158. The tweet on "Court Cases and The Public Record" on 4 March 2017, gave the link to the document circulated to the members on 3 March 2017 which referred specifically to the claimant and those involved in the Castillo v Unite case. Again, we conclude that this was a determination made on or around 4 March 2017 by the Branch officers that the claimant's case should be referred to in a tweet. This decision was a detriment to her as it further isolated her from her colleagues. We remind ourselves that the nature of the work of the BASSA involves travel all over the world and communication via social media is the principal means of keeping in touch and be seen as part of a team. ***We again would make the point that it was neither necessary nor acceptable for her to be identified by name and blamed for the alleged damage done to the union and the union movement.*** *We have come to the conclusion that she was unjustifiably disciplined, paragraph 2a(iii).*

162. ***We have found that the change to the Branch's constitution, the timing of the amendment and the way in which it was expedited, were targeted at the claimant.*** *The Branch officials and that the Branch were anxious to implement the proposed amendment prior to the claimant inspecting their documents on 7 April 2017. There was a determination on the 3 April 2017. The branch officials only disclosed the nature of the proposed amendment on the day of the meeting on 3 April 2017. Out of the 9,000 members only 41 attended the meeting.* ***The claimant was named in the proposed draft letter to be sent to her with the threat of disciplinary and/or court action should she breach the provisions in the amendment which were in themselves quite restrictive as they do not allow for the claimant to discuss the documents with her legal advisors. Accordingly, she has suffered a detriment as she was targeted, isolated from the membership and restricted in her use of the information, paragraph 2a(vi).***

(2) The statutory minimum award cannot apply

24. The submissions made by Unite in paragraphs 12 to 16 of its Skeleton are surprising to say the least. They amount to an assertion that the union can denigrate a member as much as it likes and then when it is declared that it acted unlawfully, can simply shrug its metaphorical shoulders and assert that there is nothing it can do to reverse the harm it has caused. The more the member has been denigrated the greater the difficulty in reversing the position so nothing can be done. It would be a disgrace if Unite could avoid liability for compensation by such a disingenuous and cynical route when they have taken no steps.

*25. Section 67(8A) and 67(3) in effect gave Unite four weeks to take steps to revoke the determination or to take all the steps necessary for securing the reversal of anything done for the purpose of giving effect to the determination. In this case Unite (and BASSA) has done nothing. Those passages in bold above identify that KM was "**identified and blamed",** that the conduct of Unite "**increased the claimant's isolation from her colleagues and attributed bad motives to her",** that KM was "**identified by name and blamed for the alleged damage done to the union and the union movement"**, that KM "**suffered a detriment as she was targeted, isolated from the membership and restricted in her use of the information".** It is important to note that there is no defence of reasonable practicability set out in the section. The determination must be revoked, all necessary steps must be taken.*

26. Unite cynically assert that if anything is done to address the matters publicly it would "simply draw further attention to them". It would certainly draw attention to just how badly BASSA conducted itself and the fact that Unite have gone along with such conduct and not publicly resiled from it or repudiated it. The provision is analogous to unofficial strike action where the Union is liable it if has not repudiated the conduct – section 21 233 and 237 of TULCRA 1992. The Union takes the consequences of its members infractions unless it has complied with its duties. In this case Unite should have made it clear that it repudiated the conduct of its members, that KM had been wrongly identified and blamed and that she was wholly innocent of the slurs directed against her. It should have made it clear to those she worked with that she had been made the victim and was not the wrongdoer. These would be steps to secure the reversal of the calumnies that had been directed against KM. There was not even any attempt to engage with KM as to how Unite could rectify the position.

27. It is submitted that the minimum statutory amount shall be not less than the amount specified in section 176(6A) and that it should be awarded.

(3) Injury to feelings and other non-pecuniary loss

28. ***The way in which section 67(5) to (8A) works is usefully summarised by commentary on section 67 in Harvey:***

> *These provisions are parallel to the ordinary rules on assessing compensation for unfair dismissal (sub-s (8)(a) being the maximum for the basic award and sub-s (8)(b) adopting the maximum for the compensatory award); for mitigation (sub-s (6)) in unfair dismissal law see Q [740]n, and likewise for contributory fault (sub-s (7)). There are, however, three differences–(i) although the maximum under sub-s (8)(a) is the same as for the basic award, the method of calculation is not the same (there being no obligation to use the mathematical formula based on age and length of service that applies when calculating the basic award); (ii) by virtue of sub-s (8A) there is a minimum award (as in TULR(C)A 1992 s 176(6A) in the case of exclusion or expulsion) where the union has not, at the date of application, revoked its determination or has failed to take all steps reasonably necessary to do so; (iii) damages can include aggravated damages and amounts for injury to feelings (with the latter being subject to the discrimination law guidelines in Vento v Chief Constable of West Yorks Police (No 2) [2003] ICR 318, CA): Massey v UNIFI [2007] EWCA Civ 800, [2007] IRLR 902, CA (where damages were also awarded for personal injury caused by the union's actions; Essa v Laing [2004] ICR 746, CA applied). For an example of the assessment of such compensation (under the previous provisions) see Bradley v National and Local Government Officers' Association [1991] IRLR 159, [1991] ICR 359, EAT. In deciding whether a union has taken all reasonably necessary steps, it is no answer for the union to say that any remaining steps could equally well have been taken by the applicant himself: NALGO v Courtney-Dunn [1991] ICR 784, EAT*

29. Unite argue that non-pecuniary loss is not recoverable at paragraphs 17 to 22 of its Skeleton. It appears from paragraph 22.5. that Unite also argue that compensation for injury to feelings is not covered. The submission by Unite simply ignores the wording of section 76(5) which puts compensation at large[3] based upon what is just and equitable.

30. At paragraph 18.1. Unite argue that the wording mirrors "so far as it goes" the language of unfair dismissal compensation under section 123 of ERA 1996. That is not correct. Section 123(1) provides that the amount of the compensatory award shall be such amount as the Tribunal "considers just and equitable in all the circumstances having regard to the loss sustained by the

complainant in consequence of the dismissal. The section puts the unfair dismissal compensation fairly and squarely in the ambit of pecuniary loss. Section 67(5) does not do so.

31. At paragraph 18.2. Unite admit that the detriment provisions in TULCRA 1992 (s 149) and ERA 1996 (s49) <u>can</u> cover non pecuniary loss. Section 149(2) refers to compensation which the Tribunal considers "just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the act or failure which infringed his right". Section 49(2) refer to the amount of compensation being "such as the tribunal considers just and equitable in all the circumstances having regard to (a) the infringement to which the complaint relates, and (b) any loss which is attributable to the act, or failure to act, which infringed the complainant's rights."

*32. Unite assert that provisions have in some cases been held not to cover non pecuniary loss and this is correct (ie the Working Time Regulations 1998 as a classic example). Reference is made by Unite to **Santos Gomes v Higher Level Care Ltd** [2018] ICR 1571. This was a case under the Working Time Regulations 1998. Singh LJ stated:*

> *"66. Nevertheless, I would prefer to leave for decision in another case, in which the issue arises directly, whether cases such as Brassington and Blane were correctly decided in their own context. This is because (i) those cases have a longstanding pedigree, going back around 40 years; (ii) they were decided by judges with long experience of employment law; (iii) the House of Lords had the opportunity to say that they were wrong since they were cited in the Dunnachie case but did not say anything about them; (iv) this court did not have the benefit of full argument on the point, since Mr Pascall came to the hearing to distinguish the earlier appeal tribunal line of authority, not to bury it; and (v) they appear to relate to situations in which there may be no financial loss at all and so the purpose of Parliament in conferring the rights in question may be frustrated if compensation for injury to feelings were not available either. This is a point mentioned by Judge Peter Clark in particular, in Blane's case in a passage which I have quoted at para 47 above.*
>
> *67. However, even if correctly decided, that line of authority is distinguishable from the present case because it concerns breaches of employment rights which are analogous to discrimination claims. In the present context, I agree with Slade J [2016] ICR 926 that the wrong complained of is akin to a breach of contract."*

33. Singh LJ clearly had in mind the distinctions between the different types of statutory claims/cases and, after considering, inter alia, ***Cleveland Ambulance NHS Trust v Blane*** *[1997] ICR 851 and* ***South Yorkshire Fire & Rescue Service v Mansell (unreported)*** *30 January 2018 (Soole J), noted:*

> *53. First, Soole J was simply following the earlier decisions to which have already made reference and applying them to the particular context before him. As he observed at para 56 of his judgment:*
>
> > *"The* ***established categories (trade union rights, whistleblowing) are treated as akin to discrimination cases in a relatively loose sense, namely that the claimant has suffered some form of detriment on the grounds of his protected right or act****. Whilst the right may require a particular status (e g trade union member; health and safety representative …), the example of whistleblowing demonstrates that this is not essential, save in the requirement to be a 'worker' (section 47B). What matters is the right, to which Part V gives further protection."*
>
> *54. Secondly, Soole J expressly considered and distinguished the decision of Slade J in the present case: see para 54 of his judgment. He drew a* ***distinction from claims for breach of contract or claims akin to breach of contract, such as the present case, and cases of statutory torts.*** *He regarded the case before him as falling into the latter category.*

34. The distinction set out above is a good one and dictates that, in the present case, compensation for non-pecuniary compensation is appropriate. KM sets out the terrible effect that the conduct of the members had upon her and this is a case which is wholly akin to a statutory tort.

35. In ***Bradley & Ors v NALGO*** *[1991] ICR 359 compensation for injury to feelings was awarded. In relation to whether compensation for injury to feelings could be awarded, Wood J stated "it does not seem in the present case that it is necessary to decide that matter." In* ***Massey v Unifi*** *[2007] IRLR 902 the Court of Appeal adopted the same approach as in other statutory tort cases and awarded compensation for injury to feelings.*

36. It is submitted that the cases in which non-pecuniary losses have been awarded should be followed and Unite place their case far too highly in asserting at paragraph 21 that there is no binding authority. On the contrary, even Santos, on which Unite appear to place reliance, recognised the difference between claims akin to breach of contract and claims akin to statutory torts.

37. It is submitted that the assertions made in paragraph 22 of Unite's skeleton should be rejected:

37.1. The phrase "just and equitable" can bring in non- pecuniary loss dependent upon the type of case.

37.2. The compensation provisions in section 67 are most akin to a statutory tort. They are not akin to unfair dismissal and it is simply wrong to assert that the claims are similar to unfair dismissal or contractual rights. Section 65 does not deal with contractual rules but is more akin to discrimination in that the member is unjustifiably treated (detriments) because of one of the matters in section 65(2). The most natural interpretation is that the compensation does cover non-pecuniary loss.

37.3. This is a classic case where damages for injury to feelings should be awarded for their to be a remedy that properly compensates the Claimant. KM has suffered real detriment over a period of many months and should be properly compensated for this. Having asserted that KM is not entitled to a minimum award, Unite now argue in paragraph 22.3. that a declaration and such award is the primary remedy! In fact the minimum award relates to Unite's obstinacy in failing to take any steps to make good its breaches and this is why it is awarded. The damages for injury to feelings recognise the very real wrongs and harm that KM has suffered.

37.4. The assertion in paragraph 22.4. does not make sense. In ***Cleveland Ambulance NHS Trust v Blane*** *[1997] ICR 851 the relevant provision was section 149 of TULCRA 1992 which refers to such compensation as it "just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained" . The fact that the latter 12 words are absent in section 67 cannot be relevant. The compensation under section 67(5) is what is just and equitable "in all the circumstances". It cannot be arguable that it is not just and equitable in all the circumstances to award damages for injury to feelings where KM was subject to what was, in effect, a campaign of denigration which self evidently cries out for such compensation. The section does not preclude such compensation and it is clearly appropriate.*

37.5. Nor does the fact that there is no express provision which mentions compensation for injury to feelings mean that it should not be awarded; there are other areas where it has been awarded without such an express reference (the fact it is expressly mentioned in the discrimination statutes stems from 1975 when it was included in the Sex Discrimination Act 1975, simply to make the position clear, which found its way into the Equality Act 2010).

38. It is submitted that Unite's assertion that damages cannot be awarded for non-pecuniary loss should be rejected.

(4) The Appropriate Award.

39. Unite sets out its submissions at paragraphs 23 to 30. The points made in paragraph 23 are noted. The Tribunal can decide what to award by way of damages for injury to feeling based upon the evidence from KM. The acts of the

members are acts for which Unite are liable. It was their sustained campaign which amounted to unjustified discipline. Paragraph 24 is simply not accepted. The Tribunal can award damages for injury to feeling based upon its view of the impact of the conduct upon KM. This is fairly standard.

40. The bands at paragraph 25 are accepted. KM seeks £30,000 which is the lower part of the upper band. This is appropriate given the evidence from KM, in particular, as set out in KM's statement, of the ongoing campaign of bullying and harassment:

40.1. Fear and isolation at work set out at paragraphs 8-9.

40.2. Threats and fear for personal safety set out at paragraphs 10-13.

40.3. The conduct of Unite in changing the constitution set out at paragraphs 14-16.

40.4. The emails sent to the whole of the membership that meant she was 'recognised' as a troublemaker as set out at paragraphs 17 to 22.

40.5. The negative impact at work as set out at paragraphs 23 to 26.

40.6. The damage to KM's home life, marriage and relationship with her children as set out at paragraphs 27 to 33.

40.7. The effect on KM's health as set out at paragraphs 34 to 35.

40.8. The damage in her confidence with the union set out at paragraphs 36 to 37.

*41. These matters are as serious as **Massey** since they massively impacted upon KM's feeling of safety and wellbeing. The Tribunal is entitled to accept this evidence and gauge the impact of Unite's conduct on KM.*

Aggravated damages

*42. The Tribunal is entitled to award aggravated damages. The test in **Commissioner of Police v Shaw** [2012] ICR 464 is the appropriate one and, without punishing Unite, it is submitted that aggravated damages can be awarded because of the manner in which Unite conducted itself. It was said in **Shaw** that:*

> *"16. We draw attention to three features of that summary, based as it is on Lord Devlin's analysis in Rookes v Barnard [1964] AC 1129 .*
>
> *(1) Aggravated damages are compensatory in nature and not punitive.*
>
> *(2) The features that may attract an award of aggravated damages can be classified under three heads—(a) the manner in which the defendant has committed the tort; (b) the motive for it; and (c) the defendant's conduct subsequent to the tort but in relation to it.*
>
> *(3) The features enumerated at (2) above affect the award of compensation because they aggravate the distress caused by the actual wrongful act….*
>
> *21. Aggravated damages are an aspect of injury to feelings . It is a necessary corollary of the point made in the previous paragraph that*
>
> > *"aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the*

discriminatory act or conduct on the applicant and thus the injury to his or her feelings"…

22. Criteria . The circumstances attracting an award of aggravated damages fall into the three categories helpfully identified by the Law Commission: see para 16(2) above. Reviewing them briefly:

(a) The manner in which the wrong was committed . The basic concept here is of course that the distress caused by an act of discrimination may be made worse by it being done in an exceptionally upsetting way. ***In this context the phrase "high-handed, malicious, insulting or oppressive"*** *is often referred to (as it was by the tribunal in this case). It derives from the speech of Lord Reid in Broome v Cassell & Co Ltd [1972] AC 1027 (see at p 1087 g), though it has its roots in earlier authorities. It is there used to describe conduct which would justify a jury in a defamation case in making an award at "the top of the bracket". It came into the discrimination case law by being referred to by May LJ in Alexander v Home Office [1988] ICR 685 as an example of the kind of conduct which might attract an award of aggravated damages. It gives a good general idea of the territory we are in, but it should not be treated as an exhaustive definition of the kind of behaviour which may justify an award of aggravated damages. As the Law Commission makes clear, an award can be made in the case of any exceptional (or contumelious) conduct which has the effect of seriously increasing the claimant's distress.*

(b) Motive . It is unnecessary to say much about this. Discriminatory conduct which is evidently ***based on prejudice or animosity or which is spiteful or vindictive or intended to wound is, as a matter of common sense and common experience****, likely to cause more distress than the same acts would cause if evidently done without such a motive—say, as a result of ignorance or insensitivity. That will, however, only of course be the case if the claimant is aware of the motive in question: otherwise it could not be effective to aggravate the injury: see Ministry of Defence v Meredith [1995] IRLR 539 , 543, paras 32–33. There is thus in practice a considerable overlap with head (a).*

*(c) Subsequent conduct . The practice of awarding aggravated damages for conduct subsequent to the actual act complained of originated, again, in the law of defamation, to cover cases where the defendant conducted his case at trial in an unnecessarily offensive manner. Such cases can arise in the discrimination context: see Zaiwalla & Co v Walia [2002] IRLR 697 (though NB Maurice Kay J's warning at para 28 of his judgment (p 702)) and Fletcher [2010] IRLR 25 . But there can be other kinds of aggravating subsequent conduct, such as where the employer rubs salt in the wound by plainly showing that he does not take the claimant's complaint of discrimination seriously: examples of this kind an be found in Armitage , *476 Salmon and British Telecommunications plc v Reid [2004] IRLR 327* ***. A failure to apologise may also come into this category****; but whether it is in fact a significantly aggravating feature will depend on the circumstances of the particular case. (For another example, see the very recent decision of this tribunal (Silber J presiding) in Bungay v Sain i(unreported) 27 September 2011 . This basis of awarding aggravated damages is rather different from the other two inasmuch as it involves reliance on conduct by the defendant other than the acts complained of themselves or the behaviour immediately associated with them. A purist might object that subsequent acts of this kind should be treated as distinct wrongs, but the law has taken a more pragmatic approach. However, tribunals should be aware of the risks of awarding compensation in respect of conduct which has not been properly proved or examined in evidence, and of allowing the scope of the hearing to be disproportionately extended by considering distinct allegations of subsequent misconduct only on the basis that they are said to be relevant to a claim for aggravated damages. (words in bold -emphasis added)*

*43. It is difficult to think of more **high-handed, malicious, insulting, oppressive** conduct or behaviour **based on prejudice or animosity or which is spiteful or vindictive or intended to wound** than the various messages sent which are referred to in the judgment. This was in reality a campaign of hatred waged against an individual because she stood up for her rights by simply asking to see the Branch accounts. There has not been one redeeming factor from Unite throughout the course of this debacle. It is noted that, at paragraph 28, Unite state that it was fundamentally entitled[4] to defend itself in relation to allegations and rumours that were circulating but it went too far. This is an understatement which even now seeks to downplay the conduct towards KM. There has been no apology and no attempt to redress the harm caused to KM. This is a case which cries out for an award of aggravated damages which KM seeks in the sum of £10,000.*

44. The award that is sought consists of:

44.1. The minimum award of £9787.

44.2. £30,000 injury to feelings.

44.3. £10,000 aggravated damages

44.4. Loss of earnings. KM has set out in her witness statement at paragraphs 34 to 35 that she was off work for 25 days. Attached to this document is a letter form BA which confirms the flight allowance figure. Whilst she was paid sick pay she lost the standard allowance she would otherwise have received. This is calculated as:

5 x £77.35 + 20 x £76.01 = £1,906.95

44.5. The costs of the hearing of 29th January 2020 which had to be adjourned due to the late service by Unite of its Skeleton whereby it too the jurisdictional point.

45. The cap at section 67(8) applies so that the compensation is limited to £38,654 (plus the costs are a separate claim). The refresher for Counsel on 29th January 2020 was £2500 plus VAT."

34. The following are Mr Duggan's footnotes:

*"[1]KM had already sought compensation, including damages for injury to feelings in her ET1 at **page 42***

[2] Unite refer to section 192 of TULCRA 1992 at paragraph 10.6. but do not set out the actual scheme which is different from sections 66/67.

[3] Subject to sections 76(6)-(8A). "

35. In his addendum to his skeleton argument, Mr Duggan submitted that the wording of section 67 does not require that a fresh claim form should be presented "an application to an employment tribunal." He refers to the wording in section 117(1) Employment Rights Act 1996, in which it is stated that "an employment tribunal" shall make an award of compensation, not "the" employment tribunal shall make an award of compensation. There is no requirement that a new claim in respect of

remedy should be presented. The same argument applies in relation to this sections 128 and 132 ERA 1996.

The law

36. Both Mr Cooper QC and Mr Duggan QC, have referred to the relevant sections in TULR(C)A and to cases in their written arguments which do not require repeating. We have set them out in Mr Duggan's skeleton arguments above. It is acknowledged that there is no case law specifically on the jurisdictional issue and on non-pecuniary loss. On jurisdiction, this is largely down to statutory interpretation of the relevant provisions.

37. We have also considered sections 64 to 67, 149, 176(6A) for 188 to 192 TULR(C)A; sections 7(3ZA)(a), 117, 124, 128, 176(6A), 227 all Employment Tribunals Act 1996; section 49 and 123 Employment Rights Act 1996; section 34, Employment Relations Act 2004, schedule 1, Employment and Tribunal's (Constitution and Rules of Procedure) Regulations 2013, and article 4(2)(a) The Employment Rights (Increase of Limits) Order 2017.

38. In addition, we have taken into account the following cases: National and Local Government Officers' Association v Courtney-Dunn [1992] IRLR 114; Beaumont v Amicus-MSF UKEAT/0122/03, [2004] All ER (D) 425 (Feb), Dunnachie v Kingston Upon Hull City Council [2004] ICR 1052, HL; Brassington & others v Cauldron Wholesale Ltd [1978] ICR 405, EAT; Brassington & others v Cauldron Wholesale Ltd [1978] ICR 405; Cleveland Ambulance NHS Trust v Blane [1997] ICR 851, EAT; Santos Gomes v Higher Level Care Ltd [2018] ICR 1571, CA; Bradley & others v NALGO [1991] ICR 359, EAT; Massey v Unifi [2007] IRLR 902, CA; Commissioner of Police for the Metropolis v Shaw [2012] ICR 464, EAT; and Forcer v Bakers, Food & Allied Workers Union [2004] UKEAT0634 03 1806; and Alexander v Home Office [1988] IRLR 190,CA.

Conclusion

Has the application been properly instituted?

39. Mr Cooper submitted that the legislative scheme in section 67 requires that there be a fresh claim as the claim for a remedy hearing is not within the existing proceedings and requires an application before "an" Employment Tribunal. Rule 1, schedule 1, Employment Tribunals Rules 2013, defines a "complaint" as including a "claim". As such rule 8 requires that a claim shall be presented in the prescribed form with the required information. An "application" in an enactment conferring jurisdiction, is a "complaint" which includes a claim and must comply with rule 8.

40. We respectfully disagree. The previous section 67 provided where the claim of unjustifiable discipline was declared to be well-founded, that the claimant after waiting 4 weeks for the respondent to either revoke or reverse the determination, may apply to the EAT for a remedy hearing.

41. Rule 30 provides that an application may be made to "the Tribunal" not "an Employment Tribunal". The expression, "the Tribunal" is replete in the rules.

42. In a protective award case, the failure to comply with section 188, the duty on an employer to consult, gives either the union, employee representatives, or the affected employees, in defined circumstances, the right to bring a complaint seeking a declaration and a protective award. The claim is between those described above and the employer, section 189.

43. Where, however, the employee has not been paid their protective award, they may present a complaint to "an Employment Tribunal" for payment, section 192. This is not analogous to the scenario submitted by Mr Cooper because the claim is between the employee and the employer. The parties are not the same as in section 189 claim. There is, accordingly, the requirement that a new claim be presented in accordance with section 192. The claimant and the respondent in this instant case, are the same. She is seeking a remedy in these and not in new proceedings following the tribunal's judgment on liability.

44. Under the old section 67 there was the need for "an application" to be made to the EAT for a remedy hearing but that has been repealed as liability and remedy can be determined before an Employment Tribunal, section 34, Employment Relations Act 2004, as from 31 December 2004.

45. If Parliament intended that a claimant, after having been found that they had been unjustifiably disciplined, is then required to issue a fresh claim after waiting 4 weeks, it would have set it out clearly as well the requirement that they engage in ACAS early conciliation. Although issue fees have been repealed, prior to the judgment of the Supreme Court, the claimant may also have been required to pay another issue fee, but this is not the case in relation to a section 67 claim. Parliament has clearly set out the two-staged procedure in protective award cases.

46. We endorse the learned editors' opinion in Harvey cited by Mr Duggan in paragraph 12 of his skeleton arguments, on this issue.

Does the statutory minimum apply in this case

47. In relation to the statutory minimum, section 67(3) and 67(8A) gives the respondent 4 weeks to either reverse the determination or to "take all steps necessary for securing the reversal of anything done for the purpose of giving effect to the determination". No evidence was given by the respondent in respect of the steps it had taken in compliance with section 67(8A). Contrary to his written submissions, Mr Cooper acknowledged, orally, that the claimant is entitled to the minimum award. This applies where the union has neither revoked the disciplinary action nor has it taken all necessary steps to reverse the determination. The respondent must put the claimant in the same position she was in before the act of unjustifiable discipline, National and Local Government Officers' Association v Courtney-Dunn and Beaumont v Amicus-MSF. The minimum award is the same as for the improper exclusion of a union member, section 176(6). The figure currently is £10,022 but this figure is not the minimum to be awarded to the claimant in this case.

48. The "appropriate date" for determining the sum under section 67 is the "date of the determination infringing the applicant's right", article 4(2)(a) The Employment Rights (Increase of Limits) Order 2017. We agree with Mr Cooper that the respondent's determinations were prior to the 6 April 2017. We have taken into account paragraphs 152, 157 and 162 of our judgment on the claimant's treatment and the effects on her. In a work environment where reliance is placed on good, positive and supportive relationships amongst colleagues, the claimant felt targeted, isolated, blamed to damaging the union, and restricted in her use of information. At that time the applicable sum was £8,939. We, therefore, award this sum under section 67(8A).

Does the Tribunal have the power to make non-pecuniary awards?

49. Section 67(5) states that, "The amount of compensation awarded shall, ….. be such as the employment tribunal considers just and equitable in all the circumstances." Mr Cooper submitted that the wording is similar to section 123 ERA 1996, "(1) Subject to the provisions of sections 124, 124A, and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to the action taken by the employer." What should be considered in assessing loss are contained in subsections 123(2) and (3).

50. In an unfair dismissal case, section 123 does not provide for non-pecuniary loss, Dunnachie.

51. Mr Cooper acknowledged that in unlawful detriment cases in section 149 TULR(C)A and section 49 ERA, non-pecuniary loss had been awarded, Brassington, and Cleveland but not Santos. He argued that the distinguishing feature is the absence of the words "loss" and "infringement", Cleveland, in section 67(5) TULR(C)A. He submitted that the statutory scheme allows for the minimum award to be given and any consequential financial loss. Unlike in the Equality Act 2010, there is no express power to award injury to feelings.

52. We have come to the conclusion that the tribunal has the power to make an award for injury to feelings and for other non-pecuniary losses. Firstly, the learned editors of Harvey having considered section 67(5), stated that compensation can include injury to feelings and aggravated damages and referred to the Massey case.

53. Secondly, in Santos, it was acknowledged that trade union rights are akin to detriment claims or statutory torts, for which non-pecuniary loss can be awarded.

54. Thirdly, in the Forcer case, under the old section 67 provision, Hooper J, in paragraph 9 of the judgment, wrote,

> "There is no dispute that this Tribunal could include in its award, a sum representing an amount for injury to feelings. There was also no dispute that this Tribunal could make an award to include aggravated damages."

55. Fourthly, the same approach was taken in Bradley.

56. The compensatory provisions having been in force for some years, it would be an extraordinary and inconsistent step for this tribunal to take to depart from those cases and to accept Mr Cooper's submissions.

The appropriate award

57. We have also taken into account the cases of Vento v Chief Constable of West Yorkshire Police (No:2) [2003] IRLR 102, on the injury to feeling bands of award; and De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, updating the bands referred to below.

58. In the case of Vento, Lord Justice Mummery, giving the judgment of the Court of Appeal, gave guidance on the award for injury to feelings. He held that there should be three categories defined as the: lower; middle; and upper bands. Awards within the lower band are for less serious cases, such as where the act of discrimination is an isolated one or a one-off occurrence. Awards in the middle band are appropriate for serious cases which do not merit an award in the upper band. Awards in the upper band are for the most serious cases, "such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race." His Lordship further held that only in the most exceptional cases should an award exceed the range in the upper band.

59. The Joint Presidential Guidance on the Injury to Feelings Awards, increases the bands every year to take account of inflation. In the context of this case, the claimant presented her claim form on 31 May 2017. The first Guidance was introduced on 5 September 2017 and applies to claims presented on or before 11 September 2017. However, in paragraph 11 of the Guidance,, it states the following:-

> "….. In respect of claims presented before 11 September 2017, an Employment Tribunal may operate the bands for inflation by applying the formula X divided by Y (178.5) multiplied by Z and where X is the relevant boundary for the relevant band in the original Vento decision and Z is the appropriate value from the RPI All Items Index for the month and year closest to the date of the presentation of the claim (and, where the claim falls for consideration after 1 April 2013, then applying the *Simmons v Castle* 10% uplift)."

60. We have decided to have regard to the Vento bands in that Guidance as the claim form was presented only 5 months earlier than the Guidance. The bands are: the lower band £800 - £8,400; middle band £8,400 – £25,200; and the upper band £25,200 – £42,000. In exceptional cases an award can exceed £42,000.

61. We have found that the claimant because of the abusive communication, was left feeling vulnerable. The emails were attempts to dehumanise her and she had no means of countering the respondent's false narrative and an inability to defend herself. On Facebook, the negative comments she describes as being viral. She began to fear for her personal safety and visited the Hounslow Police Station to report her treatment and to seek advice. She was more fearful and anxious with each post and dreaded going into work with people in close proximity who were abusing her.

62. The change to the BASSA branch constitution was rushed through in an attempt at preventing her from speaking freely once she had reviewed the accounting records. At the meeting on 7 April 2017, she was wrongly accused of talking to the media, and felt the high levels of animosity towards her during the meeting.

63. From the beginning of March 2017, the respondent sent a series of emails to its membership of about 10,000 people, referring to her by name and in extremely derogatory and unpleasant terms. We found that she was specifically targeted in those emails. She had changed from being an ordinary employee to becoming infamous and could easily be identified as she kept her name on her name badge and was questioned by those working with her.

64. In order to reduce the risk of reprisals against her she had to request a "No-Fly" in respect of every union representative she knew to be involved in sending the offensive emails. In doing so, it affected her ability to swap shifts freely. She also had the constant fear that someone motivated by malice may place something in one of the bags in her charge. As a precautionary measure, she would constantly check the bags to ensure that they are still in the same state as she left them.

65. Her treatment impacted on her daughters when they eventually became aware of her treatment. It was upsetting to her that her daughters had been drawn into her workplace issues and she felt guilty that there were worrying about her.

66. Although workplace issues were not the sole cause of her marriage breakdown, they were a contributory factor as the whole experience led her to become withdrawn and depressed at home. She and her husband began to argue a lot and it felt as if each argument was pushing them further apart. The marriage had irretrievably broken down in or around February 2018.

67. Whereas previously, she would socialise with her colleagues, such as being invited out for meals, drinks and shopping trips, currently they are distant and such invitations are few.

68. She was on sick leave due to stress at work from 15 to 21 April 2017, and from 21 May to 16 June 2017. She found it difficult to return to work knowing that the whispering campaign against her was continuing. There is no medical report as she is not making a personal injury claim. She said, and we do accept her evidence, that her anxiety remains and that nothing will ever be the same for her again. "The respondent has turned my life upside down by pressing a few buttons on a computer keyboard." Such is her current state after four years.

69. Taking these above matters into account, we have come to the conclusion that it would be just and equitable to make an award that falls within the upper band having regard to the fact that the claimant currently experiences the consequences of the respondent's unjustifiable disciplinary action and fears for her personal safety. Her life has changed significantly for the worse. We, therefore, make an award for injury to feelings towards the lower end of the top band in the sum of £30,000.

Aggravated damages

70. An award may be appropriate where the respondent has acted in a high-handed, malicious, insulting or oppressive manner. We agree with Mr Duggan's skeleton argument in paragraph 43. The messages sent to the claimant were intended to wound, they were spiteful and vindictive as they were meant to punish the claimant for exercising her right as a union member. It was a campaign of hatred raged against a single individual who did not have either the resources or the support to respond effectively. Although entitled to defend itself, it went too far in the claimant's case. There has been no attempt to redress the harm caused to her.

71. Taking these matters into account, and having regard to the judgment in Shaw, we decided not to increase the injury to feelings award because of aggravating features, instead to make a separate award in respect of aggravated damages in the sum of £5,000.

Loss of earnings

72. The claimant was off work due to stress for five weeks as a result of her treatment at work. She claims loss of flying allowance. From the pay slips provided, Mr Cooper reasonably calculated that the flying allowance comes to 26% of her gross pay in 2017, which is £7,433.01, divided by 52 weeks, is £142.94. This figure is divided by 5 days giving £28.59 per day. During the 25 days she was absence in April to June 2017, due to stress at work, she lost £714.75. We agree with the respondent's calculation as it is the best evidence based on the claimant's payslips. (75-76) We, therefore, award her the sum of £714.75.

Costs

73. The claimant claims her costs for the hearing on 29 January 2020 having to be adjourned following Mr Cooper raising the issue of jurisdiction.

74. On 6 December 2018, the respondent ought to have been aware that the claimant had not presented a further claim form for remedy as it believed she should have done. We acknowledge that Mr Cooper was working on his brief the day before the hearing and enquired into whether the claimant had presented a new claim for remedy. When he was informed by those instructing him that she had not, he alerted Mr Bheemah, counsel during the liability hearing, of his intention to raise the jurisdictional issue. In our view this issue could have been raised much earlier avoiding a hearing on 29 January 2020. In any event, we did not find in favour of the respondent in relation to the jurisdictional issue.

75. Having regard to rule 76(1)(c), the remedy hearing was adjourned because of the jurisdictional issue raised, very late in the proceedings, by the respondent. The respondent is ordered to pay the claimant's costs, namely counsel's fees, in the sum of £2,500.

76. Compensation is capped by section 67(8) TULR(C)A 1992. The maximum amount of compensation the tribunal can award is an amount equal to 30 times the limit for the time being imposed by section 227(1)(a) ERA 1996, which is the maximum amount of a week's pay in respect of a basic award in unfair dismissal cases, in addition to an amount equal to the limit for the time being imposed by section 124(1) ERA, being the maximum compensatory award available in unfair dismissal cases.

77. Currently the cap on a week's pay for the purposes of a basic award is £525, and 30 x £525 is £15,750.

78. In an unfair dismissal claim the claimant's maximum compensatory award would be limited to 52 weeks' gross pay under section 124(1) ERA 1996, which is £22,904.

79. The maximum amount of compensation the claimant can be awarded is £15,750 plus £22,904, a total of £38,654 plus her costs in the sum of £2,500.

80. The total awarded to her, therefore, is £41,154. A schedule is given below.

81. We would suggest to the parties that steps should now be taken by the respondent's officials to restore a good working relationship with the claimant. She has been a member of the union for 34 years and recognises the benefits of membership. This would be in the interests of both parties.

THE SCHEDULE

1. The minimum award:	£8,939	
2. Injury to feelings:	£30,000	
3. Aggravated damages:	£5,000	
4. Interest @ 8% on £35,000 April 2017 to 28 May 2021-214 weeks @ £53.85 per week:	£11,523	
5. Loss of earnings:	£714	
	£56,176	
6. The statutory limit under section 67(8) is £38,654:		**£38,654**
7. Plus Costs in the sum of:		**£2,500**
		£41,154

_____
Employment Judge Bedeau

28 July 2021
Date: ……..

29 July 2021
Sent to the parties on: .....
.....J Moossavi.....
For the Tribunal Office