Case Number: 3328253/2019
3303560/2020
3302532/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mr S Newall		British Airways plc

Heard at: Watford (Hybrid hearing) **On**: 5,6,7 January 2022
Before: Employment Judge Cowen
Mr D Wharton
Mr D Sutton

Appearances
For the Claimant: Mr Newall (In Person)
For the Respondent: Ms Bell (Counsel)

JUDGMENT

1. The claimant's claim for pay under s. 169 TULRCA is successful and the respondent must pay the claimant **£743.68**
2. The claimant's claim for unfair dismissal under s.152 TULRCA is successful and the respondent must pay the claimant **£7945.47**
3. The claimant's claim for outstanding holiday pay is successful and the respondent must pay the claimant **£149.55**

REASONS

Background

1. The claimant brought three separate claims on 30 December 2019, 16 February 2020 and 29 March 2020 making claims against his former employer for failure to pay for time off for Trade Union duties, automatically unfair dismissal, unfair dismissal under s.98 Employment Rights Act 1996 and outstanding holiday pay.

2. At a Preliminary Hearing held on 26 January 2021, it was identified that the cases would be heard together and directions were given for the

preparation for trial.

3. A joint bundle extending to over one thousand pages was provided to the Tribunal in electronic format, together with an index. Witness statements were received from the claimant and from Mr Chris Holmes, Ms Angela McGrath, Mr Geoff Ayers and Ms Sharon Walsh, were provided on behalf of the respondent. Each of those gave oral evidence to the Tribunal. Additional documents were added to the bundle without objection by the parties and the Tribunal allowed them to be added where it was necessary and relevant to the hearing of the case.

4. The proceedings were conducted over CVP, whilst EJ Cowen was in Watford ET, the Tribunal Members and the parties were on CVP. Regular breaks were held during the hearing. A proposed timetable, cast list, and reading list were provided by the respondent which the claimant did not take issue with. He added two incidents to the proposed chronology which were noted by the Tribunal. Closing submissions were made by both parties and the claimant provided a written closing submission and made oral submissions. The respondent made a closing submission.

5. The issues in the case were identified in the Case Management Orders as:-

1) Remuneration for Union activities
- Has the respondent failed to pay the claimant adequate remuneration for carrying out trade union duties under section 169 of TULRCA?

2) Unfair Dismissal
- Was the reason for the claimant's dismissal (or, if more than one, the principal reason) that the claimant had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time amounting to an automatic unfair dismissal under section 152 of TULRCA?

If not:

- What was the reason for the claimant's dismissal? The respondent seeks to rely on the claimant's conduct, which is a potentially fair reason, falling within s.98 of the Employment Rights Act ("ERA") 1996.

- Did the respondent act reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant in all the circumstances? - in particular:

- Did the respondent have a genuine belief in guilt?
- Was there a reasonable basis for sustaining such belief?
- Was there a reasonable investigation?

- Was the decision to dismiss within the band of reasonable responses?

- Remedies
  If the claimant was unfairly dismissed:
  (a) to what basic award is he entitled under s.119 of the ERA; and
  (b) what compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the claimant under s.123 of the ERA?

In particular:

(a) Can the respondent show that the claimant would or might have been dismissed in any event? If so, should any compensatory award be reduced to take account of the chance that the claimant would or might have been dismissed in any event (*Polkey*); and

(b) Was any of the claimant's conduct blameworthy and culpable? If no, should any award be reduced by reason of the claimant's contributory fault?

3) Holiday Pay

- Has the respondent paid all sums properly payable to the claimant on the termination of his employment?

- Has the respondent made an unlawful deduction from the claimants' wages when calculating the claimant's holiday pay entitlement, taking into account any allowances agreed as part of a pay deal with the unions?

THE FACTS

6. Voluntary Recognition Agreement
   On 8 July 2013 Unite the Union signed a voluntary recognition agreement ('VRA') with the respondent. In it the identity of 'The Trade Union' is defined as 'Unite the Union'.

7. At section 8 of the VRA the issue of confidentiality is addressed:
   " *The Trade Union and its representatives shall keep confidential both during and after this Agreement all sensitive information relating to the Company, its business, customers and employees which is provided to them by the Company in connection with this Agreement or the bargaining arrangement between the parties. Where such sensitive information is to be provided, Management (i) will indicate that this is the case; (ii) will explain to the Trade Union why the information must remain confidential at that point and (iii) require that a specific non-disclosure agreement is entered into if appropriate*."

8. The VRA does not specify that it applies only to the Mixed Fleet Unite branch. The definition contained in the VRA of 'The Trade Union' applies to all of Unite the Union and its representatives. Hence, they are all covered by the confidentiality clause contained within the VRA.

9. Trade Union Pay
The claimant worked as cabin crew for the respondent between 12 December 2014 and 18 November 2019. In August 2016 he was elected as a representative of the Unite trade union on behalf of the Mixed Fleet Cabin Crew branch. In 2018 he became the Main Crew Convenor for the union which involved him in negotiations with the management of his employer.

10. Part of the claimant's role on behalf of the trade union was to provide monthly information to the respondent as to the hours which union representatives would require to be freed from their roles, in order to undertake their union responsibilities. The claimant's understanding was that during this time undertaking trade union duties, the claimant (and others) were to be paid, in accordance with the s.168 TULRCA.
The claimant believed that the respondent was not complying with the legislation in terms of the calculation of that payment. A colleague had previously raised the matter, but it had not been resolved. The claimant believed he should be entitled to both his basic pay and the Elapsed Hourly Rate ('EHR') which he would be entitled to if he were undertaking flying duties or other relevant duties (including training).

11. The claimant therefore raised the matter at a meeting on 27 November 2018 which was attended not only by those from the Unite union. No resolution was reached and this matter was the focus of a formal collective grievance on 2 May 2019.

12. A meeting was held on 8 August 2019 at which Chris Holmes on behalf of the respondent agreed that from now on they would be paid basic pay and EHR for any trade union duties. The issue of backpay in relation to this point was not resolved and correspondence continued between the parties. On 5 September 2019 Mr Holmes emailed the claimant to say that backpay was still not resolved and that future payments would require a change to the system. At the time of the claimant's dismissal, neither of these issues had been resolved and no additional payments of EHR had occurred.

13. Unfair Dismissal
The claimant, like all staff is subject to the policies and procedures contained in the Our Colleague Guide('OCG'), which are non-contractual. At section 4.4 the OCG sets out the policy on use of confidential

information and includes;
" The duty of confidentiality applies at all times to:

- Information concerning the affairs, business products or services of British Airways or the IAG Group, or any of their predecessors, or British Airways' business partners."

" Confidential Information to be kept secret, includes but is not limited to the following:

- Trade secrets, financial information, research, photographs, know-how, inventions, designs, processes, formulae, notation, improvements
- Unpublished price sensitive information "

"If a colleague is in any doubt about the confidentiality of information and to whom it can and cannot be disclosed, they should as their line manager"

11. During the course of 2017 there was a pay and allowances dispute between the members of the union and British Airways. There were a number of days of industrial action and an employment tribunal claim, before the parties reached a settlement which included that there would be a review of the EHR. This review commenced in January 2018. On other occasions the respondent had requested non-disclosure agreements to be signed by those participating in the negotiation, but did not do so on this occasion.

12. In December 2018 the claimant completed training for confidentiality on a course entitled 'In Safe Hands'.

13. At the initial meeting of the review it was agreed by all the attendees on both sides, that the terms of the discussions would be confidential.

14. The negotiations continued until 8 March 2019 when a draft agreement was reached. The claimant informed Mr Holmes that he had sent the agreement to "our reps for feedback with the caveat that it is confidential and awaiting clarification on certain sections". This was not challenged by Mr Holmes who understood the claimant to be referring to representatives of the Mixed Fleet Unite branch within British Airways.

15. The negotiation then continued through the summer and on 10 September 2019 the claimant sent the document which it was proposed would be sent to all Mixed Fleet colleagues, to a group of Unite representatives known as the Cabin Crew Advisory Group ('CCAG'). The members of this group were all Unite representatives for cabin crew, but not only within British Airways, but also other airlines.

16. The document sent out by the claimant was drafted by the trade union and not by the respondent – although it contained information provided by the respondent.

17. The claimant sent this document to them in order that they could provide feedback on the drafting and whether it would convey the message to their colleagues of the proposal. The claimant believed that he had Mr Holmes' agreement to do this, due to the earlier exchange of emails in March 2019.

18. On 1 October 2019, the claimant met with Mr Holmes, a Band 2 HR Business Partner. The claimant had no prior warning about the purpose of the meeting. Mr Holmes told him that it had come to his attention that the claimant had sent out an email to people outside of the respondent which contained sensitive and confidential information. Mr Holmes was unaware until the claimant told him, that all these people were Unite representatives, as their email addresses did not convey this, but showed that they had email addresses at other competitor airlines.

19. The claimant explained to Mr Holmes that it was sent to CCAG and agreed that some are employed by Virgin, TUI, Thomas Cook, Easyjet and others. The claimant denied that he had sent individual identifiable data, nor any data supplied by the respondent, to them.

20. At this meeting Mr Holmes told the claimant it was important that if he had shared confidential company information wider than necessary, he must contact the recipients and ask them to delete the information. The claimant asserted that it was not sharing confidential information and that it remained confidential and in safe hands.

21. The claimant was allowed to continue to work and completed a trip to Las Vegas. However, when he returned on 4 October 2019 he was asked to meet again with Mr Holmes. At this meeting the claimant was suspended from duty pending an investigation into the allegation of breach of confidence by sending the email. Mr Holmes also removed a table showing the cost to British Airways of the proposed changes, from the document prior to it being sent to colleagues for approval. He believed that the table was confusing and would require reference to other statistics and on balance it was better to remove it.

22. On 7 October 2019 the claimant sent an email to all those who had received his previous email, asking them to treat it as confidential.

23. On 14 October 2019, the respondent's competition lawyer sent an email to all those who received the claimant's email asking them to delete the email and not to share the information it contained. This email was not shown to

the claimant at the time of his dismissal.

24. The claimant was interviewed as part of the investigation process on 15 October 2019 by Ms Cheema. Ms Cheema did not have a copy of the claimant's offending email when she interviewed the claimant. The claimant explained that all those to whom he sent the email were elected trade union officials and that the forum was a confidential one where information is not shared outside the group. He also told her that he had not thought at the time he sent the email that he was breaching any policy, but since he had been told about the investigation, he now understood there may have been a breach of policy. He also said that did not think the document contained any information provided by the respondent and that he understood he had no permission to share the document which the respondent had provided.

25. On 18 November 2019 the claimant sent a statement to Ms Cheema with additional evidence. This was the first time that the claimant referred to the 2017 dispute and the agreement that EHR would be reviewed;

> "*BA and Unite will undertake a review of Elapsed Hourly Rate and the role it plays for Mixed Fleet colleagues. On of the key objectives will be ensure that it is structed in an efficient way to take into account factors such as tax consequences for Mixed Fleet colleagues, variations in currency, subsistence costs and local inflation….. This review will commence immediately, be concluded as soon as possible, by 31 March 2018 at the latest and if agreed will be implemented as soon as reasonably practicable. If agreement is not reached the current EHR arrangements will remain in place".*

26. The investigation was then passed to Angela McGrath, a Band 3 Performance Development Manager, who contacted the claimant on 1 November 2019 to say that she considered there was a case to answer, and a disciplinary hearing would be held on 7 November 2019.

27. The claimant attended on 7 November 2019, with his trade union representative. The allegation was that the claimant had shared confidential information with competitor airlines. The claimant argued that all the people he had shared the information with were elected TU representatives and the forum he had shared it with was one which the respondent was aware of and with whom he had previously discussed the issue of EHR.

28. The claimant did not deny sending the email on 10 September 2019. He did not admit that doing so breached any policy. However, his actions were considered to be deliberate (albeit in good faith).

29. On 18 November 2019 a meeting was held to provide the claimant with the outcome. He was informed that the allegations were upheld and he was summarily dismissed. He was provided with a letter outlining the reasons for his dismissal.

30. Ms McGrath held that the claimant had failed to declare in his first interview on 1 October, nor in his interview on 15 October, that he relied on the 2017 post dispute agreement. She considered that failing to highlight this information at the first opportunity meant that he was unreliable and "caused her to have an opinion" of the claimant. She believed that the delay in providing the explanation meant that he was less likely to be reliable.

31. The letter referenced the fact that the claimant had a final written warning which had expired on 21 September 2018. Ms McGrath had looked at the claimant's personnel file. She did this whilst she was deliberating. Ms McGrath felt that this expired warning meant that the claimant did not have an 'exemplary record', as he claimed.

32. The claimant appealed by way of a letter dated 26 November 2019 and was heard by Sharon Walsh on 13 December 2019. The claimant was accompanied by his TU representative. All fifteen of the points raised by the claimant were discussed.

33. After the meeting Ms Walsh spoke to Mr Ayers, who had been the first person to report the claimant's email.

34. An outcome letter was sent to the claimant on 3 January 2020. Ms Walsh also considered it significant that the claimant had not raised the reference to the EHR review until after his investigation meeting. She also said that she did not believe that the claimant had shown any remorse, specifically because he had not made an admission of breach of the policy.

Holiday Pay

35. The claimant's contract of employment stated that he was entitled to 30 days holiday per annum, rising to 34 days with length of service. By the time the claimant was dismissed he was entitled to 34 days per annum. The contract of employment did not give the employee the right to carry over unused holiday entitlement from one year to another. However, some exceptions could be made for trade union representatives.

36. The parties agreed that as a result of historic litigation, the claimant was entitled to be paid for 28 days with both basic pay and EHR. Holiday pay

beyond 28 days was paid at the basic rate only. There was no evidence of how that holiday pay was subject to pro rata, where an employee left during the course of the holiday year. It was therefore unclear whether the first 28 days of holiday were paid in full even if the number of days was reduced pro rata.

37. The claimant was dismissed on 18 November 2019. The leave year ran from 1 April to 31 March. Therefore, the claimant had worked for 7.5 months of the year prior to his dismissal. The claimant kept a tally of the number of days he had accrued and taken, which showed that he was owed 5.61 days.

THE LAW

Trade Union Pay

38. S.168 TULRCA- Time off for carrying out trade union duties.

(1) An employer shall permit an employee of his who is an official of an independent trade union recognised by the employer to take time off during his working hours for the purpose of carrying out any duties of his, as such an official, concerned with—

(a) negotiations with the employer related to or connected with matters falling within section 178(2) (collective bargaining) in relation to which the trade union is recognised by the employer, or

(b) the performance on behalf of employees of the employer of functions related to or connected with matters falling within that provision which the employer has agreed may be so performed by the trade union, or

(c) receipt of information from the employer and consultation by the employer under section 188 (redundancies) or under the Transfer of Undertakings (Protection of Employment) Regulations 2006, or

(d) negotiations with a view to entering into an agreement under regulation 9 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 that applies to employees of the employer, or

(e) the performance on behalf of employees of the employer of functions related to or connected with the making of an agreement under that regulation.

(2) He shall also permit such an employee to take time off during his working hours for the purpose of undergoing training in aspects of industrial relations—

(a) relevant to the carrying out of such duties as are mentioned in subsection (1), and

(b) approved by the Trades Union Congress or by the independent trade union of which he is an official.

(3) The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.

(4) An employee may present a complaint to an employment tribunal that his employer has failed to permit him to take time off as required by this section

39. S.169 TULRCA- Payment for time off under section 168.

(1) An employer who permits an employee to take time off under section 168 or 168A shall pay him for the time taken off pursuant to the permission.

(2) Where the employee's remuneration for the work he would ordinarily have been doing during that time does not vary with the amount of work done, he shall be paid as if he had worked at that work for the whole of that time.

(3) Where the employee's remuneration for the work he would ordinarily have been doing during that time varies with the amount of work done, he shall be paid an amount calculated by reference to the average hourly earnings for that work. The average hourly earnings shall be those of the employee concerned or, if no fair estimate can be made of those earnings, the average hourly earnings for work of that description of persons in comparable employment with the same employer or, if there are no such persons, a figure of average hourly earnings which is reasonable in the circumstances.

(4) A right to be paid an amount under this section does not affect any right of an employee in relation to remuneration under his contract of employment, but—

(a) any contractual remuneration paid to an employee in respect of a period of time off to which this section applies shall go towards discharging any liability of the employer under this section in respect of that period, and

(b) any payment under this section in respect of a period shall go towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

(5) An employee may present a complaint to an employment tribunal that his employer has failed to pay him in accordance with this section.

Unfair Dismissal

40. S.152 TULRCA states;
" Dismissal [of employee]1 on grounds related to union membership or activities.
(1) For purposes of [Part X of the Employment Rights Act 1996]2 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
(a) ….
(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,"

41. In order to receive the protection of s.152(1)(b) the actions of the claimant must be the activities of an independent trade union. The definition of activities will be wider for a trade union representative, than for a member of the union. The Tribunal must consider whether a representative acts outside of union rules, as they can no longer be said to be taking part in the activities of that union. The Tribunal therefore considered a number of cases, including *Fortune v Thames Water Authority EAT 335/78*.

42. The Tribunal also considered *Crowther v British Railways Board EAT 1118/95*: the EAT upheld a decision that an employee was dismissed for misconduct and not union activity where he organised industrial action. The employee was a trade union representative and did have some authority to represent them on a joint committee, his duties did not include the incitement or organisation of industrial action without reference to the accepted negotiating procedures within the railway industry.

43. *Lyon and anor v St James Press Ltd 1976 ICR 413, EAT*. In that case the EAT said that 'the special protection… must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal'.

44. *Pearson v HP Enterprises Services UK Ltd ET Case No.2412201/13* P, a trade union representative, was sent consultation documentation for redundancy, which HPES Ltd stated was strictly confidential. P circulated the information to members of his union branch and removed the password protection that was on the original document, but included a note stating that it was classified 'HP confidential' — i.e. that it should not

be shared with anyone outside the company. HPES Ltd dismissed him for sharing the information, knowing it was confidential and that he did not have authority to distribute it. The employment tribunal found that the dismissal was unfair under S.152(1)(b). The Tribunal concluded that sending the information was part of a trade union activity and he did not act dishonestly or in bad faith.

45. *Morris v Metrolink RATP Dev Ltd 2019 ICR 90, CA*, Underhill LJ, considered whether the use of the leaked information was a 'sufficient departure from good industrial relations practice to take his conduct outside the scope of "trade union activities"' for the purpose of S.152. Underhill LJ did not accept that it was in this case and upheld the tribunal's view that, at most, some sort of warning for storing and not deleting the information might have been appropriate

S.98 Unfair Dismissal

46. The Tribunal must consider whether the dismissal was unfair. In doing so they consider the following issues in accordance with s.98 Employment Rights Act 1996 ('ERA') and BHS v Burchell [1978] ICR 303;
    a. What was the principal reason for the dismissal and was it a potentially fair reason in accordance with section 98 of the Employment Rights Act 1996? The respondent asserts that it was a reason relating to the claimant's conduct.
    b. Was the dismissal fair in all the circumstances in accordance with equity and the substantial merits of the case (and section 94 of the Employment Rights Act 1996)?
        i. Did the respondent have a genuine belief in the misconduct which was the reason for dismissal?
        ii. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?
        iii. Did the respondent carry out a reasonable investigation in all the circumstances?
47. It is also contended by the claimant that an unfair procedure was followed, **s.98(4) Fairness**

48. In considering s.98(4) the ET must be satisfied that the employer has acted reasonably in all the circumstances in treating that reason as sufficient. We note that there is no burden of proof and we must consider all the facts in order to reach our own conclusion as to whether the decision to dismiss lay within the band of reasonable responses

49. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift* [1981] IRLR 91

Review or rehearing

50. It is not necessary to consider whether the appeal was a review or a rehearing as Taylor v OCS Group Limited [2006] IRLR 613, CA indicated that what is important is that the procedure was fair overall. It also sets out that an appeal can correct any defect in the initial investigation or procedure.

Contribution

51. If the dismissal was unfair, the Tribunal must consider whether the claimant caused or contributed to the dismissal by any blameworthy or culpable conduct and, if so, to what extent?

52. The Tribunal must also consider under s.123(6) ERA 1996 whether deduction should be made from the compensatory award for any contributory actions by the employee which could be said to be blameworthy and have led to the dismissal.

Polkey

53. The Tribunal should also consider if the dismissal was procedurally unfair, whether an adjustment should be made to any award to reflect the possibility that the claimant would still have been dismissed in any event had a fair and reasonable procedure been followed? Polkey v AE Dayton Services [1987] UKHL 8.

Holiday Pay

54. The principle of holiday pay was to ensure that workers took a break from work for health and safety reasons, without risking a downturn in their pay. The courts have therefore indicated that a payment which gives incentive not to take that time off, is contrary to the purpose of the EU Directive from which the right came.

55. The Working Time Regulations ('WTR'), regulation 16 specifies the way in which a worker is paid in respect of any period of annual leave: this is at the rate of a week's pay in respect of each week of leave.

56. Reg 14(2) WTR stipulates that " where the proportion of leave taken by the worker is less than the proportion of the leave year which has expire, his employer shall make him a payment in lieu of leave in accordance with (3)…."

57. The decision in *Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221, EAT* set out that the limit on claims for holiday can only go back 2 years at a maximum. This caused there to be a change in the s.23 ERA. No such change was made to TULRCA.

DECISION

Trade Union Pay

58. The parties agreed on 8 August 2019 that going forward the claimant (and others) would be paid EHR for the days when he was undertaking union duties. This did not occur as the parties remained in negotiation over how to action this payment and how to award backpay. The claimant (and others) had raised this matter with the respondent by way of grievances, on three separate occasions prior to this agreement.

59. The fact that the respondent delayed and/or failed to bring the issue to a conclusion, does not obfuscate the agreement to pay, which occurred on 8 August 2019. The Tribunal awards such EHR as is appropriate from this date forward, which lies within the limitation for this claim.

60. The time limit for bringing a claim under s. 169 is set out in s.171 (as set out above) as three months from the date of the failure (to pay), or if not reasonably practicable to have done so, within a reasonable period. The ET1 was issued on 30 December 2019. The final payment which was not made was for activity on 1 October 2019. The claim for these payments was therefore made within 3 months of the final activity.

61. The claimant claimed for a period of time dating back to when he became a representative in 2017. The Tribunal must consider whether this amounts to a series of deductions. This claim was not brought as a s13 ERA claim, but under s. 169 TULRCA. The regulations put in place to amend the ERA to reflect the decision in Bear Scotland, did not include a change to s. 169 TULRCA.

62. Therefore, the Tribunal consider that the claim is limited to a period between 8 August 2019 and 1 October 2019. In accordance with the schedule provided by the claimant in the bundle (p465/6) the Tribunal calculated this to be 28 days at £26.56; a total of **£743.68**

Unfair Dismissal

63. When Mr Holmes first spoke to the claimant on 1 October 2019, the claimant had no prior warning of the reason for the meeting. The Tribunal do not consider that it is fair of the respondent to be critical of the claimant, for not mentioning immediately the origin of the negotiation in 2017. The claimant admitted that he had sent the email and the respondent was entitled to rely on the admission to uphold their genuine belief.

64. The Tribunal also accept that the claimant did not refer to the source of the negotiation when interviewed by Ms Cheema as part of the investigation. However, he did refer to it in his email of 18 October 2019 and at the disciplinary hearing and therefore it was information which was available to Ms McGrath prior to her decision.

65. Ms McGrath's conclusion that the failure to provide this explanation at the outset meant that the claimant's evidence was unreliable, was not a reasonable conclusion. The initial meeting was without notice of the purpose and therefore he was taken by surprise. The interview with Ms Cheema prompted him to consider the background to the email.

66. In any event, it was not evidence which was central to whether the claimant had authorisation to discuss the content of the negotiation with the CCAG. She therefore placed too much reliance on this evidence which amounts to a lack of reasonable grounds.

67. The evidence before Ms McGrath showed that the claimant was aware that distributing sensitive information outside of the respondent would amount to gross misconduct within the OCG. The email which he sent did go to people outside of the respondent, but they were all trade union representatives and received the email in their capacity as such.

68. The respondent would have been aware, at the time of the dismissal, that as trade union representatives, they should keep information confidential in accordance with the VRA. This should have been considered by Ms McGrath, but both the investigation and the disciplinary officers failed to look at the VRA, or what it set out in terms of confidentiality. Ms McGrath failed to consider the way in which the VRA extended or acted beyond the terms of the respondent's OCG. Had she looked at the VRA, she would have seen that the claimant raised a valid defence in saying that all those in elected positions are bound by confidentiality.

69. The Tribunal considered the references to the claimant's contract of employment, but noted that the contract does not take account of the claimant's status as a trade union representative and the VRA. The Tribunal noted that the claimant would not have been a representative at the time he signed the contract, but no alteration was made when he was appointed. It was clear that although the actions of the claimant may breach his restrictions as an employee, they did not breach his restrictions as a trade union representative and that he was acting within that remit when he sent the email.

70. There was limited evidence before Ms McGrath, but what she did have, showed a miscommunication between the claimant and Mr Holmes when the claimant emailed Mr Holmes on 8 March 2019 and said he had sent a document to 'our reps'. The evidence showed that Mr Holmes had understood this to mean those who were part of the Mixed Fleet Unite branch in British Airways and was happy to allow distribution to that extent. Whereas the claimant had understood this to mean all Unite representatives, including those in CCAG.

71. The Tribunal consider that Ms McGrath failed to take into account this miscommunication and to consider whether the claimant was therefore legitimately carrying out trade union activity when he sent the email.

72. The Tribunal was satisfied that the actions of the claimant in sending the email were within the realms of his trade union responsibilities. He did not do this as an individual employee and that passing information to the CCAG was within his authority as a representative. The Tribunal considered *Pearson v HP Enterprises Services UK Ltd ET.*

73. Furthermore, there was no evidence of any malicious intent or bad faith by the claimant at the time of sending the email.

74. The Tribunal was satisfied that the claimant had therefore been dismissed for a carrying out a trade union activity and was therefore automatically unfair in accordance with s.152(1)(b)

75. The Tribunal also considered in the alternative, whether, the dismissal would be unfair under s.98 ERA. The Tribunal considered that whilst the respondent had a genuine belief in the misconduct, it did not have reasonable grounds to do so, as Ms McGrath did not have reasonable grounds to consider that the claimant had breached the confidentiality clause in his contract. This was due to her failure to consider the contract and the VRA. It was clear to her that the claimant was carrying out work as a trade union representative at the time he sent the email. The VRA agreement supports his contention that all Unite representatives are covered by the confidentiality agreement.

76. The Tribunal also considered whether the respondent was reasonable in its consideration that dismissal was the appropriate sanction (i.e. was it within a band of reasonable responses). Both Ms McGrath and Ms Walsh concluded that the claimant had not reflected or shown insight into his conduct and therefore could not be trusted, not to repeat his actions. This overlooks the fact that the claimant acknowledged in his investigatory interview that "since this has been discussed with me, I understand that there now may have been a breach of the policy". This indicated that

whilst he did not agree or admit he had breached a policy, he understood that the respondent may see it that way at the investigation stage. The Tribunal considered that this was an indication of insight on the part of the claimant and was not taken into account by the respondent.

77. The Tribunal also concluded that the respondent failed to consider any mitigation on the part of the claimant. The claimant was a longstanding employee who had previously worked well as a trade union representative and engaged well with management. The fact that there was no evidence that his sending of the email had caused any damage to the company was also ignored. Ms McGrath's view of the claimant as not being reliable due to his assertion that he had an 'exemplary record', when in fact he had a lapsed final written warning, was also inappropriate on her part. She also did not take into account the fact that his actions were not gratuitous or a deliberate disclosure of information and that his acts were carried out with the best of intentions.

78. For all these reasons, the Tribunal concluded that the decision to dismiss was not within a band of reasonable responses.

79. The Tribunal considered whether the claimant contributed to his dismissal; it was the claimant's action which gave rise to the disciplinary process, and he could have been clearer with Mr Holmes about who he intended to send the email to, or asked for his explicit permission if he was uncertain. The claimant acknowledged that on reflection he could see that his actions may be perceived as a breach of confidentiality.

80. The Tribunal therefore considered that his actions were culpable in that he failed to take available precautionary steps of clarifying with Mr Holmes what he was doing and that he understood his error shortly after the event. The Tribunal concluded that a deduction of 20% would accurately reflect the extent of the claimant's culpability.

81. The Tribunal also considered the respondent's submissions on Polkey, in respect of whether a dismissal would have occurred, had the respondent carried out a fair procedure. The central issue in this dismissal was the fact that the claimant had authority via his position as a trade union representative to send the email to other such representatives. Had the respondent considered the VRA then they would have seen the confidentiality clause that it set out. The Tribunal were content that if they had investigated the matter fully and taken into account the evidence of the claimant and the VRA, then as a reasonable employer, the respondent would not have dismissed the claimant. The Tribunal therefore makes no deduction under this heading.

82. The Tribunal saw no evidence to suggest that the claimant had failed to mitigate his loss and therefore calculated the following compensation is due:-
    a. Basic Award 4 x 430.83 = £1723.32
       Less 20% of contribution = - £344.66
    b. Compensatory Award 4.7 months x £1462.55 = £6,869.29

Pension loss	=	£ 789.22
Job search expenses	=	£ 50.00
Loss of statutory rights	=	£ 500.00
Less 20% of contribution	=	- £ 1,641.70

83. The Tribunal did not consider that any award of deduction for failure to follow the ACAS code was appropriate.

84. The total award for unfair dismissal is therefore **£7,945.47**

85. Holiday Pay
    The claimant claims he is owed 5.61 days of holiday pay. He argued that if he had taken the holiday, he would have been paid for these days in full. The respondent's submission could be summarised by saying that it was too difficult to work it out, so the Tribunal should dismiss the claim.

86. The Tribunal considered that the OCG – Our Working World at 2.2 set out that annual leave cannot be carried forward unless British Airways prevented the colleague from taking the annual leave. In those circumstances the line manager and colleague should come to an agreement. The only evidence of whether the claimant was allowed to carry over holiday came from the claimant. The respondent could not assert that he had not been allowed to carry it over. The Tribunal accepted the claimant's evidence on this point.

87. The Tribunal was shown no evidence to support the respondent's claim that the 28 days of full pay should be prorated when the leave entitlement is prorated to reflect the amount accrued in the final year. The Tribunal therefore finds that the claimant was entitled to have the first 28 days paid at his full rate.

88. The Tribunal noted that Mr Ayres was unable to explain the calculations contained in paragraph 9 of his witness statement which appeared to make no logical sense. The Tribunal was not prepared to accept these figures unless they could be explained/justified. It preferred the evidence of the claimant as set out at paragraphs 100 and 101 of his witness statement.

89. The Tribunal therefore finds that the claimant was owed 5.61 days of holiday, to be paid both the basic rate and EHR. The claimant is therefore owed **£149.55**

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Employment Judge Cowen

Date: 16 February 2022……..

Sent to the parties on:.

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For the Tribunal Office

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