Case Number: 3304306/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr P Carberry	v	Bedfordshire Fire and Rescue Service

Heard at: Watford **On**: 20 and 21 February 2023

Before: Employment Judge Hyams **Members:** Mr R Jewell
Dr B Von Maydell-Koch

Representation:

For the claimant: Ms Naomi Ling, of counsel
For the respondent: Mr Alex Shellum, of counsel

UNANIMOUS RESERVED JUDGMENT

1. The respondent wrongly refused the claimant paid leave for carrying out trade union duties, contrary to section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992, on 24 November 2021.

2. The respondent must pay the claimant compensation in the sum of £2,123 for that wrongful refusal.

REASONS

Introduction; the claim made by the claimant in this case

1 By a claim form presented on 8 April 2022, the claimant claimed under section 168(4) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA") that he had wrongly been refused paid leave for carrying out trade union duties. The claimed failure was in respect of the failure to pay him for 24 November 2021. The early conciliation certificate was at page 3 of the hearing bundle. Any reference to a page below is to a page of that bundle. The certificate showed that ACAS was notified by the claimant on 7 February 2022, and that the certificate was issued on 11 March 2022. Accordingly, the claim was made in time.

The evidence which we heard

2 The hearing bundle contained 165 pages including its index. We heard oral evidence from the claimant on his own behalf and from Ms Rachel Barker on behalf of the respondent. Ms Barker is, and was at the time of the refusal of paid time off in question, employed by the respondent as Employee Relations Manager.

The material facts and the statutory framework

The claimant's position with the respondent

3 The claimant is and was in 2021 employed by the respondent as a Firefighter at the respondent's Leighton Buzzard fire station. He is also a member and an official of the Fire Brigades Union ("FBU"), which is an independent trade union recognised by the respondent for relevant purposes. The claimant is and was in 2021 an elected local representative of the FBU.

The events which gave rise to this claim

4 As the local FBU representative, the claimant assisted and supported a fellow employee of the respondent, Mr Stuart Young, when Mr Young was disciplined and demoted from the rank of Watch Manager to Firefighter. That demotion was the subject of an employment tribunal claim of unfair dismissal and breach of contract. The claim was also for notice pay and arrears of pay. That claim was numbered 3320875/2019. It was listed to be heard by video (Cloud Video Platform) on 22-24 November 2021 inclusive. Mr Young was represented by counsel (Miss Naomi Ling, who also appeared before us) who was instructed by Thompsons, solicitors. The only documents before us relating to Mr Young's claim were (1) the ET1 claim form and the Grounds of Claim accompanying that claim form ("the grounds of claim"), and (2) the ET3 response form and the accompanying Response. Those documents were at pages 113-148.

5 The grounds of claim included the following two paragraphs (on page 129):

> '5. The Claimant appealed against the disciplinary sanction, arguing among other things that his demotion from Watch Manager to Firefighter was inconsistent with the National Joint Council (NJC) Grey Book ("the Grey Book") terms and conditions.'
> '7. The Claimant claims that in demoting him, by more than one role, from Watch Manager to Firefighter he has been dismissed unfairly and that the unilateral decision to demote him by more than one role is inconsistent with the Grey Book and amounts to a breach of contract.'

6 On the next two pages, there was this paragraph.

"9. The Claimant claims that the decision to dismiss him was unfair and unreasonable in the circumstances. The circumstances the Claimant relies upon include, but are not limited to the following:

a. The investigation was flawed and there was no evidence to support the findings. For example the Claimant made no attempt to conceal the fact that the response to the initial fire call was late, he recorded it as such when entering information in the official record.

The Respondent concluded that the Claimant had booked two colleagues off duty for his own benefit. However, it provided no evidence to support this and unreasonably discounted the evidence of the colleagues in question. One colleague confirmed that he had asked the Claimant to book him off call, whilst the other could not recall whether or not he had made the request.

b. The Respondent unreasonably concluded that the Claimant had been dishonest, fraudulent, had failed to follow procedure and abused his position. For example the Claimant attended the Respondent's workplace in response to receipt of a text from the Respondent and as such he was entitled to an attendance payment.

The Respondent unreasonably maintained that the Claimant was not eligible for payment. The Claimant had responded to a communication, from the Respondent, requesting that he attend the workplace. Therefore the Claimant was not wilfully seeking payment for a sum he was not entitled to. The Claimant maintains that a failure to follow the correct procedure was not an act of gross misconduct.

c. The decision to dismiss the Claimant was too severe a sanction given the allegations and evidence obtained from the investigation. For example it was held that the Claimant had abused his position for his own benefit. However, the benefit identified was based upon an assumption that the Claimant was attempting to give the impression that his level of availability was greater than it was. The assumption overlooked the fact that the Claimant had no need to do so as he had already met his contractual requirements with regard to availability."

7 In the Grey Book, there was (according to paragraph 10 of the grounds of claim on page 131) this passage.

> "The defined roles of employees are:
> Firefighter Firefighter (Control)
> Crew Manager Crew Manager (Control)
> Watch Manager Watch Manager (Control)
> Station Manager Station Manager (Control)
> Group Manager Group Manager (Control)
> Area Manager".

8 On 14 October 2021, the claimant made an application "for trade union leave" on the respondent's form of which there was a copy at pages 100-101. He had at first asked for all three days of the hearing of 22-24 November 2021 off, with pay, on the basis that he was going to be a "witness at Employment Tribunal", but when he realised that he was not rostered to work on 22 November 2021, he had crossed out the request to take leave on that day. The hours when he would otherwise have been working were 07:30 to 18:00, and the parties agreed that his pay for that working day was £123.

9 The form was initially responded to by Mr Darren Evans, the claimant's Station Manager, when on 20 October 2021 he approved the application in full. That approval was apparently put on the respondent's management information system on 4 November 2021. However, that approval was subsequently withdrawn in the manner stated by Ms Barker in paragraph 5 of her witness statement, which was in these terms.

> "On 14 October 2021, Mr Carberry submitted a request for 3 days' trade union leave in order to attend Employee S's [i.e. Mr Young's] tribunal hearing as a witness for the listed dates. This request was later updated as Mr Carberry realised that he was not rostered to be in work on 22 November 2021 and therefore only needed 23 and 24 November 2021 off (page 99 of bundle). Mr Carberry's Station Manager approved the request (page 100 of bundle); however, the request was then escalated to the Borough Commander who sought HR advice as to whether the leave request should be granted. I then sought advice from the Service's legal advisor as to when Mr Carberry was required to give evidence at the hearing. They confirmed to me that he was only required to give evidence on one day, and this was scheduled to be 23 November 2021. Subsequently, I contacted Mr Carberry's Station Manager to confirm this (page 101 of the bundle). I did state to the Station Manager that if he had the necessary crewing to release Mr Carberry for 2 days then that could be a local decision for him and the Borough Commander to make. However, I understand that the Service was under considerable pressure with crewing at that period in time, in particular due to Covid-19 related sickness absences."

10 The email to which Ms Barker referred as being at page 101 was in fact at page 102. It was dated 17 November 2021 and was in these terms:

> "Hi Darren
> Thanks, I've now heard back from legal, Pat will be required to give evidence on the 2nd day, (23rd) not both, so not 24th as well.
> If you have the crewing to release him for 2 days then that's a local decision for you/Stuart but he won't be required on both days."

11 The reference there to "Stuart" was to the Borough Commander. It was agreed by the respondent that without the claimant present at work on 23 and 24 November 2021, there was the respondent's minimum required number of four riders available at the Leighton Buzzard fire station. The optimum number of riders to be rostered to work at that station was five, however.

12 The claimant then asked for, and was given permission by Mr Evans to take, 24 November 2021 as a day of annual leave.

13 The claimant's witness statement contained this passage.

> "6. I considered that I was entitled to paid time off to attend this member's tribunal hearing. However, this was not simply because I represented him at a local level and believed he had been treated unfairly. The case involved a wider issue that potentially impacted upon our entire membership as well as industrial relations with the Service.
>
> 7. Our member was accused of gross misconduct and as an alternative to dismissal he was demoted from the role of watch manager to firefighter. We have nationally agreed terms and conditions of employment, referred to as the 'Grey Book', which include a right to demote by one role without the need for agreement, or two roles with the agreement of the employee. Our member had in breach of his terms and conditions been demoted by two roles without his agreement.
>
> 8. The Service argued that the roles of watch manager and crew manager were supervisory and suggested that our member had been demoted by one role not two. The Service also suggested that there was ambiguity, that the matter was unclear and open to interpretation. Therefore the case involved an important issue regarding the interpretation of the right to demote, which is included in our nationally negotiated terms and conditions.
>
> 9. As I have explained I considered that it was necessary to attend all three days of the tribunal hearing. I was not only giving evidence and supporting this member. The issue in dispute was potentially of national importance to the FBU and certainly involved ongoing industrial relations with the Service. Therefore I needed to observe the entire proceedings and hear the evidence from the Service as it

impacted upon the wider membership and the disciplinary sanctions open to the Service."

14 The claimant's application for time off to undertake trade union duties had to be seen against the applicable statutory framework, to which we now turn.

The statutory framework

15 Section 168(1) of TULRA provides:

> "(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".

16 The matters "falling within section 178(2)" include these:

> "(a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
>
> (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
>
> (c) allocation of work or the duties of employment between workers or groups of workers;
>
> (d) matters of discipline".

17 Section 168(3) provides:

> "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."

18 The relevant part of that code was paragraphs 12 and 13 at pages 51-52. So far as material, they were in these terms (the bold font being in the original).

> "**Examples of trade union duties**
>
> 12. **Subject to the recognition or other agreement, trade union representatives should be allowed to take reasonable time off for duties concerned with negotiations or, where their employer has agreed, for duties concerned with other functions related to or connected with the subjects of collective bargaining.**
>
> 13. **The subjects connected with collective bargaining may include one or more of the following**:
>
> **(a) terms and conditions of employment, or the physical conditions in which workers are required to work.** Examples could include:
>
> - pay
> - hours of work
> - holidays and holiday pay
> - sick pay arrangements
> - pensions
> - learning and training
> - equality and diversity
> - notice periods
> - the working environment
> - operation of digital equipment and other machinery;
>
> (b) **engagement or non engagement, or termination or suspension of employment or the duties of employment, of one or more workers**. Examples could include:
>
> - recruitment and selection policies
> - human resource planning
> - redundancy and dismissal arrangements;
>
> **(c) allocation of work or the duties of employment as between workers or groups of workers**. Examples could include:
>
> - job grading
> - job evaluation
> - job descriptions
> - flexible working practices
> - work-life balance;
>
> **(d) matters of discipline**. Examples could include:

- disciplinary procedures
- arrangements for representing or accompanying employees at internal interviews
- arrangements for appearing on behalf of trade union members, or as witnesses, before agreed outside appeal bodies or employment tribunals".

19 The respondent had agreed with the FBU this (page 66):

> "1 **Introduction**
>
> 1.1 The word 'official' in the context of this Policy is defined as a member who has been elected or appointed in accordance with the rules of the Union to be a representative of all or some of the branch officials within the Service, and includes the Service Chairperson and Secretary and members of the Service Executive Committee (or similar).
>
> 2 **Paid Time Off During Working Hours**
>
> 2.1 A reasonable amount of paid time off will be granted to any official of the Fire Brigades Union (FBU) for the purpose of enabling them to carry out those duties which are concerned with industrial relations between employee and employer, including:
>
> ...
>
> - Appearing on behalf of the membership before an outside body, such as an employment tribunal which is dealing with an industrial relations matter concerning the employer".

Relevant case law

20 In *Ministry of Defence v Crook* [1982] IRLR 488, the Employment Appeal Tribunal ("EAT"), presided over by Tudor Evans J, determined that the "range of reasonable responses of a reasonable employer" test should be applied in relation to a claim under section 27(2) of the Employment Protection (Consolidation) Act 1978, which was in substantially the same terms as section 168(3) of TULRA.

21 Both parties before us accepted that the range of reasonable responses of a reasonable employer test applied here, despite the doubt cast on the applicability of that test for the reasons stated in paragraphs NI[1993]-[1996] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*").

22 While neither party referred us to the decision of the Court of Appeal in *Stoker v Lancashire County Council* [1992] IRLR 75, we noted that in paragraph 20, Dillon LJ (with whose judgment McCowan and Nolan LJJ agreed) said this:

> "It might be the view that a reasonable employer could be expected to comply with the full requirements of the appeal procedure in its own disciplinary code."

The parties' submissions on liability

23 Both counsel put before us persuasive written closing submissions, and supplemented them with cogent oral submissions. We mean no disrespect by not referring to each and every aspect of their submissions. We record here, however, that Mr Shellum advanced the following arguments in the following paragraphs of his written closing submissions.

23.1 "Plainly, the Respondent has not agreed to permit union officials to take paid time off to observe Tribunal hearings or otherwise attend Tribunal hearings when they are neither giving witness evidence before the Tribunal nor representing the member in question by conducting proceedings. Had it intended to do so, then it would have made that intention clear." (Paragraph 16)

23.2 "[E]ven if the duties listed at Para 2.1 are non-exhaustive generally, it is submitted that they are exhaustive in relation to the sorts of matters which are explicitly addressed in the bullet points. Specifically, in the instant case therefore, Para 2.1, bullet point 5, as addressed above, should be taken to be exhaustive in relation to attendance at Employment Tribunals. Had the Respondent intended a broader entitlement to be conferred upon union officials for attending Tribunal hearings in a capacity other than as a witness or representative conducting the proceedings, then it would have so stated in Para 2.1". (Paragraph 25)

23.3 "The consequence of the Claimant's argument is that the Tribunal is being invited to interpret the Order in such a way that FBU officials, including low ranking local FBU officials, would have the right to paid time off to attend Tribunal hearings of indeterminate length in their entirety, irrespective of Service need, in circumstances where the FBU official in question is neither giving witness evidence nor acting as representative conducting the proceedings, simply because of some nebulous, ill-defined relevance to the broader membership and/or to provide unspecified assistance to the member and his / her lawyers, which the Respondent would be unable to query owing to the cloak of litigation privilege." (Paragraph 33)

23.4 'Not only does such an approach [i.e. the one which we have just set out, namely paragraph 33 of Mr Shellum's submissions] go beyond what the

Respondent can be reasonably interpreted as having agreed through the wording of the Order, but it is also unreasonable, not least because it is impracticable and skews the operation of the policy undeniably and unreasonably in favour of the trade union:

a. Noting, as put by the Claimant, that the exercise is to an extent prospective, the Claimant's interpretation in part depends on some nebulous, ill-defined test of relevance to the membership which is incapable of easy and ready application by either party without recourse to the Employment Tribunal;
b. Indeed, on the Claimant's case, per his personal determination of the necessity of his attendance at [PC/9], it is a matter for each individual FBU official, no matter how junior – noting that the Claimant was acting as a local FBU representative, to apparently determine the relevance of a given matter to the broader membership, and therefore to determine the scope and application of their own entitlement in each instance as the case may be;
c. Additionally, on the Claimant's case, a trade union official may pray in aid the general proposition that officials give support generally to their member and liaise generally with legal representatives during Tribunal hearings as a reason why they should be given paid time off, in circumstances where the Respondent is unable to query the extent to which such support / communication with lawyers is in fact necessary or even likely due to the cloak of litigation privilege. This is particularly concerning given that such a feature in general terms would in theory apply, to some extent, in every case attended by a trade union official, and therefore skews the application of the Order entirely in the trade union's favour, which is neither reasonable nor reflective of the nature of the Respondent's agreement; and
d. The further effect of the Claimant's interpretation is to relegate the importance of service need – the Tribunal will recall "the need to maintain a service to the public" as a feature of the reasonableness of the purposes for which time off may be taken, per the ACAS Code.' (Paragraph 34)

23.5 "The line drawn by the Respondent, providing paid time off for union officials to give witness evidence in Tribunals, or otherwise act as representatives on record during Tribunal proceedings, has the fundamental appeal that it is workable in practice and likely to minimise future litigation. It is moreover entirely a line that is within the range of reasonableness of a reasonable employer, per ***Crook***." (Paragraph 36)

23.6 "The question of reasonableness as to the amount of time off permitted in the instant case only arises if the Claimant succeeds in demonstrating that the purposes for which he wished to take the leave fell within the ambit of

s.168(1)(b) TULRCA / the Order. The Tribunal should resist considering the length of time requested before determining the scope of the agreed entitlement *per se* – hard cases make bad law." (Paragraph 37)

24 Ms Ling's submissions on behalf of the claimant included this passage.

"14. On a natural and ordinary determination of the policy, a reasonable amount of paid time off is to be granted for the purpose of carrying out duties which are concerned with industrial relations between employee and employer. The bullet points are examples of what those duties may consist of, as is made clear by the use of the word 'including'.

15. This is consistent with the ACAS code of practice at paragraphs 12 and 13 which indicates clearly that the examples given within the code are examples only and not exhaustive lists of what should be included.

16. The question of what is 'reasonable' is for the Employment Tribunal to determine, pursuant to s168(3). Once it has been determined that the functions in respect of which paid time off is sought fall within s168(1)(b), the question of how much time is reasonable arises. R has a mechanism for agreeing the relevant amount of time at paragraphs 6.3 and 6.4 of its order or policy at p69 of the bundle.
17. C's primary case is that C's attendance for the full hearing falls within bullet point 5 at paragraph 2.1 [i.e. the one which we have set out in paragraph 19 above]. 'Attendance on behalf of' should be broadly interpreted, as R itself agrees that attending as a witness falls within the wording, in addition to representing a member.

18. His secondary case is that it falls within 'duties concerned with industrial relations between employee and employer'. Of particular note is that in her email to Darren Evans, Ms Barker herself did not say that the request was not appropriate as the function did not fall within s168(1)(b): she left it up to him to decide as an operational decision whether paid time off would be granted.

19. Relevant considerations on these points include the following:

    (a) Members are entitled to expect support of a number of kinds at their tribunal hearings from their union representatives: ie, moral and emotional, but also practical support such as answering questions and addressing concerns that the member may have.
    (b) Union officials are more likely to have a relationship with solicitors instructed on behalf of members or to be more confident in liaising with or challenging legal representatives.

(c) Union officials will be familiar with collectively negotiated agreements and be able to give instructions on arguments that may be deployed and considerations that might be relevant to the arguments. Their contribution is not limited to evidential matters though these are important too. Members themselves are unlikely to be able to contribute in this way.

(d) Unions pay counsels' fees and the view of officials as to how the case has gone (including how counsel has performed) is rightly relevant to any decision by the union as to whether or not to appeal.

20. In the current case there was a clear imperative for time off to be granted. The case in question involved the correct interpretation of the Grey Book, a matter which required C's engagement in relation to industrial relations between employee and employer and, indeed, between national employer and union bodies. The tribunal is invited to accept C's evidence on this. 'Disciplinary procedures' are also expressly referenced in the ACAS code of practice (p51 of the bundle)."

25 As for the reasonableness of allowing the claimant to take both 23 and 24 November 2021 off with pay, Ms Ling submitted principally this.

"22. As for whether it was reasonable to permit the two days requested by C, this is a matter on which Mr Evans or another witness with knowledge of the operational imperatives would have needed to give evidence for R to make good its case that it was not reasonable. It is submitted that general assertions about crewing levels at the time are not sufficient: it would be necessary to give specific evidence about levels on 23 and 24 November 2021 in order to argue successfully that it was not reasonable to give C paid time off.

23. In any event, it is submitted that R could not mount a defence on this basis in the current circumstances because (i) C was granted the leave when it was first requested and (ii) C was able to take the 24th as annual leave. Ms Barker agreed in cross examination that these facts did indicate that the service could have accommodated C's paid leave."

A discussion

26 As we pointed out to the parties and discussed with Mr Shellum during the hearing, if a person attends a court or tribunal hearing as a witness, then that person's involvement may, depending on the facts of the case, go beyond just giving oral evidence. It may include in addition being present to give instructions (1) on the oral evidence of the opposing party's witnesses, and (2) in relation to any submissions made on the facts, i.e. of either party. It is not

necessary to know precisely what the witness is likely to say by way of instructions to see that such instructions are at least capable of being, if not likely to be, of assistance to the party on whose behalf the witness attends the hearing. Thus, the fact that litigation privilege would protect the instructions from being disclosed is irrelevant in this context.

27 A trade union official may (depending on the facts of the case in relation to which he or she attends a hearing before an employment tribunal) be able to give evidence which the employee could not give about the manner in which the employer has in the past applied its policies. Such evidence would be relevant to a claim of unfair dismissal of the sort which Mr Young made and which was heard on 22-24 November 2021. That is clear from the part of the grounds of claim which we have set out in paragraph 6 above.

28 Mr Carberry was likely to be able to give better evidence than Mr Young about the scope of the roles referred to in the passage from the Grey Book set out in paragraph 7 above.

29 A trade union which has funded the legal representation of a member in a tribunal hearing such as that of Mr Young will be very interested in knowing how well the legal representative(s) performed at the hearing. The presence at the hearing of an official of the union will be of considerable assistance to the union in that regard. In addition, the official (and only the official, i.e. not the member) will be able to give instructions on behalf of the union where an issue which has wider ramifications arises. Further, a union official will be more likely, if not very more likely, to know when such an issue has arisen.

30 Here, the respondent would have paid the claimant to attend all of the hearing of 22-24 November 2021 concerning Mr Young's claim if the claimant (Mr Carberry) had been representing Mr Young at that hearing. It would be surprising in that circumstance if the respondent could lawfully say that it was reasonable not to pay the claimant here to attend that hearing and give instructions as well as evidence merely because the union had paid for legal representation for Mr Young.

31 The provision by a union official of emotional support to a member of the union during an employment tribunal hearing, would, however, in our view not be done by the official as a union official. Rather, we concluded, it would be done by a person who so far as relevant merely happened to be a union official.

Our conclusion on the issue of liability

32 We concluded that the claim had to be decided principally by reference to the policy at page 66, the relevant part of which we have set out in paragraph 19 above.

33 The parties agreed that the words "[a]ppearing on behalf of the membership" before a body such as an employment tribunal included appearing on behalf of an individual member as well as the membership of the union employed by the respondent. We endorse that agreement.

34 We concluded that the word "including" in the opening words of paragraph 2.1 of document at page 66 and the words "may include" in paragraph 13 of the ACAS code, which we have set out in paragraph 18 above, should not be read as meaning that only the things set out below those words were covered by (respectively) paragraph 2.1 on page 66 and paragraph 13 on pages 51-52. Nevertheless, the fact that the examples given in both places were not exhaustive was in our view incidental. That was because, we concluded, the key question when applying the policy on page 66 will always be whether or not on the facts of the individual case before (for example) an employment tribunal, it was outside the range of reasonable responses of a reasonable employer to refuse to pay the trade union official in question to attend the hearing of that case (or, as the case may be to do so throughout that hearing), and that that question would fall to be decided against the introductory words as well as the examples given below those words.

35 We did not accept all of Ms Ling's arguments on behalf of the claimant set out in paragraph 24 above. Rather, we concluded that the main material factors were those to which we refer in paragraphs 26-30 above. In addition, however, we accepted Ms Ling's submission that the fact that Mr Evans had initially granted the claimant's application to attend, with pay, as an official of the FBU, the hearing on 23 and 24 November 2021, and that he then permitted the claimant to do so albeit on annual leave on the second of those two days, showed that the respondent's ability to provide what it regarded as the minimum service required was not affected by the claimant's absence from work on those two days.

36 On the facts of this case, given the factors to which we refer in the preceding paragraph above, we concluded that it was outside the range of reasonable responses of a reasonable employer for the respondent to limit the entitlement of the claimant to pay under the policy at page 66 in the way that it did, that is to say by limiting it to pay only for the day that the claimant attended to give oral evidence.

Remedy

37 That meant that the claim succeeded and that the claimant should have been given paid leave to attend the hearing of Mr Young's claims on 23 and 24 November 2021.

38 The amount of compensation to be paid was the subject of written submissions by Ms Ling and oral submissions by Mr Shellum. Ms Ling referred us to the decision of the EAT presided over by Mr Commissioner Howell QC in *Skiggs v*

South West Trains Ltd [2005] IRLR 459, and submitted that it was to the effect that we could and should make awards of three sorts:

38.1 for the financial loss sustained by the claimant by reason of the breach of section 168(1)(b) of TULRA, namely (see paragraph 8 above) £123,

38.2 compensation for injury to feelings, and

38.3 compensation "to reflect the fact that a wrong has been done to an individual".

39 However, we did not see the decision of the EAT in *Skiggs* as authority for the proposition that compensation for injury to feelings as such could be awarded. Rather, it is, we concluded, authority only for the proposition that the third of the three kinds of compensation for which Ms Ling contended should be awarded for a successful claim of a breach of what is now section 168 of TULRA. That was clear from paragraphs 15-18 of the judgment in *Skiggs.* We regarded the reference in paragraph 19 of the judgment in that case to the issue of recalling the claimant "to give evidence of any alleged injury to his feelings for which he wished to claim special compensation" as being only incidental. That was because of the circumstances described in that paragraph which gave rise to that reference.

40 Indeed, having checked *Harvey*, we found the following paragraph (NI[2112]-[2499]):

> "If the employee's complaint is substantiated, the tribunal must make a declaration to that effect, and it may also make an award of money compensation (TULR(C)A 1992 s 172(1)). It may award by way of compensation whatever sum it considers just and equitable in the circumstances, *having regard to the employer's default* and any loss sustained by the employee (s 172(2)). The italicised words mean that, even in the absence of any other loss, an employment tribunal may award a 'reasonable and proportionate sum' by way of recompense to the union member concerned simply to mark the wrong done to him by his employer (*Skiggs v South West Trains Ltd* [2005] IRLR 459, EAT—time off for union duties). The EAT declined to give specific guidance on how that reasonable and proportionate sum might be assessed, preferring to leave it to the good sense and judgment of the employment tribunal. It would appear that compensation for injury to feelings is not available because, unlike in a case of detriment for taking part in trade union activities, a refusal of time off is not a species of discrimination against an employee because he is a union member but is, rather, a denial of his rights as a union member: see the obiter views of Judge Eady QC (after hearing full argument) on a refusal of time off to a union safety representative in *Rowe v London Underground Ltd* UKEAT/0125/16 (17 October 2016, unreported) (see para [3562.02]) where she applied the analysis adopted

> by the EAT in a case about compensation under similar wording for the refusal of rest breaks under the Working Time Regulations 1988 in *Santos Gomes v Higher Level Care Ltd* [2016] IRLR 678, EAT (as to which see CI [242]). In *Santos*, Slade J acknowledged (at para 70) that it was at least arguable that compensation could be awarded under this wording for injury to *health* as opposed to *feelings*." (Original emphasis.)

41 Given that passage, and given our understanding of the ruling in *Skiggs*, we concluded that the claimant should receive awards of only the first and third sorts sought by Ms Ling on his behalf. Ms Ling submitted that the claimant should receive £2,000 for each of the second and the third heads of compensation for which she contended (i.e. a total of £4,000), and argued that in any event the amount of the compensation by way of reparation for the wrong done should not be less than the minimum award for compensation for injury to feelings in accordance with current version of the *Vento* guidelines, which was in November 2021 £990. Mr Shellum, in contrast, submitted that the figure of £500 was appropriate compensation by way of reparation for the wrong done.

42 The claimant gave evidence to us that he felt inhibited about representing employees as a trade union official as a result of the limiting of his paid time off in the manner about which he complained in these proceedings. We accepted that evidence.

43 In all of the circumstances, we concluded that the claimant should receive £123 in respect of the loss of a day's holiday and £2,000 by way of reparation for the wrong done to him in that regard.

<u>In conclusion</u>

44 The claim accordingly succeeds and the claimant is entitled to compensation in the sum of £2,123.

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Employment Judge Hyams

Date: 28 February 2023

Sent to the parties on:

24 March 2023

For Secretary of the Tribunals