EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs T Coxhill	**v**	Unite the Union

Heard at:	Reading (by CVP)	**On:** 14 & 15 November 2022 22 February 2023 & 24 February 2023 (in chambers)

Before: Employment Judge Anstis
Mrs A Gibson
(the parties having consented to a two-person tribunal)

Appearances
For the Claimant: Mr T Dracass (counsel)
For the Respondent: Ms S Fraser Butlin (counsel)

RESERVED JUDGMENT

1. The claimant was unjustifiably disciplined by the respondent.

2. The claimant must pay the respondent costs agreed at £1,790.73 within 28 days of this judgment being sent to the parties.

REASONS

INTRODUCTION

1. This is our decision on a matter remitted by the Employment Appeal Tribunal to the tribunal. The remission was to re-address the question of section 65(5) of the Trade Union and Labour Relations (Consolidation) Act 1992. The error in our previous decision is described in para 51 of the EAT's decision:

> "*the tribunal's reasons demonstrate that it made its own assessment that the same disciplinary action would have been appropriate absent the protected component of the conduct, rather than determining whether the Union had shown that it would have applied the same sanction in the hypothetical circumstances*".

2. The relevant passage of our original decision is that at the paragraphs which appear under the heading "*Has the respondent shown that the claimant would have been disciplined in any event (s65(5))?*":

> *"112. Section 65(5) provides that:*
>
> *"This section does not apply to an act ... if it is shown that the act ... is one in respect of which individuals would be disciplined by the union irrespective of whether their acts ... were in connection with conduct within subsection (2) or (3) above."*
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> *113. We accept Mr Dracass's submission that the wording "if it is shown that" requires the union to prove that this subsection applies.*
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> *114. There was some discussion at the hearing about what actual or hypothetical comparator the union could point to in support of its case that anyone else would have been disciplined for these actions even if they had not been in connection with a legal challenge to the union. We heard some evidence and argument to the effect that the claimant and her branch had authorised payments for the family fun day in much the same way as they had for the legal action (a 'mandate' with no budget and with bills being paid as submitted by various individual members). No disciplinary action had been taken in respect of that but (i) it does not appear that this ever came to the attention of anyone within the union with authority to propose disciplinary action, and (ii) both the respondents' witnesses considered that such an activity would fall within the activities for which branch funding could be made available, being a "worthy cause".*
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> *115. The answer to this depends on looking at the claimant's actions as a whole, and then removing the protected element of support of legal action against the union.*
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> *116. In that case we have a scenario in which a branch secretary has been party to and endorsed a loosely expressed mandate from the branch which appears to authorise unlimited spending by branch members, with them having no accountability for budgeting or any requirement for further authorisation of their actions by the branch. Not only that, but the expenditure is on something which can be costly and notoriously difficult to keep within limits (legal fees) when other avenues were available (such as an internal complaint) to achieve the desired outcome.*
>
> *117. We go further than that and find that the expenditure in question was not one which the branch was entitled to make under rule 17.3. We do not accept the claimant's suggestion that this*

payment was made on account of "members ... who have suffered misfortune". That provision is not designed to assist members who are aggrieved at a decision that another part of the union has made. That only leaves expenditure on "worthy causes". We do not consider that money spent on legal challenges to the actions of another part of the union are a "worthy cause", and especially not when this is done without having previously taken any steps to resolve the matter internally. The end result of this was, of course, a loss of around £8,000 to the union.

118. What we thus have is a serious failure of governance and the spending of branch money outside the scope permitted by the union's rules. The union was not able to point us to any comparable situations - perhaps because, as we were told during submissions, anyone faced with such an allegation would normally resign their union position. However, it appears to us to be inevitable that someone in such a situation would face serious disciplinary action, and we are satisfied that sanctions arising from this would at least equal to that which the claimant was subject at the initial disciplinary stage.

119. As is set out in the note of the decision, the key consideration here was the use of union funds to sue the union, but the significance of that in this case was the use of union funds in this manner, not the fact of suing the union. We are satisfied that anyone who had used union funds in comparable circumstances, but not involving a legal challenge to a union decision, would have been treated in the same way and subject to at least the same sanctions as applied in this case."

3. The EAT's description of the error of law in our reasons is as follows (para 48):

"In dealing with the hypothetical question we reluctantly conclude that the employment tribunal has fallen into a substitution mindset:

(1) At paragraph 115 the tribunal referred to "looking at the claimant's actions as a whole". When read in context it seems clear that it is the tribunal looking at the claimant's action as a whole, rather than assessing how the Union would have looked at the conduct in the hypothetical comparison;

(2) At paragraph 116 the tribunal states "we have a scenario in which a branch secretary has been party to and endorsed a loosely expressed mandate from the branch which appears to authorise unlimited spending". This is the analysis of the tribunal rather than that which the Union would have applied absent the protected element of the conduct;

(3) At paragraph 116 the tribunal states "the expenditure is on something which can be costly and notoriously difficult to keep within limits (legal fees)". That is the tribunal's reasoning. The union's witness did not rely on this factor in answering the hypothetical question;

(4) At paragraph 117 the tribunal held "We go further than that and find that the expenditure in question was not one which the branch was entitled to make under rule 17.3." The tribunal sets out its own assessment;

(5) The tribunal goes on to state "We do not accept the claimant's suggestion that this payment was made on account of "members ... who have suffered misfortune" and "We do not consider that money spent on legal challenges to the actions of another part of the union are a "worthy cause"". Again, it is the tribunal rejecting the claimant's argument."

4. The "*hypothetical circumstances*" or "*hypothetical question*" is (para 46): "*would the member have been subject to the same disciplinary action absent the protected component of the conduct for which the member was disciplined*".

5. This judgment should be read together with our earlier judgment and the EAT's decision in this case, but this judgment supersedes our earlier judgment.

6. The EAT had anticipated that (para 54(3)) "*The matter should be capable of being determined on the basis of evidence already heard, the parties submissions and consideration of this judgment, without the need for further evidence; although whether brief further evidence should be permitted is a case management decision for the employment tribunal.*" Directions given by the employment judge provided that to the extent that either party wished to rely on additional evidence at this hearing that evidence should be disclosed to the other party and "*if at the remitted hearing there remains a dispute about whether such additional evidence should be heard by the tribunal, this will be considered by the tribunal as a matter of case management at the outset of the hearing.*" Both parties did provide additional evidence, and, except as referred to below concerning the claimant's witness statement, agreed that that evidence should be heard.

7. Given its comment, the EAT may be surprised to learn that we heard three further days of evidence and submissions and have taken an additional day in chambers to make this decision, in the circumstances we describe below.

8. At the start of the hearing the tribunal found itself unexpectedly without one of the previous non-legal members, Mr J Cameron. On enquiry, we understood that Mr Cameron was no longer available to sit on this case. Having been told that Mrs Gibson was appointed from the panel of members selected after consultation with organisations or associations of organisations representative

of employees, both parties consented to the tribunal sitting as a two-person panel. We are grateful to the parties for this pragmatic approach, which avoided the delay that appointing a substitute member would inevitably have involved.

9. The tribunal took the whole of the first morning of the hearing to read back into the case and to read the parties' skeleton arguments.

10. On resuming the hearing at 13:00 we addressed an application by the respondent to strike out paras 9, 10 and 13 of the claimant's witness statement. We ruled that para 13 should be deleted and paras 9 & 10 partially redacted.

11. Immediately before closing submissions were to be made, the claimant made an application to include in evidence an email from Wayne King (of the respondent) concerning the £950 payment referred to below. We admitted that into evidence, but concluded that there should then be an adjournment for the respondent to consider this new material and take instructions, and that there should be an award of costs against the claimant. The orders arising from this application are set out in a separate case management order dated 22 November 2022.

12. The hearing resumed on 22 February 2023 to hear additional evidence from the claimant and from Wayne King on behalf of the respondent, along with the parties' closing submissions. By the time of closing submissions the parties had agreed an amount for the costs award we had previously made, and that is incorporated in this judgment, together with the agreed time for payment. The tribunal panel met in chambers on 24 February 2023 to consider its decision.

THE EVIDENCE

Introduction

13. There has been no challenge to the findings of fact in our earlier judgment. The error to be corrected is an error of law, albeit that may require further findings of fact at this hearing.

14. The "hypothetical question" that we are to answer is essentially a question of fact, and that will have to be dealt with later in our discussion and conclusions. We include in this section of our decision an account of the evidence we heard and, where appropriate, some observations on it.

The November 2022 hearing

15. On the basis that it was for the respondent to prove that s65(5) applied we heard first from Andy Green. He is a member of the respondent's Executive Council, and was on the appeal panel that determined the claimant's appeal against the disciplinary sanctions originally imposed on her.

16. The essence of his evidence is that any payment of branch funds towards legal fees would be a breach of the union's rules, since such payment was not

provided for in rule 17.3 and the provisions for legal advice in rule 4.6 are a complete code for payment of union money towards legal fees. He spent some time explaining how legal fees could be met under rule 4.6 (referring to examples of that), and said "*it is necessary to keep close control of legal action that is funded by the Union given the high costs and risks that this involves.*" Para 4 of his statement reads as follows:

> *"Branches are not and never have been permitted under the Union's rules to spend branch funds on legal advice or legal representation. If a branch wished to take or fund a legal challenge that falls outside of rules 4.6.1 or 4.6.3, they would need to seek Executive Council approval. It would be breach of Union's rules to use branch funds to take legal action irrespective of who the action was against. There have been no disciplinary cases involving branch officials using branch funds on legal action, as no branch has ever done this. I am not aware of any branch secretary or treasurer ever authorising the payment of costs for legal advice or legal representation against any party out of branch funds and, anyone doing so, would be disciplined in the same way."*

17. His conclusion at para 13 is in similar terms:

> *"Branches cannot spend Union funds on any type of legal action, no matter who the action was against, and it would be a breach of rule to do so. If any branch secretary was found to have used branch funds to bring legal proceedings against someone other than the Union, in the manner the Claimant permitted here, they would have been disciplined in the same way and the Executive Council appeal panel would have applied the same sanction."*

18. We heard evidence from the claimant. She said "*a sum of £950 was paid to a member in T3 on 23 March 2016 following representations made by T3 reps*". She says that as far as she was aware this was recorded in branch accounts which were audited and forwarded to the regional office, without any action being taken by the regional office in respect of the payment. In her oral evidence she said that this was an employment tribunal fee, in the days when fees were charged by employment tribunals for starting a claim.

19. The claimant's evidence went beyond the question of payment of legal fees, addressing other possible misuse of branch funds. Given (at the time of the November hearing) the limited evidence in respect of payment of legal fees, we considered that broader evidence on disciplinary action (or lack of disciplinary action) for misuse of union funds may help us in determining the hypothetical question, and on that basis we allowed into evidence some parts of paras 9 and 10, which the respondent had objected to. These concerned a supposed theft of branch funds uncovered by the claimant in 2012, in respect of which she says "no disciplinary action" was taken against those responsible, and a

regional official did not properly assist the police with enquiries that the claimant had instigated.

20. In response to this Ms Fraser Butlin pointed out to the claimant that that as part of further particulars previously provided by the claimant she had said "*I reported stolen branch funds to police. Four senior reps lost their position within Unite … as a result of investigation.*"

21. The claimant also said that in 2017 a regional official had attempted to move branch money to a strike fund in breach of procedures, that this was only stopped through her intervention, with no action being taken against the relevant official. When asked about this Mr Green said that regional officials were employees and dealt with under a separate disciplinary system (that he was not part of) to that which applied to members such as the claimant. The claimant accepted that this individual was an employee of the respondent, not simply a member.

22. The claimant said "*I believe I had been targeted by the respondent for some time in a gerrymandering exercise.*" In answer to questions from the tribunal she said that the "*gerrymandering*" in question was the breaking down of the union branch or branches at Heathrow airport into smaller elements (the original Terminal 4 "breakaway" and the later Terminal 3 "breakaway" which led to the events in question in this case). She said that her view was that a larger branch was better as it carried more weight with their employer. She considered that smaller branches were to the detriment of the membership, but it seemed to be her case that smaller branches at Heathrow was the favoured option of some within the union. Despite her suggestion that she was being "targeted", in her oral evidence she said that any move to smaller branches was a move against union members, and not against her personally.

23. Her statement also contained reference to "United Left" voting as a bloc against her. She said that this arose because the leader of United Left was a colleague and ally of the regional secretary, and as a result of this United Left members had been compelled to support the decision made by the regional secretary to recognise the "breakaway" of Terminal 3 without a membership vote.

24. We had originally read the claimant's statement as suggesting that the disciplinary action taken against her was part of this alleged "targeting" of her, or was a result of her having fallen foul of factionalism or politics within the trade union. Following her oral evidence it was far less clear whether this was her allegation or what, if any significance this might have had in the disciplinary sanctions that were imposed on her.

25. She argued in her statement that, contrary to our finding at para 117, payment of legal fees in an attempt to retain the original branch 562 structure amounted to a "worthy cause" under rule 7.3.

26. At para 14 of her statement she said:

> *"It is clear to me that the only reason I have been disciplined was that the legal action taken was against the union. I believe that if branch funds had been used in the same manner to pursue a legal challenge on behalf of branch members, but the legal action was not against the union, I would not, as the Secretary of the branch, have been subject to disciplinary action and/or the same disciplinary sanction. One can think of various hypothetical examples that could arise whereby a similar mandate was passed to spend branch funds to pursue legal advice/action which did not involve a legal challenge to the union itself. I do not believe I would have been disciplined in the same way in those circumstance; so much is clear from the reasons stated for my disciplinary action at the time because the disciplinary panel's fundamental focus, as found by the ET, was on the fact that the funds were used 'to take legal action against the union'."*

27. That was the position towards the end of 15 November 2022, and the parties were about to embark on their closing submissions when the question of an email from Wayne King to the claimant concerning the payment of £950 in tribunal fees was raised by the claimant. We have described above and in our order of 22 November 2022 the consequences of that.

The February 2023 hearing

28. The hearing resumed on 22 February 2023.

29. The claimant referred to the £950 payment in this way in her witness statement:

> *"We had also previously used branch funds to pay for legal fees to assist members e.g. following a government change of law, a sum of £950 was paid to a member in T3 on 23 March 2016 following representations made by T3 reps. This was not queried by anyone."*

30. Wayne King was a regional co-ordinator for the respondent. He reported to Vince Passfield and Peter Kavanagh. Following the claimant's suspension in October 2016 a lack of elected officials for the branch meant that the branch was placed in "regional administration", with Mr King taking charge of the branch in a caretaker role ahead of fresh elections. It seems that he was in place as caretaker at the branch for more than a year.

31. Mr King says during his period in charge of the branch, members raised various questions about payments previously made by the branch, in particular in relation to mobile phone bills and other electronic devices. As a result of this, he made various enquiries into the branch's finances, and on 13 July 2017 emailed the regional finance administrator asking if she could provide information about various payments that had been made by the branch. Branches were obliged to submit quarterly accounts to the regional finance administrator. One of the payments he was questioning was a payment by

cheque of £950 made on 23 March 2016. He received a response the same day, identifying this as being a payment to HMCTS in respect of "tribunal fees".

32. It was not part of Mr King's evidence or the respondent's case that payment of court or tribunal fees was a matter distinct from the payment of fees for legal advice.

33. On 17 July 2017 Mr King sent an email to the claimant asking her to bring copies of phone bills to a meeting they were due to have, but he did not mention the "tribunal fees".

34. On 15 August 2017 Mr King wrote to the claimant asking for information in respect of various payments including the £950 tribunal fee payment. This was the email that had prompted the adjournment on 15 November 2022. He raises questions across a number of payments – particularly in relation to the family fun day and mobile phones. As regards the tribunal fee he says:

> *"Can you let me know details of the member the branch paid tribunal fees of £950 for and provide me with a copy of the minutes from the branch meeting this was agreed at. Given the recent changes in ET fees the member will need to be contacted regarding repaying the money once they've been reimbursed."*

35. "Recent changes" was a reference to the Supreme Court's decision on tribunal fees and consequential arrangements for them to be reimbursed to those who had paid them.

36. Mr King never received a response to this from the claimant, beyond her stating that "*your previous email will be easy to answer once I have paperwork in front of me*".

37. Around this time the claimant's disciplinary hearing and subsequent appeal were being heard, with the appeal concluding in early September 2017. Mr King also describes it as being a very busy period for negotiations with Heathrow airport, who the branch members worked for.

38. In late October 2017 the claimant made a complaint against various union officials including Mr King. In his witness statement he says:

> *"I was called to a meeting with the General Secretary and Regional Secretary on 9 November 2017. At the meeting I was told a complaint had been raised against me by the Claimant that mentioned litigation and that I was not to take any further steps in relation to the Claimant or the branch. I asked what this included and was told "everything". I asked about interim elections, as I had already begun the process, but was told in no certain terms there were to be no interim elections and no further inquiries relating to the branch. I did not raise anything with the General Secretary or Regional Secretary regarding the £950 Tribunal fee or other*

branch financial issues given the unequivocal instruction and unknown litigation."

39. By March 2018 the claimant had started this tribunal claim. Mr King says:

> *"On 8 June 2018 I shared with the reps the limited information I had regarding branch payments including the £950 Tribunal fee and explained that no further action could be taken until the Claimant's legal claim had been concluded. By this point the reps were aware of the claim, as the Claimant had made it common knowledge that she was taking the union to court. Questions were being raised about the claim and I told the reps I could not discuss it."*

and

> *"If the Claimant had not cancelled her Unite membership after she left* [Heathrow airport]*'s employment in 2020, my intention was always to raise the issues concerning the £950 payment when the Claimant's case was concluded but we never got to that stage."*

THE LAW, AND THE QUESTION TO BE DETERMINED

40. It is for the respondent to show that the requirements of section 65(5) are met – that is:

> *"This section does not apply to an act, omission or statement comprised in conduct falling within subsection (2), (3) or (4) above if it is shown that the act, omission or statement is one in respect of which individuals would be disciplined by the union irrespective of whether their acts, omissions or statements were in connection with conduct within subsection (2) or (3) above."*

41. The EAT decision sets out the agreed approach by the parties to this at para 45 (an approach which appears to be endorsed by the EAT):

> *"(1) What was the reason, or were the reasons for the discipline. The tribunal must determine the union's reason, and not substitute its own reason;*
>
> *(2) Was that reason, or one of the reasons, conduct … that would be protected, absent section 65(5);*
>
> *(3) Can the conduct be separated into components;*
>
> *(4) If so, is there a component of the conduct for which the member would have been subject by the union to the same disciplinary sanction, absent the component that would otherwise have resulted in the conduct being protected. The determination must be of what the union would have done in such circumstances and,*

> *again, the tribunal must not substitute its reasoning for that the union would have applied."*

42. The EAT answers the first three questions as follows (para 47)

> *"The tribunal reached a clear finding of fact about the reasons why the union disciplined the claimant; it was because of her role in allowing the use of union funds to sue the union which included, to a subsidiary degree, a lack of proper governance in so doing. That was conduct that absent section 65(5) applying would be protected. The conduct could be separated into components; most obviously (1) using union funds to bring legal action (with an element of lack of proper governance) and (2) the legal action being against the union."*

43. Point 4 poses the question: "*is there a component of the conduct for which the member would have been subject by the union to the same disciplinary sanction, absent the component that would otherwise have resulted in the conduct being protected?*

44. Given the way in which the EAT identified the different components, the only component that could fit this would be "*using union funds to bring legal action (with an element of lack of proper governance)*", so the question becomes: has the respondent shown that use of union funds to bring legal action (against someone other than the union, and with an element of lack of proper governance) would have resulted in the same disciplinary sanction being imposed on the claimant. In considering this "*the determination must be of what the union would have done in such circumstances and … the tribunal must not substitute its reasoning for that the union would have applied*".

45. The EAT notes (para 46):

> *"The determination of what the union would have done absent the protected component is difficult. In some cases, there may be evidence about what the union has done in similar circumstances that may be of key importance in determining how the union would have acted in the circumstances under consideration. In other cases, the tribunal may have to assess the evidence of a witness who answers the hypothetical question, would the member have been subject to the same disciplinary sanction absent the protected component of the conduct for which the member was disciplined. However, considerable care needs to be taken in assessing such evidence. As Lindsay J, noted in Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124:*
>
> > *"Another permissible approach is to ask witnesses how the hypothetical case that requires to be considered would have been dealt with, although great care has to be exercised in assessing the answers to questions such as that, because the witness will be aware that it will be next to impossible to disprove any answer*

to a hypothetical question and also witnesses will know, by the time of the tribunal hearing, what sort of answer is convenient or helpful to the side that they might wish to support.""

DISCUSSION AND CONCLUSIONS

Is the answer in our original decision?

46. A large part of the parties' submissions were to the effect that the answer to the hypothetical question was to be found in an analysis of our original reasoning.

47. As Ms Fraser Butlin pointed out, if that was the case then it was surprising that the EAT saw fit to remit the question to us. We did not see anything in our decision that pointed to an obvious answer to the hypothetical question. There are elements of our decision that could be argued either way. For the reasons given below, we found the new evidence concerning the £950 payment much more helpful in answering the hypothetical question.

The hypothetical question and the £950 payment

48. We note and accept the caution in Vento about witnesses providing "convenient" answers to hypothetical questions. We also accept that such answers may be given without any intent to mislead the tribunal. Evidence given as to hypothetical matters in such circumstances is not worthless, but is to be treated with caution.

49. In contrast, evidence regarding the respondent's actions in relation to the £950 tribunal fees payment seems to us to be very helpful since it is, on the face of it, the only direct evidence we had about the "hypothetical question" – payment of legal fees or expenses outside rule 4.6 but not in respect of legal action against the respondent. The actions also arose at a time when no-one knew that the hypothetical question would be asked. Actions speak louder than words in answering the hypothetical question.

50. The claimant was insistent that branch accounts had always been properly supplied to the regional accounts assistant, and local accounts and records had been kept by the local branch, but she no longer had access to them. Since the regional accounts assistant was able to provide Mr King with information on the payment it does appear that accounts were filed with her, but we do not see her role in this as anything other than basic record keeping. In particular, we do not understand her role to have been to check that payments were being made in accordance with the respondent's rules.

51. Mr King's position was that he had recognised immediately on being told that this was for tribunal fees (on 13 July 2017) that any payment of tribunal fees by the local branch would have involved a breach of the union's rules.

52. The claimant is clearly wrong in her witness statement to say "*this was not queried by anyone*". It was queried by Mr King in August 2017, although in a

manner which was more to do with proper governance and obtaining a refund of the money (given the new rules on tribunal fees) than breaches of the respondent's rules.

53. Mr King clearly had concerns that the payment had been made without proper authority. As with the payment of legal fees for which the claimant was disciplined, we have the element of a suspected lack of proper governance.

54. It is clear to us that the respondent's treatment of the £950 payment is an appropriate comparison with the treatment of the payment in respect of which she was disciplined. Mr King was at pains to say that he was not the person who would be responsible for instigating disciplinary action, and also that a conclusion that union rules had been breached could not be reached without a full investigation. Nevertheless, he also accepted that he could raise breaches of rules with Mr Passfield or Mr Kavanagh for them to take action, and he also agreed that he immediately recognised this payment as being, on the face of it, a breach of rule 4.6 in respect of payment of legal fees. We also note his concerns about governance in respect of the payment, which seem to us to match the concerns about governance that arose in respect of the payment for which the claimant was disciplined.

55. Everyone agrees that no disciplinary action was taken by the respondent against the claimant (or anyone else) for this payment of £950.

56. So there is different treatment. On the face of it, payments in breach of rule 4.6 (without proper governance) for a claim against the union attract disciplinary sanctions but a payment in breach of rule 4.6 (without proper governance) for a claim against a member's employer (or former employer) does not.

57. That is not in itself an answer to the hypothetical question, but it does mean we should enquire as to why there was that difference in treatment.

58. There were some difficulties for the respondent in explaining this difference in treatment. Mr King immediately identified the possibility of a breach of rule 4.6 in payment of the tribunal fee, but he took no action about this potential breach of the rules. In fact, he did nothing to follow it up for around a month, and when he did it was in respect of recovering of the payment and governance and proper authority for the payment, not that it was against the rules.

59. A number of explanations were put forward for this. Mr King said that he had been given the task by the branch members of getting to the bottom of various payments, and he wanted to complete this task. However, he also accepted that it was only the tribunal fees payment that was likely to constitute a breach of the respondent's rules. Whatever the rights and wrongs of other payments they were much more a matter of governance and he did not suggest that other payments infringed any rule. It would have been perfectly possible for him to report the apparent breach of rule 4.6 to Mr Passfield or Mr Kavanagh and continue with his enquiries into the other payments.

60. The respondent also emphasised that at the time this payment came to light the disciplinary process in respect of the claimant for the other payments was well underway, and the disciplinary hearing was due imminently (it was originally scheduled for 18 July 2017 but took place on 27 July 2017). In relation to a branch meeting of 2 August 2017 Mr King says:

> *"The minutes show I did not raise the £950 payment of Tribunal fees with the branch at the meeting. This was because it was similar spending to that which the Claimant …* [was] *at that time suspended and subject to membership disciplinary cases in relation to. I took the view it would not have been appropriate to raise this payment … with the branch whilst the membership discipline case was ongoing."*

61. That is, at most, an explanation as to why he did not raise it with the branch, but it does not explain why he did not raise it with Mr Passfield or Mr Kavanagh. It is clear from this that he knew that the claimant was subject to a disciplinary case for breach the rules on payment of legal fees, and in those circumstances we would have expected him to raise with his managers a possible repeat of this alleged offence in the payment of the tribunal fees.

62. Further reasons given for Mr King not taking this further were his difficult relationship with the claimant (which culminated in her complaint against him) and pressure of work in relation to negotiations with the employer. But all he had to do was to notify his managers of the possible rule breach, and it would then be up to them to take action (if at all) and commission further investigations.

63. He says that once the formal complaint was made he was told to make no further inquiries into branch matters. We understand that a degree of caution may be appropriate when complaints are made against a particular individual, but on the whole we would not expect that to mean the end of any inquiries or investigations. At most they would be transferred to others.

64. Finally, he says that there was nothing that could be done after 2020 when the claimant left her job and the union.

65. Mr King knew of a potential breach of rule 4 in respect of the payment of tribunal fees on 13 July 2017 but did nothing to report this to anyone. We find his observation that "*my intention was always to raise the issues concerning the £950 payment when the Claimant's case was concluded but we never got to that stage*" to be peculiar. We gave our first judgment in this claim in summer 2019, prior to the claimant ceasing to be a member of the respondent in 2020. At that point the case was concluded. Mr King could not have known that the claimant would bring a successful appeal. If he really was waiting for the case to be concluded he would have raised the issue following our original judgment in 2019. He did not.

66. There is a separate point that the claimant was not the only person who could have been accountable for this breach of rule 4. In the case of the legal fees for the claim against the respondent, the branch chair and the individuals who had brought the claim were subject to disciplinary action too. Rule 17.10 provides "*The Branch treasurer shall be responsible for dealing with financial transactions concerning the Branch, ensuring that all payments are made in accordance with the rules of the Union …*". Thus if there had been a payment made in breach of the rules the treasurer would have been accountable for it just as much as the branch secretary. There was a treasurer in place at the time of the tribunal fees payment of £950. Whatever concerns there may have been about reporting or taking further action against the claimant could not have applied to the treasurer. Mr King's explanation as to why he made no report in respect of the treasurer was not entirely clear. We understood him to be saying that the treasurer no longer held office at that branch but was treasurer for another branch. If that is the case, we do not see it is a good reason for not reporting this potential breach of rules in respect of the treasurer. In any event, Mr King was clear that her no longer being the treasurer for the relevant branch did not absolve her of responsibility for any misconduct, yet no complaint was made by him that she had possibly breached the rules.

67. The respondent has to show that the claimant would have been subject to the same disciplinary action in respect of a breach of the rules where the money was not used for a claim against it.

68. The respondent's witnesses saying that this would be done counts for little in the face of the evidence on what actually happened in relation to the £950 payment. Although recognised as a breach of the rules by Mr King it was not reported as such by him. The respondent has not suggested that Mr King was someone who took an unacceptably liberal view of breaches of the rules. For the reasons given above we do not accept the explanations given by Mr King for why he did not report this matter. Where the breach of the rules was in respect of fees for legal action against the employer it was addressed as (at most) a matter of governance, not of a breach of the rules. In those circumstances, we conclude that the claimant was subject to unjustified discipline. The claimant's (and the treasurer's) treatment in respect of the £950 payment gives the answer to the hypothetical question: where payments in respect of legal fees or costs are made in breach of the rules (and with a lack of proper governance) but not in relation to legal action against the respondent the same disciplinary action would not be taken and the same disciplinary sanction would not have been applied by the respondent.

Employment Judge Anstis

Date: 24 February 2023

Sent to the parties on: 24 March 2023

For the Tribunals Office

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