



EMPLOYMENT TRIBUNALS

Claimant: Mr A Arif
Respondent: DHL Services Limited

Heard at: West Midlands (Birmingham) **On: 9, 10 and 11 May 2023**
Employment Tribunal

Before: Employment Judge Childe

REPRESENTATION:

Claimant: Ms D Vandenburg (Counsel)

Respondent: Mr J Crozier (Counsel)

JUDGMENT

1. The claimant's claim that he was automatically unfairly dismissed on the basis that the principal reason for dismissal was that the claimant had taken part in the activities of an independent trade union at an appropriate time is not well founded and is dismissed.
2. The claimant's claim that he was unfairly dismissed by the respondent is not well founded and is dismissed.
3. The claimant's complaint that the respondent breached the claimant's contract of employment by failing to pay him notice pay is not well-founded and is dismissed.

Summary of the case

1. The claimant was employed by the respondent, DHL services, as a warehouse operative. The claimant was employed from August 2017 until his dismissal on 7 September 2022. Prior to his dismissal the claimant held the position of union convener.
2. The respondent says the claimant was dismissed for dishonesty in that he provided false/misleading information to Shoosmiths, the respondent's representatives, on a telephone call to them on 9 June 2022 and thereafter, regarding a union member he was representing.
3. The claimant's case is he that he was not acting dishonestly and did not provide false/misleading information on 9 June 2022. Rather he honestly, but mistakenly believed he was speaking to the union member's lawyers about his case on 9 June 2022. The claimant says that the calls which he made to Shoosmiths were part of his trade union activities and the respondent's decision to dismiss him for making those calls was automatically unfair because it was protected trade union activity. The claimant also brought a claim of ordinary unfair dismissal.

Introduction

4. This case was heard in person in Birmingham Employment Tribunal. I was referred to a bundle which ran to 296 pages. On day three of the hearing I was provided with an additional document, which was an email from Mohammed Azam to the claimant, dated 9 June 2022 and timed at 12:18 PM.
5. I heard witness evidence from:
 - a. The claimant, who was employed by the respondent as a warehouse operative and trade union representative.
 - b. Adil Qadus, who is a paralegal at Shoosmiths solicitors, the respondent's appointed lawyers in this case.
 - c. Tariq Hussein, who was the disciplinary officer in this case and an interim general manager for the respondent.

- d. Chris Tonks, who was the appeal officer and vice president of the respondent's operations life-science, and healthcare division.
6. A private preliminary hearing had taken place on 17 March 2023. At this preliminary hearing a list of issues had been agreed by the parties. At the start of the hearing I had a discussion with the parties and it was agreed that this list of issues would be adopted for the final hearing. Ms Vandenburg confirmed that the only protected activities that were being relied on for the purposes of the automatic unfair dismissal claim were the claimant's conduct which was subject to the disciplinary process. This conduct was the claimant's discussion with Shoosmiths' solicitors on 9 and 27 of June 2022.
7. At the start of the claimant's evidence on the afternoon of the second day of the employment tribunal hearing, Ms Vandenburg began to ask the claimant supplementary questions about mandates for industrial action from August 2021. This evidence was not in the claimant's witness statement nor is it identified as a relevant issue (e.g. a protected trade union activity) in the original list of issues, or indeed by Ms Vandenburg at the start of the final hearing. The respondent objected to this evidence being advanced on the basis that the respondent had not had the opportunity to put forward its own evidence in connection with this issue. Ms Vandenburg confirmed that this information was being raised as "contextual information." I granted Ms Vandenburg the opportunity to take instructions from the claimant about whether he wished to make an application to amend his claim to include this issue. Ms Vandenburg took instructions and confirmed that the claimant's decision was not to pursue this matter any further. The tribunal therefore did not consider the issue of industrial mandates from 2021 in its judgement.

Issues to be determined

8. The issues I have to determine are set out in a case management order dated 17 March 2023 before EJ Gaskell. These are as follows:
 - e. Automatic unfair dismissal
 - i. Did the claimant's conduct subject to the disciplinary process amount to an activity of an independent trade union pursuant to

section 152 (1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992?

- ii. If so, was the claimant dismissed because he had taken part, or proposed to take part in the activities of an independent trade union?

The burden of proof is on the claimant.

f. Unfair dismissal

- i. Did the respondent have a fair reason to dismiss?

- 1. Was the claimant dismissed for a potentially fair reason?

The burden of proof is on the respondent.

- 2. Did the respondent have reasonable grounds to believe that the claimant was guilty of misconduct?

- 3. Did the respondent carry out as much investigation as was reasonable in the circumstances?

- 4. Was the respondent's decision to dismiss within the band of reasonable responses open to them?

- 5. Did the respondent consider alternatives to dismissal?

- ii. Did the respondent follow a fair procedure?

- iii. If the dismissal was procedurally unfair, would the claimant have been dismissed in any event?

g. Wrongful dismissal

- i. Was the respondent entitled to dismiss the claimant without notice?

h. Remedy

- i. To what compensatory losses is the claimant entitled?

- ii. Should any compensatory losses be subjected to an ACAS uplift?

- iii. How much notice pay, if any, is the claimant entitled to?

Findings of fact

The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

9. The claimant commenced employment with the respondent in August 2017 as a warehouse operative. The claimant worked at the respondent's Lode Lane, Solihull site for 8 years and had spent 4 of those years in a union capacity as a shop steward for Unite the Union.
10. The claimant was latterly a union convener at the respondent's Solihull site. In this role he was employed by the respondent but carried out his union duties. From August 2021 the majority of the claimant's duties at work were union activities. As part of his union duties, the claimant had accompanied approximately 250 people at disciplinary hearings, had undertaken dozens of appeal and disciplinary processes and was latterly in the process of undertaking a diploma in employment law.
11. The respondent provides logistics support to various customers throughout UK and Ireland.
12. The claimant had been representing Mohammad Azram, an employee of the respondent and a union member, in an appeal, in his capacity as trade union representative.
13. In approximately 2021 Mohammad Azam lodged a claim in the employment tribunal. The Claimant's understanding at the time was that the "*claim went quiet*". Mohammad Azam did not appoint a representative in the employment tribunal and acted as a litigant in person. It was understood by the claimant that Mohammad Azam did not have the legal support of Unite.
14. On 20 May 2022 Shoosmiths wrote to the employment tribunal and said they were representing the respondent in the Mohammad Azam case. Mohammad Azam was copied into this email. In the email Shoosmiths state "*We write to inform the Tribunal that we are acting on behalf of the Respondent, DHL, in the above matter.*" This email was sent from Adi Qadus, paralegal at Shoosmiths. His signature sign off provided his direct telephone number ("the **Shoosmiths' Email**"). The claimant was provided with the Shoosmith's Email by email by Mohammad Azam on 9 June 2022 at 12:18:06 PM.
15. The claimant was asked to be a witness in a case brought by another employee of the respondent, Austen Smith. The claimant liaised with Unite's chosen lawyers, Thompsons, to prepare for the case. The claimant received

support from Thompsons' in producing his witness statement and with the administration of attending the employment tribunal hearing by CVP.

16. The Austen Smith case was due to last for two days on 7 and 8 June 2022, and the claimant expected to give evidence on 8 June 2022 in connection with what happened at the appeal hearing. What actually happened was that the claimant was told by Austen Smith on 8 June 2022 he was not required to give evidence after lunch. The claimant assumed that Austen Smith's case had settled.

9 June 2022 call

17. The next day, on 9 June 2022, the claimant contacted Adil Qadus, paralegal at Shoosmith's solicitors, on his direct telephone line. The contents of this telephone call and the purpose of this call are disputed by the parties. I make the following finding of facts, based on the evidence before me and on the balance of probabilities.
18. I find the following was said during the telephone call between the claimant and Adil Qadus on 9 June 2022:
 - i. The claimant called to advise Adil Qadus that he was now aware of Mohammad Azam's claim as he initially wasn't aware Mohammad Azam had even brought a claim.
 - j. Adil Qadus was unsure of the purpose of the claimant's call and who he was, as he wasn't Mohammad Azam's representative. Adil Qadus asked the claimant who he (i.e the claimant) was and the claimant said he was the trade union representative for Mohammad Azam and he "will help out wherever he can and to contact him on behalf of Mohammad Azam".
 - k. Adil Qadus then asked the claimant if he was representing Mohammad Azam and if he was noted as his representative on Mohammad Azam's ET1 form. The claimant replied that he was representing Mohammad Azam and he believed he was noted as Mohammad Azam's representative on the ET1 form.
 - l. The claimant then went on to say that he put a grievance in against Ian Farish, the appeal hearing manager, on behalf of Mr Azam as he (Mr Farish) walked out of the appeal hearing and that Mr Farish did the same

on another case, which was settled out of court. The Claimant then said that he was expecting the same to happen with this case (i.e Mohammad Azam's case) and that he believed Mohammad Azam's case would also settle outside of court as the other one did. When referring to the other case, the claimant was referring to Austen Smith's case, which the claimant knew had settled the day before.

19. In making the above finding, I have accepted that the written file note Adil Qadus produced of the 9 June 2022 conversation is an accurate record of the call. I have accepted Adil Qadus's evidence that he made a file note of the telephone call with the claimant on 9 June 2022 immediately after the call and the notes accurately reflect his conversation with the claimant. I found Adil Qadus' evidence to be honest and straightforward on this point. In cross examination the claimant couldn't provide any reason to doubt that this is what Adil Qadus did. I find there was no reason for Adil Qadus to give other than accurate information on this point.
20. I now go on to consider the accuracy of each of the relevant statements that the claimant made to Adil Qadus during the 9 June 2022 call and his reason for making those statements.

The claimant's statement that he believed he was noted as Mohammad Azam's representative on the ET1 form.

21. I find that Mohammad Azam was a litigant in person. There is no evidence before the tribunal that the claimant was noted as Mohammad Azam's representative on the ET1 form.
22. I did not accept the claimant's evidence that at the time he made this statement, he believed he was identified as the representative on Mohammad Azam's ET1 form, for the following reasons:
 - m. The claimant was an experienced trade union official and would have known if he had been named as a representative on a claim form, before making a call of this kind on behalf of an individual.
 - n. As an experienced trade union official, the claimant would have understood the difference between being a TU representative and being an appointed representative for the purposes of a tribunal claim.

- o. The claimant provided no credible explanation for why he would hold this belief. Under cross examination, he said “he didn’t know 100%, but believed it could be possible.”
- 23. I find therefore that the claimant did not genuinely believe, at the time this statement was made to Adil Qadus, that he was the representative on Mohammad Azam’s ET1 form.
- 24. I find, on the balance of probabilities, that the reason the claimant said to Adil Qadus that he was Mohammad Azam’s representative on the claim form was to enable him to establish his credentials as an official representative in the employment tribunal proceedings and to have a discussion with Adil Qadus about Mohammad Azam’s claim.

The claimant’s statement that he believed Mohammad Azam’s case would also settle outside of court as the Austen Smith one did

- 25. I find that the reason the claimant made this comment was because he was suggesting to Adil Qadus that his expectations were for Mohammad Azam’s case to settle in the same way as Austen Smith’s case did. I find that Mr Farish was the common appeal manager in both cases. The claimant knew that the Austen Smith’s case had settled the day before and the claimant had seized the moment to open up settlement discussions in the Mohammad Azam case.

The claimant’s explanation for the purpose of the call on 9 June 2022

- 26. In making the above finding of fact, I have considered the explanation the claimant gave about the accuracy and purpose of this call.
- 27. The claimant suggested in cross examination that he thought he was speaking to Mohammad Azam’s appointed solicitor and the purpose of his call was to “seek an update, see if there is anything missing, fill in blanks.” I found the claimant to be less clear than Adil Qadus in his evidence about what was said on the call on 9 June 2022 and what the purpose was and I don’t accept the claimant’s evidence on this point, for the following reasons:
 - p. The difficulty with the claimant’s explanation is that he did not seek an update or ask if anything was missing, during this call. On a generous

reading he did fill in some blanks, but the information he provided was about another case (the Austen Smith case), with a common appeal manager, settling the day before.

- q. The claimant was aware that Mohammad Azam's Employment Tribunal claim was live in 2022. The claimant was provided with the Shoosmiths' Email, by Mohammad Azam. The more likely explanation is that the claimant's intention was to contact Adil Qadus to discuss Mohammad Azam's case and to see if he could open up discussions on settlement.
- r. I do not accept that the claimant was acting under the misapprehension that Shoosmiths' were Mohammad Azam's appointed representatives, as alleged by the claimant. In the Shoosmiths' Email it is clear that Adil Qadus and Shoosmiths represented the respondent. I find it implausible that the claimant would not have read the email in full and seen that Shoosmiths represented the respondent.
- s. I accept Chris Tonks's evidence that the respondent's cases were handled by Shoosmiths and Thompsons usually represented Unite. I find that given, the claimant's extensive knowledge of carrying out Trade Union work for the respondent over the course of 8 years, and his involvement in the Austen Smith case, he would have known this too and would not have mistakenly assumed that Shoosmith's were Mohammad Azam's lawyers.
- t. If the claimant had genuinely thought he was talking to Mohammad Azam's appointed solicitor, it would not have made sense to tell them (i.e who he thought were Mohammad Azam's named representatives) that he was in fact Mohammad Azam's named representative.
- u. The timing of the discussion is also relevant. The day before, on 8 June 2022, the claimant had been involved as a witness in a case with a common manager (Ian Farish), which had settled. The claimant was aware of this. I find the likelihood is that the claimant took the opportunity to seize the moment and share information to facilitate a settlement of Mohammad Azam's case. He knew that the respondent had settled the Smith case the previous day.

Conclusion about the purpose of 9 June 2022 call

28. The purpose of the claimant's call on 9 June 2022 was to encourage the respondent to settle Mohammad Azam case and to suggest that the respondent did so because Ian Farish had walked out of the appeal in the Mohammad Azam case in similar circumstances to the Smith case, which the claimant knew had settled the previous day.
29. In reaching this conclusion, I reject the claimant's explanation that he mistakenly telephoned Shoosmiths and that he was simply providing who he thought was Mohammad Azam's lawyers with helpful information about Mohammad Azam's case in his capacity of trade union representative.
30. On 27 June 2022 the claimant was handed a letter which invited him to an investigation hearing with Lee Fairbrother. This letter was handed to the claimant prior to his call at noon with Adil Qadus. The invitation letter set out two broad allegations:
 - a. a potential breach of the term of a Cot3 settlement agreement between Austin Smith and DHL Services Limited dated 8 June 2022 and breaches of confidentiality by [the claimant] generally in connection with this claim;
 - b. a potential breach of confidentiality in connection with a telephone call by [the claimant] to Shoosmiths Solicitors on 9 June 2022.
31. This investigation invitation letter did not refer to an allegation that the claimant had committed gross misconduct.

27 June 2022 call

32. That same day, the claimant called Adil Qadus three times, firstly at twelve noon and then at 12.07. Adil Qadus made a file note of those calls immediately afterwards. The claimant accepted in cross examination that he had no reason to doubt Adil Qadus's chronology that he called the claimant three times.
33. I find the following was said during the three telephone calls between the claimant and Adil Qadus on 27 June 2022 (here I only set out the relevant matters that were said. The totality of what I find was said is set out in Adil Qadus's contemporaneous file note on 27 June 2022):

- a. The claimant said to Adil Qadus that he spoke to him on 9 June 2022 and they had a conversation about the Mohammad Azam case and the Vento bands, confidentiality.
 - b. The claimant said he had now been pulled up for gross misconduct about that conversation and the claimant wanted to know what Adil Qadus said and who he told.
 - c. The claimant then put Adil Qadus on hold for a few minutes and Adil Qadus hung up. The claimant called again and there was difficulty with the phone line, so he hung up.
 - d. Finally, the claimant called again. The claimant said that he had been pulled up for a gross misconduct issue about the phone call with Adil Qadus.
 - e. Adil Qadus asked how the claimant knew this was the reason for the gross misconduct because Adil Qadus didn't know anything about this.
 - f. The claimant left the room and went to his office and he read out from the investigation invite letter. The claimant read that the first allegation of gross misconduct was a COT3 agreement breach and the second was a breach in relation to a telephone call with Shoosmiths on 9 June 2022.
 - g. The claimant said he wanted to know what Adil Qadus said and who did he say that to. The claimant said he understood that it's the client for Adil Qadus but for the claimant it's his job is on the line.
 - h. Adil Qadus responded by saying that whatever he speaks about to the client (by client Adil Qadus meant the respondent, who were Shoosmiths' client) is confidential between him and the client and that's not something he could disclose to him. The claimant then said "what if he gets the client on the phone". Adil Qadus said even so they would need to speak to Shoosmiths' and he would speak to his senior colleagues about how this is to be handled, but it wasn't something that he could comment on. The claimant then said that he was going to get the client on the phone and hung up. That was the end of the telephone call.
34. Lee Fairbrother, Operations Manager, investigated the allegations against the claimant. The claimant attended two investigating hearings on 4 July 2022 and 21 July 2022.

35. During the investigation meetings the claimant was given the opportunity to put forward his version of events relating to his conduct in the telephone calls with Shoosmiths' Solicitors on 9 and 27 June 2022.
36. On 4 July 2022 the claimant said the phone call to Shoosmiths' on 9 June 2022 had been a "mix-up". The claimant was asked to explain the purpose of his call to Shoosmiths' at this stage. The claimant explained at this stage that he wasn't meant to be speaking to Shoosmiths', but that he was requesting an update on behalf of Mohammad Azam from Mohammad Azam's solicitors. On 21 July 2022 the claimant said he couldn't remember what was said on 9 June 2022, but he had assumed he was speaking to Mohammad Azam's solicitor and not Shoosmiths.
37. The claimant was informed on 8 August 2022 that the investigation had found a case to answer and was suspended. The delay in suspending the claimant was because of a planned shutdown of the respondent's operation in the last week of July 2022 and the first week in August 2022.
38. Tariq Hussain was appointed to hear the disciplinary. Tariq Hussain is an experienced manager and disciplinary officer.
39. The claimant was sent an invite to a disciplinary hearing on 8 August 2022. In that invite letter the claimant was informed that the following allegations would be considered:
 - i. Your conduct in connection with telephone calls made by yourself to the Company's Solicitors, Shoosmiths Solicitors LLP on 9th June and 27th June 2022.
 - j. A potential breach of Clause 8 of a COT3 Settlement Agreement, dated 8 June 2022, between a former employee of DHL and DHL Services Limited.
40. The claimant attended a disciplinary hearing with Tariq Hussain on 25 August 2022 and 7 September 2022.
41. During the disciplinary hearings the claimant had the opportunity to put forward his version of events relating to his conduct in the telephone calls with Shoosmiths Solicitors, on 9 and 27 June 2022. The claimant had the file notes Adil Qadus had produced of his calls with the claimant. The claimant said to Tariq Hussain during the disciplinary hearing on 25 August 2022 that the purpose of his call to Shoosmiths on 9 June 2022 had been to pitch

Mohammad Azam's case to who he mistakenly thought were the claimant's solicitors.

42. Tariq Hussain gave evidence that at the conclusion of the first disciplinary meeting, his initial thought process was that he did not believe that the claimant had breached the terms of Austen Smith's COT3, but wanted to understand how the telephone calls had come about and "whether [the claimant's] conversation with [Adil Qadus] could have been the result of a misunderstanding, or whether [the claimant] had sought to mislead [Adil Qadus]."
43. Tariq Hussain spoke to Adil Qadus about the nature of the calls on 1 September 2022. A note of the conversation with Adil Qadus was produced ("the **September 2022 Adil Qadus Note**"). Adil Qadus confirmed how the calls had occurred and that his notes were contemporaneous and accurate. Adil Qadus recalled that the claimant had referred to himself as Mohammad Azam's representative and Adil Qadus's point of contact, and that the claimant said he "believed" he was recorded on the ET1 as Mohammad Azam's representative. Adil Qadus said that rather than in any way seeking an "update", Adil Qadus was clear that to his mind the purpose of the call was to try "*to suggest that the same thing should and will happen as the other [case – i.e. Austen Smith's claim]*" and the claimant was "*showing me his hand, tactics to say the facts are the same and so his approach would be the same.*" Adil Qadus gave his view that the call was not a mistake. Adil Qadus said "*It didn't come across to me at any point that he thought I was the legal representation for Mohammad Azam.*" The claimant was not provided with this note prior to the conclusion of the disciplinary hearing on 7 September 2022.
44. At the second disciplinary meeting on 7 September 2022, Tariq Hussain explained to the claimant that he had to decide whether the purpose of the telephone call on 9 June 2022 was as the claimant asserted a genuine mistake or whether alternatively it was part of a deliberate attempt to try and encourage or coerce settlement in favour of Mohammad Azam. Tariq Hussain asked the claimant whether there was anything he would like to add before Tariq Hussain made his decision. The claimant's union representative, Jason Richards, said to Tariq Hussain that it was clear for anyone involved

in this case that the call on 9 June 2022 was a mistake and that the claimant had accidentally called the wrong solicitor. Mr Richards went on to say that it would be wrong for Tariq Hussain to think that this was an attempt on the claimant's part to gain information maliciously.

45. Tariq Hussain communicated his decision to dismiss on 7 September 2022. Tariq Hussain's reasons are recorded in the meeting note and are repeated in the disciplinary outcome letter. The central features of Tariq Hussain's decision were that:

- k. It was not credible for the claimant to suggest he was unaware that Shoosmiths' were acting for the respondent. This was because of the wider background knowledge the claimant would have had of employees and the respondent's legal representatives, and because the email from which the claimant obtained Adil Qadus's telephone number clearly states that he acted for the respondent.
- l. The purpose of the call – knowingly made to the respondent's representative – was done because the claimant was "*aware a settlement had been agreed*" in the Austen Smith case, and that "*knowledge formed the basis of the contact the claimant subsequently initiated with Shoosmiths... the claimant used that knowledge to attempt to interfere in the case of [Mohammad Azam]*" and did so "*with the intention of either encouraging or suggesting that a similar settlement be achieved*".
- m. In making this case, the claimant provided "*false or at least misleading information to Shoosmiths Solicitors*" in "an attempt to obtain confidential information by misleading [Adil Qadus] as to [his] identity (as the representative for [Mohammad Azam]) in the knowledge that [he was] not."

46. In reaching these conclusions, Tariq Hussain further rejected the assertion that inexperience led the claimant to act as he did; and that he preferred the account given by Adil Qadus to that given by the claimant.

Reason for dismissal

47. The respondent says the claimant was dismissed for gross misconduct. This is contested by the claimant.
48. I find that the respondent's reason for dismissing the claimant was as follows:
 - a. The claimant dishonestly providing false information to the respondent about the purpose of his call to Adil Qadus on 9 June 2022 ("the **Call**"). The claimant said to the respondent the purpose of the Call was to speak to Mohammad Azam's solicitor, whereas Mr Hussain concluded that the purpose of the Call was to speak to the respondent's solicitor and to leverage settlement in the Azam case, based on what had happened in the Smith case.
 - b. The claimant provided false information to Adil Qadus by claiming he was the named representative on the ET1 claim form of Mohammad Azam, when he knew he was not.
 - c. The claimant continuing that dishonesty in the explanation he subsequently gave to the respondent about the purpose of the Call and the false information he gave about the Call.
49. In reaching the above finding of fact, I have accepted Mr Hussein's evidence about his reason for the claimant's dismissal. It was clearly articulated in the Mr Hussein's witness statement and in the evidence he gave to the tribunal. It was consistent with the contemporaneous documentation at the disciplinary hearing and the explanation provided to the claimant at the time of his dismissal.
50. Tariq Hussain decided to summarily dismiss the claimant for gross misconduct.

Claimant's Appeal

51. The claimant appealed the decision to dismiss on 13 September 2022.
52. The claimant was provided with a copy of the September 2022 Adil Qadus Note on 22 September 2022, after the disciplinary hearing but prior to the appeal hearing.

53. The appeal hearing took place on 3 October 2022. The claimant was represented by a Unite national officer, Matt Draper. Chris Tonks was the appeal officer.
54. During the appeal hearing the claimant did complain that Tariq Hussain had spoken to Adil Qadus and produced the September 2022 Adil Qadus Note but had not provided it to the claimant prior to the disciplinary outcome. However, the claimant did not challenge the account given by Adil Qadus, as recorded in this note.
55. At the appeal, the claimant was given the opportunity to advance his grounds of appeal. The hearing lasted four hours. Chris Tonks offered to re-investigate any important matters, although the Claimant did not make any suggestions in response to this invitation. The claimant provided no further explanation about why he made the telephone calls on 9 and 27 June 2022.
56. Chris Tonks delivered his outcome by letter on 20 October 2022. He did not find that Chris Tonks had been “open and honest” about the Adil Qadus calls, for reasons which are very similar to Tariq Hussain’s reasons.

Relevant Law

Dismissal for Trade Union Activities

57. The claimant’s claim is brought under s.152 of the Trade Union and Labour Relations (Consolidation) Act 1992 (“**TULRCA**”). This section provides:

“152. Dismissal of employee on grounds related to union membership or activities.

(1) For purposes of Part X of the Employment Rights Act 1996 (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—

[...]

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,

[...]

58. The burden of demonstrating that the dismissal was on a prohibited ground falls to the claimant: *Goodwin Ltd v Fitzmaurice* [1977] IRLR 393, EAT; *Marley Tile Co Ltd v Shaw* [1980] ICR 72, CA.
59. “Activities of an independent trade union” is not defined. Although not to be restrictively interpreted, it is not without limitation. Shop stewards and other union officials may also lose the protection granted by S.152(1)(b) where they are found to have acted wholly unreasonably or maliciously in carrying out their functions — *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’.
60. In *Mihaj v Sodexo Ltd* (2014) UKEAT/0139/14 the EAT stated:

“The issue for the Employment Judge to decide was whether an Employment Tribunal, on a full Liability Hearing, was likely to find that the Claimant was dismissed for carrying out trade union activities. The way in which those activities was carried out was not relevant unless it was such as described in Bass or Lyon, namely acting in bad faith, dishonestly or for some extraneous cause or in any other way such as to take those actions outside the proper scope of trade union activities.”
61. Trade union activities “*must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal.*” For example, “*wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair*”: *Burgess v Bass Taverns* [1995] IRLR 596, CA at [16], [20].

62. In *Morris v Metrolink Rapt Dev Ltd* [2018] EWCA Civ 1358 the court of appeal summarised the principles that should be adopted in determining this question at paragraph 19. The court of appeal said in this case “*there will be cases where it is right to treat a dismissal for things done or said by an employee in the course of his trade union activities as falling outside the terms of section 152(1), because the things in question can be fairly regarded as a distinct reason for dismissal notwithstanding the context in which they occurred; and this reference to acts which are “wholly unreasonable, extraneous or malicious” seems to me to capture the flavour of the distinction. The precise phraseology should not be treated as definitive ... but the point which it encapsulates is that in such a case it can fairly said that it is not the trade union activities themselves which are the (principal) reason for dismissal but some feature of them which is genuinely separable.*”
63. At paragraph 20 the court of appeal went on to say “*... this distinction should not be allowed to undermine the important protection which the statute is intended to confer. An employee should not lose the protection because something which he or she does in the course of trade union activities could be said to be ill judged or unreasonable.*”
64. In *Azam v Ofqual* (2015) UKEAT/0407/14, HHJ Eady QC upheld an ET’s determination that the claimant’s activities went “*outside the proper scope of trade union activities*” where she had (i) disclosed the employer’s confidential information, provided to the claimant in the course of her trade union function, beyond the circle of confidence; and (ii) had misled the branch secretary about the confidential nature of the documents. There was a difference in approach in *Morris v Metrolink Ratpdev Ltd* [2019] ICR 9, CA, where the union official immediately informed HR that he had come into possession of confidential information and did not disseminate the information.

Reason for dismissal

65. The reason for dismissal was considered more recently in *Kong v Gulf International Bank* [2022] ICR 1513, CA. Kong was a whistleblowing dismissal case, but the Court of Appeal took the opportunity to consider

similar provisions (including s.152 TULRCA 1992). The court of appeal said at paragraph 47 and then at paragraph 50:

“There is no doubt that the authorities to which we were referred, in the different contexts of alleged retaliation for trade union activities and protected disclosures, and victimisation, have a common feature: they concern an inquiry into the employer’s reasons for reacting to something that the individual has said or done.”

The statutory question to be determined in these cases is what motivated a particular decision-maker; in other words, what reason did he or she have for dismissing or treating the complainant in an adverse way. This factual question is easy to state; but it can be and frequently is difficult to decide because human motivation can be complex, difficult to discern and subtle distinctions might have to be considered. In a proper case, even where the conduct of the whistleblower is found not to be unreasonable, a tribunal may be entitled to conclude that there is a separate feature of the claimant’s conduct that is distinct from the protected disclosure and is the real reason for impugned treatment.”

Analysis and conclusion on dismissal for taking part in trade union activities

Issue 8(a)(i) Did the claimant’s conduct subject to the disciplinary process, amount to an activity of an independent trade union pursuant to section 152 (1)(b) of the Trade Union and Labour Relations (Consolidation) Act (TUCLRA) 1992?

66. Dealing with the claimant’s conduct step by step.

9 June 2022 telephone call

67. The claimant discussing Mohammad Azam’s case with Adil Qadus, in his capacity as TU representative, is clearly protected trade union activity. The claimant was attempting to a resolve a dispute, which in this case was

between Mohammad Azam and the respondent. This trade union activity took place at an appropriate time (as defined in section 152(2) TULRCA). The respondent doesn't take issue with this. I find that the claimant was carrying out these duties within his working hours, in accordance with arrangements made by the respondent.

68. However, the key issue here is whether the manner in which this activity was carried out took it outside the protection of trade union activity. I have as a matter of fact found that the claimant knew he was talking to the respondent's solicitor on 9 June 2022, not Mohammad Azam's union solicitor as the claimant has claimed. The claimant knew that he was not the named representative on Mohammad Azam's ET3 form. Despite knowing this, the claimant told Adil Qadus he was the named representative on Mohammad Azam's ET3 form. I have found the reason the claimant said this was to establish his credentials as an official representative in the employment tribunal proceedings to enable him to have a discussion with Adil Qadus about Mohammad Azam's claim. The claimant referred to the Ian Farish case to try and open up settlement in the Mohammad Azam claim.
69. I find that the claimant's conduct on 9 June 2022 was dishonest and deliberately misleading. The claimant was holding himself out to be something he wasn't; Mohammad Azam's legal representative on the ET3 form. This took place in circumstances where it was not appropriate for the respondent's representative to enter such discussions because the claimant was not Mohammad Azam's appointed representative on his ET3 form.
70. I reject Ms Vandenburg's submission in page 43 of her written submissions that the claimant's call to Mohammad Azam on 9 June 2022 was still protected trade union activity because *"calling the other side's solicitors to discuss the case is exactly what a trade union rep ought to be doing. Especially where the member does not have legal representation and has requested the trade union rep's help"* and *"the only feature which could begin to be genuinely separable is the Claimant holding himself out as the legal rep in the knowledge that he was not on the ET1."*
71. I find that the way in which this activity (the phone call on 9 June 2022) was carried is separable from the trade union activity of contacting the respondent's solicitor to discuss the union member (Mohammad Azam's

case) because the claimant dishonestly and deliberately mislead Adil Qadus on 9 June 2022 about his status as a named representative on Mohammad Azam's ET3 claim form. It was that dishonesty which took the discussion outside the protection of trade union activities. It was more than ill-judged or unreasonable behaviour, because of the intention to deliberately mislead Adil Qadus.

27 June 2022 telephone call

72. I find the telephone call between Adil Qadus and the claimant on 27 June 2022 did not amount to protected trade union activity. I find that the claimant telephoned Adil Qadus on 27 June 2022 because he realised that the respondent had found out about the 9 June 2022 call and he wanted to understand what Adil Qadus had said to the respondent because he was worried that he could be disciplined and dismissed for this misconduct.
73. I take the following factors into account when reaching this conclusion:
 - a. I've accepted that the file note Adil Qadus made of the discussion between him and the claimant on 27 June 2022 was an accurate note of the discussion they had. The claimant said to Adil Qadus *"I have how been pulled up for gross misconduct about that conversation and I want to know what you said and who you told."* This was clearly the purpose of the claimant's call and this is not protected trade union activity.
 - b. The claimant had received an invite to a disciplinary investigation earlier that day, from Lee Fairbrother which had invited the claimant to an investigation meeting to determine whether there was a case to disciplinary case to answer, in connection with the breach of Austen Smith's COT3 and a breach of confidentiality in connection with the call to Shoosmiths on 9 June 2022. The claimant was worried he had committed gross misconduct by talking to Shoosmiths on 9 June 2022.

Issue 8(a)(ii) If so, was the claimant dismissed because he had taken part, or proposed to take part in the activities of an independent trade union?

74. I find that the reason for the claimant's dismissal was, as set out in paragraph 48, above:

- a. The claimant dishonestly providing false information to the respondent about the purpose of his call to Adil Qadus on 9 June 2022 (“the Call”). The claimant said to the respondent the purpose of the Call was to speak to Mohammad Azam’s solicitor, whereas Mr Hussain concluded that the purpose of the Call was to speak to the respondent’s solicitor and to leverage settlement in the Azam case, based on what had happened in the Smith case.
 - b. The claimant provided false information to Adil Qadus by claiming he was the named representative on the ET1 claim form of Mohammad Azam, when he knew he was not.
 - c. The claimant continuing that dishonesty in the explanation he subsequently gave to the respondent about the purpose of the Call and the false information he gave about the Call.
75. The false information and dishonest conduct identified in paragraph 74 was severable from the purpose of the claimant’s call on 9 June 2022, which I find was to broker a settlement of the Mohammad Azam case. Providing false, dishonest and misleading information to the respondent in this way took the 9 June 2022 call and what followed afterwards outside the protection of the activity of an independent trade union, pursuant to section 152 (1)(b) of the TULCRA. As I set out at paragraph 71 above, it was more than ill-judged or unreasonable behaviour; it was a dishonest intention to deliberately mislead Adil Qadus and the respondent.
76. Having reached this conclusion, the claimant’s conduct at paragraph 74, for which the claimant was dismissed, did not amount to the activities of an independent trade union. The claimant has failed to establish that he was

automatically unfairly dismissed by the respondent for carrying out the activities of an independent trade union.

Unfair Dismissal

Issue 8 b(i)(1) Was the claimant dismissed for a potentially fair reason? The burden of proof is on the respondent.

77. The first issue that I must determine is therefore what the principal reason for dismissal is and whether the Claimant was dismissed for a potentially fair reason.
78. Turning to the principal reason for dismissal. A 'reason for dismissal' has been described as: 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' – *Abernethy v Mott, Hay and Anderson* 1974 ICR 323, CA.
79. The respondent says the claimant dismissed for gross misconduct. This is contested by the claimant.
80. I find that the reason for the claimant's dismissal was, as set out in paragraph 48, above:
 - a. The claimant dishonestly providing false information to the respondent about the purpose of his call to Adil Qadus on 9 June 2022 ("the Call"). The claimant said to the respondent the purpose of the Call was to speak to Mohammad Azam's solicitor, whereas Mr Hussain concluded that the purpose of the Call was to speak to the respondent's solicitor and to leverage settlement in the Azam case, based on what had happened in the Smith case.
 - b. The claimant provided false information to Adil Qadus by claiming he was the named representative on the ET1 claim form of Mohammad Azam, when he knew he was not.
 - c. The claimant continuing that dishonesty in the explanation he subsequently gave to the respondent about the purpose of the Call and the false information he gave about the Call.

81. I have found that the reason for dismissal was related to the claimant's conduct, as set out in paragraph 80 above. This is a potentially fair reason under s.98(2)(b) Employment Rights Act 1996 ("ERA").
82. Having established the principal reason for dismissal, I turn now to the relevant law in connection with the unlawful dismissal complaint. The law is found in sections 94, 95 and 98 of ERA. S.98 deals with fairness. There are two stages. First the employer must show a fair reason. Then employment tribunal should consider (with the burden of proof on neither party) whether the respondent acted fairly or unfairly in dismissal.
83. S.94 deals with fairness generally. The key factors are whether in the circumstances (including the size and administrative resources of the respondent), the respondent acted reasonably or unreasonably in dismissing the claimant, determined in accordance with equity and substantial merits of the case.
84. I reminded myself of the well-known *Burchell* principles which states in all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.
85. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer.

Did the respondent have reasonable grounds to believe that the Claimant was guilty of misconduct (issue 8 (b)(i)(2))?

86. Going through this test, I find that the respondent did have a reasonable ground for holding the belief that the claimant had committed gross misconduct.
87. Tariq Hussain carried out a thorough investigation, including interviewing relevant witnesses for the respondent, to establish whether it was possible that the claimant's calls on 9 June 2022 and 27 June 2022 were the result of a mix up as the claimant alleged. Tariq Hussain had considered early in the disciplinary process whether the telephone call the claimant made to Adil

Qadus on 9 June 2022 could have been the result of a misunderstanding, or whether the claimant sought to deliberately mislead Adil Qadus.

88. However, Tariq Hussain was entitled to balance this against the evidence that the claimant's case was not credible. I accept the respondent's submissions that these factors include (i) the claimant's unreliable and incredible account; (ii) the claimant's inability to explain the call and how he came to be calling the respondent's solicitor (see paragraphs 36 to 41 above, for an account of the different explanations given by the claimant); (iii) the claimant's obvious knowledge and reference to settlement on the 9 June 2022 call; and (iv) Adil Qadus's contemporaneous file notes and compelling evidence about the calls.
89. I accept that Tariq Hussain considered the account of the claimant, against the account by Adil Qadus and the overall balance of evidence and was entitled to conclude that the claimant's account should be rejected, for the reasons he articulated. It cannot be said to be outside the range of reasonable responses for Tariq Hussain to reach the conclusion that he did.
90. The claimant maintained throughout the investigation, disciplinary and the appeal process that he had mistakenly contacted the respondent's solicitor on 9 and 27 June 2022, albeit the reasons he gave for doing so changed throughout the investigation and disciplinary process (see paragraphs 36 and 41 above, for an account of the different explanations given by the claimant). The claimant did not accept that he knew he was speaking to the respondent's solicitor nor did he accept that he had deliberately mislead Adil Qadus during his call on 9 June 2022.
91. There was sufficient information available to Tariq Hussain to reject this explanation.

Failure to put allegations to the Claimant

92. In cross examination Tariq Hussain was challenged on why he had not told the claimant that Tariq Hussain thought that the claimant was trying to mislead Adil Qadus. There is force to this argument and I do accept that Tariq Hussain did not put the allegation of dishonesty to the claimant as squarely

as he could have done, either in the disciplinary invite letter or during the disciplinary process.

93. I consider this to be a procedural failing. I accept Ms Vandenburg's submission that Tariq Hussain failed to provide dull details of the allegations of dishonesty against the claimant. This was against the respondent's Disciplinary and Grievance Policy which states that the employee should be provided with "*brief details of the allegation or matter to be discussed and copies of any evidence in support of the allegations or matter*". It is also against the ACAS Code [on disciplinary and grievances] which provides "9. *If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*"
94. However, I accept the respondent's submissions that this is not a case where the respondent had failed to address its own understanding of events or one in which the claimant could be in any doubt of what he was accused of. It was clear at the investigation and disciplinary stage that the claimant was accused of being potentially untruthful to Adil Qadus. This is why the claimant was given an opportunity, on numerous occasions, to explain why he contacted Adil Qadus and what he was hoping to achieve from that discussion. The claimant's explanation was found to be contradictory and lacking by Tariq Hussain and there was a reasonable basis for Tariq Hussain to reach a conclusion on this point. The difficulty for the claimant was that he was not able to provide a credible and believable explanation for his conduct on 9 June 2022 to Tariq Hussain. He had access to the Adil Qadus's file note at the disciplinary stage and so he knew what Adil Qadus's recollection of the phone call on 9 and 27 June 2022 was. Tariq Hussain was entitled to view the claimant's explanation as inadequate and conclude that he had been dishonest in his explanation of why he phoned Adil Qadus on 9 June 2022.
95. It was certainly clear by the time the claimant reached the appeal stage that he had been accused of dishonesty. The claimant's dismissal outcome letter

dated 7 September 2022 states “*You subsequently provided what appears to me to be false or at least misleading information to Shoosmiths.*”

96. The claimant did therefore have the opportunity to comment on or provide additional information to the allegation of providing a false or misleading statement, at the appeal stage. The claimant did not do so and instead maintained his initial explanation that there had been an error, or a “*mix-up*”, when he called Shoosmiths, as he believed he was calling Mohammad Azam’s legal representatives. This explanation had already been rejected by the respondent.
97. Given this factual context and applying the band of reasonable responses, I do not find that the respondent’s approach to putting the allegations to the claimant fell outside of the band of reasonable responses.
98. I do not accept Ms Vandenburg’s submissions that the claimant did not have a proper opportunity to respond to this allegation or that if the claimant had been provided with sufficiently particularised allegations he would have had a proper opportunity to respond to the allegations of dishonesty or could have called other witnesses such as Mr Smith or Mr Azam. Put simply, the claimant did have the opportunity to explain his actions on 9 and 27 June 2022 and could at any time have asked Mr Smith or Mr Azam to provide evidence. He chose not to do so.

Failure to provide the Claimant with evidence/information

99. It is accepted by the respondent that the September 2022 Adil Qadus Note was not provided until 22 September 2022, after the disciplinary hearing, but prior to the appeal hearing.
100. This was a procedural failing as identified by Ms Vandenburg in her submissions. It was against the respondent’s own disciplinary and grievance policy which states “*If the Disciplinary Manager considers a further investigation is appropriate any additional information and evidence will be put to the employee at a hearing before any final decision is made*”.
101. However, having said this, I accept the respondent’s submission that any failure in this regard made no difference to the overall fairness of the decision. The claimant had already had the opportunity at the disciplinary stage to

comment on Adil Qadus's contemporaneous file note of the discussion on 9 and 27 June 2022 and understood the case against him. The claimant was in possession of the Adil Qadus interview notes prior to the appeal. The claimant raised the issue of the "failure" to provide them earlier in the appeal hearing but made no further reference to them and did not take issue with the content of Adil Qadus's interview. The claimant had the opportunity to raise any further issue with the failure to provide the Adil Qadus interview note earlier and did not do so, suggesting that the delay in providing it was immaterial to the fairness of the process or of the decision to dismiss.

Did the Respondent carry out as much investigation as was reasonable in the circumstances (issue 8 (b)(i)(3))

102. I have dealt in paragraphs 92 to 101 above with the main criticism Ms Vandenburg makes of the respondent's investigation. I find that the respondent did carry out as much investigation as was reasonable in the circumstances. Here I accept Mr Crozier's submissions that the respondent had carried out a reasonable investigation and in particular, had undertaken a further, lengthy meeting with the Claimant and then interviewed the only other person who had direct knowledge of events, namely Adil Qadus.

103. The Claimant did not in his appeal refer to additional investigation which ought to have been carried out, which were relevant to the disciplinary allegations.

Did the Respondent consider alternatives to dismissal (issue (8)(b)(i)(4))

104. I accept Tariq Hussain's evidence on this point, which is set out in paragraph 25 of his witness statement. Tariq Hussain did consider a lesser sanction to dismissal but concluded that as he believed the claimant had behaved dishonestly, a lesser sanction was inappropriate. Tariq Hussain considered the claimant's conduct to be the deliberate providing of false information to the respondent's solicitors and the claimant did not own up to this. There was no sign that the claimant regretted his behaviour and no sign that he would learn from his mistakes and act differently in the future. I find it was within the range of reasonable responses for Tariq Hussain to form this view.

105. I reject Ms Vanderburg's submission that "*At most, the Claimant should have received a written warning.*" This submission fails to take into account that the Claimant had been dishonest in his explanation for the call on 9 June 2022 and throughout the disciplinary process. The Claimant's misconduct is not analogous with the finding in *Morris v Metrolink Rapt Dev Ltd*. In *Morris* the Union representative behaved in an honest way by immediately informing HR that he had come into possession of confidential information. In this case, the claimant maintained his dishonest explanation of the call on 9 June 2022 throughout the disciplinary process.
106. It was reasonable of the respondent to consider the claimant's unblemished disciplinary record but conclude that given the finding that the claimant had behaved dishonestly, it was nonetheless appropriate to dismiss the claimant.

Did the respondent follow a fair procedure (Issue 8(b)(ii))

107. I have identified some procedural failings on the part of the respondent: the respondent failed to put the allegation of dishonesty in writing to the claimant and failed to provide him with the Adil Qadus investigation note, prior to the decision to dismiss was taken. However, I conclude that despite those procedural failing, the overall procedure followed by the respondent was fair and within the band of reasonable responses. The claimant was aware of the allegations against him. The claimant had the opportunity to comment on those allegations. A thorough investigation was carried out. Tariq Hussain carried out a thorough and fair disciplinary process. The claimant had the opportunity to challenge the decision to dismiss the appeal.

If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event (Issue 8(b)(iii))

108. I have concluded that the dismissal was procedurally fair. However, if I am wrong on this point, even if I was to find that the dismissal was procedurally unfair, I find that the claimant would have been dismissed in any event. I have found that the above procedural failings did not impact on the overall fairness of the decision to dismiss.

109. I find that if the respondent had properly set out the allegation of dishonesty against the claimant and had provided the Adil Qadus investigation document at the disciplinary stage, the outcome would have still been the same. The claimant would have maintained his position that he had mistakenly called Mohammad Azam's solicitor on 9 and 27 June 2022. The respondent would have found the claimant's conduct to be dishonest and this would not have altered the findings of fact made against the claimant or the seriousness with which the respondent viewed the claimant's conduct.

Wrongful dismissal (Issue 8 (c))

110. The claimant was dismissed without notice. He brings a breach of contract claim in respect of his entitlement to notice pay.

111. The respondent says that it was entitled to dismiss him without notice for his gross misconduct in connection with the call on 9 and 27 June 2022 and his dishonest explanation of that phone call.

112. I must decide if the claimant committed an act of gross misconduct entitling it to dismiss without notice. In distinction to the claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision I would have made about the claimant's conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

113. I set out my findings about the claimant's actions at paragraphs 67 to 73 in connection with the trade union activities, above. They are equally applicable to the question whether the claimant was guilty of conduct entitling the respondent to dismiss without notice. I find that the claimant's dishonest conduct in connection with the call on 9 and 27 June 2022 and his dishonest explanation of that phone call, did amount conduct entitling the respondent to dismiss without notice. The complaint of breach of contract fails and is dismissed.

Remedy (Issue 8 (d))

114. The claimant complaints are not well founded and therefore the claimant is not entitled to compensation.

Employment Judge Childe

21 June 2023

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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