EMPLOYMENT TRIBUNALS

Claimant: **Mr R Gull**

Respondent: **GMB**

Heard at: **East London Hearing Centre**

On: **26th April 2023**

Before: **Employment Judge Reed**

Representation
Claimant: In person
Respondent: Ameer Ismail, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

1. Mr Gull was an employee for the purposes of both the Employment Rights Act 1996 and the Equality Act 2010.

REASONS

Claims and issues

1. The principal purpose of this hearing was to determine the issues relating to Mr Gull's employment status. These were a) whether Mr Gull was an employee for the purposes of s230 of the Employment Rights Act 1996 and b) whether he was an employee for the purposes of s83 of the Equality Act 2010.

2. These are significant preliminary issues, because the claims Mr Gull seeks to bring require him to have been an employee. If he was not an employee for the purposes of the Employment Rights Act, his claims for unfair dismissal, notice pay and redundancy pay must fail. If he is not an employee for the purposes of the Equality Act his claim for age discrimination must fail.

3. Also before me was the respondent's application for strike out and a deposit order.

Procedure, documents and evidence heard

4. This was a video hearing, the parties attending through the Tribunal's CVP system. At the beginning of the hearing there were some difficulties with Mr Warr's connection, but these were resolved during a break before he gave evidence.

5. I heard evidence from the claimant on his own behalf and from Mr Warr on behalf of the respondent.

6. I had a bundle of relevant documents running to 203 pages. References to page numbers within these reasons are references to that bundle unless indicated otherwise.

7. Unfortunately, a period of ill health and the pressure of other work has meant that this judgment has taken significantly longer to produce than expected. I apologise to the parties for that delay.

Findings of fact

8. The respondent is a well-known Trade Union. It has about 500,000 members in the UK and employs approximately 500 staff.

9. Mr Gull was a long-term member of and activist within GMB.

10. Mr Tony Warr is the Head of Legal and Senior Organiser of the London Region of GMB. He was a Regional Organiser in London from 1997, then a Senior Organiser from 2006, before being appointed Head of Legal for the London region in 2010.

11. A number of factors in this case have created difficulties for the fact finding exercise. The events relating to the establishment of the relationship occurred over a decade ago. Other significant events are only slightly more recent. Neither party produced significant contemporaneous documentation in relation to these matters. Often Mr Gull was the sole witness with direct knowledge of events. Inevitably, his recollection has been affected by the passage of time and the absence of documents that might assist his memory.

12. Mr Warr was not directly involved in Mr Gull's situation until 2020 and so was not able to assist directly with many of the most relevant events. Given his long service with GMB, however, he has been able to provide some relevant background information.

13. All of this means that this is a case where I have had comparatively little reliable direct evidence to draw on in reaching many of the key factual conclusions. This has meant that it has been necessary to consider carefully

what evidence is available and to seek to draw appropriate inferences from it.

Engagement in 2005

14. Mr Gull's evidence is that he has been employed by GMB since 2005. He describes himself as having been 'put in place' by Ed Blissett, who had been a senior official in GMB at the time.

15. Immediately prior to his appointment Mr Gull had been a Senior Steward in the Basildon branch. He was made redundant from his previous job. He suggests that the decision to make him redundant might have been related to his union activities at that time. His Regional Officer, Kelly Rogers, had suggested that he might be an asset to GMB and arranged a meeting with Mr Blissett.

16. Mr Blissett had offered Mr Gull a role working in two branches in Walthamstow and Hackney, primarily with Local Authority members. Initially, the London Borough of Waltham Forest contributed to Mr Gull's pay, which Mr Gull says was £2,100 a month at time.

17. Mr Gull describes his work as that of a regional officer within GMB. He attended disciplinary meeting and other meetings in support of the members. He advised and supported members who were going through a TUPE transfer or similar job change. He says that a lot of time was taken up with single status – the implementation of a national agreement between employers and trade unions that aimed to harmonise pay and conditions within the public sector. In broad terms, he says that he continued in this work, working approximately 35-40 a week, until he resigned.

18. Mr Gull says that, in 2005, no mention was made of him being a Branch Secretary and there was no suggestion that he had been, or would need to be, elected to any position within GMB to obtain or continue in his role.

19. Mr Gull says that he was aware that, after a few years, the London Brough of Waltham Forest stopped contributing to his pay. He does not recall exactly when. He says that at that time GMB decided that they would maintain his level of pay. In order to allow for this, it was decided that his role would be expanded to cover the Managerial and Professional Officer's Union branch.

GMB Structure / GMB Rulebook 2021

20. The parties agree that the 2021 GMB Rulebook is the constitutional rulebook in force from 1st July 2021 (i.e. in the final portion of Mr Gull's relationship with GMB), p113-188. Neither party has suggested that there was any material difference between the 2021 Rulebook and previous Rulebooks that would have any bearing on this case.

21. The ultimate authority within GMB rests with the Congress, Rule 8. This is a body made of delegates who are elected from the members. Responsibility for the day-to-day operation of GMB is held by the Central

Executive Council, Rule 10. That is made up of members elected from each region.

22. Regions are geographical areas within which GMB operates, Rule 19. Each region is managed by a regional council, elected every four years.

23. Regions, in turn, are made up of the branches operating within that region. The rules describe the union branch as 'the basic unit of the union'. Each branch should have a number of branch officers, including a Branch President and Branch Secretary, Rule 35(3).

24. Branch officers, including the Branch Secretary are to be elected every four years, Rule 35(3).

25. There is, however, provision for appointment of a branch secretary under Rule 35(4), which provides:

> If, in the opinion of the regional committee and regional secretary, and with the agreement of the branch concerned, it is not practical for a member of the branch to act as branch secretary, regions have the power to direct an organiser to temporarily for up to six months carry out the branch secretary's duties, whilst the regional secretary and regional committee formally review the situation and agree the long term solution. This organiser will take part in the branch committee's meetings, and will have the right to speak but not to vote.

26. The Branch Secretary's duties are set out at Rule 37:

> **Rule 37 Branch secretary**
>
> 1 The branch secretary will:
>
> - keep all the branch's books, accounts and documents;
> - carry forward in the contribution book and on members' cards all contributions members have not yet paid;
> - deal with all correspondence and read it to the members of the branch; and
> - take part in all branch and committee meetings, and keep a record of them.
>
> 2 Each quarter, the branch secretary will hand over all money taken on behalf of the branch to the region. They will also give the region a quarterly sheet showing the branch's income and spending. If, under the circumstances, the branch secretary is not able to do this, they must make other arrangements with the regional secretary.
>
> 3 The branch secretary will send to the National Administration Unit the branch's financial report, which should be signed by the auditors and the president, within the timetable set by the National Administration Unit.

4 The balance sheet must have the necessary details filled in to allow the National Administration Unit to make up the summary for the region.

5 If branch auditors are not available, the branch secretary must apply for auditors from the regional office.

6 If a member wants to transfer to any other branch, the branch secretary must provide written authority, which can be either provided on paper or by digital media. The branch secretary must not allow any member to transfer to their branch without evidence of such approval from the branch secretary of the branch they are transferring from. Transfers will need to be approved by the regional secretary and registered with the regional office. Branch secretaries of both the branch that the transferee is leaving and the branch the transferee is joining will be advised by the regional office when the transfer takes place.

7 The branch secretary will report to the regional secretary, in writing, any case where a collecting steward has failed to carry out their duties.

8 The branch secretary and the president can call special branch meetings when necessary.

9 The branch secretary must give one month's notice if they want to resign. If they do not do this, they will lose any payments they are owed.

10 When the branch secretary resigns or retires (or when asked to do so), they must give all money, books and property of the Union to the responsible officers of the region. If they do not do this, we may begin legal proceedings against them.

11 The branch secretary will have the right to speak and vote on any business carried out at their branch.

27. The regional committee has the power to discipline any branch officer, in accordance with rule 35(11). This provides that:

Any branch officer who the regional secretary and the regional committee believe has not satisfactorily carried out their duties can be removed from office at any time by the regional committee. The regional committee have the power to authorise the branch members to hold a new election, or to take any other action they feel is appropriate.

28. Each branch is required to set up a branch fund, Rule 34. One permitted use for this fund is to 'make special payments (honorariums to branch officials), in line with financial rules set by the Central Executive Council, Rule 34(4).

29. Rule 17b provides for 'Organisers'. These are full-time paid employees of GMB. They are not eligible to be elected to any lay office within the union.

Events in 2008

30. Mr Gull agreed that the basis of his relationship changed somewhat after Mr Blissett left. In 2008 or 2009 he had a meeting with Mr Paul Kenny, who was the General Secretary at the time. Mr Kenny was also acting as London Regional Secretary in a caretaker role following Mr Blissett's departure. The meeting was also attended by John Cope, another senior officer.

31. Mr Gull said that they explained that they were happy with his work but had some concerns about the way that Mr Blissett had engaged him. Mr Gull says that he was told specifically that they had 'no intention of terminating my employment', but that they would have to change the way that things were done. He said that he was told that he would be paid through an honoraria and that he would need to take on additional branches in order to maintain his level of pay.

32. This initially meant that his pay significantly reduced, by about a third, because an additional branch was not added for some years. Mr Gull was not happy about this but, given the economic situation at the time, he concluded that this was not 'the best time to jump ship'.

33. Although he was not directly involved at this stage, Mr Warr has been able to provide some background to these events. He said that Mr Blissett had had a practice of using a 'branch secretary's commission' as a mechanism for paying some branch officials a fixed sum of £2,100 per month. He suggested that this was often a way of recognising those who had a long service with GMB and had applied for full-time employed roles without success (although it was not suggested to me that Mr Gull fell within that category).

34. When Mr Kenny became involved, Mr Warr said, he was concerned about these significant fixed commissions, in part because he thought it might suggest that the officers had a contractual status as workers. Mr Warr says that he was aware of this concern because he was a Senior Organiser at the time. He says it is unlikely, therefore, that Mr Kenny or Mr Cope would have referred to Mr Gull's employment. He says they would not have believed that such a relationship existed. Further, it was precisely the sort of contractual relationship that Mr Kenny was concerned to avoid creating or giving the impression might exist.

35. It is difficult to be sure about the precise words used in a meeting that occurred significantly over a decade ago. On balance, however, I accept the suggestion that Mr Kenny did not refer specifically to an employment relationship. Mr Warr's account of his views is a plausible one, particularly given that Mr Gull agrees that there were some concerns about the manner of his engagement.

36. I also think it is relevant to note that the Employment Appeal Tribunal had, in 2006, upheld an Employment Tribunal finding that two GMB Branch Secretaries were employees. It seems inevitable that Mr Kenny was aware of that decision given his position within the Union and this would also have factored into his approach.

37. If Mr Kenny was concerned about Mr Gull's employment status and wished to make a change to clarify it, he would have to proceed in one of two directions. Either he would wish to make clear that Mr Gull was an employee in order to regularise his position or he would wish to make sure that Mr Gull was not regarded as an employee.

38. If Mr Kenny had wished to take the former route the obvious step would have been to enter into a conventional employment relationship with Mr Gull by explicitly employing him and providing him with a written contract of employment. This could have been done by appointing Mr Gull as an Organiser under Rule 17b or employing him in some other post. This was not done. I infer that Mr Kenny's intention was to maintain Mr Gull in his position in a way that did not amount to employment.

39. I also bear in mind that Mr Kenny was an experienced union official who would have been likely to have in mind the significance of using the term 'employment' in a situation where he did not agree that such a relationship existed. I therefore concluded that he did not use the term 'employment' and probably used a more neutral term, such as 'work' or 'position'.

40. I find that it is likely that Mr Kenny believed that the effect of appointing Mr Gull as a Branch Secretary achieved his end of retaining Mr Gull's ongoing services in a way that did not amount to an employment relationship.

41. I understand Mr Warr's view to be that Mr Gull was, even before this conversation, operating as a Branch Secretary and receiving a 'branch secretary's commission', which he regards as equivalent to an honorarium. He says that this was common practice at the time (indeed, he says that when he was a Branch Secretary in the mid-1990's he received the same form of commission).

42. I do not accept this, because I have accepted Mr Gull's evidence that nothing had been said to him prior to the meeting about being a Branch Secretary and, at the meeting, his appointment to that post was presented as a change in order to address Mr Kenny's concerns.

Events in 2015

43. On 9th February 2015, Julie Adamson emailed GMB's London Regional and London Regional Staff announcing that Mr Gull had been appointed interim Branch Secretary at the SoLo Branch, p57. This had the affect of significantly increasing Mr Gull's pay, although it did not return to its previous level. In 2020, Mr Gull described it as being £3,000 below what it had been prior to the change in 2008.

Nature and extent of Mr Gull's work

44. Mr Gull says that he might attend 5-6 disciplinary and other meetings with members in a week, although there were also times where he would have no meetings in a week. He said that, in his experience, disciplinary meetings

would come in clusters, either because of the time of year or particular tensions in a sector. There would be significant work around any particular meeting, particularly in disciplinary matters, because he would have discussions with the employee before and after the meeting itself.

45. This work, Mr Gull says, amounted to an average of 35-40 hours per week. He said because the level of work varied his hours did as well. Sometimes they were as high as 60-70 hours in a week.

46. Mr Gull carried out some, but not all, of the work required under the Rules of a Branch Secretary. He maintained Branch accounts and attended the Branch meetings that occurred. He did not, however, arrange branch meetings in all his branches regularly. He described the members in his branches as not 'interested in the political side' and mostly wishing to get assistance with their immediate employment issues. This made them difficult to organise in any collective sense. Mr Gull said that many meetings were not quorate (despite Rule 35(3) requiring only five members for a quorum). He said that at one stage in Walthamstow only one member showed up to an AGM.

47. No branch plans were produced by Mr Gull (as required by Rule 35(1b)) until 2017 or 2018. Mr Gull said that this coincided with Mr Kenny becoming the Regional Secretary in the London region. Mr Gull said that everyone had been told at that stage that, unless Branch Plans were produced, the honorarium would not be paid. He accepted that the Rule had been in place before this but said that in practice it was not complied with or enforced.

48. Mr Gull described his work outside representing members as very minimal. He described it as 'not very high on my priorities' and, in any event, not what the members wanted from him.

49. GMB accepts that Mr Gull was carrying out the type of work that he suggests but disputes its extent. Essentially, they argue that he is overstating the amount of work that he was doing and the number of hours he was doing.

50. I was provided with a number of emails in which GMB staff request Mr Gull's assistance with a member, see p59-62. These essentially confirmed his account that he was providing advice and representation.

51. The number of emails, however, was very limited. They did not therefore establish that Mr Gull was carrying out the sort of volume of work that he suggested.

52. Mr Ismail argued that I should draw an adverse inference from Mr Gull's failure to provide more documentary evidence. He noted that, in addition to considerably more email communication (between Mr Gull and GMB staff, between Mr Gull and members and Mr Gull and employers) one would expect there to be many other documents related to his work of representation and advice – if it was as extensive as Mr Gull suggests.

53. Under cross-examination, Mr Gull said that he used a number of different emails for his work; that these tended to fill up and that he would then delete

old emails. At one stage he suggested that he no longer had access to these emails, but almost immediately went on to say that he could search his GMB emails. He also suggested that he was not the most assiduous notetaker. I did not find any of these explanations convincing. It is implausible that the only emails available to Mr Gull are the very limited selection provided to me. It is equally implausible that there are no notes, letters or other documents relating to Mr Gull's work. I therefore concluded that Mr Gull was in a position to produce significantly more documentation than he did.

54. At the same time, GMB could also have produced significantly more evidence in relation to its contention that Mr Gull was exaggerating his level of work. It would have been possible for GMB staff in the areas that Mr Gull worked to give evidence as to their interaction with him and for searches to be carried out in their email to locate any similar requests to those that have been produced (or to establish that they did not exist).

55. I accept Mr Ismail's submission that the burden of proving employment status is on Mr Gull, not GMB. But GMB's access to relevant evidence is a relevant factor to consider in determining whether an adverse inference should be drawn. I also bear in mind that the purpose of considering drawing such inferences is in order accurately establish the underlying facts; not to punish a party for failure to disclose.

56. It is also notable that the emails that I have seen appear to be in the nature of routine correspondence. They presume that Mr Gull will be available to assist and will do so. For example, on the 18th October 2019, Anna Meyer, a Regional Organiser, involved Mr Gull by copying him into an email to a member, p60. She wrote that Mr Gull 'will be able to assist you with some advice' and tells the member to forward him relevant correspondence. This was in the context of a member who had been suspended and had a pending disciplinary hearing. I would not expect the email to be written in the way that it was if Mr Gull might well not be available to assist the member or if he might not agree to do so. The way that the email is written suggests that Ms Meyer made this type of referral to Mr Gull regularly. It is not the sort of email that I would expect to see if Ms Meyer only rarely contacted Mr Gull on such matters.

57. Given all of this, I do not draw any negative inference from Mr Gull's failure to disclose further documents.

58. Mr Gull also said that there were occasions where he was unable to support a member at a meeting, because he was already committed to another meeting. He said that in such cases, he would be able to delegate to a shop steward, who would be able to attend the meeting. Not all workplaces, however, had a shop steward. If one was not available, he would need to contact Mr Warr, as the Head of Legal, who would arrange for an accompanying rep.

59. Mr Warr's evidence was that, if Mr Gull did not wish to attend a meeting, the Regional Officer would ask for an accompanying representative. He explained that accompanying representatives are usually retired branch

secretaries or officers working on a voluntary basis, although paid a daily honorarium in relation to their work.

60. This gives some indication that he was undertaking enough work to lead to such conflicts, although without much more detail it is impossible to put great weight on this.

61. Overall, I accept Mr Gull's evidence that he was, in practice, working full-time or close to full time.

62. Mr Gull described himself as being line managed by the Regional Secretaries who, in practice, sent him work. In practice, however, this was a loose and hands off arrangement. They sent him work, in the sense of referring members to him for representation and support. But there was little other significant contact: no one-to-one meetings, no annual reviews and no attempt to manage his work day-to-day.

Branch accounts and system of paying honorarium

63. A number of documents relating to the relevant branch accounts and Mr Gull's payments have been produced. They are described below and, as will be apparent from the description, are a very narrow sample of the accounts. They do, however, shed some light on the relevant arrangements.

64. At p50 and p51 of the bundle are Branch Income and Expenditure records. The way that p50 has been photographed means that it is not clear what branch it refers to or what period of time it relates to. P51 is from the SoLo Branch, but most of the document (including the dates) is illegible (the photo appears to have been overexposed).

65. The MPO accounts record Mr Gull receiving monthly payments, described as 'B/Sec Commission' of £1,050 pounds a month in August, September and October of 2010, p52. These payments are the only expenditure recorded within the branch during this period. In the same period the only income within the branch in a payment from GMB described as 'Top up re: R Gull'.

66. The Walthamstow Branch accounts for February to April 2011 record similar Commission payments in February (£1050), March (£1572.33) and April (£1572.33), p53. There are also payments to Mr Gull in respect of travel expenditure. These accounts also record a payment from GMB of £2,265.33 described as 'Refund B/Sec Commission'. The only other expenditure in this period is a payment to GMB described as 'JCT December 2010'.

67. There is a record of Branch Officers' Honoraria from the MPO Branch from the 4th quarter of 2012. This records a payment to Mr Gull of £1050.

68. There is a summary statement of contributions and commissions for the MPO Branch from the 3rd quarter of 2014. This records as Honoraria of £1050, which I understand to refer to Mr Gull.

69. Mr Gull says that these documents are examples of the accounts produced for the branches. P51-53 are handwritten, which he described as the 'Old Style' books. These would be produced in discussion with the London Region Finance Officers, who acted as the branch auditors. Mr Gull described attending a meeting with them to go through the accounts (initially Julie Adamson and later Joanne Baez). He said that prior to 2020 it was the Finance Officers who filled in the forms and provided the numbers for his commission. He would then send the final copy to the National Audit office.

70. It seems to me that, although Mr Gull described himself as producing the accounts, in practice at this stage they were produced by the branch auditors, based on information provided by Mr Gull.

71. Mr Gull said that he did not fix the amount of his commission, it was determined by the branch auditors, who would adjust the figures coming from each branch in order to produce a consistent payment.

72. Later the system became electronic, but substantially the same process was followed.

2020

73. In 2020 Mr Gull was told by Joanne Baez, the Finance Officer at that time, to take over production of the accounts. He says that, in order to produce figures for his Honorarium, he copied the figures from the previous year.

74. On 4th March 2020, Mr Kenny, the London Regional Secretary, emailed Mr Gull raising concerns about the proposed accounts in the SoLo Branch. He referred to a loss of branch income and the impact this was likely to have given the proposed level of the honoraria, p66. He noted that, based on the proposed figures, the SoLo branch would only receive a nominal figure into its account each quarter.

75. On the 5th March, Mr Gull replied to this email, setting out his understanding of his position. This included sets out his account of the history of his post. Mr Gull ends the email by saying:

> Therefore forgive me, if I do not volunteer to take a pay cut, therefore the decision lies with other people, but as trade unionist, I would not ask someone to do the same work, with the same employer, for less money.

76. Mr Kenny then replied the same day:

> "Richard
>
> Thank you for your email and the background information.
>
> There seems to be a very distinct difference in the interpretation of honoraria payments to branch post holders as these are not "wages" as you suggest.
>
> The branch should be able to fund its activities and request support from the region where this may be necessary.

To leave the branch with so little going to its account each quarter may present difficulties in being able to achieve its objectives and fulfil the Branch organising plan.

Can I suggest that we meet to go through this in more detail. I am happy to convene a meeting at Hendon so we can look at this more carefully.

I look forward to hearing from you.

Regards,

Warren Kenny"

77. Mr Gull replies:

"Dear Warren,

I am more than Happy to have a meeting, with you and the regional committee, to discuss, the issue,

I believe the regional committee should be involved as ultimately it is their decision.

I doubt there has been any misunderstanding on the Honoraria, as there should be enough people in the union knowing the amounts of money I have been receiving and they must be expecting something in return, you can call it bananas if you want, but its still money paid for work done.

Regards,

Richard"

78. Mr Kenny replied, requesting a meeting between him and Mr Gull, with Mr Warr also attending. A meeting between the three men occurred on 18th March 2020.

79. Following the meeting, Mr Kenny emailed Mr Gull on the 20th March:

"Dear Richard,

Thank you for taking the time to come to hand and on Wednesday, I believe it was very helpful to talk through the Branch honoraria payments and structures with you in person. As you rightly suggested emails can often be misinterpreted and lack any tone or expression.

It was helpful to clarify that any branch honoraria payments from branch funds are normally agreed by the branch committee and can fluctuate if the branch income, through a reduced membership, may also reduce the amount of available branch income to make these payments. These are on very payments, not wages and an employment contractual agreement between yourself and GMB does not apply.

That aside, I am very keen to look at how we help you to build membership across the three branches you are acting as secretary for, these being Walthamstow, MPO and SoLo.

Given the current national crisis, and in order to make sure we all give ourselves a little more preparation time we have agreed to organise a meeting between us, Anna Meyer, Mick Ainsley, Tony Warr and Gavin Davies As we should formulate a longer term strategy to help deliver membership growth and build structures around you so we are more sustainable in these areas.

I have asked our finance officer to process your three branch organising plans so payments are made to you as you have listed within.

Once things calmed down regarding the outbreak of the virus, I will ask colleagues to convene a date for us to meet at hand and and we will come up with a plan to give you the additional support you need in these areas. New paragraph until then, take care of yourself and stay safe.

Best wishes,

Warren Kenny"

80. Mr Gull replied the same day:

"Dear Warren,

I'm afraid this e-mail, has not set my mind to rest, I thought the meeting established that I had no idea, as to how, the branch payments were assigned to me, and who made the decisions, my intention was never to decide whether or not I had employment rights, seeing as I was trained by the GMB, I would never agree that in a meeting if I was representing a member, so I definitely would not agree for myself.

I would prefer to concentrate on the positives, as long as people are honest with me, i will be honest with them, whatever the payment is, it is, I will do the best I can for the union, what that is will depend on how much time I can spend doing that, and as I made clear if the payments are reduced, I will have to find other work to make up for the loss, I thought you and Tony understood that, I just want people to be upfront with me, that is all.

Regards

Richard"

81. Mr Kenny then replied:

"Dear Richard

I had hoped my initial e-mail would both offer you some financial reassurance and clarity relating to your lay position of Branch Secretary. It

would appear that this may not have been explained carefully in my first email so I will try and expand.

Your role is rule Branch Secretary for the three branches previously mentioned. This is a position which is normally elected by the members of each branch. The honoraria payments would normally be decided by the Branch committee as per rule.

As these structures either do not exist or are not fully formed in your branches payments for honoraria from each branch count have been previously submit it in line with your branch organising plans and paid.

I have agreed to continue with these payments but want to also look at how we increase membership in your branches and thus, in turn, increase the amount of income the branch will receive each quarter. This will provide additional funds for the branch to undertake some of its core rulebook functions, a problem we both agree hasn't been happening due to a previous low level of interest from the wider membership.

Your interpretation of the relationship is, I am afraid, not accurate. The link to our rule book is here...

The relevant section for Branches and Branch secretaries is listed from pages 38 through to 46. This details information for the role that you have and that of others who should be elected into the various branch positions via a regularly scheduled pattern of meetings involving members of the branch. I hope this is both helpful and reassuring.

I have copied in Tony so we can have further discussions if necessary but for now take care and see you soon.

Best Wishes

Warren Kenny"

82. I accept that these emails provide an accurate summary of the meeting and the parties positions at that time. GMB, in the person of Mr Kenny, strongly held the view that Mr Gull was not an employee, but rather solely an officeholder in his role as Branch Secretary. Mr Gull equally strongly disagreed and insisted he was an employee. GMB was willing, at least in the short term, to pay Mr Gull the amounts he was seeking (in the form of an honorarium).

83. Unsurprisingly given that this was occurring at the beginning of the Covid-19 pandemic there was little further discussion of Mr Gull's situation at this stage and the intended meetings referred to in the emails did not occur.

2021

84. In February 2021, there was a delay in paying Mr Gull's honoraria. The immediate cause of the delay was that Mr Gull had not submitted the Branch

plans / accounts in time. This is reflected in the contemporaneous emails, p78-82.

85. The emails also confirm the ongoing disagreement between Mr Gull and GMB (in particular Mr Warr) as to the nature and terms of their relationship. Mr Gull saw himself as an employee entitled to be paid a regular wage. GMB viewed him as an officeholder, who was only entitled to an honorarium. Mr Warr's view of this is encapsulated by his email of 24th February 2021:

"Hi Richard

Please let me clarify to avoid further confusion and so that we can all move forward together.

Yes, I did ask that contact be made with you to ask that you resubmit any outstanding branch organising plans. I am then informed, sorry reminded, that your honoraria payments barely leave any other funds in the branches where you are the branch secretary.

Honoraria payments were not the making of previous senior officials of the Union. The payments made to branch secretaries prior to honoraria came under scrutiny by HMRC and it it was Congress that changed the rules on payments, not senior officials of the GMB. If you have any correspondences, notes or minutes that suggests to the changes were of the making of senior officials then by all means please feel free to send me copy.

I do believe that a review is necessary and relevant to establish how membership can be increased and social media is just one such way, which was indeed discussed at our meeting before lockdown last year. The review should also look at branch organising plans, something we have asked organisers to do in conjunction with the appropriate branch representatives on an ongoing basis. The substantive issue though is the amount being paid in honour area against bunch income which is simply unsustainable.

I would therefore suggest the review takes place at your earliest convenience with the allocated officers who are copied in. A report can then be submitted for consideration by the Regional Committee. I do hope this can be undertaken in a timely fashion.

This morning, I had a conversation with the Regional President, Penny Robinson who agrees with the above. Additionally we have agreed to reinstate your honoraria which will be considered on 1/4 by quarter basis to provide time for the above review to take place.

Best Regards

Tony Warr
Regional Secretary (Acting)"

Reduction to Branch Commission 2021/2

86. In October 2021 GMB's Central Executive Committee made a decision to reduce the amount of Branch Commission from 10% to 7.5%. From the branch point of view, this was a reduction of 25%, which was obviously substantial.

87. The decision was communicated to Mr Gull through email by Joanne Bayes on 10th December 2021, p92-94. Mr Gull received separate emails in relation to each branch. The email begins 'Dear Branch Secretary,' and concludes 'If your branch pays honoraria, please can you factor the reduction in when deciding on the Branch honorarium that will be set for the coming year'. It seems clear from this it was, in large part, a standard text sent to all Branch Secretaries (although it contained specific calculations of the likely financial consequences in each branch).

88. Matters came to a head in April 2022, when Mr Gull was told that GMB was unwilling to pay the honorarium figures he had proposed, because there were insufficient funds within the Branch Accounts to do so. He was asked to submit revised figures.

89. There followed a series of emails, in particular between Mr Gull and Mr Warren Kenny, p92-102. Both, essentially, reiterate their positions. In broad terms, Mr Gull regarded the refusal to pay as wholly unreasonable and unfair, because he was, as he saw it, having his pay unilaterally reduced. In broad terms, Mr Warren believed that Mr Gull was being unreasonable by refusing to acknowledge that he was not an employee and therefore only entitled to an honorarium – which had to be determined by reference to the funds available to the Branches concerned. The correspondence, on both sides, became frustrated and acrimonious.

90. On 27th April 2022 Mr Kenny wrote to Mr Gull to inform to relate a decision made by the Regional committee, p104. This was that no honoraria would be paid, because a) there was no branch structure in all three branches and b) that the proposed honoraria would leave each branch with 'almost zero funds'. There would therefore be no honoraria paid, pending elections in all three branches and organising plans submitted. These elections would be overseen by a Regional Senior Organiser.

91. Mr Gull replied, indicated that he did not intend to take part in any elections, 104. This was treated as a resignation by GMB, p103.

Other work

92. In his evidence Mr Gull accepted that he had done other work at various points between 2005 and 2022. He described this as being on a casual basis, primarily involving occasional weekend and night work in the electric power industry. At one stage he had worked for a 10 week period, between 7pm and 2am.

The law

93. The starting point for considering employment status in reference to the Employment Rights Act 1996 s s230, which provides the following definition:

> **230 Employees, workers etc**
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

94. The relevant issue in this case is whether there was a contract of service (there is no suggestion that the claimant was an apprentice). The starting point in that analysis is the approach set out in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] QB 497. In summary:

    a. An employee agrees that, in consideration for a wage or other renumeration, he will provide his own work and skill to perform service for his employer.

    b. An employee agrees, expressly or impliedly that in the performance of that service he will be subject to the employer's control to a sufficient degree to indicate an employment relationship.

    c. The other provisions of the contract are consistent with an employment relationship.

95. The requirement that an employee 'provide his own work and skill' has led to significant judicial consideration of the impact on employment status of an individual who has a right to send a substitute in his place. An absolute right to send a substitute is unlikely to be consistent with personal service and therefore mean than an individual is not an employee, see *Express and Echo Publications Ltd v Tanton* [1999] IRLR 367. A more limited right to send a substitute may be consistent with employment status, depending on the nature of the right and whether it is such to displace the obligation to perform work personally, *Stuart Delivery Ltd v Augustine* [2022] IRLR 56.

96. The modern approach to employment status is often described as 'the multiple test', because it involves considering the myriad factors that may be relevant to whether a particular contract is one of service or not.

97. These factors include:

    a. *Mutuality of obligation:* In general, employers are required to provide a particular level of work and employees are obliged to perform that work. Where there is no obligation to offer work or to accept it if offered, a contract is unlikely to be one of employment, see *Carmichael v National Power plc* [1999] ICR 1226.

b. *Control*: An employer has control over their employee. They can give orders and expect them to be carried out. This contrasts with an independent contractor, who is engaged to provide a particular result or service, but has discretion over how that end is to be achieved.

   What is most significant, however, is not whether there are actual day-to-day instructions being given, but where the ultimate right of control resides, see *White v Troutbeck SA* [2013] IRLR 949. This reflects the fact that many employees, by reason of their circumstances or expertise, are given considerable practical autonomy. What is most relevant to the control element of the test is whether the engager has a contractual right to control, whether they choose to exercise it or not.

c. *Organisational integration:* The more an individual is integrated into an organisation, the more likely they are to be an employee.

d. *Economic reality:* This, fundamentally, requires considering whether an individual is operating their own business, rather than being employed by someone else.

98. It is useful to bear in mind the guidance of then Mr Justice Mummery endorsed by the Court of Appeal in *Hall (Inspector of Taxes v Lorimer* [1994] ICR 218. He points out that the multiple test is not a mechanical exercise of running through a checklist, but rather an attempt to arrive at an overall picture from the accumulation of detail. This requires stepping back to consider the picture as a whole. It requires evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not every factor is of equal weight and the importance of a particular factor may vary from one situation to another.

99. How the parties view or label their relationship is a relevant, but not conclusive factor for consideration, see *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99. What is important is the contractual relationship between the parties, not how they perceived or labelled it. Similarly, how an individual or engager has represented the tax status of the arrangement to HMRC is relevant, but not conclusive, see *Richards v Waterfield Homes Ltd* [2023] IRLR 145.

Officeholders

100. The term officeholder is a complex one that can mean a number of different things within the employment context. This is not a case that is concerned with either a statutory officeholder (where a post is created by parliament through statute) or any similar post arising from the common law.

101. Rather this case concerns the type of situation identified by Lord Nicholls in *Percy v Church of Scotland National Mission* [2006] ICR 134. That is one in which an organisation has made provision within its constitution for a particular role. As Lord Nicholls notes an individual in that position may be an office holder, but not an employee; may be an officeholder on the basis of a contract of employment or may both hold an office and concurrently be an employee. Lor Nicholls warns against the false dichotomy of assuming

that an officeholder cannot be an employee or vice versa. Instead the nature of the office and its terms is a relevant factor to be considered when determining whether there is an employment contract.

102. In considering whether an individual may be an officeholder, but not an employee, the guidance in *Social Club & Institute Ltd v Bickerton* [1977] IC 911 is relevant. This requires consideration of:

a. Was the payment an honorarium or a salary? Was it made contractually for services rendered or in the form of a grant?

b. Was the payment fixed in advance?

c. Was there a right to the payment that could be enforced?

d. The size of the payment?

e. Whether an individual is exercising the functions of an independent office or subject to the control of the engaged?

f. The extent and weight of the duties performed.

g. The description given to the payment, its treatment in the account and for the purposes of tax and national insurance.

103. *Fire Brigades Union v Embery* [2023] EAT 51 dealt with an employee of the London Fire Brigade who was on full-time release to perform his duties as an elected official of the FBU. The Employment Appeal Tribunal concluded that Mr Embery was not employed by the FBU. It relied on the legal principle that an individual cannot generally have two employers simultaneously. Since Mr Embery was employed by the LFB, he could not be employed by the FBU at the same time.

104. *Embery* also emphasises the need to reach sufficiently detailed findings in relation to remuneration and control, within the context of the assessing employment status.

105. *GMB v Hughes* [2006] UKEAT 0288/06/0208 concerned Branch Secretaries within GMB. Then President Elias upheld the Employment Tribunal's conclusions that they were employees. The EAT noted that it was common ground that the Branch Secretaries were Officeholders and that the relevant issue was therefore whether there was simultaneously a contractual relationship with the Union.

106. A key element of both the Tribunal and the EAT's analysis was the extent to which the posts involved work beyond the duties specified in the GMB Rule Book in respect of the Branch Secretary. The Tribunal had concluded that the vast majority of the Secretaries work (some 90%) fell outside the Rule Book and compromised largely of representation, negotiation and consultation on behalf of members.

107. I remind myself, however, that although *GMB v Hughes* involved the respondent in this case and individuals with the same title as Mr Gull, it is the legal principles laid down by the EAT that are important. It does not follow axiomatically that, because the Branch Secretaries in that case were found to be employees that Mr Gull was an employee.

Employment for the purposes of the Equality Act 2010

108. The starting point in relation to employment for the purposes of the Equality Act 2010 is s83(2)(a):

> **83 Interpretation and exceptions**
>
> (2) "Employment" means—
>
> (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

109. This is a wider definition than that found in the Employment Rights Act, since it includes not only those engaged under a contract of employment, but also those engaged under a contract personally to do work.

Conclusions

110. Applying the law to the findings of fact I reach the following conclusions.

111. The starting point is to consider the basis on which Mr Gull was engaged in 2005. I accept his evidence that he was offered a role within GMB and at this stage, there was no mention of him being a Branch Secretary or holding any officeholder post within the GMB. He was paid for that role by GMB.

112. Mr Warr, in his evidence, describes Mr Gull as receiving a 'branch secretary's commission' at this time, which he characterises as an 'honoraria by a different name'. This, however, is not based on any direct knowledge of the situation at that time. It is a supposition from his general knowledge of the respondent and, in particular, that other people in a somewhat similar position were receiving such a commission. I accept it is Mr Warr's honest interpretation of the information available to him, but I do not agree.

113. I also find that it is appropriate to draw an inference from the financial contribution made by London Borough of Waltham Forest to the payment made to Mr Gull. It seems to me inherently unlikely that a local authority would agree to pay a sum to a Union to support an individual's work if they believed that the Union had no obligation to pay that individual and that individual had no obligation to carry out any work.

114. I also accept Mr Gull's evidence that, at this time, he was to be paid £2,100 a month. I infer from this also that he was expected to carry out a reasonable amount of work to justify this significant payment. It is inherently implausible that GMB would enter into such an arrangement on the basis that Mr Gull could work as much or as little as he wished – particularly when the arrangements to provide cover for the work that he did not do involved

expenditure on their part. The lack of written documentation suggests that the agreement was somewhat informal. On the balance of probabilities, I conclude that it was based on the understanding that Mr Gull would carry out the work assigned to him, unless there was some good reason that he was unable to do so, entered into with the knowledge that there was sufficient such work to provide him with a full-time role.

115. On a day to day basis GMB made little attempt to direct Mr Gull's work. Essentially he was allowed to proceed as he saw fit. For the purposes of considering his employment status, however, I must focus on the extent to which there was a contractual right to direct him, rather than the extent to which it was exercised. In this context, there was little change in the relationship over the course of the employment. Bearing in mind the lack of detailed evidence in relation to the earliest period of the engagement, it is appropriate to consider the engagement as a whole, since it does not appear to me that there was a significant change over the engagement, so far as the control exercised by GMB was concerned.

116. In this context it is notable that, on a number of occasions, Mr Gull complied with the directions issued by GMB. For example, on several occasions he changed the way in which he prepared accounts in response to instructions from GMB. Similarly, he accepted the instruction to provide branch plans when instructed to do so by Mr Kenny. Similarly, in 2008, when Mr Gull was told that his remuneration would significantly reduce and it remained reduced for a significant time, he accepted this.

117. None of this is a decisive indication of a strong level of contractual control but taken together it is a significant sign of subordination in circumstances where the passage of time and the informal nature of the arrangement means there is little other evidence to rely upon.

118. In relation to his integration into GMB as an organisation, there are factors pointing in both directions. On one side, Mr Gull was acting as a union representative, representing GMB's members in significant disputes. In an important sense he was representing the Union to employers. He was not doing so in the context of carrying out his own profession, in the way that a solicitor or barrister might. His status in those proceedings arose solely from his position within the Union. This is a factor that points towards him being integrated into GMB and therefore an employee.

119. On the other side, in many ways Mr Gull was detached from GMBs other operations and was not closely integrated into its operations. He received minimal line management and largely operated independently. All of this indicate that he was not closely integrated into GMB's operations.

120. Balancing these factors together, I have concluded that they tend to indicate that Mr Gull was not an employee. Overall, this was a moderately strong indicator against employment status.

121. In 2005, there was no significant factor that suggests that Mr Gull was either an office holder or carrying out any part of his work on a voluntary basis. He

was engaged by GMB to provide representation and support to their members. He was paid a regular monthly payment to do so.

122. Mr Ismail argues that the arrangements in place to provide alternative representation to members if Mr Gull was not available amounts to a right of substitution. I accept that there were such arrangements in place. Throughout his engagement with GMB Mr Gull could delegate meetings to a shop steward or arrange for an accompanying representative if he was not available to represent a member.

123. I do not accept, however, that this amounted to a right of substitution. In many roles there will need to be arrangements in place to provide cover, if and when a particular individual is unavailable. It is self-evident that where a role involves representation in disciplinary meetings, there are likely to be occasions where the scheduling of the meetings makes some form of cover arrangement desirable. But that is not the same as a right of substitution that excluded personal service.

124. A right to substitute, in this context, is the right to perform agreed work by sending someone else to do it, rather than by doing it yourself. That is not the same as an arrangement to cover particular work, because an individual is unavailable while performing other work for the engager.

125. It is also relevant that, where an accompanying representative was used this was arranged and paid for by GMB.

126. It is illustrative to consider how the approach to cover might have been different if Mr Gull had been explicitly engaged through a full-time employment contract (for example if he had been an organiser under Rule 17b). The same potential diary clashes would have arisen. Practically, the same cover arrangements would have been in place.

127. For all of these reasons, therefore, I concluded that there was no right to substitute in a relevant sense that prevented Mr Gull being obliged to provide personal service.

128. Stepping back from these individual factors to consider the position as a whole, I conclude that Mr Gull was employed under a contract of employment between 2005 and 2008. Looking at the essential facts, he was paid to carry out substantial duties in what appears, on its face, to be an employment type relationship. The main factor against him being an employee at that stage is the somewhat detached nature of his duties and lack of integration into the GMB. In these circumstances, however, that does not outweigh the other matters suggesting employment status.

129. The question then becomes whether the discussions in 2008 changed either the agreement between Mr Gull and GMB or its character in a way that altered the nature of the engagement.

130. It is clear that the relationship changed, in particular that Mr Gull became an office holder at this stage. But I have concluded that he remained engaged under a contract of employment alongside that office. This is because,

fundamentally, the appointment to an office was a mechanism for allowing Mr Gull to be remunerated while continuing to carry out his existing role. It was an adjunct to the existing employment contract, rather than a replacement for it.

131. It is common ground that Mr Gull was not elected to the positions of Branch Secretary that he, in practice, held. The only mechanism for such an appointment is found in Rule 35(4). This requires a) that it not be practical for a member of the branch to act as secretary, b) the branch to agree to the appointment, c) that the person to be appointed is an organiser (defined by Rule 17b) and b) that the appointment by temporary (for not longer than six months).

132. I have no information as to whether criteria a) or b) were satisfied in respect of any of the branches where Mr Gull acted as Secretary. It is, however, clear that he did not hold the formal post of organiser within the GMB rules. It is also clear that the appointments were not temporary.

133. It is apparent that neither party focused on either the requirements of the Rulebook (which would have both prevented Mr Gull's appointment since he was not an organiser and required elections if he was to continue in post). Very little of Mr Gull's time was devoted to his duties as Branch Secretary and many of those duties were not performed at all (without objection from GMB).

134. Although the payments were described as honorarium, Mr Gull continued to receive substantial sums on a regular basis. Until Mr Kenny began to raise concerns in 2020 about the financial viability of the ongoing payments these remained fixed payments. Mr Gull's primary work remained outside his role of as Branch Secretary, being concerned with his work representing members.

135. It is also appropriate to touch on Mr Gull's tax position at this stage, since it is only from 2008 that I have clear evidence of how his tax affairs were dealt with. It is common ground that from 2008 GMB paid Mr Gull's income tax / National Insurance through the PAYE system and that he received a P60. Mr Warr's evidence was that he believed that this was a HMRC requirement and that the Finance Director had advised that anyone who gets payments that are not expenses should be issued with a P60.

136. I do not accept that the arrangements made for Mr Gull's tax are a mere technicality. From the tax point of view, Mr Gull should only have been within the PAYE system if he was treated as an employee for tax purposes. Although I note I have no real evidence of the basis on which this conclusion was reached and that the label applied for tax purposes is not determinative, it seems to me to be a significant factor pointing towards Mr Gull being an employee.

137. Similarly, it is significant, although in no way determinative, that Mr Gull was enrolled into a pension scheme by GMB (albeit a different scheme than that used for its employees). This is a minor indication that he was treated as an employee.

138. Overall, I have concluded that Mr Gull remained engaged under a contract of employment, notwithstanding the fact that he had been appointed to an office. It follows from this that he was an employee for the purposes of the Employment Rights Act 1996.

139. In respect of the employment status for the discrimination claim, it also follows from the conclusion that Mr Gull was engaged under a contract of employment that he fell within the definition of employment for the purposes of the Equality Act 2010.

Strike Out

140. The rules in relation to strike out are contained in Rule 37 of the Employment Tribunal Rules:

> **37 Striking out**
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

141. The respondent's application to strike out is pursed on two fronts. First, that Mr Gull has not adequately pleaded his claim for age discrimination and it therefore has no reasonable prospect of success. Second that, the claim in general, and the claim of age discrimination in particular, is so weak that it has no reasonable prospect of success.

142. In considering an application to strike out on the grounds that a claim has no reasonable prospect of success, it is important to bear in mind the difficulties of assessing the strength of contested claim on a preliminary basis. This point has been made on a number of occasions in the Employment Appeal Tribunal (see, in particular, *Ezsias v North Glamorgan NHS Trust* [2007] IRLR 603). Where there is a crucial core of disputed facts that will need to be resolved it will only be in exceptional cases that it is appropriate to conclude that a party has no reasonable prospect of succeeding.

Deposit order

143. The rules in relation to a deposit order are contained in Rule 39 of the Employment Tribunal Rules:

> **39 Deposit orders**
>
> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
>
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
>
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
>
> otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of

the deposit shall count towards the settlement of that order.

144. Broadly, therefore, when assessing whether to make a deposit order a Tribunal must decide whether the allegation or argument advanced by a party has 'little prospect of success'. This is expressly lower than the threshold for 'no reasonable prospect of success' which applies in other contexts, such as in relation to strike out.

145. This consideration is not limited to purely legal issues and may consider the likelihood of a party being able to establish the essential facts of their case, see *Van Rensbury v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07.

146. A deposit order should not, however, be made unless there is a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim succeeding. Such a consideration needs to bear in mind the context of the decision and the nature of the claim. In particular, where there is a substantial dispute of fact between the parties, the Tribunal must remember the difficulties of assessing factual allegation at a preliminary stage. These include the facts that disclosure will not have been completed, witnesses have not yet given evidence and that evidence has not been tested in cross-examination. In a discrimination claim it is also appropriate to note that, if a claimant proves primary facts on which a Tribunal could conclude that there was discrimination the burden of proof will pass to the respondent. Consideration of whether there is little prospect of success must take into account the potential reversal of the burden of proof. It is also necessary to remember that it is common for there to be no direct evidence of discrimination in cases where it has occurred. Few employers will openly admit to discrimination and, in many cases, may be unaware of their own subconscious bias.

Conclusions on strike out / deposit order

147. I rejected the argument that Mr Gull's age discrimination claim is inadequately set out in his claim form. The claim form is brief and sets out the claims in general terms. That is not unusual in the context of the Tribunal. The age discrimination complaint is not particularised, but Mr Gull has been able to clarify to me that he argued that the decision to dismiss him was, at least in part, based on his age and that he says that this was an act of direct discrimination. He does not pursue any other discrimination claim. Again, this sort of clarification is not unusual within the Tribunal context.

148. In respect to the other matters relied upon by the respondent, the unfair dismissal claim is not close to the threshold of either no reasonable prospect of success or little reasonable prospects of success. At the very least, there is a clear argument that the misapprehension relating to Mr Gull's employment status led to a repudiatory breach of contract and that his resignation thereby led to an unfair dismissal.

149. The arguments relating to the age discrimination claim are less clear cut. Based on the evidence that I have seen the central difficulty for Mr Gull's

claim of age discrimination essentially this. There is significant contemporaneous documentation indicating that the motive of GMB's actions over his honorarium was the financial position of the Union generally and the relevant branches specifically. Their fundamental position throughout was expressed as being a) that Mr Gull was not an employee, but rather an officeholder; b) was therefore only entitled to an honorarium as Branch Secretary, which had to be based on the funds available within each Branch and c) that the financial circumstances in the branches meant that the payments Mr Gull sought were not sustainable.

150. Even if GMB was wrong in this (and it follows from the judgment on employment status that it was wrong in relation to the issue of employment status) none of this has anything to do with Mr Gull's age. There is no obvious connection within either Mr Gull's account or the evidence I have seen to establish that any part of the decision might have been influenced by Mr Gull's age.

151. Nonetheless, bearing in mind the difficulties of assessing factual matters at a preliminary stage, I do not find that Mr Gull has either no or little prospect of success. I bear in mind in particular the guidance given by the EAT in *Sharma v New College Nottingham* UKEAT/0287/11 that Tribunals should be cautious before relying on contemporaneous documentation that appears wholly inconsistent with allegations of discrimination as being sufficient to demonstrate that there is little reasonable prospect of success. I bear in mind that I have not heard any significant evidence about the events surrounding the end of Mr Gull's employment. Mr Gull has not had the opportunity to explain why he believes that the decisions about his honorarium were influenced by his age and he has not had the opportunity to question the GMB witnesses on this point to seek to undermine their accounts.

152. In my view there remains in this case the sort of core factual conflict that should be resolved at a full merits hearing, with contested evidence. It is not suitable for the form of summary analysis possible during a preliminary hearing.

Employment Judge Reed
Dated: 13th September 2023