EMPLOYMENT TRIBUNALS

Heard at:	London South
On:	11 to 13 October 2023
Claimant:	Mr D Ajiboye
Respondent:	Bouygues E&S Solutions Limited
Before:	Employment Judge Ramsden
With members	Mr C Mardner Mr P Mills
Representation:	
Claimant	Mr S Doherty, trade union representative
Respondent	Mr Hill, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The Claimant's complaint of unfair dismissal is well-founded.
2. The Claimant's complaint of detriment on grounds related to union membership or activities is not well-founded and is dismissed.

REASONS

Background

3. The Claimant worked for the Respondent as a Security Officer from 1 July 2016 until his dismissal on 9 May 2022 (though his continuous service began earlier, on 12 May 2004, as he transferred into the Respondent's employment pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006).
4. The Respondent supplies facilities management services, and at the time of the events complained about, it provided such services to the National Crime Agency

at 19 different sites pursuant to a single contractual arrangement (the **EOS Contract**). It was at one such site that the Claimant worked.

5. The Claimant has brought two complaints against the Respondent (as part of two separate claims which the Tribunal Ordered on 23 June 2023 should be heard together):

   a) of unfair dismissal, under section 94 of the Employment Rights Act 1996 (the **1996 Act**); and

   b) that he was subjected to a detriment for taking part in the activities of an independent trade union at an appropriate time, pursuant to section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (the **1992 Act**).

6. The Claimant seeks compensation in respect of each complaint, and a declaration that his complaint under section 146 of the 1992 Act is well-founded.

7. The Claimant also says that there has been an unreasonable failure on the part of the Respondent to comply with the ACAS Code of Practice on disciplinary and grievance procedures, the current version of which is dated 11 March 2015 (the **ACAS Code**).

8. The essence of the Claimant's claims, as identified in the Case Management Orders of Employment Judge Martin Downs of 3 August 2023 and clarified at the outset of this hearing, are that:

   a) as part of his role as a trade union workplace representative at the one of the sites managed by the Respondent under the EOS Contract, he organised and raised a collective grievance on behalf of himself and nine other colleagues on 20 January 2021. The Respondent penalised him for doing so when, on 24 June 2021, it issued him with a final written warning, in breach of section 146(1)(b) of the 1992 Act; and

   b) the Respondent purported to alter the tasks assigned to its Security Officers in connection with the Covid-19 pandemic, and while the Claimant initially refused to comply with the additional task assigned to him, he subsequently complied with it. The Claimant says that, despite this subsequent compliance, the Respondent commenced disciplinary proceedings against him for repeated failure to carry out that task, and the outcome of the disciplinary process that followed (which took account of his pre-existing final written warning) was his dismissal, which the Claimant says was unfair.

9. The Respondent denies these claims, and says that:

   a) the final written warning was fairly and appropriately issued to the Claimant for misconduct, and was not influenced by the fact that he had previously raised a grievance or that the Claimant was a workplace organiser for his trade union. In fact, the Respondent says that it was unaware that the

Claimant was a trade union workplace organiser until correspondence indicating that fact was disclosed to it as part of these proceedings (which disclosure post-dated his dismissal); and

b) the Claimant was fairly dismissed for his conduct.

The facts

10. As noted above, the Claimant started to work for the Respondent on 1 July 2016 (though his continuous service began on 12 May 2004).

11. In terms of relevant levels of authority within the Respondent, the Claimant was line managed by Piotr Dziankowski (Security Supervisor). Brendan Horan was the Security Manager, who was senior to both of them. Craig Simpkins was the General Manager of the EOS Contract, and senior to each of the Claimant, Mr Dziankowski and Mr Horan. Emmanuelle Chautemps was senior to Mr Simpkins, being an Executive Director of the Respondent.

12. On 20 January 2021, the Claimant sent an email to Lindsey Fordham of the Respondent's HR team, raising a grievance on behalf of himself and at least one other colleague, Chukwunonye Anaghara, who was also a Security Officer working at the same site as the Claimant (the **Grievance**). The parties dispute whether the Grievance was brought on behalf of other Security Officers besides the Claimant and Mr Anaghara. The Grievance concerned two matters:

    a) An alteration to the tasks of the Security Officers to include what the Claimant and Mr Anaghara (and, the Claimant says, other Security Officers) regarded as cleaning duties; and

    b) An adjustment to their working pattern.

13. Both changes had purportedly been made in connection with the Covid-19 pandemic.

    a) In respect of the change to the tasks of the Security Officers, this involved the addition of a check to be conducted when patrolling the building of the various sanitiser pumps and stations around the building to identify whether those needed refiling.

    The Respondent's client, the National Crime Agency, had asked the Respondent to ensure that certain safety measures were built into the facilities management services the Respondent was providing, including that the Respondent was to ensure that the sanitising stations at various points around the building did not run out of sanitiser.

    The Respondent's Security Officers performed regular patrols of the building, and already checked various things as part of those patrols (such as whether the toilets were leaking). The Respondent considered that the Security Officers could, as part of those patrols, check whether the sanitising stations

needed restocking, and then report any that did to the cleaning staff to top-up.

b) In respect of the adjustment to the working pattern of the Security Officers, the Respondent had done this so as to minimise the risk of the spread of Covid-19 among the Security Officer staff. It had done so because it thought that the revised shift pattern would reduce the risk of contamination between sub-teams of Security Officers. This revised working pattern resulted in each Security Officer working fewer hours than previously, though they were paid the same amount as before the change was made, but it did mean that they were "on call" on their rest days. It also had the consequential effect of altering the pattern of rest days for the Security Officers.

14. Mr Simpkins, as the General Manager of the EOS Contract, had played a part in each of the management decisions that resulted in above changes. The changes had been implemented across all 19 sites operated by the Respondent as part of the EOS Contract.

15. The Grievance was described by the Claimant and Mr Anaghara as being brought "against EOS Managers" which, given his role, included Mr Simpkins.

16. That Grievance was heard on 5 February 2021, and its outcome communicated to the Claimant and Mr Anaghara on 8 February 2021. The decision-maker at the Respondent, Carl Goard, determined that:

a) It was reasonable to require the Claimant and his Security Officer colleagues to check the hand sanitisers while they were on patrol; and

b) The previous shift pattern should be reinstated for the Claimant and Mr Anaghara.

17. The Claimant appealed the outcome of the part a).

18. The Claimant made a request, in mid-February 2021, for extended leave to travel to Nigeria on 1 May 2021 for the period to 23 May 2021. This was refused by Mr Simpkins on 26 February 2021, though he approved the Claimant having two weeks' leave commencing on 6 May 2021 which, with rest days, would mean the Claimant would return to work on 27 May 2021.

19. On 29 April 2021 the Claimant reported to the Respondent, by telephoning its designated absence-reporting line (as required by the Respondent's Sickness Absence policy) that he had "gastroenteritis – diarrhoea" and be unable to work that day or any of the subsequent three. This, together with rest days, took him to the period when his approved leave began, and so had the effect that the Claimant was off for the same period that he had requested by way of extended leave, returning to work on 27 May 2021.

20. The Claimant has admitted in oral evidence that he flew to Nigeria on 29 April 2021. The Claimant's position is that he could manage to do that. He says that, though he was not well enough to work, he knew that he needed to go to Nigeria

so as to obtain traditional African medicine that was necessary for the recovery of his health, and he managed the flight despite his gastroenteritis. He says that his flight was booked to leave for Nigeria during his approved period of leave, but that he telephoned the airline on the first day of his sickness absence and changed it so as to leave on that same day. The Claimant has produced no documentary evidence about the date of his flight or when it was booked, despite being Ordered to provide flight details on 7 March 2022 by EJ Wright, and further Ordered to do so on 8 June 2022. Nor did he disclose this in connection with standard disclosure Ordered by EJ Downs to take place on 22 August 2023. The Claimant has also not disclosed any medical evidence relating to this period of ill-health.

21. Contemporaneous records note that Mr Horan of the Respondent attempted to contact the Claimant on a number of occasions during his days of sickness absence, but his mobile telephone was switched off. Mr Horan observed, in the notes of the investigation meeting, that:

"*I found this strange as previously you've never turned your phone off apart from when you travelled abroad.*"

22. The Claimant returned to work on 27 May 2021. A disciplinary investigation meeting was held with him via Teams on the day he returned to work, without any notification of that meeting, which the Claimant had thought was a return to work meeting. The Claimant was not accompanied at that meeting.

23. The investigation meeting was with Mr Horan, the Respondent's Security Manager, and Emma Thomas, an HR Manager. At the conclusion of that meeting, Mr Horan recommended that the case be referred to a disciplinary hearing, and so the Claimant was suspended on full pay on the same day. There were three allegations that the Claimant faced, but only two are relevant for our purposes:

    a) That the Claimant had abused the Respondent's Sickness Absence Policy to obtain a longer period of leave; and

    b) That the Claimant had unreasonably refused to provide documentation in relation to sickness absence, including the details of when he flew to Nigeria, and when his ticket was booked.

24. In the course of that investigatory meeting, the Claimant said that he had been to Nigeria, but he refused to answer Mr Horan's questions about when it was he travelled, and when he booked his flight and the date the flight was booked for.

25. A disciplinary hearing was held on 15 June 2021. As was the Respondent's practice, the decision-maker appointed to hear the disciplinary case was the General Manager of the contract on which the Claimant worked, i.e., Mr Simpkins. Ms Fordham was in attendance from the Respondent's HR team, and Mr Horan attended to present the allegations against the Claimant. The Claimant attended with his trade union representative, Mr Doherty (the same Mr Doherty who

represents him in these proceedings). The key points of note from this meeting are:

a) Mr Doherty objected to the attendance of Mr Horan, saying that Mr Horan's part in investigating the matter was complete with his having produced an investigatory report, and it was inappropriate for him to attend the disciplinary hearing. Mr Simpkins emphasised that Mr Horan was not a decision-maker in the disciplinary matter, but said that his presence was desired to present management's case and so that he was available to answer any questions raised by any of the persons at the meeting concerning his investigation. Mr Doherty said that Mr Horan's presence tainted the hearing, and that it was against the terms of the ACAS Code. Mr Horan then left the meeting at Mr Simpkins' instruction as a result of Mr Doherty's objection.

b) The Claimant complained that he had no warning or invitation to the investigatory meeting. He had understood that meeting to be a return to work meeting, and he thought it was unfair that he was summoned to a meeting at which he was suspended without notice.

c) The Claimant also complained that no return to work meeting had been held with him before his suspension.

d) The Claimant said (a position he has maintained in oral evidence before the Tribunal) that he complied with the Respondent's Sickness Absence Policy, by telephoning the Respondent's absence reporting line and notifying them that he was sick, and therefore he had not abused the Sickness Absence Policy.

e) The Claimant continued to refuse to provide the Respondent with information or evidence about when he flew to Nigeria, when he booked his flights, or when those flights were booked for. In relation to the allegation that he unreasonably withheld documents concerning his sickness absence, he cited his rights to privacy, and said that the Company's Sickness Absence Policy did not oblige him to provide them.

The meeting was adjourned so that Mr Simpkins could ask Mr Horan some questions pertaining to his investigation (given that Mr Horan had, by that point, left the meeting).

26. The disciplinary hearing resumed on 22 June 2021. The allegation that the Claimant had abused the Respondent's Sickness Absence Policy to obtain a longer period of leave than had been authorised was upheld, as was the allegation that he had unreasonably refused to provide documentation in relation to that absence. Mr Simpkins determined that both of these allegations (the **Absence Matters**) were made out (and a third allegation, not outlined above, was not). The Claimant was issued with a final written warning (the **FWW**).

27. A letter was sent to the Claimant confirming this conclusion on 24 June 2021. That letter referred to his right to appeal the decision, and included the following:

 "*Having taken all of the facts, circumstances and the severity of the situation into account, I am very disappointed by your actions which I consider to fall significantly short of the standard I would expect of an employee in your position. A position where trust, honesty and integrity are at the fore front of all aspects of your role and the values that the Company holds. Your actions have resulted in additional costs to the contract and have placed further stress and challenges on the Security department who have covered in your absence. I believe that you're your* [sic] *actions fall within one of the non-exhaustive examples of gross misconduct which may result in dismissal however, I have taken into consideration your long service and clean record and have decided to issue you with a Final Written Warning.*

 This warning will remain on your file for a period of 12 months. If any further misconduct of any nature takes place within this time, further disciplinary action may be taken and may lead to your dismissal."

28. On 28 June 2021 the Claimant appealed the decision to issue him with a FWW, and in doing so referred to the allegations being a "*means of victimisation*", and said that "*The Manager* [pursued a] *personal vendetta by personal bullying and harassing me to provide documents that are never a requirement*". He went on to note that: "*Supervisor/Security Manager marked me for my active role in organising my colleagues at work hence, their decision to initiate plan to get rid of me.*" It was clarified at the outset of these proceedings that the Claimant considers the Respondent's actions in issuing him with the FWW to be retaliation for his role in raising himself, and in organising his colleagues to raise, the Grievance.

29. An appeal hearing was held in respect of the decision to issue the Claimant with a FWW on 11 August 2021. Mr Goard of the Respondent was the Appeal Officer for this purpose, and a member of the Respondent's HR team was present at that meeting, along with the Claimant and Mr Doherty.

30. The outcome of the Claimant's appeal against the FWW was communicated to him on 27 August 2021 – the appeal was rejected, and the FWW upheld. Mr Goard's letter included the following:

 "*The crux of the matter is that* [four days] *is a long period of sick leave for gastroenteritis which generally lasts for 2 days, which would mean that you could return to work on 1 May, and that your manager tried to contact you but your phone was switched off which to him meant that you were abroad. This casts serious doubt on your reporting sick at a time when you had previously requested annual leave which was turned down.*

 The resolution of this potential misconduct is simple; we have requested in our investigation and since that you produce your flight ticket to demonstrate that your

flight was not booked prior to your requesting annual leave in February 2021, that your flight was not booked to leave the UK on 1st or 2nd May 2021… You have not complied with this request, and still refuse to do so and in so doing provides reasonable grounds for us to believe that you did fraudulently book sick leave so that you could take extended leave to go to Nigeria.

The letter of 25 June 2021 confirming the outcome of the disciplinary hearing considered the effects of your extended absence at work and that as a security officer you are required to demonstrate higher levels of trust, honesty, and integrity. Your long service and clean disciplinary record were also taken into account."

31. The Claimant's Grievance was finally resolved – not in his favour – by means of a Grievance Stage 3 Appeal Outcome letter sent to him on 28 September 2021.

32. In late September 2021, the Claimant collapsed on-site, resulting in his being absent from work due to illness from 20 September to 27 October 2021. He returned to work on 'light duties'.

33. The Claimant filed his claim of detriment relating to his trade union activities on 25 November 2021.

34. The Claimant returned to 'full duties' in February 2022, and then took a period of planned annual leave. The parties had agreed that when he returned to work after that annual leave he would perform all internal patrols, which were to include the sanitiser checks. He was rota-ed to work night shifts at first, returning to day shifts on 28 March 2022.

35. Mr Dziankowski, the Claimant's line manager, asked the Claimant to complete the daily hand sanitiser check on 28 March 2022, and again on 29 March 2022. The Respondent says that on each of these days the Claimant refused to do so.

36. On 29 March 2022, following a discussion with Mr Horan, the Claimant was suspended from work to allow an investigation into allegations against him of potential gross misconduct of "*Repeatedly failing to follow a reasonable Management Instruction: Carrying out the sanitiser patrol*".

37. The Claimant was sent (on 5 April 2022) a letter inviting him to a Disciplinary Hearing on 14 April 2022.

38. The next day the Claimant was certified as unfit for work until 7 May 2022, due to "Anxiety disorder" and "Stress at Work". Mr Horan tried to get in touch with the Claimant, but the Claimant said he was too unwell to speak to him.

39. The Claimant did not attend the meeting scheduled for 14 April 2022, and that meeting was rescheduled to 9 May 2022 by letter sent 21 April 2022. That letter stated:

"*If you are unable to attend in person, please note that we can support you to attend in various ways i.e., we could hold the meeting virtually via MS Teams,*

you could provide a written statement outlining your response to the allegation or you could ask a representative to attend on your behalf."

40. A further Statement of Fitness for Work was provided, dated 6 May 2022, which repeated that the Claimant was not fit for work because of "*stress at work and anxiety disorder*", and that he would not be fit for work until 4 June 2022.

41. The Disciplinary Hearing on 9 May 2022 went ahead in the Claimant's absence (and nor did Mr Doherty attend on his behalf). Mr Horan presented the management case that the Claimant had been refusing to comply with a reasonable instruction to check the sanitiser stations, and Ms Fordham from the Respondent's HR team attended. The decision-maker at the meeting was Mr Simpkins. An extract of that meeting is below:

"*CS: He [the Claimant] has mentioned sanitizer and toilet roll checks. Was DA [the Claimant] asked to carry out a task relating to toilet rolls?*

BH: At first, a couple of years ago, we asked him to check if there was enough toilet rolls and the soap dispensers were full. It was just a visual check. That came to an end and it was just for the sanitiser task to be completed… The reason we ask the Security Officers to carry this out this task is because the Cleaners duties had increased. They were busy cleaning touch points and carrying out additional cleans.

The Security Officers carry out patrols and it makes sense for this to be added to their patrol."

Later on in the meeting, the following is noted:

"*CS: So, he [the Claimant] was asked twice and refused?*

BH: Yes…

LF: Would you consider the task supports H&S?

BH: I would, it is about protecting ourselves and our colleagues. The sanitisers were a government recommendation."

42. Mr Simpkins decided to dismiss the Claimant on 9 May 2022, and wrote to the Claimant on 12 May 2022 to confirm that. He observed that:

"*The sanitiser check is a simple task that is within your capability to carry out. It is a reasonable request as the task can be carried out during your patrols, during which, you carry out other similar tasks.*

Having taken all of the facts, circumstances, and the severity of the situation into account, I am very disappointed by your actions which I consider to fall short of the standard I would expect from an employee in your position.

In reaching my decision I also took into consideration the disciplinary policy states that a repeated refusal to carry out a reasonable instruction is one of the examples of gross misconduct and you have a Final Written Warning on file which states that if any further misconduct takes place, disciplinary action will be taken

and may lead to your dismissal. I therefore reached the decision to terminate your employment from Bouygues E&S Solutions Ltd with immediate effect and I am satisfied that your actions are sufficiently serious, to warrant dismissal without notice."

43. The Claimant appealed that decision, by email dated 20 May 2022, referring to "*continuous victimisation due to my union activities*". His grounds can be summarised as:

    a) The request to conduct sanitiser checks was not a reasonable one as:

        (i) The pandemic should not be used to permanently require Security Officers to carry out "*such an unsafe assignment*"; and

        (ii) The task should fall to the cleaners to perform;

    b) His action was in good faith to protect himself and his colleagues;

    c) He was being targeted due to his union activities; and

    d) The FWW was not reasonable, and should not have been relied upon.

    He also complained that the Respondent's decision to proceed with the Disciplinary Hearing in his absence was not appropriate.

44. In the final day of this hearing, in the course of Mr Anaghara's evidence, it became clear to the Tribunal and the Respondent that Mr Anaghara was saying that he and the Claimant had brought a joint Employment Tribunal claim against the Respondent in respect of the Respondent's instruction to Security Officers working on the EOS Contract to carry out sanitiser checks – a different claim to those that are the subject of this hearing. The Tribunal Panel has checked the Tribunal records, and we can see that a Claim Form was sent to the Tribunal by Mr Anaghara, on behalf of himself and the Claimant. That Claim Form was received by the Tribunal on 6 June 2022, and it identified Mr Doherty as Mr Anaghara's representative. The Claim Form said:

    "WE ARE NOT MAKING ANY CLAIM JUST THAT OUR EMPLOYER ADD ADDITIONAL CONTRACT TO OUR JOB.WHICH WE REFUSE TO DO AND THREATEN TO SACK US.

    THE JOB HAVE TO DO WITH COVID-19 WHICH FALL UNDER THE CLEANING SECTION",

    and later on:

    "THIS HAPPEN SEPTEMBER 2021 WHEN OUR EMPLOYER ASK US CARRY SANITISER AND DO TO EVERY FLOOR AND REFILL THE EMPTY ONES.THE SECURITY OFFICERS REJECTED IT BUT WE WERE THREATEN WITH DISCIPLINARY ACTION OTHERS BACK DOWN.

    BUT ME AND DAVID REFUSE BECAUSE THE CLIENT(NCA) TOLD US THEY GAVE OUR EMPLOYER A NEW CONTRACT ON COVID-19 CLEANING.

WHICH THE CLEANERS SUPPOSE TO DO NOT SECURITY OFFICERS ON SITE.

WE WANT JUSTICE."

The Tribunal can see that the ACAS Early Conciliation Certificate sent by Mr Anaghara with his Claim Form refers to the Date of receipt by Acas of the EC notification as being 11 December 2021, and the Date of issue by Acas of the certificate was 21 January 2022, with the names of Mr Anaghara and Mr Ajiboye as Prospective Claimants.

This is referred to as the **Joint Claim** below.

45. On 7 July 2022, the Tribunal wrote to Mr Anaghara, the Respondent and the Claimant, rejecting the Joint Claim for lack of jurisdiction, given it appeared to be for breach of contract and the Claim Form indicated that Mr Anaghara's employment was ongoing.

46. An appeal of the Claimant's dismissal was held on 11 July 2022, with Mr Chautemps, a Board Director, acting as joint decision-maker with Geradina Abarno, Head of HR. Mr Simpkins attended to present the management case, and the Claimant attended, accompanied by Mr Doherty. The key points to note from this meeting are:

    a) Mr Doherty objected to Mr Simpkins' presence, as Mr Doherty said it undermined the independence of Mr Chautemps and Ms Abarno as decision-makers on the appeal;

    b) Mr Simpkins presented management's position – using the arguments referred to in the Disciplinary Hearing outcome letter;

    c) The Claimant said, at one point: "*the allegations was that I refused reasonable request, this is not true*", and at another: "*We maintain a safe environment; it is not to be involved in a cleaner's role*"; and

    d) Mr Doherty reiterated that the Claimant disputes the propriety of the FWW.

47. The appeal outcome was communicated to the Claimant by letter on 3 August 2022. The decision to dismiss the Claimant was upheld by the Respondent. The letter sent by Mr Chautemps concluded that:

    a) The management instruction to undertake sanitiser checks as part of their patrols was a reasonable one, and within the Claimant's terms and conditions of employment;

    b) The Respondent refuted the Claimant's contention that the Security Officers were asked to refill the sanitisers or the toilet rolls – they were to note if they observed that they needed replenishing and pass that information to the cleaners;

    c) The allegation of victimisation related to union activities was denied; and

d) It was not reasonably practical to continue to delay the Disciplinary Hearing, and it was sensible for the panel to proceed in the Claimant's absence.

48. The Claimant filed his second Claim Form against the Respondent, bringing a claim of unfair dismissal, the next day on 4 August 2022.

The disputed facts

Disputed fact 1: Did the Claimant's actions in both flying to Nigeria on 29 April 2021 and refusing to disclose the details or documentary evidence concerning his outward flight, amount to misconduct engaging the Respondent's Disciplinary Policy?

49. Two of the Respondent's policies are relevant to this analysis: its Disciplinary Policy and Procedure and its Sickness Absence policy. The latter is dated June 2018. The former is not dated, but no argument was made about its application to the Claimant by Mr Doherty.

50. Relevant extracts from those policies appear below:

a) The Disciplinary Policy and Procedure:

"*Minor breaches of discipline may include failure to comply with rules or standards concerning:*

- *Attendance…*

Usually the appropriate action for such relatively minor breaches of discipline which in isolation are not of serious consequence, and where an employee had not heeded informal reprimands, would be to issue a first or second level warning. The level of warning would depend on the circumstances of the particular case…"

"*The following list of offences is not intended to be comprehensive and merely serves to provide examples of acts normally considered as gross misconduct: …*

- *Deliberate falsification of documents or records e.g. expense claims, statutory records, time sheets, etc. …*
- *Repeated refusal to carry out a reasonable instruction within the contract of employment.*"

b) The Sickness Absence policy:

"*If you are ill or cannot come to work for any other unforeseen reason, you must call the Absence Reporting Line as soon as possible…"*

"You should let the Absence Reporting Line know: why you cannot attend work, when the problem started, when you expect to return to work, and any other information they request…"

"False claims for sick pay and deliberate falsification of Attendance Records or time sheets are considered Gross Misconduct and could result in dismissal..."

"On your return to work following any sickness or other absence, you will have an interview with your manager, regarding the absence. During this interview, you will be encouraged to advise of any medication you are on, whether the issue could re-occur and if there is any help the Company can give you to avoid a re-occurrence."

51. The Claimant says that:

    a) He complied with the Sickness Absence policy. As that policy instructs, he telephoned the absence reporting line and gave them the information he was supposed to, including the anticipated duration of his condition, which he estimated at four days;

    b) There is nothing in the Sickness Absence policy to the effect that he was not to fly to Nigeria during his sickness absence;

    c) As for how he could manage a flight to Nigeria on the first day of gastroenteritis which he expected to last four days, he says that he knew that the only medicine which would help him recover was traditional African medicine, which he had run out of, and therefore the flight was something he needed to undertake in order to recover;

    d) There is nothing in the Sickness Absence policy which requires him to divulge information concerning when he flew to Nigeria, or when that flight was booked or rescheduled, and he considers it an invasion of his privacy to be required by the Respondent to provide it; and

    e) He was a long-serving employee of, at the time, 17 years' service with an unblemished disciplinary record, and the Respondent's decision to issue him with the FWW was, he says, unreasonable, and calls for explanation. He points to his activities as a workplace organiser for the GMB as providing that explanation.

52. The Respondent, for its part, says:

    a) It is highly suspicious that he apparently knew, on the first day he contracted gastroenteritis, that it would last four days, and that that period happened (with rest days) to cover the period of leave that he had requested and was refused by Mr Simpkins two months earlier;

    b) It is also incredible that, with gastroenteritis, he was able to undertake a flight to Nigeria;

    c) It is unbelievable that, as the Claimant indicated in oral evidence, on the morning he developed gastroenteritis he was able to telephone the airline and reschedule his flight purportedly booked for when his approved leave commenced so as to instead travel on that same day;

d) Its request for the details of which outward flight the Claimant took, and when it was booked and (if relevant) rearranged, was a reasonable one that the Claimant should have complied with at the time of his return to work;

e) Moreover, the Tribunal Ordered the Claimant to provide this information on at least two occasions, which the Claimant did not comply with, which also indicates that the Claimant's story should not be believed;

f) The Claimant's apparent compliance with the reporting requirements of the Sickness Absence policy is not the relevant issue – the issue is whether his conduct engaged the Disciplinary Policy and Procedure, which the Respondent said it did, involving a false claim for sick pay. In any event, the Respondent says, the policy does not attempt to provide a comprehensive list of behaviour that amounts to misconduct, but falsely claiming to be sick so as to obtain additional leave clearly does engage that policy;

g) It was reasonable for the Respondent to issue the Claimant with a FWW in respect of this behaviour. As Mr Simpkins said in his written and oral evidence, he considered the behaviour sufficient to justify summary dismissal, but he concluded that the FWW was appropriate having taken account of the Claimant's long service and clean disciplinary record; and

h) Mr Simpkins had treated a different employee, in analogous circumstances, in the same way, and issued that employee with a final written warning for falsely claiming sick leave to extend a booked holiday. This, the Respondent says, shows that the Claimant's union activities (of which Mr Simpkins says he was unaware) played no part in the decision to issue him with a FWW.

53. The Tribunal prefers the Respondent's position on this point: it is simply unbelievable that a person who develops gastroenteritis would wish to, or be able to, rearrange a flight booked for a later date to bring it forward to that same day when his symptoms began. The Tribunal members cannot see how a person known to have gastroenteritis would be able to manage a long-haul flight and would therefore act so as to bring that scheduled flight forwards. This, together with the Claimant's failure to provide evidence of when the flight was booked, and when it was booked for, over the two years and nearly six month period that has passed since that time and this hearing, lends very considerable weight to the Respondent's contention that the Claimant put into action a plan to enable him to have the extended leave that Mr Simpkins refused.

54. The Claimant's position on this matter is simply not at all credible.

55. The Tribunal is conscious of the fact that, upon the Claimant's return from his sick and then annual leave, the Respondent was not in possession of all the facts that we now are, namely, his subsequent admission that he flew on 29 April, the

Claimant's failure to comply with Tribunal Orders to disclose his flight information, and the additional time that has passed since that information was initially requested by the Respondent. Even so, putting ourselves in the shoes of Mr Simpkins, faced with the information that he then had, we conclude that it was entirely reasonable for the Respondent to conclude that the Claimant's conduct engaged its disciplinary policy and was of a very serious nature.

56. Mr Doherty pointed the Tribunal to review the decision of the Newcastle Employment Tribunal in the case of *Kane v Debmat Surfacing Ltd* (with case number 2501862/2020). That case concerned an employee who, whilst off sick with chest pains, was apparently observed at his local pub. The Employment Judge in that case, EJ AE Pitt, observed that "*There is nothing in the disciplinary procedure prohibiting an employee from acting in this way*", i.e., going to a public house when absent due to ill health, and "*There is no rule the respondent can point to, which says that an employee cannot socialise in whatever way they deem appropriate whilst absent from work through illness*". The *Kane* decision is not, of course, binding on us, but in any event we see marked differences between it and the facts here. Firstly, the ailment in *Kane* was chest pains, which wouldn't necessarily impede a person's ability to go to the pub. In this case, the Tribunal is of the firm view that gastroenteritis would impede a person getting on a long-haul flight. The second significant difference is that there was no suggestion that the claimant in *Kane* refused to cooperate with the employer's enquiries. There is that evidence in this case. Where there is reasonable doubt about the truthfulness of an employee's account of their absence from work, we consider that employee should cooperate with any reasonable enquiries of their employer. The Claimant in this case did not do so.

<u>Disputed fact 2: What was the Respondent's sole or main purpose in issuing the Claimant with the FWW?</u>

57. The Claimant's position is that the FWW was retaliation on the part of the Respondent for the Claimant's role in making and organising the Grievance. The Claimant says that Mr Simpkins, as General Manager of the EOS Contract, was the subject of the Grievance (given the changes that were the subject of the Grievance concerned the EOS Contract sites), and that he was motivated by a desire to penalise the Claimant for the Grievance by issuing him with the FWW.

58. The Respondent denies this, and says that its sole purpose in issuing the FWW was to respond to the Claimant's misconduct in respect of the Leave Matters. In fact, it says, it considered that misconduct sufficiently serious to justify dismissal, but Mr Simpkins took account of the Claimant's long service and unblemished disciplinary record in instead settling upon FWW as the appropriate response.

59. Mr Simpkins was the Respondent's decision-maker in relation to the Leave Matters disciplinary process, and he said in oral evidence that:

a) He did not regard the Grievance as in any way personal – it concerned two of the organisation's decisions made in response to the Covid-19 pandemic, which he had supported;

b) He did not consider that he was biased against the Claimant in any way by reason of the Grievance when he determined the Leave Matters disciplinary hearing. In fact, he said, it would have been difficult to find a manager of the appropriate level who could have determined the Leave Matters disciplinary hearing if that were the approach taken, because the management team as a whole were responsible for determining the Respondent's Covid-19 responses;

c) He had been involved in hearing a similar disciplinary matter, around two years prior to the Leave Matters one pertaining to the Claimant, and he reached a similar conclusion – that an employee who had claimed to be sick so as to extend authorised annual leave should be issued with a final written warning – and that shows the Claimant's trade union role did not influence the outcome here; and

d) He was unaware that the Claimant was a workplace organiser for the GMB until he saw the Bundle in connection with these proceedings – he had no knowledge of that fact at the time he took the decision to issue the FWW to the Claimant. (He did know that the Claimant was a member of the GMB, because he had had GMB representation in the disciplinary and grievance hearings.)

60. As noted above, the Tribunal considers that the Leave Matters incident was rightly the subject of a disciplinary investigation. We consider that the Respondent's perception that the Claimant had falsely claimed to be sick and had unreasonably refused to provide evidence concerning his flight were the main reasons for the FWW.

61. The Tribunal was left with the impression that the Respondent did view the Claimant as a challenging employee. The Claimant had exhausted all means of challenging the addition of the sanitiser checks to his tasks as a Security Officer – the Grievance and the related internal appeal procedure, an ACAS conciliation process, and then bringing an Employment Tribunal claim (which failed for want of jurisdiction). The Respondent knew that the Claimant, in resisting the instruction to conduct sanitiser checks, was working with at least one other person (Mr Anaghara) and it potentially knew he was working with and organising more (being the other eight GMB members among the Security Officer cohort who apparently supported the Grievance) – but even if this was an influence in the decision to issue him with a FWW rather than a lesser disciplinary sanction, we consider the main reason for the decision to issue him with a FWW to be the Claimant's misconduct in claiming to be sick when (as the Respondent suspected) he travelled to Nigeria, and refusing to comply with a reasonable management instruction to share the evidence of his flight booking with it.

Disputed fact 3: Was the Claimant taking part in the activities of an independent trade union at the time he was organising the Grievance?

62. The Claimant's position is that he was. He points to the fact that the Grievance was sent from his email account, and that it is signed by him and Mr Anaghara. He also points to handwritten confirmation, apparently from either further Security Officers, that they supported his filing the Grievance on his behalf. This latter document, from November 2021, post-dates the Grievance filed in October 2020, but the Claimant said that he did collect their signatures at the time on print-outs of the email sent, but he did not retain those documents. The signed piece of paper he has disclosed includes the following:

"*The officers names below put down their names willingfully to confirm I organized and coordinated and filed aforementioned grievances against Bouygues Security Manager at my site*".

63. Mr Doherty, a GMB Trade Union/Health and Safety Representative with the GMB Trade Union, described the Claimant as a local workplace organiser, and confirmed that both the Claimant and Mr Anaghara were taking part in the activities of the GMB at their site at the time of organising the Grievance.

64. Regardless of Mr Simpkins' knowledge of that fact, it is clear that the Claimant was taking part in the activities of an independent trade union at the time he was organising the Grievance - the Tribunal has no reason to doubt the evidence of Mr Doherty on this point – he has, with the authority of the GMB, claimed the Claimant's actions as GMB activities. We therefore find that the Claimant was taking part in the activities of an independent trade union at the time he was organising the Grievance.

Disputed fact 4: Was the addition to the Security Officer's tasks to include sanitiser checks "a reasonable management instruction within the contract of employment"?

65. The quoted text is included as an example of behaviour which would normally be considered by the Respondent to amount to gross misconduct.

66. There are four pieces of evidence that need to be considered when assessing this question:

    a) The Claimant's contract of employment;

    b) The Claimant's job description;

    c) The Employee Handbook; and

    d) Evidence about the Claimant's pre-existing duties.

67. The Claimant's contract of employment included the clause set out below:

"*16. HEALTH & SAFETY*

The Company is committed to ensuring, so far as is reasonably possible, the health, safety and welfare of all of its employees. Every employee has an obligation, pursuant to the Health and Safety at Work Act 1974, to work with the Company to control risks and take reasonable care in the workplace. You therefore have a responsibility to familiarise yourself with the relevant procedures and training and abide by all the Company's rules and procedures."

68. The Claimant's job description included the following:

"*Main Purposes of Job To form part of security team in the successful operation on all London sites of the EOS contract, to ensure the safety and security of the employees, visitors and clients property on the estate…*"

The Main Duties & Responsibilities section of the job description lists those duties and responsibilities, and that list contained:

"*14. To fulfil Health & Safety responsibilities by adherence to the requirements of the Company's Health & Safety Policy and Health & Safety Management Plans*",

"*15. To comply with the Company's Policies, Management Plans and Procedures*", and

"*16. To undertake such other duties appropriate to the level and character of work as may reasonably be required within the Department / Service. Significant permanent changes in duties will require agreed revisions to be made to this Job Description*".

69. The contractual section of the Respondent's Employee Handbook contained:

a) In the Duties section:

"*the nature of the business means that all our employees have to be flexible and open to change… It is also a condition of your employment that you may have to carry out other duties of a similar type/level to your normal job or duties for which you are capable of assignment or secondment to by reason of your qualification, training or experience*"; and

b) In the Conduct section:

"*During the course of your employment you may be asked by your manager to carry out other duties or instructions to meet the needs of the business. These instructions and duties are considered to be within your role and/or capability and should be carried out within the timescales specified. Should you have concerns regarding these instructions you must raise them with your manager immediately. Failure or refusal to carry out any such requests, without good cause, may result in the Company instigating the Disciplinary Procedure.*"

70. The parties agree that the Claimant's pre-existing duties included checking the bathrooms for any leaking toilets, and for any people (after a sad incident when an employee had passed away in the bathroom), and the Security Officers

checked these things when on their regular patrols around the building. They completed a Daily Occurrence Book (the **DOB**) when doing their patrols. If they observed, for example, a leaking toilet, they would pass that information on to another team for it to be fixed.

71. The Respondent avers that the above provisions of the Claimant's contract (as understood in the context of the Job Description), together with the pre-existing practices described in the previous paragraph, render the instruction to carry out sanitiser checks a reasonable one within the scope of the Claimant's contract. Moreover, they note that the instruction originated at a time (October 2020) when Covid-19 posed a real threat to health and safety, and that it was connected to a request from the client to try to protect staff and others using the building from that virus. This, the Respondent says, makes the case for the reasonableness of the instruction stronger.

72. The Claimant did and does not regard the instruction as a reasonable one. He considered it part of a 'slippery slope' whereby the Respondent was trying to make the Security Officers take over duties that properly belonged to other roles (in this case, those of the cleaning staff who worked in the building), so as to reduce costs incurred in servicing the contract. The sensitive context of the building in which the Claimant worked (being one used by the National Crime Agency) made it all the more important, he says, that the attention of the Security Officers remained on *security*, and not on cleaning matters.

73. The Tribunal notes that the instruction was initially issued on 29 October 2020, that the Claimant's grievance concerning it was finally resolved with a Grievance Stage 3 Appeal Outcome (not in his favour) on 28 September 2021, and he was the subject of disciplinary action for a putative failure to comply with this instruction for two failures at the end March 2022. While this instruction was initially given at the time of the pandemic, the context was somewhat different by the end of March 2022, giving possible credence to the Claimant's 'slippery slope' contention.

74. However, we see force in the Respondent's argument that the Claimant's contractual terms encompassed this instruction: it was furthering the health and safety of the people using the building, it was not an onerous task given the Security Officers were already patrolling the building and performing some non-security-specific checks, and the duties of the cleaners (who, unlike the Security Officers, did not work 24/7) had increased. We consider it was a reasonable management instruction, certainly in October 2020, when people were asked to 'muck in' and do their bit to help stop the spread of Covid-19, and still in March 2022, given the nature of the Security Officers' existing patrols and the convenience of asking them to do some minimal checks while doing those patrols. We consider the sanitiser checks were minimal checks that were reasonable for the Respondent to expect the Security Officers to perform in the context of their existing patrol checks work, which was of a similar nature. We

also consider them to be within the scope of the Claimant's contract of employment – clause 16 anticipates that the Respondent would issue instructions to the Claimant to control risks to health, and the Tribunal considers the sanitiser checks to be an instance of this.

Disputed fact 5: Did the Claimant perform the sanitiser checks when patrolling the building? If so, from which date?

75. In the course of giving his oral evidence, the Claimant said that he had started to perform the sanitiser checks from around August 2021. The Respondent expressed surprise at his evidence on this point, and said that the Claimant had never before asserted that he had carried out these checks, including in his witness statement, which is silent on this important point.

76. The Respondent said that the Claimant's new argument that he had performed the checks ambushed it somewhat, and meant that it had not included documentary evidence in the Bundle relevant to this point, or called witnesses to speak to their first-hand experience of whether or not the Claimant had performed the checks (although Mr Simpkins was in a position to say what he had been informed by Mr Dziankowski and Mr Horan on the question).

77. The Respondent says that the Claimant did not perform these checks, and points to the following in support of its position:

    a) Mr Simpkins had been informed by the Claimant's line manager, Mr Dziankowski, that he had not been performing these checks. Mr Dziankowski confirmed to Mr Horan that the Claimant had not performed the checks on 28 March 2022 by email:

       "*As we spoke earlier on today in the morning I asked David to check the sanitizer. David said no. I asked why he doesn't want to check sanitizer David replay the case is still on. David said if manager not sure about certain request like checking sanitizer by David he supposed to ask HR for more information*",

       and on 29 March 2022, again by email:

       "*Due to undeniable fact that sanitizer and toilet roll check issue is currently a judicial matter I would like you Brendan Horan my manager to communicate to me in writing whatever you want to say on this subject. I will replay you*";

    b) The Claimant had vociferously objected to performing the checks, and his objection had formed part of the Grievance, which wasn't finally resolved until the end of September 2021. Whilst that resolution occurred prior to the 28 and 29 March 2022 dates in question, his strongly-held view that he should not be performing these checks is a point in favour of the

Respondent's contention that he did not perform the checks on these dates;

c) The Claimant's witness statement says nothing to the effect that he did perform the checks – his written evidence focuses on why he considers the instruction to do them was an unreasonable one;

d) The Claimant did not attend the Disciplinary Hearing about this matter (he was unwell), but at the appeal meeting the Claimant said:

"*the allegations was that I refused reasonable request, this is not true. The supervisor asked me to carry out sanister* [sic] *checks and toilet roll checks, this response does not constitute a refusal. The response I provided, was to inform him (Brendan), that this matter, by undertaking the activities, should take place after the decision has been made at the tribunal. Only after the decision from the tribunal has been made, then I would do the activities, but not until then*".

This, the Respondent says, was the Claimant agreeing that he had not performed the checks, and that he would not do so until an employment tribunal ruled that this was a reasonable instruction; and

e) The Claimant's appeal against his dismissal does not say anything about the Claimant having performed the sanitiser checks. The appeal is detailed, and focuses on the reasonableness of the instruction. If the Claimant had been performing the checks, the Respondent says, he would have said so in this document.

78. The Claimant's oral evidence in the hearing was that he did refuse to carry out the checks at first, until both:

a) it was made clear to him that the Security Officers were only required to run sanitiser checks and not to refill the sanitising stations; and

b) an ACAS conciliator told him, via his representative, Mr Doherty, that it was reasonable to carry out the checks.

The Claimant says that, from the point onwards, which he said he thought was reached around August 2021, he did carry out the sanitiser checks – and in any event, he says, it was well in advance of the 28 and 29 March 2022 dates in contention.

79. In support of his position that he did carry out the checks, the Claimant points to:

a) The fact that he recorded that he carried out the checks in the DOB. No DOBs were in evidence before the Tribunal, which the Claimant says is because the Respondent refused to disclose them;

b) The evidence of Mr Doherty, who said in his witness statement that:

"*After the outcome of 08/02/2021 pg 163-164, the Claimant and colleagues withdrew their joint claim from the Tribunal, advised their*

members/colleagues to carry out the sanitiser checks during patrols, and recorded them in their Daily occurrence book (DOB)";

c) Mr Doherty's oral evidence was that he saw the DOBs:

"*I saw his* [the Claimant's] *name and that he had patrolled. They* [i.e., the Claimant and Mr Anaghara] *put sanitisers and every other check done together. Any issues with the checks were identified in the DOB.*"

Mr Doherty, like the Claimant, said that there are no DOBs in the Bundle because the Respondent refused to disclose them;

d) Mr Anaghara's witness statement supports the Claimant's contention. It says:

"*15. The Claimant and I escalated the non-compliance of the Respondent to the tribunal with the ACAS conciliator advising the Respondent. Still, the Respondent never took the advice from the Conciliator. Instead, the Respondent quickly fabricated a false instruction to save the Manager.*

16. The Respondent quickly reversed the initial instruction instead of instructing us to clean toilets and refill chemicals when the Respondent realized we had approached the tribunal.

17. As the Conciliator tried to mitigate the issue, the Respondent denied it, and a detailed instruction was requested. Respondent refuted and reverted instruction to ordinary checks.

18. We withdrew the claim based on the Respondent's denial during Conciliation. The Claimant, myself and other colleagues then carried out the checks at each patrol and recorded them on the Daily Occurrence Book.

19. Contrary to the Respondent's claim that we didn't carry out the sanitiser checks, which is false, they have refused to produce the site instruction requested at the meetings and the daily record book in the Respondent's custody.

20. The disciplinary process of the Claimant and myself was premeditated, biased and well-planned to dismiss us eventually"; and

e) Mr Anaghara's oral evidence was that he and the Claimant started to carry out the sanitiser checks after the ACAS conciliator told them to do so, which he thought occurred around August or September, though he was unsure of which year.

80. The Tribunal is left with the unenviable task of trying to sort through this confusing and conflicting evidence to determine whether or not the Claimant carried out the sanitiser checks on 28 and 29 March 2022.

81. The task is all the harder as the fact pattern around the various tribunal claims that were brought is confusing. Because it was only in the course of Mr

Anaghara's evidence (on the final day of the hearing) that the Tribunal understood that the references in the three Claimant-supporting witness statements to ACAS conciliation and to a claim about the sanitiser instruction was to a different claim than the two being heard today, we could only check the Tribunal records after conclusion of evidence and submissions, and therefore this information was not available to either party. We have recorded what we found in relation to the Joint Claim in the chronology above. That chronology, when read with:

a) Mr Anaghara's witness statement;

b) the Claimant's position set out in the appeal hearing minutes;

c) Mr Doherty's witness statement;

d) the Claimant's purported response to Mr Dziankowski, recorded in Mr Dziankowski's email to Mr Horan on 28 March 2022; and

e) the Claimant's purported response to Mr Dziankowski on 29 March 2022, which again Mr Dziankowski recorded in an email to Mr Horan on that same date,

indicates that as at 28 and 29 March 2022 the Claimant was still refusing to carry out the sanitiser checks. The Joint Claim was rejected by the Tribunal for want of jurisdiction in early July 2022 (we cannot see that, as Mr Anaghara and Mr Doherty assert, it was withdrawn by Mr Anaghara and the Claimant), and the minutes of the 11 July 2022 appeal hearing meeting record the Claimant as saying that:

"*Only after the decision from the tribunal has been made, then I would do the activities, but not until then*".

82. That language refers to the future, which may suggest that the Claimant had not at that point received the Tribunal's rejection of the Joint Claim dated 7 July 2022. Alternatively, it could be referring to the early conciliation in respect of the Claimant's second Claim Form for the complaints being determined in these proceedings (the Claim Form complaining of unfair dismissal), which conciliation ended on 5 July 2022 (and the Claimant filed his Claim Form in respect of that unfair dismissal claim on 4 August 2022). Either would explain why the Claimant appears to be referring in the appeal minutes to his complying *in the future* if the tribunal so rules, rather than referring to compliance dating back to August 2021. Mr Dziankowski's email of 28 March 2022 refers to the Claimant as having said "*the case is still on*" as an explanation for his non-compliance, and Mr Dziankowski's email of 29 March 2022 records that the Claimant said, on that date, "*Due to undeniable fact that sanitizer and toilet roll check issue is currently a judicial matter I would like you Brendan Horan my manager to communicate to me in writing whatever you want to say on this subject. I will replay you.*"

83. The three Claimant witnesses refer to the Respondent refusing to disclose the DOBs from 28 and 29 March 2022, however, no correspondence was included

in the Bundle from the Claimant to the Respondent seeking such disclosure, and no application for specific disclosure was made to the Tribunal. Mr Simpkins' evidence is that the DOBs simply recorded the start and end times of a patrol and not whether checks were performed. He says that a separate sanitiser check form was to be filled in by the checking Security Officer, and this is consistent with the initial 29 October 2020 instruction to perform the sanitiser checks. Either way, the DOBs or the sanitiser check forms, would have aided the Tribunal in answering this question, and would have been relevant to the disciplinary hearing in respect of this matter which occurred on 9 May 2022. This documentary evidence would have been all the more important given the Claimant's absence from that hearing.

84. While Mr Doherty questioned the accuracy of the appeal hearing minutes, the minutes themselves note that the Claimant corrected a different aspect of them on 27 July 2022, which indicates that the Claimant at least thought the above-quoted passage to be accurate.

85. Furthermore, we place great weight on the facts that:

    a) As noted above, the Claimant's witness statement does not say that he carried out those checks or that he recorded the output of those in any DOB; and

    b) (The fact that weighs most heavily in our assessment,) Despite sending a considered appeal against the decision to dismiss him on 20 May 2022, no-where in that appeal letter does the Claimant mention that he did in fact carry out the checks. This would be most surprising if he did, in fact, carry out the checks – the Respondent saying that he failed to do so *was the reason he was dismissed* (as clearly set out in the dismissal letter). It is simply not credible that, if he had performed the checks on those dates, the Claimant would not mention that fact in his appeal against that decision.

86. For the above reasons, we conclude that the Claimant did not carry out the sanitiser checks on 28 and 29 March 2022.

The hearing

87. The Claimant was represented in the hearing by Mr Doherty, his trade union representative, and the Respondent by Mr Hill, Counsel.

88. The Tribunal spent some time at the outset of the hearing discussing the scope of the claims brought. The Claimant initially sought to make an application to amend his claim so as to include a complaint of automatic unfair dismissal and/or dismissal on the grounds of trade union activity pursuant to section 152 of the 1992 Act, but withdrew that application before it had been heard.

89. The Claimant also confirmed that, despite there being references to wider matters (such as a failure to pay him in full for some sick leave, health and safety breaches, and race discrimination), he was not looking to pursue those matters as complaints in their own right, but rather that formed part of the general background by which he was seeking to explain the nature of his activities as a workplace organiser at the site at which he worked, on behalf of GMB members among his Security Officer colleagues.

90. The Respondent served a hearing bundle, 303 pages of which was agreed. The back of that Bundle contained two documents which the Claimant wished to be included, which inclusion was resisted by the Respondent as irrelevant or repetitive of material already included elsewhere in the Bundle. Those documents were:

    a) A document entitled “Further Particulars of Claim”, prepared by the Claimant and apparently dated 27 June 2022 (though it does not appear to have been sent to the Respondent or the Tribunal); and

    b) An email from the Claimant to himself dated 15 January 2023.

    The Tribunal could see that each of these documents contained material that did not form part of the Claimant’s pleaded case - referring to other matters, such as alleged health and safety breaches by the Respondent, grievances raised by the Claimant, and potential race discrimination, which had not been referred to previously, including at the Case Management Hearing of 1 August 2023. Again, Mr Doherty confirmed that the Claimant was not seeking to expand his claims to include these matters, but rather the Claimant wanted to include that material as background to the claims he is bringing. On that basis, the Tribunal determined that those documents should be included in the Bundle, and they formed pages 304 to 307, and then 308 to 309, of that Bundle.

91. Evidence was given by Mr Simpkins and Mr Chautemps on behalf of the Respondent. The Claimant gave evidence on his own behalf, as did Mr Doherty, who had acted as his trade union representative in relation to the events with which this case is concerned, and Mr Anaghara, who was a Security Officer colleague of the Claimant’s at the time of the events complained of.

92. On the third day of the hearing, evidence from Mr Anaghara referred to a third Tribunal claim brought by the Claimant against the Respondent, that being a claim for breach of contract in connection with the addition of the sanitiser checks to the Security Officers’ rounds, which had been jointly brought by him and the Claimant. The Tribunal then understood that references to a tribunal claim and discussions with Acas conciliator made in day two of the hearing had also been referring to this claim – but that was far from apparent at the time. The Respondent’s position is that it was unaware of such a claim. The Claimant and Mr Doherty confirmed both that that joint claim has been withdrawn, and that it is not part of the claims being heard here. (As noted in the chronology, the tribunal

records in fact indicate that that claim was never accepted by the Employment Tribunal, for want of jurisdiction.)

Law and related good practice guidance

Unfair dismissal: The law on dismissal for misconduct

93. The protection of employees from unfair dismissal is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**).

94. Section 98(1) sets out that that an employer may only dismiss an employee if it has a **fair reason** (or principal reason) for that dismissal:

    "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

    (a) the reason (or, if more than one, the principal reason) for the dismissal, and

    (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

95. The Supreme Court in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731 held that:

    "*In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker*".

96. Subsection (2) of section 98 identifies "*the conduct of the employee*" as a reason falling within subsection 98(1).

97. In the context of a dismissal for "conduct", the employer must have reasonably believed the employee guilty of misconduct at the time of the decision to dismiss them. The seminal decision of *British Home Stores Ltd v Burchell* 1980 ICR 303, EAT, as refined in subsequent authorities such as *Singh v DHL Services Ltd* EAT 0462/12 and *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, set out three questions to be answered when assessing the fairness of a conduct dismissal:

    a) Did the employer believe the employee guilty of misconduct at the date of dismissal?

    b) Did the employer have reasonable grounds for that belief? and

    c) At the stage when the employer's belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

98. As for the degree of thoroughness required for an investigation to be reasonable, that is, according to the EAT in the case of *ILEA v Gravett* [1998] IRLR 497:

"*infinitely variable; at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase. At some stage, the employer will need to face the employee with the information which he has. That may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing*".

99. The requisite degree of thoroughness of an investigation is not only assessed by reference to the weight of initial evidence of what the employee is alleged to have done (e.g., whether they have been "*caught in the act*"), but also by the gravity of the charges and their potential effect upon the employee (*A v B* [2003] IRLR 405).

100. Subsection (4) of section 98 provides:

"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

101. In other words, when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at 'in the round', the dismissal was fair or unfair.

102. The test in section 98(4) is an objective one. When the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).

103. In many (though not all) cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).

104. Therefore, if all three of the *Burchell* questions are answered in the affirmative, a further question must be answered by the Tribunal – whether, in light of its genuine and reasonable belief in the employee's misconduct, the sanction of dismissal was within the range of reasonable responses open to it on an objective

basis (*Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ 903).

105. Section 98(4) (i.e., the fourth question referred to above) requires a tribunal to "*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*" (*Taylor v OCS Group* [2006] EWCA Civ 702). As Smith LJ, giving the judgment of the Court, said in (paragraph 48 of) that case: "*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not… the employment tribunal … should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss. So, for example, where the misconduct which founds the reason for the dismissal is serious, an employment tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.*"

106. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

    "*It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer's process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness*".

107. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the "*size and resources of the employer*".

<u>Unfair dismissal: Investigating misconduct</u>

108. While the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23), that does not mean that the test is assessed multiple times to separate aspects of the same dismissal. The Court of Appeal in *Taylor* held that considering procedural fairness is part-and-parcel of considering whether the employer's decision to dismiss was within the range of reasonable responses.

109. The opportunity for an employee to put his side of matters is an important part of a reasonable investigation, and part of the basic requirements of natural justice

(*Khanum v Mid Glamorgan Area Health Authority* [1978] IRLR 215) – but it is a principle rather than an absolute rule. Whether an investigation without the employee's input is in fact fair will depend on the circumstances of the case, "*But it must be very much the exception rather than the rule that the hearing could proceed without the employee attending*" (Ansell HHJ in *William Hicks & Partners (A Firm) v Nadal* UKEAT/0164/05/ZT).

110. If there has been a procedural flaw at the 'decision to dismiss' stage, but that stage is followed by an appeal brought by the employee against that decision, it is the entirety of the employer's process (together with its reasons for dismissal) that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

Unfair dismissal: The ACAS Code

111. Section 207 of the 1992 Act provides that:

"*(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.*

(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provisions of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

These provisions apply to the ACAS Code.

112. The relevant extracts of the ACAS Code are set out below:

"*5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*"

"*6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*"

"*7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.*"

"*12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The*

employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this."

"*25. Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available.*"

Unfair dismissal: Guidance produced by ACAS on disciplinary matters

113. Unlike the ACAS Code, employment tribunals are not *required* to have regard to ACAS guidance, including its guidance entitled "Discipline and Grievances at work, The Acas guide", dated July 2020 (the **ACAS D&G Guidance**), and its guidance on investigating disciplinary matters (which begins at Step 1: Deciding to investigate - Investigations at work - Acas) (**ACAS Investigations Guidance**). ACAS guidance does, though, provide good practice advice from an expert body.

114. Relevant extracts from the ACAS Investigations Guidance are set out below:

a) From "*Step 2: Preparing to investigate*": "*Where possible, the employer should get somebody who's not involved in the case to carry out the investigation, for example another manager or someone from HR.*

This is to keep things as fair as possible."

b) From "*Step 3: Carrying out an investigation*": "*The person investigating should get all the information they reasonably can and need for the case…*

Types of physical evidence could include:

- *emails*
- *paperwork*
- *receipts*
- *computer records*
- *phone records*
- *CCTV recordings*
- *attendance records*".

c) The following is also from "*Step 3: Carrying out an investigation*": "***Holding investigation meetings***

In both disciplinary and grievance investigations, the person investigating might also need to get information from:

- *the employee*
- *'witnesses' – other employees involved*
- *other witnesses, for example clients or customers*

If you need to invite someone to an investigation meeting, you should:

- *let them know in writing – for example, a letter or email*
- *confirm the date, time and location*
- *give them reasonable notice*".

d) Step 3 also includes: "*In a disciplinary investigation meeting, there is no legal right to be accompanied but it's good practice for employers to allow it.*"

e) From "*Step 4: If there are witnesses*": "*Witnesses can give important evidence that might help decide the outcome of a disciplinary or grievance case.*

If there's any witnesses with information about the discipline or grievance issue, the person investigating can ask them to write it down in a 'witness statement'.

The person investigating can also have a meeting with a witness to ask them what they know or saw. Someone should take notes during the meeting. At the end of the meeting, the witness should sign the notes and these can also form a witness statement...

The employee under a disciplinary investigation or who has raised a grievance case should be given a copy of any written evidence, including witness statements."

115. Relevant extracts from the ACAS D&G Guidance are set out below:

a) "***Preparing for the meeting***

You should:

- *ensure that all the relevant facts are available, such as disciplinary records and any other relevant documents (for instance absence or sickness records) and, where appropriate, written statements from witnesses…*
- *allow the employee time to prepare his or her case…*
- *consider what explanations may be offered by the employee, and if possible check them out beforehand…*
- *arrange a time for the meeting… You may also arrange another meeting if an employee fails to attend through circumstances outside their control, such as illness…*

- *allow the employee to call witnesses or submit witness statements…*".

b) "***What if an employee repeatedly fails to attend a meeting?***

There may be occasions when an employee is repeatedly unable or unwilling to attend a meeting. This may be for various reasons, including genuine illness or a refusal to face up to the issue. Employers will need to consider all the facts and come to a reasonable decision on how to proceed. Considerations may include:

- *any rules the organisation has for dealing with failure to attend disciplinary meetings*
- *the seriousness of the disciplinary issue under consideration*
- *the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service*
- *medical opinion on whether the employee is fit to attend the meeting*
- *how similar cases in the past have been dealt with.*

Where an employee continues to be unavailable to attend a meeting the employer may conclude that a decision will need to be made on the evidence available. The employee should be informed where this is to be the case..."

The *Polkey* principle

116. The House of Lords in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 held that, in determining whether or not a dismissal is fair, the tribunal cannot consider whether a lapse in procedure in fact made any difference, i.e., whether the employee would have been fairly dismissed in any event. However, this question is relevant to an assessment of *remedy* for any unfair dismissal.

117. If the tribunal concludes that there was a real chance that the employee would have been fairly dismissed by the employer notwithstanding the unfairness identified, the tribunal may conclude that it is just and equitable to make a reduction to the compensatory award that might otherwise be awarded to the claimant, having regard to the loss sustained by the claimant from the dismissal.

118. Her Honour Judge Eady QC (as she then was) described the approaches that could be taken by an employment tribunal The EAT in *Williams v Amey Services Ltd* UKEAT/0287/14. In summary:

a) The tribunal has a very broad discretion;

b) The guiding principle what is "just and equitable" in the particular case-and-fact-specific circumstances. It is not a "range of reasonable responses

of a reasonable employer" test, it is a determination by the tribunal as to what justice and equity require in the particular circumstances of that employer and the facts in the case; and

c) The tribunal could take one of three approaches:

(i) Confine the compensatory loss to the additional period of time which the tribunal concludes would have been taken by the employer if it had followed a fair process;

(ii) Reduce the compensatory award on a percentage basis to reflect the chance that the outcome would have been the same had a fair process been followed; or

(iii) Applying a combination of those two approaches, i.e., confine the compensatory award to the additional period of time during which a fair process would have been followed, and allowing for a percentage chance that the outcome would have been the same.

Contributory conduct

119. Blameworthy or culpable conduct on the part of the claimant can reduce any award made to them if their dismissal is unfair – specifically, this can reduce either or both of the basic and compensatory awards.

120. As for the basic award, section 122(2) of the 1996 Act sets out that:

"*Where the tribunal considers that any conduct of the complainant before the dismissal… was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

121. In the case of the compensatory award, section 123(6) of the 1996 Act provides that:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

122. If the tribunal has made a prior finding that, by reason of the conduct of the claimant, it would be just and equitable to reduce the basic award, it must do so (*Carmelli Bakeries Ltd v Benali* UKEAT/06/16/12/RN).

123. This differs from the position as regards a compensatory award. In respect of that, if a tribunal concludes that the claimant's dismissal was to any extent caused or contributed to by any action of the claimant's blameworthy conduct, it must apply section 123(6), whether that point has been raised by the respondent or not (*Swallow Security Services Ltd v Millicent* UKEAT/0297/08).

124. "*Whether in any particular case it is appropriate to deal with the question of the element of contribution at the liability stage or whether it is better merely to make the findings of fact and leave the precise determination as to the amount of liability at the remedies hearing must be a matter of judgment for each Tribunal*" (*Sodexho Defence Services Ltd v Steele* UKEAT/0378/08/CEA).

125. The case law on contributory conduct in the unfair dismissal context may be summarised as follows:

a) The assessment falls to be made by the tribunal, not the respondent (*London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220);

b) That assessment is to examine the blameworthiness or culpability of *the claimant's* conduct. The blameworthiness of another person is not relevant (*Parker Foundry Ltd v Slack* [1992] ICR 302);

c) In the case of the basic award, the sequential questions to be answered by the tribunal are:

   (i) Was the claimant's conduct before the dismissal blameworthy or culpable? (And that conduct is not confined to conduct that caused or contributed to the claimant's dismissal – any conduct by the claimant prior to dismissal can be taken into account – *Parker Foundry*.)

   (ii) If so, would it be just and equitable to reduce the basic award?

   If the answers to both question is "yes", the basic award is to be reduced to the extent that is just and equitable;

d) The different statutory language means different questions are to be answered in relation to an adjustment of compensatory award for contributory conduct:

   (i) Was the claimant's conduct before the dismissal blameworthy or culpable?

   (ii) Did that conduct cause or contribute to the claimant's dismissal to any extent? It is not enough for the tribunal to simply identify misbehaviour on the part of the employee – the conduct must have had a causative link to the dismissal to some extent: *Hutchinson v Enfield Rolling Mills Ltd* [1981] IRLR 318. This is not a hypothetical analysis of what would have happened if the dismissal had been fair (*Renewi UK Services Ltd v Pamment* EAT 0109/21);

   (iii) If so, by what proportion would it be just and equitable to reduce the compensatory award for that conduct?; and

e) The tribunal must identify what conduct on the part of the claimant it is basing the reduction on, and explain the rationale for setting the reduction at the level it does (*Sandwell v Westwood* EAT 0032/09).

<u>Detriment (other than dismissal) on grounds related to union membership or activities</u>

126. Section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992 (the **1992 Act**) provides that:

“*(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of-*

…

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…

(2) In subsection (1) “an appropriate time” means-

(a) a time outside the worker’s working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose “working hours”, in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

…

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

(5A) This section does not apply where-

(a) the worker is an employee; and

(b) the detriment in question amounts to dismissal.”

127. This can be broken down into a number of questions:

a) Question 1: Was the Claimant subjected to a detriment by the Respondent?

b) Question 2: Was that detriment targeted at the Claimant as an individual (as opposed, say, to an organisation-wide detriment)?

c) Question 3: Was the Respondent’s sole or main purpose in subjecting the Claimant to detriment to penalise the Claimant for taking part in the activities of an independent trade union?

d) Question 4: When the Claimant was taking part in the activities of an independent trade union, was he doing so at an “appropriate time”, being either:

(i) outside of his working hours, or

(ii) within working hours in accordance with the agreement or consent of the Respondent for such time to be spent on trade union activities?

128. The term “detriment” is not defined in the 1992 Act, but it is a wide concept. Elsewhere in discrimination law, the House of Lords has held that whether something is a “detriment” should be assessed from the viewpoint of the worker (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337). “Detriment” in this context does not (as per section 146(5A)) include dismissal, and dismissal on grounds related to union membership or activities is covered by section 152.

Discussion and conclusions

Unfair dismissal

129. As set out above, “*the conduct of the employee*” is a potentially fair reason for dismissal (under section 98(2) of the Employment Rights Act 1996). In light of the line of authority stemming from *Burchell*, the questions to ask and answer then become:

a) Did the Respondent genuinely believe the Claimant guilty of misconduct at the date of dismissal?

b) Did the Respondent have reasonable grounds for that belief?

c) When the Respondent’s belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?

d) Was the Respondent’s response – of dismissing the Claimant – within the range of reasonable responses available to it?

Question 1: Did the Respondent genuinely believe the Claimant guilty of misconduct at the date of dismissal?

130. Yes – it is clear to the Tribunal that Mr Simpkins, who was the decision-maker, believed the Claimant had refused to conduct the sanitiser checks on the two occasions he refers to in the dismissal letter, being 28 and 29 March 2022. Mr Simpkins regarded this as “repeated” refusal to carry out a reasonable instruction, so within the scope of behaviour identified in the Respondent’s Disciplinary Policy and Procedure as gross misconduct. While twice is only just “repeated”, it is a repeat.

131. As per the case of *Jhuti*, Mr Simpkins’ reason is what should be examined here, unless the evidence causes us to consider that there was something else afoot. Here, we have no reason to doubt Mr Simpkins’ written position (as recorded in

the dismissal letter, and consistent with his witness statement) and his oral evidence, that it was the "repeated" refusal to conduct sanitiser checks on 28 and 29 March 2022, combined with the pre-existing FWW (which was issued in response to misconduct), that were his reasons for dismissing the Claimant.

132. The Tribunal considers that the Respondent, in the human person of Mr Simpkins as its decision-maker, genuinely believed the Claimant guilty of misconduct at the date of dismissal.

Question 2: Did the Respondent have reasonable grounds for that belief?

133. There are two instances of misconduct that were operating on Mr Simpkins' mind, so whether he had reasonable grounds for believing that the Claimant had committed each of those acts of misconduct are considered below.

(1) The failure to carry out sanitiser checks on 28 and 29 March 2022

134. The investigation into the allegation that the Claimant failed to carry out the sanitiser checks was conducted by Mr Horan, and his report is included in the Bundle.

135. Confusingly, on the same day as that investigation report was produced, a letter was sent to the Claimant suspending him, which stated: "*The reason for your suspension is to allow a thorough investigation under Bouygues Energies & Services disciplinary procedure into the allegations against you of potential gross misconduct… It is considered in the best interests of Bouygues Energies & Services and yourself that you are not at work during this investigation*". This suspension, according to the investigatory report, was communicated to the Claimant in the course of Mr Horan and Ms Stevens' discussion with him on 29 March 2022 as part of the investigatory process. It is not at all clear what further investigation was undertaken after that time, and the Respondent has pointed to Mr Horan's investigation report as the product of the investigation that it undertook.

136. On the understanding that Mr Horan's report represented the conclusion of the investigatory stage of the Respondent's process, it is that report that we have considered here.

137. The Respondent says that Mr Horan's investigation, as summarised in his report, amounted to a reasonable investigation, and notes that although the Claimant did not attend the disciplinary hearing, Mr Horan had spoken to the Claimant before compiling his investigation report.

138. Mr Doherty for the Claimant has made the surprising claim that the product of an investigation meeting should not be an investigation report (in the Tribunal's view, it should be). He also seems to be asserting that no investigation was carried out, and says that, even if an investigation was carried out, Mr Horan was biased

against the Claimant in relation to the sanitiser checks, and so he was an inappropriate person to task with an investigation into the matter.

139. The Tribunal has read Mr Horan's investigation report in the Bundle, and considers it inadequate in a number of respects:

a) Mr Horan sets out the background, and then goes on to identify the allegation against the Claimant: "*Repeatedly refusing to carry out the sanitiser check*". However, as he notes in his background, the "*repeated*" failure he was to investigate was confined to two dates, being 28 and 29 March 2022. Mr Horan's findings, though, involve a recitation of the background again, beginning with October 2020 instruction and the Claimant's Grievance. The investigation report therefore reaches a conclusion in respect of a wider date range than the allegation the Claimant was facing.

While, on-the-face-of-it, this is overly-inclusive and may, for that reason, not be regarded as problematic, in fact scant evidence appears to have been gathered by Mr Horn in respect of 28 and 29 March 2022. His conclusion seems to be in large part based on a greater body of evidence relating to other dates. We therefore do not think his conclusion clearly relates to the allegation he was asked to investigate;

b) Before he was appointed to investigate this allegation, Mr Horan was in fact monitoring the Claimant's compliance with the instruction to carry out the sanitiser checks on the Claimant's return to full duties in March 2022. The email in the Bundle from the Claimant's line manager, Mr Dziankowski, reporting that the Claimant had failed to carry out the check on 28 March 2022 was addressed to Mr Horan. Mr Dziankowski says:

"*As we* [i.e., Mr Dziankowski and Mr Horan] *spoke earlier on today in the morning I asked David to check the sanitizer. David said no. I asked why he doesn't want to check sanitizer David replay the case is still on. David said if manager not sure about certain request like checking sanitizer by David he supposed to ask HR for more information.*"

Again, on 29 March, Mr Dziankowski's email to Mr Horan includes a statement which the Claimant appears to have addressed to Mr Horan:

"*Due to undeniable fact that sanitizer and toilet roll check issue is currently a judicial matter I would like you Brendan Horan my manager to communicate to me in writing whatever you want to say on this subject. I will replay you.*"

Mr Horan was clearly invested in the Claimant's compliance or otherwise with the instruction. He was not an unbiased investigator; he was - prior to the commencement of his investigation - involved in the management of the Claimant in relation to sanitiser checks. This is borne out by the fact that, at the disciplinary hearing that followed in the Claimant's absence, Mr

Horan said "*There is no way* [the Claimant] *would comply with what we were asking.*" Not only was Mr Horan part of the "we" doing the instructing, but he had a settled view of the Claimant's attitude to the sanitiser checks which could have clouded his investigation into whether checks were carried out on 28 and 29 March 2022. Mr Horan and the Claimant had a history and a difficult relationship that made Mr Horan's appointment as investigatory officer inappropriate. His designation as investigating officer is not consistent with Step 2 of the ACAS Investigations Guidance cited in this judgment.

c) The evidence of the Claimants' witnesses and that of Mr Simpkins conflicts regarding where the conclusions of the sanitiser checks were recorded, but both parties agree that they were recorded on some kind of document, whether that be DOB forms or sanitiser check forms. Neither seems to have been examined as part of Mr Horan's investigation – a serious flaw. Blank forms for those dates would, in themselves, have been relevant evidence.

Moreover, the Respondent's Disciplinary Policy and Procedure anticipates that such documentary evidence would form part of an investigation. That policy and procedure includes the following text, which the Tribunal has interpreted as addressing an investigating officer:

"*When a breach occurs (or is suspect), before considering a matter within the Disciplinary Procedure, it is your responsibility to establish the facts clearly and have available any documentary evidence that may be relevant. Any witnesses to the alleged breach of the rules should be interviewed quickly before their recollection fades.*"

d) On the latter point, about witness interviews, despite the fact that the Report states that "*The Investigator met with relevant individuals either in person or by telephone*", the only person who is recorded as having been talked to by Mr Horan is the Claimant himself. The Report says that "*Copies of the notes of these meetings, witness statements and the documents referred to are listed in the List of Documents section of this report and are attached to this report*", but the List of Documents section doesn't refer to any notes or witness statements whatsoever (at odds with Step 4 of the ACAS Investigations Guidance). Mr Dziankowski should obviously have been interviewed as well. As has been seen in his hearing, Mr Anaghara would have been available to offer evidence to Mr Horan about the Claimant's compliance with the DOB checks on those dates, as may others. The copy of the Report included in the Bundle does not have any appendices, and so the Tribunal is left to assume that those documents are elsewhere in the Bundle, and to track those through from the dates in the appendix. Mr Horan was not proffered as a witness by the Respondent for us to ask him about this.

As for the discussions with the Claimant, the Report says: "*A meeting was held between DA* [the Claimant] *and BH* [Mr Horan] *with Debbie Stevens (DS) as witness*" – but there are no notes of this meeting, and nor does the Report even summarise what was said in it. The reader is left entirely ignorant of what the Claimant's position was in that meeting.

More fulsome extracts from the ACAS Code are set out above, but paragraph 5 of that Code includes: "*It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.*" In the Tribunal's view, the "necessary" investigation was not conducted or recorded here.

e) Moreover, the Claimant's evidence is that he was given no warning whatsoever about the investigation meeting. The Respondent's Disciplinary Policy and Procedure is drafted unclearly on the right of notice, but it would seem to envisaged by the following extract:

"*You* [the investigating officer] *should inform the employee of the purpose of any investigative meeting at which his/her presence is required and that formal disciplinary action may follow.*"

Informing the employee *during the investigatory meeting itself* is not, in the Tribunal's view, reasonable or compliant with the intent of the above-quoted policy (and nor does it meet the good practice guidance in the ACAS Investigations Guidance).

The Respondent has not countered the assertion that the Claimant was given no advance notice of the investigatory meeting, and there is no invitation to any disciplinary investigatory meeting in the Bundle. Had he been given warning, the Claimant could have spoken to colleagues who, as the Claimant would have it, observed him carrying out the checks, and brought their evidence to bear on the otherwise flawed investigation.

f) While the ACAS Code does not require that a Claimant is given the right to be accompanied at an investigatory meeting, it notes that "*such a right may be allowed under an employer's own procedure*" (paragraph 7). The Respondent's procedure did not specifically allow for that right, but it says:

"*the rights of representation in the Procedure do not apply to this investigative process, but a request to be accompanied by a trade union representative at a meeting would not be unreasonably refused. It is in the interests of all concerned that there should be fullest co-operation in this process.*"

In this case, the Claimant was not given the ability to request Mr Doherty's presence, given he was not aware of the meeting until he was in it.

In the Tribunal's view, it was reasonable for the Claimant to have had the right to be accompanied here, given that Mr Doherty had been involved in this issue for some time given the Grievance.

140. The Tribunal notes that the investigation report was begun and completed on the same day as the Claimant apparently failed for the second time to complete the sanitiser checks, with some haste. The Respondent's investigation into the sanitiser checks compliance by the Claimant was far from a reasonable one.

141. However, there were possibilities for these flaws to be corrected by later stages in the process (as per the *Taylor* decision cited above).

142. Unfortunately, it seems that Mr Simpkins did little more than ask Mr Horan a handful of questions relating to the content of his investigatory report. Mr Simpkins did not seem to consider it necessary to conduct any further investigation into the matter, so that opportunity to correct its shortcomings was missed.

143. A further opportunity presented itself at the appeal hearing of 11 July 2022, which the Claimant and Mr Doherty did attend. Mr Chautemps, the chair of the appeal hearing, identified eight actions for himself and his co-decision-maker, Ms Abarno, in the course of that meeting. He then adjourned the meeting, and reconvened it on 3 August 2022. The action items he identified included:

    a) "*check with the other SO's*" – which, if this occurred, would have provided the opportunity for Mr Anaghara and any other Security Officer who witnessed whether or not the sanitiser checks were carried out to provide evidence to that effect; and

    b) "*refer to* [the meeting on 28 March 2022 between the Claimant and Mr Horan] *and understand purpose*",

    but there does not appear to be any record of how those actions were followed-up or the questions prompting them resolved. In oral evidence Mr Chautemps confirmed that he did not speak to any of the other Security Officers.

144. What is clear is that the notes of this meeting (on which the Claimant subsequently commented though not Mr Doherty) record that both the Claimant and Mr Doherty had ample opportunity to put across the points they wished to make. It was at this meeting that the Claimant said, in relation to the sanitiser checks:

    "*Only after the decision from tribunal has made, then I would do the activities, not until then.*"

    He did not once state in this meeting that he had carried out the checks that he was dismissed for failing to do.

145. We therefore conclude that at the time the appeal outcome was determined, the Respondent had reasonable grounds for believing the Claimant to be guilty of misconduct at the time of his dismissal – the Claimant did not challenge the assertion from the Respondent's management that he had not performed the sanitiser checks at the appeal hearing.

(2) The Absence Matters

146. This investigation occurred earlier than the one concerning the sanitiser checks. Again, it was Mr Horan who performed it. As for the sanitiser checks investigatory meeting, no notice was given to the Claimant of the meeting – it was conducted on the day he returned from work after his annual leave, and Mr Horan's report written on that same day – so our criticisms in this regard are the same as for the sanitiser checks investigation.

147. Once again, the Respondent has not included in the copy of the report in the Bundle the appendices that were apparently attached to it, but a separate note of the conversation he had with the Claimant is included in the Bundle. Those notes record that the Claimant was defensive and uncooperative, particularly as regards the request to share his outward flight details and booking details with Mr Horan. He might have been less so had he been warned of the meeting, but in any event, given the Claimant only clarified when he flew to Nigeria in the course of this hearing, and failed (including in connection with this hearing) to provide any documentary evidence concerning his flights, it does not seem that a fuller investigation would have made any difference.

148. One of the two forms of misconduct that resulted in the FWW was that the Claimant, as the Respondent saw it, "*Unreasonably refused to provide documentation requested in relation to a sickness absence*" (and some further documentation concerning an isolation period relating to Covid-19). The Claimant did, in the Tribunal's view, unreasonably refuse to provide the evidence concerning his sickness absence, and we cannot see how warning the Claimant of the investigatory meeting would have made any difference given he has still not provided that documentation in connection with his Employment Tribunal claims.

149. As for the other, that he "*Abused the sick pay policy to obtain a longer period of leave that was previously rejected*", while he should have been forewarned of the meeting, and it would have been good practice to have allowed him to be accompanied, we consider the Respondent had reasonable grounds for believing that the Claimant had committed that misconduct. The Tribunal has reached the same conclusion, on the same evidence as was available to the Respondent at the time.

150. We conclude that the Respondent had reasonable grounds for believing the Claimant guilty of misconduct in relation to the Absence Matters.

Question 3: At the time when the Respondent formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

151. The Tribunal has identified numerous flaws with Mr Horan's investigation into the alleged failure to carry out the sanitiser checks on 28 and 29 March 2022, and the disciplinary hearing concerning that was a missed opportunity to correct those, summarised as:

a) The investigation looking into, and therefore reaching a conclusion in relation to, a wider period of potential non-compliance with management instructions than the allegation was centred on;

b) Mr Horan's involvement in the management instruction;

c) The fact that the investigation did not gather relevant documentary evidence;

d) Mr Horan did not appear to have interviewed any witnesses, and there is no record of his discussions with the Claimant;

e) The Claimant was given no warning of the investigatory meeting; and

f) The Claimant should, in the circumstances, have been given the right to be accompanied at the investigatory meeting.

152. Some of these were "corrected" (as per *Taylor*) by the appeal hearing, namely b), e) and f). The Claimant himself seems to have confirmed in the appeal hearing that he did not conduct the sanitiser checks on 28 and 29 March, albeit that his statement on this is far from clear, and certainly was unclear to Mr Chautemps and Ms Abarno, who did not understand that the Claimant had filed a claim with the Employment Tribunal concerning the addition of sanitiser checks to his assigned tasks. Nevertheless, the appeal hearing gave the Claimant the opportunity to state his position, albeit that he did not do so clearly.

153. It is clear to the Tribunal that some flaws remained. Taking account of the principle in *Gravett*, the Tribunal finds that in this case, documentary evidence in the form of DOBs or sanitiser check forms should have been gathered (even if they would have been "blank" if no checks were recorded, that would be evidence in itself). Moreover, witness evidence was not gathered and/or recorded.

154. Particularly in light of the fact that a possible sanction (and, as it turned out, the actual sanction imposed) in this case was dismissal (as *A v B* indicates we should when assessing the reasonableness of the investigation), the Respondent had not carried out as much investigation as was reasonable in the circumstances, either at the time of the Claimant's dismissal or at the confirmation of that decision as part of the conclusion of the appeal process.

155. As for the Absence Matters investigation, as noted above, there was little more investigating the Respondent could do on these matters without the Claimant's cooperation, which he refused to give. In relation to these matters, we find the Respondent had carried out as much investigation as was reasonable in those circumstances.

Question 4: Was the Respondent's response – of dismissing the Claimant – within the range of reasonable responses available to it?

156. As the *Graham* and *British Leyland* cases cited above illustrate, the exercise for the Tribunal is to refrain from stepping into the shoes of the decision-maker, and we have not done so. Rather, it is for us to identify the range of reasonable responses available to the Respondent to the situation it found itself in with the Claimant and conclude whether the actions it took were within that range. Section 98(4) of the 1996 Act directs that when considering this question, account should be taken of the circumstances, including the size and administrative resources of the employer.

157. Acknowledging that the case of *Sharkey* stands as authority for the fact that not every procedural flaw renders a dismissal unfair, here we do not think dismissal was within the range of reasonable responses given the investigatory process of the sanitiser checks allegation was fatally-flawed. The Respondent appears to us to be a large, well-resourced organisation, but even if it were not, we would be of the same view. If an employer only has one person's emails to the effect that the critical act of misconduct occurred when there was more, unexplored, evidence to bear on the subject, and the author of the emails was not even interviewed by or on behalf of the decision-maker, a reasonable employer would not dismiss - there was very little to go on that the alleged misconduct had actually taken place.

158. Both at the disciplinary hearing and the appeal hearing stage, much was made of the background context to the allegations. That background was arguably relevant to determining which of conflicting accounts is to be preferred, but that is difficult to do when the accounts had not been properly gathered from all the people in a position to give them.

159. While *the Tribunal* has determined that the Claimant did not in fact carry out the sanitiser checks on 28 and 29 March 2022, we have done so having heard from five witnesses and after attempting to untangle some very confusing statements from the Claimant's witnesses as to what happened with the claim filed by the Claimant and Mr Anaghara about whether the task assigned to them to perform sanitiser checks amounted to a breach of contract. The Respondent did not put itself in the position of best knowledge that it could have done, and what it did know did not bring dismissal into the reasonable range of responses.

160. Our conclusion that dismissal was not within the range of reasonable responses open to the Respondent takes account of the facts that:

    a) the Claimant was a long-serving employee;

    b) he had, until the Absence Matters, an unblemished disciplinary record; and

    c) he was already the subject of a final written warning, so any further disciplinary sanction would have had very significant consequences for him (e.g., extension of the duration of his final written warning, dismissal).

    These factors narrow the range of reasonable responses open to a reasonable employer in the Respondent's shoes.

161. Besides the flawed investigation into the sanitiser checks, the Claimant has made a number of other criticisms of the Respondent's process:

a) He says that the disciplinary hearing should not have proceeded in his absence on 9 May 2022;

b) He avers that Mr Simpkins was not an appropriate person to determine either disciplinary process concerning the Absence Matters or the sanitiser checks, given the Grievance brought by the Claimant had concerned him; and

c) Mr Doherty on the Claimant's behalf asserts that the investigatory officer should not have attended the disciplinary hearing, and nor should the initial disciplinary decision-maker attend the appeal hearing of that decision.

162. We agree with the first of those, but it does not affect the range of reasonable responses open to the Respondent given that the appeal meeting presented the Claimant with an opportunity to express his position on whether he had carried out the checks, and his position on whether he had in fact carried out the checks was incredibly unclear.

163. Taking each of the Claimant's further procedural criticisms in turn:

a) *The Tribunal agrees that the disciplinary hearing should not have proceeded in the Claimant's absence on 9 May 2022*. It is accepted, both by case law and ACAS in its guidance, that there are situations when it is reasonable and appropriate for a disciplinary hearing to proceed in the absence of the employee who is the subject of it, but the Tribunal does not consider that it was an appropriate course of action in this case.

(i) Firstly, regardless of Mr Simpkins' own knowledge on 9 May 2022, it seems that the Claimant had supplied to the Respondent a fit note showing that his GP did not consider him fit to return to work ahead of that meeting. If the Respondent chooses to use an external agency to manage absence reporting, it is still incumbent on it to check whether an employee previously-absent for a considerable period due, in part, to work-related stress, has put forward a valid reason for non-attendance at a crucial meeting such as a disciplinary hearing. If it could not do that efficiently, the meeting should have been scheduled for a few days later to enable that information to filter through.

(ii) The ACAS D&G guidance – not binding on this Tribunal, but expressing a view we agree with – indicates that all the facts must be considered before the employer can come to a reasonable decision as to how to proceed. Those facts include any medical opinion on whether the employee is fit to attend the meeting. The Respondent had been provided with that information, but Mr Simpkins was unaware of it and, so far as the evidence before us

indicates, had taken no steps to enquire about the Claimant's health on 9 May 2022. Furthermore, the ACAS D&G Guidance indicates that in deciding whether or not to proceed in the Claimant's absence, the seriousness of the disciplinary issue should be a factor (here, it could not be more serious – it potentially would result in dismissal), as well as the employee's length of service. It does not appear that those were taken into account, and the Tribunal considers that a reasonable employer would not have proceeded with the meeting if those factors had been considered in this case. While Mr Horan wrote to the Claimant to express understanding, in the context of Mr Horan's relationship with the Claimant, that may well have been perceived as pressure – and the Claimant's evidence was that it was received by him in that way.

Moreover, the ACAS D&G Guidance recommends that where the employer's decision is that the meeting will proceed in the employee's absence, the employee should be told of this. Mr Simpkins did warn the Claimant of this in his letter of 21 April rescheduling the 14 April meeting to 9 May, but that decision was clearly taken without considering the circumstances that prevailed on 9 May.

(iii) The case law on the subject of when it is appropriate to proceed without the employee concerned emphasises the importance of giving the employee the ability to put their case forward. As per *Khanum*, the opportunity for an employee to put their side is part of the basic requirements of natural justice. It should be exceptional for a hearing to proceed without the employee's attendance (*Nadal*). This was not a case of numerous attempts to meet with the employee that were thwarted by that individual at every turn. Moreover, given the investigatory flaws, it was all the more necessary that the Claimant's input be obtained.

b) *Disagrees that Mr Simpkins was an inappropriate person to determine the disciplinary process*. Mr Simpkins' evidence was that it would be have been difficult for the Respondent to identify a member of the management team capable of determining the disciplinary process who had not been involved in the management decisions that were the subject matter of the Claimant's grievance. In principle, the Tribunal does not see this as presenting a difficulty – but again, because a question as to Mr Simpkins' independence could be raised in light of the Grievance, it was all the more important that the investigation was thorough and balanced to ensure fairness and confidence in the process overall.

c) *Disagrees with Mr Doherty's concern about the presence of Mr Horan at the disciplinary hearing, and the presence of Mr Simpkins at the appeal*

hearing. Provided those individuals are clearly not acting in the capacity of decision-makers (which they were not in this case), and provided the chair of the meeting takes steps to ensure the employee who is the subject of the proceeding is not intimidated by their presence, we do not see this as problematic. Moreover, the Tribunal considers it appropriate, and consistent with the ACAS guidance, that the investigating officer is available to face questions from or on behalf of the employee who is the subject of the disciplinary hearing, and the same is true for the person who took the decision to dismiss at the appeal hearing. Provided those individuals are not decision-makers in those meetings, the principal benefit to be derived from their attendance is for the employee, who can question their methodology, evidence-gathering, etc. This is their opportunity to point out flaws in management's case, and the failure of the investigating officer / initial decision-maker (as applicable) to attend just slows down resolution of the process.

<u>Polkey</u>

164. The Respondent says that if the Tribunal finds that the Claimant was unfairly dismissed because of procedural failings, we should find that he would have been dismissed in any event.

165. We agree. This hearing has effectively involved an examination of the same evidence that was available to the Respondent, had a more thorough investigation been conducted. The Tribunal has concluded that the Claimant twice refused to carry out a reasonable management instruction on 28 and 29 March 2022, and we know that the Respondent concluded that that misconduct should be met with summary dismissal in light of the Claimant's pre-existing FWW. We find it 90% likely that, had a fair procedure been followed, the Claimant would have been dismissed in any event (the Claimant has adduced insufficient evidence to persuade the Tribunal that he carried out the sanitiser checks on 28 and 29 March 2022), but that a fair procedure would have involved awaiting the Claimant's return to work, and some more investigation that would have been prompted by engaging with him as part of a disciplinary or a revised investigatory process. We assess that, in light of the Claimant's second fit note, which expired on 4 June 2022, a fair procedure would have seen the Claimant employed until the end of June 2022. The reason we set the likelihood at 90% is because it is possible that the DOB forms or sanitiser check forms would record that the Claimant carried out those checks. That seems unlikely to us, though, as outlined in our factual findings on this point.

Contributory conduct

166. We also find that the Claimant's dismissal was, in very significant part, attributable to his conduct.

167. The Tribunal has found that the Claimant was clearly culpable in relation to the Absence Matters incident, which resulted in the FWW, and we also find that he did not carry out the sanitiser checks on 28 and 29 March 2022 when that was a reasonable task for him to be assigned by the Respondent. We find that those were the most significant factors in the decision to dismiss him.

168. In addition, though, we consider that the Respondent's eagerness to characterise the second failure to carry out the sanitiser checks after his return to full duties in March 2022, and its overly-hasty disciplinary process thereafter, shows that the Respondent was looking for an opportunity to dismiss him. The email from Mr Dziankowski to Mr Horan on 28 March 2022 indicates that a conversation had occurred between Mr Horan and Mr Dziankowski anticipating that the Claimant would not perform the checks. Mr Dziankowski was clearly "primed" to look out for infractions.

169. The Tribunal considers that the Respondent had come, by this point, to regard the Claimant as a trouble-maker, for reasons not just associated with his contributory conduct (i.e., the Absence Matters incident and the sanitiser checks on 28 and 29 March 2022), but the general challenge he posed to the Respondent's instructions, and the difficult relationship which clearly existed between him and Mr Horan (as displayed by Mr Horan's poor investigation and his statement to Mr Simpkins in the 9 May 2022 disciplinary hearing that "*There is no way he would comply with what we were asking*"). As Mr Doherty put it in the appeal hearing, by the end of March 2022 "*every option [was] being explored to get him dismissed*".

170. The Tribunal finds that the factors that contributed to the Claimant's dismissal were three:

    a) We consider that the Absence Matters incident, for which C entirely responsible, contributed 50% to the Claimant's dismissal (not least because it resulted in the FWW, and it meant the Respondent did not trust the Claimant);

    b) We assess that the Claimant's "repeated" failure to carry out the sanitiser checks on 28 and 29 March 2022, for which the Claimant is entirely responsible, contributed 25% to his dismissal; and

    c) We also regard the Respondent's perception of the Claimant as challenging, a perception exacerbated by the breakdown of his relationship with Mr Horan, as contributing 25% to his dismissal. We do not regard as contributory conduct. As Mr Simpkins said in his oral evidence in relation to the grievance process, use of that process should not be regarded negatively, but rather it provides staff an opportunity to air

their concerns. The same should be true of respectful challenge and disagreement between management and an employee.

171. Consequently, we find that the Claimant's conduct contributed 75% to his dismissal.

Detriment (other than dismissal) on grounds related to union membership or activities

172. In order to determine the question of whether the Claimant's claim under section 146(1)(b) of the 1992 Act succeeds, the following questions need to be answered:

Question 1: Was the Claimant subjected to a detriment by the Respondent?

173. The detriment the Claimant points to is the FWW. He was subjected to a FWW, and it was detrimental.

Question 2: Was that detriment targeted at the Claimant as an individual (as opposed, say, to an organisation-wide detriment)?

174. The FWW was targeted specifically at the Claimant as an individual.

Question 3: Was the Respondent's sole or main purpose in subjecting the Claimant to detriment to penalise the Claimant for taking part in the activities of an independent trade union?

175. As set out in Disputed fact 2, we find that the main purpose of the Respondent in issuing a FWW to the Claimant was to respond to what it perceived to be the Claimant's false claim to have been sick and his unreasonable refusal to provide evidence concerning his flight to Nigeria.

Question 4: When the Claimant was taking part in the activities of an independent trade union, was he doing so either: (i) outside of his working hours, or (ii) within working hours in accordance with the agreement or consent of the Respondent for such time to be spent on trade union activities?

176. The Claimant's position is that he was organising others to raise the Grievance within working hours.

177. The Respondent's clear evidence is that it did not recognise the GMB. Mr Hill confirmed that the Respondent had no agreement with the GMB for any GMB workplace organisers to perform such activities in work time.

178. This complaint therefore fails on two grounds:

a) the FWW was not issued for the sole or main purpose of penalising the Claimant for union activities; and

b) the union activities were not carried out at an appropriate time.

Conclusions

179. The Claimant's complaint of unfair dismissal is well-founded.

180. The Claimant's complaint of detriment on grounds related to union membership or activities is not well-founded and is dismissed.

Employment Judge Ramsden

Date 9 November 2023