EMPLOYMENT TRIBUNALS

Claimant: **Ruth Hannan**

Respondent: **RSA (The Royal Society for the Encouragement of the Arts Manufacturers and Commerce)**

Heard: **London Central (Via CPV)** **On:** **10th to the 12th October 2023**

Before: **Employment Judge Codd (Sitting alone)**

Appearances

For the Claimant: Mr A Ohringer (Counsel)
For the Respondent: Ms A Fadipe (Counsel)

JUDGMENT

1. The claimant was dismissed on the 10th of October 2022 within the meaning of S95 of the Employment Rights Act 1996.
2. The claim for detriment under S146 of the Trade Union Labour Relations Act 1992 is consequently dismissed for lack of Jurisdiction.
3. The claimant was unfairly dismissed for an automatically unfair reason pursuant to S152 of the Trade Union Labour Relations Act 1992.
4. The Respondent shall pay the claimant the sum of £6,959 by way of basic award, pursuant to S156 Trade Union Labour Relations Act 1992.

Employment Judge **Codd**

12th October 2023

Decision and Reasons

Background

1. The respondent is a charity which has as its mission the creation and implementation of ideas and actions leading to social and economic change, through the medium of the arts, manufacture and commerce. The claimant was employed by the respondent from the 5th of May 2019 until her departure on the 10th of October 2022. The claimant had varied roles in that time and at the end of her employment she was head of policy and participation. She was a member of the 20 strong senior leadership team.

2. The claimant claims unfair dismissal in respect of her purported dismissal on the 10th of October 2022, pursuant to **S152** of the **Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA)**. In the alternative the claimant avers that she was subjected to a detriment in connection with trade union membership and activities under **S146 TULCRA**. The claimant engaged in early conciliation between the 9th of January 2023 and the 24th of January 2023. Her claim was issued on the 2nd of February 2023, in time.

3. It is said by the claimant that in the course of her employment she was an employee representative, one of a team of 8 who endeavoured to bring inclusion to the voices of the workers, and highlight issues to the senior management team. However, after a time this role disbanded and the claimant began (alongside colleagues) the process of consultation about unionisation of the workforce, and its subsequent application. The history of the claimant's role is not disputed. There is no dispute that she performed her role well for the respondent.

4. In 2022 the process of unionisation was progressing and the IWGB union was selected as a potential representative union. Three applications were made by the IWGB union for voluntary recognition by the respondent. Those applications and representations did not obtain approval by the respondent . Amongst other matters, there was a dispute relating to the make up of the collective bargaining unit. Following the three attempts for voluntary recognition, an application was made by the IWGB union for statutory approval via the Central Arbitration Committee (CAC). That application was opposed by the respondent, but was ultimately successful in around November 2022, following a number of hearings at the CAC and a secret ballot of employees.

5. Whilst the proceedings with the CAC where ongoing, in July 2022 the claimant decided to leave her employment and obtained an alternative position. She provided her notice in accordance with her contract and her leaving date was set for the 18th of October 2022. The claimant continued to work her notice and her last day in the office would have been the 13th of October 2022, with the remainder of her notice being annual leave.

6. In October 2022, whilst the CAC application was ongoing, the IWGB Union contacted various journalists as part of a campaign to highlight the difficulties in unionising, due to the resistance of the respondent. The claimant spoke to a journalist on the 3rd of October 2022. An article was published on the 9th of October 2022 in the Observer newspaper, reciting comments of the respondent's anonymous employees and highlighting the application process for unionisation which had been undertaken. The claimant was personally named, as was her position. Several direct quotes were provided from her, referencing her as the 'outgoing head of policy and participation.' The comments of the claimant, in effect accused the respondent of hypocrisy, regarding its approach to the IWGB union and the process of unionisation.

7. That same day, a decision was made between 4 members of the executive team that the claimant should cease her work with the respondent early, due to the perceived reputational damage caused. A letter was composed late at night on Sunday 9th October 2022, following several drafts, which sought to end the claimant's role early.

8. On the 10th of October 2022, the claimant's access to the respondent's systems was terminated, and the letter was served upon the claimant. The respondent argues that it had invoked a Payment in Lieu of Notice (PILON) clause in the claimant's contract, due to perceived misconduct. The claimant was required to courier her work belongings back to the respondent. The claimant was paid until the 18th of October 2022 and this included her holiday accrued and the remainder of her notice period. There is no dispute that the claimant did not appeal the decision, nor was she advised of her ability to do so, within the termination letter.

9. The claimant had initially pleaded her case on the basis of a **S152 TULRCA** unfair dismissal. However, in their grounds of resistance dated the 8th March 2023, the respondent argued that there had in effect been no dismissal, as the respondent was contractually entitled to foreshorten the claimant's notice, by exercising the PILON clause in her contract and therefore this would not amount to a dismissal in the context of **S94 of the Employment Rights Act 1996.** There was no dispute in respect of the legal effect this would create, namely a curtailment instead of a dismissal. Although the claimant argued that the contract contained no PILON clause. However, in view of the position taken by the

respondent, the claimant applied to amend her claim to include a claim for detriment, under **S146 TULRCA,** in the alternative. At a preliminary hearing on the 10th April 2023 permission was given to the claimant to amend her claim, to include a detriment. The matter was then case managed and set down for a hearing before an Employment Judge (sitting alone).

Issues in dispute

10. Two separate lists issues have been prepared by the parties. The issues are relatively narrow and can be summerised as follows:
    a) Did the claimant's employment contract contain a PILON clause?
    b) Did the respondent's decision on 10th of October 2022 amount to a dismissal or a curtailment of her notice pursuant to a PILON clause.
    c) Did the claimant's comments in the newspaper article on 9th of October 2022 amount to ' activities on behalf of an authorised trade union?' And if so;
    d) Was the decision on the 10th of October 2022 linked to that 'union activity' and did that decision amount to:
        a. a detriment within S146 TULRCA, or
        b. an unfair dismissal within S152 TULRCA?
    e) What remedy (if any) should be awarded?

Preliminary Issues

11. At the outset of the hearing Ms Fadipe made an application for the matter to be adjourned in order that a full panel (including lay members) could be allocated to this matter. This was on the basis that I did not have jurisdiction to hear the claim sitting alone, solely in respect of the S146 detriment claim. It was of course open to the respondent to consent to the matter being heard by an Employment Judge sitting alone, however, the respondent declined this option, notwithstanding that they had been present and represented by Ms Fadipe at the preliminary hearing, and had been in receipt of the listing for some 5 months at the point the application was made, highlighting the error.

12. Mr Ohringer, on behalf of the claimant, did not oppose the contention that a panel was technically required, although the claimant consented to me hearing the matter.

13. **S4 of the Employment Tribunals Act 1996**, deals with the composition of hearings and Jurisdiction. I was directed to this and considered it in detail. For my part, I agreed with the interpretation of S4, and endeavoured to make enquiries as to the availability of lay members, particularly given that the parties indicated that matters may be able to be condensed to two days.

14. Whilst those enquiries were ongoing, Mr Ohringer suggested that, in order to preserve as much as possible of the hearing time, I could determine as a preliminary issue, whether the employment contract contained a PILON clause. This would in effect narrow the issues, as if there was no PILON clause then there could only be an unfair dismissal claim, as the detriment claim was linked to the PILON clause. If there was a PILON clause then the unfair dismissal would effectively be resolved and only the claim for detriment would be a live issue. I allowed Ms Fadipe time to take instructions on this approach and the respondent confirmed that they consented to this approach. I also allowed the parties some time to prepare submissions on the point, at the request of the respondent they prepared brief written submissions.

15. I shall therefore deal with my discussion in two parts, first addressing the preliminary issue of the PILON clause, and secondly, if appropriate the substantive claim.

Part 1

The law

Preliminary Issue – PILON Clause

16. For the purposes of the law of unfair dismissal, section **95(1)(a) Employment Rights Act 1996 (ERA)** provides that the concept of dismissal includes a case in which the contract of employment is terminated by the employer. **S94 of the ERA** also provides the right for employees not to be unfairly dismissed.

17. The relevant statutory provisions applying to this matter are **S 152 TULRA 1992** in relation to dismissals related to union activities and **S146 TULRA 1992** in respect of detriment in respect of union activities. I shall consider the relative elements of these provisions in more detail, as part of my substantive decision.

18. The issue of the existence of a PILON clause and whether it appears in the contract is a matter of fact to be determined. The standard of proof to be applied is the balance of probabilities, and the burden initially rests with the claimant to demonstrate that a dismissal has occurred.

19. I have been referred by both parties to the case of **Fentem V Outform EMEA Limited [2022] EAT 36**. That case in turn follows the decision in **Marshall (Ambridge) Limited V Hamlin [1994] ICR 962**. I have as part of my decision making, considered both of those decisions in full.

20. Both parties agree the principle of both decisions, is that where an employer in the proper exercise of a PILON clause, brings forward the date at which the employee leaves (accompanied by a payment in lieu), that this does not amount

to a dismissal within the meaning of **S 95(1) ERA**. In the absence of a PILON clause, I must evaluate if there has been a dismissal within the context of **S95(1) ERA.**

Submissions – PILON Clause

21. The parties have not required me to hear evidence to determine this point and have both prepared written documents. I agreed that oral evidence was unlikely to assist me. Ms Fadipe agreed that it made administrative sense for the respondent to go first, in order to establish what was said to be the PILON clause, on the basis that the claimant asserted no such clause existed.

22. Ms Fadipe, commenced her submissions, speaking to her document and expanding matters. During the respondent's submissions I asked the respondent to clarify which of the contractual provisions was said to amount to a PILON provision. I was informed that paragraphs 15.6 and 15.7 of the contract were the matters relied upon and that these clauses should be read conjunctively. The respondent argued that interpreting these matters the case was in effect a parallel of the decision in **Marshall.** These provisions appeared at first reading to be garden leave provisions. However, it was argued that they contained all of the essential elements of a PILON clause.

23. I asked the respondent to clarify whether it asserted clause 15.5 of the contract applied? This clause related to misconduct, and the termination of contacts. I was informed that it has never been argued that there was a dismissal for misconduct, and that this clause did not apply as it was the PILON clause in 16.6 and 15.7 being exercised.

24. I noted in the course of the discussion that the claimant had been paid to the end of her notice period, and that administratively this occurred on the usual pay run date. I asked Ms Fadipe to clarify what date the respondent argued that the employment had come to an end (by way of curtailment), as it was not clear based on the argument I had been presented with. Ms Fadipe then asked for a short opportunity to take further instructions on this matter, which I allowed.

25. When the hearing resumed, Ms Fadipe confirmed that having taken further instructions that it was now the respondents case that the contract contained no PILON clause, and the actions on the 10th of October were in effect to exercise clause 15.6 and 15.7 as garden leave. This was a remarkable change in position, the respondent having argued emphatically up until this point that a PILON provision had been exercised and was present (including as part of a strike out application). It was an unexpected turn of events, prompted by my request for the Respondent to clarify the effective date of termination or curtailment of the employment. I am now told that is the 18th October.

26. In response Mr Ohringer was brief and understandably taken aback by the change in position. However, he maintained that this was an effective termination and there was no PILON clause. He said everything about the respondents case had been related to a foreshortening of the notice period and that until today, no argument had ever been raised that it was in effect a garden leave provision. He invited me to find that there was no PILON and there was an effective dismissal on the 10th of October 2022.

Findings and Analysis – PILON Clause

27. Notwithstanding the respondent's change in position, it is still necessary for me to analyse the contract and the events that took place. The contract of employment is found at page 144 of the bundle with paragraphs 15.5 – 15.7 being the relevant matters. I have set these out below.

> *"15.5 In cases of gross misconduct, your employment may be terminated without notice. The RSA may elect, in its absolute discretion to terminate your employment without notice on payment of an amount equal to your salary for all or part of your notice period.*
>
> *15.6 During any period of notice of termination (whether given by you or the RSA) the RSA may require you not to attend your place of work, for the duration or part of your notice period and/or may at its discretion relieve you of some or all of your contractual duties during that period. You will also not have communication with colleagues, donors, stakeholders or clients of the RSA.*
>
> *15.7 During the period of notice, including any garden leave, you will remain an employee of the RSA and remain bound by these terms and conditions. It is agreed that the period of notice is a reasonable period of garden leave. This will not affect your entitlement to receive a basic salary together with a payment that reflects the value of your contractual benefits that would have been due to you during the period of your notice. "*

28. The respondent has been clear that it does not rely on clause 15.5. It has placed vociferous and longstanding argument, including an application for strike out on the basis of a perceived PILON clause. However, the about turn which the respondent has completed in submissions in effect to argue that there was now no PILON clause, was extraordinary and was pleaded nowhere in its case. Everything, about the previous argument regarding the PILON was in effect a

construct that there had been a dismissal by way of curtailment of notice (falling outside the scope of S95). The speed at which this argument was abandoned, in response to a routine question about dates, suggests the lack of forethought given to the argument.

29. I am persuaded having carefully considered 15.6 and 15.7 together, that they are limited in effect to garden leave provisions. The terms are limited to a discretion whether to assign tasks, or not. A strict PILON clause causes an employment to end, by the respondent, in effect buying itself out of the contract. I cannot see that these provisions are present in these terms. The weighting to 15.6 and 15.7 are to keep the employee bound to the contract, at the discretion of the respondent, during its duration. This is clearly intended to protect the commercial interests of the employer, rather than giving a mechanism for the mutual contractual obligations to cease, as would be achieved by the PILON.

30. Paragraph 15.5 makes reference to discretionary payments for gross misconduct dismissals, but again this does not in my view amount to a PILON. It follows therefore that I do not need to apply the guidance in **Marshall** and **Fentem**, as these only apply where a PILON exists. For the avoidance of doubt I find that there is no PILON clause in the contract.

31. Turning then to consider whether there was an effective dismissal or the application of a garden leave provision, I must have regard to the dismissal letter. I attach weight to that document at page 80 of the bundle, but I am also assisted by some of the earlier drafts of this letter at 223 which were not sent out, as well as the letter at page 85 sent to the IWGB union after the employment had ended, on the 25th of October 2022.

32. The dismissal letter is headed “immediate termination of employment.” I apply the ordinary meaning of the words to my interpretation, namely that the employment has ended without delay. There can be no ambiguity as to what the words mean. It cannot in my view be interpreted as anything other than such.

33. Although the respondent argues the tone of the remainder of the letter could be consistent with the invoking of garden leave, that in my view is to seek to stretch the interpretation. Garden leave is not specifically mentioned in the letter, nor the contractual terms relied upon. The terms in the letter could be described as ambiguous.

34. It was clearly in the contemplation of the respondent that an act of gross misconduct had been committed. That much is clear from the first draft of the letter at 241, which states: “*We no longer require you to attend work due to your*

explicit attempt to damage the reputation of the RSA. Your comments to the press published yesterday were not in line with the RSA values and were in breach of the RSA process. The conflation of these factors is likely to constitute a breach of contract of your employment. " Although this later draft was edited, it clearly and unambiguously reveals the intent that the contract would end, because there was likely to have been a breach of contract.

35. At page 85, in response to the claimant's grievance the respondent wrote: *However, on discovering these breaches, instead of terminating Ruth's employment summarily on the grounds of gross misconduct, the RSA chose to terminate Ruth's employment by making a payment in lieu of the balance of her notice period, pursuant to its right to do so under her contract of employment. "* This rationale is clear that there was a termination, this was predicated upon a PILON clause. That position has during the course of this hearing, been abandoned.

36. It has been suggested to me that the continuation of contractual benefits until the 18th of October 2022 and the fact the claimant was paid as usual in the payroll run, militates against a dismissal. I am not persuaded that the administration of the payroll and receipt of contractual benefits until the 18th of October 2022 is a persuasive argument that there was no dismissal. I have observed administratively the claimant had only a few working days left, only 2 of which were in the office, the rest being accrued annual leave. I can well imagine for the sake of 2 days pay, it was easiest to leave the payroll alone. There is no evidence that this was a deliberate exercise of garden leave in those circumstances as the respondent believed they were ending the employment with a PILON clause due to the conduct of the claimant.

Conclusions S95 – dismissal

37. For all of the reasons above, I am persuaded that the decision falls squarely in a finding that the respondent dismissed the claimant on the 10th October 2022 and did not intend to or effect the placing of the claimant upon garden leave. There was no PILON clause, therefore there can be no curtailment and the termination of employment, amounts in my finding to a dismissal within the context of **S95(1)(a) ERA 199.**

38. It follows in those circumstances, that I must go on to consider the fairness of the dismissal, in the context of the claimant's argument pursuant to **S152 TULRCA.** It is not possible for a claimant to also run a detriment argument arising out of dismissal in those circumstances and therefore I dismiss the claim for detriment pursuant to **S146 TULRCA**, due to lack of jurisdiction.

39. In those circumstances as there is no longer a detriment claim, it is appropriate for me to continue to hear the remainder of the argument sitting alone. I shall adjourn the matter, to (tomorrow) the 11th October 2023 in order to hear the evidence in relation to the unfair dismissal claim.

Part 2 – Unfair Dismissal Claim

40. Having determined that the claimant was dismissed the remaining issues in the proceedings to be determined are:
    i) Did the claimant's comments in the newspaper article on 9th of October 2022 amount to 'the activities on behalf of an authorised trade union?' And if so;
    ii) Was the decision on the 10th of October 2022 to dismiss the claimant, linked to that 'union activity' and did that decision amount to:
        a. an unfair dismissal within S152 TULRCA?

The law – Unfair dismissal

41. **S94 of the ERA 1996** confers the right on employees not to be unfairly dismissed. Having already found that there was a dismissal, I must evaluate whether there was a potentially fair reason for the dismissal under **S98(4) ERA**.

42. The determination of the reason for dismissal is a question of fact, to be evaluated upon the basis of the available evidence.

43. A dismissal becomes an automatically unfair dismissal in circumstances where the reason (or principle reason if more than one) for that dismissal was related to the activities of an independent trade union as defined in **S152 of the TULRA**. The activity must be authorised on behalf of the trade union and not simply activities of an individual member, in order to be afforded protection.

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

(1)For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a)was, or proposed to become, a member of an independent trade union,

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

(ba)had made use, or proposed to make use, of trade union services at an appropriate time,

(bb)had failed to accept an offer made in contravention of section 145A or 145B, or

(c)was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

44. There is no debate as to the applicable provisions are **S152(1)(b) TULRCA** and there is consensus that I must determine whether the acts of the claimant are captured by that definition, of "activity" and does not extend beyond that, because the actions of the claimant are malicious, malign or extraneous. Whether the activity falls within the definition is a question of fact.

45. If I am not satisfied that the conduct falls in the definition of **S152 TULRCA**, then in essence the claim would fail and the dismissal will not be considered to be unfair, as a potentially fair reason of conduct under **S98(4) ERA** may apply. It will be necessary for me to evaluate what the reason for the dismissal was. The standard of proof to be applied is the balance of probabilities.

46. I have been referred to Article 10 of the ECHR – which is the right to freedom of expression. This is a qualified right. In the context of these proceedings, that is relevant in that no employer could restrain a freedom of expression, however, it does not prevent that expression being considered to be misconduct, if it fell outside of the **S152 TULRCA** protection of 'union activity'

47. I have been referred to in excess of 10 different authorities by the parties, who have taken me through these in their submissions . I shall only refer to these as necessary. In so far as it assists my determination and analysis. However, the most relevant of those decisions which I consider must be central to my decision making is: ***Lyon V St James Press Ltd [1975] IRLR 215.*** Per Phillips J: *The marks within which the decision must be made are clear: the special protection afforded by paragraph 6(4) to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate.*

We do not say that every such act is protected. For example, wholly unreasonable, extraneous or malicious acts done in support of trade union activities might be a ground for a dismissal which would not be unfair.

48. There is very little disagreement between the parties regarding the appropriate legal provisions and the fact that **S152** does not offer a license for every action to be protected, and there are limitations. Equally the issue of whether the activity engaged in falls within the protection of S152 is ultimately a question of fact to be determined upon the evidence.

Evidence

49. I have considered the various matters within the bundle and the additional authorities provided as well as detailed written submissions. I have heard evidence from the then Director of HR (Now CEO) Sacha Taylor and the claimant. Both witnesses provided thoughtful and credible accounts. Both were candid at points and both offered appropriate concessions, where it might not necessarily be supportive of their case. This was refreshing and symptomatic that both are consummate professionals, separated only by the ideology as to whether the claimant's actions fell to be protected under **s152** or not. I shall deal in more detail with specific elements of their evidence throughout my analysis.

Findings and analysis.

The status of the IWGB in the workforce.

50. It is worth noting at the outset that a number of the authorities that I have been referred to discuss the actions for time off for union activity or journalistic roles for unionised workforces. As such they are not on all fours with this case. The respondent in their submissions drew a distinction at paragraph 32 regarding the activities of the union and that the claimant was not a Shop Steward or officer of the union, and called into question whether the activities could be part of 'union activities' in those circumstances.

51. The workforce was attempting to unionise. The claimant was a union member. There is nothing that I have been shown in the legal authorities which prevents the claimant's actions falling within the definition of 'union activity', on the basis of the fact that the workforce had yet to obtain the statutory status or voluntary recognition. It would be a perverse outcome under the statute if **S152 TULRCA** protection were excluded in the process of unionisation. The lack of formal roles within the workplace, is not in my view fatal to the claimants case, nor is it determinative. It is a question of fact as to what occurred.

52. I consider that **Schedule 1A – S 161 (2) TULRCA** also provides statutory protection for an union member engaged in the process of obtaining recognition, including a campaign of recognition, or to influence fellow employees offering support for recognition, and that the acts of the claimant should not be narrowly constructed, but adjudicated on their purpose and effect.

Journalism as a protected activity.

53. The next question to be asked is whether the act of journalism is a protected activity. I have been referred to authorities relating to publications and editorial roles undertaken for a union. But there has been no authority presented which defines whether the claimant giving an interview in these terms amounts to a union activity.
54. In ***British Airways Engine Overhaul Ltd v Francis [1981] ICR 278*** the individual gave a prepared statement to the press, and this was found to have attracted the protection of union activity. A prepared statement is different to an interview, where a soundbite may be selected by the journalist, and editorial control rests with those outside of the union.

55. However, the authorities are clear that the definition of activity should not be cast too narrowly, and I agree with that sentiment.

56. I have been referred to the ***ACAS Code of Practice on Time Off for Trade Union Duties and Activities 2010***, for guidance on the actions which might come under the definitions of activity. This list is neither authoritative nor exhaustive, it unfortunately is silent upon the issue of journalism.

57. It seems to me as a question of interpretation, that in a modern society, it is routine that an individual may in the proper course of union activity give a press interview, either to a newspaper, television, or even via social media. I can easily understand why the ACAS guidance does not cover such issues as media, as once one starts to codify media relations in the context of “activity”, codification becomes fraught with endless complications, once modern forms of media are factored in.

58. However, we live in a modern world and it is in the DNA of unions to use all available voices to pressure and advocate for change on behalf of its membership. It seems to me that despite what may then become a lack of editorial control, the concept of a newspaper, television or media interview, could fall comfortably in the definition of union activity.

Activities of the claimant

59. I have heard how the claimant was an employee representative and later on, one of a group who in effect spearheaded the unionisation. I have no doubt that she believed that that was appropriate for the workforce. The claimant was involved in numerous meetings and discussions with the IWGB union. Some of the sticking points to the creation of the bargaining unit, related to whether the claimant's level of role should be included in that bargaining unit. Ultimately she told me that she withdrew from the bargaining unit, in order to speed the process through. I was left in no doubt that at all times the claimant has conducted herself with a view to facilitating union recognition.

60. I was also left in no doubt that her employment prospects and indeed the treatment by the other leadership team of the respondent, did not change as a result of her involvement. Although Ms Taylor was at times a little illusive, as to what was known within the business about the claimant's union involvement, I am satisfied that there was sufficient evidence that the claimant was proposed to be involved in the bargaining unit. The respondent therefore knew full well, that the claimant was heavily involved in the unionisation campaign, and likely to be a member of the said union.

61. The claimant told me in her evidence that although the CAC process was ongoing, a decision was made to go public and attempt to use social media and or the press to attempt to influence the process of recognition. It was suggested to the claimant in evidence that this was in effect immaterial as the CAC was seized with the process and were holding a ballot. There was in effect nothing to be gained by the press involvement.

62. I accept the claimant's evidence that the press campaign was an attempt by the IWGB Union to influence the respondent into submitting to the unionisation. In any dispute (as there then was) it is open to the parties to settle their differences, which would have resulted in recognition. Equally when a third party is involved to determine a dispute there is always a risk that the party may lose. There was also the secret ballot process, and the campaign may have also sought to influence undecided workers to vote in support of recognition.

63. I do not therefore see the argument that that this was somehow an illegitimate or malign campaign at this stage. Whilst the CAC process was ongoing, it had yet to be determined, and as I have observed, the DNA of a union is to advocate, pressure and represent. I can understand why those who were anxious about the potential outcome, attempted to use all resources at their disposal, to influence everyone involved in the process.

64. Whilst the claimant admitted that she lacked knowledge as to the physical workings of the CAC (as the IWGB were litigating this aspect), she was aware

that there had been three rejected applications for recognition. It was not until the hearing on 10th of October 2022 (coincidently the date of the dismissal) that the CAC determined the need for a secret ballot. Given the hearing date there was perhaps a logic to the timing of the purported press campaign.

65. I accept that the claimant was an IWGB member. I accept her evidence that she had been involved in meetings with the IWGB including the meeting where it was decided to go public with a press campaign. I accept the claimants evidence that the IWGB then put out feelers to various journalists.

66. On the 3rd of October 2022, Tom Wall a journalist with the Observer Newspaper, contacted the claimant as he had been given her details by the IWGB. He proposed an article about the struggle to unionise the respondent. The claimant agreed to speak to him.

67. I accept Ms Fidepe's argument, that the claimant on her evidence volunteered to speak to the journalists. However, the IWGB facilitated this, and this is an important distinction. The claimant volunteering does not sever the link to authorised union activity. The IWGB needed workers to speak to the press as part of the campaign and the claimant was one such individual nominated after she volunteered. **S 161 of Schedule 1A of TULRCA** provides protection for engaging in the process of recognition. Had they been recognised, I suspect the claimant would have been in a prominent union role such as a shop steward. The claimant is an eloquent and intelligent individual and I can well imagine why she was selected, to speak with the press.

68. When the claimant gave evidence about the article she confirmed that Tom Wall had given her an overview of the article, prior to her comments. Given that the article came about because the IWGB wanted it, there is no distinction here and it seems to me to sit squarely within union activity.

69. I find that the fact that the IWGB Union put the claimant forward to speak to the journalist, brings her within the category of an authorised union activity. It then follows that I must examine how the claimant conducted herself, to analyse whether her conduct was such that it took her outside of the protection afforded. To do so I will need to examine the nature of the article and the events that followed

The Article

70. I have read in detail (numerous times) the article, which the claimant is quoted in. The phrase "*not living our values*" is a direct quote from the claimant and it

appears in the headline. It goes on to accuse the respondent of hypocrisy over the request for union recognition and the way the IWGB have been treated.

71. In the sub heading of the article it also quotes the claimant's words; *"The body gave an award for unionising workers to the IWGB, which it now refuses to recognise."* It is suggested that I must consider the specific comments of the claimant carefully in isolation. However, I have had regard to the whole article, and I consider this essential as it paints the context, and is necessary for a proper evaluation and understanding, alongside an analysis of the specific words used by the claimant.

72. The article starts by setting out the refusals of the three voluntary recognition applications that were submitted to the respondent. This is factually accurate. At 214 of the bundle it references the *"RSA's industry wide support for trade unions"*. At 215 of the bundle it quotes Andy Haldane (the respondent's then CEO) as stating *"the decline of trade unions has left workers less able to bargain for pay".* In short it set the scene for why the allegation of hypocrisy may have been levelled against the respondent. The quotes used have not been refuted.

73. It also confirms the IWGB Union as applying for statutory recognition, via the CAC. It provides quotes and references about the respondent's stance on the IWGB Union, which are highly critical. I have been unable to clarify if this was the accepted position of the respondent, and where these quotes were taken from. Ms Taylor in her evidence assumed that these quotes had been taken from correspondence by the respondent with the IWGB or the CAC. I therefore find that the respondent does not dispute that they may have been accurately quoted as describing the IWGB Union as *"not a fit and proper organisation for collective bargaining."* Nothing in the evidence I have seen, suggests that this position is in any way an inaccurate representation of the respondent's position, and sits with the wider information I have been provided with, regarding the resistance of the respondent to consent to recognition.

74. The claimant is then named in the article as is her role as follows:

"Ruth Hannan, the RSA's outgoing head of policy and participation and IWGB member, said the RSA was being hypocritical. "The RSA has done a huge amount of work over the past few years on the future of work and what good work looks like – and we've given the IWGB an award," she said. "But the RSA is telling the world one thing, and doing another…..

Hannan, who is leaving after more than three years but remaining an RSA fellow, said many of the society's illustrious former and current fellows would be shocked by its approach to union rights. "They joined the RSA because it is open, pioneering, enabling and optimistic. They would be disappointed to hear

we're not living our values – and that we've made life so hard for staff. We are letting down our very high historical reputation."

Dismissal Rationale

75. In evidence Ms Taylor highlighted that she felt the statements of Ms Hannan to have harmed the reputation of the respondent. She said that a collective management decision was taken to send a letter to the claimant to curtail her notice, acknowledging that I had already found a dismissal had taken place for the reasons stated above.

76. I struggled with this part of Ms Taylor's evidence as to how the discussions took place. It is said that this was on a Sunday and that there were multiple phone calls between , herself Mr Haldane, Mr Mathers and Mr Richards. Many of which took place late in the evening.

77. I find that there must have been some anticipation of the article. Ms Taylor was not challenged about this, but a spokesman is quoted in the article. I find the respondent was on notice that it would appear, which is why it came to prominent attention of the executive team, on the Sunday. I would have been surprised had there not been some e-communication about this on a Sunday. A text message or an email trying to co-ordinate a catch up, or even a phone log. However, this does not appear in the disclosure before me. Which is perhaps surprising. I also struggle with who the decision maker was, given that Ms Taylor appeared to be operating a shuttle service between the various members of the senior management team. Ms Taylor's evidence in this regard was somewhat confusing and hard to unpick, and at points opaque as to who decided the way forward. It is not clear what was taken into account, and what they decided between them as the reason for dismissal. It perhaps matters little who the ultimate decision maker was, but certainly Ms Taylor was heavily involved. It is apparent on the evidence that they felt the claimant's continued presence would risk a further damage to the reputation, and she should go immediately.

78. From the emails that were passing back and forth on the 9th of October 2022 (at 220 of the bundle between Mr Richards and Ms Taylor), the original draft of the termination letter, and the letter of the 25th of October 2022 to the IWGB, I find that they all clearly link a potential breach of terms of her contract, and potential for gross misconduct, as a reason for the decision to end the claimant's contract of employment early. In her evidence Ms Taylor was clear that she felt that the claimant had a responsibility to the respondent under the media policy and given her senior role and the language used, that this would damage the reputation of the respondent.

79. I am left in little doubt from the evidence I have heard and the written intentions of the respondent in its early drafts, that they believed that an act of gross misconduct had been committed. I find that this was the reason they acted.

80. The respondent was alive to the risk of a **S152 TULRCA** infringement. Mr Richards specifically referenced the risk on the 9th of October 2022, that the letter of dismissal could be seen as the claimant's employment being terminated for union activity. The dismissal letter was toned down as a result.

81. Ms Taylor in her evidence drew a distinction as to whether it was a legitimate activity. She said the use of the phrase '*we've*' and 'naming the claimant's role' in the article were the central issues linked to reputational damage. Ms Taylor also said that the phrase in relation to '*making life hard for workers',* was misleading. The implication being that it was implicit there were difficult working conditions at the respondent. She felt that this breached the media policy and fell outside reasonable conduct.

82. The claimant in her evidence expressed some regret for the fact that she had allowed her name to be used. Hindsight is a wonderful thing. She referred to the use of "we – or we've" as an affectionate term for the Respondent and one that she has struggled to stop using even having left the organisation. I have seen evidence of this in the claimant's evidence. I can see that in the free flow she used this phrase as it was her common terminology, and perhaps that was ill judged, and naive. However, I did not get any sense from the claimant that she intended this to be misleading or malicious.

83. My assessment of the claimant's evidence as a whole, is that she just wanted to highlight the hypocrisy she perceived, and bring pressure to bear on the situation. That in my finding, as I have said, is a legitimate activity.

84. I cannot see why, in any trade union dispute, that a senior or prominent worker cannot make a press statement, protected as a union activity. It is a legitimate activity for a union member to criticise an employer (in this case in relation to its treatment of the unionisation process), and it is a legitimate outcome for that criticism to cause reputational damage to the employer, if it is made in a public domain. Parliament clearly contemplated this, when it gave the protections afforded by **S152 and S161 of Schedule 1A TULRCA**, to ensure that undue influence was not brought to bear, by an employer. This is of course to be distinguished from the malign activity which has as its central purpose, to mislead or harm, without a legitimate objective.

85. Ms Taylor stated that as a member of the management team, the claimant should not have given the interview and accordingly this breached the media

policy (without consent of the respondent), particularly given the claimants position. She argued it appeared as if the claimant was speaking for the respondent. The reliance on these two matters is in my view a flawed justification for the action undertaken.

86. The protections of **S152 TULRCA** do not discriminate between the level of worker, within any organisation. The only qualifying feature to be afforded protection is that the action must be legitimate union activity. The fact that a union statement may contravene a firms usual media policy, is the whole point of freedom to be unionised, and the point of the protection under **S152 and S161 of Schedule 1A TULRCA**. Union members should be free to be critical, in appropriate circumstances. To hold the claimant to a higher standard because of her position, would be a contravention of her article 10 rights, and effectively provide a discretionary opt out for employers, from the protections afforded by **S152 TULRAC** based on an employees management seniority. The **TULRCA** does not provide such a distinction. I find that the principle of the contravention of the media policy by the claimant, related to her position would not be a fair reason to dismiss the claimant and would in principle amount to a contravention of **S152 TULRCA.**

87. That said, I can see that an individual (such as the claimant) should choose their words carefully, to be captured by the protection. I have already found the use of the phrase 'we've' may have been ill judged. However, the article makes it clear that in her role the claimant is an IWGB member. I find that this reference is sufficient to interpret that the claimant was aligned and speaking for the union and not on behalf of the respondent. In relation to her accusation of hypocrisy "*saying one thing and doing another,*" I find is an entirely legitimate statement for a union representative to make. It is not offensive or malicious. It highlights a potential important issue from the perspective of the claimant and the union. This was in relation to the respondents praise and criticism of the IWGB, being in perceived conflict with each other.

88. I find the use of the phrase *"not living our values"* is a clear and legitimate criticism, highlighting the context above that the respondent has both promoted unionisation by others, but has resisted it internally. I note that in her evidence Ms Taylor repeatedly noted that *'unionisation was not felt to be in the best interest of the charity as a medium sized charity'* and they had welfare structures in place for staff. The fact that staff may feel differently, is an entirely legitimate criticism to make in the context of union activity and recognition.

89. Ms Taylor asserted that the phrase "*made life so hard for staff*" is misleading, and thus falls outside the protection of union activity. When I asked about the interpretation of this, and how it could be read, either as 'unionisation has been

made hard' or 'working conditions have been made hard', she felt it would be interpreted as the latter, and as a result was misleading. In summary her allegation was that this coupled with the claimant's role, made it appear that the respondent acknowledge some form of wrongdoing and somehow legitimised the IWGB and claimant's allegations. Ms Taylor said that the claimant was in effect a middle manager, however, the job title may be perceived as one of greater influence, and the public may not be able to distinguish this. Whilst the concerns highlighted are understandable, in my finding this insufficient justification for the actions of the respondent. A management role and union activism are not mutually exclusive and it would be inappropriate to apply such a fetter.

90. Contained within the article (at 218 of the bundle) there is a spokesperson quote. This is clearly a distinct voice from the claimant. It also says that until the CAC process is over, it would not be appropriate for comment. In my finding this is a further factor as to why the claimant can be seen as speaking distinctly on behalf of the IWGB members. In that regard she is entitled to accuse an employer of making either the registration, or the working conditions hard. It may be both. But neither takes it out of the sphere of union activity. However, my own interpretation on reading it was that it was the process of registration that was made hard. But I do not think it changes the outcome if it is the other context.

91. In my finding the risk of reputational damage was clearly a factor that motivated the claimant's dismissal and that this was misplaced.

92. I find that on all of the information provided to me that the sole reason for the dismissal of the claimant was the article, and the perceived consequences for the respondent that this created.

Conclusions

93. I Have made it clear above that the activities of the claimant being promoted by the IWGB fall within the definition of 'authorised union activity'. I am not persuaded that they were so removed as to represent individual activities of a union member, and therefore the respondent has not discharged its burden in that regard.

94. I am satisfied that the conduct of the claimant was a union activity within the definition of **S152 TULRCA**. The comments were not malicious. There was nothing for the claimant to gain. Her desire was to pressurise the unionisation and that in my view makes it a legitimate aim.

95. The wording used could not be considered offensive, it is eloquent , and at times hard hitting, but it is comfortably within the sphere of legitimate criticism and the

language appropriate to that. I do not consider the phraseology to be misleading, and there is balance in the article. The respondent has fallen well short of demonstrating that it falls into the malicious, wholly unreasonable category or the extraneous as described in **Morris V Metrolink Ratp Dev Ltd [2018] EWCA Civ 1358**.

96. The respondent perceived the claimant's actions to be misconduct. They were alive to the **S152 TULRCA** risk in their correspondence. The sole reason for the dismissal was the article. I have found the article is legitimate union activity by the claimant. It follows therefore that I am bound to find that the claimant was dismissed for participating in union activity and therefore was unfairly dismissed for an automatically unfair reason under **S152(1(b) TULRA.**

Remedy

97. The claimant in her schedule of loss indicated that she sought a modest amount, of £2569.50, by way of a basic award. She did not seek any compensatory award. I got the sense that the remedy the claimant sought was the principle, of the decision, as her losses in the circumstances were very modest.

98. In discussions with the parties I highlighted **S156 TULRCA,** which sets out a minimum basic award to be applied as a starting point in cases of dismissals pursuant to **S152 TULRCA.** Having discussed this with counsel, there was no opposition to the fact that I should apply **S156 TULRCA** and that in the first instance this would amount to a more significant basic award, namely £6,959 (for the relevant tax year). No party argued that because the claimant had overlooked **S156 TULRCA**, that it would be just and equitable to reduce that award, and I take the view as the statutory guidance intended a larger basic award, there was no reason in the first instance to depart from this, as starting point.

99. However, the respondent did argue that there ought to be a reduction for contributory conduct. The basis of this argument was that I had made the findings at paragraph 83 above that the claimants words were ill judged and naive. Ms Fidipe argued in those circumstances that the basic award should be reduced by half. This was opposed by the claimant who argued that the scope of the conduct fell within the remit of **S152 TULRCA** and was therefore protected, and did not amount to contributory fault.

100. As a matter of construction, it follows that if an individual is afforded protection under **S152 TULRCA**, their action is legitimate union activity. It would be a perverse finding that the conduct were then subject to a reduction for contributory conduct, and would erode the very protection that was intended.

101. It seems to me that (in relation solely to the basic award prescribed by **S156 TULRCA**), the issue of contributory conduct, must stand and fall as to whether the activity falls for protection **S152 TULRCA**. If the conduct were such that contributory fault should be applied, then it follows that the conduct would fall into the categories described in **Morris V Metrolink** and therefore be incapable of **S152 TULRCA** protection.

102. Even if I am wrong about that, I do not find that the claimants wording was such that it merited a reduction. I have noted that there was sufficient delineation in the article to identify that the claimant was speaking in support of the unionisation and not on behalf of the respondent. There was an eloquent logic to her argument, and her argument, was perfectly reasonable. The manner in which she used the phrase 'we've' was perhaps not the wisest, but it did not take the matter outside of the protection of **S152 TULRCA,** because of the claimant's conduct. I therefore refuse the respondent's argument that a reduction should be applied to the basic award.

103. In conclusion, I find that the claimant was unfairly dismissed pursuant to **S152 TULRCA 1992**, and I award the claimant a basic award only pursuant to **S156 TULRCA 1992**. The respondent must pay the claimant £6,959.

104. That is my Judgment.

Employment Judge Codd

24th November 2023

Sent to the parties on

24/11/2023

For the Tribunal