



EMPLOYMENT TRIBUNALS

Claimant: Mr B Falanka

Respondent: London School of Economics

Heard at: London Central

On: 13, 14, 15, 16, 19 & 20
February 2024

Before: Employment Judge Emery
Mr D Kendall
Mr S Godecharle

REPRESENTATION:

Claimant: In person

Respondent: Ms M Sharpe (counsel)

JUDGMENT

All claims of unfair dismissal, automatic unfair dismissal, and detriment related to trade union membership fail and are dismissed.

REASONS

1. Judgment and reasons were given at the hearing, there was a subsequent request for written reasons.
2. The claimant was dismissed for gross misconduct on 2 September 2021, the respondent says the reason was an act of falsification of timesheets for personal gain.
3. The claimant says that this is not the reason for his dismissal, that he was dismissed for his trade union activities, that he was subjected to detriment by his manager including negative remarks related to his union membership during his employment.

4. Dismissal Issues:

- a. What was the reason or principal reason for dismissal? Was it because of the claimant's trade union activities? If so, his dismissal was unfair.
- b. The respondent says the reason was conduct. Is this a genuine belief?
- c. If the reason was misconduct, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?
- d. The determination of fairness must be in accordance with equity and the substantial merits of the case. The Tribunal will usually decide, in particular, whether:
 - 1.1.1 there were reasonable grounds for that belief;
 - 1.1.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.1.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.1.4 dismissal was within the range of reasonable responses.
- e. If the dismissal was unfair, did C contribute to the dismissal by culpable conduct?
- f. Can R prove that if it had adopted a fair procedure, would have been fairly dismissed in any event (Polkey)? And/or to what extent and when?

5. In work detriments related to trade union membership or activities (section 146 TULRCA)

- a. Did the respondent do the following things:
 - i. Take nearly four months to hear the claimant's appeal against dismissal (the appeal was made on 15 September 2021, the appeal hearing was on 12 January 2022).
- b. By doing so, did it subject the claimant to detriment?

6. Breach of contract (notice pay)

- a. Did the claimant commit an act of gross misconduct?
- b. If not, how much notice pay was the claimant entitled to?

Witnesses

7. We heard evidence from the claimant. The claimant gave some evidence through a Tribunal-appointed interpreter, he gave some evidence in English. He asked many of his questions to witnesses through the interpreter. The Tribunal made sure that the claimant had sufficient time to ask and answer questions. On his behalf statements were submitted from Ms. Lukau Ayenge, a Cleaner; Ms. Beverly Williams, a former cleaner/supervisor; Mr. Domingo Augusta, a porter, Mr. Mory Traore a porter; Ms. Khadidia Tembeley a cleaner. All the claimant's witnesses were witnesses on the claimant's behalf in the disciplinary process
8. For the respondent we heard from:
 - a. Ms Mary Lee, Senior Facilities Manager, who investigated the disciplinary issue
 - b. Mr Viktor Fejokwu, the Facilities Manager, who reported into Ms Lee
 - c. Mr Allan Blair, Director of Facilities, who chaired the disciplinary process
 - d. Mr Julian Robinson, Director of Estates, who chaired the appeal against dismissal.
9. The Tribunal spent the first half-day of the hearing reading the witness statements and the documents referred to in the statements. There are many disputed issues, and we set out below our 'factual findings' in respect of all relevant issues.
10. The judgment does not recite all the evidence we heard, instead we confine our findings to the evidence relevant to the issues in this case. It incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.
11. I use the first names or nicknames for many of those who were witnesses in the disciplinary process but who are not witnesses. The reason: this is the way they are referred to in many of the documents, and the name by which many were known within the workplace.

The facts

12. The claimant had been in role for nearly 11 years, latterly as Campus Services Manager in the Facilities Team, when a new Facilities Manager, Mr Fejokwu, started employment with the respondent on 11 May 2019.
13. Some weeks into his role, Mr Fejokwu became concerned about issues with the signing-in of facilities staff. He formed what we accept was a genuine view, that porters and cleaners were signing-in using initials, and that some employees including the claimant appeared to be signing-in and signing-out when they arrived at work.
14. Mr Fejokwu and the claimant worked overlapping shifts on Sundays. Over the first few weeks of his employment, Mr Fejokwu gained the view that the claimant was not assisting him with operational matters, the claimant would suggest that Mr Fejokwu should leave work early and told him not to "kill-

himself" doing the job.

15. It is the respondent's case that the Sunday Supervisor, Baba, spoke to Mr Fejokwu on 10 June 2019 and alleged that an employee, Alseny Djallo, had been signed-in as at work on 2 and 9 June 2019, both Sundays. Baba said that Alseny had not been seen at work on these days. The claimant was at work these days.
16. Mr Fejokwu spoke to his manager, Ms Lee, who was also relatively new in post, about this incident and was formally interviewed by her on 13 June 20019 (190-3). Mr Fejokwu says that the claimant "didn't want to work with me... in observation staff were starting and finishing outside of their contract times." He said that Baba spoke to him on 10 June "... and said he had a problem with the sign on sheet ... Alseny was not on site." He said signatures did not match, just initials were used. He said that "everyone knows" the claimant was "signing people in and asking for his money." He said his main concern was that the claimant "has got a grip" on his team.
17. Ms Lee started an investigation. On 19 June 2019 she met with Abdulrazaq: he did not have direct evidence of the claimant seeking money for shifts, he said he believed this was happening from conversations he had. He said that the claimant picked on him because he had raised an issue about staff leaving their shifts early (196-8).
18. On 20 June 2019 Ms Lee met with Baba, notes were taken by HR (199-200). He says that he asked where Alseny was after he noted he had been signed in, no one had seen him. He said that the claimant responded, "some people are covering for hours for people who are absent". He said that the claimant tried to sign-out for "the boys" and he stopped the claimant from doing so.
19. Richmond was interviewed on 21 June 2019. He gave examples of concerns he had about staff being signed-in but not working; he said that "... he had heard ... they put [Souleyman's] name there so they can collect the money". He said he was "suspicious" that the claimant was changing times on the timesheets (201-2).
20. Alseny was interviewed on 26 June 2019. Initially he said he had worked the Sundays in question, plus 23 June, he was asked to bring in his diary showing the days he had worked the next day. At the reconvened interview the next day, Alseny is asked the following: "I have 3 statements saying you were not on site 2, 9 and 16 [June]. You tell me about it". In response Alseny says "I don't want to lose my job".
21. Alseny is asked who has signed him in, and why did he allow this to happen. He said the claimant "signed in and out for me" that the claimant "told me" he had done so, that the claimant wanted money from him "when I get paid" (203-12).
22. On 31 July 2019 Alseny asked to "withdraw" his pay claim for the 11 hours over 3 Sundays "I didn't work..." (215). On 15 August 2019 his union rep submitted

a formal grievance for the “undue influence” and “bullying” Ms Lee placed Alseny under during this interview.

23. Souleyman was interviewed on 4 July 2019. He said he had not had issues signing in; all the signatures were his own on all dates he worked (213-4).
24. On 15 August 2019, the claimant was suspended from work. Ms Lee spoke to him and informed him that “potentially fraudulent activity” had taken place on timesheets for the cleaning team. He was advised this may be gross misconduct and a full investigation would occur (220-1).
25. A significant issue for the claimant is that one of the issues which led to his suspension, an alleged timesheet irregularity on 14 August 2019, had not occurred. The claimant had signed his name against Ms Ayenge’s name. He had then crossed out his name and signed in the right place. The claimant’s case is that this was an innocent error, that it was he who pointed out this error to Richmond and not vice versa, and that there was nothing he did to warrant his suspension from work.
26. The respondent argues that it is only when Richmond asked where Ms Ayenge was that the claimant changed the signing-on sheet. Richmond provided a statement of this incident on 20 August 2019 and was re-interviewed on 11 September. He said that on 14 August 2019 he had noted that Ms Ayenge “had been written in on the sheet as working from 10.00 to midnight. However, it was ... 9.20pm, but the time had been written in against her name... he noticed that [the claimant’s] name was signed in and out as working from 10.00 to midnight but it was 9.20pm.” He spoke to the claimant about Ms Ayenge, the claimant said, “oh it’s me, it’s a mistake”. Richmond said that the claimant was by this time aware of the investigation and had asked him to speak to “the Ghanaian people” to tell them to say nothing and pressed him to speak to one member of staff, Cecilia (231-2).
27. An investigation meeting took place with the claimant on 9 September 2019. The claimant was accompanied by a union rep. He was asked about the signing-in process, and he said that he signed in at his start-time and out when he finished his shift. He mentioned what he said was his mistake on 14 August 2019 on signing the wrong line.
28. On the issues raised by Alseny, he said “he did not know anything and he had no comment”, that he was not aware that this was an issue which was going to be addressed at that meeting. If Ms Lee wanted to have a meeting about Alseny, she would need to put everything in a letter explaining what had happened, “[he] stated that he did not know anything.” (227-30).
29. Additional allegations were made against the claimant in writing on 9 October 2023 – including further allegations of falsification of timesheets and use of threatening and intimidating language and/or behaviour towards staff (233-4).
30. The claimant attended the next disciplinary investigation meeting with a TU rep. The precise order of events on 14 August 2019 was discussed. The claimant’s

case was that he brought the signing in error to Richmond's attention, that he had signed in early for this shift as he was working 2.00 to 10.00 pm on one shift and 10.00 pm to midnight as cover. He said that Richmond was "lying" in saying he had pointed out the error in signing-in. The claimant stated that he had not spoken to Richmond about speaking to Ghanaian staff or Cecilia.

31. On the issue of Alseny being signed in for Sunday shifts the claimant said, "He did not know anything about this...". Ms Lee talked through the evidence, including that of Baba who had noted that Alseny was not on site when he had been signed in. The claimant's response was that he had helped with signing out, but that Baba was in charge and responsible for timesheets on Sundays.
32. When Alseny's evidence was discussed, that the claimant had asked Alseny to "hand over the money to him at the end of the month", the claimant's response is noted, "he laughed and shook his head" and said he "did not know anything about this, he never had a conversation about any money"; he did not know who had signed Alseny in, and he did not work with Alseny at weekends, "he did not know why Alseny mentioned his name" (246-52).
33. Alseny put in a grievance on 20 November 2019 about Ms Lee's interviews with him. He says he was taken by surprise, and he had felt panicked, that they "insisted that he give the name" after he had said he had not wanted to "... he had felt pressured so he ended up giving the name ... he had left really guilty and bad about giving the name". He said that his issue was "with the means of approach" to him. He said that "the person who was in charge of the porters was responsible" for putting his name on the timesheet, but "he did not want to give the name ... it was not his role to give names and he did not want to get involved..." (257-9).
34. Alseny's grievance was partially upheld – the meetings with him on 26 & 27 June 2019 were outside of process, as a formal meeting should have been held under LSE's processes; the allegation of bullying by Ms Lee in respect of this meeting was not upheld (260-2).
35. A formal Disciplinary Investigation report was prepared by Ms Lee; this set out the issues raised by Baba and Richmond and what was said by them during the investigation meetings, Mr Fejokwu's comments when interviewed, and the disciplinary investigation findings. Ms Lee comments on the discrepancies between the claimant's account and the other accounts of what had happened over signing in. It details allegations of alleged threatening behaviour.
36. The investigation report concludes while "occupational fraud ... is typically difficult to monitor", Alseny did not work four Sundays, Alseny alleges that the claimant had signed his name and asked for money, he "was visibly scared and frightened" about sharing this information ... I feel it is more probable than not that the claimant did manipulate the timesheets for hours that were not worked for his own financial gain (263 – 274).
37. The disciplinary hearing started on 9 March 2020. The claimant had a trade union rep who asked questions and indicated the claimant wanted to call

witnesses – Richmond and Alseny (283).

38. The Covid pandemic then intervened; colleagues were furloughed, and the respondent argues that it was unable to call witnesses in the interim.
39. In February 2021 the process restarted, the claimant submitted statements on his behalf including from Mr I Traore (307), Mr M Traore (342) and Ms Tembeley (319-20). These stated that the claimant did not seek to change their hours without their consent, that they did not witness any incidents involving the claimant. The resumed disciplinary hearings took place on 12 and 22 April 2021.
40. The claimant's union representative made it clear that his case was that his signing-in against Ms Ayende's name on 14 August "was a mistake, and all the other allegations are fabricated" and he was therefore unable to respond to them. His case is that this was not a shift where he was manager, that Baba was in charge on Sunday. He said he never signed people in or out, that the allegations made by Mr Fejokwu were "assertions".
41. Alseny was interviewed – he said, "I did not work" on the Sunday's where he was signed-in; he answered most of the other questions put to him with "I don't know" (325-32).
42. The disciplinary hearing reconvened on 22 April 2021, and the claimant's rep asked Ms Lee questions; Ms Lee is questioned as to why Souleymain was interviewed but his interview is not in the report; Ms Lee stated "there was nothing relevant" in his answers. His rep argued that Alseny alleged Ms Lee had "bullied him" and that his statement about the claimant is therefore "completely unreliable".
43. The claimant raised other concerns via his rep, including the length of time it took to interview witnesses, that there was "a partial investigation with a limited range of witnesses who were communicating amongst each other" about the claimant, "It looks like the report and investigation has been done in concert with these people rather than detached from the witnesses." His rep argued there was a "fundamental lack of evidence", and witnesses were not interviewed (333-41).
44. The disciplinary hearing was reconvened on 13 May 2021 and Alseny was asked questions. He repeated that he had not worked the June Sundays in question that "Sundays are not my shifts". He said that he asked not to be paid for these shifts "after I told them the truth and said I didn't work." He said that he did not mention the claimant's name at the 2nd meeting, that he was "under pressure" and panicking". He was asked about the claimant's involvement and "why did you choose [the claimant]?" His repeated answer was "I don't want to talk about it". He was asked whether he or Ms Lee was the first person to name the claimant, he responded "she didn't say it." (375-82).
45. The 5th disciplinary hearing took place on 24 May 2021; the claimant started by saying that it was not Alseny who was working, that "it was Mamadou..." who

was working the Sundays. Mr Broan gave evidence, he said he was unaware of any issue with the claimant. Mr Mamadou Djallo gave similar evidence.

46. The claimant provided a statement from Ms Williams in his support – saying he was a good supervisor who worked hard to find cover for staff; it mentions the event on 15 August 2019 when the claimant signed in under Ms Ayenge’s name “I am told that he then crossed it out immediately... I believe [the claimant] made a mistake”. Ms Williams denies the allegation that the claimant intimidated another employee; that the claimant “cannot sign for someone and collect the wages”, that it was Richmond’s responsibility to put in the time sheets, and another member of staff who does the payroll. She says Richmond is “lying” over an issue he said Ms Williams told him about “... I do not speak to [Richmond] because I have had multiple problems with him in the past.”
47. Ms Williams says that Richmond accused the claimant because he was “afraid to lose his job”. She says that Alseny was “forced” to give evidence against the claimant, under threat of not being given overtime, and was said under duress. Ms Williams says that the claimant was the union rep, who was of “vital importance” during the UvW strike at LSE. He says that the claimant had “influence” with employees, and he “persuaded people to respect the picket line and go on strike. This may explain why these allegations have been made...” (409-14).
48. The claimant provided a statement from Mr Ayenge – she says that she does not believe the claimant would have signed in her name – it was a day that she had called in to say she had a medical appointment at short notice, and could not work – she says she told the claimant she had told “the office” also, hence she could not understand why the claimant would deliberately sign in against her name.
49. Mr Fejokwu gave evidence at the next disciplinary hearing on 8 June 2021 – he explained the issues he faced with the timesheets, including initials, that he spoke to Baba who confirmed his suspicions, and he went to speak to Ms Lee. He was asked questions by the claimant’s union rep, and reiterated why he got suspicious about the amount of ‘sickness’ recorded on Sunday shifts. The claimant gave further evidence, repeating his responses about Alseny.
50. Abdulrazaq gave evidence – he said he had been threatened by the claimant; when he “pretended” to take a photo of the timesheet, the claimant’s response during the hearing was “everything he says is a lie.” He says he pretended to take the photo “because I had this suspicion that something was going on...”. He said that there was activity “where people were supposed to be in, but we did not see them.” (460– 474).
51. A further statement was provided for the claimant – Mr Augusta, a porter. He says he was there when the claimant signed in against Ms Ayenge’s name, that he pointed out to the claimant he was signing the wrong place, that the claimant crossed out and wrote against his own name, that this is a common mistake on the timesheets (383-4).

52. The reconvened disciplinary hearing took place on 23 June 2021. Abdulrazaq continued to give evidence, and he was asked questions about why he had pretended to take a photo, whether he had done so on other occasions, why he needed to take photos; when the claimant called him a 'liar' he responded saying "... this is what I was complaining about ... he's showing me intimidation and threats...".
53. Richmond gave evidence – he said he noticed an issue with people not coming to work yet being paid, "I decided to take a very low profile and take a look at what is going on." He said that on 14 August 2019 Ms Ayenge's shift was 5.00pm to 10.00pm and she was due to work cover from 10.00pm to midnight. He had asked the claimant where Ms Ayenge was as he had not seen her, that the claimant said Ms Ayenge had left work early to go to an appointment, "so I let her leave at 9.00".
54. Later in the disciplinary hearing Richmond said that towards the end of Ms Ayenge's shift "a time has appeared for her"; he asked the claimant where she was, the claimant responded "no maybe she's in the other building" and that the claimant said he had signed against Ms Larbi's name mistake, that when he checked back the entry had been crossed out.
55. Richmond's evidence was that the next day, Ms Ayenge called him and said she would not be in that day. "I asked her what happened [the day before]"; he says that Richmond informed him that she had called the claimant at 3.30pm to say she would not be at work "so [the claimant] would have known that she wasn't coming to work."
56. The claimant's response at the disciplinary hearing to this evidence was that Richmond was "a liar" (475 – 487).
57. The hearing reconvened on 29 June 2021. Richmond continued to give evidence on questions from the claimant's union rep. he referred "rumours going around for a long time" about the claimant's conduct; that the rumours were that the claimant had "colluded" to put someone to work on a Sunday "and the person doesn't come to work and his name is on the books and got paid. ...".
58. On 6 July 2021 Ms Lee gave further evidence and was questioned by the claimant's union rep. Ms Lee said that there was a "pattern" to the issues raised by Mr Fejokwu, Richmond, and Baba, that she had been told by Richmond that there was an "issue" following the 15 August timesheet issue.
59. The claimant's rep summed-up the claimant's case; he repeated the 14 August explanation, saying that the claimant's mistake had been witnessed by Mr Domingo; on the Alseny issue, the claimant "has no idea" who signed him in, and "no idea" why Alseny would say it was him. He said the burning issue is why so many people a lying, why several other staff members were not interviewed by Ms Lee, that the allegations are "vague, circumstantial ... untrue". Mr Fejokwu's credibility was questioned, and Richmond had given "a dishonest account" over the photos. Alseny was put under pressure and this

“calls into question the reliability of what was said. ... there was an expectation that he would name somebody.” (504 -513).

60. The final disciplinary hearing took place on 2 September 2021. At this meeting the claimant was informed he was being dismissed for gross misconduct. The reasons: (i) falsification of timesheets for his own financial gain; (ii) use of threatening and intimidating language and behaviours towards staff. Mr Blair summarised his reasoning at the meeting, the main points are as follows:

- a. Mr Blair was “initially satisfied” that the issue with Ms Ayenge and the claimant signing against her name was an error, however the claimant had said she was in the building and had then changed the time sheet “this sowed seeds of a lack of trust in you...”.
- b. While the claimant was a hard worker, the evidence was he had sent staff home early on occasions and finished their work – “this is not leadership, and also puts [the claimant] in a position where he might then be able to call in favours.”
- c. He accepts mistakes can be made by timesheets, but there was from the claimant “a lackadaisical and causal approach” to timesheets leading to inaccuracies and encouraging sloppy practice “signing out at the same time as signing in is a serious health and safety matter ...”.
- d. Alseny was “clearly incredibly uncomfortable” giving his account; while his grievance had been partially upheld, “This does not change the information that was shared ... nor was it ever denied...” that the notes were accurate. He concluded that Alseny had “never contradicted his account that [the claimant] signed him in for shifts that he did not work, for money... I cannot see why Alseny would make it up...” .
- e. Abdulrazaq and Richmond’s evidence showed that there were issues with timesheets, that Richmond was “acutely aware” that something was not right, and questioned the claimant over Ms Ayenge’s whereabouts, that the claimant said she was in the building when “he clearly knew that she was not. This shows a complete disregard for integrity...”. He did not accept there was a coincidence over the timesheet signing.
- f. The claimant’s conduct at the hearings, shouting and calling him and staff members liars “only go further towards demonstrating” his use of threatening and intimidating behaviour. He said that comments made by the claimant and others including “I will show them who is Falanka”, all confirm that his behaviour is “unacceptable intimidating and threatening.”

61. Mr Blair concluded that there was insufficient mitigation to change this decision: his behaviours were “very concerning”, and timesheet fraud in relation to extorting money from Alseny meant summary dismissal is the appropriate decision.

62. The claimant was given the right of appeal, and he exercised it via an 11-page letter from the UVW on 15 September 2021. The grounds were: (1) conclusions were reached without adequate evidence; ((2) the accuser's evidence was unquestioningly accepted even when it was contradicted by other witnesses "and/or defied logic"; (3) reliance on irrelevant facts and untenable assumptions; (4) ignored and rejected evidence favourable to the claimant "without reason"; (5) accepted evidence of unreliable and/or dishonest witnesses; (6) exhibiting bias against the claimant and his supporters; (7) "concern of trade union victimisation" (532-543).
63. Mr Blair provided his comments on the appeal document; on the trade union membership allegation he said, "This is a cheap shot. The process has only ever been about ... the behaviour of those individuals" (546-9).
64. The appeal was chaired by Mr Robinson. The claimant was asked questions, he reiterated he did not know what occurred with Alseny, that Baba was responsible for taking the time sheets to the office. His union rep suggested that Alseny was attempting to protect someone else and was pressured and uncomfortable during his evidence. We think he felt bribed and pressured ...". He said that there was enough doubt and uncertainty which meant the evidence "is not sufficient enough" to show the claimant was responsible.
65. Mr Blair was asked questions by the claimant's rep. He said that the issue of 14 August was "not really considered" because the issue with Alseny "is fact. He admitted to never being [at work], he's been signed in ... and been paid and he identifies [the claimant] ... the decision focused on Alseny." He accepted in questions from the Chair that the claimant's conduct during the disciplinary hearings had "swayed" him on the issue of coercion and intimidation, but not "falsification and coercion [because] we have evidence". Mr Blair accepted that there were contradictory statements from Mr Fejokwu on the issue of trade union membership, and Abdulrazaq also gave different accounts on the photos issue. Mr Blair argued that Alseny had "not flinched ... has been consistent" in his account of his timesheets.
66. The appeal decision dated 25 January 2022 was as follows: on the use of threatening and intimidating conduct towards staff – there was "insufficient evidence" to uphold this allegation, and it was an "error" for Mr Blair to have relied on Mr Fejowku's evidence of not feeling welcome, there was no other evidence in support.
67. On the falsification of timesheets/fraudulent activity: the conclusion was that there was "ample opportunity" for the claimant to have falsified the timesheets on the days in question as they were in his possession and he would hand them into the office; they were submitted with false information and Mr Diallo was paid for shifts he had not worked; Mr Diallo's account was that the claimant had contacted him after the timesheets had been submitted and asked for this cash on pay-day; the claimant could not say why Mr Diallo would raise this allegation against him. Mr Robinson upheld the "key ground of potentially fraudulent activity, specifically the falsification of timesheets for his own personal gain".

The relevant law

68. Employment Rights Act 1996 – Pt X Dismissal

s.94 The right

- a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

1. 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.
2. A reason falls within this subsection if it—
 - a. ...
 - b. ...
 - c. is that the xxx...
3.
4. 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 issue

69. Automatically unfair dismissal - Section 152 TULRCA

S.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, ...

Dismissal - process

70. *BHS v Burchell test - Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] EWCA Civ 903:*

"35 ...once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct.

- a. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case
- b. Did the employer believe that the claimant was guilty of the misconduct for which he was dismissed
- c. Did the respondent have a reasonable ground for that belief.

"36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. ... In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."

71. The ACAS Code states that a properly conducted investigative process:

- enables the employer to: discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;
- secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and
- even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.

72. *W Weddel & Co Ltd v Tepper [1980] IRLR 96 at 101:*

"... [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the

[employment] tribunal in this case, “gathered further evidence” or, in the words of Arnold J in the Burchell case, “carried out as much investigation into the matter as was reasonable in all the circumstances of the case”. That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably.’

73. University College London v Brown [2021] IRLR 200: what was the purpose of the employer in determining to hold the appeal when it did? It involves considering the thought process of the person who made this decision.
74. Yewdall v Secretary of State for Work and Pensions EAT 0071/05: The questions to consider:
- a. Have there been acts or deliberate failures to act on the part of the employer?
 - b. Have those acts or omissions caused detriment to the claimant?
 - c. Were those acts or omissions in time?
 - d. If in time, has the claimant established a prima facie case that they were committed because of his trade union membership or activities?

Conclusions on the evidence and the law

75. The respondent argues that Mr Fejokwu, the new Facilities Manager, became suspicious over time about signing-in issues. He was also suspicious because he believed that the claimant was not assisting him in operational matters.
76. The claimant argues that the respondent did not have a genuine belief in wrongdoing. He argues that the respondent and in particular Mr Fejokwu was motivated by the claimant’s trade union membership. We accept that Mr Fejokwu probably was aware of his membership. He made one negative comment about union membership prior to the claimant’s suspension.
77. But we also accept that Mr Fejokwu’s concerns were real. He was concerned about the signing-in methods of porters and cleaners, the use of initials, the fact that staff including the claimant appeared to be signing in and out when they arrived at work.
78. The respondent’s case is that the claimant was responsible as Team Leader for timesheets on shifts. The claimant accepts this is the case for weekday working. His case is that on a Sunday Baba was responsible for timesheets. The claimant says he did not work Monday mornings, that Baba came in on his day off to submit the timesheets. The respondent says that Baba does not work Mondays and could not have put the timesheets into the office. It says that it has evidence that the claimant submitted these timesheets to the Estates office each Monday.
79. The respondent’s case is that it slowly realised that timesheets may not be accurate. Mr Fejokwu had suspicions, as did other staff members.

80. The Tribunal accepts that the issue of the alleged time-sheet irregularity on 14 August 2019 was not an issue on which the respondent had enough evidence on which to reasonably conclude the claimant had committed misconduct. There were contradictory accounts. In particular Ms Ayenge says that she called the office to say she was not well, meaning the office would be aware she should not be paid. It is also an incident of a very different character to that of Alseny, on which more below.
81. Mr Blair states at the dismissal hearing that this incident in his mind “sowed the seeds” of the issue of trust. We accept that at the time, the respondent had a misconception based on this incident that the claimant may have committed misconduct.
82. However, at the date of this incident, Ms Lee, had spoken to Alseny because he had been signed in work on 2, 9, 16 and 23 June 2019 – all Sundays and all days the claimant was working, and all days on which no one had seen Alseny at work. Mr Fejokwu was told about the 2 and 9 June issues on 10 June 2019, and we accept he immediately reported this to Ms Lee.
83. The claimant criticises the interview with Alseny; the respondent accepts there were shortcomings in this interview. However, Alseny was clear in saying that he had not worked these dates and the claimant had asked for the wages; he emailed confirming he did not want to be paid for these dates.
84. At no time did Alseny suggest his evidence about the claimant was wrong, for example in his grievance interview on 20 November 2019, he said he felt “really guilty and bad” about giving the name, that “he had felt pressured”, so he had done so. He was asked how he had come to name the claimant, Alseny responded “he had known it was a particular individual who had been in charge” of giving cover, he said he did not want to name the person at this meeting (258). We accept that the respondent is entitled to conclude that Alseny was referring to the claimant, whilst not doing so by name.
85. We therefore accept that the respondent had a genuine belief when it suspended the claimant that he may have committed an act of serious misconduct in relation to the Alseny being signed in on Sundays in June 2019 when he was not at work.
86. We do not accept that the claimant’s trade union membership played any part in this decision. The claimant was, we found, suspended because of the respondent’s genuine belief the claimant may have committed serious misconduct.
87. Following this there was a further investigation process, staff were interviewed, and there was a lengthy disciplinary process lasting over 18 months, in part because of the pandemic and in part because the claimant sought various postponements via his union.
88. 5 members of staff were interviewed in Ms Lee’s fact-finding process. The

claimant criticises this saying that more witnesses should have been interviewed. The claimant produced statements from some of these employees.

89. The respondent must follow all reasonable leads which may point to guilt and innocence. We considered carefully why these witnesses were not interviewed – and we accept the respondent’s argument that many employees – as the claimant’s witnesses – will not have an issue with the claimant, they got on with him at work and saw nothing wrong. The claimant was able to provide statements in support during the process. We did not consider this to be a failure by the respondent, it is not unfair in these circumstances not to interview all employees who the claimant wants to be interviewed.
90. We accept that Ms Lee was entitled to interview staff who she believed could provide relevant evidence on whether or not the incident with Alseny had occurred, that her belief was individuals who had no knowledge of this would not be able to add evidence.
91. We also accept that the respondent was entitled to conclude from these interviews that there were serious concerns with the claimant’s practice over timesheets. The primary evidence was from Alseny, we accept that Ms Lee was at this stage entitled to consider the evidence of Abdulrazaq, Baba and Richmond, all of whom alleged that the claimant’s conduct was a cause of concern.
92. We conclude from this evidence that the respondent had a genuine belief that the claimant needed to be suspended from work. We accept that the decision to suspend was one another employer of a similar size and resources would have made – it was within the range of reasonable responses.
93. At this point, the respondent was faced with a choice – was Alseny potentially credible in his account, or not? It is not always reasonable for an employer to accept unquestionably the account of an employee who may themselves be under suspicion.
94. We accept that the respondent had other evidence on which to make this decision: Alseny was signed-in on days when he was not working – this is significant evidence that something wrong was happening. His shifts overlapped with the claimant; the claimant handed in the timesheets on Monday. In other words, there was an opportunity to sign Alseny in and then take the timesheets to the office. This was all evidence the respondent was reasonably entitled to consider in the investigation.
95. The claimant argues it could have been someone else, that Alseny is covering up for someone. But there is no evidence whatsoever of this. The claimant argues he was not in charge on this shift, it was Baba. We accept it was possible for other Team Leaders to make amendments. But we accept that the respondent was entitled to conclude in the investigation that it was the claimant in charge on Sunday afternoon and evening, also it had Alseny’s evidence.

96. We conclude – considering the ‘range of reasonable responses test – that the respondent acted reasonably in accepting and believing Alseny’s evidence. In doing so, the respondent reasonably believed the claimant to have committed acts of serious misconduct.
97. We also conclude that the disciplinary process followed was one within the range of reasonable responses. It took place over many months, there was several hearings, the claimant was represented throughout, the claimant was able to introduce his own witness evidence and his rep was allowed to ask questions of witnesses.
98. While there is a suggestion that witnesses raised the issue of the claimant’s trade union activity, and Mr Fejokwu expressed some ambivalence towards unions, we are satisfied that this played no part whatsoever in the decision to dismiss. The focus throughout, from Ms Lee’s interview onwards, was the potential misconduct by the claimant in signing in Alseny and then demanding payment from him.
99. We conclude that the respondent had a genuine belief following a thorough investigation and a lengthy and thorough disciplinary process that the claimant had committed an act of gross misconduct by signing in Alseny and demanding money from him. This was in the circumstances outlined above a reasonable belief, a fair dismissal within the range of reasonable responses.
100. The claimant criticises the length of time it took to hear his appeal. The disciplinary process took two years from suspension to dismissal; the appeal process took just over four months. The appeal hearing notice was sent out on 17 December, the appeal took place on 12 January 2022. The substantive delay is therefore 3 months, from 15 September to 17 December. During this period the claimant’s representative raised several queries about the lack of progress or information. On 2 December the Head of HR Partnering wrote to his rep saying that “it has been difficult to arrange the hearing” because of issues with availability of staff” and apologising for the delay. Mr Robinson’s statement paragraphs 11-13 deal with this issue – that there were several appeals outstanding at this time, there were staffing issues in addressing the appeals. and changes have now been made to ensure appeals take less time. We accepted this evidence and found that this delay was in no way caused by or connected to the claimant’s trade union membership.

**Employment Judge Emery
20 June 2024**

Judgment and Reasons sent to the parties on:

2 July 2024

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For the Tribunal:

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