



# EMPLOYMENT TRIBUNALS

**Claimant:**  
Howard Beckett

**Respondent:**  
Unite the Union

**Heard at: London Central**

**On:** 25 June - 9 July 2024

**Before:** Employment Judge Nicolle

**Non-legal members:** Ms D Keyms  
Mr S Hearn

**For the Claimant:** Mr B Williams of Counsel.

**For the Respondent:** Mr S Gorton KC.

## JUDGMENT

1. The unanimous judgment of the Tribunal is that the claims pursuant to sections 64 and 146 of the Trade Union Labour Relations (Consolidation) Act 1992 (TULCRA) fail and are dismissed. This The claim for constructive unfair dismissal fails and is dismissed.

## REASONS

2. Oral reasons were given on 9 July 2024. The respondent subsequently requested written reasons. As explained to the parties the substance of these written reasons reflects the oral reasons given save that those sections concerning the relevant legislation and case law are expanded and non-material changes are made for consistency, chronological consistency, to correct any inadvertent omissions and otherwise for ease of reading.

### The Hearing

3. The hearing took place over 11 days, an additional day having been added to enable the Tribunal to conclude its deliberations and give an oral judgment at the request of the parties.

4. At the commencement of the hearing an application was made by the respondent made for the anonymity order to be lifted. The Tribunal unanimously decided that it would be inappropriate for anonymity to persist and therefore from that point onwards the parties have been referred to by their non-anonymised names.

5. There was an agreed bundle of circa 2300 pages with some additional documents being added during the hearing.

6. The Claimant gave evidence and Mr Len McCluskey, the former General Secretary of the Respondent, gave evidence on his behalf. Gail Cartmail who was most recently Executive Head of Operations, (Ms Cartmail), Sarah Carpenter, who was most recently Executive Head of Operations and previously Regional Secretary of the South East, (Ms Carpenter), Barbara Kielim, Director of HR Training and Development (Ms Kielim), and Simon Cox, who most recently was Senior Advisor to Sharon Graham the General Secretary of the Respondent, (Mr Cox) gave evidence on behalf of the respondent.

### The Parties

#### The Claimant

7. The Claimant has been a solicitor for approximately 30 years. He part owned a firm of solicitors on the Wirral which he sold prior to joining the Respondent on 1 June 2021 as Executive Director of Legal Membership and Affiliated Services. His job description listed the principal functions of his role which included developing relationships with external providers of affiliated membership services to the Union, advising on and assisting in developing new income streams, assisting in the further development of the Union's brand and the recruitment and retention of members.

#### The Respondent

8. The Respondent is the UK's largest trade Union (variously referred to as the Respondent, Unite or the Union). It has grown following a series of mergers most recently with Amicus and has in excess of 1 million members with approximately 1000 shop stewards.

### Relevant documents

#### Rule Book

9. The Respondent has a Rule Book that includes provisions regarding the circumstances in which the Union will provide legal assistance. Paragraph 4.6.3 provides:

A member who requires advice and/or representation on a problem relating to the member's employment which first arose at a time when the member was entitled to benefit and which cannot be resolved through the member's work place representatives should refer the matter to the appropriate Regional Officer. The Union may provide such advice and/or representation as the Executive Council shall consider appropriate, whether by a full time officer or otherwise, and on such terms as the Executive Council shall consider appropriate.

Benefits Policy and Guidance effective from 1 November 2022

10. Rule 5 (e) provides:

Members are afforded legal assistance in accordance with Rule 4.6 and the determinations of the Executive Council made pursuant to the Rule. The provision of legal services the level at which it is afforded and the selection of any of any provider is at the discretion of the Executive Council.

Disciplinary procedure

11. Clause 6.1 includes a power of suspension where an employee is accused of gross misconduct.

Internal employee disciplinary investigations

12. The policy on internal employee disciplinary investigations provides that if the police are carrying out a criminal investigation into a matter that is also the subject of an internal disciplinary investigation, the Union needs to be careful that its investigation does not prejudice or disrupt the police proceedings.

Absence management policy

13. This provides at clause 2.5 that a fit note is required on the 8<sup>th</sup> day of continuous absence, including the weekend, and should be submitted to the HR Department on the day of receipt.

Declaration of interests

14. At the Executive Council between 6-9 June 2022 the General Secretary highlighted that the policy on the declaration of interest and register of gifts (the Declaration of Interests Policy) had been circulated to the Council and would be discussed later that day. The Declaration of Interests Policy, which the Tribunal was told was effective from June 2022 (page 2232 onwards in the bundle), includes at section 4.3 that any individual with a conflict of interest relating to a financial decision, must declare it as soon as the conflict arises, and must excuse themselves from any voting or decision making on that matter, preferably in advance of the discussion or meeting taking place. Section 4.6 provides that at inception of the Declaration of Interests Policy all existing Union employers should make a full written disclosure of any interest which could appear to be a conflict of interest.

15. The Tribunal heard evidence that most incidences of disclosures pursuant to the Declaration of Interests Policy concerned minor matters such as Christmas gifts, bottles of wine, food hampers, et cetera.

Organigram

16. It shows various Assistant General Secretaries, one of whom was the Claimant following his promotion to Assistant General Secretary with effect from 5 December 2016, as reporting to the General Secretary. There is also a Chief of Staff reporting directly into the General Secretary, who at the material time was Andrew Murray (Mr Murray).

Explanatory note regarding judgment sequence

17. Whilst I set things out largely chronologically it will assist ease of understanding to set out certain matters thematically to include that pertaining to the provision of legal assistance.

Legal assistance for Union members

18. The Tribunal was referred to an employment tribunal case, the Rueby case, in which the Claimant had given a witness statement. We were referred to the recollections of Stuart Brittenden of Old Square Chambers, the respondent's instructed barrister. His note of the consultation included:

- Common sense point, member subs used for legal support.
- Would not use members subs to sue Union.

19. The Claimant's witness statement in Rueby stated interalia:

- a) at paragraph 3 that legal assistance is discretionary;
- b) at paragraph 10 that I would make the same decision for any member with the only exceptional circumstance in which I authorise the provision of legal assistance from a non-panel firm to sue Unite being if it is a personal injury claim for which the Union has employer or public liability insurance;
- c) at paragraph 11 I have never authorised legal assistance for a member to pursue an Employment Tribunal claim against Unite and I treated Mr Rueby in the same; and
- d) at paragraph 16 if Ms Kielm had responded to Mr Rueby she would have advised him that legal assistance would not be provided as there was a conflict of interest and we do not provide legal assistance where an individual is seeking to sue ourselves.

Email from the Claimant to Mr McCluskey of 16 June 2017

20. The Claimant confirmed that the union had legal expense insurance in place to cover officers and staff who are Unite members and they can receive legal advice as to whether they have an action against Unite under the terms of this insurance without having to go through our panel first.

21. Mr McCluskey said there was a perceived dichotomy between the position of Unite employee who were members of Unite and those who were members of another union, for example the GMB, who would have a potential ability to otherwise pursue a claim against Unite.

The ARAG policy

22. The insurance policy for such claims was initially provided by DAS but subsequently ARAG. The ARAG policy covers employment disputes such as unfair dismissal or redundancy claims. The section on insured events refers to a dispute with the insured's

current, former or prospective employer relating to their contract of employment or related legal rights. The beneficiary can claim under the policy as soon as the internal procedures as set out in the ACAS Code of Practice for Disciplinary and Grievance Procedures have been or ought to have been concluded.

Edwards v Unite and others (case numbers 2205756/2018 and 2401913/2019)

23. Mr Williams referred the Tribunal to the very long judgment of the Manchester Employment Tribunal in Edwards v Unite and others. This included at paragraph 118 which the Claimant saying that a case enjoyed merit, then regardless of the respondent they would support it, it did not contain a conclusive statement as to the Respondent's position regarding such claims.

24. The Tribunal was also referred to the position of a Unite employee in the Republic of Ireland who had potentially been entitled to benefit of the insurance but where ultimately it was not provided given that the internal procedures had not been exhausted.

Press coverage pertaining to the Respondent

25. There has been substantial press coverage regarding Unite. The Tribunal is very mindful of what is relevant for its determinations, but nevertheless it is impossible to draw a line of complete demarcation between the wider press coverage on issues concerning Unite and the specific allegations pertaining to the Claimant.

The Times

26. The Tribunal was referred to an article from the Times on 16 January 2021 which included detailed contentions of potential conflicts of interest relating to the Respondent's Birmingham Hotel project and the award of contracts to the Flanagan Group, a Liverpool based company. The article suggested that there were inappropriate and improper tendering processes for the award of those contracts. The Times editorial of the same date had an article entitled "crony socialism".

27. There was an article more specific to the Claimant in the Times on 19 February 2021 which stated that Unite promotes financial services run by friends of Len McCluskey and specifically referred to the roles of former colleagues of the Claimant, Mr Bemrose in relation to Home Services and Ms Lonsdale in relation to Your Tax Refund. It stated that both companies operated from premises owned jointly by the Claimant at Eastham Hall on the Wirral.

28. A statement given by the Claimant on behalf of the Respondent said that Home Services and Your Tax Refund were two of about 50 companies and organisations endorsed by the Union. A spokesman said that Mr Beckett does not have any involvement whatsoever in the process of vetting and selecting these companies nor negotiating terms and conditions. He received no income from the companies for use of Eastham Hall and does not, and never had, any personal financial interest in either firm. In response to questions Mr McCluskey said that this was wrong.

The Guardian

29. There were similar articles in the Guardian, in particular, 26 January 2021 referring to Operation Aloft which was an inquiry into the sale to developers of council owned land in Liverpool but also making a connection with the Birmingham Project.

30. There was a further article in the Guardian on 18 June 2021 recording the fact Mr Beckett had pulled out of the leadership campaign for the new General Secretary's position.

#### The position of General Secretary

31. General Secretaries serve a five year term. Mr McCluskey had served two terms with his second term extended because of Covid and what would have been the 2020 election being deferred until 2021.

32. The Claimant obtained the requisite number of nominations to be on the ballot. However, to avoid splitting the vote for the left leaning candidates he pulled out in advance of the election. Sharon Graham (Ms Graham) stood on a manifesto (page 245 in the bundle) focusing on the industrial role of the Union. She wanted to distance the Union from the internal politics of the Labour Party and stated that "there would be no more blank cheques for the Labour Party and that we need to do more than Westminster elections". She was ultimately the successful candidate. Ms Graham commenced as General Secretary on 26 August 2021.

#### The Claimant's sickness absence

33. On Ms Graham commencing as General Secretary the Claimant immediately went off sick with stress and only returned for a short period before going on long term sick leave with effect from 11 October 2021 which continued until his resignation on 12 January 2023.

#### Internal restructure and effect on the Claimant's position

34. The Claimant was advised that there would be an ongoing restructure and that he would no longer be covering political. This was recorded in an email from Ms Graham of 20 September 2021. She stated that Rob Macgregor would cover political in the interim as Unite finalised the structure going forward. This was explained on the basis that Ms Graham wanted to move focus from a civil war within the Labour Party to focus on jobs and the workplace.

#### Ms Graham did not give evidence

35. It is significant that Ms Graham did not give evidence so much of the evidence as to her motivations and intentions was one step removed from other witnesses and particularly Mr Cox.

#### Without prejudice settlement negotiations

36. The Claimant then initiated a without prejudice process which the parties anticipated would result in his consensual departure. That was referred to in an email from him to Ms Graham on 22 September 2021 and there were then quite protracted discussions. It

gradually became apparent that the Claimant either was unhappy with the financial terms, or maybe was reconsidering whether he wished to leave in principle, so for example on 9 October 2021 he sent a WhatsApp message to Ms Graham saying: "I've not told anyone I am leaving this is a massive decision and I am going to take it in my time". It is apparent from her subsequent message in which she stated: "It's been weeks you came to me to ask to leave, you have spoken with Andrew and Len, I need to move things on it is now detrimental to the members" that she was becoming increasingly exasperated. The claimant responded by saying that the proposed separation had come about because of the fact that he was moved from politics. Ms Graham responded by saying: "We have to put a deadline on this I am refocussing the Union and of course I am moving people into the roles they need to focus on that includes legal. You have been aware of the political change since the beginning of last month, you made the decision to go as a result".

#### Email from the Claimant to Mr Murray of 10 October 2021

37. The Claimant advised Mr Murray that he was taking time off for ill health. He refers to the treatment he has received from Ms Graham since the election and said that his mental health not good. He went on to say that there were many issues forcing his exit not least the change in his role, in particular politics being taken from him in such a public manner immediately before the Labour Party conference at a time when "political" reasons had resulted in his suspension by the Labour Party when he had advocated the position of Unite as mandated by the Executive Council. . The Claimant had been suspended from the Labour Party as a result a tweet he had sent regarding Priti Patel and the issues regarding deportations. Ultimately that matter was referred to the Law Society but no action was taken against the Claimant and therefore is not a relevant issue for this Tribunal.

38. The Claimant advised Mr Murray that he would be submitting a grievance.

#### The Claimant's role within the Labour Party

39. The Claimant had a significant role within the Labour Party being one of two Unite members mandated to sit on the National Executive Council (the NEC). He was part of a left leaning block supportive of Jeremy Corbyn and opposed to Keir Stammer.

#### Temporary cover for the Claimant's roles

40. It became apparent that the Claimant that was not leaving pursuant to a settlement agreement. However, despite the fact that the Claimant was off sick no permanent appointments were made to cover his roles. There was temporary cover as illustrated by an email from Janet Henney to Ms Cartmail of 11 February 2022 and an email from Ms Graham to Mr Cox of 14 February 2022 in which she said we have not yet discussed with anyone Mr Beckett coming back so it seems odd to move, I have no issue with it, we would need to speak to Jane and Cliff to see if ok. If Mr Beckett comes back we may be leave. That is inconsistent with the Claimant's contention that there was no possibility of his returning.

#### The Claimant's attempted return to active employment

41. The Claimant sought to return to active employment in February 2022 but there was a requirement for him to provide a fit for work certificate. There was a misunderstanding

by the Respondent regarding fit notes which rather confusingly are quite the opposite, in other words certification of sickness as opposed to a certificate from a GP that someone is fit to work. This undoubtedly caused a degree of confusion. Nevertheless the Claimant had not provided, in contravention of the Respondent's sickness absence policy, fitness for work certificates during his absence. He and his lawyer argued that as a senior employee he that should not be required to comply with the policy in this regard, but it was made clear to him by Ms Cartmail and others, that the request for a statement of fitness to work is a requirement that applies to all employees up to and including Assistant General Secretaries. The Claimant did provide statements of fitness for work in March and April 2022 which referred to work related exhaustion and need for rest and recuperation and on 29 April 2022 he was signed off for a further three months.

#### The criminal investigation pertaining to the Claimant

42. A search warrant was obtained by South Wales Police from Southwark Crown Court which resulted in searches being undertaken at the Respondent's Theobalds House Head Office and at the Claimant's flat in London and home on the Wirral on 6 April 2022. The search of the Claimant's office at Theobalds House was undertaken by plain clothes officers so it was as discreet as possible but nevertheless was understandably seen by the Respondent as a very concerning and serious issue. The search warrant (in the bundle at page 511 onwards) referred to the relevant period for all material as being from the start of the tendering process or pre-contract or pre-contract negotiations. The Claimant was one of four suspects the other three names being redacted.

#### Email from Ms Goodwin of 7 April 2022

43. An email was sent by Lynne Goodwin to all Executive Committee members, officers, staff and organisers on 7 April 2022 in which she said that in relation to the media report attached and others similar please be advised that the South Wales Police attended Holborn on 6 April to exercise a warrant related to an employee of the Union. The Union was understandably concerned to avoid the perception that it related more generically to Union activities. Mr McCluskey said he would have preferred it to have been much more specific that it had nothing to do with the Birmingham Project. It was apparent from Mr McCluskey's evidence that he was, possibly understandably, defensive about the criticism of the Birmingham Project and the escalating costs.

#### The Birmingham Project

44. The Birmingham Project was a flagship policy initiated by Mr McCluskey in 2015. It had an estimated initial cost of circa £7 million but by its completion total costs exceeded £100 million. This obviously gave rise to significant concerns.

#### Special Executive Council meeting on 29 January 2021

45. A special Executive Council meeting was called on 29 January 2021 to discuss these concerns. The General Secretary reported to the Council on the background to the Union's property development. He is recorded as deploring recent malicious and inaccurate press reporting as being designed to smear the Union. The Claimant and Mr McCluskey consistently referred in disparaging terms to critical press coverage as being that of the Murdoch or right wing media seeking to worse smear the Union. When I pointed out to Mr



McCluskey that some of the coverage was in the Guardian he responded by saying there were certain Guardian journalists who also had an agenda.

46. At this meeting the Claimant presented a detailed report on the Birmingham Project. The Claimant advised the Council that the Birmingham project has been valued at the cost of construction making it a sound investment for the Union. The Claimant had responsibility for the financial issues of the Birmingham Project on being appointed as Interim Finance Director following the unexpected death of the Ed Sabisky, Executive Director, Finance, Property and Pensions (Mr Sabisky) on 1 March 2020. It was surprising that he remained in post as Interim Finance Director for such a long time as he does not have accounting experience. Mr McCluskey's evidence was that the tragic nature of Mr Sabisky's death, who was a close personal friend, meant that he was unable to focus at that time on a permanent appointment particularly given that a General Secretary election was impending.

47. The Claimant gave a series of reasons why additional costs had been incurred to include an extra floor having been added, additional sprinklers post the Grenfell fire, an increase from 3 to 4 star rating, building inflation costs being particularly high in Birmingham and the Unite protocol (which involves contractor firms paying above the minimum wage at circa £11.50 per hour).

48. He said that if a formal valuation had been obtained it would inevitably have been used in a pejorative way by the "right wing media" to attack the Union. He provided examples of other hotels, and we do not need to go into detail of these, namely the Starwood Capital Renaissance Manchester and the Hilton Birmingham Metropole and their values. The Respondent says they were not appropriate comparators.

#### Independent valuation of the Birmingham Project

49. Ultimately an independent valuation was obtained from Fleurets. In their valuation of 8 December 2021 they said that the market value of the Birmingham Project and Conference Centre was £29 million. That came as a shock to Ms Graham and others given that the build costs were substantially in excess of that figure.

#### Mr Bowdrey QC instructed by the Respondent

50. As a result of these concerns Martin Bowdrey QC was instructed to prepare a report on 13 January 2022. He produced an interim report, the Tribunal has not seen the final report, which is heavily redacted. It refers to a figure of circa £14 million ascribed to CI 232, which is the Unite protocol, as not featuring in the final accounts and it remaining a mystery as to how and when this figure had been assessed and then presumably paid to Flanagans.

#### The disciplinary process pertaining to the Claimant

51. The disciplinary process commenced after the police search of Unite's premises on 6 April 2022. An email from Ms Cartmail to Mr Cox on 28 April 2022 refers to the Claimant's cautionary suspension and investigation in relation to the following areas:

- Initial interim report findings of the QC lead enquiry into the Birmingham Project and Conference Centre. Initial findings are that the report you gave to the Executive Council at the Special Executive Council in January 2021 was misleading on finances and spend, reported value based on incomparable hotels and a valuation figure.
- Signing a seven year contract with Hardy Evans without prior authority.

The Claimant was not suspended at this point as he remained off work on sick leave.

#### The Claimant's email to Ms Graham of 13 June 2022

52. In an email to Ms Graham of 13 June 2022 the Claimant referred to coverage regarding the police warrant being issued. Further, he highlighted what he considered to be the considerable financial benefit the Hardy Evans relationship had provided to the Union and or generally that relationships he had established that the provision of affiliated services to the Union had been generated millions of pounds of revenue. He said that the commentary was intended to traduce his reputation and that he was not feeling a great deal of support from the Union.

#### The Claimant's suspension on 3 August 2022

53. It was not until the 3 August 2022, at a time when he was seeking to return to active service, that the Claimant was suspended. A letter was sent by Ms Cartmail advising him that he was suspended with immediate effect because of two specific allegations namely:

- Misleading the Executive Council in reporting the Birmingham project valuation and false comparisons.
- Concerns about the probity of awarding contracts for affiliated services.

He was advised that his email account had been suspended.

54. Ms Cartmail said that she had drafted the letter of suspension as early as 28 April 2022 and it was had in abeyance given the Claimant's ill health.

#### Mr Pike and Sky News

55. It is apparent that this letter of suspension, along with other matters pertaining to the Claimant and the ongoing disciplinary process, found their way to Mr Pike of Sky News. Ms Cartmail says that she carefully controlled access to this and other relevant documents.

#### The Claimant's email to Ms Cartmail of 4 August 2022

56. The Claimant referred to his being subject to victimisation that comes after other acts of victimisation. He said it was because he had stood in the General Secretary election and did not support Ms Graham and that he was perceived as a threat to her.

#### Letter from Harvard Law dated 12 August 2022

57. Harvard Law referred to a claim of victimisation against Unite and they requested payment of the Claimant's reasonable legal costs for them to provide necessary representation.

#### Ms Cartmail's response of 18 August 2022

58. In a response from Ms Cartmail on 18 August 2022, she said that the Claimant was not automatically entitled to legal representation paid for by Unite as provision of legal representation a discretionary benefit of membership. She said that Unite does not cover legal costs to members or employees in circumstances where they are seeking to litigate against Unite as this clearly represents a conflict of interest.

#### Ms Carpenter's investigation

59. Ms Carpenter was appointed to carry out an investigation. She interviewed a number of people including Mr Cox on 9 September 2022. He stated that he believed that the Claimant had misled the Executive Council about the value of the Birmingham assets. Mr Cox was not in attendance at the special Executive Council in January 2022. Ms Carpenter says that it would have been apparent to her that he was merely reporting what he had been told rather than what he had heard. He advised Ms Carpenter that he had been told by Monica Sorice, Simeon Jones and Tom Murphy, the Directors of Blackhorse, that they had asked the Claimant for a valuation but to no avail. Mr Cox asserted that he could not think of any justification for including information on the "comparable" hotel values other than to suggest that the Birmingham Project is a similarly valuable asset which he said was not true. He referred to the police having found payments of £1.1 million from a company owned by Frank Harold to the Claimant from 2012-2015. He said that Ms Carpenter would need to ask the Claimant how Mr Harold benefitted financially from Unite. He also made reference to Kate Lonsdale and Klass Accountants and how she runs the Unite Benevolent Fund. He subsequently updated the minutes of note of his conversation with Ms Carpenter to include additional material which related largely to the police investigation so, for example, he added reference to the South Wales Police alleging or investigating suspected bribery, money laundering and fraud.

#### The Respondent's approach to the South Wales police investigation

60. The Respondent sought to distance themselves from the South Wales Police investigation. This included a statement given by Mr Cox on 15 September 2022 which referred to Unite being a victim and the Claimant as being suspected of committing serious crimes over a period of many years including inter alia bribery, money laundering and fraud. He went on to state that given the specific and serious nature of these matters it is unthinkable to him that the Claimant could continue as a senior employee of Untie without having satisfactorily answered all the allegations in full and explained the payments he received. He referred to there being a number of red flags which indicate that the Claimant might have other inappropriate connections with affiliated service providers, that he signed onerous affiliated service provider contracts without approval of the General Secretary and that he may have been untruthful about his role in awarding such contracts in the past.

#### Mr McCluskey and Ms Carpenter's investigation

61. Mr McCluskey repeatedly stated that he was available to be interviewed by Ms Carpenter. She did not avail herself of his offer. The Tribunal finds that surprising given that the Claimant repeatedly stated that Mr McCluskey was aware of all contracts entered into and was the primary person responsible for the Birmingham Project. No explanation was given as to why he would not be an appropriate witness. Ultimately Mr McCluskey provided a statement.

#### Emma Gibbons

62. Others interviewed included Emma Gibbons, the new Director of Finance, who stated that she had not seen any payments coming back pursuant to the Hardy Evans contract.

#### The Claimant's meeting with Ms Carpenter on 17 October 2022

63. The Claimant attended an investigation meeting with Mr Carpenter on 17 October 2022 at Friends House, Euston. He was represented by Mike Eatwell of ONC. He was asked a series of questions regarding both misleading the Executive Council in respect of the Birmingham Project this and Conference Centre and the probity of affiliated services contracts.

64. He stated at paragraph 9 that Mr McCluskey had volunteered to be interviewed as part of the investigation and he saw it as a witch hunt. At paragraph 10 he advised that the presentation given to the Special Executive Council meeting had not been prepared by him and had been put together by Purple Apple for Mr McCluskey and Mr Murray who agreed it should be reported to the EC. At paragraph 44 he said that the previous General Secretary was aware of everything. At paragraph 62 he referred to various issues having been reported in the Times in 2015 and therefore they were all in open sight. He said at paragraph 63 that this would end in litigation for victimisation and that Ms Carpenter would be complicit. Ms Carpenter at paragraph 66 asked the Claimant if there was a conflict of interest with his role in Unite to which he said no.

65. At paragraph 68 he was asked questions about payments received and at that point he discontinued the interview. He contends that it was a PACE interview by proxy and that he believed that Ms Carpenter, either directly or by Mr Cox, was being primed with questions from the South Wales Police. The Tribunal finds no evidence for that but will revert to the general nature of the questions later.

66. Ms Carpenter states at paragraph 22 of her witness statement in relation to the investigation meeting she held with the Claimant on 17 October 2022 that she found him incredibly defensive and hostile. He increasingly became uncooperative during the meeting and proved defensive, short and abrupt in his answers. The Tribunal having read that transcript understands the basis upon which Ms Carpenter would have formed that view.

67. She rebuts the suggestion that she had a large lever arch file of relevant documents which the Claimant was not provided and says it contained her own notes and questions that she had prepared for the meeting.

68. She says that any communication to The Times or other media should have gone via Pauline Doyle who is the Respondent's experienced media advisor rather than being provided directly by the Claimant.

Ms Carpenter's interview with Ms Sorice on 26 October 2022

69. Ms Sorice said that she and her fellow directors of Blackhorse had made repeated requests for a valuation of the Birmingham Project to no avail and they found they were being kept in the dark.

Ms Carpenter's interview with Mr Murphy on 28 October 2022

70. He referred to the Special Executive Council meeting in January 2021 and a valuation at around £95 million. It is not clear exactly what he was referring to but it is likely a reference to the comparator hotels referred to by the Claimant given that Mr Murphy goes on to say "yes they were very similar hotels in similar areas and used to show that we were on a par or better than those in terms of our valuation and for the future".

Ms Carpenter's interview with Mr Uppal on 4 November 2022

71. Mr Gush Uppal was the former Acting Director of Finance but had only been employed for a period of a few months. He says the presentation given by the Claimant to the Special Executive Council was selective and constructed in such a way to convey that there was no issue. Whilst there was nothing incorrect there were a lot of half-truths. He went to say that Mr McCluskey and the Claimant ruled by fear although the Tribunal heard no other evidence to that effect, and Mr Uppal was only employed for a matter of months, so we make no finding in that regard.

Ms Carpenter's interview with Mr Brown on 9 November 2022

72. Mr Nick Brown assisted the Claimant with procurement and tendering. He said in relation to Hardy Evans it was an online only offer and seemed a fait accompli. He said that the claimant often pushed and pointed in the direction of Hardy Evans. He says there was no real tendering process. He said there was clearly another agenda going on. He never saw any income. He did not formally raise any concerns.

Letter from McGrath Sheldrick dated 16 November 2022

73. The Claimant's solicitors McGrath Sheldrick letter of 16 November 2022 invoked a formal grievance procedure on their client's behalf. Very briefly it referred to insufficient information in the investigation process, his demotion from Assistant General Secretary post Ms Graham's appointment, issues regarding data protection and his subject access request, failure to provide him with legal support and the disclosure of his suspension to Trade Union representatives.

Mr McCluskey's email to Ms Carpenter of 16 November 2022

74. Mr McCluskey reiterated his willingness to provide a statement and then of his own volition sent a four page statement which was included as part of her investigation.

Ms Carpenter's written questions to the Claimant dated 18 November 2022

75. Ms Carpenter's written questions to the Claimant were primarily in relation to the Black horse directors' concerns and the affiliated services contracts. The Claimant did not answer those questions.

Appointment of Grant Thornton

76. Grant Thornton, forensic accountants, were appointed by the Respondent to carry out an investigation in relation to the appointment of associated service providers. They produced a report on 2 November 2022. Its principal findings are that many of the associated service providers appear to be linked directly or indirectly to the Claimant, they refer to a commonality of ownership structures and that many of the associated service providers have common directors, shareholders and employees and several of whom have direct links to the Claimant prominent amongst these being Ms Lonsdale and Mr Howard (also known as Mr Stevens). Seven of the ASPs share two registered offices being Eastham on the Wirral and Mallard Way in Swansea. The report refers to the relationship between the Claimant and Ms Lonsdale. The Tribunal finds they had a previous personal relationship, that Ms Lonsdale was then employed at the Claimant's firm of solicitors and then took on a role providing various services to the Respondent to include running the Benevolent Fund. There is a section on the relationship between Mr Howard and the Claimant and reference at paragraph 1.23 to payments made between them with it being suggested that the Claimant loaned at least £1.1 million to Mr Howard between 2012-2015.

The Claimant's response to the Times February 2021 report regarding affiliated service providers

77. There is reference to the rebuttal which the Claimant gave in response to the February 2021 Times article in paragraphs 5.17 and 5.18. The Claimant's draft responses did not go via the normal media relations PR person at Unite. We consider it to be unequivocal, and is accepted by Mr McCluskey, that the responses given by the Claimant did not represent a complete and candid disclosure of his involvement in or connection to the affiliated service providers. That is not to say there was anything wrong with such relationships it is simply an observation that the disclosures made were factually incorrect, or at least omissions from what was said arguably created a false impression as to the overarching nature of those interconnected business relationships.

The Claimant's position regarding the appointment of affiliated service providers

78. The Claimant says that he was brought on board by Mr McCluskey because of his personal business relationships and he did nothing more than seek to develop them for the benefit of Unite.

Ms Carpenter's report dated 1 December 2022

79. I will refer to this briefly in the interest of proportionality. Ms Carpenter sets out who she interviewed, the specific allegations and repeats much of the content of Grant Thornton's report. She summarises the various interviews she had undertaken. She sets out at page 23 of that report the facts established in relation to the Birmingham Project, to include that the written presentation given to the January 2021 Special Executive Council did not refer to the valuation issue at any point, either to give a valuation or to explain why one would not be given. The Special Executive Council minutes record that the meeting was told that the valuation is the same as the cost. There is no evidence that Blackhorse directors were kept properly informed in line with legal responsibilities. The information on other hotels given in the presentation differed in location and/or scope to the Birmingham Project and so they were not legitimate comparisons
80. In relation to affiliated services the contract with Hardy Evans was disadvantageous to the Union. The Claimant had a number of direct and indirect links with affiliated service providers and there was a conflict of interest in him giving work to affiliated service providers who had registered offices in buildings he owned, there was evidence of personal relationships between the Claimant and at least two of the affiliated service providers, there was evidence of personal financial transactions between the Claimant and Mr Howard at the same time as communication between them was happening about Hardy Evans and there was evidence that an affiliated service provider paid rent to the Claimant.

Revenue purportedly generated by Hardy Evans and the other affiliated service providers

81. The Tribunal was referred repeatedly by Mr Williams to evidence that the service providers, particularly Hardy Evans, had generated substantial revenue for the benefit of the Respondent. In particular we were taken to the September 2021 Executive Council Membership Report of the Assistant General Secretary. The Claimant says that circa £30 million was generated as revenue. However, we find that from looking at these reports this is a somewhat nebulous concept as ultimately it arises from Hardy Evans, amongst their other roles, seeking to persuade lapsed members to re-join the Union and that had a knock on beneficial effect in terms of Union revenue. The quoted figure of £21 million needs to be seen in that context. Ms Carpenter, for example, says that the Union could have retained members through other means and therefore it was not a source of revenue which could be seen as specifically attributable to the services provided by Hardy Evans.

Invitation for the Claimant to attend a disciplinary hearing

82. In a letter from Ms Kielim dated 2 December 2022 the Claimant was invited to a disciplinary hearing to be held on 9 December 2022. The allegations being that he misled the Executive Council in reporting the Birmingham Project valuation and false comparisons and concerns about the probity of awarding contracts for affiliated services.

Email from Bob Wylie to Mr Pike of Sky News of 8 December 2022

83. On 8 December 2022 there was an email from Mr Wylie to Mr Pike of Sky News in which he said that Ms Graham, the newly elected General Secretary pledged to find if there was any wrongdoing in the construction and spend related to the Birmingham Project due to various serious concerns about potential criminality that had emerged. He advised that the Mr Bowdrey QC and Grant Thornton reports had been shared with the police and that the General Secretary was committed to doing all in her power to recoup any money lost and holding anyone responsible to account.

#### Letter from Magrath Sheldrick dated 6 January 2023

84. Magrath Sheldrick in a lengthy letter made a request for the disclosure of additional documents. The Respondent says that the Claimant's solicitors had made repeated requests for documents, many of which had already been provided, or others which would be inappropriate to provide. Initially it was proposed that the Claimant would be provided with access to his emails, however that was rescinded on the request of the South Wales Police.

85. The Claimant was signed off on 10 January 2023 with lower respiratory tract infection.

86. His solicitors in a letter of 11 January 2023 referred to that and said that he was not well enough to participate in the disciplinary hearing.

87. On 12 January 2023 there was an email from Janet Henny to dear colleagues regarding the South Wales Police attendance on 6 April 2022 and it enclosed a statement which had been presented to the F&GPC and shared with the Executive Council and said it would be available on the Respondents website. It referenced the Respondent conducting a criminal investigation to include potential offences of bribery, fraud, money laundering and tax evasion. It did not specifically reference the Claimant.

#### The Claimant's resignation

88. The Claimant tendered his resignation in an email at 22:23 on 12 January 2023 in other words the day before the scheduled disciplinary hearing. It is important for the Tribunal to focus on what he said at this time as to his reasons for resigning and rather than setting these out now will consider his specific allegations in our conclusions.

#### Ms Cartmail's conclusions dated 13 January 2023

89. Ms Cartmail had decided that a hearing would take place in the Claimant's absence. This was in effect a combined disciplinary and grievance hearing. She referred at page 21 of her conclusions, (page 1309 in the bundle), to the investigation unearthing and examining extremely serious matters which called into question the standing and integrity of a senior employee. She stated that had the Claimant remained in employment the findings of the investigation would have resulted in the allegations being upheld as constituting gross misconduct to include serious financial wrongdoings. She stated at paragraph 10 that in relation to affiliated



service providers it was clear that he was benefiting financially from alternative income streams and did not declare this. She found this to be a clear conflict of interest and an abuse of his position and trust that was placed in him as a senior employee of Unite. He awarded contracts on the basis of nepotism and favouritism and for his own financial gain. In relation to the Birmingham Project she found that the Claimant had misled the Executive Council and directors of Blackhorse regarding the valuation of the Birmingham Project and that he had failed to arrange for the provision of advice to the Blackhorse trustees/directors regarding their fiduciary responsibilities regarding the financial transactions connected with the Birmingham Project and that the requirement for the Blackhorse directors to have oversight and insight were wilfully ignored by the Claimant leading to obfuscation and the provision of misleading information.

#### The Claimant's evidence regarding his resignation

90. The Claimant says that he resigned in response to a campaign of politically motivated mistreatment which was intended to destroy his reputation, career and livelihood. In paragraph 11 of his first statement he says that Ms Graham was driven to the point of blind obsession to position herself, no matter the collateral damage, in the best possible way to secure a second term of office. At paragraph 16 that Ms Graham had sought to destroy his reputation, career and livelihood. In cross examination he said that Ms Graham has always needed an antichrist and I became it. He says that he was seen as disloyal when he did not support her. He says that Ms Carpenter was part of the witch hunt against him.

#### Mr McCluskey's evidence regarding the Claimant

91. Mr McCluskey stated that any personal financial relationships that the Claimant may have with affiliated service providers were of no consequence to him unless they brought the Union into a conflict of interest. He said the important thing was that the relationships were producing revenue.

92. Mr McCluskey had a high regard for the Claimant. That is borne out by the highly positive reference to him in his autobiography in which he referred to having benefitted from the protection of the Claimant's legal genius. He said in response to a question from me that the allegation that the Claimant had misled the Executive Council was wrong and unfair. He acknowledged that there can be a degree of factionalism within Unite as in all trade unions.

#### Mr Cox's evidence

93. Mr Cox says the final report Mr Bowdrey QC was not disclosed to the Claimant when it was produced on 7 December 2022 as it was subject to professional privilege and had been provided to another law enforcement agency which asked the Respondent not to release it. He referred in pretty pejorative terms to the Claimant providing contracts to his friends and that there was no evidence that he had sought to get the best value for money for the Respondent.

#### Conflict of interest

94. This section was inadvertently omitted from the oral reasons but that should be included for completeness.
95. I asked the Claimant, given that he was a solicitor, how he would define a conflict of interest. He did not provide a direct answer to this and said that it would depend on the context. We considered this surprising for an experienced solicitor.
96. We consider that the Claimant consistently sought to evade the issue of the existence, or perception, of a conflict of interest by referring to his *raison d'être* being to nurture his business contacts and the revenue he claimed had been generated via the relationships he established.

## The Law

### Relevant sections of the trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA)

97. To avoid unnecessary recitation only the sections of the provisions pertaining to the claim and the issues the Tribunal has to determine are set out.

#### S 64 Right not to be unjustifiably disciplined

- (1) An individual who is or has been a member of a trade Union has the right not to be unjustifiably disciplined by the Union.
- (2) For this purpose an individual is “disciplined” by a trade Union if a determination is made, or purportedly made, under the rules of the Union or by an official of the Union or a number of persons including an official that—

- (d) he should be deprived to any extent of, or of access to, any benefits, services or facilities which would otherwise be provided or made available to him by virtue of his membership of the Union, or a branch or section of the Union,
- (f) he should be subjected to some other detriment.
- and whether an individual is “unjustifiably disciplined” shall be determined in accordance with section 65.

#### S 65 Meaning of “unjustifiably disciplined”.

- (1) An individual is unjustifiably disciplined by a trade Union if the actual or supposed conduct which constitutes the reason, or one of the reasons, for disciplining him is—
- (a) conduct to which this section applies, or
- (b) something which is believed by the Union to amount to such conduct.
- (2) This section applies to conduct which consists in—
- (c) asserting (whether by bringing proceedings or otherwise) that the Union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the Union or any other agreement or by or under any enactment (whenever passed) or any rule of law.

- (6) An individual is not unjustifiably disciplined if it is shown—  
(b) that the assertion was false, and  
(c) that he made the assertion, or encouraged or assisted another person to make or attempt to vindicate it, in the belief that it was false or otherwise in bad faith,

and that there was no other reason for disciplining him or that the only other reasons were reasons in respect of which he does not fall to be treated as unjustifiably disciplined.

- (7) In this section—  
“conduct” includes statements, acts and omissions.

#### S 66 Complaint of infringement of right.

- (1) An individual who claims that he has been unjustifiably disciplined by a trade Union may present a complaint against the Union to an employment tribunal.  
(2) The tribunal shall not entertain such a complaint unless it is presented—  
(a) before the end of the period of three months beginning with the date of the making of the determination claimed to infringe the right, or  
(b) where the tribunal is satisfied—  
(i) that it was not reasonably practicable for the complaint to be presented before the end of that period, or  
(ii) that any delay in making the complaint is wholly or partly attributable to a reasonable attempt to appeal against the determination or to have it reconsidered or reviewed, within such further period as the tribunal considers reasonable.

#### S146 Detriment on grounds related to Union membership or activities

- (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose] of  
(b) preventing or deterring him from taking part in the activities of an independent trade Union at an appropriate time, or penalising him for doing so.  
(6) (b) preventing or deterring him from making use of trade Union services at an appropriate time, or penalising him for doing so.  
(7) (a) In this section—  
(a) “trade Union services” means services made available to the worker by an independent trade Union by virtue of his membership of the Union.

#### Constructive unfair dismissal

98. Section 95 (1) (c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer’s conduct.

99. The leading authority is Western Excavating ECC Ltd -v- Sharp [1978] ICR 221. The employer’s conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

100. In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer’s breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

101. In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

102. The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

103. In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

104. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e. from the perspective of a reasonable person in the claimant’s position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

105. The repudiatory breach or breaches need not be the sole cause of the claimant’s resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

106. Omilaju is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.

107. We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

108. We note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principal reason for the resignation, but it must be part of it and the breach must be accepted.

109. In the Judgment of Keene LJ at page 12 in Meikle:

“The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.”

110. In a case in the Employment Appeal Tribunal heard by a former President, Elias P, Abbeycars (West Horndon) Ltd v Ford UKEAT/0472/07/DA he referred to Meikle at paragraph 34 and he then said:

“On that analysis, it appears that the crucial question is whether the repudiatory breach played a part in the dismissal. There must be a causal connection between the repudiation and the resignation; if they are unconnected acts then the employee is not accepting the repudiatory breach.

It follows that once a repudiatory breach is established, if the employee leaves then even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon. We respectfully agree with this reasoning. We think it would be invidious for tribunals to have to speculate what would have occurred had the employee been faced with the more limited

grounds of legitimate complaint than he had perceived to be the case.

Moreover, if there is a repudiatory breach which entitles the employee to leave and claim constructive dismissal, we see no justification for allowing the employer to avoid that consequence merely because the employee also relies on other, perhaps unjustified or unsubstantiated, reasons. The employee ought not to be in a worse position as a result of relying on additional, albeit misconceived, grounds.

Accordingly, although the tribunal did not in this case specifically engage with the question of whether there was a causal link between the repudiatory breach and the dismissal, that was no doubt because in the circumstances of this case this appeared not to be in dispute. It was never suggested that the employee did not resign because of the list of grievances that he set out in his letter. It follows from the reasoning in the Meikle case that if any of those matters constituted a repudiatory breach, the resignation would be enough to establish constructive dismissal.

Having regard to those two authorities, and there are others applying the same principle, it is clear to this Tribunal that when the Employment Tribunal asked itself what the principal reason for the resignation was, it asked itself the wrong question. It should have asked itself whether the breach of contract involved in failing to pay the sick pay was a reason for the resignation, not whether it was the principal reason.”

111. We note the case of Bournemouth University v Buckland 2010 IRLR 445 CA. the head note reads:

“In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.

The following stages apply to the analysis of a constructive dismissal claim:

- (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied;
- (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
- (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and
- (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been

a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement...”

### The parties' submissions

#### Respondent

112. Mr Gorton KC says that the Claimant's evidence should be treated with considerable causation. He referred the Tribunal to various aspects of his evidence which he says are unreliable and that included his frequently using populist jargon including witch hunt, conspiracy, Murdoch right wing press etc. He says that the Respondent's witnesses were all creditable.
113. He says that standing for election as General Secretary is not a trade union activity in an appropriate time but rather a membership facing activity. He says that there is a line of demarcation in the legislation between membership activities and protections and those relevant to employees or workers. He says that factualism or politicising is not what protection pertaining to trade union activities is directed to. He says that the whole architecture of the legislation is to police and protect trade union members. He sets out the guidance on the burden of proof under section 148(1) and says that the claim under section 64 is as a member not as an employee. He says that the claims under sections 65 and 146 are out of time and should fail for that reason.

#### Claimant

114. He says that it is significant that Ms Graham has not given evidence, At paragraph 19 Mr Williams says that the totality of the media coverage and the internal releases was greatly overwhelming impression that the Claimants future employment was untenable in the eyes of the Respondent.
115. He sets out in sections 22 to 61 criticisms of what he calls baseless disciplinary charges. He says that there was no reason why the disciplinary hearing could not have been postponed given the Claimant's ill.
116. He says that elections and due processes for the leadership of the Union are clearly activities of the Union.
117. He says the Claimant never denied a degree of interconnectedness between the affiliated service providers but this does not justify the conclusion that the Claimant was dishonest.
118. He said in response to a question from me that the Respondent was not bound to suspend the Claimant notwithstanding the police search warrant on 6 April 2022.

### **Conclusions**

#### Unjustified disciplinary pursuant to section 64 of TULRCA

119. The provision is arguably somewhat circular in that the contention made by the Claimant is that under 64 (1) he has the right not to be unjustifiably disciplined by the Union and under 64 (2) (d) that involves being deprived of any access to any benefits which would otherwise be provided to him.
120. In asserting that the Union has contravened or is proposing to contravene a requirement which is, or is thought to be imposed by under the rules of the Union, this the Claimant saying that he was entitled to the benefit of paid for legal assistance.

#### Out of time?

121. The first issue we need to consider is whether this claim is in time. The Respondent asserts that it is not. The original request upon which the Claimant relies was made in his email of 4 August 2022 and letter of 12 August 2022. We find that that these are the dates upon which the request was made. The fact that a further reference was made on 16 November 2022 and repeated in a summary letter from the Claimant's solicitors on 28 November 2023 does not, in our opinion, have the effect of deferring the period from which time starts to run. You do not gain the benefit of additional time protection by merely repeating what in effect was the same contention. Therefore time runs from the date upon which the first request was made, and if we take 12 August 2022, it is clear that ACAS early conciliation was not commenced until 6 December 2022 and therefore that claim is out of time given that the time period under section 67 of TULCRA is three months subject to it not being reasonably practicable to commence proceedings within the requisite time period and we find that given that the Claimant is a solicitor and had the benefit of legal advice that it was reasonably practicable.

#### Substantive merits

122. Notwithstanding our decision that the claim is out of time that we go on to consider the substantive contentions for completeness as to whether such an entitlement actually existed.
123. It is necessary to consider Rule 4.63. We accept that there is a degree of uncertainty as to the circumstances in which Unite provides legal advice and assistance. Nevertheless, we do not consider that this would have been a case where unjustifiable discipline would have been made out. The Claimant made a request and the Rules provide for the Respondent to exercise discretion. It is not a mandatory entitlement but rather discretionary and the Respondent exercised its discretion as it is contractually entitled to.
124. Further, the terms of the third party insurance provide that such advice and assistance only becomes potentially applicable once internal procedures have been exhausted. Internal procedures had not been exhausted. The Claimant had not yet invoked the grievance procedure. The disciplinary investigation was ongoing. It is entirely understandable that the Respondent, and its insurers, would be unwilling to provide potentially large numbers of employees engaged in internal



processes, with internal Union representation available, with the benefit of insurance backed claims. That is normal and consistent to the Tribunal's experience of how insurers act in the assessment of internal claims.

125. Further, the Claimant's evidence at paragraph 118 in the Edwards case is that any such assessment would be merits based and that is part of the discretion which either the Respondent or its insurers would have been entitled to exercise.
126. We do not, however, find that the assertion under section 65 (2) (c) was false or made under section 65 (6) in bad faith.
127. We find that the Claimant was not subject to unjustifiable discipline pursuant to S 64 of TULCRA and that claim therefore fails and is dismissed.

#### Constructive unfair dismissal

128. We need to be very careful in our conclusions that we do not make findings regarding the police matters and criminal allegations against the Claimant as that would be outside the scope of our role.
129. Further it would be inappropriate for us to express any view on the serious allegations made in connection with the Birmingham Project. Nevertheless, we find that the attempt made during Ms Carpenter's internal investigation to draw a line of demarcation between police and employment matters was inherently difficult and in effect impossible.

#### The grounds relied upon by the Claimant

130. In assessing a claim for constructive dismissal we need to consider the specific test legal tests and the basis upon which the Claimant resigned. It is important that we do that based on what he said at the time rather than what is now being asserted. Looking at the list of issues and addressing these individually.

#### Demoting the Claimant without notice and without good reason

131. We find that the Claimant was not demoted. We find that it was a normal expectation that a new General Secretary would make appointments, to what Mr McCluskey described as their kitchen cabinet, of those who had close political affiliations with them. It was therefore to be expected that Ms Graham would look to bring in her own people to senior roles.
132. Further, the position of Finance Director was only on an interim basis and was never intended to be permanent. The Claimant had no particular issue with that being removed.
133. Political was something he felt strongly about. Nevertheless given that he was adopting a high profile role within the Labour Party and that Ms Graham's manifesto was to depoliticise the Union, in terms of its interactions with the Labour Party, we find it was to be expected that she would make such changes. We take

account of the evidence from Ms Cartmail and Mr McCluskey that on his appointment he did much the same in terms of bringing individuals in, very much as a new Prime Minister does in appointing Cabinet Ministers.

134. This was not a demotion. The Claimant continued to receive the same salary and other terms and would have remained as an Assistant General Secretary but certain additional portfolios no longer being his responsibility.

135. In any event he does not refer to this in his letter of resignation. Further, we would have taken the view had this been relied on as a single cause that he would have affirmed the contract given the very significant time which had elapsed.

#### Unjustified discipline

136. Our findings have already been set out and therefore that is dismissed as a ground for constructive dismissal. In any event is not specifically referred to by the Claimant in his resignation email.

#### Failing to care for the Claimant during a prolonged period of illness

137. We find that to be a very nebulous concept. The Claimant was off work but had not specified in ways he was not cared for by the Respondent. The Claimant failed to properly communicate with the Respondent in the provision of fit for work certificates. We find that this would not have been capable of being a fundamental breach of an implied term of trust and confidence.

#### Preventing the Claimant from returning to work by way of an invented policy for fit notes

138. We find, as said previously, that the Respondent was confused as to fit notes. Nevertheless we do not consider that this in itself was capable of giving rise to a fundamental breach of an implied term of trust and confidence. Further, considerable time had elapsed between the Claimant initially seeking to return to work and the issue of fit notes being raised and his resignation. Further, we do not consider this to be one of the reasons he has relied on.

#### Systemically misusing his private information and breaching his rights of privacy and confidentiality

139. We find no evidence of misuse of the Claimant's private information. We do, however, find that there are substantial grounds to believe that the Respondent may have, whether inadvertently or deliberately, at whose instigation we are not in a position to say, leaked communications regarding matters pertaining to the him, the police investigation and the Birmingham Project to Mr Pike and others. However, we find no evidence that that was done by, or at the instigation of, Ms Cartmail, Ms Kielim or Ms Graham, and therefore on the balance of probabilities we are not able to conclude that it was done and therefore we dismiss the contention that it constituted a breach of the implied term of trust and confidence.

Inventing baseless disciplinary charges as a means to remove the Claimant from his employment

140. The Claimant refers to baseless allegations being made in his resignation letter. The Tribunal finds there are many potential criticisms of basis of the allegations, and to a large part reflected in what has been set out at length by Mr Williams. Nevertheless we do not consider that in circumstances where a police search warrant had been issued, there was evidence from the Grant Thornton report of an acknowledged interconnectivity of contracts with affiliated service providers, there was evidence and that valuations of the Birmingham Project had either not been obtained or confusing comparators had arguably been used, that the allegations could be described as baseless. Clearly there was substance behind them. They were not matters which had no obvious and serious concern. They were not merely invented. There is no suggestion that Ms Graham or the Respondent incited the police to carry out their search investigations.

141. It would have been extremely surprising in the Tribunal's view had the Respondent allowed its Head of Legal to return to active employment in circumstances where there were ongoing police investigations into very serious matters to include bribery, money laundering and offences under proceeds of criminality legislation.

Conflicts of interest

142. Mr Williams sought to rely on the absence of a documented conflicts of interest policy. Whilst we consider that this represented a significant oversight in the Respondents procedures we do not consider that this was sufficient to explain why the Claimant, as an experienced lawyer, would not have been able to recognise the existence, or potential existence, of conflicts of interest in business relationships he established on behalf of the Respondent. This

143. Therefore, we reject the suggestion that the allegations were baseless.

An unreasonable prejudicial disciplinary process, rejection of evidence from the General Secretary and failing to disclose to the Claimant material evidence.

144. The Tribunal finds that there were significant deficiencies in the investigation and disciplinary processes.

145. We find that there was a lack of proper separation between the respective roles of Mr Cox, Ms Cartmail and Ms Carpenter.

146. We find it extremely surprising that Ms Carpenter deemed it unnecessary or inappropriate to interview Mr McCluskey. It rather raises the suggestion that Mr McCluskey may have been seen as being too closely aligned with the Claimant and therefore not someone who should be interviewed. We would see that as being a significant shortcoming in a non constructive dismissal disciplinary process.

147. We reject the assertion that the Claimant was not provided with significant material evidence. There may have been some areas where additional material could be provided. Nevertheless he had the Grant Thornton report, Ms Carpenter's report and the various statements pertaining to her report. We take account of the fact that his solicitors were requesting the provision of voluminous emails and documents at the same time as the Claimant failed to provide written responses to a series of what we consider to be reasonable questions.

Refusing to adjourn the disciplinary hearing

148. We find it surprising, given that the Claimant had only been signed off on account of a respiratory tract infection until 24 January 2024, that the Respondent decided it was not appropriate to postpone the hearing. We do, however, take into account that the Claimant had been off for nearly 18 months. There may have been a concern that he was never going to return to face a disciplinary hearing. There had been two previous postponements of the hearing.

149. Ultimately what we need to consider, is not what is now said in the potentially persuasive arguments advanced in relation to deficiencies in the investigatory, disciplinary and grievance procedures, as referred to by Mr Williams from page 7 onwards in his skeleton, many of which we consider to be meritorious, but rather what he contended at the material time.

The Claimant's grounds of resignation as set out in his resignation letter

150. Looking at that document and the reasons given.

Failure to provide him with essential documents

151. We have addressed this. Whilst arguably the final report of Mr Bowdrey QC dated 7 December 2022 may have been relevant we do not find that the failure to provide it would be sufficient, either alone or cumulatively, to constitute a breach of the implied term in trust and confidence. Further, we take account of Mr Cox's evidence that there were restrictions imposed on its circulation given its potential relevance to a possible criminal proceedings.

The failure to provide access to Unite employers until 36 hours ago

152. That in itself would not in our view be a sufficient issue to constitute a breach of the implied term of trust and confidence.

The failure to answer questions quite reasonably posed on his instructions by solicitors.

153. The Tribunal has considered the totality of the relatively voluminous correspondence between the Claimant's solicitors and the Respondent. We find that whilst there may have some instances where full answers were not provided

that the Respondent, when the correspondence is considered in its totality, provided answers on a timely and efficient basis to the correspondence. It may well be the Claimant did not always get the answer he was seeking, for example, the provision of legal assistance but nevertheless we do not find that any deficiency in the respondent's response to correspondence to be capable of giving rise to a breach of the implied term of trust and confidence.

A false narrative being created in correspondence

154. This has not been particularised. It is a very general point. We take on board what we have said previously in relation to media communications but again do not consider that this constituted a breach of the implied term of trust and confidence.

The volte face regarding email access

155. This was also a decision made following a request from the police. We do not consider it sufficient to be a breach of the implied term of trust and confidence.

Continued breaches of its own procedures

156. No specific contention is made as to exactly what procedure had been breached and as such it is not in our view capable of giving rise to a breach of the implied term of trust and confidence.

Fundamental breaches of rights as an employee

157. This is a generic reference and is not in itself something which can properly be responded to as a specific allegation.

Leaks of information intended to have the effect of damaging the Claimant's reputation

158. This has already been addressed.

His rights being and welfare being ignored at the altar of a smear campaign

159. This is a very general contention and again not something which could, in our opinion, give rise to a breach of the implied term of trust and confidence.

A refusal to consider an alternative process

160. It is not clear what is being stated. We think it may relate to a contention that the disciplinary process should be stayed pending the outcome of the police enquiry. That would have meant that the Claimant would have remained in employment on an ongoing basis as the police investigation has still not been concluded. We do not consider that that this would have justified a breach of the implied term of trust and confidence.

General observations on the constructive dismissal claim

161. Whilst the Tribunal considers that there were potential matters which would potentially have justified constructive dismissal, for example, the nature of the allegations, the failure to interview various individuals, the lack of specificity regarding the probity of affiliated service etc we nevertheless remind ourselves that it would be an error of law for us to substitute grounds which were not relied upon by the Claimant at the time of his resignation. It particularly significant that he did not say that he was resigning because the Respondent had insisted on the disciplinary hearing proceeding in absentia notwithstanding him being signed off. As such it would be wrong for us to find that this was the reason why he resigned, when he himself as a solicitor with legal representation, albeit that his resignation letter was sent out of hours, did not refer to it as one of the reasons he relied on.
162. We find that the Claimant did not resign in response to any breach of the express or implied terms of his contract but rather that he resigned due to the fact that he had general frustration with the process and was unwilling to engage in answering questions regarding the affiliated services contracts. This was particularly evident from his approach during the meeting with Ms Carpenter on 17 October 2022 and in his failure to answer written questions posed by her on 18 November 2022.
163. We find that he affirmed the contract in relation to earlier alleged breaches to include his demotion.
164. Ultimately the breaches looked at either individually or cumulatively were not sufficient to give rise to a breach of the fundamental term of trust and confidence and therefore the claim for constructive dismissal fails and is dismissed.

That the Claimant in standing for General Secretary of the Respondent undertook an activity in an independent trade union at an appropriate time and suffered detriment as a result pursuant to section 146 (1) (b) of TULCRA.

165. First, in terms of statutory construction we do not accept Mr Gorton KC's contention that this is a provision which is incapable of utilisation by an employee as opposed to a trade union member. We take account of the fact that section 146 refers specifically to a "worker" having the right not to be subject to any detriment as an individual by any act or any deliberate failure to act. We acknowledge that there is a degree of overlap between membership and employee or worker rights. Nevertheless, we do not consider that it would be appropriate to adopt a prescriptive interpretation of section 146.
166. We find that standing in the election for General Secretary, together with the associated election campaign, would constitute an activity of an independent trade union undertaken at an appropriate time. Nevertheless the Claimant actually contends is based on Ms Graham's alleged perception that he represented a potential candidate to stand against her in five years' time. This, in our view, is not something which could sensibly be seen as an activity of an independent trade union. We accept Mr Gorton KC's submission that would in effect involve politicising or factualism within a Union and is not something which would be an activity of a

this trade union. We reject the contention that his act of running for election as General Secretary was the potentially protected activity he is seeking to rely on.

167. We then repeat our findings as set out in relation to the constructive dismissal claim. Given that we have rejected all of the individual allegations at 2.1.1 they would also per se be rejected pursuant to section 146 (1) (b) as not being capable of constituting a detriment, even if we had found that the Claimant was protected given our determination as to the distinction between running for General Secretary and being a perceived threat to the.

#### Out of time?

168. We do however find that this claim would have been in time. We take the view that there were a series of connected actions which culminated, or would have culminated had we found them to be substantiated, in the Claimant's resignation on 12 January 2023 and therefore the claim would have been in time but nevertheless for the reasons set out it fails and is dismissed.

#### Ms Graham

169. The Claimant in his witness statement made a series of very overt contentions that Ms Graham was ill disposed towards him. Nevertheless, the Tribunal did not consider that any evidence existed that Ms Graham had acted on a vindictive basis towards him either personally or as a result of his being perceived to be a potential future candidate to run against her for General Secretary. We consider that evidence exists that Ms Graham had not ruled out the possibility of the Claimant returning to active employment.

170. The Tribunal sees her absence as being a significant lacuna in the Respondent's evidence. Nevertheless it is the Respondent's prerogative as to which witnesses they call and the Tribunal acknowledges that for a hearing of this duration she may have had other activities she needed to pursue and we are also mindful that the Claimant was on record as saying that he wanted to put her on the witness stand with a view to attacking her.

#### Final conclusions

171. The unanimous judgment of the Tribunal is that the claims pursuant to sections 64 and 146 of TULCRA fail and are dismissed. The claim for constructive unfair dismissal fails and is dismissed.

**Employment Judge Nicolle**

**2 September 2024**

Sent to the parties on:

6 September 2024

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For the Tribunal:

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