Case No: 2601074/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Ward

Respondent: DHL International (UK) Ltd

Heard at: Nottingham **On:** 12 and 13 March 2025

Before: Employment Judge New

Representation
Claimant: Litigant in person
Respondent: Ms Clayton, Counsel

RESERVED JUDGMENT

1. The complaint that the dismissal was automatically unfair for taking part or proposing to take part in the activities of an independent trade union contrary to Section 152 Trade Union and Labour Relations Consolidation Act 1992 is not well founded.

2. The complaint that the dismissal was automatically unfair for health & safety reasons contrary to section 100 Employment Rights Act 1996 is not well founded.

3. The complaint of ordinary unfair dismissal is not well-founded.

REASONS

Introduction

4. The respondent is a multinational logistics company providing courier, package delivery and express mail services out of its service centres. The respondent employed the Claimant as a LGV (Large Goods Vehicles) Driver based at its East Midlands Airport service centre from 2 August 2010 until he was dismissed with effect from 4 July 2024.

5. The claimant claims that his dismissal was unfair on ordinary unfair dismissal principles, automatically unfair on grounds that the reason or principal reason for dismissal was that he had taken part in the activities of an independent trade union (section 152 TULRCA) or automatically unfair

on grounds that the reason or principal reason for dismissal was the fact he had brought to the respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety in circumstances where there was a health and safety representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means (section 100(1)(c)(ii) ERA 1996).

6. The respondent contests the claim. It says it had a fair reason for dismissing the claimant, namely 'some other substantial reason of a kind such as to justify the dismissal' (section 98(1)(b) ERA 1996). The respondent says that the 'some other substantial reason' was an irretrievable breakdown in the relationship of trust and confidence. It denies that the dismissal was on grounds of trade union activities, or the claimant having raised any health and safety matters.

7. The claimant's application for interim relief failed at a hearing on 31 July 2024.

8. The claimant's application to amend his claim to include a claim for whistleblowing detriment was refused on 11 December 2024.

The Hearing

9. I heard the claim on 12 and 13 March 2025.

10. The Claimant gave evidence on his own behalf. The Claimant also produced statements from Mr Derek Curtis, Ms Sukhi Khaira and Mr Craig Cox. Ms Khaira and Mr Cox were not in attendance to give evidence. It was agreed that whilst the Tribunal would read their evidence, they were largely character statements, and the Tribunal could only give them limited weight in the absence of them attending to be cross examined. Mr Curtis did attend the hearing to give evidence, but on the second day of the hearing, after discussion, the Claimant agreed that Mr Curtis' evidence would not be heard. This was because it transpired that the Claimant had not understood that he could not cross-examine his own witness, and because the point he wished to raise with that witness had not been put to the Respondent's witnesses. Furthermore, Mr Curtis' evidence appeared only to be relevant to factual matters which were not in dispute or not central to the legal issues in the case.

11. For the Respondent we heard from Mr Mark O'Doherty, Linehaul Director who reached the decision to dismiss the Claimant and Mr Ben Hiles, Senior Director, who considered and rejected the appeal against dismissal.

12. The parties produced written witness statements in advance. I took time to read those statements in advance of the hearing. Each witness was then asked questions about the evidence contained in their statements.

13. The parties cooperated in producing a bundle of 422 pages. A few additional pages were produced during the hearing, but they were not formally admitted into evidence because it transpired they were related to a point which was not in dispute between the parties.

The Issues

14. At the start of the hearing, we spent some time clarifying the issues as set out below:

1. Ordinary Unfair Dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely breakdown of trust and confidence.

1.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2. Automatic Unfair Dismissal contrary to section 152 TULRCA 1992

2.1 Was the reason (or principal reason if more than one) for the Claimant's dismissal because the Claimant had taken part in the activities of a trade union. The claimant relies on the followed alleged trade union activities:

- Going on a GMB workplace organiser course from 3 April 2024
- Recruiting members for the GMB for the last 3 years and increased efforts to do so after 3 April 2024 including by posting GMB membership details on canteen notice board

2.2 Were the alleged activities of a trade union carried out at an appropriate time either:

- A time outside the Claimant's working hours; or
- A time within the Claimant's working hours at which, in accordance with the arrangements agreed with or consent given by the Respondent, it is permissible for him to take part in the activities of a trade union.

The claimant says that he completed the alleged activities during his break or on agreed leave, so outside of his working hours.

3. Automatic Unfair Dismissal contrary to section 100(1)(C) ERA 1996

3.1 Was the reason (or principal reason if more than one) for the Claimant's dismissal because the Claimant raised and/or complained about the following health and safety matters:

- On 19 December 2023 – an issue of truck safety relating to the steering wheel locking on a particular vehicle
- On 9 May 2024 – Carrying out a check on safe systems of work sheets (p359)
- On 20 May 2024 – The Claimant marking a blank date on a site induction familiarity sheet which should have contained information on when dates and times of fire alarm tests should have been carried out at Tewksbury Service Centre

3.2 Were those circumstances connected with his work and ones which he reasonably believed were harmful or potentially harmful to health or safety?

3.3 Was it appropriate for the Claimant to bring those health and safety issues to the Respondent's attention in the following ways:

3.3.1 On 19 December 2023 – raising it verbally at the end of the meeting with Mr O'Doherty

3.3.2 On 9 May 2024 –by email to Alex Brown in an email (p359)

3.3.3 On 20 May 2024 – by raising it with the female member of staff on that date, then taking a photocopy and presenting it to Mr Alex Brown in the meeting on 22 May 2024.

3.4 If the Respondent had a health & safety representative or safety committee, was it not reasonably practicable for the claimant to raise the matters by those means. The claimant says that it wasn't reasonably practicable because of the shift times he was contracted to work.

4. Remedy for unfair dismissal

4.1 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

4.2 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

4.3 What should the terms of the re-engagement order be?

4.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.4.1 What financial losses has the dismissal caused the claimant?

4.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.4.3 If not, for what period of loss should the claimant be compensated?

4.4.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.4.5 If so, should the claimant's compensation be reduced? By how much?

4.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.4.7 Did the respondent or the claimant unreasonably fail to comply with paragraph 9 of the Code by failing to send written documents/evidence in advance of the meeting at which the Claimant was dismissed?

4.4.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

4.4.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

4.4.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

4.4.11 Does the statutory cap apply?

4.5 What basic award is payable to the claimant, if any?

4.6 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Findings of Fact

15. The claimant was employed by the respondent as a Class 1 LGV Driver based at its East Midlands Airport service centre from 2 August 2010.

16. The respondent is a multinational logistics company providing courier, package delivery and express mail services out of its service centres. Although there are other service centres in locations in the vicinity including Birmingham, Stoke on Trent and Northampton, those sites do not have class 1 drivers like the claimant. The drivers in those locations are class 2 drivers, making local deliveries. The nearest of the Respondent's locations employing class 1 drivers were the service distribution centres attached to Heathrow Airport in London or in Glasgow.

17. The claimant's duties usually involved driving out in the morning from the East Midlands Airport service centre to the service centre in Exeter on 'import' duties, where he would then sleep and return in the evening on an 'export' shift.

18. For the type of driving work undertaken by the claimant, there were three shifts – one in the morning, one during the day and another in the evening. For each of those shifts, there were approximately five or six supervisors on duty (first line managers), and then one Operational Manager overseeing the day to day running of the operation. Mr Adrian Eden was one of those Operation Managers. The entire UK Linehaul Operation was overseen by Linehaul Director, Mark O'Doherty managing approximately 460 colleagues.

19. The respondent does not recognise any trade union at East Midlands Airport. It does not engage in collective bargaining with any trade union in relation to that site.

20. The claimant has been a member of the GMB trade union for at least several years. The claimant is a strong proponent of trade union membership and standing up for employment rights. He believes in holding his employer to account for complying with its own policies and procedures.

21. There is no dispute that the claimant frequently supported colleagues with grievance and disciplinary issues in the workplace. He accepts that he did so in the capacity of a workplace companion as he was not an accredited trade union official at any point during his employment.

22. The respondent operates an Employee Consultation Forum (ECF). The claimant was an ECF representative until around April 2023.

23. The respondent also has a Health and Safety Committee with health and safety representatives. The claimant was not part of that committee, and he was not a health and safety representative. Tony Henley was the appointed health and safety representative for East Midlands Airport at the relevant times. The claimant accepts that there were a number of ways that health and safety issues could be raised through the proper channels including by raising it with Mr Henley if they were on shift together, to leave a note on his desk, to email Mr Henley, to leave a note for the ECM representative, or to raise it with his manager.

24. The Respondent has a disciplinary procedure which provides under the section which relates to 'formal process' for an investigation to be carried out. As regards the right to be accompanied, the policy states as follows:

"*Whilst there are no statutory rights to be accompanied, the employee may choose to be accompanied by a work colleague or Trade Union Representative, as part of the investigating interview*."

Bridge Strike Disciplinary Issue

25. On 10 March 2023, an incident took place whilst the claimant was driving a high sided vehicle between East Midlands Airport and Exeter where the vehicle he was driving struck a low bridge in circumstances where the weather conditions were adverse.

26. Adrian Eden met with the claimant later on the day of the incident for an initial fact-finding meeting to discuss what had happened. The claimant admitted that his vehicle had struck the bridge, and he explained the circumstances in which that happened. In this meeting, only one bridge strike was under discussion.

27. There does not appear to be any dispute that a second investigation meeting took place on 28 March 2023 between the claimant and Mr Eden, although the Tribunal was not shown notes of that meeting.

28. The claimant was then invited to a formal disciplinary hearing scheduled for 11 April in a letter from Alex Brown dated 6 April 2023. The claimant complained to Mr Brown that because the letter had been received on a bank holiday, he had not been given the amount of notice required by the disciplinary policy and he would have insufficient time to prepare for the meeting. He also complained that the proposed time of the meeting would put him in breach of the working time directive in terms of working hours. Mr O'Doherty was not necessarily entirely in agreement with the claimant's analysis, given that bank holidays did constitute working days at the Respondent's business, but in any event agreed to reschedule the

meeting. He also agreed that the matter would be dealt with by Mr Stacey to avoid any perceived conflict of interest.

29. Brian Stacey, SDC Transport Manager for the respondent (more senior than Mr Eden), sent a letter dated 14 April 2023, inviting the claimant to attend a disciplinary hearing on 17 April 2023. Of particular significance to the claimant is that this letter contained allegations relating not only to the bridge strike previously discussed, but to a second alleged bridge strike said to have happened on the return journey back to East Midlands Airport. The disciplinary charge of gross misconduct was in relation to those two alleged bridge strikes and related to allegations of Reckless Driving, Neglect of Duty and a serious breach of conduct in relation to Health and Safety procedures and safe systems of work. The letter inviting him to that disciplinary hearing enclosed copies of a pack of evidence including telemetric tracking data, images and various other documents and policies.

30. The claimant attended the disciplinary hearing on 17 April 2023, chaired by Brian Stacey. At an early point in the meeting, the claimant queried the reference to two alleged bridge strikes. Mr Stacey took an adjournment at that point and when the meeting was reconvened ten minutes later, he confirmed to the claimant that he was only looking at one bridge strike incident, not two. The claimant queried why the letter had referred to a second bridge strike, and asked Mr Stacey to apologise for its inclusion. Mr Stacey is recorded as saying that he did not know why the second bridge strike had been referred to. The disciplinary hearing continued and there was a discussion about the one bridge strike incident admitted by the claimant.

31. The outcome of that disciplinary hearing was that the claimant was issued with a final written warning on 18 April 2023 in relation to one bridge strike. No action was taken at all in relation to the second alleged bridge strike. That final written warning expired on 17 April 2024. The claimant otherwise had a clean disciplinary record.

32. The claimant appealed that final written warning, and an appeal hearing took place on 10 May 2023. One of the claimant's grounds of appeal related to the fact that a 'false allegation for 2nd bridge strike' had been included on the second invitation to the disciplinary hearing. The claimant argued that this was libel by Mr Stacey and unprofessional. The appeal hearing chairperson, Mr Hiles, explained his perspective that it was very clear, after the 10-minute adjournment, that the disciplinary hearing was only considering the one allegation, that Mr Stacey had not known why a second incident had been referred to and that it was clear it had played no further part in the disciplinary discussion.

Defamation civil proceedings

33. On 10 July 2023, the claimant issued proceedings against Mr Stacey in the County Court for defamation (libel) and wilful neglect, seeking £9,500. His claim related to the 14 April 2024 letter inviting the claimant to the re-scheduled disciplinary hearing invitation where the second alleged bridge strike was referenced. The claimant alleged in his claim that reference to

this second alleged bridge strike incident in the invitation letter was a false statement and that it was distributed to other parties within the company and that it was therefore defamatory. The respondent's legal department supported Mr Stacey in defending the proceedings.

34. The reasons the claimant decided to pursue county court libel proceedings against Mr Stacey, even in circumstances where it was withdrawn as an allegation 10 minutes after it was queried, was because he could not understand why the allegation had been raised at all, Mr Stacey had not apologised for it having been included on the letter, because that letter would remain on his file and because he felt it was his right to defend his reputation. The claimant explained during the hearing the seriousness to a professional driver of being accused of two bridge strikes rather than one, namely that it would infer absolute incompetence, and it would likely lead to criminal prosecution for at least four road traffic offences and would likely ruin his future livelihood.

35. When issuing his claim, the claimant did not take legal advice, and he had not appreciated the potential risk of costs until he later received costs warning letters from the Respondent. He admitted during the hearing that his perspective then became somewhat blinkered and was clouded by fear and anxiety of the potential financial consequences for him. The Claimant told us that he was a man of principle and having launched the claim, he needed to see it through.

36. The claimant now admits under cross examination that in the cold light of day it was potentially a disproportionate response to a minor error.

37. In my judgment launching county court proceedings in relation to a disciplinary allegation which was then withdrawn and proceeded no further 10 minutes after it was queried, was a very significantly disproportionate reaction. I accept that the Claimant felt genuinely aggrieved by the very fact that a possibility of a second bridge strike had been raised, and the lack of any apparent explanation for it, but having understood it would play no further part in the disciplinary and had been very clearly withdrawn (a matter clearly recorded in the notes that would be on his file) my finding is that it was an escalation of the highest order to take civil action against his manager and therefore an entirely disproportionate response.

38. I accept that the claimant had a legal right to pursue any claim that he wished, whether it had any merit or not. I find however that in launching his civil claim in the circumstances described above, the claimant did so in a deliberate and calculated attempt to assert authority and power over his managers and to retaliate against a disciplinary process and sanction he felt was unreasonable.

39. In error, the county court issued a default judgement on 22 August 2023 against Mr Stacey, ordering him to pay the claimant £10,027.88, having overlooked an application made by solicitors on Mr Stacey's behalf on 11 August 2023 to have the claim struck out on the basis that the claimant had no reasonable grounds for bringing his claim, that it was an abuse of process and that the claimant had no realistic prospect of succeeding on the claim. That application was supported by a detailed witness statement from a lawyer acting for Mr Stacey which set out, by reference to the

relevant legislation, precisely why the respondent said that the claimant's claim for defamation had no reasonable prospect of success.

40. Whilst the claimant had not taken legal advice when launching his claim and may not have fully understood that it was an obviously meritless claim, I find that his failure to take advice or otherwise reconsider his position or discontinue the proceedings at that point in August 2023 was an act of stubborn disregard for the impact the claim would or might then have on the relationship of trust and confidence with Mr Stacey and the respondent more generally.

41. On 30 August 2023, the claimant emailed Alex Brown raising a formal grievance about how the bridge strike disciplinary issue had been dealt with, referring to the 'libel and malicious falsehood' he believed had occurred. This email also referred to the fact he had brought a civil claim against Mr Stacey and implied that the respondent would also be liable under the same claim. In seeking to have the disciplinary sanction removed, and his position on the ECF committee re-instated, the claimant ended his email by stating "*a failure to acknowledge and action will only result in a civil claim against DHL the company and specific individuals*". That email was copied to a number of people including Mr Eden, who were not otherwise involved in the ongoing litigation.

42. In all the circumstances set out above, and particularly where the claimant had already exhausted the internal disciplinary process, I find that this email was seeking to use his civil claim and the threat of further litigation as a weapon against management to coerce the outcome he sought. It was unreasonably threatening in tone given that it made direct threats of litigation including to Mr Eden in circumstances where he had done no more than conduct a workplace investigation as part of his role, the details of which the claimant had full opportunity to discuss in a disciplinary hearing. Mr Eden's email of 16 October 2023 to HR and Mr Eden's evidence to Mr O'Doherty in the meeting notes on 29 May 2024 is clear evidence that he was left very worried and felt personally threatened with the risk of litigation as a result of this email.

43. The claimant accepted that the fact he had brought a claim against Mr Stacey had become well known amongst his colleagues, although he disputed that he had been the cause of that fact. Whether or not employees and managers were already aware of the litigation by other means, the claimant's email of 30 August 2023 undoubtedly had the effect of disclosing the existence of litigation to Mr Eden. The claimant's email of 30 April also had the effect of undermining Mr Stacey's authority in front of his subordinate, Mr Eden.

44. Before the error of issuing a default judgement was corrected by the court, the claimant emailed Mr Stacey on 1 September 2023 seeking to enforce the judgment. In that email, the claimant stated that he "*was prepared to allow 14 days from the date of this order for you to pay in full before escalating to collection and enforcement*" and "*If you fail to pay and enforcement action is taken or searches to locate your private address involve additional costs including but not limited to collection agents fees may also be added to the outstanding amount including interest*".

45. Even accepting that the Claimant may not yet have read correspondence from the respondent's solicitors suggesting that the county court judgement had been issued in error, in the context of the ongoing employment relationship, I find that the claimant's email of 1 September 2023 was unreasonably threatening in tone towards Mr Stacey, expressly threatening that he intended to take enforcement action and send in debt collection agents to his private address if the debt was not paid within 14 days (a much shorter period than the one month allowed for payment by the court). The claimant accepted in answer to my questioning of him that this email was probably an error on his part, that it was applying too much pressure on Mr Stacey. He admitted that he was blinkered in his approach at the time and that he had not considered the impact on Mr Stacey.

46. Whilst the claimant seeks to explain his actions by reference to the fact he was clouded by anxiety about the litigation and the financial risk of costs being awarded, I note that on the claimant's own account he had not been aware that the judgment had been issued in error and hence he presumably thought he had won the claim, at which point there was no obvious reason to be fearful of costs or for his judgment to be clouded by anxiety. In my judgment, the claimant's email to Mr Stacey was designed to apply maximum pressure on Mr Stacey as a further act of vindicative retaliation.

47. Indeed, later on 1 September 2023, Mr Stacey wrote to the Priya Patel, HR for the Respondent complaining about the claimant's email to him earlier that day. Mr Stacey particularly complained about the fact the claimant had now disclosed to other managers, including colleagues subordinate to him, that he was involved in such litigation, and raising concerns about the impact this would have on his ability to manage the department. He also spoke of the profound impact it was having on his mental health, and the decision he now faced as to whether to tell his wife (who suffered with mental health issues) about the matter, risking a deterioration in her condition, or not telling her but then dealing with the potential worst fall out if debt collectors were to arrive at their door.

48. In November 2023, there were some without prejudice settlement discussions between the claimant and the lawyers acting on behalf of Mr Stacey and DHL. In a letter dated 6 November 2023, those solicitors explained to the claimant that the words "*without prejudice*" meant that neither side can draw this correspondence to the attention of the court in any proceedings, other than when discussing the amount of costs to be awarded to a party at the end of the proceedings. I infer that it was this explanation about the meaning of the words 'without prejudice' that led the claimant to understand that using those words in conversation or on correspondence would essentially protect you from legal action, an understanding which is relevant to events that follow. I infer that at the relevant times in question, the claimant had not understood that those words only had that potential effect in the context of a discussion about settlement of a dispute.

Defamation particulars of claim struck out – 24 November 2023

49. A hearing took place in relation to the defamation matter at Manchester County Court on 24 November 2023 at which the previous default judgement was set aside and the claimant's particulars of claim were struck out on "disclosing no reasonable ground for bringing the claim, is likely to assume the just disposal of his case and the claimant has failed to comply with the CPR Practice Direction 5.2 paragraph 4" [123-124]. It appears that the claimant had until 6 December 2023 to file and serve a fully particularised Particulars of Claim properly compliant with the CPR if he wanted to continue the claim.

50. The claimant was ordered to pay the respondent costs. The amount of costs was £8,000 but a first version of the judgment showed, in error, a figure of £80 costs, which was subsequently corrected in a judgment dated 22 February 2024 under the slip rule to £8,000 [127]. It is agreed between the parties that the claimant has paid only £150 of that amount. The claimant told the Tribunal he thought that in paying the £80 amount, before it was corrected, he had done all that was required.

51. The claimant believed that his defamation claim had failed on a technicality relating to the particulars of claim rather than any issue with the substance or merits of his case. Accordingly, he did not show towards the respondent or Mr Stacey any contrition or remorse for his actions. In my judgment, the evidence from the county court judgement is that his particulars of claim were struck out because his claim was completely without merit.

Information warning from Mr O'Doherty

52. On 19 December 2023, Mr O'Doherty had what was described as an informal conversation with the claimant to discuss the impact that the claimant's actions in relation to the civil claim and the related correspondence with managers were having on Mr Stacey and his wife particularly, and the impact more broadly to other managers. There is no dispute about the fact the conversation took place, although there is some lack of clarity about exactly what was discussed and agreed. There are no notes of the meeting.

53. I accept that the claimant did not receive any advance notice of the meeting, and that he was not permitted to be accompanied at the meeting. As this was an informal meeting, and not a disciplinary meeting, that is not unusual or unreasonable. The claimant also complains that he was not permitted to take a break and that one was due to him as he had only just arrived back in the depot after a period of driving. I can make no finding on that matter as it did not have evidence of hours worked or breaks taken.

54. The claimant accepts that he had not until this meeting with Mr O'Doherty on 19 December 2023 appreciated the impact of his actions on Mr Stacey and that when Mr O'Doherty outlined the impact, I accept the claimant's undisputed evidence that he was then apologetic, offering to write a letter of apology to Mr Stacey. The claimant also raised with Mr O'Doherty the

considerable impact on his own mental health of what he saw as a false allegation having been raised against him, which he felt Mr O'Doherty was overlooking.

55. Whilst I do not doubt the claimant's evidence about the impact on his mental health, I was concerned by the claimant's apparent inability (even many months later at the hearing) to recognise that the impact on the claimant of being very briefly subject to an allegation (even a very serious allegation) of a second bridge strike which was then quickly withdrawn and no further action taken, would reasonably be vastly outweighed by the likely impact on Mr Stacey of being subjected to such serious litigation against him in his personal capacity about such a minor matter that he had conducted in the course of his normal duties, with the associated threats of enforcement action on his family home.

56. The claimant accepts that during this meeting on 19 December 2023 with Mr O'Doherty, there was an expectation, to which he agreed, that he needed to work on repairing the relationship with Mr Stacey and that he would make an effort with colleagues more widely too. Mr O'Doherty accepts that he did not tell the claimant the possible consequences if the claimant's approach did not change, or the relationships were not repaired.

57. The claimant complains that he found the meeting an intimidating attempt to persuade him to withdraw his civil claim. Given that the claimant's particulars of claim had already been struck out by that point, I reject that contention and find that the Respondent was reasonably and robustly attempting to draw to the claimant's attention the impact that his actions towards his managers in relation to the litigation were having on the employment relationship.

<u>Health & Safety Issue raised 19 December 2023</u>

58. Although Mr O'Doherty does not recall it specifically, Mr O'Doherty does not deny that the claimant raised a health and safety issue at the end of this discussion on 19 December 2023 about a particular vehicle where the steering wheel had locked solid whilst it was being driven. He certainly accepts that Mr Curtis also raised the same issue around the same time.

59. In response, Mr O'Doherty said something to the effect that it was 'something he needed to know about'. Although the claimant interprets that comment by Mr O'Doherty as lacking any apparent concern, I find that Mr O'Doherty did take the concerns seriously as the claimant accepts that Mr O'Doherty took steps to re-visit the investigation that had already been undertaken in relation to the concerns and took steps to further investigate on the basis of the details Mr Curtis had provided.

60. There is no evidence to suggest that Mr O'Doherty was displeased with the claimant for raising the health and safety issue.

Without Prejudice Issue

61. On 29 January 2024, the claimant received an email from a junior clerk, Mr Leivars, telling him that his holiday request for particular dates had been rejected. In response, the claimant responded to Mr Leivars with an email headed "*without prejudice*" indicating that he was *"deeply upset*" by this "*devastating news"*, proposing alternative dates to use up his leave entitlement. The claimant went on to say: "*failing this I will consider unreasonable and may breach my contractual rights and employer responsibility as I have not been offered any alternative but when it suits operational requirements*".

62. I accept Mr O'Doherty's evidence which was that Mr Leivars had raised concern with a manager, Mr Brown about the email querying why the words 'without prejudice' were being used and fearful about the possible implications. Mr Brown in turn raised those concerns with Mr O'Doherty believing that the claimant's use of the term without prejudice was inappropriate. The respondent did not raise or address those concerns directly with the claimant until the meeting on 1 July 2024.

63. The claimant's explanation during the hearing as to why he used the words 'without prejudice' on this email was that he put it on most emails within the company, as a matter of habit, to prevent legal action against him, as a means of protection.

64. The claimant disputes that using the words 'without prejudice' would have been intimidating to Mr Leivars. He firstly points to the fact that Mr Leivars also used the words 'without prejudice' in his email responding to the claimant. He also maintains that Mr Leivars was a clever individual and that Mr Leivars likely used that word because there had been 'banter' in the office between the claimant, Mr Leivars and another employee about using the phrase before or after comments made in the office. In cross examination however, it transpired that what the claimant refers to as banter was in fact the claimant advising or suggesting to Mr Leivars and another employee that they might like to consider using those words when they were saying something potentially inflammatory about a colleague or manager, to protect themselves from future litigation in relation to it.

65. I find that in the particular circumstances of this case, using the words 'without prejudice' on that email was inappropriate, unduly confrontational and impliedly threatening in nature. I accept Mr O'Doherty's witness evidence that Mr Leivars had been concerned by the email and queried it with his managers. On a careful reading of the email exchange and particularly noting the evident excessively conciliatory tone being taken by Mr Leivars trying to de-escalate the matter, I consider it more likely than not that Mr Leivars put the words 'without prejudice' on the return email not as part of ongoing banter, but only because the claimant had himself used those words and because Mr Leivars understood from the claimant's previous suggestion to him that using those words would protect from litigation.

66. Using that phrase, an inherently legal term, towards a junior clerk, in the context of an email where the claimant was evidently unhappy about the

decision and about which he was evidently raising a challenge, naturally infers that the claimant had in mind some kind of legal process or claim. In turn that would naturally cause concern to the recipient knowing as he did that the claimant had demonstrated a propensity to pursue or threaten litigation in relation to the most minor of matters relating to his employment. On the claimant's own evidence, whenever he used the words without prejudice, it was designed to ensure that the email could not be used against him in court, and therefore to gain himself some protection for his actions.

67. I was particularly struck by the fact that the claimant should be thinking in those terms, i.e. the need to protect himself from litigation, about a straightforward email about holiday leave, demonstrates a concerning insight into the claimant's confrontational mindset towards his employment relationship, his managers and his colleagues.

Training with GMB

68. In April 2024, the claimant arranged to undertake training with the GMB trade union with the aim of becoming an accredited GMB workplace organiser, which took place on dates in April, May and June, with the last date on 9 June 2024. He received certificates dated 23 September 2024 confirming that he had completed qualifications for 'NOCN Level 1 Award for Trade Union Health and Safety Representatives', 'NOCN Level 1 Certificate for Trade Union Representatives (Stage 1)' and 'NOCN Level 1 Award in Trade Unions Today'.

69. The respondent was supportive of the claimant undertaking this training in his own time and the claimant accepts that the respondent went to some considerable effort to rearrange his shifts to accommodate the training dates.

70. The claimant relies on a GMB release form signed by Mr Brown as evidence that the respondent had agreed to meet the costs of the course. I find however that it is entirely apparent that although Mr Brown had handwritten onto the form the words *"….so agree to paid time off"*, the fuller context makes clear that the words 'do not' were missed out from this sentence so that it should have read *"do not agree to paid time off"*.

71. I make that finding given that the clear intention of the handwritten words was to indicate that the printed words about granting paid release being a legal right for trade union representative to attend training, were not applicable in a situation where the respondent did not have a recognition agreement. Furthermore, Mr Brown had crossed out the optional wording "*It is*" and left in the words "*is not*" so that the printed words read "*It is not our intention to grant paid release"*. Furthermore, the handwritten comment was under the heading "*Paid release will not be granted on this occasion because:*". Mr Brown was evidently trying to make clear that although he was granting consent for the claimant to attend the course, it would not be paid for by the respondent.

72. Whilst the issue of whether the leave was paid or not is not an issue in dispute, I make findings on this matter as I found it to be an illuminating

and relevant insight into the claimant's attitude and approach towards the employment relationship and what I consider to be a disingenuous attempt by the claimant to rely on what was obviously a typographical/handwritten error with apparent disregard for the risk of impacting the employment relationship.

Recruitment activities for GMB

73. Around the time that the claimant was arranging and undertaking his GMB course, his efforts to recruit membership for the GMB also increased. The claimant was placing QR codes about GMB membership on canteen notice boards and sending unsolicited WhatsApp messages to drivers encouraging them to join the GMB. The claimant's undisputed evidence was that placing QR codes on noticeboards took place during his lunch or tea breaks.

74. It is apparent from an email on 25 April 2024 [308], that these recruiting efforts came to the attention of Mr Eden and in turn Mr Brown and Mr O'Doherty. The claimant relies on this email as evidence of negativity towards his trade union activities. The email reads:

"*Hi Alex*

You may already be aware of this, but it has come to my attention that Mr Ward is sending union Rhetoric to other drivers trying to get them to get together and create a group. Nothing much we can do but apparently he is somehow contacting drivers without consent for him to have their number. The only problem I have is the driver who told me about this did not want to make a complaint, although he did maintain that others felt the same way about Andy getting their numbers.

I did see some of the messages so they are genuine but again probably not a lot we can do without someone coming forward to make a complaint.

Kind Regards

Adrian Eden"

75. Whilst I note that management are expressing concern in this email about the claimant's actions as regards trade union recruitment, I accept Mr O'Doherty's evidence that the only concern that was being raised about the claimant's actions in this respect was about the fact his WhatsApp messages were unsolicited by drivers, and drivers had informally raised concerns about how the claimant had got their telephone numbers, and whether that was an issue from a data protection perspective. His evidence is entirely consistent with my reading of the email.

76. The claimant accepts that he had never been picked up on or told off about posting QR codes.

Safe systems of work checks

77. On 9 May 2024, the claimant took it upon himself to check the physical copies of the risk assessment and safe systems of work documentation held by the respondent. He did not do so in any official capacity. I infer that the claimant did so as he was learning about such matters as part of his trade union training course.

78. He found that the majority of the documents had expired dates. He raised this with the managers in the office at the time and then by email to Alex Brown and Mark O'Doherty amongst other people [359]. There is no evidence in that email chain of a negative response towards the claimant in that respect.

79. The claimant refers to another email chain dated 17 April 2024 [295] where Mr Murray (the claimant's supervisor) had been alerted by Mr Leivars to the fact the claimant had been into the office, referring to being a 'union representative' and requesting copies of policies and requiring those to be in a lockable cabinet. In response, Mr Murray forwards the information to Alex Brown remarking "*And so it begins."* The email in turn was forwarded to Mr O'Doherty.

80. I accept that the '*and so it begins*' comment demonstrates at least a degree of annoyance by Mr Murray about the points being raised by the claimant. I accept that it could be inferred from this comment that the claimant's new trade union education was not welcomed by at least Mr Murray. In the context of the wording of the email however, I do not accept the extent of the inference the claimant seeks to make.

81. Firstly, I note that this email did not relate to the claimant raising concerns on 9 May 2024 about risk assessments or safe systems of work. Instead, it related to the claimant requesting copies of all policies and procedures on 17 April 2024. In my judgement, Mr Murray was most likely expressing annoyance about the suggestion reported to have been made by the claimant that employment policies should be kept in a locked cabinet, a suggestion which I accept did not seem reasonable. I do not accept that this email, or any others produced by the claimant, serves to evidence that management generally felt threatened by the claimant's new skills and knowledge such that they might seek to engineer his dismissal on that basis.

82. I observe from the names of the qualifications later gained by the claimant [378-380] that the GMB training being undertaken by the claimant was likely to have been aimed primarily at those who were due to act in an official capacity as recognised trade union representatives, or appointed health & safety representatives in workplaces where the GMB had a recognition agreement. As the GMB was not recognised by the respondent, the claimant was and could not act in either of those capacities even after he had completed his training. Whilst any employee is entitled to show an interest in, or raise, health and safety matters, I find that the claimant had not made that distinction in his mind about the lack of any official GMB role with the respondent. In making that finding I particularly refer to the claimant's conversation with Mr Brown on 24 May 2024 [318] where the claimant reports to Mr Brown that he had described himself to a female colleague as "*the East Midlands GMB Rep and H&S officer*", a title which Mr Brown had to correct the claimant about.

83. In light of his training with the GMB, the claimant was seemingly expecting to be able to conduct inspections of risk assessments and safe systems of work or making demands in relation to the storing of employment policies as though he were doing so in an official GMB capacity. In those circumstances, it is not surprising that the claimant's managers were relaying to each other, and to Mr O'Doherty what was happening with some sense of concern.

Tewksbury Service Centre – 20 May 2024

84. On 20 May 2024, the claimant had reason to be at Tewksbury Service Centre. In order to gain entry to the toilet facilities, he had an interaction with a female colleague who needed to update his security pass to allow entry to that part of the building. In the course of that exchange, the female colleague said to the claimant *"if it doesn't work come back and I'll fiddle with it"* to which the claimant responded, *"I am assuming you are referring to the security pass*". The female colleague, having spoken with her manager, felt uncomfortable about what she had perceived to be the potential sexual innuendo relating to the claimant's questioning of her use of the word '*fiddle*'. She went back to the claimant and made it clear that she did not welcome the comment. This led the claimant to try and question her about what she meant. The manager at the Tewksbury Service Centre subsequently raised this matter with the claimant's management team pointing out that it had impacted the female colleague quite heavily and that she was visibly emotional and shaken up at the time.

85. In the same interactions with the female colleague on 20 May 2024, the claimant asked to read the site induction/familiarity safety sheet and noted that the fire alarm test time and day had been left blank. Again, he did not do so in any official capacity. The claimant felt that this raised a potential health and safety concern because if the time of the test was not noted, anyone unfamiliar with the site would not know if the fire alarm sounded whether it was a test or a genuine fire. He therefore marked the blank space with a question mark and asked to take a copy. The female colleague enquired why he should want to do that, and he told her that he reported on matters of health and safety to management and that it was of potential relevance to staff at East Midlands Airport if they were to visit this site. He was permitted to take a copy.

86. In light of the complaint about the claimant's conduct made by the female employee, the respondent sought to address that matter with the claimant. As an initial step, it sought to have an initial exploratory conversation with the claimant about what had happened, so that it could decide whether it was a disciplinary matter which would require a full disciplinary investigation, or whether it could be dealt with informally or with no action. One might reasonably describe the proposed meeting as an informal investigation meeting. The claimant takes no issue with the fact it was proper for Mr Eden to need to raise the issue with him as a complaint had been made.

Informal investigation meeting interactions with Mr Eden – 23 May 2024

87. On 23 May 2024, Mr Eden sought to have that informal investigation conversation with the claimant. There is relatively little dispute about the subject matter of the conversation between Mr Eden and the claimant in two conversations before and after the claimant took a break from his duties, but there is considerable dispute about the tone and interpretation of those conversations. We did not hear from Mr Eden directly, but we had the benefit of notes of the second conversation taken by Mr Knox in which the first conversation was discussed [315-316]. We also had notes of the claimant's meeting with Mr Brown the following day which again recounts what happened in the two conversations with Mr Eden [317-321], Mr O'Doherty's later meetings with Mr Eden [323-328] and Mr Knox [329-331] who recount what took place. We then had the Claimant's first-hand account of the events that day about which he was cross examined in the hearing and Mr O'Doherty's account in his witness evidence of what he understood had taken place, about which the claimant cross examined him. Taking those accounts together, I find the events of that day were as follows.

88. The initial conversation between the claimant and Mr Eden on 23 May 2024 took place when the claimant had just returned from driving duties and was due a break. He was in the process of signing in, in a reception area (where other drivers and staff members were around) when Mr Eden asked to speak with him. There was then an exchange between them about the fact the claimant had not yet had his break, and the claimant referred to his legal entitlement to take one. The claimant therefore objected to the meeting taking place at that time. In this part of the discussion, there is no dispute that the claimant asked Mr Eden what the conversation was about. Mr Eden was unsurprisingly reluctant to discuss that with the claimant in a public area with other drivers around and ushered the claimant to a meeting room nearby. By being ushered into a room by his manager when he was entitled to take a break, the claimant maintains that Mr Eden was acting unreasonably and in contravention of his employment rights under the working time directive.

89. In my judgment, Mr Eden only ushered the claimant into the room in order to answer the claimant's question about what the matter was about which, for the claimant's own benefit, ought not to have taken in the public area. Mr Eden was not denying the claimant his right to take a break; he was taking a moment in private to explain the reason for wanting a discussion with the claimant. Mr Eden then explained to the claimant the nature of the matter in hand, namely the information that had been received about a complaint by the female colleague in Tewksbury about the claimant's conduct on 20 May 2024.

90. Having learnt that the nature of the conversation was potentially disciplinary in nature, the claimant asserted what he considered to be his right to have a GMB representative present in the discussion. Mr Eden explained his understanding that the meeting was not a formal investigation meeting, but just an initial discussion about what had happened, such that there was no right to have a representative present. The claimant then asserted firmly that Mr Eden was denying him his

employment rights, got up and left the room stating that the conversation was over. Mr Eden describes the claimant as having 'stormed out of the room' which seems to me to be a fair description of what I find took place.

91. As the claimant was in the process of leaving the room, Mr Eden said to the claimant '*are you refusing to comply with a reasonable request, Andy*', presumably unclear on whether the claimant had any intention of returning to the conversation after his break.

92. In response, and whilst walking through the reception area with other drivers present, the claimant retorted that Mr Eden was *'breaking his employment rights*' or '*breaching my working time directive'* on the claimant's own evidence. The claimant accepts he made that comment in a public area but maintains he did so in a calm and collected manner, without raising his voice and only because Mr Eden had instigated the exchange by accusing him of refusing a reasonable request, which the claimant maintains was also said in earshot of other drivers. I note that Mr Eden's version of events as described to Mr O'Doherty [324] was that Mr Eden's comment about refusing a reasonable request happened *'as he [the claimant] got to the office door'*, implying Mr Eden's comment did not take place in a public space. I find it unlikely that Mr Eden would have made those comments in a public space, given the care he evidently took at the outset to ensure the conversation took place in a meeting room and not in the reception area.

93. Taking the evidence as a whole, I find that it was clearly an ill-tempered and disrespectful exchange so far as the claimant's conduct was concerned, unnecessarily confrontational towards his manager. Given that the conversation was not a formal investigation interview under the disciplinary policy, and was no more than an initial conversation to decide whether a formal investigation was necessary, in my judgement the claimant had neither a statutory right nor a right under the respondent's policies to be accompanied. I accept however that the claimant may have been reasonably mistaken about that and evidently believed that he did have that right. That being the case, it was perfectly reasonable that he make that request to be accompanied to his manager and to disagree with the response he received when Mr Eden told him he did not have such a right. But as with all conversations in the workplace, there is an expectation that the claimant engage in that debate and disagreement respectfully and courteously. In my judgment, the claimant did not engage respectfully and courteously in that exchange with Mr Eden. I accept that the claimant did not shout or swear, but his disrespect and discourtesy to Mr Eden is evident from the fact I find that the claimant was seeking to control events in a defiant controlling manner. By storming out of that meeting and exclaiming in front of driver colleagues that Mr Eden was breaching his rights, he was deliberately trying to assert authority on the situation, making a scene in front of colleagues and thereby undermining Mr Eden's authority.

94. The claimant then took his break and returned to Mr Eden, indicating that he was now prepared to meet with Mr Eden. The second conversation then took place, this time with a note-taker Mr Knox present. It is evident from all of the accounts that this conversation quickly descended in a similar manner to the first conversation. There was a discussion about why

the claimant had not been prepared to speak earlier, and why he had apparently now changed his mind. The claimant again asserted his right to be accompanied, and Mr Eden again pointed to the fact it was not a formal investigation meeting, but a 'documented discussion'. The claimant, who had evidently spent time checking the position during his break, was referring to his statutory right to be accompanied and quoting case law. He was also referring to a GMB book setting out the law. The claimant asserted that in refusing him the right to be accompanied, Mr Eden was breaching the implied term of trust and confidence.

95. Mr Eden sought to clarify if the claimant was refusing to carry on with the meeting without a representative. The notes record that the claimant stated "*If you want to continue I will sit here and help you through your investigation*" and thus the claimant maintains he was not refusing to participate. It is evident from a later part of the notes however that he continued to protest about his right to be accompanied repeatedly alleging that Mr Eden was denying him his rights. In response, Mr Eden indicated that if the claimant was insistent, then he was prepared to re-arrange the meeting and he made moves to close the meeting.

96. Mr Knox's account to Mr O'Doherty records that the claimant was insistent that the notes record the case law he was quoting correctly, because he wanted to be able to refer to it in a Tribunal, thereby impliedly threatening litigation about Mr Eden's conduct. There is no dispute that the claimant was also referring to wanting to raise a grievance against Mr Eden for having forced him into the office when he was on a break.

97. Mr Eden describes to Mr O'Doherty that he felt it was an *"impossible situation to manage, he was citing passages from GMB book, constantly talking over me. His behaviour was ridiculous"*. Mr Knox describes how stressful he found the conversation and that the claimant *"had an answer for everything", "slammed the book on the table"* and that Mr Eden *"could not get a word in edgeways"*.

98. In Mr Knox's account, he felt that the claimant had come into the meeting with a "*I am going to catch AE (Mr Eden) out kind of attitude*".

99. The claimant disputes that he was interrupting or speaking over Mr Eden and put to Mr O'Doherty in cross examination that the notes of the meeting did not record anywhere where the claimant had interrupted. The claimant disputes that he slammed the GMB book on the table, suggesting instead that Mr Eden was not allowing him to answer the question put.

100. Taking into account the consistent thrust of Mr Knox and Mr Eden's accounts of the meeting, together with the findings above about the claimant's confrontational attitude and approach towards his managers, I find it more likely than not that the claimant's conduct in that meeting was disrespectful of Mr Eden's authority and unreasonably threatening in nature.

101. The claimant maintains that despite his strong views about the right to be accompanied and his dissatisfactions with Mr Eden's actions, he did nevertheless offer Mr Eden an account about the events on 20 May, which he says were not captured by the notes. I infer that if there was any kind of

explanation offered by the claimant, it happened too late after Mr Eden had decided to close the meeting, reasonably exasperated with the claimant's conduct.

Meeting with Mr Alex Brown – 24 May 2024

102. The following day, the claimant met with Mr Alex Brown, a more senior manager. Mr Brown had stepped in as a result of Mr Eden feeling that he was no longer able to engage successfully with the claimant [317]. On this occasion, an HR representative was present. The claimant again requested that a GMB representative be present. In response, the HR representative explained the meeting was 'an investigation which could result in a disciplinary hearing depending on the outcome of this investigation' and said that the meeting 'does not require a companion' because 'there is no decision to made at this point, we are investigating an allegation'.

103. I observe that this description (i.e. an investigation which might lead to a disciplinary hearing) was somewhat different to the nature of the conversation proposed by Mr Eden the day previously (a meeting to decide whether a formal disciplinary investigation process was required). In my judgement, the HR representative's description was more akin to the notion of a formal investigation under the respondent's disciplinary procedure and hence one where the respondent's policy did provide an employee the option to be accompanied. I find that the HR representative's response was in line with the statutory right to be accompanied, but apparently out of line with the respondent's own more generous, but presumably non contractual policy.

104. Whilst the claimant did assert what he thought were his rights to be accompanied to this meeting, he was far more respectful in the manner in which he made that request, and then quickly acceded to the response when it was given. There is no suggestion that the claimant acted with anything other than courtesy and respect towards Mr Brown in this meeting, in marked contrast to his interactions with Mr Eden the previous day. Despite not being permitted the right to be accompanied, the claimant proceeded to engage constructively with Mr Brown in a discussion about the events on 20 May.

105. The claimant is also recorded in the notes of the meeting as having mentioned to Mr Brown the issue about the fire alarm testing sheet. He explains to Mr Brown:

"I used the toilet and then asked for the site safety sheet which you can use as evidence. I read and signed the sheet but was not allowed a copy of the sheet. I explained to the manager why I wanted a copy of the sheet and that I am the East Midlands GMB Rep and H&S officer I was concerned about the lack of fire alarm test, it was listed on there but with no day or time filled in so we would not know when it was".

In doing so, I find that the claimant raised his health and safety concerns about that matter.

In response, Mr Brown queried the claimant's reference to being the GMB rep, pointing out that the GMB is not recognised by the respondent and that he is therefore not a GMB representative for East Midlands. Mr Brown goes on to say *"I appreciate why you question the safety sheet because the fire alarm testing part was left blank"* and makes no further comment about it, moving the conversation onto the complaint from the female colleague. Accordingly, I find this meeting to be evidence of the respondent noting and acknowledging the claimant's health and safety concern without any negative connotation, and the respondent rightly and reasonably correcting the claimant's wrong understanding of his status as a GMB health & safety representative.

106. Mr Brown then sought to explore with the claimant his behaviour the previous day with Mr Eden and asked for the claimant's account. In the course of that exchange, the claimant explained he understood he had the right to representation for "anything pertaining to a disciplinary" and had been quoting employment rights and case law to Mr Eden to explain why he believed that to be the case. Mr Brown asked the claimant why he had changed his mind and was now prepared to discuss the matter with Mr Brown without representation, unlike with Mr Eden the previous day. In what I consider to be an illuminating comment, the claimant responds:

"*You are the manager and I have respect for you"*

and goes on to explain that it was Mr Brown's more senior position that was the difference, which the claimant put down to his military background. The claimant stated that Mr Eden:

"*cannot throw me in jail"*,

clearly implying that Mr Brown's authority had far more weight and significance to the claimant. In my judgement it was very evident in the claimant's exchange with Mr Brown that he was frankly admitting that he was prepared to have the discussion with Mr Brown in a respectful manner, even when he was unhappy that he wanted a representative present, because he had a much greater degree of respect for Mr Brown than he did towards Mr Eden.

107. In cross examination during the hearing, the claimant maintained that it was a question of who he had more respect for, and he rejected the notion put to him that he was picking and choosing which of his managers that he was prepared to engage with. In my judgment the respondent was entitled to form the view from the claimant's comments in the meeting with Mr Brown, and the events of the previous day, that the claimant was indeed picking and choosing which of his managers he was prepared to engage constructively with.

<u>Mr O'Doherty's investigations</u>

108. Concerned by what he had heard of the claimant's recent actions, Mr O'Doherty arranged meetings with Mr Eden and Mr Knox to understand what had taken place. He also had notes of the meetings between the claimant and Mr Eden on 23 May 2024 and with Mr Brown on 24 May 2024.

109. Having explained his detailed account of the events of 23 May 2024, Mr Eden explained to Mr O'Doherty that he did not feel intimidated by the claimant, but that he felt unable to control the meeting with the claimant because the claimant refused to allow him to speak. Mr Eden described:

"I have got to the point that I believe he has an issue with me and he just pushes all the boundaries and I believe through his doing I am going to struggle to manage him".

Mr Eden also stated:

"The frustration is I am trying to do my job and trying to be courteous even though he is talking over me and he is then saying he wants to raise a grievance….I just feel that the relationship has completely gone with me and I don't see how I could have him as part of my team if he continues like this. That is how I feel…." and "I feel I have come to the end of the road with AW as to how I can manage him, that is me personally but I feel that he is having a similar effect on the wider team with his behaviours and the way he carries himself. I fully appreciate that workers have rights and that reps have employee's best interests, but I believe AW is using it to his own ends. I feel since he got a final warning which I was involved in, it feels personal now from him".

110. Mr Eden also mentioned to Mr O'Doherty the email of 30 August 2023 [285] referenced above. Mr Eden indicated that he was aware that the claimant had sued a colleague previously and that he felt threatened and fearful because the claimant was threatening litigation against him personally and against the company if he was not given his ECF role back.

111. Mr Eden told Mr O'Doherty about that email of 30 August 2023:

"that worried the hell out of me and felt fearful and upset."

"*The email about suing me that was a direct threat to me it made me fearful, I couldn't fight that and it could actually happen, as it happened to another manager and I worried if I lost my job, I have a family to look after. I feel he is deliberately pushing me as a professional person I should be able to rise above it but it almost got to a point in that meeting where it feels like he has engineered it so there is no relationship. I don't understand why he had the meeting with Alex where I believe there was no issue and yet not me, why could he do it with him and not me so there is clearly an issue with me and I am worried I will say something I will regret and I don't see how we can work together"*.

112. Mr O'Doherty sought to explore the extent to which Mr Eden felt the relationship could be restored or repaired, but Mr Eden's response was:

"Whilst he is behaving like he is I really don't think I can work with him…..he is making it impossible….I have to treat on eggshells…..he has total disrespect towards me and the company, he will pick at things and I am under a level of scrutiny from him and I shouldn't be made to feel like that at work. The threat to sue me and the effect of this behaviour last week had an impact on me".

113. In Mr O'Doherty's meeting with Mr Knox, Mr Knox largely corroborated Mr Eden's account of the events of 23 May 2024, as described in an earlier section. Mr Knox was extremely critical of the claimant's behaviour during the meeting, "*going on and going on*", describing "*I have never seen anything like it, for someone to be so defensive from the beginning*". Mr Knox described that the claimant was trying to twist Mr Eden's words, that Mr Eden could not take control of the meeting because of the claimant's behaviour and "*it felt more like I was in a courtroom with the way he was acting and it was very stressful"*.

114. Mr O'Doherty did not carry out any other documented investigation interviews. Mr O'Doherty's evidence was that he did not interview Mr Stacey because he already had Mr Stacey's long email to HR of 1 September 2023 which Mr O'Doherty described as an impact statement, and which Mr O'Doherty felt was sufficiently detailed on its own.

115. Mr O'Doherty did not interview Mr Brown in a formal recorded interview, but it was apparent from Mr O'Doherty evidence that he had spoken to Mr Brown about Mr Leivars concerns about the without prejudice email. He was also clearly aware of Mr Brown's meeting with the claimant on 24 May 2024.

116. Mr O'Doherty did not interview Mr Leivars because Mr O'Doherty felt that it was sufficient that Mr Brown had highlighted that Mr Leivars had raised concerns about the email, and that Mr Brown too had those concerns. Mr O'Doherty also pointed to the fact that the email chain existed in writing.

117. Mr O'Doherty's evidence however was that Mr Eden was articulating a view that Mr O'Doherty knew to be a widespread view amongst managers and colleagues generally who found it difficult to manage the claimant on a day-to-day basis, especially junior managers who feared that they would be the next person to be sued by the claimant.

Invitation to Formal Meeting

118. In a letter dated 12 June 2024, Mr O'Doherty wrote to the claimant inviting him to attend a "*formal meeting to discuss your on-going relationship and employment with DHL International UK Ltd."*[337]. The meeting was scheduled for 1 July 2024.

119. The claimant was offered the right to be accompanied by a trade union representative or work colleague.

120. The claimant was warned in the letter that:

"although no decision regarding an outcome has been or will be made until the conclusion of the meeting; however, please be advised that if we are not able to identify a lasting resolution to the ongoing relationship issues then one potential outcome of this meeting may be the termination of your employment".

121. The letter did not make reference to any specific details about why the respondent considered the relationship with the respondent was in issue. It did not specify that the defamation litigation and associated threats, the without prejudice email or the meetings with Mr Eden on 23 May 2024

were central issues for discussion. There was no reference to the previous informal meeting on 19 December 2023.

122. The letter did not attach any of the written evidence which was subsequently referred to by Mr O'Doherty in the formal meeting.

123. In an email the following day, the claimant contacted Mr O'Doherty indicating that he was willing to meet, but indicated that he found the explanation about the purpose of the meeting rather vague in terms of referring to 'your ongoing relationship and employment'. The claimant requested clarification of the specific issues that were to be discussed and requested copies of any evidence, statements, complaints or recorded discussions. The claimant also raised concerns about the reference to the possibility of his employment being terminated, which he felt was a "*very prejudiced paragraph*".

124. On 13 June 2024, Mr O'Doherty responded by email to the claimant clarifying that it was not a disciplinary hearing and that there were no specific allegations of misconduct. He clarified that:

"*the meeting will be to discuss the ongoing relationship between the parties which, in the Company's opinion, has deteriorated significantly to the point where trust and confidence has broken down. The meeting will explore whether that is capable of being restored"*.

125. In relation to the claimant's request for documents, Mr O'Doherty did not provide any documents, but explained that the claimant or his representative could request an adjournment at any point they wished to discuss any points raised during the meeting.

126. As to the sentence about a potential outcome being termination of employment, Mr O'Doherty explained:

"i*t would be remiss of the Company not to inform you that one potential outcome of the meeting may be the termination of your employment if an acceptable resolution to the breakdown in relationship cannot be identified".*

127. During cross examination, the claimant put to Mr O'Doherty that the failure to provide him copies with this written evidence in advance of the formal meeting was in breach of the respondent's disciplinary policy and the ACAS Code of Practice on Disciplinary and Grievance procedures. Mr O'Doherty explained that the reason he did not provide copies of that written evidence to the claimant was because he had been advised by HR/Legal that it was not necessary to do so and because it was not a formal meeting to which the disciplinary procedures applied.

128. I accept Mr O'Doherty's evidence that the reason he did not send the documents to the claimant in advance of the dismissal meeting was because he was acting under advice that doing so was not required by any policy. Mr O'Doherty accepted that he might otherwise have sent the documents and that there was no reason other than the advice from HR/Legal which would have prevented him from sending those documents to the claimant.

Formal Hearing – 1 July 2024

129. The claimant attended the formal meeting on 1 July 2024, accompanied by his GMB representative, Mr Warwick [341]. Mr O'Doherty chaired the meeting. Ms Patel, HR was also present together with a notetaker. We had the benefit of detailed notes of the meeting about which the claimant did not take significant dispute.

130. At the outset of the meeting, Mr O'Doherty reiterated that the purpose of the meeting was to discuss the ongoing relationship with the respondent, and the respondent's opinion that over the last 12 months the relationship with the claimant had declined.

131. Over the course of just over one hour (starting during the claimant's night shift at 22:26) on 1 July and, with a very brief adjournment at the claimant's request, Mr O'Doherty went through the three main points which he wanted to discuss, and gave the claimant the opportunity after each point to make points in his defence, and for discussion and questioning to take place.

132. Before addressing the details of the claimant's position in relation to the points raised with him by Mr O'Doherty, my overall finding is that despite the claimant clearly understanding that his continuing employment was in question and termination of employment a real possibility, the claimant did not take a conciliatory, remorseful or apologetic tone in relation to the concerns that were raised with him and, other than in relation to the use of the without prejudice phrase, made no attempt to persuade Mr O'Doherty that he was capable of being reflective or thoughtful about his actions. His approach was to explain and justify his actions, and to suggest that it was unreasonable for the respondent to conclude that the relationship was impacted at all.

133. The first issue raised with the claimant by Mr O'Doherty was the defamation litigation against Mr Stacey and the significant impact that had on Mr Stacey. The claimant accepted during the meeting that he had discussed that issue with Mr O'Doherty in December 2023 and had agreed to work on the relationship moving forward. Mr O'Doherty put to the claimant that the respondent's solicitors had warned the claimant when he threatened litigation, that his claim was unlikely to succeed and that the claimant had gone ahead anyway, which made the litigation appear to Mr O'Doherty to be an intentional act by the claimant to harm the interests of the company and the relationship with his managers. In response, the claimant maintained his position that pursing that litigation was his right and that he only lost on a technicality, thereby implying he did not accept his claim had been found to be substantively flawed or lacked merit.

134. The claimant maintained his position that the accusation against him of the second bridge strike was false and that he still did not know where that allegation had come from. Mr O'Doherty explained to the claimant that his view was that Mr Stacey was simply doing his job, putting a potential allegation and that it had quickly been withdrawn once it was queried. Mr O'Doherty even went as far as explaining to the claimant his understanding of how the second allegation had come to light, namely that the tracker data from his vehicle suggested the claimant had gone down a

road with a low bridge which gave rise to the potential concern that the claimant had struck that bridge. Despite providing that additional information, the claimant did not change his approach and maintained that he was entitled to pursue the litigation. When discussing the impact on Mr Stacey, the claimant pointed to the impact of the false allegation on his own mental health which he felt had been overlooked.

135. During the meeting with Mr O'Doherty, the claimant now accepts that he showed none of the reflection or acceptance that he showed on cross examination in the hearing that his actions in pursuing that litigation was potentially a disproportionate response to a minor issue, or that he was blinkered in his approach. He accepts that he maintained during the meeting with Mr O'Doherty that the litigation was a perfectly proper and reasonable course of action to take.

136. Mr O'Doherty then took the claimant in some detail through Mr Eden and Mr Knox's account of what happened in their interactions in the two conversations on 23 May 2024. Mr O'Doherty asked the claimant for his version of events, and specifically put to the claimant the key respects in which the accounts differed and the reasons (as described above) why Mr Eden felt so strongly that the claimant's actions were disrespectful and that the relationship had broken down. Mr O'Doherty raised a specific concern about the fact the claimant had been prepared to engage constructively with Mr Brown and not Mr Eden, and that the claimant had told Mr Brown this was because he respected Mr Brown. Mr O'Doherty made it clear to the claimant this was disappointing and a matter of significant concern as it implied the claimant did not respect Mr Eden. The claimant's position was to provide his own perspective that his actions towards Mr Eden were entirely reasonable, explaining his perspective on his right to a break and to be represented at any meeting about a disciplinary issue. The claimant maintained that the comment about respecting Mr Brown had been taken out of context, and that due to his military background he paid more respect to Mr Brown based on seniority in rank and that it was not correct to say that he had no respect for less senior managers.

137. On cross examination about his interactions with Mr Eden in the tribunal hearing, the claimant reflected that his powerful voice could be perceived as being aggressive and was somewhat apologetic about that. Yet he accepted he had not made that reflective comment during his meeting with Mr O'Doherty. The claimant also accepted during cross examination that rather than firmly defending his position, it might have been more appropriate to offer that kind of insight to try and convince Mr O'Doherty that the relationship was not beyond repair.

138. Mr O'Doherty went on to discuss with the claimant the impact on Mr Leivars of the without prejudice email. The claimant was defensive about the suggestion that his use of the word had caused Mr Leivars to be intimidated. However, after an adjournment called by his trade union representative, the claimant indicated that he now accepted it was an error on his part to use that term and that it had become habitual for him to put that on his emails in light of all the legal battles. The claimant continued to maintain however that he did not believe Mr Leivars would have been

intimidated by it, or that it would have caused a breakdown in the relationship with Mr Leivars.

139. The claimant raised with Mr O'Doherty that he felt concerned about the sudden escalation of this recent issue about his interactions with Mr Eden to an alleged breakdown in trust and confidence. Mr O'Doherty sought to set these specific concerns mentioned into the wider context and what Mr O'Doherty described as a widespread feeling amongst managers of a pervading threat of litigation. He explained to the claimant that despite the conversation in December, the perspective of managers was that they were treading on eggshells and that saying something wrong would land them in court. The claimant was pointed specifically to his email of 30 August 2023 and the intimidatory impact that had threatening individuals with litigation. It was explained to the claimant that it was the cumulation of these events, and the intimidatory impact on managers that led to the concern that there was a breakdown in the relationship.

140. The claimant maintained that he did not see a breakdown in the relationship and that he could only apologise if managers were intimidated by his confidence. The claimant's representative pointed to the imbalance of power between managers and colleagues and that when employees were in weaker positions it was perfectly reasonable to request to be accompanied to those meetings, and that an employee is well within their rights to insist on their legal right to take a break. It was argued that exercising those rights could not reasonably cause a breakdown in the employment relationship. The claimant's position throughout the meeting with Mr O'Doherty, and in the tribunal hearing, was that he was doing no more than standing up for his legitimate employment rights and holding his managers to account. He believed firmly that his managers were not doing their jobs properly and that his behaviour when raising those concerns was entirely fair and appropriate.

141. It was suggested by the claimant's trade union representative that it appeared that the respondent's proposition that the relationship had broken down was more about the claimant's association with the GMB and his role in representing individuals and helping them to defend his rights. Mr O'Doherty firmly denied that was the case, explaining that it was not about him being a union rep, but the relationship between the claimant and his managers.

142. The claimant's trade union representative suggested that the claimant was properly entitled to a genuine opportunity to demonstrate there had not been a breakdown in the relationship and a genuine opportunity to maintain a reasonable working relationship. Mr O'Doherty therefore asked the claimant how he thought the relationship could be rebuilt and what he could do to move the situation forwards. The claimant's response was effectively that it was a question of the relationship needing to be remodelled so that managers understood he was not being intimidating and that he was in fact being respectful towards them, simply insisting on his right to be accompanied and rights to take a break. He maintained that he was simply sticking up for his rights and that whilst he might come across as confrontational, he did not believe he had done anything wrong and that he couldn't help the feelings of managers. He maintained that if he had ruffled feathers by asking questions that was more a question of

the knowledge and experience of managers given that he did so respectfully and courteously.

143. I find therefore that when invited to consider how the relationship might be capable of repair, the claimant took no serious level of accountability for the impact of his actions and showed no willingness to change his approach, expecting the relationship to be capable of repair only if managers changed their perspective and recognised his employment rights properly and his entitlement to enforce those.

Outcome of Formal Meeting – Dismissal

144. Having heard from the claimant and his representative, Mr O'Doherty adjourned the meeting for approximately one hour to consider his decision.

145. Mr O'Doherty then delivered his decision verbally to the claimant when the meeting was reconvened in the early hours of 2 July 2024. Mr O'Doherty explained he felt that the claimant's conduct towards managers had been inappropriate and that his actions had created a climate of mistrust and fear where the claimant was unable to provide any solution to remedy or repair the relationship. Mr O'Doherty referenced the claimant saying "*if I have to drag others behind me to do their job better then so be it*" which Mr O'Doherty explained led him to believe the claimant was not willing to take any responsibility for the impact of his actions.

146. Mr O'Doherty explained to the claimant that he did not believe the claimant was genuinely remorseful or that he understood the impact of his actions, or that he wanted to change. Accordingly, Mr O'Doherty explained that he believed the relationship had broken down irretrievably and therefore that he would be dismissed with immediate effect with a 12-week payment in lieu of notice.

147. The decision to dismiss the claimant on this basis was confirmed in a letter dated 4 July 2024. The relevant extracts of the letter read as follows:

"Dear Andrew,

Confirmation of Outcome of Meeting on 1 July 2024

I write to confirm the outcome of the meeting on 1st July 2024, which was attended you and Mr Warwick your union representative and myself and Priya Patel and Mandy Bell. This meeting was to discuss your on-going relationship and employment with DHL International UK Ltd.

During the meeting I shared examples with you of why, in the Company's opinion, we believe the relationship between you and the Company has deteriorated to such an extent that we no longer have trust and confidence in that relationship. Your behaviour towards managers who are carrying out their jobs demonstrates an unwillingness on your part to accept their authority and displays a general lack of respect and trust [in them]. I stressed to you the impact this has had on their wellbeing, I asked you if there was anything you considered you could do to help repair the relationship but you were unable to provide any sensible solutions other than to justify your behaviour; I find you accepted no responsibility for your

actions and your responses demonstrated a complete lack of awareness of the impact you have on others. Nothing I heard from you gave me any confidence that things would change or that you were or able to change your behaviour.

Taking all of this into account I felt I had no alternative but to terminate your employment with notice, with immediate effect due to a breakdown in trust and confidence in the relationship between you and the Company. I accept your own view that the relationship is not broken but your responses further support my view that nothing would change if you remained employed the Company and instead managers would be forced to accept the situation and continue managing you in fear of threats of litigation or grievances and being undermined and treated disrespectful on a daily basis; I do not consider that situation is sustainable and it is not in line with the Company's values. I do not believe that any other course of action in this case would successfully repair the trust and confidence in the relationship between you and the Company."

Appeal against dismissal

148. The claimant appealed his dismissal by email dated 5 July 2024 [366]. He set out his grounds for appeal in that email.

149. Mr Hiles, Senior Director, Network Operations wrote to the claimant on 15 July 2024, inviting him to an appeal hearing on 24 July 2024 [369].

150. An appeal hearing took place on 24 July 2024. The claimant attended accompanied by Mr Warwick. An HR representative and note-taker were also present alongside Mr Hiles as the chair of the meeting. The Tribunal had the benefit of detailed notes of the appeal meeting [371-375] about which the claimant took no serious dispute.

151. Over the course of approximately 1.5 hours, Mr Hiles invited the claimant to take him through his grounds of appeal, and there was discussion and questioning about each point.

152. In overview, the claimant's appeal did not raise any new evidence or any significantly changed approach. His appeal was largely repeating his assertions that his actions in each of the respects discussed at the dismissal meeting were reasonable and were not grounds to conclude that the relationship had broken down irretrievably. The claimant accepted in cross examination that his appeal was essentially to say that he maintained his position about his right to pursue a defamation claim against Mr Stacey, that he did not believe he responsible for the altercation with Mr Eden, that his email to Mr Leviars was perfectly acceptable and had not caused intimidation. The claimant accepted on cross examination that his attitude had not changed despite the fact he had been dismissed, and that he had always been constant in maintaining his integrity and belief in his position. The claimant maintained that the issues raised were the result of and initiated by managers of the respondent and that his behaviour was in response to those unreasonable actions of managers.

153. One new point raised by the claimant's representative was there should have been a meeting to discuss the concerns about the breakdown in the

relationship in a diplomatic manner, and that mediation should have been undertaken to set an understanding of the procedure and protocols in a polite and fair manner.

154. Mr Warwick also raised again the concern that dismissal was because of his GMB training and duties. It was also suggested that the respondent should not fear the claimant raising health and safety issues such as when he raised concerns about the painting of lines in the warehouse.

155. A further point raised by the claimant was the suggestion that his dismissal had been pre-judged as evidenced by the fact that a relief driver had been booked to cover the claimant's usual driving route on 1 and 3 July 2024, implying that it was pre-determined he would not be there to undertake the shift. Mr Hiles responded during the appeal meeting in relation to that point, pointing to the fact that it was prudent for the respondent to put in place contingency measures to ensure a driver was available for the route in the event either that the claimant was dismissed, or that the meeting might have caused distress to the claimant such that he did not feel able to drive.

156. Mr Hiles indicated at the end of the meeting that he would take some time to consider the outcome of the appeal and send an outcome in writing. That outcome letter was sent to the claimant on 26 July 2024.

157. At no point during the appeal did the claimant request to call witnesses. Neither did he complain about the lack of documentary evidence.

158. The relevant parts of the letter read as follows:

"I have considered your appeal letter and the points you raised during our meeting. You told me that the company did not offer you support during the disciplinary process following an incident where you hit abridge and received a final written warning. It is my view that the company followed a normal disciplinary process in that case and you were not treated any differently to any other colleague in such situation. When you subsequently sued Mr Stacey for defamation you are correct that the Company did offer to support him in those proceedings as he was understandably very upset and very frightened that he was being personally sued when both he, and the Company, believe he conducted the process professionally and fairly and in accordance with company policy. In the appeal hearing, I did not hear anything from you about the impact of your actions on Mr Stacey nor about the impact of your actions towards other colleagues in your dealings with them.

You and your companion mentioned you were not offered mediation before the decision to dismiss you was made, something you did not raise at the time or have sought to raise before this process. However, Mark O'Doherty did reach out to you to discuss your behaviour but you chose to disregard that and have continued in a similar vein since then. Mr Stacey was carrying out his job as an independent disciplinary manager as was Mr Eden as a line manager and Mr Leivars who received your email headed 'without prejudice', you have shown no awareness about your impact on others and no contrition or apology for your actions and I do not believe you have or had any intention of changing your behaviour. This is

not banter, it is an attempt to intimidate people. I do recognise that mediation can resolve issues between individuals where there is a genuine willingness on the part of both parties to work towards that, in your case I do not believe mediation would work or is a serious possibility or desire on your part as you have not and I believe, will not, acknowledge that you have done anything wrong or shown any willingness to modify your behaviour. Rather than recognise the impact on others you seem to just want to justify your actions. This is not in one isolated incident involving one individual, but a pattern of behaviour.

Your employment was not terminated because you raised issues about yard marking or because you were trained as a union representative or any of the matters you raised, it was terminated because you decided to sue a manager who was carrying out his job and pursued that to the end and then continued to undermine and disrespect managers and individuals who are carrying out their jobs. I believe Mr O'Doherty's conclusion was correct, that managers and other colleagues are now fearful of being sued or having grievances raised against them you and can no longer go about their business normally. This is a breakdown in trust in the relationship between the company and you and therefore I do not believe his decision was unreasonable or unfair. Based on this, I am upholding the decision taken Mr O'Doherty on 1 July 2024, to terminate your employment due to a breakdown in trust and confidence."

The Relevant Law

Ordinary Unfair Dismissal

159. Section 94 ERA 1996 confers on employees the right not to be unfairly dismissed by his employer.

160. Section 98(1) provides:

> **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.
> …
> (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 case.

161. A dismissal may therefore be fair if the employer can show that it is for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held'. I will refer to that as 'SOSR' throughout the rest of this judgment.

162. SOSR under section 98(1)(b) is a catch-all provision providing a residual potentially fair reason for dismissal that employers may be able to rely on

if the reason for dismissal does not fall within the four specific reasons in section 98(2).

163. There is no statutory definition of SOSR, but there is a considerable body of case law which makes clear that the reason must be substantial. Substantial has been interpreted as meaning not frivolous or trivial and not based on an inadmissible reason (such as a discriminatory reason).

164. A breakdown of trust and confidence, often closely related with a breakdown in working relationships, can constitute a proper basis for SOSR. The Court of Appeal in **Perkin v St George's Healthcare NHS Trust [2005] IRLR 934** held that the dismissal of a senior executive whose manner and attitude towards colleagues had led to a breakdown in the employer's confidence in him and rendered it impossible for the senior executives to work together as a team ought preferably have been treated as a dismissal for SOSR rather than for conduct.

165. The EAT has criticised the use of the notion of trust and confidence in the context of SOSR since it more properly relates to the law of constructive dismissal. **Hutchinson v Calvert UKEAT/0205/06** is an example of a case where the EAT held that a breakdown in trust and confidence did arise between a severely disabled man who required intimate personal care from a carer where there were a series of seemingly minor disagreements, but the EAT in that case noted that it was a "wholly exceptional" case, referring particularly to the fact that the carer had to be in close personal contact.

166. Underhill P was particularly critical in the case of **McFarlane v Relate Avon Ltd UKEAT/0106/09** where it was held that an analysis referring to loss of trust and confidence was unnecessarily complicated, and that it was more helpful to focus on the specific conduct in question, rather than to resort to general language of that kind. Underhill P states:

> *"First, we are bound to say that the Tribunal unnecessarily complicated the analysis by referring to "loss of trust and confidence". Its doing so is understandable, since that is the way the case was put in the Respondent's pleading and apparently in Mr Knight's oral submissions. Nevertheless, we think it unhelpful. Although in almost any case where an employee has acted in such a way that the employer is entitled to dismiss him the employer will have lost confidence in the employee (either generally or in some specific respect), it is more helpful to focus on the specific conduct rather than to resort to general language of this kind. We have noticed a tendency for the terminology of "trust and confidence" to be used more and more often outside the context of constructive dismissal in which it was first developed (see, classically, Malik v Bank of Credit and Commerce International SA [1997] ICR 606): this is a form of mission creep which should be resisted. But, in this case at least, the reference to trust and confidence does not obscure the Tribunal's substantive reasoning."*

167. In **Leach v The Office of Communications (OFCOM) [2012] EWCA Civ 959** the Court of Appeal held that the mutual duty of trust and confidence was an obligation at the heart of the employment relationship. However, it was stated that:

> *"it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of*

dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances. That is what the ET did with regard to the nature of the Respondent's organisation, the Claimant's role in it, the nature and source of the allegations and the efforts made by the Respondent to obtain clarification and confirmation, the responses of the Claimant, and what alternative courses of action were reasonably open to the Respondent."

The Court of Appeal approved of the EAT's analysis that it is not sufficient merely to say that trust and confidence has broken down. Something more is required. Having examined all the relevant circumstances, the court of appeal upheld an SOSR dismissal was upheld but found that the real reason was on the basis of reputational risk if the matter became public.

168. It follows therefore that tribunals need to be aware of the distinction between an SOSR dismissal for relationship breakdown and a conduct dismissal for the employee's fault in causing that breakdown. The EAT in **Ezsias v North Glamorgan NHS Trust, IRLR 550** was alive to that distinction but concluded that it was open to the tribunal on the facts of that case to conclude that it was the fact of the breakdown which was the reason for the claimant's dismissal and not the claimant's conduct in causing that breakdown.

169. The employer must first bear the burden of proof in showing that SOSR is the sole or principal reason for the dismissal. To do so, it needs only to establish an SOSR reason for the dismissal which could justify the dismissal of an employee holding the job in question. It is not necessary to show that it actually did justify the dismissal.

170. Once the reason has been established, it is then up to the tribunal to decide whether the employer acted reasonably under section 98(4) in dismissing for that reason. To do so, the tribunal must decide whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

171. In the context of an SOSR/breakdown of trust and confidence dismissal, the employer should take steps to try to alleviate the situation and should not dismiss the employee until it can reasonably conclude that the breakdown in relationships is irretrievable. Failure to take reasonable steps to improve relationships will make the dismissal unfair — **Turner v Vestric Ltd 1980 ICR 528, EAT**.

172. The EAT case of **Matthews v CGI IT UK Ltd 2024 EAT 38** held that the Turner case did not require that 'all' reasonable steps must be taken by the employer and in that the tribunal had been entitled to conclude that it was reasonable for the employer not to have engaged in mediation in light of the confrontational and entrenched stance taken by the employee.

173. Procedural fairness is still as important in SOSR dismissals as in all other types of dismissal, as it goes to the reasonableness of the employer's decision to dismiss. **Jefferson (Commercial) LLP v Westgate EAT 0128/12** held that what is reasonably by way of a procedure when contemplating dismissal for a relationship breakdown, will depend on the particular circumstances of the case.

174. **Governing Boyd of Tubbenden Primary School v Sylvester 2012 ICR D29** EAT held that the existence or an absence of a warning would be highly relevant considerations of fairness in an SOSR dismissal where a headteacher dismissed a teacher having lost confidence and concluding her continued employment was untenable.

175. The reasonableness of an employer's dismissal procedure will normally be assessed by reference to the Acas Code of Practice on Disciplinary and Grievance Procedures and, where the code applies, tribunals are required to take it into account where it is relevant and an unreasonable failure to follow its recommendations my result in an adjustment of compensation following a successful tribunal claim.

176. There are some conflicting authorities however about the extent to which the code and any uplift applies to SOSR dismissals. In the case of **Lund v St Edmund's School 2013 ICR D26** the EAT concluded that the Code applied to a dismissal which was not based on the employee's conduct per se but on the effect of his conduct on others, which amounted to SOSR. In the EAT's view, the Code applies not only in circumstances where disciplinary proceedings are invoked against an employee but also in circumstances where they should have been, as it is not the outcome of the process which determines whether the Code applies but its initiation. In the case of **Phoenix House Ltd v Stockman 2017 ICR 84,** the EAT held that the Code does not apply to SOSR dismissals based on a breakdown in the working relationship. The EAT concluded that in the absence of clear words in the Code applying it to the dismissal in question, it would not be right to apply the sanction for non-compliance. The EAT accepted however that elements of the Code such as giving the employee the opportunity to demonstrate that they could fit back into the workplace without undue disruption were capable of being, and should be, applied but could not lead to a financial sanction for failure to comply with the code.

<u>Automatic Unfair Dismissal – s152 TULRCA- trade union membership/activities</u>

177. Section 152 of Trade Union and Labour Relations (Consolidation) Act 1992 states:

> **152 Dismissal of employee on grounds related to union membership or activities.**
>
> (1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
>
> (a) was, or proposed to become, a member of an independent trade union,
>
> (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, . . .
>
> (ba) had made use, or proposed to make use, of trade union services at an appropriate time,
>
> (bb) had failed to accept an offer made in contravention of section 145A or 145B, or
>
> (c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or proposed to refuse, to become or remain a member.

(2) In subsection (1)"an appropriate time" means—
(a) a time outside the employee's working hours, or
(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;
and for this purpose "working hours", in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.
…."

178. In order for the employee to be protected under 152(1)(b), the employee must first establish that they were taking part or proposing to take part in the activities of an independent trade union. In order to decide what constitutes trade union activities, the Tribunal may take into account the Acas Code of Practice on 'Time off for trade union duties and activities' which lists activities including attending workplace meetings to discuss and vote on the outcome of negotiations with employers, meeting full time officers to discuss issues relevant to the workplace and voting in union elections. Typically shop stewards or members would be conducting those activities in the context of the independent trade union being recognised by the employer, but that need not necessarily be the case (**Post office v Union of Post Office Workers and ano 1974 ICR 378, HL**).

179. A tribunal is entitled to draw a distinction between the activities of union officials such as shop stewards and those of ordinary members. The range of activities in which a shop steward can claim to be participating on behalf of the union is much wider than that for an ordinary trade union member. The activities of an ordinary trade union member who holds no official position within the union will need to persuade a Tribunal that their activities were carried out through accepted channels and in accordance with approved union practices in order to be protected. The EAT held in **Hall-Raleigh v Ministry of Defence EAT 3/79** that 'if a man conducts a campaign of his own without reference in any way to the union' he is not engaging in the activity of that union and is not protected.

180. The case of **Lyon and anor v St James Press Ltd 1976 ICR 413**, EAT is authority that recruitment of new members is capable of constituting a protected activity of union members.

<u>Automatic Unfair Dismissal – s100 ERA – Health & safety</u>

181. Section 100(1)(c) of the Employment Rights Act 1996 states:

"100 Health and safety cases.
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
…
(c) being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

182. In **Balfour Kilpatrick Ltd v Acheson and ors 2003 IRLR 683, EAT,** the EAT identified three requirements that need to be satisfied for a claim under s100(1)(c) to be made out. It must be established that (a) it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee, (b) the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety, and (c) the reason, or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

183. On the face of it, an employee must go through a safety committee or representative wherever possible when raising health and safety concerns. Where an employee chooses not to go through those channels, preferring to take matters into their own hands, they may lose the protection under this section unless they can point to a specific reason why it was not reasonably practicable to have done so. In a case involving a situation where there was a serious and immediate danger to health and safety, an employer is much less likely to be able to resort to a technical legal argument that the correct route for raising the concerns had not been followed.

Burden of Proof – automatically unfair dismissal

184. The burden of proof in an automatically unfair dismissal case depends on whether the employee has sufficient qualifying service to pursue an ordinary unfair dismissal claim. If so, then the burden of providing the reason for dismissal is on the employer, as it is in an ordinary unfair dismissal claim. The employer will look to discharge that burden by showing that where dismissal is admitted, the reason was one of the potentially fair reasons under s98(1) or (2). The employee will then have what has been described as a 'light burden' to show, but not prove, that there are issues which warrant investigation, and which may be capable of establishing the competing automatically unfair reason that he or she is advancing. If the employee does so, then the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal (**Maund v Penwith District Council 1984 ICR 143, CA**.) However, it does not follow, either as a matter of law or logic, that the tribunal must find that, if the reason was not that put forward by the employer, then it must have been that asserted by the employee. It is open to the tribunal to find that, on a consideration of all the evidence, the true reason for dismissal was not advanced by either side.

Discussion & Conclusions

185. Having established the facts set out above, I must now apply the law to those facts. In doing so I will briefly summarise the submissions from the claimant and respondent in relation to each point.

186. I will start by addressing some of the technical hurdles which the claimant must first satisfy in order for his automatically unfair dismissal claims to get

off the starting blocks. I will then turn to consider the evidence about the reason for dismissal which is a central point of dispute in this case.

Activities of an independent trade union

187. The claimant's case is that the reason or principal reason for dismissal was because of the training he had recently undertaken with the GMB, his recruitment activity for the GMB in posting QR codes on notice boards and/or by representing employees with grievance and disciplinary meetings, all of which he says constitute activities of an independent trade union at an appropriate time under section 152(1)(b) TULRCA.

188. I must first decide whether those three activities constitute activities of an independent trade union. Clearly the GMB is an independent trade union. The claimant was not at any point prior to his dismissal a shop steward or acting in any official capacity on behalf of the GMB. His activities must therefore be assessed in the capacity of the claimant being an ordinary trade union member where a narrower definition of activities is capable of protection.

189. The respondent accepts, and I agree that taking part in recruitment activities including posting QR codes on noticeboards encouraging employees to go to the GMBs website to join the union does constitute trade union activities. Similarly, there can be little doubt that the claimant undertaking training organised by the GMB in order to become a workplace organiser must also satisfy the definition.

190. In my judgement, the claimant having represented or accompanied colleagues to grievance or disciplinary meetings does not satisfy the definition of trade union activities because the claimant only ever did so in the capacity of a colleague and not as a shop steward and in circumstances where the GMB was not a recognised trade union of the respondent.

191. I must then decide whether the two types of trade union activities which I accept are capable of protection were undertaken at an 'appropriate time'. The respondent accepts the claimant's evidence that his recruitment activity posting QR codes on a noticeboard was undertaken during lunch and tea breaks and accordingly were undertaken at an appropriate time because it was outside of the employee's working hours.

192. The respondent does not accept that the claimant undertaking training with the GMB took place at an appropriate time. As I understand the respondent's submissions on this point, it says that the training course took place during what would ordinarily have been the claimants normal working hours and hence s152(2)(b) applies. It accepts that consent had been given for the claimant to attend the course, but as it was not part of a wider agreement permitting staff release for trade union training or other trade union activities, in the way that would often be the case in recognised workplaces, it is not at an appropriate time and therefore not protected.

193. If I have understood those submissions correctly, I disagree. On my reading of section 152(2)(b) there are two alternatives – either that the employer had consented to the employee carrying out those activities

during working hours, or in accordance with arrangements agreed with his employer more generally. The respondent had clearly given consent to the claimant to attend this particular training as evidenced by the signed employer release form [294] and therefore it is irrelevant whether the respondent had any wider agreement about release for such matters. Even if I am wrong about that, in my judgement the claimant was undertaking the training course outside of his working hours, given that he was not required to be at work because his shifts had been adjusted to accommodate the dates of the course.

194. It follows therefore that the claimant's recruitment activity posting QR codes on noticeboards and his undertaking training with the GMB are capable of protection as trade union activities being undertaken at an appropriate time. If the reason for dismissal or principal reason for dismissal was either or both of those matters, it will be automatically unfair.

195. The fact the claimant regularly accompanied colleagues to disciplinary and grievance meetings is not capable of protection. If the reason or principal reason for dismissal was for those activities, it will not be automatically unfair.

Health & Safety (s100(1)(c))

196. The claimant's case is that the reason or principal reason for dismissal was because on three occasions he brought to the respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. The claimant is not someone designated officially as a health & safety representative and is claim is pursued under section 100(1)(c) ERA.

197. There is no dispute that the claimant did on the three occasions alleged raise matters which he reasonably believed were harmful or potentially harmful to health and safety. Those occasions were on 19 December 2023 raising an issue of truck safety relating to a steering wheel locking on a vehicle verbally to Mr O'Doherty, on 9 May 2024 carrying out a check on safe systems of work sheets and finding them to be out of date and therefore raising it in an email to Mr Brown and on 20 May 2024 highlighting a blank date on a site induction familiarity sheet where information on fire alarm testing times/dates should have been entered and then raising it with the female member of staff on site at the time and then to Mr Brown the following day in a meeting.

198. The respondent's submission is that those three matters are not capable of protection under section 100(1)(c) because it is accepted by the claimant that the respondent has a health and safety representative and a health and safety committee and therefore section 100(1)(c)(ii) provides he is only entitled to protection in circumstances where it was not reasonably practicable for the claimant to have raised the matter by those means (i.e. with that representative or at the committee). The respondent submits that the claimant admitted in cross examination that he could have raised those matters directly with the health and safety representative or committee and therefore his claim must fail.

199. The claimant accepts that the three matters were not raised via the health and safety representative or the health and safety committee and he accepts that he had availed himself of those routes on other matters in the past.

200. Under cross examination, the claimant admitted that he could have raised all of those matters directly with the health and safety representative unless he did not have a phone signal at that time. The issue of the phone signal does not seem to be relevant as the claimant did not in fact raise any of the three matters in question by phone. In any event, he accepted that in circumstances where he did not have a phone signal he could, for any of the three matters raised, have waited until he did have a phone signal, because none of them were immediately life threatening or so dangerous that they had to be rectified in that moment – he accepted that he could have taken time to compose an email later the same day.

201. Whether or not the claimant realised the significance of making that concession during his evidence, the Tribunal considers it was a fair and reasonable concession to have made given that none of the health and safety issues that he raised were particularly pressing. The matter of the missing fire alarm testing date on a familiarisation sheet was particularly minor in my view given there was no suggestion fire alarm testing was not taking place, just that staff visiting the site might not know in advance if it was a test or not. Similarly, the out-of-date safe systems of work documentation was a legitimate concern, but not reasonably an extremely dangerous or imminent issue given that safe systems of work documentation was clearly in place but perhaps not necessarily fully up to date on paper at least. The first issue in relation to a vehicle steering lock appears to the Tribunal to be the most potentially urgent issue, but the claimant appears to accept Mr O'Doherty's account that the matter had already been investigated and the claimant and his colleague raising it caused him to re-open or follow up on that investigation rather than look at it for the first time. It follows therefore that it was not a matter of absolutely immediate concern or otherwise making it not reasonably practicable for the claimant to use health and safety representative or committee channel for raising his concerns. It was therefore reasonably practicable for him to have raised the three matters via the health and safety representative or committee.

202. Having made those concessions, in my judgment the claimant's claim under section 100(1)(c) must fail. Having chosen to raise those issues via a channel which was not through the health and safety representative or the health and safety committee in circumstances where he accepts he could feasibly have done so, he loses the protection of the section 100(1)(c). That is not to say that he was wrong to have raised those issues by that route, just that the protection of the legislation in terms of automatic unfair dismissal is lost.

203. The claimant's claim of automatically unfair dismissal under section 100(1)(c) therefore fails.

204. If I am wrong about the findings above and the claimant is entitled to protection under section 100(1)(c) I go on below, for completeness, to

address whether any of the health and safety matters raised by the claimant were the reason or principal reason for dismissal.

Potential reasons for dismissal

205. I must then turn to the central point of dispute in this case, namely the reason or principal reason for dismissal. There is no dispute in this case that the respondent dismissed the claimant on 2 July 2024.

206. I have in mind four potential reasons or principal reasons for dismissal that were under discussion in this case.

207. The first is, as the respondent submits, a fair reason under section 98 (1)(b) ERA of some other substantial reason ("SOSR"), namely a breakdown of trust and confidence.

208. The second and third reasons are the alleged automatically unfair reasons which the claimant submits are the reason or principal reasons for dismissal. Those are that the reason or principal reason for dismissal was because the claimant had taken part in the activities of an independent trade union (recruiting for the GMB and undertaking GMB training), or because he had raised health and safety matters (on the three occasions listed above).

209. The fourth reason that I have in mind is conduct. Although the claimant's case was primarily argued on the basis that the reason for dismissal was an automatically unfair reason, there were aspects of the way in which the claimant put his case in cross examination, certainly insofar as his challenges to a fair procedure was concerned, that were effectively an argument that the matters put to him by the respondent as reasons to terminate his employment were more properly matters of misconduct or gross misconduct which should have been dealt with under the respondent's disciplinary procedures, and that it was not appropriate to stick the label of SOSR/trust and confidence as a means of avoiding that process.

210. Whether or not the case was put in that way by the claimant, it is proper that I should consider whether another reason for dismissal, i.e. one that is not advanced by either party is in fact the real reason for dismissal. That is particularly so in light of the case law set out in the section above cautioning about the risk of using SOSR/trust and confidence as a convenient label to avoid addressing or incorrectly labelling the underlying issue. More so as there are often overlaps between conduct and SOSR especially as most serious acts of misconduct or indeed other serious reasons justifying dismissal will often have the effect of causing a breakdown in trust and confidence. It is therefore important to address the root cause of the reason for dismissal. In this case, there are certainly aspects of the underlying rationale for dismissal which are of the nature of acts of misconduct – namely insubordination and abusive, threatening, intimidating or aggressive behaviour.

Was the reason for dismissal an automatically unfair reason?

211. The claimant submits that it is not simply coincidental that it was only three days after completing his GMB training course that he received an

invitation to a meeting at which his employment was then terminated. He submits that his GMB education (and the efforts he was making to recruit other colleagues to join the GMB) was seen as a threat to the respondent's management team who did not welcome him using that new knowledge to challenge managers, including on matters relating to employment rights. He submits therefore that the real underlying reason for dismissal was his trade union activities and that his dismissal was a targeted act against him because of those activities. Less forcefully, the claimant submits that the respondent was motivated by the fact he had been raising health and safety matters, which again were not welcomed.

212. The close proximity in timing between the claimant completing his GMB training course and the dismissal process that followed is certainly sufficient to raise the possibility that his GMB training were somehow relevant to his dismissal and in my judgement sufficient to shift the burden of proof back onto the respondent to address that potentially competing reason for dismissal and to satisfy the Tribunal that the reason or principal reason for dismissal was in fact, as it submits, some other substantial reason being an irretrievable breakdown of trust and confidence.

213. I have considered carefully the evidence in relation to the reason being the claimant's trade union activities. If one were to take an expansive approach to the trade union activity relied on by the claimant – i.e. not just the claimant's attendance on the GMB course, but his use of that knowledge gained on the training course, there clearly is some connection with the underlying factual events which were discussed as part of the decision to dismiss the claimant. The connection is most obvious in relation to the events of 23 May 2024 when Mr Eden was attempting to speak with the claimant about the Tewskbury complaint. It would be reasonable to infer that the claimant's approach in terms of insisting on what he understood to be his right to be accompanied and to take a break in line with the working time regulations was informed by the knowledge he had gained when undertaking that GMB course. He was said to be reading at one point during the meeting from a GMB manual, presumably obtained on his training course, when quoting case law to persuade Mr Eden of his right to insist on a trade union representative or companion being present.

214. Yet my finding is that even on that expansive approach, the respondent's objection to the claimant's behaviour on 23 May 2024 was not the fact he was asserting those rights or using his recent training and knowledge to challenge his manager – rather it was the disrespectful and controlling manner in which the claimant was asserting those rights towards Mr Eden against the wider background of threatening behaviour and relationship breakdown. Mr O'Doherty was a convincing witness on this point and it is easy to see how he formed that view having understood from his meeting with Mr Eden the strength of Mr Eden's feeling about the claimant's disrespectful attitude towards him. That strength of feeling is plain on the written record of the meeting between Mr Eden and Mr O'Doherty. It is one thing to firmly and politely assert one's rights and engage constructively in a difference of opinion about those rights; it is quite another to do so in an unreasonably controlling and intimidatory manner, to refuse to sensibly contemplate Mr Eden's different understanding of his rights, interrupting

Mr Eden and causing the entire meeting to break down with the claimant effectively storming out and making a scene in front of other colleagues.

215. It must not be overlooked that the claimant accepts that the respondent was supportive of the claimant undertaking GMB training. The claimant accepts that significant efforts were made to adjust his shifts to enable him to attend the training dates. That seems to me to be compelling evidence that the respondent did not dismiss him for having gone on that course – why would the respondent approve the course if it then objected so strongly to his attendance on it. It must have been reasonably apparent to the respondent in approving the claimant's attendance on the course that the claimant would gain knowledge from that training about employment rights and it follows therefore that the respondent did not feel threatened by that prospect. Mr O'Doherty was quite straightforward in his evidence that he had no issue with the claimant attending the course of using the knowledge gained from it, and that this was not the reason for dismissal.

216. In line with the findings of fact set out above, the claimant accepts that he was never told off or criticised for posting QR codes on notice boards seeking to recruit more GMB members. The email of 25 April 2024 [308] was only critical about the claimant's trade union recruitment activities to the extent that the claimant was suspected of sending unsolicited What's app messages to colleagues who had informally raised concerns about how he had obtained their number. Put simply, the Tribunal finds no evidence that the respondent thought negatively about the fact that claimant was trying to recruit more members to the GMB, only (to a minor extent) some concern about the manner in which he was going about that activity. There is no evidence at all from which I can reasonably infer his recruitment activity played any part whatsoever in his dismissal.

217. The claimant seeks to persuade me to draw a negative inference about the respondent's view of his trade union activities and his health and safety disclosures from the email of 17 April 2024 [295]. Referring to my findings above, I reject the inference the claimant seeks to draw. The annoyance displayed by Mr Murray was not that the claimant was raising health and safety issues, or using knowledge he had gained from his GMB training, but rather that the claimant seemed to be making what I accept to be unreasonable suggestions about employment policies needing to be stored in a locked cabinet, and that the claimant seemed to be conducting himself as though he were acting in some kind of official GMB representative or GMB health & safety capacity and thereby mistakenly believing he was entitled to conduct inspections and make demands of the respondent. I do not accept that email as evidence that the claimant's trade union activities or health & safety disclosures were reasons for his dismissal.

218. Notwithstanding that I have found the claimant is not entitled to the protection of section 100 ERA, for completeness I find that there is no evidence that the respondent reacted negatively or thought badly of the claimant for having raised any of the three health & safety matters he relies on and therefore no evidence from which one could infer that those matters were the reason for dismissal. To the contrary, Mr Doherty responded to the concern about the steering wheel lock by re-opening the investigation that had already been conducted. To the minor matter of a

fire alarm testing time and date not being included on a form, the claimant was permitted to take a photocopy of the form when he was at Tewksbury and when he raised it in the meeting with Mr Brown noted the health and concern raised but raised no further query and made no further comment about it, save to correct the claimant about the capacity in which he was raising these matters. There is no evidence of a negative response when the claimant raised the issue about the safe systems of work documentation being out of date. Taking those matters together with Mr O'Doherty's evidence that matters of health and safety were taken seriously by the respondent, I find that none of the health and safety matters played any part at all in the claimant's dismissal.

219. I therefore find, for the above reasons and in light of the compelling evidence set out below that SOSR was the reason for dismissal, that neither the claimant's trade union activities, nor any health and safety disclosure were the reason or principal reason for the claimant's dismissal.

220. The claimant's claims for automatically unfair dismissal under section 152 TULRCA and s100 ERA are not well founded and fail.

Was the reason for dismissal conduct or SOSR?

221. The respondent submits that the reason for dismissal was a terminal breakdown in the relationship of trust and confidence with the claimant. At this stage of the analysis, I remind myself that the respondent need only establish that there were grounds for concluding that trust and confidence had broken down which could justify the dismissal of the claimant. Whether it did in fact justify the dismissal and whether the respondent acted reasonably in dismissing for that reason is a separate stage of the analysis.

222. There are effectively three sets of events (broadly described - the defamation claim, the without prejudice email and the meetings with Mr Eden on 23 May 2024) which form the factual basis of the reasons for dismissal. I accept that it was not the claimant's conduct during any one of more of those events which was itself the reason for dismissal. Rather, I accept the respondent's position that one has to take a wider view understanding a whole series of events which ultimately built to what the respondent concluded was an irretrievable and intolerable situation as regards the claimant's employment. I accept the respondent's submission that it was that wider picture, of which those three events provide evidence for and play their part in describing a broader breakdown in the employment relationship and the relationship of trust and confidence with the claimant, which was the reason for dismissal.

223. Examining that a little closer, I accept that it was not the simple fact that the claimant commenced defamation proceedings against his manager that was the reason for dismissal.

224. An employee unhappy with the actions of his employer is clearly entitled to take legal action where there is some legitimate or reasonable basis for him to do so. If the claimant had raised one of a raft of employment law claims in the employment tribunal, there are various statutory protections making it unlawful for an employer to subject an employee to a detriment

or dismiss him as a result of exercising those statutory rights. None of those apply in the claimant's case as his litigation was in the civil courts for defamation, but I accept the claimant's general contention that the same logic should apply – he should not be dismissed for the simple fact of exercising his lawful right to defend his reputation.

225. Yet, referring to my findings above, there is much about the context of the claimant's defamation proceedings and then the manner in which the claimant used those defamation proceedings to threaten his managers and colleagues that in my judgement justifies it forming part of the dismissal rationale in this case.

226. I refer particularly to my findings that the defamation proceedings were a very significantly disproportionate reaction by the claimant; an escalation of the highest order to a momentary and quickly withdrawn allegation of a second bridge strike. I also refer to my findings that in launching those proceedings, the claimant acted in a calculated manner aiming to assert authority and power over his managers and by way of retaliation against a disciplinary process and sanction he felt was unreasonable.

227. As I find above, the claimant's failure in or around August 2023 to take advice or otherwise re-consider his position as regards the litigation when faced with detailed explanations from the respondent about the flaws in his claim, showed a stubborn disrespect and disregard for whether his claim had any merit and the impact the claim would or might then have on the relationship of trust and confidence with Mr Stacey and the respondent more generally.

228. However, it is the claimant's email of 30 August 2023 that seems to me to be particularly egregious evidence of the claimant seeking to use the fact of the defamation litigation as a means of directly threatening Mr Brown, Mr Eden, Mr Stacey and Mr O'Doherty and the respondent generally to concede to his demands in relation to the disciplinary warning he had already received and for which the internal process had already been exhausted. It is one thing to pursue a claim against one manager and either allow those proceedings to play out in the courts or seek to negotiate a settlement with Mr Stacey or his advisers in the context of those proceedings. It is quite another to use those proceedings as a weapon as regards his ongoing employment to threaten other managers with the prospect that they may too be the subject of litigation if they don't accede to his demands. To expect that his email to his managers would have no serious impact on the employment relationship and the underlying relationship of trust and confidence was in my judgement exceptionally naïve and ill-considered on the claimant's part.

229. There is then the claimant's email to Mr Stacey of 1 September 2023 which I have found to be unreasonably threatening in tone, expressly threatening to bring in enforcement agents to attend at Mr Stacey's personal address if payment was not received within 14 days. I have found that email to have been a deliberately vindictive act by the claimant as a further act of retaliation against Mr Stacey. There is clear evidence from Mr Stacey's email of 1 September 2023 that this email and the litigation generally had a very profound intimidating impact on Mr Stacey and his wife.

230. The claimant's particulars of claim were then struck out on 24 November 2023, but he continued to maintain that this was only due to a technicality, failing to recognise or appreciate that the court had found his claim as set out to lack any merit at all. That perspective and a clear ongoing sense of injustice and disrespect for those involved in the previous disciplinary matter persisted, despite an informal meeting with Mr O'Doherty on 19 December 2023 at which the circumstances of the litigation and the impacts it was having at work were discussed. The claimant accepts he then understood and was apologetic for the impact on Mr Stacey and his wife and had agreed that he would work on repairing the relationship with Mr Stacey and make efforts with colleagues more widely too. Regrettably it later transpires that the claimant had not taken on board what I find to have been a clear, it not documented, informal warning about his attitude and approach towards his managers.

231. By this point the claimant accepts that it was no secret that he had brought defamation proceedings against Mr Stacey. Mr Eden, Mr Brown and Mr O'Doherty had been directly copied to an email in which the claimant sought to use that litigation as a weapon and threatened further litigation if he did not get his own way. The claimant accepts that it is likely those managers had spoken to their colleagues about those threats and the nature of his litigation against Mr Stacey. In turn it seems reasonable to infer that managers and staff in the claimant's workplace would likely have known enough about that litigation to know that it arose from something Mr Stacey and other managers considered to be very minor and about which most employees would not pursue litigation.

232. That is the context in which just over a month after the informal meeting with Mr O'Doherty, the claimant used the words 'without prejudice' in an email to a junior clerk whilst indicating his considerable dissatisfaction with the fact his holiday request had been declined. In assessing whether the real reason for dismissal was 'conduct' rather than 'SOSR', I accept that the respondent does not specifically rely on the claimant's use of those words in that one email as sufficient grounds for dismissal. It is not the claimant's conduct in terms of the use of those words themselves that are the issue, but what his use of those words demonstrate about his excessively confrontational approach about the routine matter of a holiday request having been declined, and the impact that then had on the recipient of the email in the wider context of the claimant having litigated on such trivial matters in the past and further threats of litigation having been issued. As I say in my findings of fact above, the claimant's use of the words without prejudice were, in the circumstances here, inappropriate, unduly confrontational and impliedly threatening in nature given all that had gone before.

233. The events which then crystallised the respondent's concerns about the relationship of trust and confidence took place on 23 May 2024 as regards Mr Eden's attempts to speak with the claimant about the Tewksbury complaint. I refer to my detailed findings above about the two exchanges where the claimant was disrespectful, unnecessarily confrontational and seeking to control events in a defiant controlling manner. I refer to my finding that by storming out of the first part of the meeting exclaiming in front of colleagues that Mr Eden was breaching his rights, he was deliberately trying to assert authority on the situation, making a scene in

front of colleagues and undermining Mr Eden's authority. I refer to my finding that in the second meeting the claimant's conduct towards Mr Eden was disrespectful of Mr Eden's authority and unreasonably threatening and intimidating in nature, particularly as regards the spurious threat of a grievance and conceivably litigation about forcing the claimant to attend a meeting when he was on a break. The marked contrast in the claimant's conduct when the same issue was addressed the following day with Mr Brown and the claimant's admission that 'you are the manager and I have respect for you' is, as I find above, clear evidence that the claimant felt able to pick and choose which of his managers he was prepared to engage constructively with, effectively admitting that he had very little, or a far lower degree of respect for Mr Eden. Even understanding the claimant's military background and particular regard to rank and seniority, it is clear that the claimant's conduct and attitude towards his most immediate manager fell far below an acceptable standard.

234. Again when considering whether the real reason for dismissal is conduct or SOSR - whilst the claimant's conduct towards Mr Eden in those two meetings were certainly central considerations in the dismissal rationale, I accept that it was the broader context of the claimant's actions and the serious impact it had on Mr Eden in light of the defamation claim and the previous threats of litigation and the completely breakdown in the relationship that Mr Eden perceived had occurred as a culminating result of all that history, that were the active reasons for dismissal. I am struck by the powerful language used by Mr Eden in his meeting with Mr O'Doherty, and it is clear in Mr O'Doherty's evidence that he understood the severity of the impact on Mr Eden. I particularly note Mr Eden's references to feeling that he was having to tread on eggshells, that he was subjected to an intolerable amount of scrutiny, that the claimant was deliberately trying to push him to a point of destroying the relationship, of deliberately using workers' rights to his own ends and the fear and threats that he felt of being sued by the claimant.

235. I firmly reject the claimant's analysis that Mr Eden and his colleagues are the ones at fault, rightly needing to be challenged for their failures to allow him a break and the right to be accompanied. It is clear to me that the claimant engaged in those interactions with Mr Eden with the confrontational mindset of an ongoing sense of grievance & injustice about Mr Eden's part in the investigation of the bridge strike issues in 2023 and consequently was intent on finding every reason to find fault in Mr Eden's actions in furtherance of that dispute, weaponizing his knowledge of employment rights, threatening grievances and litigation on spurious grounds and seeking to undermine Mr Eden's authority. It is not surprising that the claimant's conduct, when set in its wider context, had the impact it did on Mr Eden.

236. Whilst I find the claimant was culpable of conduct which was the substantial cause of the breakdown in the relationship of trust and confidence, it was the perspective of the managers, and the impact of the claimant's actions and the fear and intimidation they felt as a result of the wider context, and the fact they could no longer contemplate working with the claimant, that were ultimately the reason for dismissal.

237. I am therefore satisfied that the respondent has discharged its burden of showing that the reason for dismissal was the irretrievable breakdown in trust and confidence in the employment relationship, a substantial reason which was not frivolous or trivial and which could justify the dismissal of the claimant.

Did the respondent act reasonably in treating that reason as a sufficient reason to dismiss the claimant?

238. In light of the above detailed findings of fact and my analysis in the preceding section about the reason for dismissal, I am satisfied that there were compelling grounds for the respondent to be concerned about a serious breakdown in the relationship of trust and confidence with the claimant.

239. In order to satisfy the next step in the analysis, I need to be satisfied that the respondent has taken adequate steps to assess whether the employment relationship with the claimant was genuinely irretrievable, or whether there were steps which the respondent could and should have taken to try and improve the relationship.

240. During the meeting with the claimant on 1 July 2024 at which the claimant was ultimately dismissed, and in his appeal against dismissal the claimant and his representative submitted that the matter had apparently been escalated very quickly by the respondent to a situation of alleged breakdown and in trust and confidence and that the respondent had not taken adequate steps to try and explore the possibility of repairing that relationship before proceeding to dismissal. That was not an argument that was forcefully pursued by the claimant in the hearing because the claimant's primary focus was in pointing to the real reason for dismissal being an automatically unfair reason.

241. The claimant was warned during an informal meeting with Mr O'Doherty in 19 December 2023 that the defamation claim and his associated actions towards his managers were having a negative impact at work.

242. Yet it is clear that was not a formal warning, and it was certainly not a warning that made clear his continued employment might be at risk. The conversation was more focused on alerting the claimant to the seriously detrimental impact his actions were having on Mr Stacey and his wife. There was however a clear expectation that Mr O'Doherty was expecting some change or improvement in the way the claimant was interacting with his managers and that a cordial and respectful relationship was expected at work. That must be a relevant factor in that it suggests some efforts had been made by the respondent to draw the issue to the claimant's attention and to give him opportunity to address it. Whilst a warning is not a necessary feature of a fair SOSR dismissal in these circumstances, the existence or absence of such a warning is a relevant factor.

243. I also take into account that there were clearly opportunities for the respondent to have addressed matters more directly with the claimant. It could have dealt with the conversation on 19 December 2023 much more formally, or at least recorded the outcome in writing. It is also notable that the respondent did not speak with the claimant to raise concerns about his

use of the words without prejudice in his email at the time that it was sent in January 2024, and to explore with him the intimidating impact it had on the recipient.

244. I accept however that it was only after the events of the 23 May 2024 that the severity of the issue crystallised for the respondent when Mr Eden articulated so forcefully to Mr O'Doherty how strongly he felt about the extent of the relationship breakdown and his sense that other colleagues felt the same. It was only at that point that the respondent formed the view that the relationship of trust and confidence had been severely damaged and the ongoing employment relationship therefore at risk.

245. I accept Mr O'Doherty's evidence that he went into the meeting on 1 July 2024 to discuss the state of affairs as he saw it with the claimant and open to the possibility that the relationship might be retrievable if the claimant was capable of acknowledging the problem and his part in it, and demonstrated a willingness to change or address the issues to attempt to repair the relationship. I accept Mr O'Doherty's evidence that he had in mind the possibility of mediation or training as possible outcomes as well as the possibility of the termination of the claimant's employment. I am satisfied that the meeting with the claimant on 1 July 2024 expressly addressed what the claimant felt he could do to demonstrate the relationship could be rebuilt.

246. In line with my findings above, it is clear that the claimant took no serious level of accountability for the impact of his actions and showed no willingness to change his approach, expecting the relationship to be capable of repair only if managers changed their perspective and recognized his employment rights properly. The claimant's perspective throughout the meeting (and during the appeal) was utterly entrenched, maintaining forcefully that all his actions were reasonable and that there were no grounds for concluding the relationship had broken down. He showed barely any degree of remorse or reflection for his actions, save for being apologetic about the inappropriate use of the without prejudice phrase but even in relation to that issue refused to contemplate the possibility that his colleagues were intimidated or threatened by his actions. During that meeting with Mr O'Doherty, he showed none of the insight and reflection that he started to show during the hearing that the defamation claim was possibly an overreaction, or that his powerful voice could unintentionally have been perceived as aggressive.

247. In those circumstances where the claimant was demonstrating such an intransigent position, it is difficult to imagine anything more the respondent could conceivably have done to explore the possibility of the relationship being rebuilt. The claimant was not saying that he was willing to mediate or engage in discussion with his managers. It was quite plain that those options would have been entirely futile, only serving to further damage the relationship given that the claimant was not willing to even entertain the idea there was any fault on his side or prepared to entertain the notion that his managers reasonably felt the relationship had broken down.

248. Furthermore, I accept the respondent's submission that this was not the case of a relationship breakdown between the claimant and one manager. Although the severity of the breakdown was best evidenced and

articulated by Mr Eden, Mr Stacey had felt similarly as expressed in his email of 1 September 2023, Mr Leivars had expressed it to Mr Brown in January 2024 and Mr O'Doherty's evidence was that he knew it was a widespread view shared by managers, particularly junior managers who worked with the claimant.

249. In all those circumstances, I accept that the respondent was entitled to conclude that the relationship of trust and confidence had broken down irretrievably and that dismissal was well within the range of reasonable responses open to an employer.

Procedural fairness

250. There are various aspects of the procedure which the claimant points to as being unfair.

251. Firstly, the claimant was critical of the letter that he was sent inviting him to the dismissal meeting because it notified him that one potential outcome was the termination of his employment. The claimant argued that this indicated his dismissal had been pre-judged. I firmly reject that contention given that it is a well-established feature of a fair dismissal procedure that an employee should be given sufficient information in advance of a meeting to understand the nature of the concern and to understand its possible consequences in advance of the meeting. I agree with the respondent's submission that it would have been more problematic if the claimant had not been told expressly in advance of the meeting that dismissal was a possible outcome, as he might then reasonably have claimed he had not appreciated the alleged severity of the situation.

252. A stronger argument raised by the claimant was the fact that he had requested but was not sent in advance of the dismissal meeting the documents and evidence that Mr O'Doherty intended to rely on in support of the contention that the relationship of trust and confidence had broken down. There plainly were documents which under discussion during the dismissal meeting which Mr O'Doherty accepts could have been sent to the claimant. Specifically, he could have attached copies of Mr O'Doherty's investigation meetings with Mr Eden or Mr Knox, the without prejudice email chain with Mr Leivars, any documents relating to the defamation claim or attempts to settle it, the claimant's email of 30 August 2023 or Mr Eden's complaint in relation to that of 16 October 2023, the claimant's email to Mr Stacey of 1 September 2023 or Mr Stacey's email to HR of the same date about it.

253. The claimant maintains that without this evidence in advance of the hearing, he wasn't given the opportunity to adequately prepare as he did not know what the details of the allegations were that he was facing.

254. If the dismissal had been on grounds of conduct, then the respondent's disciplinary procedure would certainly have required those documents, in the form of an evidence pack, to have been sent to the claimant in advance of the meeting.

255. If the ACAS Code of Practice applies, it states at paragraph 9 that:

"If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

256. Providing copies of written evidence in advance is not therefore a mandatory provision of paragraph 9, but the is a strong presumption that in most circumstances it will be appropriate.

257. In my judgement, the procedure adopted by the respondent was reasonable in the circumstances of this particular case and the trust and confidence SOSR dismissal that was in contemplation. In advance of the meeting the claimant accepts that he understood the broad headline that his employment was at risk because the respondent considered there was a breakdown in the employment relationship and of trust and confidence. He understood that it was serious enough that it might result in the termination of his employment. He did therefore have sufficient information to know at least broadly the nature of the allegation he faced and the possible consequences of it.

258. In my judgement, as the meeting was genuinely intended to explore with the claimant how and why the relationship was said to have broken down and to keep open the possibility of it being recoverable or repairable, there was no requirement that it be conducted in a particular format. It was open to the respondent to make a deliberate distinction not to follow the disciplinary procedures, not as a means of avoiding transparency, but believing it was not required.

259. I am satisfied that Mr O'Doherty carefully articulated to the claimant during the dismissal meeting the basis of the concerns. He did so in numbered points, carefully summarising the respondent's position and explaining the accounts of Mr Eden, Mr Knox and describing the various emails in question. He stopped after each point and invited the claimant to give his views. He discussed the counter-perspective with the claimant and did not shut the claimant down. Mr O'Doherty made it clear to the claimant and his representative that if they needed an adjournment to consider what had been explained, they would be welcome to take an adjournment. At no point during the dismissal meeting did the claimant or his trade union representative complain about the lack of documentation or suggest that they were unclear about the points being raised with the claimant. To the contrary, the claimant appeared well equipped to respond immediately. Where on one occasion there was confusion about the email of 30 August 2024 it would clearly have been helpful to have it available to review, but the claimant did not ask for a copy and when its contents was described, he was able to respond to the point being made. It is notable that the claimant did not request the documents or raise the issue on appeal.

260. In my judgement, relying on **Stockman,** the ACAS Code does not apply to this SOSR dismissal. Unlike in **Lund**, I do not conclude that this is a case where the respondent's disciplinary procedures should have applied such that the ACAS Code ought in turn to be applicable. Whilst I have been

clear that there are significant elements of the underlying cause of the relationship breakdown which relate to the claimant's misconduct, that conduct was not itself the reason for the dismissal. If I am wrong about that and the ACAS Code does apply, I find that the requirement to provide copies of written evidence in advance is not in any event mandatory under paragraph 9 and in the circumstances of leaving open the possibility of retrieving a relationship breakdown, providing that information during the course of the meeting and giving the claimant the opportunity to take adjournment to consider it does not constitute a breach of the Code.

261. For completeness, I record that even if I had concluded the failure to provide evidence in advance was a significant procedural defect, I would have made a 100% Polkey reduction on the basis that it was clear on the claimant's evidence that it would not have changed his approach during the dismissal or appeal meetings. He was asked specifically what difference it would have made, and his answer only related to understanding more of the detail and potentially calling more witnesses to enable him to challenge with more vigour the position being taken by the respondent. It was implicit in the claimant's evidence that it would not have led him to take a more conciliatory, apologetic or reflective approach during the meeting and hence no prospect that the outcome would have been any different.

262. A further criticism raised of the procedure by the claimant was the failure by Mr O'Doherty to interview Mr Stacey, Mr Brown or Mr Leivars in advance of the dismissal meeting. Whilst clearly Mr O'Doherty could have carried out more extensive investigations, the failure to interview those individuals is not sufficient in my judgement to make the procedure unfair. That is particularly because Mr O'Doherty had the detailed account from Mr Stacey as set out in his email of 1 September 2023 which provided more than sufficient evidence of the impact of the claimant's defamation claim, a matter which had already been discussed and addressed with the claimant on 19 December 2023. As regards Mr Leivars, I accept that Mr O'Doherty could judge for himself the contents and context of the without prejudice email and was entitled to rely on Mr Brown having told Mr O'Doherty of Mr Leivars concern, a matter which was explained to the claimant during the dismissal meeting and about which he had opportunity to respond. As regards Mr Brown, Mr O'Doherty had the benefit of the notes of the meeting with the claimant on 24 May 2024, relevant aspects of which were discussed with the claimant during the dismissal meeting.

263. Finally, the claimant challenged Mr O'Doherty about his suitability to conduct both the investigation and the dismissal stages of the process, pointing to the respondent's disciplinary procedure which provides that the manager who conducts the initial investigation should not be involved in the disciplinary hearing. Given that this was not a disciplinary matter to which those procedures apply, in my judgement Mr O'Doherty was not an unreasonable choice of decision maker to address the relationship difficulties with the claimant in the particular circumstances of this case, where he had oversight of the department in question, knowledge of the relevant chain of events and particularly given there were advantages of continuity as Mr O'Doherty had conducted the previous informal meeting with the claimant on 19 December 2023.

I find, therefore, that the dismissal was fair, and the claim for unfair dismissal is dismissed.

Approved by:

Employment Judge New

4 April 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....07 April 2025.....

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FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/