EMPLOYMENT TRIBUNALS

Claimant: **Mr B Foulger**
Respondent: **Middlesbrough Council**

Heard at: Teesside Employment Tribunal
On: 11 to 13 February 2025
Before: Employment Judge Jeram

Representation
Claimant: Mr N Sharples, Solicitor
Respondent: Mr S Healey of Counsel

RESERVED JUDGMENT

1. The claimant's complaint that he was:
   a. automatically unfairly dismissed contrary to section 52(1)() TULRCA 1992 is well founded and succeeds;
   b. unfairly dismissed contrary to section 94 ERA 1996 is well founded and succeeds.

2. The respondent is ordered to reinstate the claimant to his role of Senior Transport Officer. Further case management directions will be issued to the parties.

REASONS

1. By a claim presented on 29 July 2024, the claimant made a number of complaints all of which were subsequently withdrawn, save for his complaints of unfair dismissal.

2. The issues for the Tribunal to determine were identified as follows:

2.1. Did the claimant on 26 February 2024 take part in the activities of an independent trade union? The activities relied upon are:
   2.1.1. The claimant calling 'SA' and discussing with the confidential matters brackets including the name of certain individuals) which should be discussed at a meeting with the interim Chief Executive on six February 24 referred to by the Chief Executive in a follow-up email of 21 February 2024 ('the Conversation issue')
   2.1.2. The claimant sending, along with two other trade union representatives, a letter to the Chief Executive regarding potential equal pay claims for a mass grievance ('the Letter issue')

2.2. If so, was the reason or principal reason for dismissal that the claimant had taken part in the activities of an independent trade union at an appropriate time?

2.3 Was the reason or principal reason for dismissal the Claimant had departed from a process stipulated by the chief executive and initiated a conversation with SA regarding information that he knew to be privileged and confidential in which identity of the subjects were revealed by the claimant inferred by SA from what the claimant said to her, in breach of GDPR policies he being without the consent of SH to discuss her details with HR?

2.4 Was the reason for dismissal one that related to conduct or was it a substantial reason of the type such as to justify dismissal of an employee holding position which the employee held (SOSR)?

2.5 If the reason was misconduct, did the respondent act reasonably in all circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide whether:
   2.5.1 there was reasonable grounds for that belief;
   2.5.2 at the time the belief was formed the respondent be carried out a reasonable investigation;
   2.5.3 the respondent otherwise acted in a procedurally fair manner;
   2.5.4 dismissal within the range of reasonable responses.

3 In the event that one or other of the complaints succeeds, the parties were agreed that fsurther issue that I should consider was:
   3.3 Does the claimant wish to be reinstated to his previous employment?
   3.4 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 The Tribunal considered:
   4.1 Those aspects it was referred to in an agreed hearing bundle comprising of 340 pages;
   4.2 On behalf of the claimant, the written and oral evidence of the claimant, Paul Thompson (employee and Unison trade union convenor) and Shahgufta Hussein (former employee);
   4.3 On behalf of the respondent, the written and oral evidence of Sam Gilmore (Head of Economic Growth, investigating officer), Erik Scollay (then Head of Adult Services and dismissing officer), Luke Henman (Councillor, chair of the Staff Appeal Committee)

4.4 The written and oral submissions made on behalf of both parties.

Background Facts

5 The claimant commenced employment with the respondent on on 4 June 2004 and had occupied a number of roles, most recently in that of Senior Transport Officer.

6 For the last 15 years or so of employment, the claimant was the GMB trade union convener. He was provided with an office within the Town Hall and 11 hours of pay facility time to undertake union business related to the respondent's GMB members in respect issues for their employees more widely.

7 A service review consultation was undertaken in January 2024, outlining savings proposals affecting the Governance and Information department with all members affected, including those who were members of all three recognised trade unions: GMB, Unison and Unite the Union.

8 On 22 January 2024, a meeting took place between members involved in the service review and their trade union representatives, the unions having agreed to deal with the consultation jointly and, furthermore, having agreed that the claimant would take the lead role for the review. This was consistent with not only how the unions had arranged themselves for a decade, but also with knowledge of and accommodation of the respondent.

9 The claimant attended on behalf of GMB members, Paul Thompson ('PT') attended on behalf of Unison and the representative for Unite (JG) was unable to attend. The respondent had recently been issued with a Best Value notice. There was discord amongst the members. One member, SH, who was employed as a Policy Business Partner and who was a Unison member, raised two matters: she alleged that a senior member of management had given false or misleading information to the Transformation Board overseeing the respondent's compliance with the Best Value notice; she said that that same person had subjected her to racially motivated discrimination and harassment.

10 On **29 January 2024** the unions emailed the interim Chief Executive, Clive Heaphy and the Director of Governance and Information, asking for a postponement of ('CH') requesting a suspension of the service review to enable the unions to gather information about concerns they believed required further investigation. The claimant, and PT and JG received a response the same day from a Governance and Information Manager that had been named by the unions.

11 On **2 February 2024**, the unions again wrote a joint letter to CH. They stated that they were now intentionally excluded the Director of Information and Governance from their correspondence and asked CH to respect their request to speak with him in private as a matter of urgency. It stated that they had come to learn of possible racism and bullying as well as a whistleblowing matter of even greater importance. To underscore their point, CH was informed this was only the second time in the of the unions' relationship with the respondent that such a request was made.

12 On **6 February 2024**, the claimant, PT and SH met with CH. SH informed CH about her belief that a senior member of management had provided false or misleading information to the Transformation Board (subsequently described as the

'whistleblowing issue'), as well as her belief that the same person had subjected her to race related bullying. The unions informed CH of their wish for the matter to remain private; they stated their distrust in HR and management as well as in their ability to apply fair and effective procedures. CH confirmed that he would return with proposals about how best to deal with matters.

13 On **20 February 2024**, PT, explicitly on behalf of all three unions, chased CH for a response.

14 On **21 February 2024**, CH sent an email to the claimant, PT and JG; it bore the subject heading *'CONFIDENTIAL ISSUE'*. Nicola Finnegan ('NF'), Head of HR was added as a recipient of the email, also.

15 The email contained an apology for the delayed response, noted the bravery of 'the aggrieved' for speaking out and thanked the unions for their support. It stated that CH had given the matter much thought and that he *'proposed three actions'.*

16 The first proposal was that the consultation was completed, but implementation delayed.

17 Second, the email noted that the allegations made 'related to race discrimination' and that they were serious and had potential consequences for 'the aggrieved' as well as the Council. It noted that there was a grievance process for such matters, and there was a need for neutrality. It continued:

'therefore, with the agreement of the aggrieved party and yourself, I propose that we deviate from this process'.

18 CH suggested that any investigation was conducted by a named director, JT, who was described as 'independent'. The email stated that it would not be normal or appropriate to involve the internal auditor Veritau to handle what was described as an 'individual employment matter' and nor was that in the best interests of 'the aggrieved'.

19 Finally, the email stated *'I am working with HR colleagues and in particular [SA] to raise awareness of issues not just related to race, but all of the other protected characteristics'.*

20 The email concluded: *'I would be grateful if you could confirm that this is an acceptable route to [SH] and yourselves and that you wish to proceed on this basis'.*

21 The email made no specific reference to the so called 'whistleblowing' issue and appeared to conflate that, intentionally or otherwise, with 'the allegation that SH was the victim of race related bullying.

22 On **26 February 2024,** SH contacted the claimant. She was uneasy about CH's suggestion that she submit a grievance when the unions themselves had doubts about the integrity of the process. He said he would speak to PT, and that so should she.

23 At lunchtime the same day, the claimant contacted SA, the Equality and Diversity Officer named in CH's email to discuss the merit of submitting a grievance. He had not obtained SH's explicit permission to contact SA on her behalf, and he did not expect her to object.

24 In their call, which lasted 45 minutes, the claimant confirmed with SA that the discussion was a private and *'off the record'.*

25 The claimant informed SA about the service structure review, of strained relationships and about the fact that a member was making allegations of race discrimination of a member of management as well as providing inaccurate information to the Transformation Board. Although the claimant did not mention names, he provided such information as to allow SA to guess the identity of SH as well the manager sought to complain about. She objected to the suggestion that the manager being complained about was motivated by race. He asked of SA her view of the impartiality of the director proposed by CH to investigate any grievance submitted by SH. The claimant informed SA that he believed the race discrimination complaint to be weak.

26 After the call, SA informed her line manager KR about the call and its contents.

27 On **26 February 2024**, the claimant sent a letter again on behalf the unions regarding what was described as an equal pay complaint; it alleged that it was unfair the respondent met the professional registration fees of staff working in the Legal Services department whilst Social Workers were required to pay their own registration fees.

Suspension

28 The claimant was suspended the following day, on **27 February 2024**. The letter of suspension, prepared by NF, informed the claimant that he was to be investigated about an allegation that he had:

'shared personal and highly confidential information from a meeting and email from the Chief Executive with another member of staff, including whistleblowing and grievance details and allegations against another member of staff'.

29 She informed the claimant that GF would act as a point of contact for the claimant, but that GF was unaware of the details of his suspension, and that it was for the claimant to inform him, if he wished.

30 On **29 February 2024**, Sam Gilmore ('SG') (Head of Economic Growth) wrote to the claimant to inform him that he had been appointed, by GF, to investigate the allegation.

Investigation

31 On **5 March 2024**, SG interviewed SA. SG summarised the contents of the discussion in the document that was later electronically signed by SA. SA confirmed

that she regularly took calls from the claimant about work issues, and that it was not unusual to have lengthy calls with him *'discussing various matters'.*

32 She said that the claimant had contacted her on 26 February 2024 and, in a telephone call lasting approximately 45 minutes, informed her that he had attended a meeting with CH about a whistleblowing matter and that NF did not know about the meeting. The claimant had told her that it was connected to a race discrimination allegation. He was said to have spoken about the service review, and the note continued *'[the claimant] said that, at the end of the meeting with CH, SH told CH about the race/discrimination allegations claiming that the treatment in the service review process was racially motivated'.* She said he read out (unspecified) parts of the CH's email to her.

33 SA claimed that there was nothing private about the conversation. She said she gained the impression that the claimant was *'itching to tell someone'* but that she, SA, was concerned about the suggestion that the Corporate Improvement Board was being misled by a member of management and that this led her to tell her line manager KR about it, immediately after the call.

34 On **12 March 2024**, SG interviewed CH. A summary of the interview prepared by SG but it was not signed by CH, for reasons that were not explained to the Tribunal. In the unsigned summary, CH said he agreed to keep the department director out of the process, at the trade union's request. CH was noted to say that he believed that the nature of the conversation justified the matter being brought to his attention *'rather than going straight to Human Resources, particularly as the TUs were keen to keep the [department director] at arms length from the investigation process'.*

35 Nevertheless, CH was noted to have brought the meeting to NF's attention because he *'deemed it necessary to progress the matter through the formal channels/processes'.* He said he understood that the service review proposals would be implemented the day after his interview i.e. 13 March 2024 if no grievance was submitted by SH. He was of the impression that SH was not willing to put her grievance in writing and that *'it is understood that SH would not be returning to the Council'.*

36 CH did not state whether the subject heading of his email was intended to convey his own demand for confidentiality or to reflect the union's request for confidentiality. CH made no complaint that any demand of confidentiality on his part had been breached and nor does he state that he believed he had imposed a process on SH or the unions.

37 The note continued:
'NF made CH aware of the allegation that [the claimant] shared personal and highly confidential information from a meeting and email from the Chief Executive with another member of staff, including whistleblowing and grievance details and allegations against another member of staff.'

38 On **13 March 2024**, SG interviewed SA's line manager, KR. She later signed the notes summarising her interview. She said SA raise the matter with her and that she immediately contacted LF to report the matter to her she said she understood LF than raise the issue with CH.

39 She said her immediate concern was that the conversation between the claimant and SA *'would be in breach of whistleblowing and potentially GDPR data sharing policies'* adding her own observation that the breach seemed to have been contained between officers within the respondent. She stated that whistleblowing matters should have been reported to Veritau, the internal auditors, but that raising the matter with the chief executive was permissible.

40 On **5 April 2024**, SG interviewed the claimant. He later signed the notes summarising the contents of the interview.

41 The claimant said he knew he was discussing a delicate private matter. He said he clarified with SA whether she could talk in private and that the purpose of the course to seek advice regarding a potential race discrimination complaint. He said she asked him three times to confirm that the discussion was confidential, and he reassured her that it was. The claimant reminded SG that SA's name was specifically mentioned in the email from CH, from which he had inferred that SA was formally involved in the matter.

42 He denied breaching confidentiality, because SA guessed the identity of the individuals from the conversation; he said he did not give any personal data and could not understand how he could be considered as being in breach of confidentiality or GDPR policies.

43 He added that if there had been a breach of trust than SA needed to explain why she had disclosed the contents of a private off the record conversation about a trade union matter with others.

44 The claimant was challenged as to why he had not complied with *'the established process'* identified by SG in the interview as being to contact Veritau.

45 When asked about the meeting with CH, BF, consistent with the note of CH's interview, stated that they had an understanding review process would continue, but the outcome might be suspended if a written grievance was submitted.

46 In response to the question from SG *'Any other matter which you wish to add, in mitigation/your defence?'*, the claimant said he could see no good reason why he had been suspended, that suspension should be a last resort, and that his job was wholly unconnected to the matter being investigated. He said he believed that he was being suspended because his activities were being seen as disruptive.

47 SG completed his investigation report on 13 June 2024. In it, said that there was a point of dispute as to whether in the call on 26 February 2024, the claimant named SH and others when speaking to SA, or whether SA guessed, accurately, who he was referring to from the surrounding facts. He said he considered this to be an important dispute, albeit his own summary of the interviews do not evidence such a dispute.

48 After his interview with the claimant, SG investigated the dates on which the claimant had most recently undertaken training in GDPR, Information Governance and Cyber Security and he included those dates in his report, but no details about that training

consisted of. SG included a summary of the interviews he had conducted, and he stated that the claimant was keen in his interview to highlight *'an extremely poor and combative and antagonistic relationship'* between the unions and the respondent's HR department. He said that was not relevant to his investigation, but confirmed that there was a culture of perceived distrust, leading to accusations of conspiracy, nothing of which he had observed in his investigation.

49 After setting out the evidence he understood he had obtained, SG summarised:

'in conclusion, and on the balance of probabilities, I believe that privileged and confidential information, including names was shared by [the claimant] in a telephone call with [SA]'.

50 Other than his view that the claimant had informed SA of the names of the persons involved, SG did not identify what the other information was that had been shared, why it was privileged and whose confidence had been breached.

51 He continued:
'Brian may have believed that this was a legitimate conversation with [SA] believing that she was privy to the case, involved characters and information. This belief may arise from the misinterpretation of [CH's] email. However, it is not reasonable to infer this meaning from the text of that email.'.

52 Of the four options apparently available to SG, he recommended the matter proceed to a disciplinary hearing.

53 No steps were taken to investigate SA for partaking in the call with the claimant.

Disciplinary Hearing

54 On **9 July 2024**, NF wrote to the claimant, inviting him to attend a disciplinary hearing. The allegation to be considered remained unchanged in the way it was framed at the investigation stage. The claimant was reminded of his right to be accompanied and the fact that he remained suspended. A copy of the disciplinary policy was included.

55 On **9 July 2024**, CB emailed the claimant to remind him that because he was suspended from work, he was not to undertake any union duties, either.

56 The Tribunal received no explanation as to why the respondent considered necessary to suspend the claimant. It appears that no review of the continued need for suspension was conducted, and if there was, it was not a matter that either the dismissing officer or the appeal panel considered it necessary to explore.

57 In his detailed preparation for the disciplinary hearing, the claimant asked a number of questions, including why SH had not been interviewed, or NF who he believed had a part in the decision to suspend him, he asked how specifically he had breached GDPR, or the respondent's whistleblowing policy, and why SA had not been questioned about why she participated in the conversation if it was highly confidential and in breach of GDPR. He asked why no policies were contained in the disciplinary pack.

58 On **22 July 2024**, the claimant attended the disciplinary hearing, accompanied by his trade union representative. SG also attended the hearing, which was chaired by Erik Scollay ('ES'), then Director of Adult Social Care and Health Integration. A member of HR was present to support ES.

59 SG confirmed he had not interviewed SH because she was 'not material'. He confirmed he did not interview NF because, he said, she was the 'instructing officer'. He confirmed he had not received a signed statement from CH. The notes of the disciplinary hearing record that SG confirmed at the hearing to ES that his investigations led him to be satisfied that the unions were working together to talk about SH's case.

60 The claimant said he felt targeted because of his trade union activities. He said his suspension was unwarranted and heavy handed, when compared with the lack of suspension of senior management about far more serious in relation to recent matters which the claimant had knowledge of. He said he approached SA because of the race allegation and SH's lack of confidence in the grievance process and reminded ES that it was CH who indicated that SA was the appropriate diversity lead. He reminded ES that SH had not complained and restated his assertion that SA had guessed SH's identity from the conversation. ES asked the claimant whether this was not a breach of GDPR because the claimant did not secure SH's consent before making the call. The claimant said he could not recall whether he had done that and that he was attempting to gain some clarity before advising SH further.

61 In the notes summarising the exchanges that took place at the disciplinary hearing SG repeated his position that *'sensitive information was shared, including names to [SA]'.* The claimant said that: he believed the matter had been predetermined by NF before the investigation commenced; SH was an important witness but was not interviewed; he had not been provided with policies or procedures in the disciplinary pack; SA admitted to participating in the same conversation yet nothing was done about her involvement; the length of the suspension was unfair; he did not believe he was in breach of GDPR, but if he was it was unintentional and that he should be allowed to have private off the record conversations; he felt he was being treated differently because of his trade union activities.

62 ES delivered his decision at the end of the hearing; he verbally confirmed that the claimant was *'in breach of GDPR'* having spoken about SH's '*situation'*. He concluded that the claimant should have known to terminate the conversation, since he had received *'all GDPR training'.* He concluded that conducted amounted to gross misconduct and that the claimant was to be summarily dismissed.

63 On **29 July 2024**, a letter signed by ES was sent to the claimant, setting out the reasons for his dismissal. The conclusions began by noting that union representatives had jointly met with CH to discuss allegations of such *'significance'* were made that a meeting took place outside the *'normal process'*. It stated that the subsequent email CH sent on 21 February 2024 bore the heading 'confidential issue' and extracted parts of the body of the email, emphasising the words in the email which read *'with the agreement of the aggrieved party and yourself'.* It stated that the fact and substance of the conversation with SA was not in dispute. It continued by stating that CH had *'determined a process to be followed'* and that it was clear

that the claimant understood CH's direction, and that the claimant had acted *'in obvious* contravention' of it.

64 The letter noted that no grievance had been received from SH. It noted that SH was not a member of the union the claimant represented. It stated that the claimant had failed to adduce any evidence of securing SH's consent before speaking to SA, later concluding that the claimant did not secure her consent.

65 The letter did not arrive at any conclusion as to whether the claimant informed SA of SH's identity, or whether SA had guessed it, but proceeded to note that the only way that SA would know of the proposal to appoint JT as the investigator of any grievance submitted by SH, was via the claimant.

66 In his oral evidence ES confirmed that he remained unclear whether the claimant had verbally informed SA of SH's identity or whether SA had simply guessed it, adding *'a connection as was made, that led to a broader conversation and therein lay a breach of confidentiality'*. That was the first suggestion that ES had regarded the conversation as potentially acceptable, but developed into something that was unacceptable.

67 The letter stated that the claimant had failed to terminate the call once the identity of SH was known, and that this was *'in obvious contravention'* of both CH's email and *'the principles of GDPR'* as well as the Council's *'own information governance and GDPR policies',* in respect of which, he was stated as being satisfied, the claimant had completed mandatory training.

68 It was said to be '*curious'* that despite describing Human Resources as '*corrupt'*, the claimant chose to be open with SA and that there was no evidence that the disciplinary process was in some way motivated by his trade union role.

69 The letter said that *'any mitigating circumstances'* had been taken into account, before confirming the decision to dismiss him summarily.

70 ES did not address the claimant's complaint that his suspension was unwarranted because he took the view that that was, in view of his decision to dismiss, an academic matter.

71 The claimant had, at the date of dismissal, been employed for 19 years and had enjoyed a clean disciplinary record.

Appeal

72 In a brief letter of appeal dated **2 August 2024**, the claimant stated, amongst other things: his belief that he had been dismissed for trade union activities and it was therefore automatically unfair; that his suspension was unjust and no policies were provided to support the decision made.

73 On **19 August 2023**, EJ Sweeney granted the claimant's application for interim relief, concluding that the claimant would be able to raise an evidential basis for asserting that his dismissal was for an inadmissible reason, namely that he had taken part in the activities of a trade union.

74 On **18 September 2024**, an appeal panel consisting of three councillors heard the claimant's appeal. It was chaired by Luke Henman ('LH'); the other two members of the panel had HR experience. The claimant attended the hearing, accompanied by his trade union representative. ES presented the management case; NF was present.

75 The appeal panel concurred with ES, recording its view that the claimant had shared highly sensitive and confidential personal information with SA. It agreed with ES that the claimant acted *'outside the process determined by CH'* and that the claimant was unable to confirm that he had authority from SH to discuss such highly sensitive and confidential personal information. It concluded that the claimant had breached the respondent's own policies, GDPR and now also, GDPR principles in some, unparticularised, way; it concluded that the claimant had acted in a manner amounting to gross misconduct.

76 The appeal panel recorded that there was *'no evidence'* that the claimant had any authority to act on behalf of other unions. It concluded that: the claimant had *'no legitimate or valid trade union reason'* to discuss the *'complex and sensitive matters'* of governance raised by SH with SA, that it was '*inconceivable'* that he could infer from CH's email that SA was privy to or involved *'in any way'* and that by discussing such matters, he did so *'outside the agreed procedure determined by [CH]'*. It considered noteworthy that the claimant had *'repeatedly made assertions that HR and senior officers [were] institutionally corrupt'* and it considered that the fact that the claimant was '*guarded'* in his discussion with SA indicated a lack of honest belief that he was carrying out trade union activities. It concluded his discussion was *'wholly outside legitimate trade union activity and was motivated by gossip'.*

77 The appeal panel found that NF acted appropriately by suspending the claimant, without identifying the reasons why.

78 The claimant's appeal was dismissed.

79 The claimant had not secured express authority from SH to speak to SA, but believed he had what he described as her '*tacit'* approval; he does not, as a matter of routine secure explicit permission from members before conducting his enquiries. He regularly spoke to SA, on an *'off the record'*, confidential, basis, evidence which draws support from SA's own statement. SH did not know that the claimant would call SA to speak to her about SH's concerns, and she had no objection when she learned of it. PT did not consider that by telephoning SA about his member's concerns it was in any way unusual or going beyond their working arrangements.

The Law

Reason For Dismissal

80 Section 94 ERA confers upon an employee the right not to be unfairly dismissed. It is for the respondent to show that the reason for dismissal is for a reason falling within section 98(2) or for some other substantial reason within the meaning of section 98(1).

81 A reason for dismissal i.e. the facts known or beliefs held that led it to dismiss: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. The reason given by an employer at the time of dismissal is evidence of the reason, but the decision maker's motivation must be considered: Croydon Health Services NHS Trust v Beatt [2017] ICR 1240, CA.

82 It is automatically unfair to dismiss an employee if the reason (or if more than one, the principal reason) is his taking part in 'the activities of an independent union' at an appropriate time, or proposing to do so: s. 152(1) TULRCA 1992.

83 The expression, 'activities of an independent trade union' is deliberately not defined, since circumstances in the real world vary so widely: Chant v Aquaboats Ltd [1978] ICR 643. The expression should not be construed restrictively: Dixon and Shaw v West Ella Developments Ltd [1978] IRLR 151, EAT; British Airways Engine Overhaul Ltd v Francis [1981] IRLR 9 EAT.

84 It is essentially a question of fact for the tribunal whether some act or event may fairly be described as an activity of the union; the tribunal should determine that question as a matter of industrial common sense: Brennan and Ging v Ellward (Lancs) Ltd [1976] ICR 222, EAT.

85 Phillips J said in Lyon and Scherk v St James Press Ltd [1976] ICR 413 EAT:

"The marks within which the decision must be made are clear: the special protection afforded by [s 152] to trade union activities must not be allowed to operate as a cloak or an excuse for conduct which ordinarily would justify dismissal; equally, the right to take part in the affairs of a trade union must not be obstructed by too easily finding acts done for that purpose to be a justification for dismissal. The marks are easy to describe, but the channel between them is difficult to navigate."

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

86 The CA cited these passages with approval in Morris v Metrolink Ratpdev Ltd [2018] EWCA Civ 1359. They CA distinguished between dismissing an employee for trade union activities and dismissal for things done or said by an employee in the course of trade union activities which can fairly be regarded as a distinct reason for the dismissal notwithstanding the context in which they occurred. The CA said that the reference to acts which are *'wholly unreasonable, extraneous or malicious'* captured the flavour of the distinction but should not be read as definitive and the use of the phrase *'wholly unreasonable'* had been deliberate.

87 Also in Morris, the CA approved the words of Pill LJ in Bass Taverns Ltd v Burgess [1995] IRLR 596, CA: he said *'I am very far from saying that the contents of a speech made at a trade union recruiting meeting, however malicious, untruthful, or irrelevant to the task in hand they may be, come within the term "trade union activities" in [s 152] of the Act'.* The claimant had been excessively scathing and critical of the employer when, at its invitation, he offered the union's

perspective at an employee induction course nothing he had said went beyond the rhetoric or hyperbole which might be expected of any evangelist.

Fairness

88 The test of whether the dismissal was fair or unfair is to be considered neutrally having regard to the objective standards set out at section 98(4). The Tribunal is to take the words as the starting point; it must be careful not to substitute its own view for that of the employer. The approach when considering the section is the well known band of reasonable responses test, including the decision to dismiss, which must be assessed by reference to the objective standard of the hypothetical employer. In misconduct cases the Tribunal is guided by the decision in BHS Stores v Burchell [1978] IRLR 379, EAT. Where dismissal is for gross misconduct, the Tribunal must be satisfied that the employer acted reasonably both in characterising the conduct as gross misconduct and then deciding that dismissal was the appropriate punishment: Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

Reinstatement

89 Where a complaint of unfair dismissal is well founded, the Tribunal must first explain to the complainant the potential orders for reinstatement or re-engagement that may be made pursuant to section 113 (read together with sections 114 to 116). If the complainant wishes, the ET will first consider making such an order (section 112(3).

90 Section 116 ERA then provides as follows:

'*116. Choice of order and its terms*
(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account-
(a) whether the complainant wishes to be reinstated,
(b) whether it is practicable for the employer to comply with an order for reinstatement, and
(c) where the complainant caused or contributed to some extent to his dismissal, whether it would be just to order his reinstatement'.

91 At this stage, there is a neutral burden of proof: these are issues for the ET itself to resolve, having regard to the circumstances of the case before it: British Council v Sellers EAT 2025, EAT 1.

92 Where an employer states its belief that the employee has misconducted himself such that he could no longer be trusted in its employment, the Tribunal must ask itself whether the employer had a genuine and rational belief that the employee had engaged in conduct which had destroyed the relationship of trust and confidence and practicability will not be determined on the basis of emotion, assertion or speculation: Lincolnshire Hospitals NHS Foundation Trust v Farren 2017 ICT 513, approved by the Court of Appeal in Kelly v PGA European Tour 2021 ICR 1124.

Discussion and Conclusions

The Reason for the Dismissal – Automatically Unfair Dismissal

93 ES made no enquiries of, or findings in relation to what, precisely, was the '*information'* the claimant should not have shared, or to whom that information was said to be or should be regarded as '*personal'*. SG had informed ES that SH's evidence was '*immaterial'* and ES did not seek further information, evidence or particularity about whether the 'information' was personal to anyone else, such as, conceivably, CH, the manager named by SH, or another union.

94 Similarly, ES did not explore whether the subject heading of the email sent by CH was intended to impose confidentiality on its recipients, or to reflect the confidentiality the unions had sought of him.

95 ES did not distinguish between discussions the claimant had about SH's race discrimination allegation and her 'whistleblowing' allegation i.e. that the same member of management had misled or provided false information to the Transformation Board. That formed no part of his oral or written reasons for dismissal, his management statement of case for the appeal panel, nor did it feature in his written evidence.

96 I conclude therefore that ES decided that to discuss with SA <u>any</u> aspect of the meeting that took place on 6 February 2024was unacceptable.

97 The claimant was not simply '*aware'* of the contents of that meeting, as ES sought to suggest in his written evidence; he had requested the meeting on behalf of all three unions and he partook in it. He did so in his role as trade union representative. Similarly, the email response from CH was directed to the claimant, as well as others, in their capacity as union representatives.

98 SH's allegations arose in the context of the service review in respect of which the claimant held the lead union role. SG confirmed to ES at the disciplinary hearing that he was satisfied on investigation that the claimant was acting collectively with other unions. ES did not find that the claimant telephoned SA in anything other than his capacity as a trade union representative. ES did not explore with the SA's expressed opinion that the claimant was *'itching to tell someone'.* In any event even if that were the case, or indeed the claimant had seized upon the opportunity to discuss the allegations with alacrity, I find contrary to the decision of the appeal panel, it does not follow that he was acting outside his capacity as a trade union representative.

99 ES did not make any specific findings about what aspects of CH's email the claimant shared with SA, that was unacceptable; as with the meeting, I conclude that the claimant making any reference the contents of CH's email of 29 February 2024 was unacceptable.

100 In deciding to dismiss the claimant, ES did not seek to distinguish between discussions the claimant had about SH's race discrimination allegation on the one hand, and discussion about her 'whistleblowing' allegation on the other. For the avoidance of doubt, I do not consider any such distinction can be properly made in the manner found by the appeal panel, so as to take the claimant's conduct, in whole or in part, outside the activities of a trade union.

101 Whereas the appeal panel did not explicitly conclude that the discussion about SH's complaint of race discrimination did amount to '*legitimate'* trade union activities, it concluded that the discussion about SH's whistleblowing allegation was *'wholly unacceptable'*. The claimant discussed both allegations in the same telephone call. The discussion was with SA, who was named in the email sent by CH as being someone he intended to work with on equality issues. One of SH's allegations was that she had been discriminated against. The other allegation was made also by SH, and was also of the same member of management. SH was considering whether to submit a grievance in relation to those allegations. Both he and SH were concerned to ensure that any grievance submitted was considered by an impartial investigator and the claimant discussed SA's view of the suggested impartiality of JT, the person named in CH's email. Both allegations arose in the context of a consultation about a service review, in respect of which the claimant held the lead union role. The allegation that management had sought to mislead the Transformation Board was undoubtedly serious, but it cannot properly be said that discussion about it, in these circumstances was so wholly unreasonable that it can be properly regarded as separable from the rest of the call.

102 Returning to the decision of ES. He found that to make <u>any</u> reference to the meeting or the email amounted to a '*contravention'* of a process that was either agreed with, or imposed on, the claimant and other recipients and in respect of which he believed that CH had demanded confidentiality. There are two difficulties with this finding. First, it was an interpretation of CH's email that is unsupported by a plain reading of it: he 'proposed' matters in respect of which he explicitly sought confirmation. That misinterpretation was, it appears, coincidentally repeated by the appeal panel.

103 Secondly, and more germane to the issue in point, is the wholesale absence of any consideration on the part of ES, or subsequently the appeal panel, as the how CH purported (on their interpretation) to 'determine a process' that the unions were required to comply with in relation to how they represent the interest of their own members.

104 Put more bluntly, both ES and the appeal panel found that CH had prohibited the unions from speaking to others about SH's allegations, and that the claimant contravened that direction by speaking to SA. He was dismissed because he failed to adhere to CH's direction as to how he was to go about representing the interests of union members.

105 For the avoidance of doubt, I am satisfied that the claimant's concern to ensure his discussion with SA was confidential was nothing out of the ordinary manner in which he conducted *'off the record'* discussions with management; it did not indicate, as the appeal panel appeared to suggest, that he had, or even might have, acted in bad faith.

106 The claimant did not discuss the meeting with CH or his email with anyone other than SA; the allegation against the claimant came about because SA informed her line manager, who in turn spoke to NF, who in turn, on a reading of CH's unsigned statement, *'made CH aware of the allegation'.* No complaint was ever received by the respondent about the claimant's conduct, whether from CH, SH, SA or anyone else. No investigation was compromised by the discussion; SH had not and did not

at any stage, submit a written grievance. Thus, insofar as the claimant was found to have committed a wrong, it was one without a victim and one with no discernible consequence. Nevertheless, the conduct found was considered to be so serious as to attract a summary dismissal. By contrast, whereas a factor in the decision to dismiss was that the claimant failed to terminate the call when it became apparent that SA knew the identities of those referred to in the discussion, SA was not investigated or disciplined for partaking in the same discussion.

107 I am satisfied that the claimant was dismissed because conducted a confidential *'off the record'* discussion with a member of the HR team, of the type that was typical of trade union representatives carrying out their function and which the claimant himself had routinely carried out. The discussion amounted to the activities of an independent trade union; no dispute arises between the parties that it was carried out at an *'appropriate time'.* I conclude that the decision to dismiss the claimant was for an inadmissible reason and that the complaint that he was automatically dismissed for taking part in the activities of an independent trade union at an appropriate time, contrary to section 152(1)(b) TULRCA 1992, is well founded.

108 There are several other matters that fortify my conclusion, only some of which are as follows. The allegation, as drafted, was nebulous; it demanded further particularity in order to be fairly understood, defended and, if appropriate, upheld. What was the specific '*information'* that the claimant was criticised for sharing, to whom was it '*personal'* and why was it so serious as to merit disciplinary proceedings? Who had demanded confidence and in relation to the specific information; was the confidence that of the unions, of SH, or of CH? Furthermore, the claimant was not informed, despite seeking an explanation, as to why it considered appropriate or necessary to suspend the claimant from his employment as a Transport Officer whilst the investigation was underway. SG was satisfied that the claimant had breached the respondent's policies and '*GDPR'* and this became a factor in the decision to dismiss him, when that formed no part of the allegation against him. The claimant was not provided with the provisions he was found to have breached, in order to defend himself or launch a meaningful appeal against that finding; the appeal panel did not specify the alleged breaches, either. If any evidence that SH could give was considered '*immaterial'* to the investigation, it is unclear whose personal data was found to have been unlawfully processed contrary to GDPR. Neither SG, ES, or the members of the appeal panel, all of whom enjoyed HR support throughout the disciplinary process considered it necessary to grapple with these considerations before arriving at their conclusions; their collective incuriosity is highly troublesome especially when considering that at each of the three stages, the claimant's expressed distrust of HR and senior management did attract comment.

109 There was no compelling evidence to suggest that the letter the claimant sent on 26 February 2024 relating to payment of professional registration fees was a factor in the decision to dismiss the claimant. The complaint of automatic unfair dismissal on this ground is not well founded.

'Ordinary' Unfair Dismissal

110 I conclude that ES genuinely believed that the claimant had committed an act of misconduct by discussing the meeting with CH on 6 February 2024 and the contents

of his email on 29 February 2024 with SA. That was a reason relating to conduct, and therefore a potentially fair reason.

111 For the reasons set out above, however, I am not satisfied that was not a conclusion that was based on reasonable grounds after a reasonable investigation. The conclusion that the claimant had breached provisions in the respondent's policies and of the GDPR when they did not form a part of the allegation he was charged with, and were not particularised, despite the claimant's request to do so, rendered the decision procedurally unfair. Even if the conduct for which the claimant was dismissed was, looked at objectively, capable of amounting to gross misconduct, the respondent did not act reasonably in characterising it as such, in particular having regard to the absence of any complaint or identified adverse impact of his actions. Furthermore, taking those matters into account, together with his length of service and his clean disciplinary record, I conclude that the decision to dismiss him fell outside the band of reasonable responses open to an employer acting reasonably.

Reinstatement

112 The claimant seeks an order reinstating him to his role as Senior Transport Officer. The claimant did not, on my findings above, cause or contribute to his dismissal; the respondent accepts that on a finding that the claimant was automatically unfairly dismissed, the conduct for which he is afforded special statutory protection cannot constitute blameworthy conduct.

113 The respondent does, however, contend that it is not practicable for it to comply with an order for reinstatement. On the evidence of ES, contained in his supplemental statement, the respondent contends that the respondent could no longer trust the claimant were an order for reinstatement made; that the respondent believes that he wilfully breached confidentiality, that he acted in bad faith and was motivated by a desire to gossip and case negative aspersion s in order to diminish the reputations of and relationships between colleagues.

114 There is no presumption in favour of an order for reinstatement and nor does the respondent bear any burden of disproving practicability; the burden is a neutral one and the issue is one for the Tribunal is determine in light of all the circumstances as a whole.

115 As above, ES genuinely believed when dismissing the claimant that he had wilfully breached a direction of CH and furthermore, I accept that that belief subsequently developed into a conviction that the claimant, acting as he did, was motivated by a desire to gossip and cast aspersions. But it does not follow, and I do not find, that the respondent holds a relational belief that the claimant has engaged in conduct that has destroyed the relationship of trust and confidence, so as to render reinstatement impracticable. On the evidence before me, CH did not 'determine a process' that the claimant flouted; he proposed a route by which SH's written grievance might be handled, and even then it was subject to the agreement of SH and the unions. Nor did CH complain in his draft statement that he demanded confidentiality either in the meeting or in respect of his email; he referred only to his respect of the unions' demand for confidentiality. In addition to the supplemental statement of ES, I have considered, for the avoidance of doubt, the passages in the

investigation report, the letter confirming dismissal and the letter confirming dismissal of the claimant's appeal, the respondent's comments that the claimant has been repeatedly critical of the respondent's HR and senior management. The evidence underpinning those assertions were not before me, or identified to me. I therefore attach limited weight to this factor.

116 Nor do I accept, as the respondent invites me to accept, that the claimant's own words evince a breakdown in trust and confidence. He was quoted in his investigation meeting as having *'no trust in the grievance process'* and later in the context of his appeal against his own dismissal as having *'no confidence in the grievance and disciplinary process*'; these assertions unsurprising as they are given the context in which they were made. In his own statement, the claimant contends that he seeks for his own grievance appeal in an unrelated matter and which was suspended pending his disciplinary outcome, to be dealt with *'in accordance with ACAS guidelines'*, an uncontroversial statement to make, on any view. The matters that the respondent asks me to have regard to fall significantly short, in my view, of demonstrating that the claimant lacks trust and confidence in his employer so as to render an order for reinstatement impracticable.

117 I have little doubt that, in common with similar cases, the disciplinary proceedings, and the litigation process have not served either party well. An order for reinstatement may well add to that strain initially. But I do not consider that those matters, of themselves mean that an order for reinstatement could not be complied with by the respondent, particularly with the active cooperation of the claimant.

118 I exercise my discretion to make an order for reinstatement.

119 As agreed, a further case management hearing will be set down to consider what directions are necessary to prepare for the rest of the remedies hearing.

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Employment Judge Jeram

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Date: 21 April 2025