Case Number: 2404436/2016

RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Keating**
Respondent:	**United Road Transport Union**
Heard at:	**East London Hearing Centre**
On:	**30 and 31 August 2017; 1 and 4 September 2017 and (in chambers) on 15 September 2017**
Before:	**Employment Judge C Hyde**

Representation:

Claimant:	Miss A Ahmad, Counsel
Respondent:	Mr S Brittenden, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **The complaint of unfair dismissal by reason of trade union activities under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 was dismissed on withdrawal forthwith.**

2. **The complaint of unfair dismissal under section 98(4) of the Employment Rights Act 1996 was well founded.**

3. **No deductions are to be made by reason of the application of the principles in the case of *Polkey* or by reason of contributory conduct.**

4. **The Tribunal will reconvene on a date to be notified to the parties shortly, with a time allocation of one day to determine remedy.**

REASONS

1 Reasons are provided in writing for the above judgment as the judgment was reserved.

2 The reasons are set out only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so.

3 All findings of facts were reached on the balance of probabilities.

Preliminaries

4 By a claim form which was presented on 7 October 2016, Mr Keating complained that he had been unfairly dismissed from his employment with the Respondent (referred to hereafter as "URTU"). He attached detailed grounds of his complaint to the claim form.

5 In the claim form the Claimant brought complaints of both ordinary unfair dismissal under section 98(4) of the Employment Rights Act 196 ("the 1996 Act") and section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 on the basis that he had been unfairly dismissed for trade Union activities. By a letter dated 22 May 2017 to the Tribunal on behalf of the Claimant, the trade Union activities unfair dismissal complaint was withdrawn.

6 For the sake of good order, the Tribunal dismissed that claim in its judgment above. There was no objection by the parties to that course.

7 In a response and grounds of resistance dated 28 November 2016, the Respondent set out the grounds on which they proposed to resist the claim.

8 At a Closed Preliminary Hearing which took place on 17 March 2017 before Employment Judge Russell, the issues were identified. They were recorded in an Order which was sent to the parties after that hearing on 11 April 2017 ("the Russell Order").

The Issues

9 This claim arose out of the termination of the Claimant's employment for misconduct, against a difficult background between the Claimant and his direct line management arising out of the Claimant's stated intention to challenge his immediate line manager for election to the position of General Secretary of the Union. His manager, Mr Monks, had occupied that position continuously for a number of five year terms. An unusual feature of the case was that the dismissal came about as the outcome of an appeal brought by the Claimant against the imposition of a final written warning.

10 The numbering of the Issues in the Russell Order is retained in these reasons as these were the numbers by which the Issues were referred to during the hearing and in closing submissions. They are set out below, with amendment as necessary to take into

account that the trade union activities complaint had been withdrawn by the start of the hearing.

4.1 What was the reason for the dismissal? The Respondent asserted that it was a reason related to conduct which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

4.2 [No longer relevant]

4.3 If the reason for dismissal was conduct, did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The Claimant's challenges to the fairness of the dismissal were:

4.3.1 The failure of Mr Feeny to put the fraud allegation to the Claimant;

4.3.2 The absence of cogent evidence of fraud;

4.3.3 The absence of cogent evidence of the items/services purchased;

4.3.4 The absence of a clear policy on credit card use;

4.3.5 The failure to enquire at the shop at which the card was used and instead to rely solely on inferences drawn from MasterCard statements;

4.3.6 Unreasonably ignoring the Claimant's explanation about the changed PIN.

4.4 Was the decision to dismiss fair within s.98(4) ERA 1996? The Claimant asserted that the sanction was unduly harsh and that the procedure adopted was unfair. His challenges to the fairness of the procedure were:

4.4.1 The Claimant was not given a chance to respond to the allegation of fraudulent (as opposed to unauthorised) use of the credit card;

4.4.2 The Respondent was not entitled to outsource the hearing of the appeal to Mr Feeny;

4.4.3 The final written warning given to the Claimant by the NEC was not extant at the date of the appeal hearing;

4.4.4 As the final written warning had been rescinded, the Respondent was not entitled to proceed with the appeal hearing;

4.4.5 If so, the Respondent was not entitled to elevate the sanction of final written warning to dismissal;

4.4.6 He was not given a right of appeal against dismissal.

4.5 If the dismissal was unfair, should there be any adjustment to any remedy to reflect **Polkey** and/or contributory fault and/or unreasonable failure to comply with the ACAS Code of Practice on Discipline and Grievances at Work (2015).

Evidence Adduced and Documents Produced

11 At the commencement of the hearing the Respondent produced a chronology and list of recommended core reading [R1]. The Claimant's counsel also produced a handwritten reading list [C1]. The parties had agreed on a bundle which was contained in a large lever arch file and numbered some 700 pages [R2].

12 On behalf of the Respondent the Tribunal heard evidence from Ms Brenda Irvine, URTU Administration Manager until 8 July 2016; and from Mr Eric Drinkwater, member of URTU's National Executive Committee ("NEC") since July 2007. Their witness statements were marked [R3] and [R4] respectively. The Tribunal also heard evidence from Mr Jack Feeny, a barrister who dealt with the appeal against the disciplinary sanction of a written warning and then imposed the dismissal. His witness statement was marked [R5].

13 Finally, on behalf of the Respondent, the Tribunal heard evidence from Mr Robert Monks, the Claimant's former line manager and the General Secretary of URTU from March 2001 to 16 November 2016. Thereafter he has been the Acting General Secretary. His witness statement was marked [R6].

14 Mr Keating gave evidence on his own behalf and his witness statement was marked [C2].

15 In addition, each Counsel prepared outline closing submissions in writing. The Respondent's closing submissions were marked [R7] and to those submissions Mr Brittenden appended copies of the following cases:

Santamera v Express Cargo Forwarding [2003] IRLR 273;

Shrestha v Genesis Housing Association Ltd [2015] IRLR 399;

London Ambulance Service NHS Trust v Small [2009] IRLR 563; and

McMillan v Airedale NHS Foundation Trust [2014] IRLR 803.

16 The Claimant's written closing submissions were marked [C3]. Ms Ahmad also attached a transcript of the judgment of the Court of Appeal in the **McMillan** case referred to above.

Relevant Law

17 There was no substantial dispute between the parties as to the relevant law. The

Tribunal adopted the statement of the relevant law set out in the written closing submissions [R7] prepared by Mr Brittenden.

18 Whilst the Tribunal fully accepted the proposition at paragraph 3 of that submission, namely that it is not the function of the Employment Tribunal to conduct a rehearing of the facts which formed the basis of an employer's decision to dismiss, in a case where there are issues of contributory conduct and/or ***Polkey*** determinations to be made, the Tribunal also needs to make the relevant factual determinations of its own. That is separate from the primary determination of whether the dismissal was fair or unfair.

19 Further, in relation to the principle relied on by the Respondent under the **Santamera** case as set out in paragraph 4 of the closing submission, the Tribunal sought to reassure the parties that although Mr Feeny was a barrister, the Tribunal would be judging his actions by the standard of an appeal manager not employment counsel.

20 Further, in relation to the point that the Tribunal is not permitted to substitute its own views about the evidence, the Tribunal had that very much in mind when seeking to establish during the hearing exactly what documents were produced before the disciplinary and the appeal panels, as opposed to being produced for the first time for the Tribunal proceedings.

Findings of Fact and Conclusions

21 The Claimant commenced employment with the Respondent as a Regional Officer on 28 February 2011. The Respondent is a relatively small Trade Union operating since 1890. Membership is open to those engaged in the occupation of road transport, distribution and logistics (p427).

22 Unless otherwise stated, all the parties referred to in these reasons were lorry drivers, including Mr Drinkwater and most of the other members of the NEC. Mr Monks' background was in law and Mr Feeny was in private practice as a barrister when he was asked to carry out the role of considering an appeal against the disciplinary sanction imposed on the Claimant.

23 The Claimant's role as Regional Officer was to support URTU members in their place of work and to advise and represent them in relation to their employment issues (including disciplinary and grievance processes), to negotiate terms and conditions and to support them in pursuing Employment Tribunal claims. The Claimant's region was designated number 11 which covered most of the South East of England.

24 On 6 October 2015, the Claimant was nominated by a number of the Respondent's members to be a candidate for election to the post of General Secretary of URTU. At that point that post had been occupied for some years continuously as set out above by Mr Monks who was also at the time the Claimant's line manager.

25 On 4 November 2015, the Claimant raised grievances about a conversation with Mr Monks on 6 October in which he alleged that Mr Monks had issued a threat to dismiss him if the Claimant continued with his intention to run against Mr Monks for the General

Secretary position (p91).

26 The investigation of the grievances about Mr Monks' actions commenced on 30 November 2015 with a meeting between the Claimant and the URTU National Officer, Mr Brian Hart. That meeting sadly led to the Claimant raising another grievance, on 10 December 2015, this time against Mr Hart (125) about comments allegedly made by him to the Claimant in that meeting.

27 These grievances against Mr Monks and Mr Hart were subsequently investigated by Professor Roy Lewis, an independent barrister. The outcome was contained in a report prepared dated 22 April 2016 (pp200 – 228). He did not uphold the allegations.

28 The Claimant also made an allegation of attempted blackmail against Mr Hart to the Police.

29 At a meeting of the NEC which took place on 12 December 2015 the NEC was advised by Mr B Bansel, a partner at the Union's solicitors, Messrs Pattinson & Brewer, that "*the Union has a policy that is central and crucial to the matter of the general secretary election which provides that no member would stand against an incumbent general secretary*." The minutes recorded (p128, paragraph 14) that there had been a bruising and difficult situation in 2006 which had ended up in the courts. There were two representatives of the firm of Pattinson & Brewer present at the NEC meeting on 12 December 2015. Mr Bansel's attitude to the challenge for the general secretary position and towards the Claimant's employment was set out in subsequent minutes also. He advised the NEC, and the Acting President and General Secretary in particular, throughout the time that the Tribunal was concerned with.

30 The NEC referred to in these reasons is a reference to the body as it was constituted from 2015 but it was not in dispute that for a short period from about the end of June 2016 until 27 July 2016, sometime after the termination of the Claimant's employment, a differently constituted NEC operated. The representatives of the Respondent who conducted this litigation and who took disciplinary action against the Claimant did not accept that the differently constituted NEC was ever validly constituted. Where it is necessary to refer to that body, the Tribunal will refer to it as the alternative NEC in these reasons without thereby making a determination about its legitimacy but simply to distinguish it from the initial NEC. The alternative NEC was initially ordered by the High Court in injunction proceedings and then agreed to curtail its activities in some respects, as set out below, from 27 July 2016.

31 Following the NEC's meeting on 12 December 2015, the President of the Union, Mr Phillip Brown then wrote to all members of staff, Trustees, NEC members and Officers of the Union among others (p134) to inform them that having discussed and considered written legal advice from the Union's solicitors (Messrs Pattinson & Brewer), the NEC and Trustees accepted their written advice "in its entirety". It was stated that as a consequence of the decision to accept the advice, the Union had decided that there would be no requirement for a ballot to be held in respect of the position of General Secretary. The nomination of the incumbent, Mr Monks had been accepted by the President and he had been informed that he had been returned unopposed as General Secretary of the Union for a further period of five years commencing from 1 March 2016. The notification of the re-election of Mr Monks was dated 18 December 2015.

32 In the meantime, following the NEC meeting on 12 December 2015, Mr Brown had been in contact with the Claimant confirming that the NEC had considered the Union's policy regarding nominations for election to the post of General Secretary. Mr Keating was informed in a letter dated 14 December 2015 (p131) that the Union would not accept another nomination where the incumbent General Secretary sought re-election. As a consequence therefore, the Claimant was told that his nomination for election as General Secretary had not been accepted. Mr Brown explained that this position had been reached after the benefit of written legal advice and guidance during the meeting. Mr Brown requested that Mr Bansel forwarded to the Claimant a copy of the advice and offered him a chance to speak to Mr Bansel about the decision.

33 Mr Brown also indicated that he was seeking advice as to how to investigate the Claimant's current grievances given that the complaints were about treatment by his line managers and that it would not be appropriate for the same line managers to investigate the grievances. He also sought the Claimant's view about consenting to the Union appointing a suitable independent person from outside the Union to help in resolving the differences by mediating between the Claimant and his line managers.

34 The Claimant was not content with the Union's actions in relation to the General Secretary position and in a letter dated 21 December 2015 he raised queries with Mr Bansel about the decisions taken. By a further letter on the same date he also raised some queries with Mr Brown the then President (pp135 and 136).

35 In relation to the way in which the grievances should be dealt with, he stated:

> "*I will be happy for the Union to decide how best to proceed. You have my permission to investigate by whatever means you see fit. I would like to add, that if ever I find myself in a similar situation that our Union will afford me the same in courtesy. And that if I am ever brought to task on a disciplinary matter (not that I have in my entire working life, to date) that a "suitable independent person" could carry out mediation?*"

36 While this correspondence was continuing and subsequently, certain retired Union officials made complaints to the Certification Officer about, amongst other things, the fact that Mr Robert Monks had been returned to the post of General Secretary unopposed. The applicants to the Certification Officer were Mr Roy Abrahams, Mr Trevor Bray and Mr John Bowen. They were referred to as Claimants in those proceedings. The complaints were registered with the Certification Officer on 11 January 2016, 30 January 2016 and 30 July 2016.

37 The Certification Officer reported in a decision dated 16 November 2016. He declared that on or around 1 March 2016 the Union had breached their rules which stated that the General Secretary should retire at the end of the fifth year of office. He declared that Mr Monks' fifth year of office expired on or around 1 March 2016.

38 He further found that on or around 12 December 2015, the Union had breached the 1992 Act by unreasonably excluding Mr Keating as a candidate in the planned ballot for the position of General Secretary. This breach occurred in that the Union rejected Mr Keating's nomination for the election on the basis that because he was a full-time Officer, he belonged to a class of which all the members were excluded from standing as a

candidate by the rules of the Union in accordance with Section 47(3) of the 1992 Act. The Certification Officer found in terms that there was no rule of the Union excluding such a class of members from standing for election to that position.

39 The Certification Officer made an enforcement order requiring Mr Monks to cease holding office as General Secretary forthwith. He also ordered that the result which was declared by the Union on 18 December 2015 would be treated as void and of no effect.

40 He directed that there would be a further election for the position of General Secretary and that the election was to be held with a view to a result being declared no later than 31 July 2017. In the event, by the time of the Tribunal hearing the election had not taken place and Mr Monks remained in post as Acting General Secretary. The Certification Officer gave the Union liberty to apply in the event of it being unable to comply with the requirement to declare the result of the further election by the date specified.

41 It thus appeared from the decision of the Certification Officer that the advice given by solicitors to the Respondent during the meetings and in writing about the ability of members such as the Claimant to challenge Mr Monks for the position of General Security was wrong in law.

42 The Tribunal has already referred to the fact that injunction proceedings were commenced. They were brought in the High Court probably in early July 2016. The Tribunal was shown Interim Orders in relation to injunctions made on 27 July 2016 and on 15 August 2016. The Orders made on the latter date were apparently in the same proceedings as they bore the same claim number although the Claimants were not identical to those in the earlier Order. The Claimant named in the first Order which was granted in the initial injunction hearing was Mr Monks. No-one had appeared on behalf of the Defendants on 27 July. The Defendants named on both Orders were Mr Peter Boswell, Mr Dean Jepson, Mr John Bowen and Mr John March. They were all members of the alternative NEC. In the second Order which was made on 15 August 2016, Mr Drinkwater was also named as a Claimant.

43 The first Order made on 27 July 2016 restrained the Defendants:

(1) From holding or purporting to hold any meeting of the National Executive of URTU on 6 August 2016 or at any time prior to 15 August 2016. It was stated that the Order did not prevent a special meeting of the NEC from being convened pursuant to Rules 16(3) or 38(1).

(2) From interfering with Mr Monk's ability to enter his place of work and/or carry out his mandated duties as General Secretary of the Union, save as was permitted by the Union's rules and the Officers' Agreement.

44 When the matter returned to Court on 15 August 2016, further interim Orders were made that mirrored the previous Orders, now covering the time frame of 27 August to 6 September 2016 or until further order. During the material period, the Defendants were not to hold any meeting or purport to hold any meeting of the National Executive of the Union; and they were forbidden from interfering with the Claimant's (sic) ability to enter his

place of work until 6 September 2016.

45 Finally, a consent Order was made on 12 October 2016 vacating the hearing of the substantive claims and dismissing the application upon the parties agreeing terms. There was no order as to costs.

46 The Tribunal only saw these documents after specifically directing that they be made available. However the Tribunal's view was that simply producing the Orders did not provide sufficient detail for the Tribunal to be able to conclude as the Respondent sought to suggest initially that the Orders made in these High Court proceedings bound the Tribunal, for example as to the legitimacy of the alternative NEC. It was not at all clear what the precise nature of the substantive complaint was. This was disappointing given that the solicitors acting for the applicant/Claimant's injunction in the High Court on the first two occasions were stated to be Messrs Pattinson & Brewer. The Tribunal expressed its view to the parties during the hearing about the state of play in relation to any argument such as res judicata or as to the extent to which the Tribunal should be bound by the judgment of the High Court. No further documents were produced for the Tribunal by the Respondent relating to that claim.

47 The Tribunal considered that the making of injunctions did not determine the points at issue. There had been no Judicial determination of the substantive claims, such that the Tribunal would be bound by it.

48 The Tribunal has set out this background to illustrate the contentious background against which the Claimant was working shortly before the matters which occurred which led to disciplinary action and subsequently his dismissal.

The Disciplinary Matters

49 Although no letter of appointment was produced, it was not in dispute that the Claimant's employment was governed by the Union's Rules and the Officers' Agreement. This latter document was akin to a detailed statement of terms and conditions save that it contained the provisions which applied to the various Officers' posts, not just that of Regional Officers. The applicable disciplinary procedure was set out in the Officers' Agreement (paras 9.5 and 10 at pp 354 – 5).

50 The Claimant's job as a Regional Officer involved a good deal of travel. He was based at his home in Chingford although the Head Office of the Respondent was in Manchester.

51 In respect of certain types of work related expenditure incurred, the Officers had to pay for initially out of his personal funds and then claim reimbursement from the Respondent. Alternatively, in relation to fuel, oil and certain other work-related costs of running his car, from January 2015 the Respondent put in place a system whereby each Regional Officer could use a 'company' credit card for such expenditure. The Respondent had previously had in use another credit card referred to as the "Allstar" card but the arrangement for the use of that credit card differed somewhat from the use of credit card of which the Tribunal was concerned namely the Alto fuel payment card.

52 Thus, it was recorded in the notes of an Officers' meeting (similar to a staff meeting) which took place on 20 January 2015 that Mr Monks reported to all Officers that due to issues relating to the costs of operating the All-star cards, that arrangement would be discontinued and instead Officers "would now be provided with credit cards to pay for fuel, oil and screen wash." It was further stated that the Union would apply for a credit card for them to pay for these items "in respect of their Union – provided vehicle". Mr Monks also indicated that the use of the old card would run in tandem with the introduction of the new Alto credit cards to ensure that there were no 'embarrassing hiccups'. However, at some point in the future the All-star cards would no longer be utilised. In his oral evidence Mr Monks indicated that the old card had been phased out by about three months later (p406).

53 Where the Union's credit card was used by the Officers, it followed that they were not out of pocket. The Respondent, under Mr Monks' administrative procedures, had a robust system in place for checking whether expenses had been appropriately charged to the credit card, to be paid for by the Union, not by the Officer concerned. It was not in dispute that there was also a robust system in place for checking expense claims where the employee had borne the initial expense and sought recompense from the Union.

54 The only other relevant record from the notes of the Officers' meetings or indeed from any documents given to the employees in relation to the use of the Alto card was recorded as item 5 on the minutes of the All Officers' Meeting which took place on 29 September 2015 (p55). The Tribunal noted that this document however was not before the disciplinary panel either at first instance or on appeal.

55 An issue had arisen because for practical reasons the Officers were only reimbursed for expenses which they had initially paid for when these had reached a trigger point of £50. However, this potentially meant that the Officers could be awaiting reimbursement for a number of months. Mr Monks was noted at the meeting on 29 September 2015 as having indicated that he could not understand the problem given the amount of expenses that were claimed. However, he continued that if there was a genuine concern by any Officer in regard to reimbursement of expenses, in that they were financially embarrassed as a result of non-receipt (reimbursement) of expenses, then Mr Monks would be more than happy to assist personally. The notes continued that Mr Keating suggested that perhaps a way round this problem would be to utilise the Union's credit card, currently used only to purchase fuel. Mr Monks indicated that "*he was not averse to that suggestion*." He continued that it would probably need some further thought but he could see this as a potential way forward in resolving any concern that Officers had. Mr Monks explained during the hearing that the further thoughts about this discussion were a reference to his consideration as to how any subsequent reimbursement would be dealt with. For example, it was unclear whether the Union would be authorised to make a deduction from the employee's salary or whether it was more appropriate for the Union to make a separate claim which would be dealt with separately from salary payment. The notes concluded: "*For example if an Officer utilised the Union's credit card for an expense and it was subsequently determined that it should not have been paid. How does the reimbursement to our Union of that expense take place? Whilst this was not insurmountable, these were the types of things that would need to be thought about before agreeing this as a way forward.*"

56 The accuracy of these notes was not disputed.

57 In the meantime also, the Claimant had been issued with an instruction on 12 February 2015 not to change the PIN on his Alto credit card (p409 and 399) from the PIN which he had been issued. This matter was the subject of one of the disciplinary charges the Claimant eventually faced in 2016, but there was no evidence of any prejudice to the Respondent or any dishonesty on the Claimant's part as a result of the failure to comply with the instruction. The Respondent did not discover that the Claimant had reverted to using his own PIN number until after he contacted Ms Irvine on about 25 April to seek her assistance as his use of the Alto card was barred. He was in contact with Ms Irvine while she tried to resolve the issue, and in the course of this she discovered that he was not using the PIN issued to him. It only briefly delayed her investigations, and she was able to use other methods of continuing her enquiries on his behalf.

58 On 15 March 2016, Rebecca Sharkey sent an email to the Claimant querying where the receipts were for expenses totalling £67.09 which had been charged by him to the Alto card on 18 February 2016 (pp.381-380). She told him that there were two transactions on that day, one was for £34.82 and she said that she had the receipt for that transaction. She said that there was another transaction for £67.09 and she did not have the receipt for that transaction. She continued:

> "I've checked your expenses/report form and for 18 February it only has 34.85 litres of fuel bought which must relate to the £34.82 receipt. You drove to Cambridge that day and then Northampton the following morning so you probably needed to fill up twice as that's a lot of driving! Please can you have a look for the receipt.
>
> Thanks
>
> Rebecca"

59 Some three hours later the Claimant responded also by email to Ms Sharkey in the following terms:

> "Hi Rebecca,
>
> Sorry no, I do not have any receipts laying around? I am a little concerned as this is the second time I have failed to provide you with receipts. This is very unlike me, in the last 5 years I think on only two occasions I have lost receipts, but known about it and informed head office.
>
> I only hope the provider may be of better use than I. sorry….."

60 Ms Sharkey referred the email exchange with Mr Keating to her manager Brenda Irvine the following morning and asked for clarification as to what she should do now.

61 That was the last the Claimant heard about the issue until his invitation to attend a disciplinary hearing dated 24 May 2016.

62 There was no dispute that the Claimant did not submit an expenses form which contained the expenses he had charged to the card.

63 Then Professor Lewis issued his decision on the Claimant's grievances on 22 April 2016.

64 The Claimant then telephoned Ms Irvine on 25 April 2016 about his credit card not working. Checks could not be undertaken initially because the Claimant had changed the PIN, but then another method of accessing the information was used. This incident led to the laying of the third disciplinary charge against the Claimant. He was not asked about this matter further before he received the disciplinary letter of 24 May 2016 from Mr Gallaher.

65 On 24 May 2016, Paul Gallaher the Administration Manager who took over from Brenda Irvine wrote to the Claimant. There was no dispute that there was a handover period of some months prior to her retirement during which both of them worked as Administration Manager.

66 His letter to the Claimant dated 24 May 2016 set out the three disciplinary allegations which the Claimant was being asked to respond to (p.233). The allegations were as follows:-

(1) Unauthorised use of the URTU Alto MasterCard allocated to the Claimant on 18 February 2016 at the Tesco store in Waltham Abbey, in regard to a transaction totalling £67.09;

(2) Unauthorised use of the URTU Alto MasterCard allocated to the Claimant on 6 January 2016, at the Tesco store in Waltham Abbey, in regard to a transaction totalling £14.23; and

(3) Unauthorised change of PIN number for the URTU Alto MasterCard allocated to the Claimant which came to light on 27 April 2016.

67 The Claimant was informed that on the basis of legal advice received by the union and in the light of the terms of the Officers' Agreement, if the allegations were reasonably believed, they would amount to serious industrial misconduct under paragraph 9.5 of the Officers' Agreement.

68 The letter continued that under the Officers' Agreement the General Secretary (Mr Monks) would normally be involved, however Mr Gallaher had been advised that in the light of the fact that the Claimant had raised a number of grievances against the General Secretary and in order to ensure a fair process was adopted, Mr Gallaher had been instructed to write to the Claimant. The letter also confirmed that the hearing would be conducted by the National Executive Committee's Disciplinary Subcommittee. The Claimant was told that dismissal was a permissible option if the allegations were substantiated. He was further advised of his right to be represented at the disciplinary hearing by either a workplace colleague or trade union officer. He was invited to confirm by return that he would be attending the hearing and if he chose to be accompanied to indicate the name of his representative.

69 The hearing was scheduled to take place at 2pm on 4 June 2016 at the Staindrop Lodge Hotel which was in Chapeltown, Sheffield. That venue was frequently used by the

Respondent for meetings.

70 Mr Keating responded by email to Mr Gallaher and informed him that he would not be attending the hearing on 4 June 2016. The response was by way of an email sent on 26 May 2016 just after midnight. The reasons for this were because of a prearranged personal social event and also because of the outstanding grievances against the NEC.

71 Mr Gallaher responded to Mr Keating by way of an email sent at about 9am also on 26 May 2016. He acknowledged receipt of Mr Keating's email and indicated that he would ensure it was passed to Mr Drinkwater the union's Vice President.

72 By a letter dated 31 May 2016, Mr Drinkwater wrote to the Claimant and suspended him from duty under paragraph 9.5 of the Officers' Agreement. He explained that this action had been taken in view of the fact that the Claimant had indicated that he did not intend to participate in the disciplinary process on account of his grievances and prearranged personal social event. He stated that the union had no option in those circumstances through the auspices of the Vice President but to suspend the Claimant from his duties with immediate effect: "so as to protect our union's members' interests". The Claimant was also informed that his use of the Alto MasterCard had been suspended. He was told that if he needed to purchase fuel, oil or screen wash for the personal use of his union provided vehicle, he should pay for this and claim the expense from head office in the normal manner.

73 The Claimant had submitted a grievance on 8 May 2016 (pp.229-230) against the NEC and Trustees of the union. The first limb of the grievance was the complaint about the NEC still denying him his right to stand as a candidate in the election for General Secretary of the union. The second limb was that the NEC and the Trustees had not adhered to the union's own policies and procedures and had thereby in effect breached established collective procedures and his contractual rights to deal with his grievances raised against Mr Monks and Mr Hart. Third he complained that the NEC and Trustees had not acted after receiving confirmation of his right to stand and that this constituted a breach of Rule 30 in the sense that unnecessary members' financial funds continued to be spent in breach of the rule in defence of a known illegal standpoint. Finally, he complained that the NEC in not acting after receiving confirmation of his right to stand and by not trying to right the wrong had clearly failed in their fundamental role. He believed this to be a breach of Rule 15.2.

74 One of the issues which permeated this case was a disagreement about the processes to be followed and which rules and regulations applied in relation to the Claimant as employee and which applied to him as union member.

75 In response to the Claimant's email of 26 May to Paul Gallaher, Mr Drinkwater wrote a letter sent via email to the Claimant dated 31 May 2016 (p.238). In addition to referring to the matters already set out in the suspension letter about the Claimant's stance about attending the disciplinary meeting, he also indicated that he had been informed that the Claimant was now unwell and off work from 31 May 2016 for an, as yet unspecified, period of time.

76 He informed the Claimant that the disciplinary allegations were completely separate from the Claimant's grievances and that it was not reasonable to refuse to

participate in the disciplinary process for this reason. He also indicated that the NEC had not been involved in investigating the Claimant's grievances and that both the disciplinary subcommittee of the NEC and the NEC were empowered to investigate disciplinary matters. He then referred to the logistical difficulties for the Respondent in arranging meetings of the NEC or any subcommittee of the NEC. Some of the members not only held down full-time jobs but some undertook shift work for their employers. Apparently NEC meetings were normally arranged over 12 months in advance in those circumstances. It was stated that following the NEC meeting on 4 June 2016, the next scheduled NEC meeting would not be until September 2016. Mr Drinkwater indicated that it would not be appropriate to defer matters until September 2016 given the seriousness of the allegations. Further, it would not be possible for the NEC to find a convenient alternative date in the near future.

77 He concluded by saying that in all the circumstances the NEC had no alternative but to proceed with the disciplinary hearing on 4 June 2016. He invited Mr Keating to provide any written representations and evidence that he might wish the subcommittee and the NEC to consider by no later than 2pm on Thursday 2 June 2016.

78 The notification of the Claimant's state of health came via a letter from Malcolm Williams, shop steward who indicated that he had been authorised to contact Mr Drinkwater on Mr Keating's behalf. He sent a letter also dated 31 May 2016 (pp.239-240). He stated that the Claimant was off with work related stress. Among other matters he indicated that he had noted that no investigation pack had been issued to the Claimant in relation to the disciplinary hearing. He asked on the Claimant's behalf that all contact was made via himself until such time as the Claimant's stress levels were reduced. He then provided Mr Drinkwater with some more detail about the sorts of documents that should be included in a pack to be received by the Claimant in sufficient time to prepare adequately for the disciplinary hearing. He then helpfully listed several categories of documents.

79 He further made the point that it was his contention that any attempt to deal with the matter in the Claimant's absence would be viewed as unreasonable and unfair.

80 In answer to Mr Williams' email and request for information about the disputed allegations, Mr Drinkwater wrote to Mr Williams by email dated 2 June 2016 (p.394) and provided the documents the Respondent relied on and the evidence in relation to the disciplinary charges. Mr Drinkwater repeated the request that the Claimant should provide any written representations or evidence prior to the disciplinary being held on 4 June to the Respondent by the deadline previously indicated of 2pm on 2 June 2016. It was unclear when the letter from Mr Drinkwater was sent to Mr Williams by email. There was no email record of that produced. 2 June 2016 fell on a Thursday.

81 The documents which the Respondent sent to Mr Williams were a note by Brenda Irvine about the investigations that the administration department (herself and Rebecca Sharkey) had made into the lack of receipts for the transaction at Tesco stores. The enquiries made by the administration department were the email correspondence referred to above with the Claimant and Ms Irvine's comments on the information which the documents suggested in terms of how the money had been spent. Thus she set out her reason for believing that the money charged to the credit card had not been spent at the filling station of Tesco but in the store itself. She described having made some enquiries

after Ms Sharkey referred to her the correspondence with the Claimant referred to above. She described telephoning the store in question on 21 March 2016 and being informed that the code next to the relevant transaction related to expenditure in the store. She also confirmed her enquiries which led her to believe that there was a code which identified transactions used at the Tesco filling station.

82 Finally, Ms Irvine referred to the previous incident of a purchase having been made from the Waltham Abbey Tesco in the amount of £14.23 on 6 January 2016 in respect of which no receipt had been supplied. She noted that Ms Sharkey had contacted the Claimant requesting the receipt and that no receipt had been forthcoming. She noted that it was assumed at that point that the first payment was for fuel.

83 None of these investigations, other than the initial email enquiries, involved the Claimant, nor was he informed about them at the time.

84 The email exchange with Mr Keating and Ms Sharkey was also part of the bundle. There then followed a further note of approximately a page and a half from Ms Irvine setting out information from her point of view in relation to the password and PIN number. In summary, the matter had come to light because the Claimant's attempt to use his Alto MasterCard on 25 April 2016 had not been successful. He had apparently had to charge the fuel purchase to his own personal credit card instead. When Ms Irvine attempted to make enquiries into what had gone wrong she discovered from the Alto customer services department that one reason why the card may not be working was because the wrong PIN number had been entered. She had however been able to access information about the transactions that Mr Keating had carried out without having his PIN number. In Ms Irvine's note she indicated that she kept a record on file of all Alto card PIN numbers issued to the Regional Officers, together with a copy of all paperwork originally issued with the Alto cards and for the obvious reason regarding security, should the card be lost/stolen. She prefaced this note of her practice with the phrase: "For the sake of good order". She then continued that this was also a helpful practice should any Regional Officer forget their PIN number.

85 The Claimant had explained to Ms Irvine during the course of the discussions about this issue that he had changed the PIN number to the number that he was using as he could not always remember the original number allocated to it.

86 There were various copies of receipts in relation to the fuel transactions of the Claimant made on 25 April 2016.

87 There was no suggestion that it was inappropriate for the Claimant to charge to the Alto card the expenses that he tried to use his union credit card for on 25 April 2016. There was correspondence between the Claimant and Ms Irvine showing Ms Irvine's efforts to reimburse the Claimant as soon as possible for those expenses incurred. There was also email correspondence between the Claimant and Ms Irvine dated 27 April 2016 in which the Claimant confirmed to Ms Irvine that he had changed the PIN number back to the PIN number that he was supposed to be using. Finally also in this context there was a photocopy of the union's Alto credit card which was sent by the Claimant to Ms Irvine in order to assist her with sorting out the difficulty which had arisen on 25 April 2016.

88 There was thus very little primary evidence about the credit card transactions in

January and February which had led to the other two disciplinary allegations.

89 The bundle of papers provided for the Claimant amounted to 10 pages in total including Mr Drinkwater's letter (pp.394-404).

90 The disciplinary hearing before the NEC proceeded in the Claimant's absence (pp.362-364). The Tribunal had an attendance note which had been taken recording the discussion and outcome of the meeting. Mr Bansel was in attendance again.

91 The officers of the Respondent who attended the disciplinary hearing were Mr Eric Drinkwater (Vice President), Mr Dean Jepson, Mr Ralph Bellamy, Mr John Marsh, Mr John Bowen and Mr Neil Brown (Trustee). Peter Boswell and Peter Roe (Trustees) sent their apologies.

92 It was clear that during the discussion Mr Bansel explained to the panel that this was "an allegation of potential dishonesty/fraudulent conduct". He advised the panel that he was concerned that despite being given numerous opportunities, Mr Keating had declined to provide any explanation and denial of the allegations.

93 The evidence of the "numerous opportunities" given to the Claimant by his employers to explain himself was not apparent to the Tribunal.

94 The panel considered various other possibilities. Two of the members of the panel (John Marsh and Dean Jepson) expressed the view that they did not think it was appropriate to dismiss an officer for such matters and that in other cases more serious matters had not resulted in an officer's dismissal.

95 Mr Bansel set out his views that he was troubled by the fact that an employee who was accused of misconduct and dishonesty would in circumstances where there was evidence to rebut the allegation be extremely keen to put that evidence to the employer and that the Claimant had notably failed to do so. He also commented that there was no evidence to support any of what may be legitimate concerns and relevant considerations about the reasons for the amounts being charged to the card. He explained to the panel that the applicable legal principles had been complied with in that there had been a reasonable investigation of the allegation and that the Claimant had declined to cooperate with the investigation. He stated that the Claimant had been advised of the allegations but had not provided any explanation. Mr Drinkwater expressed the view that there was clear evidence that there had been misappropriation of the union's funds and that this was compounded by the lack of any explanation from the Claimant. He was further satisfied on the evidence that the Claimant was guilty of misconduct and that the Claimant should be dismissed. This was seconded by Mr Brown (Trustee). When the matter was put to vote only Mr Brown and Mr Drinkwater were in favour of the course advocated by them. Four of the other participants on the panel voted against.

96 Mr Bansel then commented that the NEC appeared to be relying on matters that were not before them as evidence. Mr Marsh was recorded as commenting in response that it was a decision for the NEC to make and not for Mr Bansel. There was then some further discussion about whether dismissal was defensible and permissible in ET proceedings in these circumstances. Mr Bansel's advice was that it was.

97 Mr Marsh then proposed an alternative motion which was that Mr Keating should be given a written warning regarding the use of the union credit card and that the union should seek to recover the money that had been paid for the two disputed transactions. It was noted that Mr Marsh acknowledged that there was no satisfactory explanation and that Mr Keating should be given a 12 month warning, the suspension lifted, and that Mr Keating should be asked to re-sign the union's policies on the use of the company credit card. This motion was seconded by Mr Bellamy and four of the members voted in favour of this motion. The exceptions were Mr Drinkwater and Mr Brown who had voted in favour of the other motion to dismiss.

98 With the assistance of Mr Bansel, a letter was drafted after the meeting which was then sent in Mr Drinkwater's name to the Claimant informing him of the outcome of the disciplinary procedure. It was dated 7 June 2016 (pp.252 and 415).

99 This was the disciplinary process which led to the dismissal, dismissal being substituted for the final written warning on the appeal before Mr Feeny on 5 July 2016. The Claimant did not attend the appeal. The background which led up to that hearing is set out below.

100 Mr Feeny wrote to the Claimant (pp.305-9) by a letter dated 8 July 2016 informing him of his decision on the appeal and confirming the termination of the Claimant's employment and the Claimant's right to appeal under the Officers' Agreement. By the time of the hearing there was no dispute that the relevant sections of the Officers' Agreement provided that an appeal would be by way of a: "full re-hearing of all facts of the case, including further investigation if appropriate": clause 10.3 (p.355).

101 The appeal by Mr Feeny was one of the very contentious issues in the hearing before the Tribunal. Instructions were sent to Mr Feeny to conduct the appeal by Mr Bansel dated 21 June 2016.

102 The Agreement provided at clause 10 that an employee who wished to appeal against a disciplinary decision must apply in writing to the Executive Committee via the President. The Agreement further provided (clause 10.3) that the appeal hearing would not be restricted to the grounds on which the appeal was made but as set out above would take the form of a full rehearing. Clause 10.4 then specifically provided for the possibility of the penalty of dismissal being reduced to suspension without pay for up to two weeks and a final written warning, to be retained on the personnel file for 12 months: clause 10.4. The procedure then specifically provided (clause 10.5) that if the penalty of dismissal was upheld by the Executive Committee, the individual would have the right to refer the matter to ACAS.

103 Despite the Tribunal enquiring about this matter no-one was able to clarify for the Tribunal what the status of such an appeal would be and under what process it would be brought before ACAS.

104 It was noteworthy that the appeals section of the Officers' Agreement applied to appeals against all disciplinary decisions. However the specific provisions about outcome, namely reduction or upholding and then further appeal at clauses 10.4 and 10.5 were predicated on the basis that the appeal was against a dismissal.

105 The disciplinary procedure contained general principles under clause 9, then dealt with disposal of a breach of discipline outside of the formal process by counselling of the employee (9.2); and then with the application of the disciplinary procedure formally. This anticipated one procedure under 9.4 for matters which were 'simple' misconduct going through various stages and/or being of a serious enough nature that dismissal with notice could follow.

106 The next type of misconduct was described as 'serious industrial misconduct' (clause 9.5). This was the type of misconduct with which the Claimant was charged in the letter inviting him to disciplinary procedure on 24 May sent by Mr Gallaher and also as confirmed in the letter suspending him from work which was dated 31 May 2016 (pp.233 and 236).

107 Clause 9.5.1 provided that serious industrial misconduct meant misbehaviour which was: 'deliberate, reckless or grossly negligent in regard to persons or property, and which is against the interests of fellow workers and/or the union.'

108 Clause 9.5.2 provided that:

> "Serious industrial misconduct includes: theft from the Union or fellow employees, wilful damage to Union property, misuse of the Union monies or resources, fraud or falsification, fighting, refusal to carry out reasonable instruction from a superior. This list is not exhaustive and other offences may be considered equally serious."

109 The procedure then provided that in such cases of serious industrial misconduct the General Secretary (Mr Robert (Bob) Monks) may immediately suspend an employee and require him/her to leave the premises suspended on normal pay. At the first available opportunity the matter was to be referred to the appropriate stage and be dealt with as in other disciplinary cases (clause 9.5.3).

110 Clause 9.5.4 further provided that the General Secretary might dismiss the employee:

> "only in circumstances where he/she finds that theft from the Union or fellow employees, wilful damage to Union property, fraud or falsification has occurred. In these circumstances this may result in summary dismissal, as an alternative to dismissal the General Secretary may suspend the employee without pay for up to 2 weeks."

111 The Claimant's case involved criticism of the Respondent for not allowing Mr Monks to take up his role as set out in the Officers' Agreement in the disciplinary action against the Claimant. Mr Keating's approach in general was that matters should have been dealt with in-house and in strict accordance with the union's rules. The Tribunal will refer at various stages to the trade union's rule book and also to the specific terms of the Officers' Agreement. The Tribunal explained to the parties however that whilst those were important reference points, the Respondent's duty as an employer for the purposes of an unfair dismissal claim was not to act unfairly. In other words, the processes followed and the decisions taken had to fall within the band of reasonable responses. That was not to say however that failings in procedure could not either taken alone or together with other

circumstances, constitute grounds for finding that the Respondent's actions had indeed fallen outside that band of reasonable responses.

112 In addition when assessing fairness, the Tribunal considered the terms of the ACAS Code of Practice in relation to disciplinary procedures.

113 As is usually found in such procedures the general provisions of the procedure included the statement that the procedure was designed to help and encourage employees to achieve and maintain standards of conduct, attendance and job performance.

114 There was no dispute that under the procedure and in practice, issues to do with the overall administration of the trade union lay in the hands of the General Secretary and the Assistant General Secretary. For current purposes, the Tribunal was only concerned with Mr Monks. He also had overall responsibility in terms of administering and making decisions in relation to the disciplinary procedure as set out in the relevant text. Only the General Secretary (not the Assistant General Secretary) could be involved in taking disciplinary action in relation to serious industrial misconduct (clauses 9.4.1, 9.5.3 and 9.5.4).

115 In relation to the informal process of counselling the procedure provided that most disciplinary measures could be dealt with by means of conventional management and supervisory control and that wherever possible therefore the use of counselling was preferred to the use of the disciplinary procedure (clause 9.2.1). It further provided (clause 9.2.2) that whenever counselling took place, the employee should be informed of:-

(a) The nature of the offence, evidence being produced as appropriate;

(b) What action the employee should take to avoid a recurrence of the offence;

(c) What action might be taken should the offence recur e.g. disciplinary action.

116 The procedure in relation to counselling also provided (clause 9.2.3) that the employee must be given the opportunity to explain him or herself and to offer evidence.

117 The Tribunal has quoted from these provisions in order to illustrate how much emphasis was placed under the Claimant's contractual procedure on following fair procedures even in relation to the counselling process which was expressly stated not to fall within the scope of the formal disciplinary procedure: clause 9.2.4.

118 Clause 9.3 then set out the general principles of process which applied to the disciplinary procedure. These included the provisions that no disciplinary action would be taken against an employee: "until the case has been fully investigated"; that at every stage in the procedure the employee would be advised of the nature of the complaint against him or her and would be given the opportunity to prepare and present his or her case before any decision was made.

119 There was considerable dispute about whether the Respondent should have given the responsibility to Mr Feeny to deal with the appeal after the National Executive Committee had dealt with the first stage of the discipline. The Tribunal took into account that the National Executive Committee at the time consisted of some six members and in addition Trustees could sit on the NEC but their voting rights were restricted to finance matters: Rule 15(1)(b) and Rule 17(7) (p.444).

120 During the timeframe that the Tribunal was concerned with, namely from about March to July 2016 the members of the NEC were Mr Dean Jepson, Mr John Marsh, Mr Ralph Bellamy, Mr John Bowen, Mr Eric Drinkwater and Mr P Boswell.

121 The previous President (Philip Brown) stepped down in January 2015 and Mr Drinkwater as Vice President then substituted for him. This was also permissible under the rules of the union (pp.425-461): Rule 16(3).

122 Section 2 of the union's rules set out the provisions which related to the Governing Body of the union, section 3 was about the rules relating to officials of the union and section 5 had some general instructions and information about members' rights.

123 The rule book was not sent to Mr Feeny as part of his consideration of the appeal. This was relevant given the background dispute about the validity of the instructions that he was receiving from Mr Drinkwater. His evidence was that he took advice on that issue from Mr Bansel. It was also not disputed that he had advised the Respondent that dismissal was justifiable and that he had supported dismissal at the first stage in front of the NEC. Further, it was not disputed that Mr Bansel and Mr Feeny had discussed whether the decision to dismiss would be sustainable before the Employment Tribunal. This was discussed with Mr Feeny prior to the hearing of the appeal. Mr Feeny claimed legal professional privilege in relation to this discussion.

124 The Tribunal considered that there was in some respect some contradiction with Mr Feeny's role. As the Tribunal has noted above the standard to be applied to the employer was that of a reasonable employer. However Mr Feeny was an employment law specialist and to a certain extent the Respondent relied on that as establishing his independence and integrity as an appeal officer. Yet he also admitted that he took advice from Mr Bansel and had discussions with him about the case, some of which he declined to divulge on the grounds of legal professional privilege.

125 A further contentious issue was Mr Drinkwater's role during the NEC meeting on 4 June 2016 at which the decision was taken to issue the final written warning to the Claimant. The rules provided at 16(2) that the President should hold no other seats on the NEC but was not precluded from holding a seat on subcommittees of the National Executive Committee. The rule then continued:

> "The President shall not vote on any decision laid before the National Executive Committee, except to offer a casting vote in the event of the vote of members of the National Executive Committee and, if relating to a matter of Finance, Trustees, being equal."

126 It was argued on behalf of the Respondent that Mr Drinkwater in effect wore two

hats at any meetings he attended while acting President and that he was therefore entitled to vote first as Vice President and then in addition to have a casting vote if required. The Tribunal was not persuaded by that argument especially in the light of the express terms of Rule 16(2). However, the Tribunal considered that this was very much a background matter because Mr Drinkwater's vote was for a motion which was not in the event carried. The Tribunal also noted that the Trustee (Mr Brown) was not expressly entitled under the rules to vote on issues of discipline as opposed to finance, when he did so along with Mr Drinkwater at the hearing of the NEC.

127 The Tribunal had in mind that these were not breaches of procedure which led to the dismissal because the dismissal was not imposed at this hearing. However, they appeared to the Tribunal to be in direct contradiction to the rules in the context of an employer who clearly placed considerable emphasis on compliance with rules. It was also part of the background against which the disciplinary action took place.

128 The Respondent also relied on the union's rule book very strictly in arguing that the NEC meeting which was called for 2 July 2016 was not called in accordance with the rules. At this meeting the Alternative NEC purported to deal with the Claimant's appeal and revoked the final written warning. Mr Monks' construction of the rules was that if he as General Secretary was unavailable to attend a meeting, that meeting could not be valid.

129 Rule 24 dealt with the role and powers of a General Secretary. The issue of his attendance at meetings was dealt with in rule 24(3). This provided that the General Secretary should attend all Triennial Delegate Meetings and special delegate meetings (Rules 13 and 14) and that the General Secretary:

> "will attend the National Executive Committee Meetings and act under the orders of the National Executive Committee. The General Secretary shall have the right to speak on any business at a TDM" etc.

Rule 24.4 provided that the General Secretary:

> "shall perform all the duties laid down by the National Executive Committee and shall generally supervise the work of the Union in all departments, having full power to deal with all cases of emergency."

130 In other cases, such as when the President was not available, the rules provided specifically for the Vice President to step in.

131 Rule 23 provided that the NEC:

> "shall appoint an Assistant General Secretary as may be deemed necessary in the interests of the Union. The Assistant General Secretary shall act under the directions of the National Executive Committee and the General Secretary."

There were no further provisions in relation to the role of an Assistant General Secretary which were relevant to the issue of the non-availability of the General Secretary.

132 The Tribunal noted that under the rules the National Executive Committee was

responsible "For the general management of the Union": rule 15(1)(a). It was to be made up of the President, the General Secretary and not more than one representative from each region. The rule provided that three representatives in addition to the President would form a quorum with power to act.

133 The rule further provided (Rule 15.2) that the NEC:

> "shall meet as required, normally bi-monthly, to determine anything not contrary to the Rules of the Union. All decisions of the National Executive Committee shall be binding upon all members and regions until such decisions have been changed by the TDM or NAC, [National Appeals Committee] in respect of Rules 2, 4, 32 and 33…"

Rule 2 related to rules concerning qualification for membership and rule 4 was about incapacity/accident benefit. Rule 32 concerned membership complaints where a member had inappropriately disclosed the union business and rule 33 concerned attempts to induce members to secede from the union. The latter rules related to the jurisdiction of the National Appeals Committee.

134 Rule 15(6) provided that the President of the union "shall" preside at all meetings of the NEC. It further stated that in the absence of the President, the Vice President would preside and that in the absence of both, the NEC would appoint a chairperson from their number.

135 These rules were relevant to the issue of the validity of the actions of the "alternative" NEC which was convened towards the very end of June 2016 and which considered the Claimant's disciplinary process on 2 July 2016. The issue was whether the Respondent acted fairly in requiring the Claimant to attend the appeal before Mr Feeny and then dismissing him in circumstances where he had been informed by the Alternative NEC that his warning had been rescinded at the meeting on 2 July 2016.

136 In relation to the argument that no meeting was valid if the General Secretary was not present, the Tribunal considered that this was an unduly strict interpretation of the rules. Mr Monks was at that time on holiday although he was told in advance about the proposed agenda of the Alternative NEC. His interpretation of the rules would mean that the business of the union could be paralysed by for example the General Secretary being indisposed, or simply deciding not to attend meetings of the NEC and thus thwart the operation of the NEC. The Tribunal did not consider that such an interpretation was sustainable.

137 The Claimant further argued that the first stage disciplinary action should have been dealt with under rule 32. The Tribunal considered that it was clear beyond doubt that rule 32 was restricted to situations of inappropriate disclosure of trade union business (pp.457-458) and did not apply to the circumstances of this employment case. In respect of his appeal, the Claimant pointed to rule 32(9) in relation to a right to appeal to the National Appeal Committee. The Tribunal rejected this submission also for the same reason.

138 The Claimant submitted grounds of appeal by letter dated 8 June 2016. These

were:-

132.1 There was no investigation into the matters prior to the disciplinary.

132.2 About the length of time taken to bring the matter to a disciplinary given the supposed serious nature of the charges and that no suspension had been invoked.

132.3 He suspected that there was a causal connection between the union having received a letter dated 20 May 2016 from the certification office informing them of a hearing in June 2016 and the receipt of the disciplinary invitation dated 24 May 2016. He believed the disciplinary action was designed so that he would be dismissed and thrown out of the union and therefore unable to stand in the election for General Secretary.

132.4 He complained about the total unwillingness to postpone the disciplinary hearing in line with the ACAS code.

132.5 He complained about the Respondent trying to force him back into the workplace while off work with: “work related stress”.

132.6 That information requested by his representative prior to the disciplinary was still not forthcoming.

132.7 That his representative made a request for the hearing not to go ahead until adequate opportunity was afforded to him and to his representative to prepare a defence.

132.8 That the Claimant had been denied the right of representation as his representative was not available to make further representations on his behalf in the Claimant’s absence due to his attendance at the NEC meeting on other matters.

132.9 That there was no list of documents to be referred to provided to him and he was unaware of what, if any documents, the NEC members referred to.

132.10 That there were no minutes of the hearing provided to him to identify who was in attendance.

132.11 That he did not believe a case under the circumstances had been proven against him.

132.12 There was also an apparent error in relation to his rights of appeal.

139 He reiterated his readiness to repay the disputed sum which totalled £81.32. He stated that he had always been ready to repay the money pending the outcome of his

appeal. He raised a question finally about the reference to appeal to ACAS given that under the union's rules that only arose where a dismissal had been upheld.

140 Mr Drinkwater acknowledged receipt of the Claimant's notice of intention to appeal (pp.256-257) by letter dated 15 June 2016. He acknowledged that the Claimant was correct that there had been an erroneous reference to the appeal to ACAS. He stated however that the NEC considered that it was right that the Claimant should be provided with a right of appeal. He continued that as the NEC had issued the disciplinary sanction he now had sought legal advice on behalf of the NEC as to who should conduct the appeal.

141 He confirmed to the Claimant that the appeal would take the form of a full rehearing and informed the Claimant of his rights to be represented. He told Mr Keating that there was no requirement to repay the sum in question while the appeal process was underway.

142 The Claimant had cut up and returned the Alto card for security reasons to the Respondent after the issue of its use had come up towards the end of April 2016. In due course the Respondent issued a replacement card to him.

143 In the event the Claimant sent a personal cheque for the outstanding sum having informed the Respondent that he would rather do that and then claim it back when fit and well enough to do so.

144 As to the Feeny appeal hearing, the date that the Claimant was initially informed of was 23 June 2016. The Claimant did not attend having informed the Respondent that he did not consider that it was appropriate that this matter should be dealt with by someone external and also having protested through his representative about that and the fact that he was not well. Mr Feeny decided to postpone the hearing and to re-list it for 5 July 2016. He wrote to the Claimant on 23 June 2016 (pp.288-289) confirming that the Claimant had not provided a substantive response to the allegations; that it was a full re-hearing; that the sanction could be varied to include dismissal if appropriate and that the Claimant was invited to attend the re-scheduled hearing on 5 July 2016.

145 There was considerable correspondence addressed to Mr Feeny and/or his clerk from members of the NEC also objecting to Mr Feeny dealing with the matter. In particular there was an email from Mr Jepson (p.290) addressed to Mr Feeny's clerk and copied to the other NEC members including Mr Drinkwater and also copied to the Claimant and his representative Mr Williams. Although it was written the day after the scheduled Feeny appeal on 23 June, it was stated to be representing the views of the majority of the NEC of the union, namely Mr Jepson, Mr Bowen, Mr Marsh and Mr Bellamy. They characterised the meeting on 23 June 2016 as "unauthorised" and "not at the request or direction of the NEC". They had obviously also seen the letter from Mr Feeny of 23 June 2016 because they referred to the invitation to Mr Keating to attend a further appeal meeting on 5 July 2016. They asked that Mr Feeny should forward to all NEC members and Trustees, copies of the instructions and all communications received in the name of URTU in relation to the issue. They also referred to the fact that the Claimant was on sick leave at that time and referred to the employer's duty of care towards their employees. They expressed the view that there were those within URTU whose:

> "perceived malicious actions and continuous harassment could be deemed as causing [Mr Keating] further stress and anxiety"

146 On the same date Mr Keating's representative Malcolm Williams wrote to Mr Feeny (pp.292-293). This correspondence was also copied to Mr Keating. He referred to documentation having been forwarded to Mr Feeny on 22 June 2016 containing clear and direct instruction from the NEC members that the Claimant was not to attend the hearing. He questioned the validity of Mr Feeny's instructions and indicated that he knew from the NEC members that they had not given any authority for Mr Feeny to be instructed. He continued:

> "Without the NEC instruction whoever is instructing you is not acting in an authorised capacity."

147 This letter was also copied to "URTU NEC Members"

148 He further stated therefore that no hearing could take place in the circumstances.

149 Mr Williams also indicated that Mr Feeny had been told that information requested to enable the Claimant and Mr Williams to construct a defence had not been provided or forwarded. He complained that this meant that the test of natural justice or relevant sections of employment law could not be satisfied. He also referred to the failure of URTU to engage the services of an occupational health adviser in circumstances where the Claimant was medically certified with work related stress.

150 He referred to the Claimant's nomination for the General Secretary position and the fact that this matter had been referred to the Certification Officer for consideration. It also referred to Mr Keating's position that prior to and following acceptance of the nomination he had been subjected to intimidation and harassment culminating in false allegations being made against him. The reference to the false allegations was to the disciplinary allegations. He referred to correspondence in Mr Feeny's possession whereby the URTU NEC Members had clearly indicated to Mr Feeny that he was not authorised to act in these matters given the background. He further indicated that Mr Feeny's authority was not recognised either by Mr Keating or the overwhelming majority of URTU NEC Members.

151 Neither Mr Feeny nor his clerk, to whom some of these pieces of correspondence had been addressed, responded to any of them.

152 There was a further letter to similar effect from Mr Boswell, NEC Member, to Mr Feeny on 28 June 2016 (p.294).

153 Also on 28 June 2016, Mr Boswell wrote to Mr Monks expressly on behalf of himself and Mr Jepson, Mr March, Mr Bellamy and Mr Bowen (pp.295-296). It was not in dispute that Mr Monks was on annual leave at this point. Mr Boswell expressed some frustration that attempts by a majority of the members of the NEC to convene an extraordinary meeting had not met with much progress. He acknowledged that the NEC normally meets on a bi-monthly basis but pointed to rule 15(2) as a basis for meetings to be convened "as required". He indicated that he believed that this was such an occasion.

154 The Tribunal did not consider that there was any further relevant provision under rule 15 which would have prevented the five members of the NEC convening a meeting as they anticipated "as required". Rule 16 provided that the President or in his absence the Vice President should preside at all meetings of the National Executive Committee. However rule 16(3) concluded by providing that:

> "In the absence of [both the President and Vice President], the National Executive Committee shall elect a Chairperson from their number."

There did not appear to have been any minimum notice requirements or anything of that order in relation to the calling of an NEC meeting.

155 The relevant provisions in relation to the role of the Secretary in attending the meetings have already been set out above. Under the union rules the NEC and the President are listed in the section headed: "The Governing Body of the Union" and the rules relating to the Regional Officers, the National Officers, the Assistant and the General Secretary are in a separate section under the heading: "Officials of the Union". The Tribunal did not consider it to be a necessary implication that the union could not proceed with its business by holding NEC meetings in the absence of the General Secretary. It was more likely that there was an implied entitlement to nominate someone to carry out the functions that the General Secretary would normally carry out in the absence of a General Secretary at a meeting, if the meeting was otherwise duly convened. Importantly however for the purposes of the employment case this was the very issue which was in dispute at the time and there was no independent resolution of it before the hearings of the Claimant's appeal by the alternative NEC and then by Mr Feeny. The Tribunal considered that this put the Claimant in an intolerable position in terms of being required to answer to two competing parties, both of whom asserted they had the authority to address the disciplinary action he faced.

156 During the hearing it became clear that the Respondent's case was that there had been a meeting of the NEC in early April 2016 at which the issue of the Claimant's credit card use had been discussed. There were no minutes or notes of that meeting. There was certainly no action taken after the meeting by way of further investigation such as a meeting with the Claimant. The only documents relied on were those referred to above. It was unclear when Ms Irvine had written the statement. There was no dispute however that this information was only disclosed to the Claimant on about 2 June, and that he was unaware that he was the subject of a disciplinary investigation until he received the Gallaher letter inviting him to a disciplinary hearing dated 24 May 2016.

157 On 30 June 2016, the Claimant received a text message sent by Peter Boswell inviting him to an "Extraordinary meeting of the NEC" which had been convened for Saturday 2 July 2016. He wrote to Mr Boswell thereafter indicating that he understood that Mr Boswell had extended the invitation on behalf of five of the six NEC members. He confirmed that the purpose of his attendance was to provide comments in relation to his disciplinary appeal. He reminded Mr Boswell that he was out of the workplace at this time with work related stress but that he felt happy to accept Mr Boswell's invitation because it was not an "instruction", and he did not feel bullied or forced into attending. He indicated that he was also happy to attend because he would be meeting with his employers and not an "outside body". He continued by saying that although he was on sick leave currently through stress he felt that a meeting with his employers should go a long way to

putting him on the road to recovery as well as bringing him back into the workplace.

158 Mr Monks wrote to Mr Boswell by letter dated 1 July 2016 (pp.298-300) expressing the view that the meeting which was now scheduled to be held on 2 July had not been validly convened. He relied on the absence of any express provisions in Rules 15 or 16 for NEC members individually or collectively or the President to 'call' an 'Extraordinary meeting of the NEC'. He cited rule 38(1) as authority for the proposition that only the General Secretary could summon a further or additional meeting of the NEC beyond the ones which had been scheduled in accordance with the two monthly pattern. He stated that the proposed meeting would therefore be both unconstitutional and ultra vires. He believed that there was no facility under the union's rules for an 'Extraordinary' 'NEC' meeting and consequently any decision purporting to emanate from just such a meeting had no authority and was outside the trade union's rule book and lacked any form of legitimacy.

159 Under rule 38 which Mr Monks cited in his letter, headed "General Instructions", it was stated that in the event of anything occurring which the rules may not have made provision for, the General Secretary would take such steps as in his or her opinion would be in the best interest of the member(s) concerned. It then continued that should the matter be important, the General Secretary would then immediately summon a special meeting of the NEC. There was then a general exhortation that, among other matters, all members should "strictly abide by these rules".

160 Having discussed the issues which he understood the NEC was concerned about, he then indicated that he had no objection to any number of NEC members meeting to "chat through any issue or concerns". Indeed he indicated that he was more than happy to facilitate such a discussion. He confirmed that he had now made a confirmed arrangement for the room at the hotel at which the meeting had been scheduled to take place. However he reiterated his view that the meeting would not be an NEC meeting as such. He also confirmed to Mr Boswell that he was currently still on annual leave and would be returning to work on Sunday 3 July 2016.

161 The three concerns which Mr Boswell had told Mr Monks would be on the agenda were:-

154.1 The conduct and performance of the current Vice President Mr Eric Drinkwater;

154.2 The continued involvement of Mr Bansel; and

154.3 The Claimant's appeal.

162 Mr Monks confirmed in his letter that on his understanding of rule 38(1) the points in relation to the involvement of Mr Bansel and the Claimant's appeal were 'events' for which the rules of the union may not have made provision. Consequently, he was of the opinion that the union had acted in the best interest of all members concerned. He stated that he was content that he was acting inside the law and in accordance with his general obligations under Rule 24.

163 The Tribunal noted that Rule 38 was in a section headed "General Instructions and Members Rights". The provisions, including the general instructions, all related to members. The Tribunal noted that Rule 38(1) made no reference to employees. While the Officers' Agreement encouraged the Regional Officers to be members of the union it was not a requirement.

164 Mr Monks' letter of 1 July 2016 to Mr Boswell was also copied to the Vice President, Trustees and NEC Members. He did not send a copy to the Claimant but there was no dispute that the Claimant came by it, although it was unclear whether Mr Monks was aware of this at the time. Thus, Mr Keating sent an email on 1 July 2016 to the other members of the NEC excluding Mr Drinkwater. He confirmed that he had seen the letter. He analysed Mr Monks' response and made comments on its contents. Only one page of the email was before the Tribunal but it was sufficient to see that the document had been written by the Claimant.

165 On 2 July 2016, the meeting of the five members of the NEC went ahead as scheduled. Draft minutes of that meeting were produced (pp.302A-302C). A motion of no confidence in Mr Drinkwater was proposed and he was removed from his position as Vice President. In his place Mr Boswell was appointed as Vice President.

166 Mr Keating and his representative Mr Williams were invited to attend the meeting and to make comments regarding the allegations against Mr Keating. The notes simply record that Mr Keating:

> "gave a detailed response explaining the background of the allegations and his response to them. He explained the actions he had taken to try to answer the allegations. He denied any allegations of deliberate misconduct."

167 On Mr Keating's behalf Mr Williams expressed concern that he had not been provided with documents and information he had requested in order to represent the Claimant in this matter.

168 The minutes record that the NEC decided that they had been misled at previous meetings regarding the allegations made against Mr Keating and that in this case the correct procedure had not been followed and that the investigation appeared not to have been carried out as efficiently as it should have been. They carried a motion to the effect that the sanction against Mr Keating should be rescinded; that he should be allowed to return to work as soon as he was fit to do so, without any blemish on his record; and that the final written warning be removed from his records. The NEC agreed that Mr Keating should be asked to repay the disputed amount. They also agreed that the expense policy should be re-issued or once again shown and explained to full-time officers, Trustees and the NEC. They noted however that "mistakes do happen". Mr Keating and Mr Williams were called back into the meeting and were informed of the NEC decision.

169 Among other things, at the meeting a motion was carried unanimously to suspend Mr Monks on full pay in pursuance of the Alternative NEC's intention to institute an investigation into concerns about office procedures and the use of union finances without the approval of the NEC.

170 By a letter dated 3 July 2016 (p.303) Mr Boswell, describing himself as Vice President, wrote to the Claimant confirming the outcome of the appeal meeting.

171 That was the background against which the Claimant failed to attend the appeal hearing in front of Mr Feeny on 5 July 2016. His argument quite simply was that he had had an appeal meeting before the NEC, which had then informed him in writing that the disciplinary sanction against him had been rescinded therefore there were no further proceedings outstanding.

172 Mr Feeny proceeded with the consideration of the appeal on 5 July 2016 in his chambers. The Claimant did not attend and no-one else was present.

173 He wrote to the Claimant in a letter dated 8 July 2016 (pp.305-309) informing him of the fact that the hearing had gone ahead and that he had decided to dismiss the Claimant. He reiterated what he had said in his previous letter, namely that he had been instructed by the Vice President (a reference to Mr Drinkwater) to chair the appeal and it was not for him to determine whether or not he had authority or jurisdiction to do so. He thus acknowledged that he was aware that this issue was in dispute.

174 Mr Feeny also referred to having read a letter of 22 June 2016 sent by email at 3:47pm to his clerk with attachments (pp.285-286). That email addressed the issue of the Claimant's state of health and the assertion that based on the attachments the majority of the NEC was against any hearing taking place with Mr Feeny or any other outside body. Specifically it stated that Mr Keating had been told by the NEC who were referred to as "his employers" that he must not attend the hearing on 23 June 2016. He went on that apart from being sick and having no representation he had no option but to comply with the wishes of his employers, so he would not be in attendance.

175 The reference by Mr Feeny to his previous correspondence about being instructed to proceed with the hearing was probably a reference to the letter dated 23 June 2016 from Mr Feeny to the Claimant (pp.288-289) referred to above. In that letter he had also invited the Claimant to provide information to Mr Feeny if he wanted to either deny the allegations and/or provide mitigation.

176 It appeared to the Tribunal that a fundamental consideration in this case was the Claimant's contention that his employer had made a decision on 2 July 2016 overturning the disciplinary action which that same body had taken approximately a month earlier and as part of the same question whether Mr Feeny had sufficient authority to proceed with his deliberations, and knowing that the Claimant knew that his authority/competence to deal with the appeal was disputed by the Alternative NEC. The Tribunal did not consider that the union's rules expressly provided the process for an appeal against the disciplinary sanction imposed by the NEC at the first stage of disciplinary action. That course having been forced on the union by the fact that Mr Monks could not be seen as independent, a review by the same body was not in principle a course which was contrary to natural justice. The Tribunal rejected any suggestion that the consideration of the appeal by the Alternative NEC was akin to a sham, to the Claimant's knowledge.

177 There was clearly a falling out between the members of the NEC, of which the Claimant was aware, and indeed there was some evidence that he was involved in working with the NEC members who dissented from the actions taken by Mr Drinkwater.

The procedural question was whether a reasonable employer in all the circumstances should have pressed on regardless, without first resolving the issue of the NEC, especially when all parties were aware that the Claimant had been informed before the date of the Feeny appeal that his disciplinary sanction had been overturned.

178 The Tribunal considered that the matter was at the very minimum too uncertain as to who was representing the Claimant's employer in the period 30 June 2016 to 5 July 2016. Mr Feeny's actions therefore in proceeding to deal with the appeal knowing that the Claimant had been informed about a different outcome in relation to the disciplinary action was not the act of a reasonable employer. It was particularly pertinent that those purporting to be acting for the Claimant's employers, namely Mr Feeny, Mr Drinkwater and Mr Monks were all aware of what had been said to the Claimant about the meeting on 2 July. The Tribunal considered that it was hardly surprising if an employee had been told by a body representing five members of the current NEC that disciplinary matters had been overturned that he would not attend a further meeting as that meeting would therefore have no status and the Tribunal did not consider that an employer acting reasonably would hold it against an employee if they declined to act to their disadvantage.

179 Many of the points raised in the List of Issues as to the procedural and substantive fairness have been dealt with above. The remainder are dealt with below.

180 As the Claimant was no longer contending that the reason for dismissal was his trade union activities, the Tribunal was satisfied on the balance of probabilities that the reason that Mr Feeny dismissed the Claimant was a reason related to the Claimant's conduct, namely the matters set out in the invitation to discipline. A reason related to the employee's conduct is a potentially fair reason for dismissal under section 98 of the 1996 Act.

181 The next question was whether the Respondent held a belief in the Claimant's misconduct on reasonable grounds? In relation to the point about the failure of Mr Feeny to put the fraud allegation to the Claimant, the Tribunal considered that this was not a valid point because aside from the points about the validity of the hearing in front of Mr Feeny, it was apparent to the Claimant as he accepted in his evidence that the allegations although expressed in terms of inappropriate use of the credit card carried with them the implication of dishonesty.

182 The further point made at issue 4.3.2 was that there was an absence of cogent evidence of fraud. This was not a matter in respect of which the Tribunal could substitute its view of the evidence for that of Mr Feeny's. However the Tribunal established that there were many pieces of evidence which were not placed before Mr Feeny and which were relevant to the case. Mr Feeny was thus not in a particularly good position to reach cogent conclusions about the Claimant's honesty.

183 The first was the Claimant's response when he had been questioned about the January 2016 money (£14.23), and the way in which the enquiry was put to him by Ms Sharkey, as an administrative enquiry (pp190(a) and (b)). His response strongly suggested that not only did he not want to infringe any procedure, but he made it clear that he was unsure about what he had done. He was apologetic and did not push for the charge to the card to stand, and indicated a willingness to repay the money if it looked on investigation with the card provider as if it had been inappropriately charged. The Tribunal

considered that it was far more likely that this evidence was consistent with innocence than with guilt of dishonesty (pp.190a and b).

184 If Mr Feeny had seen the first email chain it would also have been clear to him that the two incidents of charging items which the Claimant was then subsequently not in a position to identify as fuel, had occurred before the Claimant was asked about either matter by Ms Sharkey or anyone else on behalf of the Respondent. That chronology was not apparent from Ms Irvine's summary statement (p395 last para). There was an interval of 7 weeks between the first incident on 6 January, and the Claimant being asked about it, not as a potential disciplinary matter, by Ms Sharkey on 23 February 2016. By then, the second incident had occurred on 18 February 2016. It was at least possible that these episodes had been acts of absentmindedness at what was on any view a stressful time for the Claimant. To the Respondent's knowledge at the time, (p396) this was conduct which was "unlike" him, and about which he expressed concern.

185 In relation to the point about the absence of cogent evidence of the items purchased, the Tribunal considered that it was clear that by the time the Claimant was asked about the January incident on 23 February 2016, Ms Sharkey believed that the money had been spent in the store. This appears to have been subsequently confirmed by Brenda Irvine. Despite having this knowledge and being familiar with the Respondent's rules about charging items to the card, the tone of Ms Sharkey and Ms Irvine's correspondence with the Claimant and each other was consistent with them not suspecting dishonesty on the Claimant's part.

186 Mr Feeny did not see Mr Keating's initial response in which he suggested that if the Respondent could not get any information from the provider about what had been charged to the credit card, that he would repay the money. Mr Feeny did not see that thereafter no-one had reverted to the Claimant about the issue apart from Rebecca Sharkey volunteering that she would attribute the amount to fuel and that there would be a further investigation to see if that yielded any more information. There was therefore nothing sinister on the face of it with Mr Keating failing to reimburse the Respondent at that point.

187 Further, on the information available to Mr Feeny, namely the statement from Ms Irvine, it did not appear the Administration Department had been able to find more details of the items and services purchased. However, there was no evidence either that attempts had been made to find them. Once again it was important to bear in mind that at the time Ms Irvine was conducting her enquiries the Claimant was unaware that there were such enquiries going on and therefore had not been able to feed into them at that point.

188 Issue 4.3.4 was about the absence of a clear policy on credit card use. Whilst there was little disagreement between Mr Monks and the Claimant about the reasons for which the credit card was to be used even though in fact the documentation about this was sparse, what was certainly not spelt out was that a breach of that procedure was likely to lead to serious disciplinary action being taken. The Tribunal has already referred to the note of the conversation at page 55 of the bundle where Mr Monks had expressed a relaxed view about matters being charged to the credit card outside the fuel and the restricted categories. The issue for him at that point was simply how this would be properly recouped. There was no suggestion that the mere charging of such work related

items would be a dishonest act.

189 Further, there was evidence that a far more accommodating approach had been extended to another member of staff whose wife had apparently misappropriated in excess of £40,000. No disciplinary action was taken against that member of staff and he was given an extended period to repay the money.

190 Finally, the Tribunal accepted, because the Respondent did not specifically dispute the evidence that the Claimant gave, that he had previously been aware that he had inadvertently used the Respondent's credit card to charge an item which was not related to work. He had apparently called Mr Monks immediately and brought this to his attention. There was no written policy about how erroneous charges to the union credit card would be put right save that the correspondence with the administrative team and the expectation of the Claimant was that such matters would be discussed with the member of staff involved in order to sort it out. This was indeed also Mr Monks' understanding.

191 Issue 4.3.5 was about the failure to enquire at the shop at which the card was used and instead to rely solely on inferences drawn from MasterCard statements.

192 This matter has been covered to a certain extent by issue 4.3.3 above. It was also relevant in this context that very short notice was given to the Claimant before the first hearing on 4 June 2016 before the NEC and certainly disclosure of documents to him was either very late to his trade union representative or it did not reach his trade union representative as Mr Williams asserted subsequently. No explanation was put forward about why it had taken such a long time between at the very least the beginning of April when this matter was supposedly discussed by the NEC and early June 2016 to provide documents to the Claimant. It was noteworthy that it was only after Mr Williams requested the documents and specified what types of documents would be relevant that some documents were apparently sent. As has been commented above, they largely related to the issue of the PIN and not to the two more substantive allegations in relation to unauthorised use of the credit card.

193 Complaint was made at issue 4.3.6 about the rejection of the Claimant's explanation that he had lost the receipts. Once again it would be inappropriate to substitute the Tribunal's view about the conclusion reached on this by Mr Feeny. The Tribunal took into account that the Claimant was not present at the hearing in front of Mr Feeny for the reasons set out above.

194 Further, it was said that the Respondent had unreasonably ignored the Claimant's explanation about the changed PIN. The Tribunal takes the same view as in issue 4.3.6 in relation to this matter.

195 Then issue 4.4 posed the question whether the decision to dismiss was fair within section 98(4) of the 1996 Act? In particular the Claimant raised certain challenges to the fairness of the process. Issue 4.4.1 was about whether the Claimant was given a chance to respond to the allegation of fraudulent (as opposed to unauthorised) use of the credit card.

196 As issue 4.4.1 repeats points or was very closely connected to the points in 4.3.1

no further comment needs to be made about it.

197 As to the Respondent's entitlement to "out source" the appeal hearing to Mr Feeny (issue 4.4.2), the Tribunal has already commented above that this was in principle something the Respondent was reasonably entitled to do. As to whether the instruction of an independent barrister was fair, the Tribunal considered that in principle this was also a fair course to follow given that the full NEC had already dealt with the discipline at the first level.

198 Next issues 4.4.3, 4.4.4 and 4.4.5 are addressed, namely that if the NEC had instructed the Claimant that the final written warning had been rescinded then there was no validity to the hearing in front of Mr Feeny and further Mr Feeny knew that the Claimant had been told this therefore it was unreasonable for him to proceed to dismiss the Claimant at that hearing and to deal with the case. These points have been dealt with above, in the Claimant's favour.

199 The Tribunal was also very concerned about the elevation of the penalty from final written warning to dismissal. It was not an option which was expressly excluded under the Officers' Agreement the relevant provisions of which have been set out above. Importantly, the ACAS Guide [para 4.17] provides in the context of the appeal, among other things: "*An appeal must never be used as an opportunity to punish the employee for appealing the original decision and it should not result in any increase in penalty as this may deter individuals from appealing*" (underlining added). The main ratio in the Court of Appeal Judgment in the case of **McMillan v Airedale NHS Foundation Trust** [2014] IRLR 803 supported this approach. The Tribunal rejected the Respondent's submissions on this issue, encapsulated in paragraphs 38 – 47 of Mr Brittenden's written submission.

200 Given that the Respondent and Mr Feeny's knew that the Claimant had no belief in the authority of Mr Feeny and the difficulties which therefore surrounded his engagement in the process and the absence of any evidence that there had been the normal investigation including a meeting with the Claimant as would have been expected under the ACAS Code of Practice, it appeared to the Tribunal that there were no fair grounds for proceeding with the hearing and then reaching the conclusion that the Claimant had been dishonest such that the appropriate penalty was dismissal.

201 Associated with that point was the fact that as Mr Feeny imposed dismissal for the first time, albeit it was on an appeal, the Claimant complains that he was not given a right of appeal against dismissal. In his letter to the Claimant Mr Feeny (p.308) noted the right to have the matter referred to ACAS where there was a penalty of dismissal. The Tribunal was unable to ascertain from any party how this was meant to work. It appeared to the Tribunal therefore that this was a nugatory right of appeal against the decision to dismiss.

202 Further, it would have been a matter of debate whether the provision in clause 10.5 of the Officers' Agreement which mentioned ACAS was applicable in a case where a dismissal was imposed for the first time on appeal or where as it stated the penalty of dismissal was "upheld" on appeal. The Tribunal saw this as yet another indication that the procedure was sadly flawed.

203 In all the circumstances therefore the Tribunal concluded that the Claimant had been unfairly dismissed both because an unfair procedure had been followed (lack of

reasonably prompt investigation, lack of justification for escalating the matter from an ordinary administrative enquiry to the highest disciplinary action, failure to provide details of the disciplinary matters to the Claimant in good time before the disciplinary hearing and failing to adjourn the outcome of the Claimant's discipline until matters were clear if the General Secretary did not agree with the views or actions of the five NEC members on 2 July 2016. An employer acting fairly would not have put an employee at jeopardy of attending proceedings which could lead to dismissal in circumstances where he had been told by the five NEC members that the disciplinary action had been rescinded.

204 The disciplinary allegation relating to the Claimant having changed his PIN number inappropriately could not properly be relied on by the employer as suggestive of dishonesty or ill intention. There was no evidence which could point to that. At most it caused some administrative inconvenience to Ms Irvine which did not prejudice her enquiries into why the card could not be used by the Claimant on 25 April. It could therefore not support the dismissal decision either taken on its own or with the other charges.

205 In addition, when considering fairness there was the fact that all the information which was reasonably available to the Respondent about the circumstances of the two charges to the credit card was not placed before Mr Feeny or indeed the NEC when it first considered this matter. Finally, as canvassed above, there was the imposition of a dismissal on appeal for the first time.

Polkey

206 The Respondent submitted that there was a 100% chance that the Claimant would have been dismissed even if there had been no substantive procedural irregularity. The Tribunal did not accept that this was likely on the balance of probabilities, having regard to the attitude of Ms Sharkey and Ms Irvine to the infringements at the time, and to the views expressed by Mr Monks about charging items which were not fuel, and also to his view as stated in his oral evidence that if he had been dealing with the discipline issue, he would have called Mr Keating in to an investigatory interview. The Tribunal also took into account the delays between the incidents and the Claimant being asked about them. It was also material that if the Claimant had used the Alto card inadvertently, at a time when he was using the same PIN for all his cards, he would not have had any reason to retain the receipts for a non-work-related expense. It would thus have been all the more problematic for him to establish why he had used the card.

207 As to the Claimant's failure to engage with Mr Feeny, the Tribunal has found that it was outside the range of reasonable responses for the Claimant to be required to attend that hearing in the circumstances of the fractured NEC. The Tribunal rejected the further submission that the Claimant would never have recognised Mr Feeny's authority, without any clarity as to the circumstances which might have pertained if the issue had been independently clarified, as too speculative. There can therefore be no ***Polkey*** deduction or effect as a result.

Contributory conduct

208 The Tribunal found on the balance of probabilities that the Claimant used the Alto card on two occasions. The use was probably unconnected with work. The Claimant

knew that work-related expenditure in the categories specified was what the card was to be used for. The Claimant also knew that the Respondent had in place robust procedures for monitoring use of the card and if there was inappropriate use, reimbursement would be sought from him. He did not know and could not have known how much detail the Respondent could access about the expenditure charged to the card.

209 The Claimant was usually meticulous in the administration of his expenses paperwork, knowing at the end of a working day if he had lost a receipt. He had never previously lost a receipt. However it was fully consistent with the inadvertent use of the card on non-work-related items, that the Claimant would not have retained the relevant receipt, or been aware that he needed to.

210 When an issue had arisen in relation to expenses previously, the Claimant had telephoned the Head Office promptly to inform them. His failure to do so on this occasion was consistent with inadvertent misuse of the card.

211 When the issue was brought to his attention by Ms Sharkey on 23 February, there was no repetition, the second incident having already occurred. It was not in dispute that in relation to charges to the card, the Claimant had not made a claim for expenses. As stated above, if the use was inadvertent on the second occasion, there was no reason for the Claimant to have been aware, even five days later that he had done this. Thereafter it was likely that he had ensured he exercised due care in his use of the Alto card.

212 The Respondent submitted that the Claimant never offered to repay the £67 odd charged to the card, nor did he apologise for any error when it was brought to his attention (the second incident brought to his attention by Ms Sharkey on 15 March – p396). The Tribunal rejected this submission. The first and last words of Mr Keating's short email in reply to Ms Sharkey on 15 March 2016 were "Sorry". In addition he expressed concern about his omission. Further in relation to the failure to offer to repay, whilst this was correct at this time, the Claimant had previously offered in relation to the January charge to do so and he had not heard back from the Respondent, and on both occasions the matter did not progress beyond an initial enquiry of him with the expectation that further enquiries would be made or consideration given to the situation by the Respondent. He also referred to his willingness to repay sums outstanding in his 3 June 2016, shortly after the matter was put to him in Mr Gallaher's letter for the first time after the emails in February and March.

213 Finally there was considerable evidence of mitigation for he Claimant's omission at about this time, by way of the difficult circumstances of the election nomination and the legal actions which were ongoing or contemplated at the time. All this was known to the Respondent at the time and could readily be seen as circumstances in which an employee might make atypical but innocent errors. In his letter to Mr Drinkwater of 3 June 2016 he stated: "*Can you imagine the amount of stress and pressure I have been under since last October?*" If he were acting dishonestly, he would have had no realistic expectation of getting away with it, being aware of the Respondent having robust checking procedures in place. As he himself said to the Respondent (p246) in his letter of 3 June 2016 to Mr Drinkwater: "*…I would be out of my mind trying to steal from the Union….*".

214 In all the circumstances therefore whilst the Claimant was probably guilty of failing to exercise due care in his use of the card, it was an administrative error on his part.

There was little real prospect of the Union losing funds as a result, and there was considerable mitigation. His actions did not cause or contribute to the dismissal in a way which was sufficiently culpable or blameworthy to entitle the Tribunal to find contributory conduct under the 1996 Act.

Remedy

215 The Tribunal will reconvene on a date to be notified to the parties to determine remedy. In the meantime the parties are to liaise with a view to agreeing directions and exchanging updated schedule of loss and counter schedule and defining the issues. Mutual disclosure must so far as possible cover evidence relevant to mitigation of loss by the Claimant and information about benefits lost such as pension, if appropriate. If the parties are unable to agree directions within a reasonable time frame, they should apply to the Tribunal.

Employment Judge Hyde

13 December 2017