EMPLOYMENT TRIBUNALS

Claimants: (1) Mr G Lepiarz
(2) Mr D Lewis

Respondent: Trades Union Congress

Heard at: London Central (via Cloud Video Platform)
On: 27, 28 and 29 February 2024 and 1, 4, 5, 6 and 7 March 2024

Before: Employment Judge Joffe
Mr M Simon
Mr F Benson

Representation
Claimants: Mr P Livingston, counsel
Respondent: Ms K Annand, counsel

RESERVED JUDGMENT

1. The claimants' claims of unfair dismissal are well-founded and are upheld.
2. The claimants caused or contributed to their dismissals by blameworthy conduct and it is just and equitable to reduce the compensatory award payable to the claimants by:
    a. First claimant: 15%;
    b. Second claimant: 20%.
3. There is no chance that the claimants would have been fairly dismissed in any event.
4. The claimants' claims of wrongful dismissal are well-founded and are upheld.
5. The second claimant's claim of direct race discrimination is not upheld and is dismissed.
6. By consent the respondent will pay the second claimant the sum of £1060.80 for unpaid sick pay for July and August 2022.
7. By consent respondent will pay the second claimant the sum of £3005.95 in unpaid holiday pay. This is a gross figure and the respondent will pay the

second claimant the net sum after deduction of the appropriate amounts for tax and National Insurance.

REASONS

Claims and issues

1. There was an agreed list of issues, which as amended, was as set out below. The second claimant's holiday pay issue was also resolved between the parties. It was agreed with the parties at the outset of the hearing that we would hear evidence on liability and the following remedy-related matters: contribution, Polkey reduction, and Acas uplift.

Agreed list of issues

1. Mr Lewis and Mr Lepiarz bring claims of (1) unfair dismissal and (2) breach of contract. In addition, Mr Lewis brings a claim of (3) holiday pay and (4) direct race discrimination. As discussed with the parties at the outset,

(1) Unfair dismissal

2. What was the reason or principal reason for the dismissals? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimants had committed misconduct.

3. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimants? The Tribunal will consider whether:

a) there were reasonable grounds for that belief;
b) at the time the belief was formed the Respondent had carried out a reasonable investigation;
c) the Respondent otherwise acted in a procedurally fair manner;
d) dismissal was within the range of reasonable responses.

4. Polkey - Is there a chance that the Claimants would have been fairly dismissed anyway if a fair procedure had been followed?

5. Contributory fault - If the dismissal was unfair did the Claimants cause or contribute to their own dismissal?

(2) Wrongful Dismissal/Breach of Contract

6. *Were the Claimants guilty of gross misconduct? Were the Claimants actions sufficiently serious that the Respondent was entitled to dismiss without notice?*

~~***Breach of Contract (Mr Lewis only)***~~

~~*7. Did the Respondent breach Mr Lewis' contract in respect to the failure to pay him full pay in July and August 2022?*~~

(3) Holiday pay (Mr Lewis only)

8. *Is Mr Lewis owed any unpaid holiday pay?*

   a) *Mr Lewis says he is owed 26.25 days (para 92 of his W/S)*

   b) *The Respondent says he is owed 17 days (para 54 of Jenny Dixon's W/S)*

(4) Direct Race Discrimination

9. *Mr Lewis complains he was subjected to less favourable treatment on grounds of race, when he was moved to half pay when off sick in July 2022 and August 2022. Mr Lewis' comparator is Mr Lepiarz. Mr Lewis is Black British.*

10. *Was Mr Lewis moved to half pay in July 2022 and August 2022?*

11. *If so, was this less favourable treatment?*

12. *If so, was it because of his race?*

Remedy

13. *Do the Claimants wish to be reinstated to their previous employment? Do the Claimants wish to be re-engaged to comparable employment or other suitable employment?*

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

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

16. *What should the terms of the re-engagement order be?*

17. If there is a compensatory award, how much should it be? The Tribunal will decide –

18. What financial losses has the dismissal caused the Claimants?

19. Have the Claimants taken reasonable steps to replace their lost earnings, for example by looking for another job?

20. If not, for what period of loss should the Claimants be compensated?

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

22. If so, should the Claimants' compensation be reduced? By how much?

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

24. Did the Respondent or the Claimants unreasonably fail to comply with it?

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

26. If the Claimants were unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

27. If so, would it be just and equitable to reduce the Claimants' compensatory award? By what proportion? Does the statutory cap of fifty-two weeks' pay apply?

28. What basic award is payable to the Claimant, if any?

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

30. Is Mr Lewis entitled to damages for injury to feelings?

Findings of fact

The hearing

2. The bundle had not been provided to the Tribunal in a complete and accessible format at the start of the first day of the hearing. Ultimately that meant we lost

several hours of hearing time, which was unfortunate in a claim which was already tightly timetabled. The Tribunal added two days to the existing six day listing so that we could complete our deliberations.

3. We had an electronic bundle running to 1346 pages. We received witness statements and heard evidence from the following witnesses:
For the respondent:
Ms J Dixon, personnel manager;
Ms A Bance, head of campaigns, communication and digital;
Ms M Quiney, head of the management services and administration department;
Mr K Rowan, head of the organisation, service and skills department;
Mr P Nowak, then deputy general secretary.
The claimants gave evidence on their own behalf.

Facts in the claims

4. The respondent is a federation of trade unions. We were told that it has something in the region of 200 employees. Most of the witnesses we saw described themselves as trade union activists.

5. On 17 September 2001, Mr Lewis commenced employment with the department as a departmental secretary.

6. On 4 June 2018, Mr Lepiarz started working for the respondent as a conference assistant.

7. The events which were the subject of the disciplinary charges the claimants faced occurred in 2020 – 2021. They concerned the provision of a website for Newham Trades Council. Ms J Dye is the secretary for Newham Trades Council and arrangements for the website were made between her and the claimants. It is not in dispute that a website was created for Newham Trades Council by Mr Lepiarz. Broadly speaking the parties agreed that at some stage the claimants asked for a payment from Ms Dye. The claimants say that the payment was to cover the costs incurred by Mr Lepiarz in creating and maintaining the website.

8. We were told Newham Trades Council are ‘stakeholders’ in relation to the respondent. Trades councils are supported in their campaign work by the respondent. They pay a voluntary levy to register with the respondent and there is a grant fund they can submit bids for. We were told that they are not provided with ‘business support’, such as IT services.

9. Mr Lewis in his role would liaise with trades councils within his region, London, East and South East region (‘LESE’). Mr Lewis had a cordial relationship with Ms Dye and they used nicknames for one another (‘Mayor’ for Ms Dye, ‘Commander’ for Mr Lewis) in their email correspondence. He provided her with various services on a voluntary basis such as assistance with Zoom codes and with designing and sending out flyers and business cards. These services

appear to have been beyond the assistance he would have been expected to provide to a trades council in his role with the respondent.

10. Sam Gurney is regional secretary for LESE.

11. Some time in the summer of 2020 there was contact between the Mr Lepiarz and Ms Dye as Ms Dye needed help with her computer. Mr Lepiarz offered to assist with setting up a new laptop but ultimately Ms Dye did not take up the offer due to concerns about being visited or travelling during the pandemic.

12. At some point after that there were discussion about the creation of a website for Newham Trades Council. Mr Lepiarz created a website. There were some discussions about payment.

13. On 24 March 2021, Mr Lewis emailed Ms Dye from his TUC email address attaching an invoice. The message said 'New invoice attached. This covers up until 31 December 2021.'

14. On 21 April 2021, Mr Lewis sent Ms Dye an email with the subject Line 'No cheque' in which he wrote:
Mayor (good morning)

Greg has similar to Unity Trust with cheques

He cannot receive cheque as I won't be able to cash it based on this invoice.

Bank details are below: [Mr Lepiarz's bank details]

15. Ms Dye made a payment of £320 to Mr Lepiarz's bank but for reasons which later became apparent, Mr Lepiarz did not believe the sum had been received by him. There were problems with the website in summer 2021.

16. In October 2021 there were emails from Mr Lewis to Lloyds Bank, copying in Ms Dye, (Mr Lepiarz's bank and also Ms Dye's) complaining about the payment having gone missing.

17. On 10 and 11 November 2021, emails were exchanged between Mr Lewis and Ms Dye about the website. These emails show something of the relationship between Mr Lewis and Ms Dye:
Ms Dye wrote:
I have had terrible experiences with my computer today. Working now! Thank you for getting the Weetabix/UNITE Guest Speaker. No reply about Clarkes Shoes. I have sent out the agenda, if Clarkes Shoes can send someone, I can amend the agenda. Have you decided not to send anymore flyers for the meetings? I know you are very busy. If you cannot do the flyers anymore, is there anyway I could learn how to do them? I am still quite unwell and have had a lung x-ray. Would I be able to claim for the zoom meeting expenses? I guess an account needs to be set-up?

Mr Lewis wrote:
Sorry to hear about the computer probs, but more so best thoughts with the lungs!!!!!! Please additionally note that you may have another guest speaker join you to speak on major dispute at November meeting, but I will not say anything and get up hopes until I get a concrete YES from them to relay to you and introduce.
Unfortunately, it is not I who have decided not to do flyers for your meetings anymore? That unfortunate honour lies with the team that surround Greg, who were kindly responsible for all the free of charge efforts on behalf of Newham Trades Council, but withdrew efforts when hearing the comments about the website being a 'waste of 'money'. Unfortunately it is like seeing a film at the cinema starring the main lead Commander, but it is not realised that the Commander is a small part of a larger puzzle, being the true stars are off camera. The website. Flyers. And efforts made never ever belonged to Greg, nor me, but so many others committed. And that includes them assisting me with the Zoom bookings, which as said, they are not doing after December 2021. As well as awkward for you, it was just as awkward for them, because they understand the great sincere work you do for Newham as the Mayor, But loose comments by your colleagues suggesting waste of money are a bridge too far, as if those comments actually understood the mechanics they would have cherished what was actually happening at expense and effort to so many seeking no credit. But now that is washed away as the crew are adamant that nothing will be done for NTC no matter how much money could or would be offered. It is now the task of your commentators to do all the things they were criticising. The crew's only outstanding task is making sure NTC receive the money back from Lloyds which they believe from their inquiries is imminent. They want no outstanding bill with NTC, and NTC will not be in a position to say that they had to pay for anything from them – so the financial books are clear and NTC will have the same balance before any website materialised. The TUC were not allowing Zoom on expenses or TCDFs for support Zoom cost – do not think that has changed as a decision. Will send you the December booking in December that was made for NTC, and as mentioned NTC will need to organise the Zooms going forward in 2022. I expect update from additional guest speaker for consideration by this Friday.

Ms Dye replied:
Thank you so much for your kind words about my health. I am excited about the mystery guest speaker. Hope you get confirmation! The whole episode about the website/flyers etc is very upsetting. Everyone was very pleased with the website when it started. It was great. They asked how the website can be updated etc which I could not help with. However, when they could not access the website, they started being annoyed about it and the money. When the website was working well, the money was not a problem. I don't know why it stopped working and disappeared. Such a shame. I thought, as all this Japanese type stuff kept coming up, it must be hacked. It is a shame it all went wrong. Pity about the flyers too. Hopefully, Lloyds Bank will get sorted. It would be helpful if TUC had an information leaflet about what can and cannot be claimed for on the TCDF. I don't want to waste everyone's time, sending in forms with the wrong things. Never mind.

18. Ms Dye contacted Mr Gurney on 11 November 2021 and they spoke about a week later. Ms Dye raised concerns about the provision of a website and other services she had received from what she said she had taken to be the TUC via Mr Lewis and another colleague named 'Greg' (Mr Lepiarz's first name). Ms Dye said that she had been led to believe there was a team of people at the TUC who could help with various issues. Mr Gurney reported in his later statement that she said that the relationship had soured after money was requested for designing and hosting the website, which she had initially believed would be free. There were then issues after she paid money and it appeared it had not been received.

19. On 24 November 2021 Ms Dye emailed Mr Gurney and they spoke again.

20. Between 29 and 30 November 2021, Mr Gurney spoke to Mr Lewis on the phone about what Ms Dye had said. He asked Mr Lewis if he could have given the impression that the support was being provided by the TUC and what had been said about charging.

21. Mr Gurney in a subsequent statement reported Mr Lewis' responses:
Darren said he had initially offered some advice to Jeanette over two years ago, pre covid, when she had mentioned having problems with her computer and subsequently had had difficulty accessing online EC meetings when the pandemic started.
He said he had been clear that he knew a range of people who might be able to help and when he was then subsequently asked about support for creating a website he had said the same thing that there were a number of people who might be able to help. He was clear that he had not said anything that would have given the impression that the support was directly from the TUC.

22. On 29 November 2021, Mr Lewis wrote to Ms Dye:
Please confirm you have seen this message regarding December Zoom please Unfortunately Jeanette, Out of respect for others who were trying their very best by Newham and being taken for granted, the December Zoom that was set up for me for Newham is no longer available. This means for 21 December Newham meeting the codes previously sent to you are no longer valid – Newham will need to set it up your own Trades Council Zoom for December and 2022 onwards. I have a call with Sam at perhaps 4pm, which he may be disappointed by because the only information I have for Sam is – if anyone asks me a question for advice, be it website developers, I make a suggestion for people to approach, and the decision lies with those asking, being Newham in this case. Newham has had 2-years of new direction assistance which is no longer. Your meetings as always remain advertised on TUC website going into 2022. Any future questions on meeting guest speakers or anything are best through the Regional Secretary direct. Many thanks.

23. Mr Lepiarz wrote to Ms Dye from his personal 'Wanderblack' email address at 17:37. He asked for bank details to pay the money back to Ms Dye. He opened the email in the manner of a letter with Ms Dye's address. Given the role played

by this email and Mr Lewis' subsequent emails in the disciplinary proceedings we set them out in full:

I'm contacting you regarding the web service provided to you from 7th October 2020 until 8th of October 2021.
As you recall on 31st of March 2021 you have received an invoice for £320 to cover the cost of web hosting and domain cost only (which I paid on your behalf to Media Temple Inc – your service provider) for period from 7th October 2020 to December 2021)
This is excluding the cost of 73 hours of web design and web administration (normally charge £30 I hour) which I was keen to provide pro bono for the cause however due to lack of appreciation and understanding from your side I terminated service on 8th October 2021. As you were aware, and I confirmed this today during our telephone conversation (Monday, 29th November 2021, 2.19pm), I never received the requested payment.
However as I cannot afford any more time wasted on this and do not wish to discuss this matter any longer I'm willing to send you £320 to your account to conclude this matter.
It is my understanding that for this matter to be closed once and for all you need to receive £320 to your bank account which you arguably sent to me. Please confirm that is what you required and please provide as soon as possible your bank details, full name of the account holder.
Please also note that once you received £320 I will not accept any responsibility for this matter and if I receive any more communication from you directly or indirectly I will contact my solicitor for further advice.
In the meantime I will contact the bank and decide on the next step how to escalate the investigation. If I have any need to contact you I will do it through a solicitor.

24. It became apparent in evidence to the Tribunal that Ms Quiney, when considering this email during the course of the disciplinary proceedings against Mr Lepiarz, had read it as an email demanding payment from Ms Dye, rather than an email requesting bank details so that Mr Lepiarz could return money to Ms Dye. Another feature of this correspondence which Ms Quiney identified to the Tribunal as contributing to what the respondent ultimately concluded was bullying and harassment was Mr Lepiarz's suggestion that he would communicate with Ms Dye through a solicitor.

25. Mr Lewis wrote to Ms Dye at 17:54:

Good evening Jeanette,

I sign this message as Darren, rather than TUC because when first giving Greg, and numerous others that has helped him with doing the best by Newham, money earning was never the target, just respect by Newham Trades Council.

As he has stated - please send over your bank account details, so this matter can be brought to a close on something he never ever received.

If, and when you receive any update from Lloyds on why the money went missing in the first place, you also keep the returned funds by Lloyds, as this matter is permanently closed, as there can be nothing more to discuss.
You keep dealing with the Lloyds matter to claim the additional £320, but this money by Greg is independently returned to dissolve a frustrating conversation, that has not been helped by Sam conversation on a matter that he did not need to know about, or I did not need to find myself talking to Sam about.

I want to thank Greg & Co for all their hard work, and financial vigour to close down this conversation on a matter that is not their fault.

My commitment to Newham and all Trades Councils has not changed, but my appetite to make progressive suggestions is no more because of this unfortunate avoidable episode - now closed.

Please send your account details including sort code for payment as soon as possible

Thank you.

25. Mr Lewis wrote to Mr Gurney at 20:15 saying he had not designed a website or been paid for a website.

26. Then at 5:49 am on 30 November Mr Lewis wrote to Ms Dye (variations in font size and bold and underlining from original message)

Greg said:
However as I cannot afford any more time wasted on this and do not wish to discuss this matter any ***longer I'm willing to send you £320 to your account to conclude this matter.***
It is my understanding that for this matter to be closed once and for all you need to receive £320 to your bank account which you arguably sent to me.
Please send Greg your correct bank details Account and Sort Code to make immediate bank transfer to you.

• Also, no matter when Lloyds Bank inform you what happened with your misplaced payment and reimburse you, Greg, nor I, do not need or want to know the reasons why error occurred.
Greg has already instructed his bank that whenever they locate the missing funds, it is immediately
returned to you also.

• Respectfully, I have no interest in this episode anymore, and to stop all talk on this matter, Greg needs your bank details immediately.

The story and solutions then belongs to you and Lloyds, and has nothing to do with Greg. And definitely nothing to do with me.

• Also, please make sure you have your December Newham meeting covered for Zoom with alternative sponsor.

Thank you.

Darren

Please further note and understand Jeanette – without Greg and his crew investing their own money and time from 2-years ago consistently - Newham would have not been able to boast a quality website.

The only reason the website ever had interruptions was not from being hacked, but because more money was required, which Greg again paid with his own money. This matter is closed as soon as you supply your bank details today Jeanette and you are transferred £320,

27. Also on 30 November 2021, at 3:39 am, Ms Dye wrote a long email to Mr Gurney raising issues. She said that she was not raising a 'formal' complaint. She explained that Mr Lewis had helped her with her broken computer in 2020 and also with some Zoom connection problems in the past. She had been introduced to him by Mr Sutton in early 2020 when she needed some assistance. He had helped her with flyers for meetings and had been very friendly,. She said that Mr Lewis had suggested a website in February / March 2021 and proposed Mr Lepiarz to help. She had had some communications with Mr Lepiarz. She thought the website was free as it was trades council support. Then she was asked for money for the work involved and told would have to pay a rental fee every year. She made a bank transfer around 28 May 2021 from her own account. In July 2021 the website was down and members complained. She was confused that she was being told that Greg and the design team did not work for the TUC, she said by both Mr Sutton and Mr Lewis. She was upset that there was no longer a friendly relationship.

28. At 10:16 on 30 November 2021 Mr Gurney emailed Mr Rowan forwarding Mr Lewis' email of 2015 the evening before. He said that he needed to discuss the Newham website issue with Mr Rowan. He had spoken to Mr Lewis, who had been adamant that he had not given the impression that the service was being provided by the TUC and that he had suggested a number of suppliers

29. Later that day, at 16:46, Mr Rowan emailed Ms Dixon, asking her to 'swiftly' start a disciplinary investigation against the claimants in light of the issues brought to his attention by Mr Gurney. Ms Quiney was copied in. Mr Rowan said that it had been brought to his attention that Newham Trades Council had received IT services provided by Mr Lepiarz and facilitated by Mr Lewis, offered in the name of the TUC and charged for. He said that 'you may wish to consider swift action to prevent any TUC emails from being deleted.'

30. On 1 December 2021, Mr Gurney sent to Mr Rowan various of the emails he had been sent by Ms Dye, which included Mr Lewis and Mr Lepiarz's emails of 29 and 30 November 2021. There were also emails exchanged between Ms Dye and Mr Lewis, with Mr Lepiarz copied in. Ms Dye wrote to say that it was terrible that Lloyds had made a banking error and perhaps a solicitor was needed to help with it. She said that she was deeply saddened that the claimants were both aggravated and annoyed with her. She was upset about the damage to their TUC working relationship. She provided her bank details. Mr Lewis wrote back to say that the money would be paid to Ms Dye and he hoped the matter could be closed. Ms Dye wrote again to say that hopefully the bank matter could be sorted out and they could all go back to normal. It was a sad situation and Lloyds bank was to blame for it

31. Ms Dixon spoke with Mr Rowan and advised him that suspension was appropriate. The reasons she gave the Tribunal for that advice were that there was an allegation of financial impropriety and an indication that TUC email addresses had been used. She said that the suspension was necessary to secure and preserve evidence.

32. It was put to Ms Dixon in cross examination that emails deleted from TUC email addresses could be retrieved. She agreed that she now understood that to be the case. Ms Quiney's evidence was that at the time she believed that the emails would be permanently deleted but she subsequently learned they were retained in the cloud for six months. It was apparent to us that neither at the time of suspension nor subsequently did any relevant person investigate ways of preserving email evidence.

33. Mr Rowan spoke with Ms Quiney and they sought approval for the suspensions from Mr Nowak which was granted. Mr Nowak said that he was asked to approve the suspensions so that any relevant evidence could be preserved and a fair and thorough investigation could be pursued and because of reputational risk to the respondent.

34. Mr Lepiarz was working in the office that day so Ms Dixon went to see him and informed him of his suspension in person. Mr Lewis was working remotely so Ms Dixon telephoned him. She made notes of the points she planned to cover in the discussions in advance and the claimants were provided with those notes, to which she added some notes of points they raised. The manner of the suspensions gave rise to grievances which we discuss below.

35. Ms Dixon's notes were as follows:

Suspension Notes – Grzegorz Lepiarz: 1 December 2021 • Meeting relates to information received by management regarding alleged misconduct • Allegation regarding Newham Trades Council and provision of paid IT services • In light of the allegations and to allow for a full investigation – DGS has approved suspension from work on full pay • Not an indication of disciplinary decision or sanction • During suspension – won't be able to access the building without prior notification • IT access will be suspended • Access card will be suspended • Will be writing to arrange investigation meeting date/arrangements – check home address • Provide list of rep and contact details • Ask if any personal effects that needs to be collected – if so, will need to escort to collect these • Will be asked to leave building immediately once personal effects collected and to refrain from using IT • Any immediate questions Note: As no reps were in the office, Ian Gifford, Events Manager attending the meeting as witness Questions from GL/JD's responses • How long suspension – initially 2 weeks with ongoing review • When will investigation be – within the next week • Can I have solicitors/lawyer at investigation meeting – suggest to discuss with union rep • Confirmed personnel will respond to queries in a timely manner, work allowing for this • Will provide information regarding investigation • Requested Cascade information: - All information on Document screen - Payslips - P60 - Holiday/sickness records since start of employment
Suspension Notes – Darren Lewis: 1 December 2021 • Call relates to information received by management regarding alleged misconduct • Allegation regarding Newham Trades Council and provision of paid IT services • In light of the allegations and to allow for a full investigation – DGS has approved suspension from work on full pay • Not an indication of disciplinary decision or sanction • During suspension – won't be able to access the building without prior notification • IT access will be suspended • Access card will be suspended • Sending letter confirming suspension and arrangements during suspension • Will be writing to arrange investigation meeting date/arrangements – check home address • Provide list of rep and contact details - posted • Any immediate questions Points from DL • Race relations cttee at 5.30 • Sam Gurney to let people into the meeting • need to speak to delegates • Sam to accept people into meeting • Need moderator

36. We heard some evidence about Ms Dixon's practice in relation to HR matters; she did not routinely make notes of phone calls or keep file notes. We observe that she did not seem to have had a system on place for keeping all of the emails and documents together for the ongoing investigation.

37. On 2 December 2021, Ms Dixon wrote to Mr Lepiarz, inviting him to a disciplinary investigation meeting on 7 December 2021:

The reason for the meeting is to discuss the following allegations, reported by management: • that you allegedly provided IT services to Newham Trades Council, and charged them for this service, which was facilitated by Darren Lewis, Secretary/Administrative Assistant in London, East and South East (LESE) • that you allegedly offered these paid for services to Newham Trades Council giving the false impression that the service was being offered by the TUC to trades councils • that you allegedly used your TUC email account to

provide the service and communicate as a service provider with Newham Trades Council

38. On 3 December 2021, Ms Dixon wrote to Mr Lewis inviting him to a disciplinary investigation meeting on 8 December 2021:

the reason for the meeting is to discuss the following allegations, reported by management: • that you allegedly brokered and facilitated services for Grzegorz Lepiarz, Conference Assistant in Congress Centre, to provide IT services to Newham Trades Council, which he allegedly charged them for

39. Ms Dixon also sent the claimants a copy of the respondent's ICT Acceptable Use policy and wrote to Mr Lepiarz saying that she had arranged to have access to his TUC email on 7 December in his presence after the investigation hearing.

40. That policy contained the following relevant sections:

2 ICT facilities are intended for TUC activity, so information sent out, received or accessed should be for this purpose. There may be some personal use of email and internet, and staff making personal use of these facilities must do so appropriately, in a responsible manner, and in a way that will not potentially bring the TUC into disrepute or place the individual or the TUC in breach of statutory or other legal obligations. Personal use should not be excessive and must not interfere with the individual's job performance or the provision of TUC services. Staff should not store personal files on TUC equipment or systems. Staff should not use the TUC's ICT to make personal commercial gain or conduct a personal business.

4. Not using ICT to undermine TUC's reputation
Staff should not use TUC ICT to undermine the TUC's reputation, brand, values or policies on equal opportunities or dignity at work. This includes using ICT whether anonymous or otherwise to
• Bully, harass or abuse anyone, whether a member of the staff or of the public – see also the TUC's Dignity at Work Policy/Social Media Policy
• Cause the TUC to be accused of making libellous or defamatory remarks
• Access, download, send or receive any data including images which TUC considers offensive, in particular sexually explicit or discriminatory material, unless as part of a legitimate TUC campaign or with the express permission of your line manager
• Gamble
• Act unlawfully including infringing copyright or non-compliance with data protection or any other laws. For example, you should not download music files to TUC systems or equipment unless the music states clearly it is copyright free or you know that the TUC has paid a copyright fee to the copyright owner

Staff should
• adhere to the social media policy and guidance issued around political involvement
• consider the impact of circulating "jokes" or unverified news items, in terms of disrupting people's work or misleading or upsetting other members of staff

• adhere to the data protection policy
Staff should not text, email or use apps apart from satnav apps while driving - see the section on distractions under our Driving at Work Policy
…

8. Monitoring and management access

TUC has the right under certain conditions to monitor activity on its systems, including internet and email use, in order to ensure systems security and effective operation and to protect against misuse including under this policy. Managers may also need to access information for the purposes of a disciplinary process or criminal investigation, or to comply with a legal requirement. There may be some urgent and important operational reasons where senior managers may authorise access to your information in your absence.
Managers will make reasonable efforts to inform you in advance. You should follow wider guidance on storing files in shared spaces to avoid such scenarios.

Any monitoring will be carried out by the IT department and/or the information manager in accordance with TUC internal processes and the law. See the Data Protection Policy for more information including on our approach to monitoring and management access.

41. On 6 December 202, Mr Lewis sent a letter to Ms Dixon raising a range of issues and saying that due to the pandemic and his health he would not be attending the meeting on 8 December 2021. Ms Dixon wrote to Mr Lepiarz that day rescheduling his investigation meeting for 9 December 2021.

42. Mr Lewis sent Ms Dixon two letters on 7 December 2021 raising a number of issues about process. He said that he should only be contacted by post and should receive no phone calls. Mr Lepiarz sent Ms Dixon a sick certificate signing him off with anxiety from 6 to 13 December 2021.

43. On 8 December 2021, Ms Dixon invited Mr Lewis to a re-scheduled disciplinary investigation meeting on 15 December 2021.

44. On 9 December 2021, Ms Dixon spoke with Ms Dye as part of the disciplinary investigation (p229-234). We saw typed notes which Ms Dixon said had been written up from handwritten notes. The latter had not been disclosed in the Tribunal proceedings if they still existed. On this date Ms Dye agreed to her investigation notes being provided to the claimants. These notes were later sent to Ms Dye and her additional comments recorded.

45. On 12 December 2021 Ms Dye wrote to Mr Lewis, copying Mr Lepiarz:
I can confirm that, I have seen this email regarding zoom. Also, I hope Greg was able to be successful with Lloyds bank last Monday. I noticed in the previous emails, it is said that, Greg set-up the website for Newham Trades Council two years ago. This is not true. It is a great pity that money and the website has made all these problems and destroyed a good working relationship we had.

46. On 13 December 2021, Ms Dixon informed Mr Lewis that it would not be possible to have the meeting on 15 December 2021 in person due to government advice and suggested an online meeting on 16 December 2021. Mr Lewis wrote to Ms Dixon asking a number of questions, and saying his trade union representative could not attend on 15 December 2021. He asked for the disciplinary investigation meeting to be held in the week starting 20 December 2021. That day Mr Lepiarz submitted a sick certificate for the period 13-20 December 2021.

47. On 14 December 2021, Mr Lewis wrote again requesting a meeting in the week commencing 20 December 2021. Mr Lepiarz wrote to Ms Dixon, Ms O'Grady and Mr Nowak saying that he would attend a meeting when advised by his doctor but would need a reasonable lead time to arrange representation.

48. On 16 December 2021, Ms Dixon suggested to Mr Lewis that they have a disciplinary investigation meeting in the week commencing 17 January 2022 (as she was not available in the week commencing 20 December 2021). She suggested the same time period to Mr Lepiarz.

49. Also that day, Ms Dixon had a second discussion with Ms Dye and added notes of that discussion to the notes of the previous meeting. One matter Ms Dye mentioned in these discussions was that not only Mr Lewis but also Mr Sutton had recommended a 'Greg' to her. Both Mr Lewis and Mr Sutton had said the Greg they were recommending did not work at the TUC. The Greg she had been in touch with had a TUC email address. It was not clear to the Tribunal whether the communications Ms Dye had directly with Mr Lepiarz via a TUC email address were limited to the initial contact about Mr Lepiarz helping her set up her laptop.

50. Ms Dye's account at this meeting was that Mr Lewis suggested a website for Newham Trade Council around February / March 2021 as an alternative to sending out flyers. She said that she did not think it was a great idea and when she discussed it with the chair and vice chair, they did not think it was necessary but said that if it was free it would be OK to go ahead. She said that she started being asked for money in about May 2021. She did not feel she could let the chair and vice chair know so she had to open a bank account and make the payment from her own money. The website was not working in July 2021. She said that at that point Mr Lewis was aggressive and horrible to her about the money, which he said had not been received. The website was cut off. Mr Lewis said he would not help her any more. Ms Dye also raised concerns that the claimants knew her home address and she felt vulnerable.

51. On 21 December 2021, Mr Gurney wrote a statement for the disciplinary investigation. He recounted that Ms Dye said she had been told there was a 'team of people' who could support her/her trades council and that Darren [Lewis] had been in regular contact over a period of time and had been very helpful on IT issues, leaflet production and then on the web page design.
She then went on to say that the relationship had soured after she had been asked to pay for the design and hosting of the website; she indicated that she

had thought this was free as it was the TUC providing the support and payment had not been mentioned at any point. After the request for payment she talked to other Newham Trades Council officers and they agreed. However she said this had then resulted in a whole series of issues as the money she had tried to transfer had not been received.

52. On 22 December 2021, Mr Lewis proposed to Ms Dixon that his disciplinary investigation meeting be held on 21 January 2022 and Mr Lepiarz proposed that his be held on 20 or 21 January 2022.

53. On 10 January 2022, Mr Lewis submitted a grievance about his suspension; he complained in particular about not being told it was a formal meeting, not being offered accompaniment and not being sent notes to approve.

54. On 17 January 2022 Ms Dixon wrote to Mr Lewis proposing a number of dates between 25 January 2022 and 11 February 2022 for his meeting and sent Mr Lepiarz the login details for an online disciplinary investigation meeting to be held on 21 January 2022.

55. On 19 January 2022, Mr Lepiarz also raised a grievance about features of the suspension process.

56. On 20 January 2022 Ms Dixon sent Ms Dye a copy of the disciplinary investigation meeting notes from 9 December and 16 December for approval. There were various longueurs in the process of obtaining Ms Dye's evidence that Ms Dixon was unable to fully account for to the Tribunal given the lack of records she had kept. Ms Dye asked for an extension of time to submit her comments on 27 January 2022.

57. On 21 January 2022 Ms Dixon and Ms Lepiarz met for a disciplinary investigation meeting via Zoom. Mr Lepiarz asked if the investigation meeting should go ahead given that he had raised a grievance. Ms Dixon spoke to Mr Nowak who agreed that the disciplinary process could be suspended until the grievance had been heard.

58. On 25 January 2022, Mr Lewis attended a grievance hearing with Ms Bance. Mr Lepiarz attended a grievance meeting also with Ms Bance on 28 January 2022.

59. On 26 January 2022, Ms Dixon wrote to each claimant to say that Mr Nowak had agreed that their disciplinary processes would be suspended pending their grievances being heard.

60. On 1 February 2022, Ms Bance wrote to Mr Lewis to say that she had not upheld his grievance.

61. On 7 February 2022, Mr Lewis submitted a grievance appeal.

62. On 10 February 2022, Mr Lepiarz raised a second grievance against Mr Nowak on the basis that he authorised the suspension on 1 December 2021. Mr

Lepiarz received a grievance outcome letter from Ms Bance rejecting his grievance.

63. On 16 February 2022, Mr Lewis raised a third grievance relating to the disciplinary investigation meeting held on 21 January 2022. On 18 February 2022, Mr Lepiarz appealed his first grievance outcome.

64. On 24 February 2022, Mr Lepiarz was signed off work sick with an anxiety disorder from 24 February 2022 to 10 March 2022.

65. On 28 February 2022, the claimants attended a grievance appeal meetings held by Mr Nowak. Mr Nowak rejected the grievance appeals by letter of 3 March 2022.

66. On 7 March 2022, Mr Lepiarz was signed off work with anxiety from 7 March to 28 March 2022. On 8 March he was signed off for 6 March to 17 April 2022 with stress.

67. On 9 March 2022, Mr Lepiarz submitted a stage 2 appeal, ie he appealed the grievance appeal outcome.

68. On 23 March 2022, Ms Dixon wrote to each claimant saying that their fit notes were due to expire and saying that she was proposing to make arrangements to hold the disciplinary investigation meetings.

69. On 5 April 2022, Ms Dixon invited Mr Lepiarz to a disciplinary investigation meeting on 12 April 2022. He replied on 8 April 2022 saying that the disciplinary process was suspended and that he had appealed the grievance outcome.

70. Also on 8 April 2022, Ms Dye sent Ms Dixon her amendments to the notes from the meetings in December 2021. There were no documents evidencing contact between Ms Dye and Ms Dixon in this period but Ms Dixon told the Tribunal that there had been some phone calls in which Ms Dye had said that she was having 'some challenges'.

71. On 9 April 2022, Ms Dye sent Ms Dixon a further email with a further statement about the website. In this statement she said that someone other than Mr Lewis had told her in late 2020 that there was someone called Greg and a design team at the TUC who could assist her with flyers and other documents. She raised the design team and Greg with Mr Lewis and Mr Lewis offered to help. When things started to go wrong, both Mr Lewis and Mr Sutton told her that the Greg they had recommended did not work for the TUC. Ms Dye was confused as to whether there were three different Gregs:

I had seen DL at many meetings and we always acknowledged each other. However, when covid started and everything was online, I had computer issues. I was advised to ask DL for some help and support. This was

approximately May 2020. DL was very helpful and introduced me to GL. We could not get very far with his help, due to covid. He seemed like a nice person though.
When I asked someone else for design help (end of 2020) about flyers and headed paper etcs. They said, there was someone called Greg and a design team at the TUC. But, because of covid, the team were working from home and we could not meet in person and get help. But, this person said, they have always worked with Greg for years. So, I fully trusted the TUC and Greg and thought, this must be the same Greg.I told DL about Greg and the design team help that I would like to increase the interest in Newham TC and DL offered to help with this matter.
Next, it got to February, 2021 and DL suggested a website, set up by GL. I was not eager about a website. As it was free, NTC agreed. Then, a payment was required. The payment could not be made by cheque. So, I done a bank transfer (May 2021). GL did supply an invoice. But, the previous two years work, is not entirely true?
The website started to malfunction in July, 2021 and I informed DL. He said, GL was annoyed that, the money has not been received. GL cut off the website in September 2021.

72. Ms Dye also emailed Ms Dixon in the early hours of 9 April 2022 to say that she did not want her investigation notes to be sent to the claimants as she was 'too frightened and vulnerable' and then again to repeat some points about her evidence and to reiterate that she did not want her notes sent to the claimants as she was 'at risk'.

73. On 11 April 2022, Ms Dye sent further amendments to her investigation meeting notes. She indicated that the discussions about web design had been with Mr Lewis and not Mr Lepiarz and said:
Whether GL or DL told me that I would need to pay for the website. I said, my impression was that, the website was free but, then about 4 or 6 weeks later, DL started asking for money on behalf of GL. DL contacted me directly to ask for a fee for the website and then, about 4 weeks later, I was told that there was an annual rental required for the website as well. Which I was not expecting, this makes it quite expensive.

74. That day Ms Dixon also wrote to Mr Lepiarz asking that he respond to the disciplinary investigation questions in writing as they had not been able to meet in person.

75. Mr Lewis was signed off work with anxiety and stress at work from 11 April 2022 to 11 June 2022.

76. On 12 April 2022, Mr Lewis wrote to Ms Dixon stating that he was not prepared to provide written answers regarding the disciplinary allegations as the disciplinary process had been suspended due to the grievances raised.

77. The claimants had meanwhile been in touch with Stephen Timms MP about the disciplinary issues, who in turn had been in touch with Ms Dye. On 13 April

2022, Mr Timms wrote to Mr Lepiarz setting out Ms Dye's account of events). She said:

In September 2020, I had computer problems and was advised that, the minute-taker (DL) at the TUC meetings would probably be able to help, as he is involved with Trades Councils work. He did help and sent out some emails for Newham Trades Council meetings and, because of covid and, working from home, he became very friendly over the phone. Someone else (RS) said, there are many people at the TUC offices that could help me with my flyers etcs and computer issues and this included someone called Greg. Also, the person that had been helping me (DL), suggested someone called Greg who works at the TUC, would be able to look at my computer. So, I thought, with all these recommendations, this Greg must be the same person and someone I could trust. As (DL) seemed trustworthy as well. I had known (RS) for a long while and thought, if he was recommending Greg, it must be ok. However, on reflection, I thought, I did not want him/Greg, to come to my house because of covid at the time. So, I bought a laptop. Greg did not visit.

In February 2021, the minute-taker (DL), suggested that, Newham Trades Council have a website. I was not very keen, as we have a facebook page. But, he said, it would be free and websites are very popular. So, I said, ok. He said, Greg would set it up. It was set up in March 2021. Then, in May 2021, I was asked to pay for it. I was asked to pay £320 and there were some lies involved, i.e. he said, Greg had been working on the website for 2 years. Also, Greg wanted to be paid by bank transfer and not a cheque. I done the bank transfer in May, 2021 and Greg kept saying, he had not received it. Lloyds Bank said, it had gone through. From June 2021, the website was not functioning properly. Then, Greg switched off the website in August 2021. There has been a lot of bad feeling and nastiness ever since from Greg and (DL). I sent a complaint to Lloyds Bank and emailed Greg about the bank transfer, asking if the matter had been resolved. But, he refused to answer me. I posted him a letter and the receipt for the bank transfer, as proof of the transaction. The money came out of my bank account. I have no idea what the outcome is regarding the money. I only know that, Greg and his colleague (DL) have completely changed over the money. When all this started to go wrong, the two people (DL) and (RS) both said, the Greg they knew did not work at the TUC but, it turns out, he does. I have told the TUC because I was very upset about their (Greg and DL) attitude and how they had both instantly changed and were being extremely horrible towards me, no longer nice and friendly. It is unbelieveable. Therefore, the TUC are looking into the matter.

78. This account of the original encounter with Mr Lepiarz and the reasons why he did not visit to help her with her laptop is consistent with what Mr Lepiarz told the Tribunal.

79. On 13 May 2022, Ms Dixon wrote to Mr Lewis, asking that he respond to the disciplinary investigation questions in writing as they had not been able to meet in person.

80. On 19 May 2022. Mr Lewis responded to Ms Dixon to say he would not be answering the questions in writing for a number of reasons, including his health

and wellbeing and the fact that the disciplinary process had been suspended for his grievance to be heard. Ms Dixon wrote to Mr Lepiarz that day to advise him that Mr Nowak had agreed to restart the disciplinary process. She noted the deadline for responding to the questions was 5 days after he received the grievance appeal outcome letter.

81. On 28 May 2022, Ms Dye emailed Ms Dixon about the investigation notes and documents, and provided further comments:
As I have not heard from you, I have decided to post you the original notes and amended notes, all signed. I have enclosed the invoice, as requested and the Lloyds statement/proof of payment. I had a lovely, nice working relationship with Darren Lewis and Greg seemed very nice too.
I am appalled that, this sum of money has gone missing, as a result of Lloyds Bank. I hope this situation has been resolved.
I was very surprised and saddened that, Darren and Greg have turned against me, instead of us working together to sort out Lloyds bank and where my payment has gone precisely. What happened to the £320? Have I lost the money or, has Greg received it now?
I am very unhappy and upset about the whole situation.

82. On 30 May 2022, Mr Lepiarz attended a stage 2 grievance appeal meeting held by Baroness O'Grady, then the respondent's General Secretary. On 31 May 2022, Baroness O'Grady wrote to him rejecting the stage 2 grievance appeal.

83. On 8 June 2022, Mr Lewis was signed off sick due to stress at work until 30 June 2022. Ms Dixon wrote to Mr Lewis on 15 June 2022 to state that the grievance process was over as he did not appeal the appeal outcome. She also said that she was arranging an occupational health appointment to ascertain whether he was fit to participate in meetings.

84. On 27 June 2022, Mr Lewis was signed off work with an anxiety disorder until 15 August 2022. On 28 June 2022, Mr Lepiarz was signed off with anxiety until 25 September 2022.

85. The respondent wrote to Mr Lepiarz on 30 June 2022 to say he would move to sick pay at half rate from 15 July 2022.

86. On 1 July 2022, Mr Lepiarz wrote to Ms Quiney, complaining about what he said was the unreasonable length of his suspension:

I am writing to you as I have serious concerns about the unreasonable length of suspension imposed on me.

Sanctions imposed on me since Wednesday, 1 December 202, have unarguably had an immense impact on my health as well as leave me with loss of income due to lack of overtime pay.

I believe Management is not progressing with the investigation with reasonable

swiftness, therefore before considering escalating this matter I endeavour to resolve the matter formally by a direct approach to you and request a meeting where we can discuss my concerns.
This has not been reported to ACAS who directly advised me to raise this a concern and if not resolved raise a grievance.

I will also be now following ACAS advice and forward this case to the solicitor for independent advice.

Taking into account my mental state I will need plenty of notice of a meeting so I have the opportunity to arrange for someone to attend the meeting to support my mental health.

87. That day Mr Lepiarz also wrote to Ms Quiney regarding the decision that his sick pay would be reduced saying that he would like a meeting to discuss his concerns. On 13 July 2022, Mr Lepiarz withdrew his sick note so that he would not move to half pay.

88. On 15 July 202, Mr Lewis' gross pay was reduced. The respondent's sickness absence policy provided that employees would receive their basic remuneration during sickness absence, subject to the following discretion:

'However for periods of extended or repeated absence on sick leave the TUC may on review of the circumstances discontinue the payment of all or any part of the salary.'

89. Also on 15 July 2022, Mr Lepiarz was invited to a disciplinary hearing to answer the following charges:

- that he provided IT services to Newham Trades Council, and charged them for this service, which was facilitated by Darren Lewis, Secretary/Administrative Assistant in London, East and South East (LESE);
- that he offered these paid for services to Newham Trades Council giving the false impression that the service was being offered by the TUC to trades councils;
- that he used his TUC email account to provide the service and communicate as a service provider with Newham Trades Council.

90. Further, on 15 July 2022, Ms Dixon and Ms Dye exchanged correspondence and Ms Dye sent an amended statement. They met that day at a Morrisons' café so that Ms Dye could hand over some documents. They had a brief meeting and Ms Dye reiterated that she was frightened by the way the claimants had behaved and did not want them to see her statement.

91. In this statement, Ms Dye said inter alia that the chair and vice chair of Newham Trades Council had thought that the website was a good idea. She went on to say: 'Everything was good. A set-up fee was agreed. But, the rental fees were not as expected. I had no idea that rental was to be paid. However, it seemed quite cheap and all ok.' In this statement, she seemed to blame Lloyds for the problems and said that it was Mr Lepiarz who had blamed her. 'Obviously,

Darren would support his work colleague who he probably knows more than me.'

92. On 17 and 18 July 2022, Ms Dye sent Ms Dixon further emails. Ms Dye seemed troubled by the results of raising her concerns. She said she had not made a formal complaint; she had just wanted some help. She had had no idea it would lead to disciplinary action. She said that Greg and Darren had been good friends and that was another reason why she did not want her statement shared with them.

93. On 21 July 2022, Mr Lewis was invited to a disciplinary hearing to answer a charge that he had brokered and facilitated services for Mr Lepiarz to provide IT services to Newham Trades Council, which he allegedly charged them for.

94. On 27 July 2022 Ms Dixon sent a bundle of the case documents to the claimants' trade union representatives.

95. On 4 August 2022, Mr Lepiarz attended a disciplinary hearing in front of a panel of Ms Quiney and Mr Rowan.

96. On 12 August 2022, Mr Lewis attended a disciplinary hearing before Ms Quiney and Mr Rowan.

97. Various indices for the bundles of documents used at the disciplinary hearing were provided to us after the Tribunal hearing started. This timing was surprising given how important the issues of what documents were in front of the panel and what documents the claimants were provided with were.

98. In terms of evidence, the claimant and the panel had the following emails (as described in the index):
24.03.21 From Darren Lewis to NTC @ 5.09pm - Invoice
2 21.04.21 From Darren Lewis to NTC @ 11.06am - No cheque
3 05.06.21 From NTC to Darren Lewis @ 8.14pm - Update
1333

4 15.10.21From Darren Lewis to Llyods Bank/NTC @ 6.16am - Missing Payment at Lloyd - URGENT attention
required !!!!!!!!!!
5 30.11.21 From Sam Gurney to Kevin @ 10.18 - FW: Newham Trades Council: Update
6 30.11.21 From Kevin Rowan to Jenny Dixon @ 16.36 - Private and Confidential
7 01.12.21 From Sam Gurney to Kevin Rowan @ 10.42 - Newham TC email 1
8 01.12.21 From Sam Gurney to Kevin Rowan @ 10.42 - Newham TC email 2
9 01.12.22 From Sam Gurney to Kevin Rowan @ 10.43 - Newham TC email 3
10 05.12.22 From NTC to Darren Lewis @10.53pm - Urgent - Update on web hosting service

99. The documents relating to the bank transfer were also in the bundles as well as the statement from Mr Gurney and Mr Timms' email of 12 March 2022.

100. The panel also had Ms Dye's statement (ie the consolidated notes from the two meetings in December 2021) and her further statement of 15 July 2022.

101. The respondent's evidence as to who decided that Ms Dye's statements should not be provided to the claimants was not altogether clear. Ms Dixon said that she took advice from the respondent's data protection officer, Ms A Pearce, who said that, as Ms Dye had expressed that she was vulnerable, her statement should not be shared. Ms Pearce did not refer Ms Dixon to any specific provisions of GDPR. Ms Dixon said that as a result of this advice, she took the decision not to share Ms Dye's statements with the claimants. She did not, however, consider that the statements should not go to the panel. In cross examination, she did not see that there was any potential unfairness in this approach.

102. In oral evidence, Ms Quiney initially said that this decision had been made by her and Mr Rowan; she then said she could not recollect and perhaps the decision had been made by Ms Dixon, but it was one which she agreed with. She did not recall whether she had spoken directly with Ms Pearce herself and did not have an understanding of the basis for Ms Pearce's advice.

103. The other communications from Ms Dye were not provided by Ms Dixon to the panel although she agreed that it was an error not to have included those documents. She said that they were just missed by her and should have been shared.

104. We saw notes of both disciplinary hearings.

105. In his disciplinary hearing, Mr Lepiarz gave an account of his interactions with Ms Dye. He initially had not been told by Mr Lewis who the website was for. He said he built it in his own time out of work. Communications about the website had come through Mr Lewis. He had previously had interactions with Ms Dye about helping with her computer. Mr Lepiarz said that he could not recall any conversations with Ms Dye via his work email and that he had used his personal email as he was doing the work on a voluntary basis. There were no emails in the bundle which showed Mr Lepiarz using his TUC address to correspond with Ms Dye. He did not know why Ms Dye would have had the impression that the website was a TUC service; he had not done anything to give her that impression.

106. Mr Lepiarz said there had never been any intention to profit and no profit had been made. He had used his own money and had made a loss. He had no web design clients and it was not his area of business. He considered it was voluntary work. He had not sought authorisation for the work but he had asked Ms Dixon generally about whether he could do voluntary work and she had said he could, as long as it was not work for someone contrary to TUC values or undertaken in work time.

107. Mr Lepiarz explained that the reference to £30 per hour costs in the emails with Ms Dye was what he had been told by someone who did web design that this service would cost. He had never provided web design services himself.

108. There was a discussion about how the invoice had come to be produced:

86. GL replied that he had for a long time been out of pocket. He told DL that he was more than happy to use his free time but financially could not pay anymore. He needed to have a discussion with DL and for him to tell him what to do.

87. DL asked him how much he had paid, and GL told him that in the end the cost was £100. It depended on dollar conversion and that if they continued he wanted him to cover costs. The next thing he knew, DL had sent an invoice to JDy who was happy to cover costs, partially what had been paid. GL had said okay, but that he did not really do that kind of service (ie with an invoice). DL had told him that JDy needed some kind of receipt in a name she could send money to. DL suggested that the invoice should be for £320, to send it to him and he would deal with it and send it on.

105. Mr Lepiarz produced documents which he said showed he had incurred costs on the Newham Trades Council website of some $720. Although Mr Rowan and Ms Quiney both suggested in evidence that the costs incurred for the NTC website were unclear to them from these documents, they did not ask Mr Lepiarz to explain the documents in any way or to produce additional supporting evidence.

106. Mr Lepiarz was asked about what were described as ‘intemperate’ emails from him and Mr Lewis after the problem arose with the payment. He said that he had only recently become aware that he had been checking the wrong bank account and had in fact received the payment from Ms Dye. He said that he had not blamed Ms Dye for the problem and had just been seeking to resolve it. Ms Dye had said she had sent the receipt by post but it had not been received. He said that Ms Dye had been persistent and unpleasant about contacting him to see whether he had received the money. He was upset as there was no appreciation of his work.

107. Mr Lepiarz pointed out there were references to ‘RS’ and ‘Roger’ in the evidence but he did not know who that was. We note that these were references to Mr Sutton, the Greater London Association Trades Council treasurer. He wanted questions to be put to that person. Ms Quiney suggested that the panel might seek further statements. Mr Lepiarz asked if he could see the documents from Ms Dye which had not been shared with him and was told he could not but that the panel would look at all of the evidence. He subsequently sent a request asking for various questions to be asked of potential witnesses including Mr Sutton about the arrangements with Newham Trades Council. He suggested that other Newham Trades Council officers be spoken to and minutes of meetings be looked at.

108. Mr Lewis in his hearing said that it was Ms Dye who had asked him for suggestions for someone to make a website. He had told her it would be voluntary work and not work done on behalf of the TUC. Mr Lepiarz was one of the people he had suggested. He said that Ms Dye had asked him to send her the invoice. She was responsible for the figure of £320. There had been no intention for Mr Lepiarz to make any financial gain. He said that there were missing emails which should be looked at and that he had sent a list of witnesses who should be spoken to. The panel asked Mr Lewis to reflect on the tone of his to Ms Dye of 29 and 30 November 2021 and Mr Lewis said that he was happy with what he had done.

109. On 15 August 2022, Mr Lewis' sick pay was again reduced.

110. On 17 August 2022, Mr Lewis was sent a letter informing him that he was summarily dismissed:
While the service was directly provided by Grzegorz Lepiarz, the panel found that you were directly involved in bringing this service and service provider to the attention of the Trades Council and directly involved in seeking payment against the above referenced invoice. This implies that this is a joint activity. In respect of this allegation, the panel find that you are in breach of our conflict of interest policy and that you breached our disclosure of interest policy. These both amount to acts of gross misconduct.

111. In addition to the single original charge, the panel also considered:
Providing a fraudulent service and misrepresentation - that by facilitating paid for services to Newham Trades Council, you gave the false impression that the service was being offered by the TUC
You contended that you were unaware of the impression given that this was a TUC service. The panel felt that this was unlikely.
Bullying and undermining the TUC's reputation
The panel was alarmed by the tone of emails from you concerning payment and also the withdrawal of TUC support for Newham Trades Council. This undermines the TUC's reputation and constitutes bullying and harassment, in particular to an individual who has a stakeholder relationship with the TUC.
The panel noted the distress caused to Jeanette Dye, which is significant and totally unacceptable.
You stated in the hearing that you did not consult with your line manager prior to taking a unilateral decision to withdraw support to Newham Trades Council and that your email confirms you intended to raise this with him only after sending the email to Jeannette Dye.
The panel finds that this behaviour falls extremely short of conduct expected of TUC staff and amounts to gross misconduct.

112. Also on 17 August 2022, Mr Lepiarz was sent a letter informing him that he was summarily dismissed.

113. The original charges were set out and then the 'panel's concerns':
Conflict of interest/providing an unauthorised service*: that you allegedly*

provided IT services to Newham Trades Council, and charged them for this service, which was facilitated by Darren Lewis, Secretary/Administrative Assistant in London, East and South East (LESE)

The panel explained that evidence showed that you provided IT services to Newham Trades Council and that they were charged for this service. You agreed that you provided this service but contended that it was provided on a voluntary basis and that the subsequent intention was to charge only for costs incurred by you. However, it is not disputed that money changed hands. You said at your hearing that the costs involved were £100 and that Darren Lewis had suggested that this was made up to £320 as the total sum charged in your invoice. While Darren Lewis agreed that the sum had been made up to £320 from the costs involved of £100, he did not agree that this had been his suggestion. The panel found that you and Darren Lewis did collude to charge for the service you provided.

114. The panel went on to find that this was a breach of the 'conflict of interest policy', breach of the 'disclosure of interest policy' and a failure to follow written instructions about furlough and that 'these all amount to acts of gross misconduct'.

115. In relation to the next 'concern', the panel found:

Providing a fraudulent service and misrepresentation *- that you allegedly offered paid for services to Newham Trades Council giving the false impression that the service was being offered by the TUC to trades councils*

In addition, you charged beyond the costs incurred for the service while giving the false impression that this was charged for on a costs basis.:

116. A further 'concern' was:

using our IT/ITC systems in an unacceptable way *- that you allegedly used your TUC email account to provide the service and communicate as a service provider with Newham Trades Council*

117. It was said that there was 'evidence that both Darren and Jeanette were using your TUC account to communicate with you and at no time did you make any attempts to stop them from doing so.' This was said to breach the ICT acceptable use policy in that staff should not use the TUC's systems to make personal gain or conduct a business.

118. The panel also considered that there had been: 'Bullying and undermining the TUC's reputation' and that the tone of emails from both claimants constituted bullying and harassment. Mr Lpiarz had not taken action in relation to the tone of Mr Lewis' emails and had compounded Ms Dye's distress by making unwarranted threats of legal action. *The panel finds that this behaviour falls far short of conduct expected of TUC staff and amounts to gross misconduct.*

119. Both dismissal letters were signed by Mr Nowak. This was because only the respondent's general secretary or deputy general secretary had authority to approve a dismissal in accordance with the respondent's procedures. Mr Nowak told the Tribunal that the respondent dismissed very few employees and that it was usually the job of the deputy general secretary to approve the dismissals. He did not recall that there had been any discussion about who should do it on this occasion and believed that it had just been assumed that he would sign off on the letters. He had not on any occasion not approved a dismissal letter he had been presented with.

120. Mr Nowak told the Tribunal that he did not forensically scrutinise the findings in the letters or review any evidence before approving the letters. He told the Tribunal that he would have satisfied himself that the policies had been applied fairly, for example that a hearing had taken place in accordance with the policies, and that the letter was 'competent'.

121. On 26 August 2022, Mr Lepiarz appealed his dismissal. He raised a number of issues including the fact that he was not able to see Ms Dye's statements, that the panel had not looked properly at his evidence of expenditure, that the panel had not interviewed the witnesses he suggested and that he had not previously been charged with bullying, but the panel had made a finding of bullying.

122. Mr Lewis also appealed that day and raised some similar issues, including an issue about how he had been found guilty of charges not originally put to him. He also complained, amongst other things, that evidence provided by Mr Lepiarz was looked at by the panel but he had not had a chance to comment on any such evidence. He also provided an evidence pack, which included emails showing him providing voluntary services to Ms Dye such as business cards and Ms Dye being effusive in her gratitude for these services. There were a number of statements of support from trade union colleagues.

123. On 1 September 2022, Mr Lepiarz was invited to an appeal hearing on 2 September 2022. This was eventually rearranged to 30 September 2022, as was Mr Lewis'. Mr Lewis' representative, Mr Bull, complained on 8 September 2022 that Mr Nowak, who was to hear the appeal, was unsuitable as he had sanctioned the dismissal.

124. On 30 September 2022, both claimants attended appeal hearings in front of Mr Nowak, accompanied by their trade union representatives.

125. On 8 October 2022, Ms Dye forwarded further emails from November and December 2021 to Ms Dixon and Mr Gurney and on 11 October 2022, she sent an email to Mr Lewis setting out her account of what had happened. She gave answers to some questions he had asked, including as follows:
Answers to your questions:
I believe you done everything for the TUC with no personal/financial gain. As you were working for the TUC.
You never bullied or harassed me. We were friends until the BACS went missing. Then, some bad-feeling started and all contact ended.

Everything you done, you have done for the TUC, as you worked for the TUC and told me, you help all trades councils, as it is your job. Nothing personal.

126. Ms Dye also forwarded that email to Ms Dixon and Mr Gurney.

127. On 21 October 2022, both claimants were informed by letter that their appeals had been unsuccessful.

128. In relation to Mr Lepiarz's appeal, Mr Nowak wrote inter alia:
Finally on the issues relating to 'bullying and harassment' – as I suggested at the disciplinary appeal hearing (para 86) – I think it is fair that if a matter of concern emerges during the course of an investigation or hearing, it would be appropriate for a disciplinary panel to consider this matter and make a finding on the balance of probability.

The substance of the allegations relating to your conduct:
I said at the disciplinary appeal hearing, that the intention of the hearing was not to rehear all of the evidence relating to your case, but for you to set out why you thought the outcome of the disciplinary panel hearing was wrong or unfair. I also invited you to submit new evidence.
With this in mind, I will not go into the detail of the case against you. However, I am satisfied that any reasonable reading of the case bundle would suggest that you did indeed provide IT services on to Jeanette Dye and that Darren Lewis facilitated and brokered such services on your behalf. That these services were charged for, and that as a result, there is a strong probability that both you and Darren Lewis either made a financial gain, or sought to make a financial gain. Jeanette Dye's email of 30 November 2021 to Sam Gurney (referenced in paragraph 28 of the appeal hearing notes), clearly suggests that Darren Lewis introduced you to her as someone who could provide IT services.

The invoice sent by Darren Lewis on 24 March 2021 which references services sold to Newham Trades Council, is made out in your name and address, and suggest payment was requested. The invoice was sent from a TUC email address, suggesting that the services were in some way provided on behalf of the TUC. I find it implausible that such an invoice was sent without your knowledge.
This reading of events also accords with the witness statements provided by Jeanette Dye to the TUC.
The witness statement from Jeanette Dye that you submitted on 10 October 2022, does not contradict this reading of events, but states that Jeanette Dye did not make a complaint against you or DL. This point is not material, as the findings of the disciplinary hearing panel were not predicated on a complaint from Jeanette Dye but the panel's assessment of your behaviours and actions which they believed constituted gross misconduct.

I further support the panel's findings regarding the tone of your email communications with Jeanette Dye, and believe this behaviour falls short of the conduct expected of TUC staff.

I would add further, that I believe your decision to launch – along with Darren Lewis – a public 'campaign' relating to your disciplinary process (http://justicefordarrenandgreg.org/) while that process is still ongoing, is at best ill-judged, and at worst has the potential to cause further reputational damage to the TUC.
In my view this reinforces the disciplinary panel's decision that your conduct has brought the TUC into disrepute.

129. There were similar statements in the letter to Mr Lewis, including a statement that Mr Lewis' participation in a public campaign had reinforced Mr Nowak's view that Mr Lewis' conduct had brought the TUC into disrepute.

130. In oral evidence Mr Nowak said*: My intention was not to return on every aspect – I considered unfairness, any new evidence, was the outcome unreasonable. They raised new areas in the hearing which were not in grounds of appeal which I tried to deal with as well as I could. There were a number of issues which I did deal with. I did not read every aspect of the original disciplinary hearing.* He said that he did not reconsider every aspect of the original findings. He did not make any further investigations.

131. Cross examined on the subject of bullying and harassment not being part of the original charges, Mr Nowak said that if a matter of concern arises during the course of an investigation or hearing, it is appropriate for a disciplinary panel to consider that matter and make a finding.

132. On 31 October 202, the claimants commenced Acas Early Conciliation and on 12 December the Early Conciliation certificates were issued. The claim forms were submitted on 10 January 2023.

Law

Unfair dismissal

133. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

134. Under s 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

135. Tribunals must consider the reasonableness of the dismissal in accordance with s 98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondent genuinely believe the claimant was guilty of the alleged misconduct?
(2) did the respondent hold that belief on reasonable grounds?
(3) did the respondent carry out a proper and adequate investigation?

136. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

137. We reminded ourselves of the case of Strouthos v London Underground Limited [2004] EWCA Civ 402 in which Pill LJ said '…it does appear to me quite basic that care must be taken with the framing of a disciplinary charge, and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. There may, of course, be provision, as there is in other Tribunals, both formal and informal, to permit amendment of a charge, provided the principles in the cases are respected. Where care has been taken on to frame a charge formally and put it formally to an employee, in my judgment, the normal result must be that it is only matters charged which can form the basis for a dismissal.'

138. We have also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

139. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

140. In reaching their decision, tribunals must also take into account the Acas Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

141. We noted the provisions of the Acas Code at para 9

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

142. The Acas Guide at page 22 provides: *Ensure that the employee and their representative or accompanying person are allowed to see any statements made by witnesses and to question them*.

143. In Louis v Coventry Hood [1990] ICR 54, the EAT stated the following
It does seem to me that it must be a very rare case indeed for the procedures to be fair where statements which have been given in writing by witnesses and upon which in essence the employer is going to rely almost entirely - and that is this case - that an employee should not have a sight of them or that he should not be told very clearly exactly what is in them or possibly have them read to him. One understands that there may be delicate situations…. where the essence of the case, the main substance of the case is contained in two statements which this employee asks to see and which he is refused without reason and upon which substantial reliance is placed, then prima facie to me it seems to be unfair. It may be the reaction of a lawyer; I trust it is the reaction of anyone.

144. In A v B [2003] IRLR 405, the EAT considered the standard of investigation required in serious cases (in that case where the charges were of criminal conduct):
Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.
60. This is particularly the case where, as is frequently the situation and was indeed the position here, the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field, as in this case. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances.

61. The Tribunal appear to have considered that the fact that there was a real possibility that the Appellant would never work again in his chosen field was irrelevant to the standard of the investigation. In our view the Tribunal was strictly in error in saying that it has no significance. However, it seems to us that it is only one of the very many circumstances which go to the question of reasonableness.
62. We accept the observations of Mr Pepperall, for the Respondent, that the standard of reasonableness required will always be high where the employee faces loss of his employment. The wider effect upon future employment, and the fact that charges which are criminal in nature have been made, all reinforce the need for a careful and conscientious enquiry but in practice they will not be likely to alter that standard

145. The EAT also considered the fact that statements which might have assisted the claimant were not provided to him:
In this context we do not accept that it was sufficient, as was done in relation to some of these statements at least, simply to provide Mr Woolfenden of a precis of what was said. For example, it was not enough, in our view, simply to tell him that Miss B had initially denied the allegations. There was some material in those statements which might have assisted the Appellant had they been made available to him.
83. If an employer reasonably forms a view that certain evidence is immaterial and cannot assist the employee, then of course a failure to disclose that material will not necessarily render a dismissal unfair. Ultimately fairness is a broad concept and must be considered in the round.
…
86. We consider that in a case of this kind it is important that the documentation is made available to the employees. The Appellant might have been able to advance arguments based upon them which could have affected the approach of Mr Woolfenden. In particular, the fact that Miss B was apparently ready to make allegations against a number of people but she was not consistent in her own evidence about what had occurred; and that in certain respects others had given evidence about particular incidents which were not consistent with her own evidence.
87. We accept that there is no hard and fast rule that statements should always be provided. Often it is enough for an employee to know the gist of the case against him and in such cases it will not infringe the principles of fairness to fail to provide the detailed evidence: see Hussain v Elonex [1999] IRLR 430 . Hussain was a case where there was a failure to provide the statements of four independent eye witnesses to several incidents; plainly the gist of their failure could be communicated orally. By contrast, in this case the material, if provided, may have helped to undermine the credibility of the complainant whose evidence was fundamental to the decision.

Suspension

146. In Crawford & Anor v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138, Elias LJ expressed concern about the way in which suspension is sometimes used by employers:

This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay v Herfordshire County Council [2000] IRLR 703 , even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee's best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.

Anonymous informants

147. This was not a case where an informant had sought to remain anonymous but a rather more unusual case where a known informant had asked that her statements not be provided to the claimants. Nonetheless some of the case law on anonymous informants seemed to us to contain useful guidance. The Acas Guide suggests that in these circumstances the employer should seek corroborative evidence and assess the credibility and weight to be attached to the evidence of the informant. The EAT in Linfood Cash and Carry Ltd v Thomson and ors 1989 ICR 518 made the following suggestions for ensuring a fair hearing:
    - informants' statements should be reduced to writing (although they might need to be edited later to preserve anonymity)
    - in taking statements it is important to note the date, time and place of each observation or incident; the informant's opportunity to observe clearly and accurately; circumstantial evidence, such as knowledge of a system; the reason for the informant's presence or any memorable small details; and whether the informant had any reason to fabricate evidence
    - further investigation should then take place, corroboration being clearly desirable
    - tactful enquiries into the character and background of the informant would be advisable
    - a decision must then be taken whether to hold a disciplinary hearing, particularly when the employer is satisfied that the informant's fear is genuine

- if the disciplinary process is to continue, the responsible member of management at each stage of the procedure should personally interview the informant and decide what weight is to be given to his or her evidence
- the informant's written statement — redacted if necessary to avoid identification — should be made available to the employee and his or her representative
- if the employee or his or her representative raises an issue that should be put to the informant, it may be desirable to adjourn the disciplinary proceedings so that the chair can question the informant
- it is particularly important that full and careful notes should be taken at disciplinary hearings when informants are involved.

148. In Ramsey and ors v Walkers Snack Foods Ltd and anor 2004 IRLR 754, EAT, the EAT said that, when considering whether the approach taken was fair, the focus should be on the reasons for granting anonymity in the first place.

Length of service

149. In Hewston v Ofsted [2023] EAT 109, the EAT said that *Whether, or how, length of service is significant in a given case is fact-sensitive and depends on which party has raised it, or attached significance to it, and why*." The Acas Guide tells the employer to have regard, when deciding on a disciplinary penalty, to 'the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service…'

Polkey reduction

150. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

151. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

152. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

> in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally

involve an assessment of how long the employee would have been employed but for the dismissal;

if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

153. As Elias J said in Software 2000:

> *The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.*

Contribution

154. Under section 123(6) Employment Rights Act 1996, where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of a claimant, it must reduce the compensatory award by the amount which it finds to be just and equitable. The employee's conduct must be blameworthy or culpable: Nelson v BBC (No. 2) [1980] ICR 110.

Failure to follow 2009 Acas Code of Practice 1 on Disciplinary and Grievance Procedures.

155. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 enables an employment tribunal to adjust the compensatory award for an unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures. The award can be increased or decreased by up to 25% if it is just and equitable in all the circumstances.

We should ask ourselves the following questions:

a. Is the claim one which raises a matter to which the Acas Code applied?
b. Has there been a failure to comply with the Acas Code in relation to that matter?
c. Was the failure to comply with the Acas Code unreasonable? (Rentplus UK Ltd v Coulson [2022] EAT 81)?
d. Is it just and equitable to award any Acas uplift?
e. If so, what do we consider a just and equitable percentage, not exceeding 25%?
f. Does the uplift overlap or potentially overlap with other general awards such as injury to feelings; if so, what in our judgment is the appropriate adjustment if any to the percentage of those awards in order to avoid double counting?
g. Applying a final sense check, is the sum of money represented by the application of the percentage uplift disproportionate in absolute terms and, if so, what further adjustment needs to be made? (Slade v Biggs [2021] EA-2019-00678).

156. Relevant circumstances when determining uplifts include:
a. Whether the procedures were applied to some extent or ignored altogether;
b. Whether the failure to comply with the procedures was deliberate or inadvertent; and
c. Whether there are circumstances which mitigate the blameworthiness of the failure to comply: Lawless v Print Plus EAT 0333/09.

Direct race discrimination

157. In a direct discrimination case, where the treatment of which the claimant complains complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual

responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

158. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. "

159. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

160. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: ‘The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.’ The ‘something more’ need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

161. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

162. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: *Laing v Manchester City Council and anor [2006] ICR 1519, EAT.* The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

163. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16,* Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

164. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

165. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Conclusions

The investigation

166. We first considered whether the respondent had conducted such investigation as was reasonable, remembering that there will be a range of reasonable investigations.

167. The claimants characterised the investigation as being limited to:

- Two interviews with Ms Dye, the notes of which were available to the disciplinary panel and appeal manager but not disclosed to the claimants;
- One request by Ms Dixon to Mr Gurney to provide a statement;
- a number of emails from Ms Dye relating to her communications with the claimants between March 2021 and November 2021.

168. They pointed out that a number of further statements were received from Ms Dye, only one of which was put before the disciplinary panel and appeal and none of which were disclosed to the claimants.

169. The claimants submitted that in circumstances where the claimants were not provided with Ms Dye's statements, it was incumbent on the respondent to have probed inconsistencies in the statements with Ms Dye, in particular on the following issues:

- Whether other officers of Newham Trade Council thought the website was a good idea initially and the related question of whether Ms Dye wanted a website or was talked into it;
- Whether other officers knew that money was being paid for the website. Ms Dye told Mr Gurney that the officers agreed but elsewhere said that she did not feel she could tell them. That also raised the related question of why she would feel she had to keep the matter a secret if she thought the services were being provided by the TUC;
- What Ms Dye believed about the financial arrangements. She said in one statement that she thought the service was free but said elsewhere that a set-up fee was agreed and it was the rental she had not expected.

170. The Tribunal took the view that on their face there was a lack of internal consistency amongst Ms Dye's various statements. We considered that a reasonable investigation would have included (but not have been limited to) questions about why Ms Dye believed the work was being offered through the TUC and what emails she had had from Mr Lepiarz's TUC email account, given that she had provided none to Ms Dixon.

171. It seemed to the Tribunal that Ms Dye's evidence has not been probed at all by the respondent, which did little or nothing to look for exculpatory evidence as well as evidence of guilt. It would not have been an onerous job for Ms Dixon or the disciplinary panel to ask Ms Dye a number of questions in writing or in a phone call . She was the only substantive witness in proceedings where the claimants' jobs were at stake.

172. It seemed to us that the investigation was not in this respect within the range of reasonable responses. A reasonable employer would have recognised that the answers to these questions might well make a difference to the interpretation of Ms Dye's evidence.

173. There were other respects in which we concluded that the investigation fell outside the range of reasonable responses.

174. It was an important part of the findings that Mr Lepiarz had acted for profit yet the disciplinary panel did nothing to properly assess the documents Mr

Lepiarz provided to show the costs he had incurred on the website. They rejected Mr Lepiarz's evidence without making any fair attempt to test it.

175. We also concluded that there were obvious oversights in the ambit of the investigation and that a reasonable employer would have at least:

- Sought to investigate with other NTC officers as to what they knew about the website and the payments and their impressions as to who was providing the website (ie was it a service being offered by the TUC?);
- Attempted to assemble further documentary evidence, at the very least asking for all of Ms Dye's correspondence with the claimants about the website

176. These would not have been extensive and complex enquiries. Ms Dye clearly had discussions with other Newham Trades Council officers about the website; particularly given the lack of clarity of her own evidence, evidence from others as to what they had been told and understood might have cast significant light on the issues. Instead the respondent chose to rely solely on the uncertain evidence of Ms Dye.

177. We concluded that the failures in the investigation continued at the disciplinary stage. One issue was that the panel were not provided with all of Ms Dye's statements. In circumstances where there were minor but collectively concerning differences between Ms Dye's various statements which had the potential to undermine her credibility, it seemed to us that this was a flaw. Ms Dixon accepted that she should have provided these materials and had no real explanation as to why she had not done so. Ms Dye was the key witness.

178. We concluded that at neither at the investigation or disciplinary stage did the respondent make proper efforts to look for exculpatory evidence. Asked about whether he had looked for such evidence, Mr Rowan said: I am *not sure that is the case, we were looking for a level of misconduct which fell below our standards and we had enough evidence to prove that was the case*. It was this attitude which we considered led to the substantive flaws we identify.

179. A curious feature of the investigation was that, having suspended the claimants in order to ensure that the email record was preserved, the respondent ultimately never pressed the claimants to agree to a search of their emails nor simply undertook the searches they could have undertaken without consent under the terms of the respondent's ICT Acceptable Use Policy. The claimants themselves were unable to access their TUC email once suspended. Given the importance of documentary evidence, we concluded that this was a further material failure in the investigation.

180. We considered carefully the respondent's submission that in the round the investigation had been reasonable / fair, but did not conclude that was the case. Each one of the failings we have identified seemed to us to have closed down a genuine possibility that material exculpatory evidence would

be found. Together they rendered the investigation as a whole cursory and unfair.

Genuine belief

181. It was not in dispute between the parties that the respondent had a genuine belief that the claimants were guilty of misconduct.

Reasonable grounds

Mr Lepiarz

182. Was it reasonable to find Mr Lepiarz guilty of the first charge that he '*provided IT services to Newham Trades Council, and charged them for this service*'.

183. We noted first that , although not explicit in the charge itself, it was clear both in the dismissal letter and the evidence of Ms Quiney that the finding was a finding that Mr Lepiarz had operated for profit / commercial gain.

184. Did the evidence reasonably support such a finding? We concluded that it did not. Mr Lepiarz had provided documentation to show the costs he had incurred. It was not reasonable for the respondent to reject that evidence without seeking to understand it properly.

185. Mr Lepiarz was cross examined at the hearing about the spreadsheet and associated documents which he had produced for the disciplinary hearing . It was put to him that there were not receipts for all of the items of expenditure and that it was not clear that some of the charges in the documentation related to the NTC website. We found his evidence on these issues at the hearing perfectly cogent but the real point was that he had not had the opportunity to provide that evidence to the internal proceedings.

186. Ms Dye's evidence referred to a set up fee and a rental fee. No one clarified with her as to whether it was her understanding that she was being charged for Mr Lepiarz's time and, if so, where she gained that understanding from.

187. We carefully considered the material from Ms Dye which the panel had and the other points which were made on behalf of the respondent.

188. It was suggested that the claimants' behaviour showed that they were trying to avoid a disciplinary investigation meetings and get hold of Ms Dye's account of events before answering questions. The difficulty with that submission was there was no evidence before us that this was a factor in the respondent's thinking.

189. It was suggested that the claimants' anxiety to return Ms Dye's money to her once the issue had been raised showed guilt.

190. It was submitted that the claimants gave evidence which was inconsistent with one another at the disciplinary hearings. Mr Lewis had said that Ms Dye came up with the figure of £320. He said that the cost was £100 and the increase to £320 had been orchestrated by Ms Dye who had seen Mr Lepiarz's work and hours.

191. Mr Lepiarz also said the cost was £100 and that Mr Lewis had suggested that the invoice should be for £320.

192. We were not persuaded that the respondent could reasonably conclude there was a material inconsistency without further investigation with the claimants. £100 was the approximate yearly cost of mantianing the website according to Mr Lepiarz but there were other items of expenditure incurred in setting up the website. The discussion occurred between Mr Lewis and Ms Dye. Mr Lepiarz may not have been aware of which of the two suggested the figure of £320. It may have been that had the respondent further investigated, it could reasonably have concluded there was a material inconsistency between the claimants which undermined their case that they were not acting for profit. However there was no such further investigation – whether in the form of further questions for Ms Dye or by putting to the claimants the apparent inconsistency between their accounts.

193. We note that Mr Lewis had done a significant amount of apparently free work for Ms Dye in other respects. This made it less inherently improbable that the website would have been produced on a not for profit basis.

194. Ultimately it seems to us that given the poverty of the investigation conducted by the respondent, there simply was not sufficient evidence on the basis of which a reasonable employer could conclude that the website had been provided with a view to commercial gain.

195. Was it reasonable to find Mr Lepiarz guilty of the second charge, that he *offered paid for services…giving the false impression that the service was being offered by the TUC to trades councils?*

196. Mr Lepiarz's evidence to the disciplinary hearing was that he had done nothing to give the impression he was providing services on behalf of the TUC. There was no email in front of the disciplinary sent from Mr Lepiarz's TUC email address and Ms Dye was not asked to produce any such emails. No search was conducted by the respondent of Mr Lepiarz's emails. The single email sent by Ms Dye copying in Mr Lepiarz at his TUC address was sent on 1 December 2021, after Ms Dye had raised issues with Mr Gurney, Neither Ms Dixon nor the disciplinary panel pressed Ms Dye on why she understood it was a TUC service. The invoice was not on TUC paper or made out to the TUC or to be paid to a TUC bank account although it was sent to Ms Dye from Mr Lewis' TUC email account.

197. Ms Dye's own evidence was unclear as to why exactly she thought the work was being done on behalf of the TUC and the respondent did not seek to clarify it with her. Although she stated she received email from Mr Lepiarz's TUC address, she was never asked for nor did she provide any such emails.

198. In those circumstances, we concluded that it was not open to a reasonable employer to conclude that Mr Lepiarz was guilty of this charge.

199. Did the respondent have reasonable grounds for concluding that Mr Lepiarz was guilty of the third charge: using *TUC email account to provide the service and communicate as a service provider with Newham Trades Council?*

200. Very similar points may be made in relation to this charge as were made in respect of the previous charge. There were no such emails in front of the respondent. There was a statement from Ms Dye that there were such emails but she was not asked for them. Mr Lepiarz said there were no such emails. The respondent did not search for the emails. The only evidence which corroborated Ms Dye's account was the fact that she had copied Mr Lepiarz at his TUC email address into correspondence on 1 December 2021. The TUC addresses followed a standard formula however and could have been guessed; that possibility was never investigated.

201. Given in particular the respondent's wholesale failure to look for emails which would have substantiated this charge, we concluded that the respondent did not have reasonable grounds to find Mr Lepiarz guilty of this charge.

Additional findings against Mr Lepiarz:

That Mr Lepiarz breached the respondent's conflict of interest policy and disclosure of interest policy and that this amounted to an act of gross misconduct

202. This charge was not put to Mr Lepiarz in advance of the disciplinary hearing so he had no opportunity to prepare to meet it. The respondent did not in fact have a 'conflict of interest policy' and the relevant parts of the disclosure of interest policy were not identified and put to him at the disciplinary hearing.

203. We concluded that the respondent did not have reasonable grounds to conclude that the claimant was guilty of this charge essentially because the claimant was given no proper opportunity to answer the charge.

That Mr Lepiarz did not comply with written instructions from management regarding furlough arrangements and that this amounted to an act of gross misconduct and 'may constitute fraud'

204. This charge was not put to Mr Lepiarz before or at the disciplinary hearing. The respondent had no evidence that Mr Lepiarz was working on the website during work hours and/or whilst on furlough. His evidence ultimately to the appeal hearing was that he had not done so. The respondent pointed to no evidence to the contrary. The respondent's written instructions to employees about furlough were never put to Mr Lepiarz and were not available to the Tribunal.

205. For those reasons, we concluded that the respondent did not have reasonable grounds to find Mr Lepiarz guilty of this charge.

That Mr Lepiarz brought the TUC's reputation into disrepute [sic], which was an act of gross misconduct

206. Again this was not put to Mr Lepiarz as a charge. Mr Nowak's evidence to the Tribunal was that what brought the TUC into disrepute was the spreading of misinformation by the claimants to stakeholders and a member of parliament suggesting that the TUC had not followed its own procedures and that the claimants were being punished for whistleblowing. Mr Rowan told the Tribunal that the conclusion was based primarily on the statements of Ms Dye. There was nothing in the statements which expressly addressed Ms Dye's view of the TUC as a result of the events which occurred and the respondent never sought the evidence of any other officers of Newham Trades Council.

207. In all of those circumstances, although we accepted that the charges clearly had the potential to bring the respondent into disrepute, the respondent did not have reasonable grounds to conclude that Mr Lepiarz had brought the TUC's reputation into disrepute.

That the tone of emails from Mr Lepiarz concerning payment constituted "bullying and harassment" and amounted to gross misconduct

208. This was an allegation which was not put to Mr Lepiarz in advance of or at the disciplinary hearing. There was no reason why it could not have been put; it was not something that arose unexpectedly during the hearing. Mr Lepiarz was not asked about the tone of his emails.

209. Further to the failure to put the charge to Mr Lepiarz, the Tribunal could not be satisfied that the respondent otherwise had good grounds in circumstances where Ms Quiney had misunderstood the content of emails and where she otherwise suggested that it was the reference to using a solicitor which made the emails bullying and harassing. We accepted that the tone of the email was unfriendly and that it would have been unpleasant

for Ms Dye to receive. It appeared to the Tribunal that by that point, the claimants were concerned as to where the issue about the website was going and were anxious to shut down Ms Dye's complaints.

210. Given the failings we have identified we concluded that a reasonable employer could not have concluded that the emails sent by Mr Lepiarz could properly be characterised as bullying, harassment or gross misconduct.

Mr Lewis

Single charge that he had brokered and facilitated for GL to provide IT services to Newham Trades Council, which he charged them for.

211. For the same reasons as we have set out above, we concluded that the respondent did not have reasonable grounds to conclude that there was a meaningful charge for the services, ie a charge over and above the costs of providing the website and/or that Mr Lewis had either made or sought to make a financial gain.

Additional findings against Mr Lewis

That Mr Lewis breached the respondent's conflict of interest policy and disclosure of interest policy and that this amounted to an act of gross misconduct

212. We found that the respondent did not have reasonable grounds to reach this conclusion for the same reasons we have set out in respect of the same charge against Mr Lepiarz.

"*by facilitating paid for services to Newham Trades Council", Mr Lewis* "*gave the false impression that the service was being offered by the TUC*"

213. Although Mr Rowan in particular identified this as a key issue, it was not put to Mr Lewis at or in advance of the disciplinary hearing. The conclusion appears to have been reached primarily on the basis that Mr Lewis communicated with Ms Dye via his TUC email address but there was a failure to explore with Ms Dye exactly what had been said to her and why she had formed the view that this was a TUC service. In circumstances where there was good evidence that Mr Lewis was providing voluntary assistance to Ms Dye in the form of assistance with Zoom codes, flyers and business cards, without further investigation, the respondent could not have reasonable grounds for this conclusion.

214. In this respect, as in relation to other charges, although the charge was apparent by the time of the appeal hearing, that hearing was neither a rehearing nor a sufficiently comprehensive and openminded review to rectify

the failings at the dismissal stage, Mr Nowak did not have reasonable grounds to uphold this charge,

That Mr Lewis brought the TUC's reputation into disrepute, which was an act of gross misconduct

215. Again this was a charge not put to Mr Lewis before or at the disciplinary hearing. For the same reasons we have described in respect of the like charge against Mr Lepiarz, we concluded that the respondent did not have reasonable grounds to conclude that Mr Lewis was guilty of this charge,

"*use of the TUC's ICT to conduct and facilitate this service is against the TUC's ICT acceptable use policy*" and also an act of gross misconduct.

216. Again this charge was not put at any relevant stage and the breaches of the policy were not identified up to and including in the respondent's witness statements to the Tribunal. In those circumstances, we concluded that the respondent could not have reasonable grounds to conclude that the claimant was guilty of this charge.

the tone of emails from Mr Lewis concerning payment constituted "bullying and harassment" and amounted to gross misconduct

217. Again it was fatal to a conclusion that the respondent had reasonable grounds that the charge was not put prior to the disciplinary hearing. Although there were some questions about the tone of the email at the disciplinary hearing, it was not put to Mr Lewis that he had bullied and harassed Ms Dye through these emails. There was no evidence that the respondent had looked properly at the context of other friendly and supportive communication between Ms Dye and Mr Lewis.

218. The emails sent by Mr Lewis were urgent and perhaps clumsily expressed. They would have been unpleasant to receive and could have felt intimidating to the recipient. However given the failures to put and/or properly explore the charge, we concluded that the respondent did not have reasonable grounds for this finding.

219. In respect of the charges which were not put against the claimants generally, we agreed with the claimants' global submission that they had not had a fair opportunity to respond to these charges and that the appeal hearing was not sufficiently comprehensive to rectify the failings at the earlier stage of the procedure.

Other procedural issues

Involvement by Mr Nowak in the dismissals and the appeal

220. The respondent said, that under the respondent's procedures, the dismissal letters had to be signed by one of Baroness O'Grady and Mr Nowak. Baroness O'Grady had been involved in the claimants' grievances so the respondent was in a position where it had to chose one or other to hear the appeal against dismissal. Mr Nowak's evidence as that he did not look forensically at the dismissal letters as he was aware he might have to be involved in any appeals and he was therefore sufficiently impartial to hear the appeals.

221. The claimants maintained that Baroness O'Grady would have been a more impartial choice given that her involvement was with the (related) grievances rather than the dismissals themselves.

222. We concluded that it was unnecessary and unfair for Mr Nowak to have heard the appeals given the availability of Baroness O'Grady. Mr Nowak played some substantive role in assessing and approving the dismissals. He would not have appeared to be nor could he properly be considered to be impartial. The respondent had other resources available in the form of Baroness O'Grady. We concluded that this aspect of the procedure contributed to the overall unfairness of the dismissals.

Not providing Ms Dye's statements to the claimants although the panel had them

223. The claimants argued that the respondent's decision to not provide Ms Dye's statements to the claimants but to provide them to the panel was simply not reasoned. The respondent's witnesses said that they considered the vulnerability of Ms Dye in making the decision. They took the view that the material which established there was a case to answer in respect of the charges was contained in the emails which had passed between the parties and which were provided to the claimants.

224. It was difficult to understand the thinking behind the decision not to disclose. The advice from Ms Pearce, the data protection officer, did not refer to any legislation or guidance. No witness was able to cast any light on the thinking about the respondent's obligations to Ms Dye under GDPR or otherwise. There was no evidence that any of the respondent's witnesses either explored with Ms Dye or themselves grappled with the logic of not providing Ms Dye's statements to the claimants in circumstances where they were entirely aware of her identity and the gist of her concerns. They did not identify what additional risk to or enhancement of Ms Dye's sense of vulnerability was created by the claimants having access to further detail in Ms Dye's statements. They did not explore why Ms Dye changed her position on the provision of her statements over time. No thought at all semes to have been given to the possibility of not providing the material to the panel. No mitigations were put in place such as scrutinising Ms Dye's evidence for inconsistencies and exploring those inconsistencies with Ms Dye.

225. In those circumstances, it seemed to us that this was also a material unfairness in the procedure and outwith the range of reasonable responses.

Not providing all relevant evidence to panel

226. The claimants identified in evidence some eleven communications from Ms Dye to Ms Dixon which were not provided to the disciplinary panel or the claimants. Ms Dixon accepted that it was an error not to have provided them. The respondent argued that not providing the emails made no difference to the outcome. We were not persuaded that that was the case in circumstances in which Ms Dye had given a number of accounts containing sometimes subtle, sometimes arguably more material differences. The number of accounts and differences was something which a reasonable disciplining manager would have considered. The question of whether ultimately such consideration would have affected the outcome goes to any reduction in compensation under Polkey principles rather than to the fairness of the dismissals.

227. We concluded that this was also a material unfairness in the procedure.

Not allowing the claimants to comment on each other's evidence

228. In circumstances where the respondent relied on what were identified as inconsistencies between the evidence given by the claimants, particularly on the issue of who suggested the invoice be made up to a sum of £320, the Tribunal majority concluded that it was materially unfair not to have given the claimants a chance to comment on each other's evidence. The context of the other deficiencies in the process meant that this further failing contributed to a situation where the claimants simply did not have the opportunity to respond to much of the material on the basis of which the respondent found they were guilty of the charges. The Tribunal majority considered it was not too onerous to expect the panel to revert to the claimants in these circumstances before reaching final decisions.

229. Mr Benson disagreed with the majority. He considered that it would not be usual for an employer to have to present the evidence given at separate disciplinary hearings to the other individuals accused of related charges and that the respondent's procedure had fallen within the range of reasonable responses in this respect.

Not recording important conversations / meetings

230. The claimants pointed to a number of discussions which were not noted, in particular by Ms Dixon. This included some of her discussions with Ms Dye and with the disciplinary panel and the discussion with Ms Pearce about data protection in relation to Ms Dye's statements.

231. The main area of concern was perhaps the failure to capture some of Ms Dye's remarks; however we accepted that those failures were relatively trivial, for example not recording what appeared to be limited discussion on the occasion when some documents were handed over in a café.

232. It seemed to us that there were certainly occasions when it would have been better practice to record conversations or make file notes of events, however we were not persuaded that the failure to do so created any material unfairness to the claimants. If anything the lack of recording simply made it more difficult for the respondent to adduce evidence to defend the claims.

Suspension

233. We agreed with the claimants that the suspensions were problematic. The primary ostensible reason was to preserve evidence (the claimants' emails) yet the respondent ultimately did nothing to obtain and preserve that evidence. There was no review undertaken of the suspensions and we were provided with no explanation for that failure. Although witnesses referred to additional reasons for the suspension such as the fact that financial impropriety was alleged and a perception that there was a risk to the respondent's reputation; there was no explanation in evidence as to why these factors were said to point to suspension. Our impression was that witnesses simply used these as pretexts without any real analysis of the situation.

234. We considered that whilst the suspensions had the potential to affect the fairness of the dismissals in that they hindered the claimants' access to their own emails and to colleagues and stakeholders whom they might have approached for evidence, that was not an inevitable effect of the suspensions but of the wider failures of the investigation and/or a failure to consider how to mitigate the effects of the suspensions.

235. So whilst we concluded that the suspensions were a knee jerk response and not properly justified we did not find that of themselves they contributed to the unfairness of the dismissals.

Threat of docking sick pay

236. The claimants submitted that the threat to reduce their sick pay was intended to coerce the claimants into participating in the disciplinary procedure ad contributed to the unfairness of the dismissals. We were surprised by the entirely open ended discretion as to sick pay in the respondent's procedure and it seemed to us to give rise to potential risks. However, the claimants' contentions in relation to the threat to reduce sick pay were not put in terms to the respondent's witnesses, so even had we been minded to conclude that this matter affected the fairness of the dismissals, we concluded that it would not have been appropriate to do so.

Appeal

237. We concluded that the appeals did not rectify unfairness in the original dismissals. They were not comprehensive, there was no further investigation, and Mr Nowak was not impartial. He did not for example look again at the decision not to provide Ms Dye's statements to the claimants and make a reasoned decision. He also buttressed his findings by taking into account post dismissal behaviour of the claimants which was not properly put to the claimants. Far from rectifying the of the dismissals, in this sense Mr Nowak's appeal compounded that unfairness.

Was dismissal within the range of reasonable responses?

238. It follows from our findings above that we concluded that the respondent did not have reasonable grounds to find the misconduct alleged had occurred. Dismissal for that misconduct was therefore not within the range of reasonable responses. The claimants submitted additionally that there was a failure to take into account Mr Lewis' long service with the respondent. In evidence before the Tribunal, there was no reference to that service until Mr Rowan said in re-examination that he had taken it into account but that the panel was also conscious of the fact that he had been employed a long time and should have understood what he was doing. We concluded that the panel did not take long service into account at the time of the dismissals. We would have expected some reference to it in Mr Lewis' dismissal letter or in a witness statement had it genuinely been in the minds of the panel. We also agreed with the claimants' submission that other sanctions had not been considered by the panel. The letters of dismissal used the language of 'no alternative' and there was simply no evidence that either the panel or Mr Nowak had consciously entertained other sanctions.

Did the claimants contribute to their dismissals?

239. We considered carefully whether there was culpable conduct by the claimants which contributed to their dismissals. The area where we had evidence from which we could reach conclusions on the balance of probabilities as to the claimants' conduct related to the emails sent to Ms Dye once she had raised a concern about the website with the respondent.

240. We bore in mind that the sort of conduct described in the authorities as 'foolish' or 'bloody minded' may be culpable in the relevant sense.

241. We concluded that the email sent by Mr Lepiarz to Ms Dye on 29 November 2022 crossed the line into being culpably unreasonable. We considered that the tone and content were aimed at shutting down Ms Dye's concerns about the website in a tone which Mr Lepiarz would reasonably have realised was intimidating.

242. Mr Lewis' repeated emails of the same date were somewhat more culpable in our conclusion; the repetition and the use of large font and underlining together with the contrast with Mr Lewis' previous relationship with Ms Dye

all seemed to us to be designed to intimidate Ms Dye into withdrawing the complaint or concern she had raised with the TUC.

243. We had to look together at the level of culpability and the level to which this conduct contributed to the dismissal. These emails and their tone were no part of the original charges. The primary reason for the dismissals related to the alleged provision of the website services for profit and under the auspices of the TUC. In terms of blameworthiness, we considered the fact that these were emails sent on one date at a time when the claimants had reason to be agitated. The tone was unpleasant but there were no threats or abuse.

244. We considered that there was a modest difference in culpability as between the two claimants and accordingly made the following reductions to compensation:

a. For Mr Lepiarz: 15%;
b. For Mr Lewis: 20%.

Polkey reduction

245. The claimants submitted that there were simply too many procedural and other failings for the Tribunal to conclude that, without all of those failings, the claimants would or might nonetheless have been fairly dismissed.

246. There some were areas in particular where it seemed to us very difficult to speculate as to what the results of a proper investigation might have been. We have no good sense of what Ms Dye's evidence would ultimately have looked like that had proper enquiries been made with her. We cannot know what other officers of Newham Trades Council might have said had they been spoken to. Had the charges been put properly and had the claimants had a proper opportunity to see and challenge Ms Dye's evidence, the hearings may have unfolded very differently. Some of the additional charges were so poorly evidenced (eg as to breach of the furlough policy), we simply have no idea what a proper investigation into those allegations might have led to.

247. On the question of whether Mr Lepiarz was able to demonstrate that Ms Dye had been charged less than the costs to him of setting up and maintaining the website, the respondent did so little to test the evidence it appears to have rejected, we simply cannot properly speculate as to what a fair investigation might have concluded, save to say that Mr Lepiarz gave a credible account of the documents at the Tribunal hearing.

248. The respondent submitted that the Tribunal should take into account the various matters as demonstrating that the claimants would certainly have been dismissed in any event, including the fact that the claimants failed to accept that there were issues with the tone of their 29 and 30 November 2021 emails to Ms Dye, either during the internal proceedings or at the Tribunal hearing. There was said to be evidence that the claimants had been

looking to avoid an investigation or disciplinary hearing prior to being clear about what Ms Dye had said Mr Lewis in particular was said to have given evasive answers to the Tribunal about some of the correspondence, for example as to why he had suggested to Ms Dye that there was a 'crew' or 'team' working on the website.

249. Whilst there was some merit in those submissions, we ultimately concluded that there was so much wrong with the investigation that we were left in territory where it was simply impossible to conclude with any confidence that a wholly different process might have led to fair decisions to dismiss. We therefore concluded that, even bearing the guidance we have set out above very firmly in our minds, we were not in a position to assess any Polkey reduction.

Uplift for breaches of the Acas Code

250. The specific breaches asserted by the claimants were:
   a. A breach of paragraph 9 in that there was said to a failure to provide the claimants with 'sufficient information about the allege misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at the disciplinary meeting';
   b. Also in breach of paragraph 9, a failure to provide copies of written evidence, ie the statements of Ms Dye
   c. A breach of paragraph 27 in that the manager who dealt with the appeal was not impartial.

251. We have already found that these were significant failures with significant effects. They were unreasonable failures on any view but the more so when considering that this was an employer which because of its nature should have had a much better grasp of the Acas Code.

252. Looking at the guidance in Lawless, we concluded that:

- Whilst there were very large areas of compliance with the Code, the failures were significant;
- The failures appear largely to have been deliberate in the sense that that they were done with an awareness of what the expected standard was – for example the non provision of Ms Dye's statements;
- We were not able to identify mitigating features. This was a sizeable organisation with a dedicated HR function which should have known better.

253. Bearing in mind that we should look at the overall size of the award when deciding to order an uplift, we concluded that it would be appropriate for us to hear further submissions on the size of the uplift at the remedy hearing.

Wrongful dismissal

Issue: Were the Claimants guilty of gross misconduct? Were the Claimants actions sufficiently serious that the Respondent was entitled to dismiss without notice?

254. We reminded ourselves that the question for us was whether we found on the balance of probabilities that the claimants were guilty of conduct which amounted to a repudiatory breach of contract

255. We have already set out above the difficulties created by the inadequacy of the investigation. The respondent did not seek to remedy the deficiencies in the internal investigation before the Tribunal so we did not have materially better evidence than that which was before the respondent on the basis of which to reach a more satisfactory conclusion.

256. The respondent submitted that the claimants lacked credibility and that was a factor which should lead us to conclude that they were guilty of the misconduct alleged. We did not conclude that the claimants' credibility was significantly impaired although there were some areas in cross examination where Mr Lewis was somewhat evasive. That factor was not sufficient on its own and in the context of our findings above to persuade us that either claimant was guilty of the conduct which the respondent had characterised as gross misconduct.

257. In those circumstances, summary dismissal was in breach of contract and the claimants' wrongful dismissal claims accordingly succeed.

Direct race discrimination (Mr Lewis)

Issues: Was Mr Lewis moved to half pay in July 2022 and August 2022?

If so, was this less favourable treatment?

If so, was it because of his race?

258. Mr Lewis' comparator was Mr Lepiarz, who is white. Mr Lewis is black. Both claimants were sent letters on or about 30 June 2022 saying that they would be moved to half pay. Having been sent that letter, Mr Lepiarz withdrew his sick certificate and was not placed on half pay. Mr Lewis did not withdraw his sick certificate and his pay was reduced.

259. Mr Lepiarz is not an appropriate comparator because of the materially different circumstances that he withdrew his sick certificate and therefore ceased to be on sick pay at all.

260. There was simply no evidence before us from which we could reasonably conclude that Mr Lewis' treatment had anything to do with his race. In

submissions, it was said on Mr Lewis' behalf that Baroness O'Grady had acknowledged in 2020 that there was institutional racism within the trade union movement. This was very far from being evidence which might have caused the burden of proof to shift.

261. We did not uphold this claim.

Employment Judge Joffe

Date: 22 May 2024

Sent to the parties on:

31 May 2024

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For the Tribunal Office:

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