EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Makanda	**v**	**The London School of Economics and Political Science**

Heard at: London Central
On: 20 March and 27 – 29 March 2023

Before: Employment Judge Hodgson
Ms L Moreton
Ms D Keyms

Representation

For the Claimant: in person
For the Respondent: Mr N Grundy, counsel

JUDGMENT

1. **The claim of unfair dismissal succeeds.**

2. **The claim of automatic unfair dismissal pursuant to section 152 Trade Union and Labour Relations Consolidation Act 1992 fails and is dismissed.**

3. **The claim of detriment contrary to section 146 Trade Union and Labour Relations Consolidation Act 1992 fails and is dismissed.**

4. **The respondent wrongfully dismissed the claimant.**

5. **The parties should confirm by 16:00, 19 May 2023 if they have agreed the remedy, if not both should file proposed directions for preparation of and attendance at a remedy hearing.**

REASONS

Introduction

1.1 By a claim form dated 15 March 2022, the claimant alleged ordinary unfair dismissal, automatic unfair dismissal contrary to section 152 Trade Union and Labour Relations Consolidation Act 1992, detriment contrary to section 146 Trade Union and Labour Relations Consolidation Act 1992, and wrongful dismissal.

The Issues

2.1 The claimant alleges unfair dismissal pursuant to sections 94 and 98 Employment Rights Act 1996.

2.2 It is the respondent's case that the claimant was dismissed for a reason related to conduct.

2.3 The claimant alleges automatic unfair dismissal contrary to section 152 Trade Union and Labour Relations Consolidation Act 1992. During the hearing, and via further and better particulars, the claimant made it clear that he alleged he had been dismissed for taking part in strike action in 2017.

2.4 The claimant alleges that he suffered detriment related to trade union membership and activities contrary to section 146 Trade Union and Labour Relations Consolidation Act 1992. He relies on one allegation of detriment, being the delay in holding the appeal against dismissal. It being his case that he submitted the appeal 19 October 2021, the relevant appeal hearing did not occur until 11 March 2022.

2.5 The claimant alleges wrongful dismissal. The respondent alleges that it dismissed the claimant because of an act of gross misconduct.

Evidence

3.1 For the respondent we heard from Mr Allan Blair, Mr Julian Robinson, Ms Mary Lee Tong Chin, and Mr Victor Fejokwu.

3.2 The claimant gave evidence. On behalf of the claimant, we also heard, from Ms Earney Williams and Mr Brigitte Falanaka.

3.3 The claimant wished to rely on two written statements of Ms Beverly Williams one dated 28 May 2021, and the other dated 4 May 2021. We allowed him to do so. Ms Williams was not called.

3.4 We received a bundle of documents. We received a chronology.

3.5 The respondent provided written submissions. Thereafter it provided supplementary written submissions. Clarification of those supplementary submissions was requested and received on 3 April 2023. Further clarification was sought and received on 4 April 2023.

Concessions/Applications

4.1 By order of Employment Judge Khan on 4 July 2022, the claim of Mr Makanda, was consolidated with the claim of Mr B Falanka, case number 2200605/2022, following a letter from Mr Simon Bennett of the United Voices of the World trade union dated 27 June 2022, which letter stated, "Upon further consideration of these cases, it is our view that these claims should be consolidated and heard together, alternatively that they should be heard separately but consecutively by the same tribunal."

4.2 The letter set out a number of reasons. It identified that both claims raised allegations of unfair dismissal contrary to section 152 Trade Union and Labour Relations Consolidation Act 1992, ordinary unfair dismissal, wrongful dismissal, and trade union detriment contrary to section 146 Trade Union and Labour Relations Consolidation Act 1992. Both claimants' dismissal and appeal processes had been handled by the same people. Both were dismissed following allegations by "several of the same individuals," in particular Mr Abdulrazaq Oduoye and Victor Fejokwu. It is said those allegations are made in bad faith. It is alleged those individuals were anti-trade union. The trade union detriment was said to be based on "substantially the same facts: that during approximately the same period, the same personnel delayed their appeal hearings for periods of more than four months for the same prohibited reason."

4.3 In relation to the facts, the evidence, and the documents, it appears that EJ Khan accepted those submissions, without any specific analysis, and made the order "by agreement." It is unclear how far, if at all, he considered the detail of the submissions put forward by the claimant.

4.4 At the commencement of the hearing, the tribunal noted that there did not appear to be a significant overlap in terms of facts, common events, or documentation. The respondent alleges Mr Falanka was dismissed for conduct which amounted to fraud. The respondent alleged Mr Makanda was dismissed for misconduct, being intimidating behaviour towards another employee. The allegations were brought at different times. The disciplinary hearings were held at different times. The appeals were held

at different times. It did not appear that Mr Fejowka had brought any allegation against Mr Makanda. Mr Makanda was not accused of fraud.

4.5 We sought to understand whether the respondent accepted that the evidence for both claims should be heard together, and if so, what was the commonality which would justify this.

4.6 The respondent could identify only one area of fact which may overlap. Mr Oduoye had made an allegation against Mr Makanda and it was alleged that his evidence was relevant to both cases. However, those allegations related to different matters. There was some suggestion that Mr Odouye was hostile to unions, and hostile to both claimants. Beyond that, it was alleged that Mr Falanaka and Mr Makanada were friends, and had given evidence for each other.

4.7 The respondent confirmed that the same manager dismissed both, albeit at different times, following different investigations, and at separate hearings. The same appeal officer dealt with both cases, albeit at different times. Both claimants alleged that delaying their appeals was an act of detriment because of trade union activity. Both alleged their dismissal was because of trade union activity. It did not appear to be either claimant's case that the person who dismissed, or the person who dealt with the appeal, acted innocently, but were inadvertently influenced by the actions of Mr Oduoye or anyone else.

4.8 We concluded that there was little if any overlap in the circumstances of each case, or the factual basis underpinning each case. They are two completely different cases, based on different facts, albeit there is a commonality in that Mr Blair dismissed both and Mr Robinson dealt with both appeals. There was no good reason for the claims to be heard together. Further, there was a serious risk that in attempting to hear them at the same time, it would lead to each case being infected by irrelevant evidence and conclusions from the other case. We considered it in the interests of justice for each claim to be considered on its own merits, having regard to the evidence relevant to each case. We therefore separated the cases. Following discussion, we elected to proceed with Mr Makanda's case. Mr Falanka's case will be heard separately. It may be heard by any tribunal. It does not have to be heard by this tribunal.

4.9 We should note that this order was made pursuant to rule 29 Employment Tribunals Rules of Procedure 2013. We found that revoking the order of EJ Khan was necessary in the interest of justice. Proceeding with both these cases together could seriously undermine the integrity of each case, as the link between them was based on the type of claims brought and not on common circumstances or facts. To the extent it is necessary to identify any change in circumstance, EJ Khan was not required to, and did not, consider the detail of the contention that there were common facts. Following the exchange of witness statements, and having considered the pleadings and statements in preparation for the final hearing, it is clear that any assumption that there were significant common allegations or

relevant facts was mistaken. This could not have been something appreciated by EJ Khan at the time he made the order for the claims to be heard together; that is an appropriate change of circumstance.

4.10 We were not able to proceed with the hearing immediately. Mr Blair dismissed Mr Makanda. Mr Grundy told us that Mr Blair had gone to Malta on a "surprise holiday." It was clear that he had known about this holiday from at least 27 February. However, the respondent chose not to apply to adjourn the hearing, instead it assumed that during the first week, the tribunal could hear all the respondent's witnesses, other than Mr Blair, who could be heard on the following Monday. The claims could then be completed within the 12 days allocated. Further, the respondent had contemplated whether the case could proceed via video, but had made no enquiries with Malta to ascertain whether permission would be granted. Mr Grundy was unable to confirm whether Malta required specific permission.

4.11 We found the respondent's approach to be unhelpful. When it became clear that Mr Blair could not attend, the respondent should not have assumed the tribunal could accommodate his absence, but should have applied to adjourn the hearing. Further, the respondent could have explored the possibility of Mr Blair attending by video, but chose not to do so.

4.12 Whilst we considered the respondent's approach to be inappropriate, proceeding without Mr Blair fundamentally disadvantaged the respondent and undermined any possibility of a fair hearing. In the circumstances, we allowed a lengthy adjournment until Monday 27 March. By agreement the hearing resumed by video.

4.13 During the hearing Mr Grundy objected to the claimant relying on the statements of Ms Beverley Williams. We agreed that the claimant could put the statements in evidence. Ms Williams was not called. Mr Grundy submitted that the statements contained no relevant evidence and little weight should be given to them, as she had not been called. The claimant said the statements were relevant to the historical background. We have derived no assistance from these statements, and we give them no weight.

4.14 At some point the claimant had the benefit of assistance from his union. Unfortunately, he no longer had assistance at the hearing. The particulars of claim contains a detailed history, and sets out a number of factual assertions on which the claimant appears to rely in support of his allegations, including the allegation that the dismissal was automatically unfair because of trade union activity.

4.15 At the case management hearing on 4 July 2022 before EJ Khan identified the issues in both claims. His order provided for the exchange of witness statements. He confirmed that no additional witness evidence would be

allowed without the tribunal's permission. Witness statements were exchanged.

4.16 On the first day of the hearing, we noted that the claimant's witness statement was poorly drafted. In particular, it did not refer to the trade union claim. It was drafted in the third person and appeared to be the submissions of a representative. It contained numerous bullet points that were in the nature of submissions and arguments. It left gaps either envisaging submissions or further oral evidence. We invited the claimant to consider whether he would wish to file further written evidence. The claimant did not serve any further statement.

4.17 We considered the matter further before the claimant gave his evidence. He said he wished to adopt the statement marked "summary of Mr Makanda's case," being the document written in the third person and exchanged as his statement. We also enquired whether the particulars of claim were true and whether, he wished to rely upon them as part of his evidence. Before proceeding, we asked if the respondent objected, and objections were raised.

4.18 Mr Grundy raised a number of matters in objection. He said there had been a clear direction for the exchange of witness statements. That direction made it clear that there would be no further evidence allowed without permission. The tribunal had raised the inadequate nature of the witness evidence with the claimant and given him an option to file further evidence, but he had not done so. It was said there would be prejudice to the respondent, albeit the only matter identified was that the respondent's cross examination had been prepared on the basis of the statement as filed. In addition, the respondent indicated that the case had been prepared on the basis of the issues identified by Mr Khan, rather than the particulars of claim as a whole.

4.19 The claimant did not make any specific submissions. The reality was that the claimant was a litigant in person who was ill-equipped to deal with the proceedings. His spoken English was sufficient such that he did not require an interpreter, but it is not his first language. The particulars of claim and the summary used as his statement had been prepared by others. We had no doubt that the claimant had difficulty presenting his case in writing. The tribunal was a challenging environment for the claimant, and his ability to engage, particularly in writing, was poor. During the hearing it was necessary, in order to seek to secure the parties were on an equal footing, to provide much guidance and assistance to the claimant. Much of the claimant's attempt to cross-examine was driven by emotion. He made extensive observations and arguments and found it difficult to formulate questions. The claimant needed the tribunal's assistance to codify some of his concerns and points as specific questions to be answered by the respondent's witnesses.

4.20 For the reasons outlined above, we are satisfied that the claimant has found the hearing a particularly difficult and challenging environment. His

ability to communicate in writing, was effectively, none existent, and it was apparent that he had not drafted his own statement.

4.21 As to the "summary" said to be the statement, it was clear that it had been drafted in the third person by someone other than the claimant. Part of it contains partial narrative of the circumstances and the events. However, much of it was notes for a person who was preparing to represent the claimant. For example, paragraph 13 reads "[Got enough here and below to summarise the case already. Can then potentially follow up with written representation for AB's consideration if time/possible.]"

4.22 The majority of the remainder of the statement, from paragraphs 14 through to 22, appears to be notes for a representative when presenting a case. For example, paragraph 15 reads "[Ways in which AO's allegations are embellishments – description of what occurred as an assault; claiming contact which CCTV indicates did not occur; claiming that this incident left injured (months of painkillers) and traumatised.]."

4.23 The tribunal was concerned to ensure that it furthered the overriding objective. It is necessary to deal with cases proportionately having regard to the complexity and importance. We should endeavour to ensure that parties are on equal footing. As to the procedure to be adopted, that is a matter for the tribunal, and we have a wide discretion. We remind ourselves that the parties have an obligation to assist us to further the overriding objective.

4.24 With litigants in person who find proceedings challenging, the tribunal may need to be proactive and inventive in adapting the procedure to ensure that there is an equal footing. The tribunal should seek to do so without being unfair to either side and without causing prejudice.

4.25 Given Mr Makanda's difficulties, ensuring an equal footing has been particularly challenging. The claimant is particularly disadvantaged, in our view.

4.26 In considering how far we should seek to assist to ensure an equal footing, we must always bear in mind fairness to both sides and we should have regard to the potential prejudice which may be caused to either side by adopting or not adopting a particular course of action.

4.27 Here, the fundamental question was whether we should allow the claimant to adopt his particulars of claim as a statement. Mr Grundy submitted that we should not. The main reasons for saying so appeared to be as follows. The claimant was ordered to provide a statement. He has provided a statement. He was given a further opportunity to provide a further statement, when the tribunal identified that his statement was inadequate. The claimant should comply with directions. The respondent says that there is prejudice. The cross-examination had been prepared based on the statement as drafted. Finally, Mr Grundy indicated that the respondent

would lose the ability to argue, by way of a defence, failure to produce evidence to support the claims.

4.28 There is no indication that the respondent would have identified or called new or different witnesses had the particulars of claim been adopted as a statement initially.

4.29 Against this, there was the potential prejudice to the claimant. The respondent wished to take a technical point that evidence had not been presented, and therefore one or more claims could not succeed. That prejudiced the claimant, albeit it may be argued that he was the cause of his own misfortune. Confining the evidence to the summary document which has been labelled a statement, but which was in reality largely a submission prepared by a representative, could significantly limit the claimant's ability to rely on those matters advanced as facts in his particulars of claim.

4.30 To the extent the respondent suggested that it was not able to prepare adequately for the case, we saw no strength in that argument. The claims were set out in detail in the claim form. At the time the respondent prepared its witness statements, it could have no reason to believe that the claimant would produce such a poor and inadequate statement. It follows, therefore that the respondent had had an opportunity to consider, obtain, access, and present all relevant evidence. The fact the claimant presented inadequate evidence provided the respondent with a technical defence against the claims. That was something of a procedural windfall, and it significantly prejudiced the claimant.

4.31 We accepted there may be some force in Mr Grundy's argument that his cross-examination was prepared based on the witness statements as it stands. Any prejudice would be addressed by allowing an adjournment and giving additional time for preparation of the cross-examination.

4.32 Standing back and considering this in the round, we reached the view that in applying the overriding objective, and seeking to put the parties on an equal footing and seeking to deal with this case fairly, it was necessary to have regard to the prejudice which both parties may suffer by the action we proposed to take. In our view not allowing the claimant to rely on the particulars of claim as a statement could lead to significant prejudice. The respondent would suffer little or no prejudice by our taking that course of action.

4.33 Finally, we note that the respondent said the claimant should comply with the orders, and his failure to comply leads him to being the author of his own misfortune. There was force in that argument. Litigants in person are expected to comply with orders in the same way that represented persons are. However, it may be necessary to adapt the procedure to ensure that there is equal footing. We were satisfied that the claimant had not engaged in drafting a written statement because of the specific difficulties that he has. We were satisfied he found the proceedings challenging. We

concluded the appropriate way of proceeding was to allow him to use the particulars of claim as his statement. We therefore allowed it.

4.34 We should note one further procedural point. Early in the hearing, it became clear that Mr Blair when deciding to dismiss had taken into account a complaint made by another member of staff, which was not directly associated with the events about which the claimant was accused. It would appear that a member of staff, who was not a witness to any of the specific events about which the claimant was accused, but who had her own grievance, did not want to be identified to the claimant. Before us, all references to that complainant's name were redacted. When we observed this, we asked for an explanation. At no time was any adequate explanation provided. At no time was an application made for anonymisation. There may be occasions when parties in preparing evidence could legitimately redact documents to anonymize individuals. If the identity of the individual is irrelevant, that may be legitimate, without a rule 50 Employment Tribunals Rules of Procedure 2013 order. However, in this case, it is apparent, for the reasons we will come to, that Mr Blair did take that complaints opinion into account. At no time was the claimant told her identity, or the nature of the allegations. Had the claimant known of the identity, either at the time when he was dismissed, or later during the course of these proceedings, he may have been able to bring relevant evidence. The respondent's unilateral anonymization has denied the claimant an opportunity to advance evidence and it has undermined open justice.

The Facts

5.1 The claimant was employed as a cleaner. He initially worked for contractors and became employed by the London School of Economics and Political Science, the respondent, following a TUPE transfer on 5 March 2018. He was employed from 11 October 2011 until 7 October 2021, when he was dismissed summarily.

5.2 At all material times, the claimant was a member of the union, United Voices of the World (UVW). In 2017, the claimant and others were involved in a strike. The claimant was not a union official.

5.3 Prior to the TUPE transfer, the claimant had been accused of physically assaulting a colleague. The investigation was ongoing at the time of the transfer and was completed by the respondent. The allegation did not result in a disciplinary hearing. On 31 August 2018, Mr Blair wrote to the claimant and summarised the findings of the investigation report of Mr Chris Allister, head of facilities. The report concluded no further action was required. Mr Blair stated, "The allegations against you that you harassed Ms Bayoro were not substantiated due to a lack of evidence." He continued, "I can therefore confirm that the investigation into the allegation against you is concluded and there is no disciplinary case to answer, nor will there be any further action on this matter." Mr Blair noted

that Mr Allister felt an incident had occurred and the report stated that Mr Allister felt there had been "collusion" given colleagues "could remember that nothing happened."

5.4 On 8 September 2019, Mr Abdulrazaq Oduoye, a colleague of the claimant, alleged in writing the claimant had assaulted him on 6 September 2019. Mr Oduoye stated, "I write to report incidents of physical and verbal abuse on my person and seek your assistance as it is causing me a great deal of worry." He stated, "As I stood backing the entrance door checking the signing sheets, someone attacked me from behind and all I could recall was seeing myself and some of the signing sheets on the floor. I looked up and saw Kinkala[1] pacing around, grabbed the signing on sheet, sign himself in and left the radio room." He alleges that he spoke to a colleague, Ms Bridget Falanka, and stated to her he had been attacked by the claimant. He stated he reported the matter orally to his manager.

5.5 Following an initial meeting with Ms Mary Lee, senior facilities manager, on 9 September 2019, Mr Allister suspended the claimant on full pay to enable a full investigation into the allegation that he assaulted Mr Oduoye on 6 September 2019. On 18 March 2019, Mr Allister held an investigation meeting with the claimant. Ultimately, Mr Allister produced a "grievance report" which appears to set out his investigation findings into the alleged assault. It is headed "November 2019." Mr Allister interviewed Mr Oduoye, Ms Falanka, Ms Willliams, Mr Ladelle and Mr Fejokwu.

5.6 Ms Falanka confirmed that she and Ms Williams had been in the room with Mr Oduoye and confirmed nothing had happened. She denied that Mr Oduoye had told her of any assault.

5.7 Ms Williams was also unable to substantiate the allegation.

5.8 Mr Allister confirmed Mr Oduoye had reported the matter to the police and he summarise the evidence. He stated he could "only partially uphold the grievance." He relied on Mr Oduoye's testimony, and the fact he reported the alleged incident to the police, as supportive. It is on that basis he appears to say, "It is my belief that something happened on this day." He recorded that no witness substantiated the assault. He placed emphasis on the word “nudge” used by Mr Ladelle, albeit Mr Ladelle had indicated that was not Mr Oduoye's words. He concluded there had been "an altercation between two colleagues" which had taken the form of "a non-accidental nudge." It appears that he reached that conclusion solely on the basis of Mr Oduoye’s evidence, as no other witness appears to have supported it. He recommended that the relationship between Mr Oduoye and the claimant should be "repaired via mediation and training." He concluded no disciplinary action was necessary.

[1] The claimant.

5.9 Mr Blair reviewed the report. He concluded that there should be no disciplinary action taken.

5.10 On 16 January 2020, Mr Allister wrote to the claimant. His letter confirmed that it was a matter of the claimant's word against Mr Oduoye and he "felt unable to progress the matter." He did not comment on the evidence of the witnesses who appeared to refute Mr Oduoye's allegation. The claimant eventually returned to work on 21 January 2020.

5.11 A further incident took place on 6 March 2020, which led to an Mr Oduoye making a further complaint, albeit that complaint was not made formally until 15 November 2020. It was this alleged incident which led to the claimant's dismissal.

5.12 Mr Oduoye initially reported the incident to Mr Fejokwu who confirmed he should make a formal complaint to Ms Mary Lee. Mr Oduoye did not send that complaint until 15 March 2020 in a document headed "emotional trauma after assault at work." He referred obliquely to the September 2019 incident and went on to say, "He assaulted me physically at Sheffield Street on 6 March 2020 between 16.00 and 16.30 hours whilst on my way to return the heater..." He went on to allege that the incidents were causing him emotional health issues and stated that he no longer felt safe at work. He stated, "This last physical assault again occurred in a working environment."

5.13 The CCTV of the incident had been secured shortly after the initial report on 6 March 2021. We do not have full details of why it was secured at this time. The alleged incident was captured by three CCTV cameras. That footage was used throughout the investigation and subsequent disciplinary.

5.14 On 4 December 2020, there was a suspension meeting which led to a letter from Mr Newsham of 8 December 2020 suspending the claimant. The suspension was said to be "in relation to an allegation by Mr Oduoye, that you physically assaulted him in Sheffield Street on 6th March 2020…" Mr Newsham confirmed he would undertake the investigation. This led to various investigation meetings with the claimant and witnesses. There were meetings on 15 December 2020, 17 December 2020, 8 January 2021, 15 January 2021, and 18 January 2021. Mr Newsham produced an investigation report dated 22 January 2021. The report confirmed Mr Newsham reviewed the CCTV footage on 11 December 2023 from three camera angles. He noted that the claimant had walked past the 'world turned upside down' sculpture and started to cross Portugal Street, directly opposite the entrance to Gorger Alley. Mr Oduoye had emerged from Gorger Alley when the two parties were approximately eight metres apart. They continued to walk towards each other, and he states "the footage shows [Mr Oduoye's] left shoulder being forced backwards and the heater in his left-hand swinging behind his back. [Mr Oduoye] also appears to be slightly knocked off his stride by an impact. Both parties continue to walk away from each other without any further conversation or

confrontation." He went on to say "the footage indicated to me that there had been shoulder to shoulder contact between [Mr Oduoye] and [the claimant], though it was not possible to determine whether this physical contact was a deliberate act by [the claimant] and could be considered an assault." Two things stood out for him, first the proximity of the parties when they passed, which he described as "abnormally close." Second, neither party stopped or appeared to acknowledge the contact. Later in the investigation, Mr Newsham accepted there had been no shoulder-to-shoulder contact, and any movement of Mr Oduoye had been instigated by contact between the claimant's leg and the heater which Mr Oduoye was carrying in his left hand. It appears that the heater was in a cardboard box. As to the movement of the claimant's leg, Mr Newsham appears to accept that it is unclear whether there was an intention by Mr Oduoye to kick, or whether he was attempting to move his leg out of the way of the heater that was between Mr Oduoye and the claimant, as they passed.

5.15 Throughout the investigation, Mr Oduoye continued to describe the incident as an assault and an attempt at intimidation. He sought to state it was part of a pattern of behaviour consistent with his previous allegations of assault.

5.16 Mr Newsham produced an investigation report dated 22 January 2021. Mr Newsham reached the following conclusions.

> **Conclusions and recommendations**
>
> **9.1 It is my opinion that the CCTV footage does not clearly show either way whether MK deliberately made physical contact with AO and assaulted him as alleged. There was contact between MK's left leg and the heater in AO's left hand which caused AO's arm to be forced backward. The footage also shows an unnatural movement of KMs left leg as he walks past AO. What is not clear is whether this is a deliberate attempt to kick out at the heater or an attempt to move his leg out of the way.**
>
> **9.2 AO alleges that KM made shoulder contact with him and touched his hand as part of the incident. I cannot see any clear evidence on the CCTV footage of these two acts. Because of this there is insufficient evidence for me to form a conclusion as to whether this contact took place. Given the speed at which the incident happened and the force with which the heater moves backwards through the impact with MK's leg it is certainly feasible that AO felt pain within his hand and shoulder from this action.**
>
> **9.3 I find it unlikely that MK did not see AO as he crossed Portugal Street, alluded to in the investigatory meeting on the 17th of December. There is nothing on the CCTV footage that would suggest that MKs view of AO was obscured and he appeared to be looking directly into Gorger Alley, directly at AO, as he crossed the road. While MK did not clearly deviate from his original path to walk into AO as was suggested in the investigatory meeting on the 8th of January, the footage shows MK continuing to walk in a line that would bring him into unnaturally close proximity to AO, when there was certainly enough time and space to avoid this.**
>
> **9.4 AO spoke of previous acts of assault, aggression and intimidation by MK in his witness interview on 8th of January 2021. I was not involved in**

> **these previous investigations, nor have I requested to view the reports into these incidents. I am therefore choosing not to consider the detail of these previous allegations when making my conclusions about this case as I feel that the CCTV footage and witness testimony related to the alleged incident on the 6th of March 2020 is sufficient evidence as to whether an assault took place. It is clear however that there is a longstanding negative tension between the two parties. This is evident from statements made in the testimony of MK on the 17th December 2020 and AO on the 8th of January 2021. This tension would lead me to conclude that the incident shown on the CCTV footage on the 6th of March was not an accident.**
>
> **9.4 From the CCTV evidence provided my conclusion is that MK's actions on the 6th of March 2020 should not be considered an assault, as there is insufficient evidence to prove that his actions were deliberate. I do though find MKs statement that he had not seen AO until coming into close proximity with him extremely unconvincing and unlikely. From my reviews of the CCTV footage and the witness testimony provided I find it more probable than not that MK was in some way attempting to intimidate or provoke AO on the 6th of March 2020 and acted in a manner that should not be considered acceptable whilst working at LSE. I believe that the manner in which KM continued to walk directly towards AO as he crossed Portugal Street should be considered as a deliberate, aggressive and intimidatory act. Whether the contact between MK's leg and the heater was a deliberate act or a by product of the manner in which KM walked at AO, I conclude that it was certainly avoidable, and therefore recommend that a disciplinary hearing is convened to take the matter forward.**

5.17 At no time did the respondent obtain any medical evidence in support of any injury caused to Mr Oduoye, or medical evidence concerning his mental health.

5.18 Mr Blair reviewed the investigation report and decided to proceed with a disciplinary hearing. On 5 February 2021, Mr Blair wrote to the claimant; he asked the claimant to attend a disciplinary hearing. As to the charge to be answered, Mr Blair wrote the following:

> **As you are aware, a disciplinary investigation was instigated by Mr Philip Newsham, Deputy Director of Estates, to discuss the allegation of a physical assault, specifically an incident that occurred between you and Mr Abdulrazaq Oduoye, on 6th March 2020, on the LSE campus.**

5.19 This led to a number of disciplinary hearings, we will consider the relevant detail below when considering the allegations. We note there appear to be disciplinary hearings on 10 March 2021, 30 June 2021, 17 July 2021, 20 July 2021, 27 July 2021, 19 August 2021, and 14 September 2021. This led to an outcome meeting on 7 October 2021, during which the claimant was dismissed, as confirmed by letter of 7 October 2021.

5.20 At the outcome meeting Mr Blair stated the following:

> **I find it difficult to understand that as we all navigate roads and pavements as part of our daily life, we would walk directly towards someone – particularly if that someone was a person you had a previous altercation with and to the extent where allegations were partially upheld, and mediation recommended. Indeed, Simon said – four strides was ample time**

> **enough to move out of the way – but Kinkela you did not do that, you made a direct beeline for him, only attempting to step out of the way once contact had been made – in my mind that is a clear act of intimidation. I also note that you were the only one to look back, over your shoulder, and I conclude from that that this was to check and see whether you had succeeded in intimating him.**

As to Mr Oduoye's account he stated:

> **There have been many times where I have noted throughout this case, that Mr Bennett has attempted to discredit the account of Abdulrazaq. I observed throughout this process that Abdulrazaq has been a bit erratic at times, and seemingly getting himself into a bit of a muddle. I put that down to his state of mental health, which I would say has deteriorated since the start of this case, and perhaps even the first incident - to the point where I felt I had to recommend a course of counselling for him due to my concerns about his wellbeing. It's alarming that as your paths rarely crossed in the 5 years or so that you have worked together, all of a sudden, when your 'best friend of many years' was suspended here we are. Again. I am at a loss to understand why Abdulrazaq would single you out to wage a campaign against you – what motive would he have in doing that, trying to get you in to trouble, when by your own admission you don't have anything to do with him. That said, having observed his nervousness which sometimes manifested as aggression I do not believe that he would have brought a false claim against you Kinkela, in the knowledge that you not only had friends in high places but that you have demonstrated behaviours that you are a force to be reckoned with, and extremely intimidating. Shouting across the table "you are a liar" and "you are a big liar I want justice" is not how we behave at the LSE.**

5.21 Mr Blair did not directly refer to any incidents in 2018, 2019, being the other complaints he took into consideration. However, it is apparent that he had taken into account other incidents as he says the following:

> **I conclude that you deliberately seized the opportunity *to further intimidate Mr Oduoye*, and that this deliberate act of intimidation was an act that has destroyed the relationship of trust and confidence between you and the LSE, making any future working relationships impossible to continue, therefore you are summarily dismissed. Your last day of service will therefore be today 7th October 2021. You are not entitled to receive notice or pay in lieu of notice. Any other monies due to you together with your P45 will be forwarded to your shortly. [Our emphasis]**

5.22 It follows, as was confirmed by Mr Blair's evidence, that he formed the view that there had been previous acts of intimidation, even though those previous acts were expressly not considered by Mr Newsham. We will consider this further when dealing with our conclusions. We are satisfied that at no time did Mr Blair explain adequately, or at all, that he proposed to revisit any previous allegations and, essentially, change his view on them and treat them as part of a pattern of intimidation, as he described it before us.

5.23 In his letter of dismissal, Mr Blair said the following:

> **The hearing was convened following the recommendation by Mr Newsham in order to consider the allegations investigated by him that you had**

> **physically assaulted Mr Abdulrazaq Odouye whilst at work, on 6th March 2020. As you know, although Mr Newsham concluded that the incident may not be described as an assault, he felt that you had deliberately intended to intimidate Mr Oduoye.**
>
> **I read very thoroughly all the witness statements provided to me and listened carefully to the information presented to me at the numerous hearing meetings, in addition to the testimonies of the witnesses who both attended the meeting in person.**
>
> **I have taken into consideration the comments from the summing up done on your behalf, by Mr Bennett, but have concluded that I found it evident that you did in fact intimidate Mr Oduoye, because you believed him responsible for the historic suspension of your close friend of many years, Mr Falanka. You confirmed to me that you would not agree to the recommended mediation following on from the first incident that occurred between you both in September 2019, that you would never have apologised to him for bumping into him, but you would have done had he been a stranger. To that end I have lost my trust and confidence in you as member of the Campus Services Team and have decided to uphold these allegations and you will be summarily dismissed from the service of the School as of today.**

5.24 The claimant appealed by letter of 19 October 2021. The claimant identified three areas said to be grounds of appeal. First, failure to properly apply the LSE's disciplinary policy, and the failure to refer to his alleged conduct. In particular, it is alleged that the concept of intimidation did not appear in the examples of gross misconduct listed in the policy. Second, the treatment of the evidence was unreasonable and ultimately perverse. In particular, he questioned why it appeared to be assumed that it was the claimant's responsibility to move out of the way of Mr Oduoye, when both could equally have moved. It also queried why it was suggested the claimant had moved towards Mr Oduoye. Third, Mr Blair had exhibited a clear bias against the claimant, favouring Mr Oduoye and raising concerns of trade union victimisation. In particular, the question why the claimant was blamed for the incident when both had an opportunity to move away from one another.

5.25 This is an extensive and detailed letter of appeal which reviews the evidence and the potential inconsistencies.

5.26 The appeal was heard by Mr Julian Robinson. On 24 February 2022, Mr Robinson confirmed that he would chair the appeal panel and he sought to arrange a meeting. The appeal hearing took place on 11 March 2022 and resumed on 30 May 2022. The appeal outcome was sent on 1 June 2022. It is clear that Mr Robinson did not view this as a rehearing of the case. It was more akin to a review; he appears to have confined his consideration to the three grounds. Mr Robinson did not identify any procedural difficulties. Mr Robinson did not identify adequately, or at all, the fact that Mr Blair had relied on the incidents in 2018 and 2019, or that he had relied on a complaint brought to his attention by another member of staff, which was never put to the claimant. He failed to appreciate that Mr Blair had changed his findings in relation to the incident in 2018 and 2019 and Mr Blair failed to make it plain to the claimant that those matters would be

taken into account and would be treated as previous acts of intimidation, even though no such findings were made at the relevant times.

5.27 As to his findings, in relation to ground one, he concluded that there was sufficient evidence that Mr Blair had found there had been "deliberate intimidation" that constituted "gross misconduct." His reasoning is unclear. As to ground two, he stated he could see "no reason to support Mr Makanda's assertion that he accidentally bumped into him." At page 910 he went on to say:

> **Both Mr.Blair and Mr.Makanda confirmed there was no previous incidents between the two or bad blood. It therefore seems implausible to me why a person would be so moved to go to the Police complaining of intimidation and to then display unbalanced and erratic behaviour Clearly something must have happened in that Radio Room.**

5.28 The basis for this is unclear. It appears that he was also taking into account the previous alleged incident in 2019.

5.29 As to ground three, he stated the following:

> **It is a matter of fact that Mr.Blair had previously found in favour of Mr.Makanda in another case, this does not suggest bias against Mr.Makanda. Mr.Blair could only base his decision on the testimony of Mr.Oduoye, the CCTV footage and the explanations provide by Mrakanda. I am therefore persuaded that Mr.Blair had considered the evidence and concluded on the balance of probability there had been deliberate acts of intimidation.**

5.30 It appears that Mr Robinson took into account Mr Blair's decision not to proceed with disciplinary proceedings in 2019, and possibly 2018. The election not to proceed appears to be interpreted as finding “in favour of Mr Makanda.“ However, he gives no indication that in fact Mr Blair had revisited those events and fundamentally changed his mind and implicitly made findings that had not been made at the time by treating them as part of a pattern of intimidation.

5.31 It is apparent the Mr Robinson identified nothing about the procedure adopted or the substantive decision which concerned him.

5.32 Neither Mr Blair nor Mr Robinson referred to the fact that intimidation was not expressly set out as an example of gross misconduct in the disciplinary procedures. Examples of gross misconduct in the procedure include the following:

> **…**
> - **physical or verbal abuse of a colleague, member of the public or employee of an organisation that has business with the School;**
> **…**
> - **racial, sexual or other acts of harassment or discrimination, including sexual misconduct on School premises or on School business; …**

5.33 Before us both have said that intimidation is a form of harassment. That was not stated at the time.

5.34 Mr Robinson upheld the dismissal by letter of 1 June 2022.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held -

> **A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal, as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 In considering the question of contribution, the tribunal must make findings of fact as to the claimant's conduct. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

6.7 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent by dismissing, the employee will have no right to payment for his or her notice period.

6.8 To amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicated Newspapers) Ltd** 1959 1WLR 698, CA**.**

6.9 The degree of misconduct necessary for the employee's behaviour to amount to a repudiatory breach is a question of fact for the tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules as to what can be taken into account. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as warranting summary dismissal. General circumstances including provocation may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly, dishonesty, serious negligence, and wilful disobedience may justify summary dismissal, but these are examples of the potential circumstances, and each case must be considered on its facts.

6.10 Dismissal on grounds related to union membership or activities is prohibited by section 152 Trade Union and Labour Relations Consolidation Act 1992. In so far as it is applicable, section 152 provides:

> **(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—**
>
> **…**
>
> **(*b*) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, …**
>
> **…**
>
> **(2) In subsection (1) 'an appropriate time' means—**
>
> **(*a*) a time outside the employee's working hours, or**
>
> **(*b*) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;**
>
> **and for this purpose 'working hours', in relation to an employee, means any time when, in accordance with his contract of employment, he is required to be at work.**

6.11 As for the burden of proof, there is an onus on the employee to raise a prima facie case of an illegal purpose;[2] then the burden of proof rests on the employer in the normal way. If the respondent fails to prove the reason relied on, the tribunal must still consider find the real reason (see **University of Bolton v Corrigan** UKEAT/0408/14 (21 December 2015, unreported) (applying **Kuzel v Roche Products Ltd** [2008] IRLR 530, [2008] ICR 799, CA.)

6.12 The tribunal must determine what was the reason in the normal way (i.e., the set of beliefs causing the employer to dismiss). It is not enough simply to pose the causative question 'but for union membership, would he have been dismissed.'

6.13 In **Cadent Gas Ltd v Singh** [2020] IRLR 86, the EAT held a tribunal must normally consider the mental processes of the decision-making manager and ascribe those to the employer, subject to an exception where another manager (here, with an anti-TU motivation) not on the disciplinary body has nevertheless been influential and responsible in some way for the investigation. This should be read in the light of the Supreme Court decision in **Royal Mail Group v Jhuti** [2019] UKSC 55, which held that there is a general power to look at the motivation of the other manager.

6.14 **Kuzel** makes it clear deciding the reason is a matter of fact for the tribunal and it turns on the question of the evidence produced and the permissible inferences on that evidence. (See paragraphs 50 – 61.) It is open to a tribunal to find the true reason was a reason advanced by neither party. It therefore follows that the failure to discharge the burden does not constrain the tribunal to find the alternative explanation advanced; the reason is simply a question of fact for the tribunal.

[2] Provided the claimant has the qualifying period of employment.

6.15 Insofar as applicable, section 146 Trade Union and Labour Relations Consolidation Act 1992 provides:

> **(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—**
>
> > **(*b*) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …**
> > **(*ba*) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, …**
>
> **(2) In subsection (1) 'an appropriate time' means—**
>
> > **(*a*) a time outside the worker's working hours, or**
> > **(*b*) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;**
> > **and for this purpose 'working hours', in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.**
>
> **…**
> **(5A) This section does not apply where—**
>
> > **(a) the worker is an employee; and**
> > **(b) the detriment in question amounts to dismissal.**

6.16 As to the burden of proof in a section 146 claim, we have regard to **Circo Ltd v Dahou** 2017 IRR 81. The Court of Appeal accepted that the approach to the burden of proof in section 146 claims, is akin to that in section 152 claims. When the claimant has established a prima facie case, in that there are issues which require explanation, it is for the respondent to prove its reason, albeit this does not appear to prevent the tribunal from finding the reason is something other than contended for by either party. However, the latter point is not one we need to decide in this case.

6.17 The tribunal noted that the respondent, in its initial submissions, had not refer to any case law establishing when it may be appropriate to revisit previous matters which have been considered as potential disciplinary matters, but which had not been pursued at the time.

6.18 The respondent's further written submissions, refer to a number of cases. We do not need to review them all, but we have had regard to them. The respondent relied on, **London Borough of Brent v Fuller UKEAT/0453/09**. The submissions relied on the EAT decision and state the "EAT held that, when deciding whether to dismiss for gross misconduct, and employer was entitled to take into account a previous similar incident for which no formal warning was given." We asked for clarification. The clarification failed to refer to the Court of Appeal

decision, which overturned the original EAT decision, and we asked for further clarification.

6.19 We have not found **Fuller** of assistance. Taken at its highest, the EAT's decision is consistent with an acceptance that each case must be considered on its merits. It falls far short of establishing any principle of law that the respondent will always be "entitled to take into account a previous similar incident for which no formal warning was given." Even less is it authority for the proposition the respondent shall be entitled to revisit those findings, when the incident in question has led to a specific disciplinary investigation, but where it was found that there was insufficient evidence to proceed to a disciplinary hearing, and where it was expressly said there will be no further action. Even when previous incidents can be revisited, **Fuller** is not authority for the proposition that the respondent may do so without making the fact of the consideration and the relevance of the consideration plain. In no sense whatsoever does **Fuller** establish a principle that in taking into account previous conduct, it is reasonable to fail to make that reliance explicit.

Conclusions

7.1 We first consider the claim of unfair dismissal.

7.2 It is for the respondent to establish the reason or if more than one, the principal reason for dismissal. The respondent says the reason relates to conduct. In Mr Mr Grundy's submissions, the reasons is put as follows:

> **The Tribunal is invited to find that R has proved on the balance of probabilities that the reason or principal reason for C's dismissal was one of conduct, namely C's actions on 6 March 2020, which were found by R to be an act of deliberate intimidation of Mr Oduoye in particular when viewed in the context of previous incidents, in particular the incident on 6 September 2020[3] and the obvious contempt which C had for Mr Oduoye.**

7.3 We remind ourselves that the reason is the set of facts known to the employer or it may be beliefs held by the employer which causes the employer to dismiss. As the reason incorporates both facts and potentially beliefs, those matters that constitute the reason may be narrow or wide. It is clear from the respondent's submissions and the evidence before us, that the reason was not confined to the narrow consideration of the events of 6 March 2020. The respondent's reason encompassed beliefs about the claimant's mindset, his intention on 6 March, and Mr Blair's beliefs about previous incidents. It is necessary for us to consider, in some detail, what were those facts and beliefs which constituted the reason for dismissal, as it will also be necessary to consider whether there were grounds for each, and whether any grounds relied on were underpinned by an investigation open to a reasonable employer.

[3] We presume this is 6 September 2019.

7.4 In reaching his decision, Mr Blair relied on what he termed a pattern of intimidatory behaviour. When forming the view there was a pattern, he relied on three matters: the events of 2018, the events of 2019, and a complaint by an employee, which was not investigated (Mr Blair knew the name of the complainant, but the respondent has chosen to withhold her name). We need to consider each of those three matters.

7.5 The 2018 investigation concerned an employee, Ms Bayoro. At the time, as noted above, Mr Blair concluded that there was no disciplinary case to answer. There was no disciplinary hearing. There were no findings of fact. There was no warning.

7.6 The 2019 investigation concerned an alleged incident on 6 September 2019. As noted above, that led to an investigation. There were at least two witnesses, Ms Falanka and Ms Williams. An investigation report was produced. There was insufficient evidence to warrant a disciplinary hearing. Mr Alistair formed the view there had been some form of incident, but as to the nature of that incident, he gave no details other than his feeling that there was a "non-accidental nudge." It is clear Mr Blair shared that view, albeit his reasons for doing so are unclear. No disciplinary action was taken. There was no finding of assault. There was no finding of intimidatory behaviour.

7.7 During the course of the disciplinary process in 2020, Mr Blair was shown what appears to be a complaint by another member of staff. As noted above, the identity of that person has been withheld from the tribunal. We do not need to record the detail of the letter, which appears to be concerned with the return of Mr Falanka and Mr Makanda. The letter identifies no specific action of Mr Makanda, and it appears to express a diffuse fear. This letter was never brought to the claimant's attention, nor was the claimant told that Mr Blair would have regard to it. It resulted in no investigation that we have been made aware of. It resulted in no disciplinary against the claimant. It is apparent that Mr Blair accepted that it was evidence of some form of blameworthy conduct by the claimant. What that blameworthy conduct was is unclear, and any underlying allegation of misconduct was never put to the claimant.

7.8 As part of his reason, Mr Blair relied on these three incidents. In doing so, Mr Blair modified his view in relation to the 2018 and 2019 incidents. In doing so, he relied on a number of matters, including his assumption that there was no good reason for false accusations, his belief that at least the 2019 incident had been reported to the police, his belief that Mr Oduoye would not have raised those matters unless there was some truth in them, and his belief that there was an underlying behaviour by the claimant which caused Mr Oduoye to raise complaints. In doing so, he modified his views about the factual circumstances of the events in 2018 and 2019. He took the view that the claimant's behaviour was, at least, intimidating. The exact view he took is difficult to ascertain as he did not record it in writing, he did not raise it with the claimant, and he did not explain the change of position. However, in relation to all three of the matters he took the view

that they formed part of a pattern of intimidatory behaviour by the claimant. It follows each was taken to be intimidatory.

7.9 It is less clear how he applied these findings. One possibility is, Mr Blair relied on the accumulation of the intimidatory behaviour, namely the pattern of behaviour, when deciding whether to dismiss. The second possibility is his belief, that there was a pattern of intimidating behavior, was a primary finding of fact from which he inferred the claimant intended to intimidate Mr Oduoye on 6 March 2020. We found his evidence on this point confusing. We reach the conclusion that there were elements of both possibilities in his reasoning.

7.10 As to the events of 6 March 2020, Mr Blair found a number of facts and formed a number of beliefs. We should set out what we have found to be the most important. He accepted the claimant and Mr Oduoye had met in the street accidentally. Mr Oduoye was carrying a heater in a box, holding it in his left hand. Mr Oduoye could not have moved out of the claimant's way easily. The claimant could have moved out of Mr Oduoye's way. Instead, the claimant walked towards Mr Oduoye making, as he termed it, a “beeline” for Mr Oduoye. Mr Oduoye’s description that he was attacked and there was physical contact shoulder to shoulder with unsustainable. The only physical contact was between the claimant's left leg and the box, which was being carried by Mr Oduoye. The reason for Mr Oduoye's inaccuracy was muddle and mental health. He also concluded that the claimant would not apologise or change his behaviour. He considered the claimant's failure to participate in mediation in 2019 to be blameworthy. Overarching all this, he considered the claimant had intended to intimidate Mr Oduoye, and this formed part of a pattern of behaviour.

7.11 We find that it was the accumulation of Mr Blair’s belief in those facts, Mr Blair’s beliefs about the claimant's motivation, and Mr Blair’s view about the likelihood of the claimant's behaviour changing which constituted the reason for dismissal.

7.12 We have regard to Burchell. Has the respondent established a reason for dismissal? We have considered the allegation that the true reason was the trade union-related activity, namely taking part in strike action in 2017, and we have not found that to be the sole or principal reason for dismissal. We explain our reasons for that conclusion below. We accept Mr Blair believed the claimant was guilty of the misconduct, and he believed the other matters which we have found collectively constitute the reason. The reason for dismissal is therefore made out.

7.13 We next consider whether there were grounds to sustain the beliefs, and whether at the time the belief was formed there were grounds to sustain those beliefs established by reference to an investigation that was open to reasonable employer. We will consider each of the main elements of the reason.

7.14 As for the events in 2018. There was an investigation at the time. The investigation found there were no grounds to take disciplinary action. It follows that there were insufficient grounds to find that the claimant had assaulted or intimidated the complainatatn, or otherwise conducted himself in a way that was blameworthy or should lead to disciplinary action. It is apparent, as noted above, that Mr Blair changed his mind in 2020. He chose to see the claimant's conduct as blameworthy and as part of a pattern of intimidatory conduct. In reaching that decision he undertook no further investigation. Moreover, he did not raise it with the claimant at the disciplinary hearing, adequately or at all. The claimant did not know that Mr Blair was taking the events 2018 into account, or that he was fundamentally changing his view on a matter where there had been written confirmation that there would be no further action. Mr Blair had no grounds on which to base his change of view. His change of view was not underpinned by an investigation which was open to a reasonable employer.

7.15 As for the events in 2019, there was an investigation at the time. The investigation found there were no grounds for disciplinary action. There is a statement by Mr Alistair that something occurred, but what that "something" was never defined nor was the evidential basis for it. It is unfortunate that Mr Blair accepted that view of Mr Allistair on face value. The investigation provided no evidence on which Mr Blair could conclude that the claimant's conduct was blameworthy. It is apparent that the witnesses interviewed should have been in a position to observe any violence from Mr Makanda, but each denied anything untoward happened. It follows that the balance of the evidence in 2019 was unsupportive of Mr Oduoye and tended to exonerate the claimant. In 2020, Mr Blair fundamentally changed his view about the events in 2019. He continued in his belief that something had happened, but then assumed that what happened was blameworthy and amounted to intimidatory behaviour by the claimant. Whilst there are some references to the 2019 incidents in the various disciplinary hearings, the statements falls far short of confirmation that the matter would be reconsidered, reopened, and potentially the findings fundamentally changed. Mr Blair never made it plain that his intention was to make new findings of fact in relation to the 2019 incidents. Mr Blair undertook no further investigation. He did not reinterview the witnesses. Instead, he modified his view and attributed blame to the claimant without further investigation and without appropriate warning. In changing his view, Mr Blair had no proper grounds, and his change of view was not underpinned by an investigation which was open to a reasonable employer.

7.16 As to the complaint by the member of staff in 2020 alleging that she was scared of the claimant, Mr Blair undertook no investigation at all. He did not raise it with the claimant. He assumed there was blameworthy conduct by the claimant. His grounds for this were limited. It appears he read only the letter and did not interview the complainant. This is not an approach open to reasonable employer.

7.17 It follows that the three matters that he relied on in support of his finding that there was a pattern of intimidatory behaviour were not supported by reasonable grounds nor underpinned by any investigation open to a reasonable employer.

7.18 As for the events of 6 March 2023, several of the factual matters relied on are not disputed. It is accepted that Mr Oduoye and the claimant met in Portugal Street. Mr Oduoye had emerged from Gorger Alley and had taken several steps to bring himself in to Portugal Street. He was carrying a heater in a box. We do not know the dimensions, but it does not appear to be more than a couple of feet in length and around eighteen inches deep. It is probably around five inches in width. It does not appear to be heavy. Mr Oduoye's complaint was one of violence and assault. It is accepted that the only contact was between the claimant's left leg and the box. Mr Oduoye's account was significantly inaccurate, and Mr Blair knew that.

7.19 The tribunal has had an opportunity to view the CCTV. When deciding contributory fault and wrongful dismissal, it is necessary for us to come to our own conclusions. However, in considering the CCTV evidence, for the purposes of analysing whether the dismissal was reasonable, we accept that it is not for us to substitute our belief as to what the CCTV shows happened for that of the respondent's managers. Nevertheless, it is appropriate to ask whether the objective evidence, namely the CCTV footage, is capable of supporting the findings made by the respondent. To the extent that the respondent's findings are demonstrably perverse, as they cannot be supported by the CCTV footage, it is appropriate to have that in mind. It is a simple question – were there grounds to sustain the belief. There are occasions when evidence, including documentary, video, and real may be open to interpretation and the range of reasonable responses may apply. Equally, it is appropriate to consider whether a finding is so perverse that it is outside the range of reasonable conclusions which could properly be reached.

7.20 The investigation concerning events 6 March 2023 is, viewed narrowly, one open to reasonable employer. There were two witnesses – Mr Oduoye and the claimant. Both were interviewed and their accounts obtained. The only other relevant evidence was the CCTV footage. That was obtained and viewed. As we have noted above, there are other elements of the belief which led to dismissal which were not supported by an investigation open to reasonable employer.

7.21 The investigation demonstrated there were no grounds for finding the claimant had assaulted or attacked Mr Oduoye. That was accepted by Mr Blair. Albeit Mr Newsham initially took the view that there had been a shoulder-to-shoulder collision, the CCTV was clear enough to demonstrate that there was no such contact and Mr Blair accepted that. Mr Blair describes the claimant as making a direct "beeline" towards Mr Oduoye. At other times, he referred to the claimant walking towards Mr Oduoye. We find that is not an interpretation of the CCTV open to a

reasonable employer. It is clear that Mr Oduoye emerged from Gorger Alley and began to walk across the road in a line which would bring him to the edge of a parked car. The claimant walked around that parked car and began to cross the road towards Gorger Alley. We do not know the exact width of Gorge Rally, but it is relatively narrow amounting to a few feet. The path adopted by the claimant is entirely consistent with him aiming to walk to the right hand side of Gorger Alley. He demonstrably does not deviate. He does not walk towards Mr Oduouye. He does not adopt a path that caused Mr Oduoye to deviate. Mr Oduoye does not deviate. There is no rational basis, and no ground, for saying the claimant made a beeline to, or walked towards, Mr Oduoye. That is not supported by the evidence, and it was an unsupported finding.

7.22 Mr Blair's finding that Mr Oduoye would have had some form of difficulty stepping to one side, or otherwise avoiding contact, is unsustainable. It is clear from the CCTV that Mr Oduoye and the claimant had been able to observe each other for several yards, albeit there were various pedestrians that crossed between them. As they approached each other, they were both in the road. The road was clear in both directions. Both could have easily moved away. Mr Blair, in concluding, that Mr Oduoye could not move, or would have had any more difficulty taking avoiding action than the claimant, had no grounds for this whatsoever. This was not a finding open to reasonable employer. This was an unsupported perverse finding, having regard to the video evidence.

7.23 Mr Blair did not find that the claimant had deliberately kicked out at Mr Oduoye. He did find that there had been contact between the box and the claimant's left leg. It is less clear whether he found that contact to be accidental. He appears to maintain the view that this was caused by the claimant making a "beeline" towards Mr Oduoye and causing the contact. We accept that it is not possible to be clear as to whether the claimant intended the contact. However, it appears that Mr Blair gave little or no consideration to whether Mr Oduoye may have moved the box to impede the claimant's progress, and this possibility was one which could not be ignored by reasonable employer.

7.24 Mr Blair specifically found that the claimant looked back, but Mr Oduoye did not. There are no grounds for that finding and it is not supported by the CCTV. There is some indication that the claimant may have looked over his shoulder, or started to look over his shoulder, as he reached the alley, several steps after the contact. However, the CCTV demonstrates that Mr Oduoye did look back. As the collision occurs, he twists to left and clearly rotates his head to look at the claimant. It is possible that he started to rotate his head before the contact. Whatever the position, it was not open to a reasonable employer to say that only the claimant looked back. That is demonstrably untrue.

7.25 Mr Blair concluded that it was the claimant who sought to intimidate Mr Oduoye. In reaching that conclusion, he did accept that Mr Oduoye's account was inaccurate. The claimant had not assaulted him. The

claimant had not attacked him. Mr Blair did, quite properly, consider why Mr Oduoye's account was inaccurate. He deals with this in a statement at paragraph 70.3. He concluded Mr Oduoye was not dishonest in his recollection but "he was rather muddled possibly due to his mental health." When reaching this decision, he had no medical evidence which would suggest that Mr Oduoye may be muddled by reason of mental health. This was simply an assumption. There were no grounds. Absent any further evidence, it was not open to him to conclude definitively that any discrepancy was caused by any mental health issue. It appears this led him to discount the possibility that Mr Oduoye was intentionally lying. In our view no reasonable employer would have discounted that possibility. There had been a complaint in 2019. Mr Oduoye had identified at least one witness. That witness, together with a further witness, did not support Mr Oduoye. In 2020, Mr Oduoye alleged he been assaulted by the claimant on 6 March and described himself as being attacked. That was clearly inaccurate and at least, objectively, an exaggeration. There was a real possibility that there was deliberate exaggeration or invention by Mr Oduoye. That possibility does not appear to have been considered adequately or at all. Whilst it would have been open to Mr Blair to conclude that Mr Oduoye was not deliberately inventing allegations, there were no adequate grounds supported by an appropriate investigation, on which she could have dismissed that possibility. This approach was not one open to a reasonable employer.

7.26 It follows that when forming the view that Mr Oduoye was without blame, and that the claimant acted in a deliberate intimidating manner, there were fundamental difficulties as outlined above. Important beliefs were founded on inadequate grounds, and based on inadequate investigation. In the circumstances, we must find the dismissal unfair.

7.27 We should highlight some further difficulties, which in themselves may render the dismissal unfair. The ACAS code of practice 2015 paragraph 5 emphasises the importance of carrying out the investigation without unreasonable delay. It is unfortunate that Mr Oduoye presented his complaint many months after the event. This led to a delay in investigation, albeit one which the respondent was not initially responsible for.

7.28 Paragraph 9 of the code provides for the employee to be notified of the case to answer. That notification must include sufficient information. The claimant was invited to attend the disciplinary by letter of 5 February 2021. That letter still referred to an alleged "physical assault" on 6 March 2020. By that time, it had been decided that there was no physical assault, but some form of deliberate act of intimidation. That was fundamentally misleading, as was illustrated by the fact the discrepancy was raised at various meetings. It cannot be assumed that an act of deliberate intimidation is the same as a physical assault. This is illustrated by the fact that Mr Blair formed his view based on an assumption of a pattern of intimidatory behaviour.

7.29 The letter failed to set out the specific allegation. We do not accept that the allegation was sufficiently clarified during any meeting, or in any correspondence, and we have considered the correspondence carefully. Had the claimant understood that the accusations was one of intimidation, and that his previous alleged conduct was being considered, the whole basis of his defence may have been different. Further an assumption appears to have been made that intimidation would equate with harassment. At the very least, that was arguable, and the claimant was denied the opportunity to advance that argument. When an employee is facing dismissal, no reasonable employer would fail to set out accurately the allegation the employee is to face. This respondent failed to set out the allegation accurately, and that was a serious flaw in the procedure.

7.30 For the reasons already given, it is clear that we must find that the dismissal was unfair. Lest we be wrong about our findings in relation to the grounds and the investigation, we should consider, whether the dismissal was within the band of reasonable responses.

7.31 It may have been open to a reasonable employer to decide that the claimant deliberately failed to give way to Mr Oduoye. However, it was not open to a reasonable employer to find that Mr Oduoye could not have given way to the claimant. A reasonable employer may have found that both were at fault, in the sense that neither gave way to the other. A reasonable employer may have found this led to a fleeting and minor contact between the claimant's left leg and the box carried by Mr Oduoye. No reasonable employer could have found that this was any form of assault. No reasonable employer could have taken into account the events in 2018, 2019, or the further complaint which has been anonymized before us, without making it explicit and without re-investigating, as appropriate. Absent that, no reasonable employer could have found a continuing pattern of intimidation. What is left was essentially an innocuous minor collision which may have been contributed to by both the claimant and Mr Oduoye, possibly because of petulance and pettiness which likely reflected a degree of dislike between the two. No reasonable employer would have ignored the fact that the claimant may have reasonably felt aggrieved because of the possibility that he been falsely accused. No reasonable employer would have failed to have all that in mind. We find no reasonable employer would have dismissed the claimant in those circumstances and taken no action against Mr Oduoye, whether in relation to the events of 6 March, or possibly by investigating whether Mr Oduoye had deliberately sought to invent and mislead. Dismissal was not open to a reasonable employer.

7.32 We have considered the appeal. Mr Grundy advances the limited arguments that the appeal cured any procedural defect. This appears to be limited to an assertion that because Mr Robinson knew nothing of Mr Blair's taking into account the complaint by the employee anonymized before us, that cured any defect. It may be possible to argue, in circumstances where it is demonstrable that an appeal intended to, and did, view the matter afresh, interviewing witnesses as necessary, and

coming to a completely independent decision, that all defects in the previous process could be cured. However, this appeal falls far short of that. It is not even clearly a review. It is certainly not any attempt at a rehearing. Mr Robinson failed to identify any defects or errors. He was not aware of the totality of what Mr Blair took into account. Moreover, the explanation he gave, in relation to his findings on the various grounds advanced, failed to recognise the obvious difficulties with the dismissal and the process adopted.

7.33 No reasonable employer, on appeal, would have failed to recognise the charge for which the claimant was dismissed was not reflected in the original letter inviting him to the disciplinary. No reasonable employer on appeal would have failed to ascertain that Mr Blair had taken into account, when concluding that there was a pattern of intimidatory behaviour, that Mr Blair had based his finding on events for which there were no supporting findings, or had substituted his own findings, without telling the claimant. No reasonable employer on appeal would have failed to recognise that a number of findings about the events of 6 March were not supported by the CCTV, as we have outlined above. No reasonable employer on appeal, when considering an allegation of bias, would have wholly discounted the possibility that more favourable treatment was given to Mr Oduoye. At the very least, this should have raised concerns which either should have been dealt with adequately in the appeal or should have resulted in the matter being looked at again.

7.34 In no sense whatsoever did this appeal cure the defects that had gone before.

7.35 We must next consider whether the dismissal contravened section 152 Trade Union and Labour Relations Consolidation Act 1992. During the hearing it was noted that the way in which this was put had changed. Following the case management hearing with EJ Khan, the claimant was invited to clarify this claim. For the purposes of section 152, it is his case that he was dismissed for taking part in strike action in 2017. It is arguable this would have required an amendment. However, both parties prepared on that basis, and in the circumstances, we have not required formal amendment of the claim.

7.36 The respondent accepts the when a prima facie case is raised, it is for the respondent to prove its reason. The respondent has not advanced its defence on the basis that there is no prima facie reason. We accept the fact that there was a strike in which the claimant took part, and which Mr Blair was aware of, coupled with the totality of his treatment of the claimant, which we found to be unreasonable, that would be sufficient to raise a prima facie case. We have considered the respondent's explanation. When deciding the reason, it is a matter for us. We are not constrained to find it is the reason advanced by the claimant or the reason advanced by the respondent. Moreover, having regard to **Kuzel**, we are conscious that in reaching our final decision as to the reason, we should

first make primary findings of fact and then consider what inferences can properly be drawn.

7.37 We have considered the totality of the matters which appear to constitute Mr Blair's reason for dismissal above. We are satisfied, on the balance of probability, that Mr Blair did believe the claimant was hostile to Mr Oduoye, and he had engaged in a pattern of intimidatory behaviour. We are satisfied that Mr Blair thought it was serious and intimidatory conduct. We are satisfied that Mr Blair, despite the evidence about that the events in 2018 and 2019, formed a view that the claimant had behaved aggressively towards Mr Oduoye and that he continued to believe the claimant was involved in some form of incident which amounted to intimidation in 2019 and that his conduct in 2018 was blameworthy. We accept that he believed the claimant sought to intimidate in March 2020. His general belief that the claimant had behaved in an intimidatory way towards Mr Oduoye coloured his view of the events in March 2020 and led him to ignore the obvious possibility that both were equally to blame. Nevertheless, he perceived the claimant to be hostility, albeit it is unclear why he attributed this hostility solely to the claimant. We also accept that he believed the claimant would not change and considered the claimant's refusal to participate in mediation to be blameworthy.

7.38 For the reasons we have given, we find that Mr Blair's approach was unfair. Where there is unfairness, it may be possible to infer a secondary finding of fact. However, generally, any findings are inferred from the failure of explanation for unfairness. And in this context, it is only those inferences which can properly be drawn which should be drawn. As regards the explanation for unfairness, we have found that there is one. Mr Blair believed that the claimant acted unreasonably and negativity towards other members of staff including Mr Oduoye. Whilst the grounds for believing that the claimant sought to intimidate may have been poor and inadequate, we do not doubt his belief. If his motivation for that belief, either conscious or subconscious, was the claimant's trade union activity (in this case being his participation in the strike) it may be appropriate to say that the sole or principal reason for dismissal was the participation in the strike.

7.39 In considering this we have had regard to Mr Blair's general attitude towards claimant which demonstrates at least a degree of hostility. We have also taken into account that he treated Mr Oduoye considerably more favourably. As regards any direct connection to trade union activity, the evidence had been very poor. At its height, the supporting evidence is the claimant's assertion that Mr Oduoye is hostile to the union and union activity. That may be so. But it is Mr Blair's mind we are looking at and whilst we found that he treated Mr Oduoye more favourably, we do not find that is a basis for our inferring that Mr Blair had the same negative view of trade union activity, whether consciously or not, as Mr Oduoye may have done. Where there is discontent and unhappiness among staff, that may lead to managers taking a negative view of an individual. On the balance of probability, we find that is what has happened here, and

whatever view the claimant took of his trade union activities, or Mr Oduoye took of his trade union activities, we do not find that is proper to draw an inference that Mr Blair acted towards the claimant because of the claimant's trade union activity, in this case participating in strike. We therefore reject that claim.

7.40 We should add that this is not a case where it has been argued that Mr Blair's decision should be taken to be tainted by any motive of Mr Oduoye. In any event, given that Mr Oduoye was not an investigator or a disciplinary manager, we take the view that that would not be a viable argument in this case.

7.41 There is also a claim of detriment pursuant to section 146 Trade Union and Labour Relations Consolidation Act 1992. It is said that the there were delays in the appeal process and again this was because the claimant had taken part in trade union activity. The whole process of complaint, investigation, discipline, and appeal was unnecessarily and unduly prolonged. It is unclear who is said to have caused the delay, or why that person's conscious or subconscious motivation was tainted by a negative view of the claimant's trade union activities. To the extent there is any evidence from which we can draw inferences, it goes no further than that outlined above. Ultimately, this allegation must fail because we accept the respondent's explanation. The explanation is to the effect that that there were numerous difficulties in organising the appeal which were caused by numerous factors. This explanation was not challenged by the claimant in his cross examination, and he presented no evidence in chief that would undermine it. We accept that there were practical difficulties. It is possible that the appeal could have been organised earlier. We find no fact from which we could draw an inference that any reason for the delay had anything to do with any part of the claimant's trade union activity.

7.42 It follows that we dismiss the both the section 152 and section 146 claims.

7.43 We agreed that the parties that we would consider contributory fault. There is no evidence on which we could properly find that the claimant's alleged actions in 2018 and 2019 were blameworthy. There is clear evidence that Mr Oduoye may have exaggerated, or lied, in 2019 by saying the claimant pushed him to the floor. It is possible that there was some other form of incident. However, we have no evidence about any lesser incident. There is no basis for finding the claimant's conduct in September 2019 was blameworthy.

7.44 We have no basis for finding that his conduct in 2018 was blameworthy.

7.45 We have noted that there is an allegation that another member of staff had difficulty with the clamant, as taken into account by Mr Blair. We have no detail of that. We cannot conclude the claimant's action was blameworthy.

7.46 It may be possible to conclude that the claimant's behaviour on 6 March 2020 was blameworthy. We have considered the CCTV carefully and we

have had the benefit of hearing from the claimant. We have not heard from Mr Oduoye. We accept that there was a minor contact between the claimant's left leg and the box containing the heater carried by Mr Oduoye. The claimant did not walk towards Mr Oduoye. He followed a natural path which would have taken him into the alley where he was heading. The claimant did not make a beeline towards Mr Oduoye. The claimant's left leg did move, but it appeared to be after it made contact with the box and appears to be a natural motion caused by the contact. Essentially, he appeared to be regaining his balance. On the balance of probability, we find the claimant was not attempting to kick either the box or Mr Oduoye. There is a real possibility that Mr Oduoye moved the box towards the claimant to impede the claimant's path. We accept that there is some evidence that neither the claimant nor Mr Oduoye acted politely by giving way to the other. Had Mr Oduoye not been carrying the box, it is unlikely that there would have been contact. We accept that there may be some evidence of underlying unhappiness between the two, or even hostility. In the claimant's case, that is not surprising. On his case, he had been falsely accused by Mr Oduoye, which had led to a long period of suspension. It would not be surprising for him to harbour negative thoughts. Equally, Mr Oduoye, if he truly believed the claimant had attacked him in September, is likely to have felt negative. His complaint about the events of 6 March is entirely consistent with Mr Oduoye disliking the claimant, as shown, not least of all, by the obvious exaggeration, whether that exaggeration was conscious or not.

7.47 Ultimately, what happened on 6 March was a minor contact, which was caused or contributed to by the fact that two individuals, both of whom could have given way, maintained a path which would led them into close proximity. The claimant did not move towards Mr Oduoye or attempt to kick him. It is possible that Mr Oduoye sought to impede the claimant by moving the box. This led to a minor contact which was, in itself, trivial. Whilst there may have been an underlying dislike on both sides, the action of both could be described as no worse than petulant or petty. Viewed one way, it may be arguable that because there was contact, that formed at least part of the reason for dismissal, and that the events of 6 March 2023 caused or contributed to the dismissal. However, when considering contributory fault, we have a wide discretion; we should only make a deduction which is just and equitable to do so. Here, there was no equity in treatment between the claimant and Mr Oduoye. Mr Oduoye received no criticism, despite making what was, whether conscious or otherwise, a false complaint of assault. Instead, his action was excused as muddle and an assumption was made that it had been occasioned by mental health issues. We have to consider whether it is just and equitable to reduce the compensation; we find that it is not.

7.48 Finally, we have to consider the claim of wrongful dismissal. In doing so, we must also make findings as to what occurred. We have dealt with this above in relation to contributory fault. There was contact as described. This is a situation where two individuals were being impolite, possibly

because of underlying hostility, and their actions could, at worst, be described as petulant.

7.49 We have set out the test above. The degree of conduct necessary to establish a repudiated breach is a matter for us. There must be a deliberate intention to disregard an essential requirement of the contract. Deliberate assault may be sufficient. Minor contact caused by rudeness or pettiness, as appears to be the case here, is not sufficient. The claim of wrongful dismissal succeeds.

Employment Judge Hodgson

Dated: 4 May 2023

Sent to the parties on:

04/05/2023

For the Tribunal Office