Neutral Citation Number: [2023] EAT 51

Case No: EA-2021-000829-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 April 2023

Before :

THE HONOURABLE MR JUSTICE BOURNE
MR CLIFFORD EDWARDS
MR NICK AZIZ

- -

Between :

FIRE BRIGADES UNION

Appellant

- and –

MR P EMBERY

Respondent

- -

Oliver Segal KC (instructed by Thompsons Solicitors LLP) for the **Appellant**
Paul Embery (acting in person) the **Respondent**

Hearing dates: 14th February 2023

- -

JUDGMENT

SUMMARY

Contract of Employment, Unfair Dismissal, Health & Safety

An ET did not give sufficient reasons to comply with rule 62(3) of the ET Rules of Procedure, because it did not record the appellant's submission that a person generally cannot be employed by two different employers to carry out the same work at the same time, or refer to any of the case law cited on that issue, or state whether the submission was accepted or rejected and give reasons for that conclusion.

The ET was wrong to find that the claimant, an employee of the London Fire Brigade who was on full-time release in order to perform his duties as an elected official of the appellant trade union, was employed by the appellant. Employment by the trade union was not compatible with employment by his main employer. The EAT applied *Patel v Specsavers Optical Group Ltd* (2019, UKEAT/02086/18) and did not find that *Prison Officers Association v Gough and Cox* [2009] UKEAT 0405/09 compelled a different conclusion.

The ET did not sufficiently explain its finding that sums paid by the appellant to the claimant were in the nature of remuneration for services.

Where the evidence (including the FBU Rule Book) disclosed no means by which the appellant could police the claimant's performance of his trade union rule (other than disciplinary provisions which applied to all trade union members), there was no basis on which the ET could properly have found that the appellant had control over the claimant of a kind consistent with an employment relationship.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. This is an appeal by the Fire Brigades Union ("FBU"), which was the respondent in the Employment Tribunal ("ET"), against a finding that it unfairly dismissed the claimant, Mr Embery. The ET also found that the claimant did not suffer detriment on grounds of philosophical belief by being dismissed, and there is no cross-appeal in respect of that part of the case.

2. There is also no challenge to the reasons given by the ET for finding that dismissal was unfair. However, the appellant contends that it did not dismiss and could not have dismissed Mr Embery, fairly or unfairly, because it was not Mr Embery's employer, and it also contends that the ET's reasons do not sufficiently deal with that issue.

Background

3. Mr Embery was employed by London Fire Brigade ("LFB") on 24 November 1997 and remains an employee of LFB to this day.

4. From the start of his employment he took part in activities of the appellant, which is the main trade union in the UK fire and rescue service and represents around 30,000 members. On 17 April 2008 he was elected to the position of regional official for the appellant's London region. From 30 September 2008, LFB released him from day-to-day firefighting duties so that he could devote himself to full-time duties for the appellant.

5. We have been told that the release (or releases of this kind) was the subject of an agreement between LFB and the appellant, one of whose provisions was for the appellant to reimburse an amount to LFB equal to the salary which it paid to Mr Embery. However, we have not been shown that agreement and it seems that it was not in the bundle before the ET.

6. Mr Embery continued to work full-time for the appellant in various senior positions. In May 2017 he was elected as the London region's representative on the appellant's Executive Council ("EC"). His work for the appellant ended on 24 July 2019, when he received a ban on holding office as an EC member as a disciplinary sanction for a breach of the appellant's rules. That decision is what gave rise to the claims in this case.

7. The facts and merits of the disciplinary case are not directly material to the issues before this Tribunal. It is just necessary to identify in outline what happened. On 29 March 2019 Mr Embery spoke in a personal capacity at a rally organised by a pro-Brexit group. This was seen as contrary to FBU policy and the Union launched an investigation. On 20 May 2019 Mr Embery was told by the Assistant General Secretary that he had a case to answer in response to a complaint by the Vice President alleging a number of breaches of the appellant's Rule Book. A hearing took place on 12 June 2019. By a letter of 14 June it was announced that a number of complaints were upheld. The sanction in one case was a fine of 40% of Mr Embery's weekly salary as a fire fighter, but for another of the complaints the sanction was a ban from holding office for 2 years. An appeal hearing took place on 24 July 2019 but the appeal was not upheld.

The ET proceedings

8. In his claim form, received by the ET on 31 August 2019, Mr Embery said that in speaking at the rally, he had been expressing his personal political views and that this was in accordance with the FBU's policies of upholding democracy and freedom of expression. On the claim form he ticked the boxes for an unfair dismissal claim and a claim for discrimination on grounds of religion or belief. The date of dismissal was identified as 24 July 2019. In the claim form he did not claim to be employed by LFB.

9. The claim was heard by EJ Postle sitting with lay members between 22 and 25 February 2021 (the final day was a discussion day not attended by the parties). The reserved judgment was sent to the parties on 4 August 2021.

10. In the judgment the EJ noted (at [7]) that there were few primary facts in dispute.

11. The ET found that at all times when Mr Embery worked full-time for the appellant, the LFB paid him a full-time salary, NI contributions and pension contributions and was responsible for his entitlement to holiday pay and sick pay. By the separate agreement between LFB and the appellant, the appellant reimbursed to the LFB the cost of the salaries that it paid to those elected officials who were released to carry out FBU functions.

12. It was found (at [11]) that Mr Embery as a full-time union official was required to devote a full working week to working for the appellant and representing its members. The EJ summarised the position at [14]:

> "All of the above suggests full time work for the Union at their request and a requirement to be available for those duties throughout the working week with absolutely no requirement in the meantime to act as a fire fighter."

13. The EJ also referred at [15] to the agreement for the appellant to reimburse Mr Embery's salary to the LFB, and continued:

> "… and the Union provides the claimant with additional sums of money each year as a top up to carry out duties. Expenses can also be paid by the Union for officials provided they are properly incurred. The claimant's salary for the tax year ending 5 April included an additional sum paid to the claimant by way of a salary of £6,904.95 … on top of the claimant's base salary (the equivalent to a fire fighter)."

14. It was further explained at [16] that the appellant provided Mr Embery with an office and all relevant equipment and paid his mobile phone bill and travel costs.

15. At [17-18] the EJ said that the "top up" was £7,784 in addition to the salary that would be paid to a firefighter and that he was free to use this sum as he wished, there being a separate procedure to reclaim work expenses.

16. At [20] the EJ noted that Mr Embery was expected to carry out his work personally and could not send someone else in his place.

17. The appellant, rather than LFB, employs a number of senior officials including its General Secretary, Assistant General Secretary and National Officers. At [21] the EJ noted that Mr Embery was subject to the same disciplinary procedure under the appellant's Rule Book as those employed senior officials.

18. Under a heading "The Law", the EJ referred first to the authorities relevant to the discrimination claim such as sections 10 and 13 of the Equality Act 2010, Articles 9 and 14 of the ECHR, section 3 of the Human Rights Act 1998 and *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246.

19. In relation to unfair dismissal the EJ then set out the relevant provisions of section 98 of the ERA 1996 and the familiar principles in *British Home Stores Ltd v Burchell* [1980] ICR 303.

20. Then, under a sub-heading "Employee/Official", the judgment explains that a claimant wishing to show that he is an employee must (1) prove the existence of a contract with the respondent, (2) prove that it is capable of being a contract of employment in that (i) it imposes an obligation to provide work personally, (ii) it imposes mutuality of obligation and (iii) the worker agrees to be subject to a sufficient degree of control by the employer and (3) if those hurdles are cleared, persuade an ET of employment status from the overall picture including such matters as arrangements for pay, equipment, discipline, sick and holiday pay, other benefits, integration into the employer's business and any restrictions on working for others.

21. The judgment continues:

> "88. Another distinction may be identified between employees who are employed under a contract of employment and office holders who may not be employees who have the rights of employees (such as the right to complain of unfair dismissal). In *Johnson v Ryan* [2000] ICR 236 the worker was a local authority rent officer appointed pursuant to the Rent Acts 1977. It was argued that as an office holder the worker was not entitled to present a claim of unfair dismissal. The EAT identified three categories of office holder:
>
> 88.1 First those whose rights and duties are defined by the office they hold and not by any contract.
> 88.2 Second, persons who are called office holders but who in reality are employed under contract of service.
> 88.3 Third, those who are both employees and office holders.
>
> 89. In determining whether a worker who is described as an office holder is an employee, the factual situation must be considered. Relevant matters include whether the worker receives a salary, whether salary is fixed and whether the worker duties are subject to close control by the employer or whether the worker worked independently. The EAT held that the rent officer was an employee. In doing so it noted that the recent approach of the appellant courts had been to take an inclusive approach to employee protection."

22. However, although both parties had made written and oral submissions on a number of authorities specifically concerning the employment status of trade union officials on full-time

release and the question of whether a person can have two employers at the same time, the EJ made no reference to those submissions or to those authorities.

23. Then, under the heading "Conclusions", in a passage from [91] to [100] the EJ explained that the ET had found Mr Embery to be an employee because:

    i. He received substantial remuneration in the form of the "top up" of around £7,000 "as no doubt a sweetener to encourage people into full time Union roles" plus his LFB salary which was "covered by the Union".

    ii. The FBU had substantial control over his work. He could have been removed from office if his duties were not performed satisfactorily, he had to perform his work personally, he had to work full-time and only for the FBU and he was provided with equipment and expenses, and a car allowance.

    iii. If he failed to abide by the FBU rules there was a process which could effectively lead to his dismissal, as in this case.

    iv. When working for the Union he was not under the control and direction of LFB.

24. The ET then went on to find that the decision to remove and ban him from office was wholly unreasonable on the facts.

25. Finally the judgment briefly concludes that although Mr Embery held a genuine philosophical belief in "National Independence", the appellant did not know about it and therefore it was not the reason for his dismissal, so his claim under the Equality Act could not succeed.

The grounds of appeal

26. The grounds of appeal are set out in narrative form, but are summarised as follows:

    i. the ET ignored and/or did not apply the material law; and

    ii. the ET reached a decision which was not open to it on the facts, applying the material law.

The Law

27. Section 230 of the Employment Rights Act 1996 provides:

> "Employees, workers etc
>
> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) –
>
> (a) a contract of employment, or
>
> (b) any other contract… whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;…"

28. In *GMB Trade Union and others v Hughes* [2006] UKEAT 0288/06, this Tribunal upheld an ET's finding that Branch Secretaries, who unlike Mr Embery were not simultaneously employed by an employer other than the union, were employees of GMB. It was not disputed that they were also office holders, and Elias J referred to a series of cases which make clear that holding an office and being an employee are not mutually exclusive. He noted also that, in *102 Social Club & Institute Ltd v Bickerton* [1977] ICR 911, features relevant to whether a secretary of a members' club might be an employee were whether any payment was in the nature of a salary rather than an honorarium in that it was paid contractually in return for services, whether it was fixed in advance, whether it was paid by right, its size, how it was treated for accounting and tax purposes, whether the office holder was subject to the club's control and orders and the extent and weight of his duties. Elias J considered that if a contractual relationship was superimposed on the claimants' office with the union in that case, it would be a contract of employment.

29. In *Prison Officers Association v Gough and Cox* [2009] UKEAT 0405/09 the claimants, who were employees of HM Prison Service, were found also to be both employees and officials of the POA. Citing *Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited* [2005] IRLR 9, Silber J ruled that it was possible for an individual simultaneously to have two jobs with two different employers provided that they were compatible with each other. The ET, he found, had applied the proper test in *102 Social Club* and had been entitled to conclude that the relationship was one of employment. Mr Gough, on whose case the judgment focused, received in addition to his Prison Service salary an annual "remuneration" of £14,000 per year which was treated as pay for tax purposes, giving rise to a pay slip and an annual P60. Although it was officially known as the "Miscellaneous Expenditure Grant", the officers were also entitled to travel, accommodation and other expenses and a car and the amount was fixed in advance rather than being based on expenses incurred. The EJ found that this payment was made in return for services.

30. In *Nailard v Unite the Union* [2016] IRLR 906, the EAT considered whether two elected shop stewards, who carried out full-time trade union duties while remaining employed by Heathrow Airports Ltd, were also employees of their union so that it was vicariously liable for their behaviour (harassment) under the Equality Act 2010. That depended on the wider definition of "employment" under section 83(2) of that Act which includes:

> "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

31. On the facts of that case Judge David Richardson held:

> "35. In our judgment it is plain that a union member who is elected to office under a provision similar to rule 17 is not thereby making an agreement to work personally for the purposes of section 83(2), nor is the union making such an agreement with the member. The member is voluntarily undertaking the duties of office; there is no commitment to any particular amount of work and no right conferred by the rules at all to remuneration.
>
> 36. Nor, in our judgment, can it be said that the rule book places elected officials in a position of subordination; they are afforded a great deal of independence by the rule book in the way they carry out the duties of office on behalf of their members. The disciplinary charges within rule 27 will apply where an elected official fails to perform the duties of the office or brings injury or discredit upon the union; but they will not permit the union to charge a lay official with a disciplinary offence merely because the union disagrees with the elected official in the way the duties are performed."

32. In *Patel v Specsavers Optical Group Ltd* (2019, UKEAT/02086/18), the EAT again considered the question of whether a person can simultaneously have two employers. The context was different, involving a joint venture by an optician in which he became a director of a company operating a Specsavers store in a locality but claimed also to be employed by the principal trading company of the Specsavers Group. Stacey J identified a well-established principle that one employee cannot simultaneously have two employers, dating back to *Laugher v Pointer* (1826) 5 B&C 547. She noted the ruling in *Viasystems* (above) that vicarious liability for the negligent act of a worker can arise and be "shared between the general and temporary employers", where, for example, a workman has been loaned or hired from one employer to another and where control is shared between the general and temporary employers. That ensured that individuals are properly compensated for tortious acts. But she noted at [42-43], where the policy behind the law concerned enforcement of employment rights rather than tortious liability, a finding of dual employment would bring practical complications: see *Cairns v Visteon UK Ltd* [2007] ICR 616. On the facts of the case before her, Stacey J held that the ET was entitled to find that there was only one employer.

33. For completeness we also mention *Community (a trade union) v HMRC* [2016] UKFTT 0824 (TC), in which full-time union Branch Secretaries who received some remuneration were held to be office holders for tax purposes, though that does not really illuminate the question of their status in employment law. The question in the present case is whether Mr Embery was an employee of the appellant as well as being an office holder.

34. Rule 62 of the ET Rules of Procedure 2013 provides, so far as is material:

> "62 Reasons
> (1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural …
>
> (2) In the case of a decision given in writing the reasons shall also be given in writing. …
> …
> (5) In the case of a judgment the reasons shall: identify the issues which the

> Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"

35. That rule reflects the well-known guidance in *Meek v Birmingham DC* [1987] IRLR 250 CA to the effect that an ET's decision must contain sufficient information to tell the parties why they have won or lost and to enable an appellate court to see whether any question of law arises.

The appellant's submissions

36. Oliver Segal KC, representing the appellant, emphasizes the following facts:

i. Mr Embery was elected as a member of the EC, not appointed by the appellant.

ii. A Facilities Agreement between LFB and the appellant provides:

> "4 Time off for Trade Union duties
> The authority will permit employees who are officials of the FBU or FOA to take reasonable paid time off during their working hours for the purpose of undertaking trade union duties.
>
> As set out in the ACAS Code, trade union duties are concerned with negotiations with the employer on specified matters, and other functions on behalf of employees which the employer has agreed the union may perform …".

iii. The FBU Rule Book consistently distinguishes between full-time officials such as the General Secretary and National Officials, who are employed and who are required (by Rule D4(2)) to devote their "whole time to service of the union", and elected lay officials such as Mr Embery.

iv. The Rule Book provides at D8(2) for the annual "Officials Allowance" of around £7,784 to cover travel and other expenses including the costs of purchasing and running a car. These purposes were identified in a statement issued at the appellant's annual Conference in 2010 following a review and discussions with HMRC. Previously individuals did not pay tax on the annual allowance. From 2010, the allowance would be paid through the appellant's payroll and give rise to an annual form P60 and, as was stated at Conference, it would be for individuals to make claims for tax relief on the expenditure to which the allowance related. Allowing for some tax liability, the amounts were increased with a view to ensuring that the net amount would remain the same.

v. Provision about disciplinary offences at G1(1) applies to all of the appellant's members. The procedure is modified in a case involving full-time officials or the President or EC members such as Mr Embery. Unlike the appellant's employees, EC members are not subject to its capability policy, and the Rule Book refers at G3(S)(ii) to a power to dismiss employed full-time officials but only to "remove from office" an EC member.

vi. In an email to other EC members on 8 April 2019 (responding to a message to the members from the General Secretary about a tweet by him), Mr Embery said: "I am perfectly entitled to tweet in a personal capacity. I am not an employee of the union: I am a lay official."

37. By his first ground of appeal, Mr Segal argues that the ET ignored or failed to apply the relevant law as set out above.

38. First, he relies on a general rule, stated in *Patel*, that a person cannot be employed by two different employers under separate contracts at the same time.

39. Then, although the decision in *Gough* supports Mr Embery's case, Mr Segal submits that it is an outlier, being the only known case in which a person on full-time release for trade union duties has been held to be employed by the union. He invited the ET to find that it was wrongly decided, but the Reasons make no reference to this. He invites us to depart from *Gough* because Silber J, he says, misdirected himself, wrongly saying at paragraphs 20-21 that the distinction between employment law cases and tort law cases such as *Viasystems* did not matter and that there was "no different question of principle which precludes a person having two jobs with separate employers at the same time provided they are compatible". In the alternative, Mr Segal seeks to distinguish *Gough*, pointing out that Silber J at paragraph 32 described the decision as fact-sensitive. In particular he notes that the remuneration paid by the trade union to Mr Gough of £14,000, plus travel and other expenses, plus (by contrast with this case) a "fully expensed motor vehicle", was more substantial and more in the nature of payment for services than the sums received by Mr Embery.

40. Mr Segal further relies on the reasoning in *Nailard* quoted at paragraph 31 above, again not mentioned in the ET's Reasons.

41. More generally, Mr Segal submits that, contrary to the requirements of rule 62(3) of the ET Rules of Procedure, the ET failed to "identify the relevant law" and state how it had been applied to its factual findings. Although all of the cases mentioned above were cited to the ET, its Reasons contain no discussion of them under "The Law" and no principles from them are applied under "Conclusions". Whilst an ET's judgment need not refer to every point taken, it must refer to and explain its conclusions on the key evidential disputes and the legal principles on which the parties relied.

42. By his second ground of appeal, Mr Segal argues that the ET's findings that the appellant paid remuneration to Mr Embery for services and that he was under the control of the appellant were perverse or not supported by evidence.

43. The ET's Reasons contain no reference to, and therefore no analysis of, the Rule Book provisions and the Conference statement about the nature of the £7,000 officials' allowance. They do not identify or analyse the key issue of whether the allowance was a contractual consideration for services or a grant to cover anticipated expenditure. If by implication the ET found it was the former, then Mr Segal submits that such a finding was perverse because it was not supported by evidence.

44. As to control by the appellant of Mr Embery's performance of his duties, there was no evidence that the President, Vice President or General Secretary had any disciplinary or other power over him that they did not have over any other FBU member under the Rule Book. A statement by the President said that EC members controlled their own workload and Mr Embery's own evidence was that he had a "large degree of autonomy". As in *Nailard*, and contrary to the ET's finding, there was no sanction for unsatisfactory performance of his duties. The fact that the LFB did not control that performance did not mean that the appellant did.

45. Accordingly, Mr Segal submits that the EJ erred at [92] in ruling that Mr Embery "would inevitably have been removed from his office if his duties were not performed satisfactorily". Whilst a poor performing EC member might have failed to secure re-election, and whilst there were disciplinary sanctions for breaches of the Rule Book, there were no performance procedures for EC members and no route by which the appellant could terminate their office contrary to the wishes of those who had elected them.

46. In support of that, Mr Segal points in particular to two pieces of evidence. The email mentioned at paragraph 35(vi) above and the fact that in 2019, Mr Embery attended the rally despite the appellant's President having told him that this was against the appellant's policy, both show that he did not see himself as subject to control by the appellant's officers.

47. Mr Segal also submits that the judgment contains a non sequitur at [99]:

> "It is clear during the time the claimant was working for the Union he was not under the control and direction of the London Fire Brigade and therefore logically he was under the control and direction of the Union."

48. Mr Segal submits that when the law is applied to the uncontroversial facts, the only possible conclusion is that Mr Embery was not employed by the appellant.

49. Mr Embery relied on a skeleton argument and made oral submissions. Both were clear, relevant and persuasive.

50. The main thrust of his response to this appeal is that the ET made clear findings of fact based on evidence, and that the appellant cannot identify any error of law. He emphasizes that there was a 2 ½ day hearing before a panel at which extensive documentation was reviewed and the witnesses were carefully questioned, giving rise to a lengthy and detailed judgment.

51. In respect of his remuneration, Mr Embery submits that the ET found and was entitled to find that his annual payment of £7,784 was in the nature of salary and that its description as an allowance was disingenuous. As he rightly said, what matters is the reality, not the label.

52. In respect of control by the appellant, Mr Embery has always accepted that he had substantial autonomy as an EC member, but nevertheless he was subject to a raft of rules and policy. Control, he submitted, is demonstrated by (among other things) his dismissal (for a speech which he gave in his own time) and the fact that he was barred from taking any other paid work while he was a full-time officer. The Rule Book at G1(1)(vii) made it possible for him to be disciplined for acting in any way prejudicial to the appellant's interests and thereby the

appellant could hold him to account. And under rule C3(5), he could be removed from the EC merely for failing to attend a meeting.

53. His case, he says, is strongly supported by *Gough*, whose facts he described as near identical to those of his case. It concerned national executive members in receipt of a fixed annual payment described as a "miscellaneous expenditure grant" who, like him, were subject to the provisions of a union rule book and to re-election.

54. Mr Embery also draws support from the judgment of Elias P in *GMB*. There, the fact that the union did not treat the Branch Secretaries like employees, e.g. by the absence of written contracts, merely reflected the fact that the union did not believe that they were employees. That, however, did not mean that they were not employees on a proper analysis.

55. Conversely, Mr Embery emphasizes the difference between his case and the 3 authorities on which the appellant relies.

56. The question in *Patel* was a technical one of whether a trading company or a holding company was the employer. Although the judgment refers to the case of *Cairns* in which it was held that dual employment would entail practical complications, the judge in *Cairns* also concluded that those complications were "not insurmountable".

57. Mr Embery points out that the facts in *Nailard* were significantly different from those in his case. It concerned more low-ranking officials. They received no remuneration from their union and their salary, unlike his, was not reimbursed to the principal employer. Nor were they subject to an "elevated" disciplinary process.

58. *Community*, he submits, is a tax case which cannot be simply read across to the employment context and which did not turn on the definition of an employee.

59. Mr Embery also relies on *102 Social Club* (see paragraph 28 above), submitting that most of the listed relevant factors support him rather than the appellant. In particular he was being paid large fixed sums by right, these were treated as salary for payroll and tax purposes and his duties were full-time.

60. Mr Embery therefore rejects the characterisation of himself as a "mere" office holder like the secretary of a cricket club who receives a small honorarium.

61. He also expressed surprise that the appellant opposes the idea of dual employment, having regard to the position of "retained firefighters" who typically have a "day job" with one employer but who are employed by a fire brigade, and are given leave of absence by their primary employer, to respond to emergency calls.

62. For all these reasons, he submits, the ET was more than entitled to find the facts in his favour and its findings disclose no error of law.

Discussion

63. Ground 1 has two components. First it is said that the ET failed to apply the law. Second, it is said that the ET failed to explain its application of the law.

64. The second of those propositions is the most straightforward issue in this appeal. We agree with Mr Segal that the ET's reasons are insufficient and do not comply with rule 62.

65. In arriving at that conclusion, we entirely recognise the important principle that an ET is not bound to rehearse every submission that was made, and it need only state conclusions on those issues which matter.

66. In this case, Mr Embery's claim was met with – and was at least potentially defeated by – a submission that a person generally cannot be employed by two different employers to carry out the same work at the same time. That submission was supported by the authority of *Patel*. In our judgment it was essential for the ET to state whether it accepted or rejected that submission, with reasons.

67. A reader of the ET's judgment would not be aware that that issue was even raised, let alone of how or why it was decided. The judgment gives the impression that this is just another of the many cases in which a working relationship must be analysed to decide whether there was a contract of employment. The familiar factors of mutuality of obligation, remuneration and control are considered and are treated as determinative.

68. In reality, however, this was not that sort of case. Nobody disputes that Mr Embery was an employee. The question was which of two bodies employed him.

69. There was also a full and relevant debate about what if any assistance either party drew from the other cases summarised at paragraphs 28-33 above. In our judgment, it was indispensable for the ET to identify its conclusions on that question, even if it concluded that none of the cases was of assistance.

70. For that reason, the appeal would succeed without more. If the argument went no further, the case might be remitted to a different ET.

71. We did however have the benefit of the further arguments summarised above.

72. We also conclude that the first component of ground 1 is well founded. *Laugher v Pointer*, *Cairns v Visteon* (cited in *Patel*) and *Patel* itself identify a broad principle that one employee cannot simultaneously have two employers, and *Cairns* particularly applies that principle in the context of employment protection legislation.

73. In *Gough*, the EAT found that principle to be surmounted. We note the similarities between the facts of that case and this one, which Mr Embery rightly emphasized. But there were also factual differences. In *Gough* there was more substantial remuneration which, though labelled "miscellaneous expenditure grant", could not be linked with expenses because all other expenses including the "fully expensed motor vehicle" were paid in addition. Here, by contrast, the payment of £7,784 was the only element which was not necessarily attributable to expenses. Travel expenses, though substantial, were paid entirely by reference to the unusually high cost of Mr Embery's travel (from Norfolk to London), and other payments were purely for out-of-

pocket expenses. Mr Embery was free to use the £7,784 as he pleased, though it was originally described as a car allowance. But if he did acquire and maintain a car, that was the only payment which could reimburse him for doing so. It is therefore not clear, as it was in *Gough*, that there was payment which necessarily exceeded expenses.

74. Accordingly, we do not consider *Gough* to be a precise factual precedent. Even if it were, however, we would respectfully doubt the EAT's reasoning in the case. In his judgment Silber J said:

> "20. Before turning to the Grounds of Appeal, it is appropriate to explain that a person can have two jobs with separate employers at the same time providing they are compatible with each other. This point was made clear by Rix LJ in *Viasystems (Tyneside) Limited v Thermal Transfer (Northern) Limited* [2005] IRLR 983 in which it was said that:-
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> > '76…In my judgment, there is no doubt that there has been a long-standing assumption that dual vicarious liability is not possible, and in such a situation it is necessary to pause carefully to consider the weight of that tradition. However, in truth, the issue has never been properly considered. There appears to be a number of possible strands to the assumption. Two are mentioned by Littledale J: the formal principle that a servant cannot have two masters; and the policy against multiplicity of actions. As for the first, even if it be granted that an employee cannot have contracts of employment with two separate employers at the same time and for the same period and purposes – and yet it seems plain that a person can (a) have two jobs with separate employers at the same time, provided they are compatible with one another; or (b) be employed by a consortium of several employers acting jointly – nevertheless that does not prevent the employee of a general employer being lent to a temporary employer.'
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> 21. It was said on behalf of the Respondents that these comments were made in a case of vicarious liability which is true but to my mind that does not matter because what was being explained in that case also applies in determining whether there can be two separate contracts of employment. After all there is no different question of principle which precludes a person having two jobs with separate employers at the same time provided they are compatible with each other. In the present case, it is not said that there could be anything incompatible with employees of the Prison Service also being employees of the Respondent but that of course in itself does not show that the Claimants can establish being employed under a contract of service with the Respondents while still employed by the Respondents."

75. Silber J's observation that the vicarious liability context of the remarks in *Viasystems* "does not matter" may reflect the fact that the difference of context did not affect the outcome of the case before him. However, the difference of context does bring different questions of policy into play. *Viasystems* concerned the protection not of a worker but of a primary employer who engaged contractors who in turn engaged sub-contractors. The question was who should be liable for damage caused by a worker's negligence, and the case was decided expressly by reference to policy questions. In the present case the policy question, which concerns the protection of an individual worker's statutory employment rights, is wholly different. For that reason, we drew little assistance from *Viasystems*.

76. The importance of the difference of context is clear from the judgment of the EAT in *Cairns v Visteon UK Ltd* [2007] ICR 616. That was an unfair dismissal claim in which the question was whether a contract of employment should be implied as between an agency worker and an end-user. The EAT decided that it should not, because the worker was protected by her contract of employment with the agency. Judge Clark held at [14-16] that the policy considerations relevant to the two types of case were different, and at [19] that the provisions which create the main statutory employment rights envisage liability falling on one employer, not two.

77. Nor is Mr Embery assisted by the exception to the rule identified for the case of a person having two "compatible" employments. In a case of the present kind, we do not consider that simultaneous employments by LFB and by the appellant would be compatible, having regard to all of the statutory employment rights and obligations including the obligation to pay National Minimum Wage and other matters such as redundancy.

78. Nor have we been referred to any convincing reason of policy why this Tribunal should, unusually, recognise a dual employment situation in this case. As Mr Segal submitted, an official aggrieved by his treatment by a trade union has other remedies. Under section 108A of the Trade Union and Labour Relations (Consolidation) Act 1992, a person may complain to the Certification Officer about a breach or threatened breach of the union's rules relating to (inter alia) a person's removal from office and disciplinary proceedings (other than against an employee of the union). Under sections 64-67 a member of a union may complain to an ET that he has been unjustifiably disciplined by the union (though those provisions probably would not apply on the facts of Mr Embery's case).

79. We therefore conclude that this was not an unusual or exceptional case in which Mr Embery could have been employed by the appellant as well as by LFB. In reaching that conclusion we note in passing that neither this Tribunal nor, it seems, the ET, was shown the terms of the agreement between LFB and the appellant regarding the arrangements for his working and payment.

80. As to ground 2, we also accept Mr Segal's submissions that the ET's conclusions about remuneration and control cannot stand.

81. First, the nature of Mr Embery's remuneration was not sufficiently analysed in the judgment.

82. It seems to us that the ET could not be materially assisted by the fact that the appellant reimbursed an amount equal to Mr Embery's salary to the LFB. Nobody has suggested that the appellant in fact paid that salary to Mr Embery.

83. Nor, we think, could any significant conclusions be based on the reimbursement of expenses. Although a substantial amount was paid for rail travel, all parties agree that it was paid for rail travel. It was not paid in return for services, and nor were any other payments in respect of out-of-pocket expenses.

84. That left the annual payment of £7,784. We agree that the fixed payment, by right, of that not insubstantial sum was a relevant fact to which the ET could have regard when deciding whether there was a contract of employment.

85. However, a proper analysis would have had to have regard to the evidence before the ET about the origin of the payment. It was open to the ET to reject the description of it as, essentially, a car allowance. But we think that the ET was bound to recognise, and give some weight to, the fact that there was no other provision to cover the expense of acquiring and maintaining a car, and to the fact that union members were encouraged to apply to HMRC for a tax refund on the basis that all or part of the money was attributable to expenses.

86. That being so, the ET's reasoning identifies no sufficient evidential basis for its conclusion that this payment was a "topped up salary" ([18]) or a "sweetener to encourage people into full time Union roles" [98].

87. If this were the only point on which the appeal succeeded, it would have to be remitted.

88. However, we also do not consider that there was a sufficient evidential basis for the ET's conclusion that Mr Embery was under the control of the appellant to a degree indicating an employment relationship.

89. That conclusion, in our judgment, could not have been reached without express consideration of the Rule Book provisions to which we have referred, and especially those provisions which draw a distinction between employees and others. There was no or no sufficient consideration of that kind.

90. Moreover, we have not been able to identify any evidence upon which that conclusion could have been based.

91. In particular, we agree with Mr Segal that there is no evidence that the appellant had any means of policing an EC member's performance, save by shoe-horning a complaint into the same disciplinary framework as would apply to any of the appellant's members who were accused of breaking the appellant's rules. Nor could control by the appellant be inferred from the provision for an EC member to be removed for non-attendance of meetings. That provision did not identify who would remove the member, or how. Ultimately it showed only that the EC was a self-policing body, but not that its members employed each other.

92. We therefore see no evidential basis for the finding at [92] that Mr Embery would have been removed from office if his performance was not satisfactory. The actual imposition on him of disciplinary measures did not distinguish him from any other member and therefore logically did not demonstrate control of a kind which would signal an employment relationship. And, although we do not doubt that his duties were a full-time commitment, that does not mean that a second employment contract was superimposed upon the first.

Conclusions

93. The appeal therefore succeeds on both grounds.

94. Applying *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] ICR 920, we can substitute a different conclusion for that of the ET only if that conclusion follows from the findings of the ET supplemented by any undisputed or indisputable facts.

95. It seems to us that the relevant facts have been found by the ET and are not in dispute. What is in dispute is the conclusion which should be drawn from them.

96. In our judgment, the facts as found by the ET do not provide a basis on which it could be concluded that there was sufficient control by the appellant over Mr Embery's performance of his union duties to found a finding that he was its employee.

97. In those circumstances, while there was more than one possible conclusion about the nature of Mr Embery's remuneration, our conclusion on the control issue means that the unfair dismissal claim was bound to fail.

98. We therefore allow the appeal, and substitute a decision dismissing the claim for unfair dismissal.