Case Number: 2300446/2016 & 2301125/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs K Smith	and	London Borough of Bromley

Held at Ashford on 2, 3 ,4, 5, 9, 10 & 11 October 2017 and 12, 16, 17 & 18 October 2017 in chambers

Representation	**Claimant:**	Mr S Brittenden, counsel
	Respondent:	Mr S Keen, counsel

Employment Judge Wallis
Members Ms R Downer
Mr N Phillips

RESERVED JUDGMENT

1. The claims of detriment on grounds related to union activities pursuant to section 146 of the Trade Union & Labour Relations (Consolidation) Act 1992 were dismissed, save for the claims at issues 1.6 and 1.15, which were successful;

2. The claims pursuant to sections 168 and 170 of the Trade Union & Labour Relations (Consolidation) Act 1992 were dismissed upon withdrawal by the Claimant;

3. The claim pursuant to section 169 of the Trade Union & Labour Relations (Consolidation) Act 1992 was successful;

4. The claims of detriment on the grounds of making a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 were dismissed;

5. A remedy hearing is to be requested by the parties if they are unable to settle the matter within 28 days of this reserved judgment being sent.

REASONS

ISSUES

1. The Claimant presented two claim forms. The first, on 8 March 2016, claimed detriment and refusal to grant reasonable paid and unpaid time off for union duties and activities under sections 146, 168/169 and 170 of the Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA). The second, on 15 June 2016, claimed ongoing detriment, additional refusals to grant time off, and detriments on the ground of making protected disclosures. The claims were refuted by the Respondent.

2. There were case management discussions on 5 September 2016 and 4 October 2016. Orders were made initially to obtain clarification of the claims and the responses to them. As a result of the information received, the following issues were agreed (numbered as in the case management order):-

Detriment on grounds related to union activities – Section 146 TULCRA

1 Was the following treatment afforded to the Claimant:
1.1 refusal of both paid and unpaid time off to attend Unite rules conference between 6 and 10 July 2015;
1.2 refusal of TOIL for meeting with a member, to prepare for a Chief Officer ill health hearing, on Monday 13 July 2015;
1.3 refusal of TOIL for attending an ill health review meeting on Friday 7 August 2015;
1.4 refusal of time off to represent a member at two meetings with HR on Wednesday 30 September 2015 and Thursday 1 October 2015;
1.5 refusal of TOIL on a non-working day to represent a member at an ill health hearing on Friday 9 October 2015;
1.6 refusal to allow the Claimant to apply for a Departmental Representative role on 15 October 2015;
1.7 refusal of TOIL on a non-working day to meet with a member on Friday 16 October 2015 to discuss a grievance;
1.8 refusal to pay the Claimant for 35 hours in attending the Unite Managing Change course from 26 October - 30 October 2015 (the Respondent only paid her contractual hours of 27 hours per week) (it was agreed at the hearing that the Respondent paid the remaining hours later);
1.9 refusal of request for TOIL to attend a disciplinary investigation meeting on Monday 7 December 2015;
1.10 refusal of request to attend Unite NISC conference on 16 January 2016;
1.11 Councillor Payne's e-mail of 29 January 2016 to Mr Woolgar and others in which he implied that the Claimant was 'mischief making';
1.12 bullying and aggressive behaviour and threats at the LJCC meeting on 25 February 2016;

1.13 the refusal on 15 March 2016 of request for TOIL in respect of the attendance without permission at two disciplinary investigation meetings on Monday 14 March 2016;
1.14 an ongoing failure, despite having been informed on 23 September 2015 that the computer and telephone in the Unite office were not working, and having identified on 21 January 2016 that urgent action needed to be taken to replace the computer, to take action to replace the computer until 22 March 2016;
1.15 refusal of request on 15 April 2016 for TOIL to accompany a member at a disciplinary hearing without permission on Friday 15 April 2016;

2 If any of the treatment in paragraph 1 above was afforded to the Claimant, did it amount to a detriment?

3 If any of the treatment did amount to a detriment, was it afforded to the Claimant for the sole or main purpose of deterring her from taking part in the activities of an independent trade union at an appropriate time or in order to penalise her for doing so?

4 Were the Claimant's activities undertaken at an appropriate time? Were they:
4.1 outside the Claimant's working hours, or
4.2 at a time within her contractual working hours at which, in accordance with arrangements agreed with or consent given by her employer, it was permissible for her to take part in the activities of a trade union?

Time off for carrying out trade union duties – Section 168 TULCRA

5 Did the Claimant request time off to attend:
5.1 disciplinary investigations on Monday 07 December 2015 and 14 March 2016;
5.2 two disciplinary investigation meetings on Monday 15 March 2016;
5.3 a disciplinary hearing on 15 April 2016?

6 Was that request for time-off during working hours for the purpose of carrying out trade union duties?

7 Was that time off during working hours?

8 What time-off did the Claimant actually take for the purposes of carrying out trade union duties or trade union activities?

9 Did the Respondent allow the Claimant an amount of time-off that was reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS?

Time off for carrying out trade union activities – Section 170 TULCRA

10 Did the Claimant request time off to attend the Unite NISC conference on 16 January 2016;

11 Did the Respondent give the Claimant permission to attend the NISC meeting in whole or in part;

12 Did the Respondent allow the Claimant an amount of time-off that was reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS?

Payment for time taken off for the purposes of union duties – Section 169

13 Did the Respondent fail to pay the Claimant in full for any time taken off for the purposes of the trade union duties set out at paragraph 5 above or for her attendance at the Unite Managing Change course from 26 October 2016 until 30 October 2016 (The Claimant accepts that she was paid for her contractual hours of 27 hours per week but contends that she should have been paid for 35 hours)? (the parties agreed that the date here should read 2015);

13.1 did the Claimant take the time off for the purposes of trade union duties under s.168;
13.2 were the duties undertaken during the Claimant's working hours;
13.3 were the duties undertaken with the Respondent's permission;
13.4 did the Claimant attend the course for 35 hours;
13.5 did the Respondent fail to pay the Claimant?

14 Is the replacement of wages criterion in section 169 (2) of the Trade Union & Labour Relations (Consolidation) Act in relation to part-timers in conflict with Article 119, such that the Employment Tribunal must give effect to the principle of the supremacy of Community Law over domestic law in determining that a female part-time worker attending a full-time course should receive full-time pay (in accordance with the conclusions reached by the EAT in Mrs P Davis v Neath Port Talbot County Borough Council 1999 WL 819127)?

Detriment on grounds of making a protected disclosure – section 47B

15 Do the following acts by the Claimant amount to 'qualifying disclosures' as defined in section 43B of the Employment Rights Act 1996;

15.1 the Claimant's e-mail to Mr. Woolgar dated 29 January 2016, in which she informed him that members of the public were using library computers to watch pornography
15.2 the question the Claimant submitted to the Local Joint Consultative Committee, in her e-mail dated 14 February 2016
15.3 at the meeting on 25 February 2016, the Claimant highlighted the respondent's responsibilities under the Code and asked why the Respondent had refused to disclose the names of those organisations bidding for the contract.

16 Did the Claimant have a reasonable belief that: (it was in the public interest and – added at the start of the hearing) -
16.1 the information referred to at 14(a) (should be 15.1) tended to show that a criminal offence was being committed and/or that a person was failing to comply with a legal obligation?
16.2 the information referred to at 14(a) to (b) (should be 15.1 & 15.2 and 15.3) tended to show that a person was failing to comply with a legal obligation ?

17 Was the Claimant subjected to the following conduct:
17.1 Councillor Payne's e-mail of 29 January 2016 in which he implied that the Claimant was mischief-making;
17.2 bullying and aggressive behaviour and threats at the meeting on 25 February 2016 as set out in paragraphs 13 to 18 of the Claimant's second ET1.

18 Did the conduct in paragraph 16 above constitute an unlawful detriment? (the Tribunal presumed that this was a typing error and that the reference was to paragraph 17);

19 Was the conduct afforded to the Claimant on the grounds that she made protected disclosures?

Jurisdiction

20 Has the Claimant brought proceedings before the end of the period of three months beginning with the date of the act of failure to which the complaint relates? If not was the act or failure to act part of a series of similar acts or failures and if so were proceedings brought within three months of that act?

21 If the complaints are out of time was it reasonably practicable for the complaint to be presented on time and if not was it brought within such further period as the Tribunal considers reasonable?

22 The Claimant's application to insert claims at 1.2, 1.3 and 1.9 was refused by EJ Kurrein at the case management discussion on 4 October 2016. On the same date he granted an amendment application by the Claimant to 'amend the 'label' of her TU detriment claims so as to bring them pursuant to TULRCA 1992.'

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3. At the end of the hearing the Claimant withdrew the claims referred to in issues 1.10; 5 to 9; and 10 to 12.

DOCUMENTS & EVIDENCE

4. The Tribunal had a trial bundle, written statements from the witnesses, the Respondent's schedule of the requests that were refused, and an amended

and updated schedule, a chronology from the Respondent, a chronology and suggested reading list from the Claimant, and a timetable proposed by the Claimant which was subsequently agreed. Both representatives produced written submissions and a bundle of authorities.

5. We heard evidence from the Claimant herself Mrs Kathleen Smith and then from her witnesses Ms Jill Crawley (Library Supervisor and Unite steward), Mr Richard Earis (then Environmental Health Officer and Unison steward), Ms Joanne Flanagan (Library Assistant and Unite steward), Ms Susanna Hulme (Senior Customer Services Assistant and Unite steward), Mr Onay Kasab (Unite Regional Official), Mr Glenn Kelly (then Unison Branch Secretary), Mr Steve Leggett (member of the public at Committee meeting on 26 March 2015), Ms Coleen O'Neill-Vernon (Library Supervisor), Ms Gill Slater (Town Planner and Unite steward), and Councillor Angela Wilkins.

6. On behalf of the Respondent we heard from Councillor Nicholas Bennett, Mr Colin Brand (then Assistant Director for Renewal and Recreation), Mr Stuart Elsey (Head of ICT), Councillor Simon Fawthrop, Mr John Gledhill (Head of Leisure Business Development), Mr Charles Obazuaye (Director, Human Resources), Councillor Ian Payne, Councillor Colin Smith, and Mr Tim Woolgar (Library Operations & Commissioning Manager).

FINDINGS OF FACT

7. Tribunals are often asked to, and sometimes do, comment about credibility of witnesses heard during the course of a hearing, and this case was no different. We considered that all witnesses in this case tried to assist the Tribunal and explained their version of events in a truthful, if not always accurate, manner.

Background

8. There was no dispute that the Claimant was employed by the Respondent on 24 November 1997 as a customer services assistant for 27 hours each week, and she remains an employee. The Claimant is employed as an assistant in Bromley library, on Tuesdays, Wednesdays and Thursdays, and every other Saturday.

9. She described herself as an active trade unionist for all of her working life. She held various positions within NUPE, NALGO and Unison. She left Unison in July 2011 and became the branch secretary of Unite. She has received extensive training from the various unions.

10. Until September 2006 the Claimant worked in the library and was granted reasonable time off to represent or accompany union members to hearings, and other trade union duties. The Respondent recognises various teaching unions throughout its schools, and in addition three unions; Unison with

around 387 members (estimated by Mr Obazuaye from check-off data), Unite, and GMB with 92 members, (again estimated by Mr Obazuaye).

11. The Claimant told the Tribunal that the Bromley branch of Unite had 499 members. Mr Obazuaye put it at 192. The Tribunal accepted Mr Obazuaye's evidence that a number of employees had transferred away from the employment of the Respondent under TUPE, and that membership of the branch was likely to include individuals who were no longer employees. The figure of 192 was therefore more likely to be correct, based on check-off data, although there may of course have been some members who paid subscriptions by direct debit. The correct figure was somewhere between the two, although the Tribunal also noted that the figures appeared in the Committee report for 26 March 2015 and were not challenged.

12. In September 2006, the Respondent was embarking on a reorganisation entitled the single status project, and it was agreed that the Claimant would spend 23.5 hours a week on trade union duties.

13. By February 2008 there was an agreement that the Claimant would spend the whole of her 27 hours on trade union duties. She had an office, telephone and computer provided by the Respondent in order to carry out her duties. Mr Kelly was granted a similar arrangement as the branch secretary of Unison.

14. The single status agreement between the Respondent and the unions was signed on 15 December 2009. However, the Claimant continued to carry out a full range of trade union duties during her 27 hours a week, paid by the Respondent. The Claimant told the Tribunal that in addition she was granted time off in lieu for time spent on trade union duties outside her working hours.

15. In common with perhaps all local authorities, and many organisations, the Respondent was constantly looking for ways to save money. In addition, the Respondent was 'on a commissioning journey' which meant outsourcing a number of services. Such a step had the effect of transferring services to a private contractor, after a tendering process, and one of the consequences was that members of staff employed in that service transferred away from the employment of the Respondent. This approach was not popular with the trade unions.

<u>Changes to departmental representation/secondment arrangements</u>

16. In January 2015 Mr Obazuaye met with the Claimant on an informal basis to explain that the union facility was to be withdrawn and she would be returning to work in the library.

17. Mr Obazuaye's evidence was that when he joined the Respondent in 2005 he set up a forum to provide regular contact on staffing and related issues between senior management on the one hand and departmental representatives and trade unions on the other. The Respondent's elected

Councillors were involved in those issues by way of matters referred to a Local Joint Consultative Committee, a sub-committee of the General Purposes and Licensing Committee, in which Councillors, trade unions and departmental representatives met on a quarterly basis to discuss matters placed on an agenda in the usual way.

18. In 2005 the Respondent had 6,000 members of staff. This had reduced to less than 2,000 by 2015. Seven departments had reduced to three.

19. Mr Obazuaye considered that by 2015 the forum was becoming ineffective for a number of reasons. It was too big, with 42 members (although many of the departmental representative posts remained vacant), particularly in view of the reduction in staff numbers. He considered that there was, to quote his supplemental witness statement, 'apathy arising in part from individual perception of ideological dominance and power at meetings and consequently attendance and quality of debate/discussion suffered resulting in passivity and detachment by some representatives.' He also thought that the aims and agenda of the forum were not keeping pace with the rate of, and pressure for, change within the organisation.

20. He therefore prepared a report for the Respondent's General Purposes and Licensing Committee on 26 March 2015. The report set out a proposal to review employee representation within the organisation. In addition to the secondment of the two trade union representatives mentioned above, a staff side secretary was seconded to the staff forum for 18 hours a week. He proposed that all of the secondment arrangements were ended. He also proposed a new corporate forum of 12 departmental representatives, to be attended by himself, the chief executive and the HR consultancy manager (Ms Eglinton). The new representatives would be elected by employees 'irrespective of whether they are in union membership'. He proposed five for Education, Care and Health Services; four for Environment and Community Services, and three for the chief executive's department.

21. Mr Obazuaye's report recommended separate meetings between management and unions, 'both planned and ad hoc, to enable both parties to fulfil their legal obligations and duties'.

22. He wrote that 'it is important to maintain a thin but fine divide between the role of trade unions and the role of departmental representatives which is currently blurred by the single engagement forum ….The mixed representation of trade union representatives and departmental representatives does not create a healthy non-adversarial environment for meaningful dialogue and engagement with the departmental representatives in particular on issues not restricted to those requiring trade union consultation and where appropriate agreements.' Hence his proposal for a separation of fora. The Tribunal found that Mr Obazuaye's words indicated a clear view that the unions were not seen as a positive asset to those meetings. His evidence referred to them constantly raising the same issues of (objections to) cost-cutting and

outsourcing. The Tribunal found that this was an irritation to an organisation that was embarked on a 'commissioning journey'.

23. The unions were consulted about these proposals, and were not in agreement with them. Each branch secretary responded in writing and set out their views, objecting to various aspects. In summary, they were concerned that there would be a reduction in staff access to union advice and representation, and they questioned the timing of the proposals. They pointed out the potential disruption to services when union officers needed time off for union duties. They suggested that the current arrangement provided value for money. The union comments were summarised in, and appended to, the report.

24. The informal meeting with the Claimant was followed by a formal meeting in February 2015 with Mr Obazuaye, Ms Eglinton, the Claimant and Mr Kasab the Unite regional officer. At the Tribunal there was a dispute about whether Mr Obazuaye had said that other representatives would have to pick up union work, or that it was not unreasonable for the union workload to be spread amongst the other stewards in the three departments. The Tribunal found that Mr Obazuaye did not put the matter as starkly as the Claimant suggested, but made it clear that he envisaged that the Claimant could call upon union colleagues to assist with the workload. We noted however that the other nine Unite stewards were, like the Claimant, volunteers and not trained as extensively as the Claimant; they were also very inexperienced. Some were reluctant to take on the responsibility of representing members at disciplinary/grievance meetings; others were in more senior positions and found it difficult to find the time to do so. The Tribunal understood why the Claimant and Mr Kasab considered that the proposal to spread the workload was unrealistic.

25. The Tribunal also noted that Mr Obazuaye's approach, whilst not unreasonable in general terms, did not acknowledge that it was the prerogative of the branch secretary to allocate duties to representatives according to their experience and skills and the complexity or seriousness of the task. In addition, the Respondent did not appear to acknowledge a worker's right to be accompanied by his chosen companion (subject to the provisions of the section) pursuant to section 10 of the Employment Relations Act 1999.

26. On 25 March 2015 the Claimant and Mr Kelly had the opportunity to address the Committee about the proposals, as set out in the minutes, which record that a number of the Councillors indicated that they did not think that council tax payers should pay for union duties to be undertaken. From the evidence that we heard, the debate appeared to follow political party lines, as might be expected.

27. The Committee agreed the proposal. In April, discussions began about returning the Claimant to her library job.

Offer of funding from the union

28. By an email of 6 May 2015 Mr Kasab, the Unite regional officer, made an offer to the Respondent for the union to meet the cost of the Claimant's continued secondment on union duties. This was discussed at a meeting on 8 May attended by Mr Kasab, Mr Obazuaye, Ms Eglinton and the Claimant. The Tribunal accepted the Claimant's evidence that Mr Obazuaye was positive about the offer. However, the offer was subsequently declined by Mr Obazuaye in an email on 19 May 2015. He wrote that he had 'consulted widely' – his evidence was that he had spoken to the chairman of the committee, the chief executive and the Respondent's solicitor – and 'I have no intention of going back to the committee for a new decision at this stage. Suffice it to say that you and your trade union colleagues were adequately consulted on the new arrangement but failed to put the proposal to the committee for consideration. As stated…we will review the impact of the new arrangement on staff engagement and communications in the future'.

29. The Tribunal asked whether the Respondent had what the Tribunal understood was a fairly common standing order in local government that prevented re-consideration of matters by committees for a period of six months. None of the witnesses was able to assist, save that Mr Obazuaye said that he had sought legal advice on procedure. For the avoidance of doubt the Tribunal found that even if there was such a provision, it was not relevant as it was not the reason given to the union for refusing the offer.

30. We were shown an email that Mr Kasab had sent to his regional secretary on 20 May 2015, which suggested that he had deliberately withheld from the meeting on 8 May that he had only been able to agree funding for three months. He wrote 'The proposal for Unite to put up funding for the branch secretary post was put to the employer. I was deliberately vague on duration – merely saying we would review it after three months. The impression given by me to the Council and which I wanted to test was that this was not time limited – while for us of course it was. At the meeting the employer represented by the head of HR was close to saying yes…The Tories cover has been blown – this was never about finance but about an attack on the trade unions'.

31. The Tribunal found that the deliberate attempt to deceive the Respondent did not reflect well on the union.

32. Mr Kasab's evidence was that he had told the Respondent that there would be a review of funding after three months, because the union's primary position was that the facility should not have been withdrawn. The Tribunal was not persuaded that this was made clear at the meeting with the Respondent. He also suggested in his email that he was 'making arrangements for cover in anticipation. The work will still be directed at (the Claimant), she will request time off on an ad hoc basis and we will use the

refusals to look at a legal case'. The Respondent suggested that this demonstrated that at an early stage the union wanted to find material to support a claim rather than making the new system work. The Tribunal found that the union was entitled to take that view; it was for the Respondent to ensure that they acted fairly and within the law, and did not provide the material.

33. Mr Kasab wrote to Mr Obazuaye in response to the refusal of the offer expressing his disappointment and described the Respondent as mounting 'a politically-motivated ideological attack on the union…this was never about money'. The Tribunal found that the Respondent's decision about the new arrangements was not only about cost or finances; we were satisfied that there was a wider issue at play, namely the way in which the Respondent viewed the unions, as expressed by Mr Obazuaye in his report, as being in some way unable or unwilling to 'create a healthy non-adversarial environment for meaningful dialogue and engagement.'

The Claimant's return to the library

34. The Claimant had various meetings with senior officers within the library service in order to agree the arrangements for her return to work and the training required to update her. The training schedule produced by the Respondent at the Tribunal hearing was never, it was agreed, shown to the Claimant and in fact never implemented as set out. Instead, there was informal training by way of the Claimant shadowing a colleague in respect of various tasks, which the Claimant indicated she preferred.

35. The Claimant returned to the library on 2 June 2015. It was agreed that she would have two hours each week to carry out union duties, on Tuesdays between 3pm and 5pm, and that she could request additional time off for union duties as necessary.

36. The specific requests for time off, and for time off in lieu, relied upon by the Claimant in this claim are set out below in detail.

37. Mr Obazuaye wrote to the Claimant on 26 June 2015, copied to Mr Kasab, Ms Eglinton, Mr Woolgar (the Claimant's manager Ms Jacob's manager), and Mr Brand (Mr Woolgar's manager) to set out the guidance for deciding whether to grant time off. He said 'the Council will continue to provide reasonable time off for legitimate trade union duties (as opposed to trade union activities). I need to clarify that any time off, paid or unpaid, has to be requested in advance and has to be reasonable and proportionate, taking into account the impact on the service and any other paid time off that has already been granted to you.' Pausing there, the Tribunal noted that this wording seems to conflate the right to reasonable paid time off for duties and reasonable unpaid time off for activities, and could be read as prohibiting time off for union activities. The Tribunal considered that this loose wording, which was then closely followed by Mr Woolgar as guidance for decision-making

about requests for time off, could possibly have led to his declaration, in October 2015, that a union training course, while 'very relevant' to the Claimant's work, was an activity and not a duty, and so he 'was not required to allow any time off'. This is explored in more detail later in this judgment. In any event the Claimant did not query the wording of Mr Obazuaye's guidelines.

38. Mr Obazuaye continued 'I note that you anticipate that you will be granted time off in lieu for meetings you attend on your non-working days. Please note that the Council is not required to pay you for attending meetings that fall on non-working days and if you wish to attend in future you do so in your own time. I recognise that there will be a few exceptions to this, and these will be dealt with on a case by case basis by the head of libraries, in liaison with (Mr Obazuaye) if necessary.' He referred to the employees' responsibility to arrange their representation, and if the representative was not available, to request a postponement. If the representative was still unavailable, then the employee would have to find an alternative or attend on their own. 'This is particularly relevant given that there are 9 Unite stewards across the Council who could be asked to attend.'

39. Mr Obazuaye confirmed that he would not be involved in every request made by the Claimant as decisions would be made by library management. He added 'I expect managers to seek HR advice and steer on this matter'. The Tribunal found that this indicated that Mr Obazuaye would be keeping a close eye on requests for time off.

Selection of departmental representatives

40. On 22 September 2015 applications were invited for the new departmental representative posts. The information contained within the application form stated that 'staff already in receipt of agreed time off for activities which impact on service delivery may not be supported in their application. All applications will be subject to agreement by the line manager and head of service'. The Claimant applied, supported by her colleagues in the library.

41. By an email dated 15 October 2015 Mr Woolgar notified the Claimant that he and her line manager Ms Jacob did not feel able to support her application. The Tribunal found that the Claimant did not receive his email until 28 October 2015 because of computer problems; it was forwarded to her personal email address by Ms Eglinton when the Claimant asked whether a decision had been made. Mr Woolgar wrote 'if you were successful in your application it would involve significant further release of your time from work….in view of the likely impact on the service we cannot support the application I'm afraid'. Mr Kelly also applied, in his department, and was not successful. The Claimant suggested that this showed a bias against the unions.

42. The Tribunal found it difficult to understand the logic of Mr Woolgar's decision. He said in evidence that he was surprised that nobody else from the library had applied; he would have granted the necessary time off to such a person. It was not clear therefore why the Claimant's appointment would have had a more deleterious effect on services compared to another person in the library service. The evidence was that the appointment would involve attendance at 9 to 10 meetings a year, four of which were the quarterly Local Joint Consultative Committee meetings, which the Claimant attended anyway as a union representative and vice chair. Mr Woolgar estimated that the other meetings would be for around two hours each. The Tribunal noted that the Claimant's appointment would therefore have a more limited effect on services than the appointment of another individual who would attend the quarterly meetings in addition to the Claimant. The Tribunal found that Mr Woolgar had not thought through his decision. It was lacking in logic and demonstrated a rigid adherence to the guidelines.

43. Mr Earis, who was a Unison steward, was appointed as a departmental representative for another department. His witness statement suggested that at an introductory meeting that he attended with the chief executive and Ms Eglinton, the chief executive said that he would like it if there 'was no need for unions because all of the staff were happy'. Mr Earis added to this in his oral evidence, suggesting that the chief executive had appeared shocked to learn that Mr Earis was a union steward. The Respondent argued that Mr Earis was well-known as a union steward; the Tribunal noted that Mr Earis accepted that he had taken on some representation after Mr Kelly's secondment had ended, and found that it was likely that he was known to HR as a representative. Whether that knowledge extended to the chief executive was unclear.

44. Mr Obazuaye produced a supplemental statement suggesting that the chief executive was not 'anti-union', but Mr Obazuaye was not at the meeting attended by Mr Earis, so could not assist about what was said. Ms Eglinton was at the meeting, but although she attended the Tribunal hearing as an observer on some days, she did not give evidence. In the absence of any contrary evidence, the Tribunal accepted Mr Earis' evidence about the words used by the chief executive, but could not accept that they necessarily indicated an anti-union stance. However, the Tribunal noted that it was already clear from Mr Obazuaye's report and guidelines that the Respondent wanted to minimise the involvement of the trade unions in staff side matters and did not view their input as conducive to a 'healthy non-adversarial environment'.

45. The Claimant had presented a grievance about not being permitted to attend the Unite conference in July 2015, and about the end of the secondment. After due process a letter of 8 October 2015 explained why they were not upheld. In any event, the Claimant was on strike the week of the conference.

46. The Local Joint Consultative Committee on 21 October 2015 agreed that the General Purposes & Licensing Committee should review the issue of trade union facility time 'in the near future'.

Abuse of the public computers in the library

47. Regrettably, the library service found that a number of members of the public were abusing the public computers in the library by using them to view pornography. Understandably this led to complaints from library users and it was difficult for the staff to deal with the culprits. Incident forms were submitted to Mr Woolgar by the staff, and some users had received bans from using the library, but the staff were concerned that insufficient action was being taken, and approached the Claimant for support. The Claimant therefore wrote to Mr Woolgar on 29 January 2016 drawing the problems and concerns to his attention. She copied her email to the chief executive, and various councillors and directors involved in the library service, although not to the councillor who held the portfolio for the library service.

48. Mr Woolgar replied by return, accepting that it was a very serious issue and explaining what was being done, including bans on various individuals, IT filters, police liaison and a new computer system that would provide better firewall protection. He also arranged to meet the Claimant to discuss these concerns and reassure her and other staff. He expressed disappointment that the staff had not raised the issue directly with him. In a subsequent email to the Claimant, after she had pointed out that staff had completed incident forms and had presumed that he was aware of the situation, he said that his disappointment was partly because the Claimant had chosen to raise this with him by email, copied to others, when they had always discussed matters face to face previously.

49. Councillor Payne, one of the councillors to whom the Claimant had copied her email, responded to Mr Woolgar and copied his reply to all addressees including the Claimant. He wrote 'Thank you for your response – whilst I agree this is a very serious challenge, maybe staff need to be trained in how to manage this type of abuse. Also they should be reporting officially to senior staff as it may have criminal overtones. I also share your opening paragraph that why did the staff not share immediately with you. I hope that Ms Smith is not mischief-making as this is not the way to do this. It is a serious matter and needs to be seen as controlled and that actions are immediately taken and not political points made.'

50. The Claimant suggested that Councillor Payne's email was belittling. The Tribunal found that he was unable to explain clearly in evidence what mischief he thought was being made, or what political point was being made. The Tribunal noted that in evidence he said both that he had not *said* that she was

mischief-making, he merely *hoped* that she was not, but later he said that she was a mischief maker and that she had an ulterior motive. The Tribunal did not consider that the email belittled the Claimant, and certainly she was not cowed by it as she wrote an excoriating response to him. The Tribunal did agree with the Claimant that it was pejorative, and found that it was unfortunate that such an important matter was used as a vehicle to criticise the Claimant about procedure.

51. As already mentioned, the Local Joint Consultative Committee (LJCC) is a sub-committee of the General Purposes and Licensing Committee and is responsible for staffing matters. It does not make decisions, but can make recommendations or refer matters to other committees. The membership of the sub-committee is nine councillors and 12 staff side representatives. It is chaired by a councillor; the vice-chair is the Claimant. Mr Obazuaye suggested that the Claimant's language and style at the sub-committee meetings often crossed the line on what was acceptable. The Councillors who gave evidence recalled cat-calling and pithy comments from the Claimant in the public gallery at meetings of the Council. Mr Brand recalled a number of difficult occasions involving the Claimant at public meetings, including one or two occasions when she had called him a 'liar'. Mr Woolgar said that she could be difficult. The Claimant denied the descriptions of her conduct.

52. The Tribunal found that the Claimant was, as was said, 'passionate' about a number of matters and would not let any perceived unfairness pass by without comment. We found that she demonstrated this without restraint and in a robust manner, and was not intimidated by authority, either in private or public meetings. The Tribunal considered that her approach influenced the Respondent's, councillors' and managers', perception of the Claimant and in turn of the union. The Tribunal noted that the Respondent's witnesses described Mr Kelly as much more pleasant to negotiate with.

<u>Demonstration on 11 February 2016</u>

53. On 11 February 2016 the union members in the library were on strike. They decided to demonstrate outside the premises of an organisation called Community Links, which the staff understood had taken part in the Respondent's tendering exercise for the libraries service. Although the tendering process was confidential, it appeared that inadvertently information had been revealed to the Claimant; she said that the information had been obtained by someone reading a confidential document over someone else's shoulder.

54. A couple of days before the demonstration, Ms Hulme posted on Facebook that this demonstration was a 'picket'. Mr Obazuaye wrote to Mr Kasab on 9 February 2016, copied to the Claimant, to point out that this would be unlawful. Mr Kasab replied immediately to confirm that it was a 'leafleting' and not a picket. Mr Obazuaye asked him to amend the post on Facebook. This was not done. The Tribunal noted that the Claimant suggested that she had

not known about the Facebook post until 11 February, but the email exchange was copied to her. It may be that she did not see it, perhaps because of computer problems (see below), and she was not challenged about the date of her knowledge at the hearing.

55. The Tribunal was shown photographs, taken on 11 February 2016, of a crowd of people standing at the entrance to the Community Links building, which was accessed by a wheelchair-friendly ramp, with banners and placards.

56. On that day the Claimant asked Ms Hulme to correct the Facebook post, and a further post was made confirming that it was not a picket. The original post was not withdrawn or edited. Mr Gledhill attended at the site at the request of Community Links; his evidence was that he saw no customers being prevented or deterred from entering.

57. The Respondent suggested that the entrance had been blocked by the 'picket'. Ms Hulme accepted in cross-examination that in the photograph it was blocked. The Tribunal noted that the weight of evidence from the witnesses who were present on the day was that they moved out of the way when customers wanted to enter, and simply handed out leaflets. The Tribunal found no evidence that any user of Community Links was discouraged from entering their premises. The demonstration was not viewed favourably by the Respondent.

LJCC 25 February 2016

58. At the LJCC meeting on 25 February 2016, one of the agenda items raised by the Claimant on behalf of the staff side was about the tendering process for the library service and suggested that the Respondent might be in breach of the Local Government Transparency Code with regard to the tender process involving Community Links. The question raised was 'Despite the results of the consultation exercise carried out by the Council, the Council is pressing ahead with a tendering process for the library service. Will the Council now disclose which organisations have come forward with bids to run the service? The Council refused to disclose that Community Links were bidding for the community libraries – despite the fact that they were the only bidder. The Council relied upon a 'commercially sensitive' response. Based on the Local Government Transparency Code, the commercially sensitive response was clearly not applicable. We are now asking that the Council reveal who is bidding for the remaining libraries. We draw your attention to section 20 of the Code which deals with commercial sensitivity which states 'The government has not seen any evidence that publishing details about contracts entered into by local authorities would prejudice procurement or the interests of commercial organisations or breach commercial confidentiality'. It is clear that the matter is not one for exemption or exclusion according to the Code.'

59. A further question raised by the Claimant on the agenda noted that the Respondent had 'just' confirmed that Community Links was the preferred bidder and sought confirmation that they were the only bidder, and the details of the bid, together with details of the previous feasibility report prepared for the Respondent.

60. The Tribunal noted the Respondent's evidence that outsourcing was a topic that was receiving publicity locally, and the Councillors who gave evidence described various campaigns against it, and on occasions, against them, in the borough. There was no doubt that this was a sensitive topic to raise, particularly when raised with the Councillors by the union and when it questioned their conduct under the Code.

61. The meeting duly took place, and there was a dispute at the Tribunal hearing about the nature of the discussion. From all of the evidence, the Tribunal found that it was heated on both sides. Councillor Wilkins' minuted request for calm illustrated that there was a need for both sides to respond accordingly.

62. The Tribunal found that the councillors were irritated by what they understood was the 'picketing' of a site belonging to a potential bidder. This apparent outrage was exacerbated by the Claimant's denial at the meeting that there had been picketing, because as far as the councillors were concerned, the Facebook entry was clear, and shown to the meeting by Councillor Bennett on his iPad. He did not refer to the later post that corrected that information; he may not have seen it at that point. The Tribunal accepted the Respondent's description of the Claimant as 'embarrassed' when the Facebook post was shown, because she had thought that it had been removed and replaced. Nevertheless, she continued to fight her corner.

63. The Tribunal noted that the minutes demonstrate that the councillors were also concerned that users of Community Links had been inconvenienced by the union members, and that they were prepared to believe that this had occurred. For example, without any supporting evidence, Councillor Smith is recorded as asking 'why were people in wheelchairs being obstructed' (and not, '*were* people in wheelchairs being obstructed'). He was unable to explain this when he gave evidence. The councillors were also concerned about the union's access to confidential information about Community Links.

64. The Tribunal found that none of the circumstances described above justified either side in conducting themselves in an aggressive manner at a public (or indeed any) meeting. We noted that the minutes record that the Claimant answered the points raised, and we found that although the meeting was hostile and loud on both sides, with some aggressive questioning, and although the Claimant described it as a 'barrage' of questions, she had the opportunity to put across her points and did so with some vehemence. The Tribunal found that she was not placed at a disadvantage and that this could not be described as a detriment.

Computer problems

65. It was the Claimant's evidence that from around September 2015 she had been experiencing problems with the computer and telephone supplied to her by the Respondent for the union office, and that she waited for five months for assistance. The Tribunal noted that the Respondent was in the process of changing suppliers and rolling out Windows 7, so all staff were to have new computers ('a major infrastructure refresh project'). The Tribunal noted that there were a number of emails in the bundle from Mr Woolgar, Ms Eglinton and Mr Obazuaye, seeking help from the IT department in respect of the Claimant's computer.

66. The Tribunal accepted Mr Elsey's evidence that once the Respondent notified its supplier that the contract would not be extended, most of the project team left the employment of the supplier, or were redeployed elsewhere, which severely hampered the rollout and other matters. The Tribunal found that the Claimant, along with others, was affected by this.

67. However, the Tribunal found that there was no evidence of any complaint from the Claimant about the computer between January and March 2016. On 1 December 2015 Ms Eglinton checked with the Claimant whether her computer was working, and the Claimant replied by text that the computer 'seems okay but just haven't got the phone connected. It's no-one's fault just impossible to find a time I can book in.' The Tribunal found that although, according to Mr Elsey, the computer was running slowly in October, the evidence suggested that this had to some extent been rectified by December and it was 'okay'.

68. In addition, the Tribunal noted the Claimant's evidence that she had a smartphone supplied by the union, which she estimated that she had had for about a year, and a union iPad which she said she had had for three years. The Tribunal found that she was able to receive emails on various devices. The Claimant's evidence about difficulties with her union email address and her work email address did not appear to present any insurmountable barrier for her.

69. The Claimant's computer was replaced by the Respondent on 21 March 2016.

THE REQUESTS FOR TIME OFF/TIME OFF IN LIEU - FINDINGS

70. The Tribunal considered these claims in the context of the findings set out above and the evidence that in addition to having two paid hours each week for union duties, the Claimant was able to request time off or time off in lieu for duties and activities. Both parties had produced tables showing time off requests, in accordance with the case management order, but there were some disagreements that could not be resolved.

71. The Tribunal calculated that from 2 June 2015 until 16 August 2016, the period that we were asked to consider, there were 48 Tuesdays on which the Claimant had the two hours facility time, and in addition 40 other requests for time off during working days were granted, including, on occasions, additional hours on a Tuesday. The total number of requests granted included between three and five requests (depending on which table was accurate) for time off in lieu, which related to time when she carried out union duties on her non-working days.

72. Over that same period the Respondent refused eleven requests; the Tribunal was asked to consider eight of the eleven. In considering those requests, the Tribunal noted that the Respondent was not legally obliged to grant time off in lieu if union work was done on a non-working day. However, Mr Obazuaye had confirmed in his guidelines of 26 June 2015 that such requests would be considered on a case by case basis, to see whether the request was an exception to the general rule that the Claimant would from then on attend union meetings held on her non-working days in her own time. On a number of occasions, Mr Woolgar refused the Claimant's requests because the circumstances were not, in his view, exceptional, and the Claimant did not seek to argue the point. The Tribunal found it difficult in those cases to say that the refusal caused any detriment to the Claimant.

73. All but one of these claims refer to a request for time off in lieu; the remaining one was for time off during working hours.

74. Issue 1.1 On 9 June 2015 the Claimant applied for annual leave for Monday 6 to Friday 10 July 2015. That request was granted. She then sought to amend her request to a request for time off (Tuesday to Thursday) and time off in lieu (Monday and Friday) to attend the Unite conference to be held that week from 6 to 10 July 2015. She told the Tribunal that she had attended annual conference every year for 20 years, and that she had always been granted time off to do so.

75. On 8 June 2015 Ms Eglinton had sent an email to Mr Woolgar to say that the Respondent 'is not minded to agree time off for annual conferences, whether paid or unpaid'. It was not clear what had prompted that email. Ms Jacob confirmed that this was the HR advice when she declined the Claimant's request. Mr Woolgar wrote to the Claimant at her request to confirm the decision, using the same wording. Less than an hour later he sent another email to say 'I have been asked to provide further clarification regarding the conference. The decision relates to this year's conference and is not a blanket decision. The key factor on this occasion was the timing of the conference coming at a time when arrangements were already in place to manage your return to your substantive role in libraries. That involves several weeks of training which have already been disrupted by industrial action. To allow absence to attend the union's national conference whilst being 're-inducted' was not appropriate or reasonable in the Council's view. Each request will be considered on its merits.'

76. The Tribunal found that this wording 'I have been asked to provide' was an indication that someone in HR had reviewed the situation and decided that a 'blanket ban' on attendance at conferences was not sustainable. It also demonstrated that Mr Woolgar was merely the conduit for the message. This was a notable feature of a number of his emails to the Claimant, in which he regularly referred to having taken advice from HR. The Tribunal found it curious that the Claimant's request for annual leave could be granted without any reference to the training programme, but that her subsequent request, for time off/time off in lieu for the same period to attend the union conference, raised that question. It was also noted that the Claimant made a subsequent request for annual leave later in July which was granted without reference to the training programme. She told Mr Obazuaye that she was going to Arundel, because she thought that he had to approve her request, and she wanted to make the point that it was not union-related. The Respondent suggested to the Tribunal that perhaps that period of leave was granted because it had been booked some time previously, but there was no documentary evidence to assist about that.

77. Issue 1.4 On 25 September 2015 the Claimant requested time off to represent a member at two meetings with HR, on 30 September and 1 October 2015. Mr Woolgar replied on the same day to say that 'in considering requests I do have to take into account the impact on the service and the amount of time granted. In view of this and the amount of time you have been released from work this week I do not feel that two more meetings next week is proportionate and therefore I am not able to grant the time off on this occasion.'

78. The Tribunal noted that in that week the Claimant's union duties took place on her usual two hours on Tuesday, three hours on Wednesday and 1.5 hours on Thursday. The Tribunal noted that Mr Woolgar did not say that there was no cover available for the Claimant, nor that he had no budget for cover, nor that the rota did not permit her to have that time off. His decision was based on the time off already taken in the previous week; he said that he had spoken to the Claimant's manager about it. The Claimant produced no evidence to show that there was cover for the time requested.

79. Issue 1.5 On 4 October 2015 the Claimant requested time off in lieu to represent a member at an ill-health meeting on Friday 9 October. Mr Woolgar replied the following day reminding the Claimant of Mr Obazuaye's email and said 'I do not believe that an ill-health meeting is exceptional and therefore time back would not be granted in this instance.' The Tribunal noted that Mr Obazuaye's email of 26 June did not explain how exceptions to the general rule would be judged, but said that each request would be decided by Mr Woolgar on a case by case basis, with HR advice as necessary. Mr Woolgar's evidence did not explain clearly why he considered that such a meeting was not 'exceptional'. The Claimant attended the meeting in her own time.

80. Issue 1.7 On 14 October the Claimant requested time off in lieu to meet with a member on Friday 16 October in order to give advice about a potential grievance. Mr Woolgar declined the request; 'In accordance with the guidelines you have been given I am not granting time back for meetings on non-working days except in exceptional circumstances'. The Tribunal could find no reason in the Claimant's evidence to suggest that the meeting could only take place on that day, and no evidence as to whether she did in fact meet the member.

81. Issue 1.8 On 21 September 2015 the Claimant requested time off, and time off in lieu, to attend a five day course run by the union 'Local Authority Change At Work' in October 2015. Mr Woolgar noted in his reply that the course was 'very relevant' to the Claimant's role and granted the usual three working days as time off.

82. Having attended the course, the Claimant wrote again to tell Mr Woolgar of the advice she had received there, that the Acas Code paragraph 19 provided that as a part-time worker attending a full-time course, she should be paid for 35 hours, not just 27 hours. The Tribunal noted that in fact it is paragraph 35 of the code that is relevant.

83. Mr Woolgar replied that the course was an activity, not a duty, and so he was not required to allow any time off and so paying her for three days was 'quite generous'. He declined to 'sanction any further allowance'. The Tribunal noted that Mr Woolgar appeared to have not understood that the entitlement to reasonable time off (unpaid) does extend to activities; it was not correct to say that he was 'not required to allow time off' for activities, if the implication was 'at all', because there is at least a requirement to consider whether such time off would be reasonable. As set out above, this may have been because the guidance produced by Mr Obazuaye was not clear on this point. In any event, the Tribunal found that attendance at the training course was a duty pursuant to section 168 (2).

84. The Claimant presented a grievance, which was not addressed, but finally on 6 September 2016 Mr Obazuaye wrote to the Claimant to say that she would be paid for the additional nine hours 'as a gesture of goodwill (ex gratia) without admission of liability. The dispute, of course, concerns a complex area of law, a dispute which would be wholly disproportionate to the sums involved.'

85. Issue 1.13 On Tuesday 15 March 2016 the Claimant requested time off in lieu in respect of two meetings that she had attended to represent members at two disciplinary investigations on the previous day. She said that she had only been contacted by the members on that day. The Respondent's disciplinary procedure provides for representation by a union or any other person, at every stage of the process.

86. On 16 March Mr Woolgar responded that this did not amount to exceptional circumstances and that the members 'must have had more than a day's notice'. He said that they could have requested a postponement if their representative was not available. He refused the request 'for something that you chose to do knowing that the ground rules in place would make it unlikely to be granted.'

87. The Claimant responded to explain that she did not choose to represent members, her members contacted her. She said that they had been told on the Friday that the meeting would be on the Monday, and they could not contact her as she was away until Monday. The Tribunal found it likely that, as this was a disciplinary investigation meeting, that there would have been short notice of it contrary to what Mr Woolgar believed; the Respondent's procedure requires seven days notice for formal hearings, not investigations.

88. The Tribunal noted that the Claimant did not address Mr Woolgar's point about seeking a postponement of the meeting. Instead, she conflated the issue of union duties carried out on a non-working day with meetings on work-related matters held by the Respondent for staff that some staff attended on their day off, and for which they were able to claim time off in lieu. The Tribunal found that that scenario was different from carrying out union duties on a non-working day, because the staff in that example were attending at the behest of their employer.

89. The Tribunal also considered it relevant that the request was made retrospectively. The Claimant did not contact Mr Woolgar on the Monday to seek approval, but simply went ahead with the meetings.

90. Issue 1.15 On 11 April 2016 the Claimant requested time off in lieu to attend a disciplinary meeting with a member on Friday 15 April. Mr Woolgar declined the request, because he said that the meeting could be re-arranged. Accordingly, the Claimant wrote to the disciplining officer and requested a postponement, which was refused on the grounds that the hearing had already been postponed once. She referred back to Mr Woolgar with this information and he sought advice from HR.

91. Ms Eglinton told him that there were at least two union representatives in the relevant department and that one of them had already represented the member at an earlier stage. Mr Woolgar replied to the Claimant at 2.46 pm on the day of the meeting, 'I have been advised by HR that there are two union reps in the department who could potentially have represented the member of staff. In view of this I do not see how there is an exceptional circumstance that could constitute a reason for granting TOIL for you to attend which falls outside the guidelines originally supplied by Charles. I would need some further explanation from you in these circumstances.'

92. The Claimant asked for the names of the representatives, which were provided. She told the Tribunal that one of them was on sick leave. The

Tribunal found that Mr Woolgar had moved the goalposts in respect of this request. His initial refusal did not refer to the suggestion that there were other representatives available. Neither did he address the Claimant's point about the right of members to be accompanied under section 10 of the 1999 Act.

93. Issue 13 All of the matters relied upon in this issue have been covered in the findings set out above, apart from the request made on Monday 7 December 2015 for time off in lieu on that day to attend a disciplinary investigation with a member. It was not clear to the Tribunal whether this was withdrawn, given that it was also part of issue 5, which had been withdrawn (see above). For the avoidance of doubt we have set out the findings.

94. Mr Woolgar refused the request on the grounds that the circumstances were not exceptional; the member would 'almost certainly have had longer notice' (although he did not check this); and could have requested alternative representation or a deferral. The Tribunal noted that this seemed to miss the point that the member had requested the Claimant, not an alternative. There appeared to be no challenge from the Claimant.

SUBMISSIONS.

95. The representatives produced written submissions; we have not tried to summarise these here. In addition, they addressed the Tribunal on various points arising.

THE LAW – A BRIEF SUMMARY

96. The relevant part of section 146 (1) of the Trade Union & Labour Relations (Consolidation) Act 1992 sets out the right of a worker 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 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.

97. 'Detriment' is not defined in the Act. It is accepted that it has the wide scope afforded to it in discrimination claims, namely 'putting under a disadvantage'. The worker has to establish that he was subjected to the detriment as an individual.

98. In De Souza v Automobile Association 1986 ICR 514 the question to be considered was said to be considered from the point of view of the victim. 'If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought …to suffice'. In Shamoon v Chief Constable of the RUC 2003 ICR 337, the House of Lords confirmed this test, but emphasised that although the test is subjective, a sense of grievance which is not justified will not be sufficient to constitute a detriment.

99. The focus in trade union detriment claims is not on whether the worker was subjected to a detriment because of his union membership or activities, but instead on what purpose the employer was seeking to achieve by subjecting the worker to the detriment. The burden is on the employer to show the purpose of his actions (section 148).

100. In Yewdall v Secretary of State for Work & Pensions EAT 0071/05 the following approach was recommended:

a. have there been acts or deliberate failures to act by the employer;
b. have those acts or omissions caused detriment to the Claimant;
c. were those acts or omissions in time;
d. if there was a detriment and the claim was presented in time, has the Claimant established a prima facie case that they were committed for a purpose proscribed by section 146;
e. if so, the onus transfers to the employer to show the purpose behind its acts or omissions. The employer must show, on the balance of probabilities, that the alternative purpose was not one proscribed by section 146.

101. 'Appropriate time' is defined in section 146 as being either outside working hours or within working hours with the consent of the employer.

102. The time limit of three months from the act or failure is set out in section 147, and refers to the usual 'reasonably practicable' test. When an act or failure is part of a series of similar acts or failures, time runs from the last of them.

103. Section 168 sets out the provisions for taking reasonable time off for union duties, which are defined. Such time off is paid in accordance with the provisions of section 169. Section 168 (2) includes time off for relevant training as a duty.

104. Section 170 sets out provisions in respect of reasonable time off for union activities, as defined. Such time off is not paid.

105. Section 172 sets out the provisions for remedies for breaches of sections 168, 168A, 169 and 170. Sections 168, 168A and 170 attract a declaration and potentially an award of compensation. Section 172 (3) provides that the remedy for failure to pay under section 169 is an order for the employer to pay the amount due; in other words, there is no provision for a declaration for such a breach.

106. The Acas Code on time off for trade union duties and activities provides useful guidance in respect of the operation of the legislation. It suggests for example the factors to be considered by both unions and

employers in deciding whether the time off requested was reasonable, including the size of the organisation and the number of workers, the need to maintain a service to the public, and the difficulties that may arise for the union in contacting members who work unusual hours.

107. Particularly relevant in this case is paragraph 19 of the Code: 'There is no statutory right to pay for time off where the duty is carried out at a time when the union representative would not otherwise have been at work'; and paragraph 35: 'There is no statutory requirement to pay for time off where training is undertaken at a time when the union representative would not otherwise have been at work unless (he) works flexible hours, such as night shift, but needs to undertake training in normal hours. Staff who work part time will be entitled to be paid if staff who work full time would be entitled to be paid. In all cases, the amount of time off must be reasonable.'

108. The payment of part time workers who attend a full time course was the subject of Davies v Port Talbot County Borough Council 1999 ICR 1132. The EAT decided that attendance at the course was 'work' within the meaning of Article 141 and the worker was entitled to receive the same pay as a full timer for attending. The EAT went on to hold that the 'replacement of wages' criterion in section 169 was, at least so far as it affected part time workers, incompatible with what was then Article 119 and had to be set aside.

Protected Disclosure

109. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure means a qualifying disclosure as defined by Section 43B which is made by a worker in accordance with any of the Sections 43C to 43H.

110. Section 43B defines a qualifying disclosure as a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:-

i) That a criminal offence has been committed, is being committed or is likely to be committed.

ii) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

iii) That the health or safety of any individual has been, is being or is likely to be endangered.

iv) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

111. Section 43C covers disclosure to an employer or other responsible person.

112. A qualifying disclosure is made in accordance with Section 43C if the worker makes the disclosure to his employer or to another person where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than his employer or any other matter for which a person other than his employer has legal responsibility.

113. Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

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114. In **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR38**, the Employment Appeal Tribunal decided that to be a protected disclosure, there must be a disclosure of information. There is a distinction between "information" and an "allegation" for the purposes of the Act.

115. In **Kilraine v London Borough of Wandsworth UKEAT/0260/15** sounded a note of caution when considering the Cavendish Munro test. Tribunals were asked to note that 'reality and experience suggest that very often information and allegation are intertwined'.

CONCLUSIONS

116. Having made the findings of fact set out above, we considered the relevant law and then returned to the list of issues to draw these conclusions.

117. The Tribunal noted that these claims arose against the backdrop of a Respondent who made clear in the committee report by Mr Obazuaye that they wanted to minimise the role of the trade unions within the organisation, whilst doing the bare minimum to act within the law in respect of the rights contained in the legislation. It was apparent that both parties viewed the other with some degree of suspicion and antipathy. The Tribunal noted that the Claimant was clearly a conscientious union representative, and spent a lot of her own time on union work. The Tribunal was also mindful of the amount of time off that the Respondent had actually granted to the Claimant.

Detriment related to trade union claims & section 169 claim

118. With regard to issue 1, the section 146 detriment claims, the Tribunal had made findings on each of the incidents relied upon by the Claimant, as set out above, and concluded that she had been treated in the way that she had described, save for her description of the LJCC meeting and the computer difficulties, with which the Tribunal disagreed, also set out above.

Issue 2, the next step, was to consider whether any of the treatment relied upon and found proved amounted to a detriment. The Tribunal considered each incident in turn, as follows, in order to decide whether there was a detriment. It will be seen that only two of the claims were successful. In summary, this was because the Tribunal considered, on the facts of each incident, that where the refusal of the request for time off was shown by the Respondent to be not unreasonable, then any sense of grievance was not justified (Shamoon).

119. Incident in issue 1.1; the Claimant had already been granted annual leave for the period so she could have attended the conference, using her annual leave. The Claimant suggested that she believed that she could not do so, but there was no evidence to support that belief. The Tribunal noted that no specific detriment was described, and found it difficult to see any disadvantage to the Claimant. It was correct that the Respondent had granted annual leave without reference to the training programme, and then raised training as an issue when the request for time off for union duties was received, but the Tribunal concluded that it was not possible to identify the Respondent's approach as constituting a detriment.

120. Incident in issue 1.4 (1.2 and 1.3 were not part of the claim); the Tribunal noted that the Respondent had granted the Claimant a significant amount of time off for union duties. The refusals had to be considered in that context. The Tribunal found it difficult to identify any detriment to the Claimant in respect of this refusal; the Claimant had not identified anything specific. It was noteworthy that Mr Woolgar did not suggest that there was no cover for the Claimant in the following week, but at the same time it could not be said to be unreasonable that, as he expressed, he wanted her to spend more time at work after a few hours absence the previous week.

121. Incident at issue 1.5; the Claimant attended the ill-health hearing on her day off. She did not specify any particular detriment. There was no evidence that she had requested a postponement. The Tribunal could not identify a detriment.

122. Incident at issue 1.6; this issue should perhaps be worded that there was a refusal to support the Claimant's application to become a departmental representative. The Tribunal concluded that this was a detriment, because it excluded the Claimant from departmental representative meetings, despite her colleagues wanting her to represent them, and that placed her at a disadvantage. With regard to issue 3, the next question was about the purpose. The Tribunal concluded that the sole or main purpose of the decision not to support her application was to deter the Claimant from taking part in union activities, because it had been made clear in Mr Obazuaye's report that the unions were not wanted in that forum, and were viewed as adversarial and their presence not conducive to harmony, and the Claimant was, according to the weight of evidence, one of the most vocal union representatives. In addition, the Tribunal had found that the decision was ill-

thought through and the Respondent had failed to note that the appointment of the Claimant would have less of an impact on services than the appointment of another person in the department. The decision echoed Mr Obazuaye's expressed view that the union workload should be spread amongst other representatives.

123. The next question was whether the Claimant was subjected to the detriment as an individual or was it part of the Respondent's decision about restricting union involvement? Although not a specific issue, the Tribunal considered that this was a relevant question given the provisions of section 146. Mr Earis, a union steward, was appointed as a departmental representative, and Mr Obazuaye made it clear in his evidence that Mr Earis was known to be a union steward when he was appointed as a departmental representative. Accordingly, the evidence suggested that the decision not to support the Claimant was not an expression of anti-union feeling. The decision was directed at the Claimant as an individual rather than as a decision against all recognised unions.

124. The Tribunal considered the time limit (issue 20) and concluded that this claim was presented within the time limit. The decision to refuse to support the Claimant was conveyed in an email of 15 October 2015, but she did not receive it until 28 October 2015 when she asked whether a decision had been made and Ms Eglinton forwarded the email to her. Three months therefore expired on 27 January 2016. The early conciliation certificate day A was 20 January 2016, and day B was 8 February 2016. The claim was presented on 8 March 2016 and was therefore presented in time.

125. If the Tribunal is not correct about the extension of time, we concluded that the delay in the Claimant receiving the decision email would have provided grounds to show that it was not reasonably practicable to have presented the claim within the time limit, and that it had been presented within a reasonable time thereafter.

126. Incident at issue 1.7; the Tribunal concluded that there was no evidence to suggest that the circumstances here were in any way exceptional and such that the request should reasonably have been granted. The Claimant was not proposing to attend a formal meeting or to represent a member at such a meeting. No specific detriment was pleaded, and the Tribunal was unable to identify any detriment.

127. Incident at issue 1.8; the Claimant suggested that the detriment here was that it took nearly a year to be paid for the two non-working days of the course, and then it was done grudgingly as an ex gratia payment. The Tribunal concluded that this could be a detriment, but that there was no evidence to indicate that the sole or main purpose was a proscribed one. Mr Woolgar's email made it clear that he had not understood that this was a duty and the correspondence suggested to the Tribunal that the Respondent had simply failed to check the legal position; there was no evidence of any

proscribed purpose in the delay, nor any evidence from which we could infer a proscribed purpose.

128. Issue 1.9 was the subject of EJ Kurrein's decision on 4 October 2016; issue 1.10 was withdrawn.

129. Incident at issue 1.11; the Tribunal concluded that Councillor Payne's email was not a detriment; it caused no disadvantage to the Claimant. The Councillors and managers already had a view of the Claimant as difficult. The Claimant may have been annoyed by the contents, but she was not so upset by it that it crossed the threshold into detriment. She replied in robust terms and permitted newspaper articles and leaflets to refer to the incident, mentioning her name, describing what she had done as 'whistle-blowing' and making claims about the way the Respondent had reacted.

130. Even if the email could be described as a detriment, the Tribunal concluded that the purpose was not a proscribed one; it was Councillor Payne taking a side-swipe at the Claimant because of her conduct at meetings. The Tribunal concluded that it was not to deter her from, or penalise her for, her union activities.

131. Incident at issue 1.12; the Tribunal concluded from our findings that the LJCC meeting was heated on both sides; the Claimant was not a cowed victim of bullying and aggressive behaviour and threats. She was not placed at a disadvantage. The reason for the Councillors' annoyance was the alleged 'picket' and their misplaced concerns for users of Community Links, together with a concern that confidential information had in some way been obtained by the union. The Tribunal concluded that their behaviour at the meeting was not an attempt to deter or prevent her from carrying out her union duties, or to penalise her for doing so. There was no detriment.

132. Incident at issue 1.13; on 16 March 2016 Mr Woolgar refused a request for time off in lieu in respect of time already taken by the Claimant on the previous non-working day. The Tribunal concluded that the Respondent's requirement that she give as much notice as possible for such requests was not unreasonable. This request came after the event. Even if the members had been given short notice of the investigation, there were grounds for Mr Woolgar to refuse, namely that the work had already been undertaken without an application being made. The Tribunal accepted that the Claimant was exasperated by this, but in the circumstances this was unjustified and we could not conclude that the refusal of an unreasonable request amounted to a detriment.

133. Computer/telephone failures at issue 1.14; having regard to our findings about this, the Tribunal concluded that the Claimant was not placed at a disadvantage; if she was, the reason was nothing to d with her union work. Various managers had contacted the IT department on her behalf. The system was being upgraded and ultimately she was provided with a new

computer. She said herself in a text that the computer was working in December 2015. She had other devices provided by the union upon which to receive emails.

134. Incident on 15 April 2015 at issue 1.15; the Tribunal concluded that this refusal for time off in lieu was different from the others. In respect of the other refusals, there was no suggestion from the Claimant that cover was available contrary to what she had been told, or that there were other specific circumstances that made the refusal questionable, particularly against a backdrop of a significant number of requests being approved. In this instance, the Claimant took steps to address the reason given by Mr Woolgar for initially refusing the request. She was able to provide evidence that a request had been made for a postponement and that the hearing would not be postponed. Mr Woolgar then gave a different reason for his next refusal, on the day of the hearing itself. The Tribunal accepted that this would cause a justified sense of grievance, particularly when the Claimant had been approached to represent the member herself, and she was best placed to know whether the departmental union representatives were experienced enough to carry out the serious matter of a disciplinary hearing. The Tribunal concluded that this amounted to a detriment.

135. The next question was therefore whether the sole or main purpose of that treatment was to deter the Claimant from taking part in union activities or to penalise her for doing so. The Tribunal had regard to (i) the tone of Mr Obazuaye's report about union involvement in staffing matters; (ii) his statement at the meeting in February 2015 that the workload should be spread amongst the other union stewards; (iii) Mr Woolgar had sought HR advice about the decision; (iv) it was not clear why the refusal of the postponement request would not tip the request for time off in lieu into the 'exceptional' category, given that this was raised by Mr Woolgar as a reason for refusal in the first place; and (v) the apparent lack of any acknowledgment of the union member's right to be accompanied pursuant to section 10.

136. The Tribunal concluded that the sole or main purpose was to deter the Claimant from taking part in union duties. There was no evidence that it would have been difficult to accommodate the time off in lieu, which in any event would have to be taken when the Respondent allowed, not when the Claimant wanted to take it. The Tribunal noted that the Respondent was not obliged to grant the request, but Mr Obazuaye's guidelines had suggested that there would be some exceptions to the general rule that there would be no time off in lieu granted, so there was an intimation that such requests would at least be considered. The Tribunal concluded that Mr Woolgar did not give the request due consideration, demonstrated by the different reasons given. The impression given as a result was that whatever the Claimant said, that request would be refused for whatever reason could be found, and that as previously suggested by Mr Obazuaye, another representative would have to share the workload and attend the meeting. The purpose was to deter the

Claimant from carrying out those duties and in effect to pressure her to assign another representative in her place. That claim was successful.

137. Issue 4; the Tribunal concluded that the Claimant's activities were undertaken at an appropriate time, namely outside working hours or in working hours with the consent of her manager.

138. Issues 5 to 9 were withdrawn.

139. Issues 10 to 12 were withdrawn.

140. Issue 13 , the section 169 claims; the Claimant relied on (i) the incidents in issue 5 and (ii) the training course in October 2015. Issue 5 was withdrawn, but the incidents at issue 5.1 to 5.3 were also pleaded as detriments, except the refusal of the request for time off in lieu for a disciplinary investigation on 7 December 2015 referred to in 5.1. The Claimant's submissions suggested that issue 13 now related only to payment for the training course. For the avoidance of doubt, if the refusal on 7 December is still to be considered, the Tribunal noted that the Claimant was not granted time off in lieu on that day and so the entitlement to pay would not arise under section 169. That claim must therefore be unsuccessful.

141. In respect of the training course in October 2015, described by Mr Woolgar as 'very relevant', the Respondent paid the Claimant for three working days, although the course lasted for five days. They later paid her for the two days as an 'ex gratia payment'.

142. The issues at 13.1 to 13.5 and issue 14 can be addressed fairly speedily in respect of the training course. The course was a union duty, as the training was relevant to her union duties (section 168 (2)). The Claimant attended both in work time and in her own time. The attendance on working days was with the permission of the Respondent. The Claimant attended for 35 hours. The Respondent failed to pay the Claimant for 35 hours initially, but later paid a corresponding ex gratia payment amounting to two days pay.

143. The Tribunal had regard to the case of Davies (see above) and the Acas Code paragraph 35, and concluded that the Respondent had failed to pay the Claimant in accordance with the legislation. However, although the Claimant requested a declaration as remedy, the Tribunal noted that section 172 (3) does not refer to a declaration as a remedy for a breach of section 169 (2). The remedy is to order payment, and as the Claimant had now been paid, such an order would not be appropriate.

144. The Claimant was accordingly successful in respect of the claims at issues 1.6, 1.15 and 13/14.

Protected disclosure claim

145. The Tribunal turned to the claim of detriment for making protected disclosures, issue 15.& 16. The Respondent accepted that the Claimant's email about the public misuse of the library computers was a protected disclosure. The Tribunal concluded that the question raised in the LJCC agenda, followed up by oral comments at the meeting, also amounted to protected disclosures. They contained information about a potential breach of the Code. It would be in the public interest to have such a matter aired. For the avoidance of doubt, the Tribunal heard no evidence to suggest that there had been such a breach, but it was not unreasonable for the Claimant to believe that this should be raised.

146. The next question (issue 17) was whether the Claimant was subjected to the conduct relied upon; the first instance was Councillor Payne's email suggesting that she was mischief-making, and it was clear that this happened and she was subject to it. The second was whether she was subjected to bullying and aggressive behaviour and threats at the LJCC; the Tribunal had made findings about the conduct at that meeting and found it did not happen in the way that the Claimant described. The Claimant was not subject to such conduct.

147. Issue 18 raised the question of whether the conduct relied upon constituted an unlawful detriment. The Tribunal had already concluded that the conduct could not be categorised as a detriment in respect of the section 146 claim, for the reasons set out above (see paragraphs 64 and 129 in respect of the LJCC meeting, and paragraphs 50 and 128 in respect of Councillor Payne's email).

148. For the avoidance of doubt, the Tribunal concluded that even if the email were a detriment, we concluded that it was not written in response to the first disclosure (and it came before the other disclosures) as a disclosure, although of course it was in reply to the email from the Claimant which contained the disclosure. The Tribunal concluded that it was written to acknowledge the serious matter that was reported, and took the opportunity to take a swipe at the Claimant because she was viewed as difficult at meetings. It was not written as an attack on the Claimant because she had made the disclosure. If the tone of the debate at the LJCC amounted to a detriment, the Tribunal concluded that it was not caused by the disclosures, but by, on the one hand, the irritation of the Councillors about the 'picketing' and the 'leak' of confidential information, and on the other hand by the annoyance of the Claimant about their reaction to those topics. Both parties reacted in a robust manner.

149. The protected disclosure claims were unsuccessful.

Jurisdiction

150. The Tribunal concluded that the claims referred to in issues 1.15 and 13/14 were presented within the time limit. The claim at issue 1.6 was also presented in time, for the reasons set out in paragraph 124 above.

SUMMARY OF DECISION

151. The Claimant was successful in respect of issues 1.6, 1.15 and issue 13/14 (although issue 13/14 will not attract any remedy for the reasons set out above). If the parties are unable to reach a settlement on issues 1.6 and 1.15, they should apply to the Tribunal office, within 28 days of the date that this judgment is sent, for a remedy hearing to be arranged.

Employment Judge Wallis
31 October 2017