



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Meehan  
**Respondent:** City of Bradford Metropolitan District Council  
**Heard at:** Leeds      **On:** 16 and 17 January 2019  
**Before:** Employment Judge Davies  
Ms H Brown  
Mr J Rhodes

## Representation

**Claimant:** In person  
**Respondent:** Ms Widdett (counsel)

# RESERVED JUDGMENT

1. The Claimant's claims of unfair dismissal (ordinary and automatically) and of being subjected to a detriment to penalise him for taking part in the activities of an independent trade union are not well-founded and are dismissed.

# REASONS

## Introduction

- 1.1 These were claims of unfair dismissal and being subjected to a detriment as a penalty for taking part in trade union activities brought by Mr P Meehan against City of Bradford Metropolitan District Council. The Claimant represented himself. The Respondent was represented by Ms Widdett of counsel.
- 1.2 At a preliminary hearing on 20 September 2018 Employment Judge Starr listed the hearing of this claim for 18 and 19 January 2019. It was then realised that this included a weekend and the date was changed to 16 and 17 January 2019. When Employment Judge Starr's order was sent to the parties on 24 September 2018, a cover letter was also sent explaining that the dates had been changed to 16 and 17 January 2019. A Notice of Hearing was sent at the same time with those revised dates. The Claimant did not attend at the start of the hearing on 16 January 2019. The Tribunal clerk called him and he said that he thought the date was 18 and 19 January 2019. He said that he was able to get to the Tribunal within an hour and he was told to do so. When he arrived, he accepted that he had received the covering letter and Notice of Hearing setting out the revised date. He also accepted that the Respondent's legal representative had sent him a number of emails in recent weeks referring to the correct dates. Most recently, on 15 January 2019 she had emailed him referring to 2 employees he was seeking to call as witnesses. She said that neither of those employees had asked for, "16 and/or 17 January"

off work. The Claimant also accepted that he had asked those people to attend as witnesses on those dates. Indeed, he accepted that he himself had taken 16 and 17 January 2019 as special leave. He was unable to explain how he could have thought that the hearing was listed on 18 and 19 January 2019, beyond asserting that he was confused. In any event, the Claimant confirmed that he had prepared questions for the witnesses and was in a position to go ahead with the hearing. The Tribunal decided that it was consistent with the overriding objective to do so in those circumstances.

- 1.3 The first matter to be addressed was an application by the Respondent for the claim to be struck out because the Claimant had not complied with the clear order made by Employment Judge Starr to provide a written witness statement. In addition, it was suggested that his claims had no reasonable prospects of success. While the correspondence did give rise to concerns about the Claimant's failure to provide a witness statement, it appeared likely to the Tribunal that striking out the claims would have been disproportionate. That is because it would have been possible to postpone the hearing and make an order for costs against the Claimant if the Respondent was not in a position to go ahead with the hearing. However, Ms Widdett agreed that if the Claimant gave his evidence orally, she would be in a position to cross-examine him. We agreed that the most proportionate course of action was to go ahead with the hearing in those circumstances.
- 1.4 During the first day of the hearing, the Claimant indicated that he wished to call witnesses the following day. He had not produced written witness statements for them. He said that they would give evidence to prove that an allegation made about him by a manager, Mr O'Brien, was false (see further below). The claims before the Tribunal did not require it to decide whether the allegation made by Mr O'Brien was false. In those circumstances, the Tribunal refused to allow the Claimant to call either individual as a witness.
- 1.5 The Tribunal was provided with a joint file of documents and we considered those to which the parties drew our attention.
- 1.6 The Tribunal heard evidence from the Claimant on his own behalf. For the Respondent we heard evidence from Mr P Charity (Contracts Manager, Facilities Management Catering and Cleaning), Mrs B Harton (Human Resources Business Partner), Mrs J Lee (District Manager, Facilities Management) and Mr B Middleton (Assistant Director, Estates and Property).

## The issues

- 2.1 The issues to be determined by the Tribunal had been discussed and agreed with Employment Judge Starr. When he presented his claim, the Claimant had not been given notice of dismissal. However, by the time of the preliminary hearing he had. He was therefore allowed to amend his claim to include a complaint of unfair dismissal. By the time of the hearing before this Tribunal, the Respondent said that the position had changed again. During his notice period, which would have expired on 10 December 2018, the Claimant had been redeployed into an alternative role. The Respondent therefore said that he had not been dismissed at all. The Claimant disagreed. We therefore added to the list of issues the question whether the Claimant had been dismissed. The issues to be determined were therefore as follows:

### **Unfair dismissal**

- 2.1.1 Was the Claimant dismissed with effect from 10 December 2018?
- 2.1.2 If so, was the reason or principal reason that he had taken part in the activities of an independent trade union in November 2016?
- 2.1.3 If not, was the reason redundancy?
- 2.1.4 If so, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, having regard in particular to whether:
  - 2.1.4.1 it adequately warned and consulted the Claimant;
  - 2.1.4.2 it adopted a fair selection process; and
  - 2.1.4.3 it made reasonable attempts to identify suitable alternative employment for the Claimant?
- 2.1.5 If the Claimant was unfairly dismissed, what is the chance, if any, that he would have been fairly dismissed in any event? When?

### **Detriment on grounds related to trade union activities**

- 2.1.6 Was the Claimant subjected to a detriment by the Respondent:
  - 2.1.6.1 erasing his position from the organisation's structure in spring 2018; and/or
  - 2.1.6.2 pursuing a sham redundancy process against him in summer 2018?
- 2.1.7 If so, was that done for the sole or main purpose of penalising him for taking part in the activities of the GMB union, namely for representing workers in relation to grievances against a manager, MC, who then orchestrated a campaign against the Claimant culminating in the decision to dismiss him for redundancy taken by MC's partner Mrs Lee in June 2018.

### **The Facts**

- 3.1 We begin by setting out an outline of the underlying events. At the start of the events with which we have been concerned the Claimant was employed as a Section Supervisor at the Council's Central Production Unit ("CPU") at Laisterdyke, Bradford. The CPU produces school meals for delivery to schools. The Claimant has also been a GMB shop steward for a number of years.
- 3.2 In June 2016 the Fire and Rescue Service had to attend the CPU because a fire alarm went off. Following a preliminary investigation, the Claimant was suspended. That led to a disciplinary hearing in August 2016 at which the Claimant faced allegations that he had unlocked and accessed the CPU building out of working hours on a number of occasions without permission for personal use; used a council computer in the CPU for personal use out of working hours on a number of occasions; activated the fire alarm by burning toast leading to the Fire Service attending; and used a computer in the CPU for personal use for prolonged periods during working hours on a number of occasions. At a disciplinary hearing all four allegations were found proved after the Claimant accepted that he had acted as alleged. Taking into account the Claimant's 26 years of service, the nominated officer decided to issue him with a final written warning for a period of 12 months expiring on 24 August 2017.
- 3.3 The Claimant's line manager was MC. MC gave notice of resignation in a letter dated 1 November 2016. In recent years six complaints had been made about him.

None of them were complaints made by the Claimant, but in his capacity as GMB shop steward he had helped three of the complainants. The complaints about MC included complaints of verbal abuse and assault. Five of them were upheld or partially upheld. The sixth was not concluded because MC resigned. At no stage was MC suspended. In his resignation letter on 1 November 2016 MC accused the Claimant in general terms of making vexatious accusations about him and of behaving inappropriately since being disciplined for gross misconduct. MC said that this had harmed his physical and mental well-being. Mr Sheard, then the Operations Manager, met MC along with Mr O'Brien (MC's Line Manager) on 3 November 2016. Mr Sheard asked MC to reconsider his resignation (he did not) and said that the allegations he had made warranted a management investigation. The Claimant was suspended on 4 November 2016 as a result of MC's allegations.

- 3.4 Mr Charity investigated the allegations. However, he did not produce a report and recommendations at the end of the investigation. This was because Mr Barker (HR) was concerned that MC's allegations were out of date and should have been dealt with by previous line management. The Claimant's suspension was therefore lifted in March 2017. He had been suspended for four months. On 22 March 2017 Mr Sheard held a meeting with the Claimant and his trade union representative Mr Chard. Mr O'Brien and Ms Harton were also present. The Claimant was told that there would not be a disciplinary hearing but that there were concerns about his behaviour that needed to be addressed. Those concerns were discussed with him and set out in a follow-up "management expectation" letter.
- 3.5 The Claimant had submitted a grievance about his suspension, which was not upheld. He appealed against the outcome of that grievance after his suspension had in fact been lifted. Eventually, on 23 October 2017 Mr Middleton wrote to the Claimant with the appeal outcome. He did not uphold it.
- 3.6 Meanwhile, on 17 May 2017 an incident took place between the Claimant and Mr O'Brien. That led to a disciplinary investigation and as a result the Claimant was invited to attend a disciplinary hearing to face allegations of behaving inappropriately and aggressively towards Mr O'Brien. The disciplinary hearing took place many months later, on 17 and 19 January 2018. The Claimant's final written warning was still live. Mr Stubbs, Assistant Director, upheld the allegations. Because the final written warning was still live, Mr Stubbs decided that the Claimant should be dismissed with pay in lieu of notice. The Claimant appealed against his dismissal on 2 February 2018.
- 3.7 After the incident in May, but before the disciplinary hearing, the Claimant had been put at risk of redundancy. He was told that the Laisterdyke CPU was to be restructured because there had been a reduction in the number of schools it was supporting from 90 to 15, a reduced output of halal food and other factors. He was one of a number of staff put at risk.
- 3.8 The redundancy process continued after the Claimant's dismissal. On 20 February 2018 an assimilation process took place matching staff to posts in the new structure. That was carried out by Mr Charity, Ms Harton and Mr Nesbitt of the GMB. Employees were informed of the outcome in letters sent on 21 February 2018. No letter was sent to the Claimant because he was not an employee at that time. On 8 March 2018 Mr Nesbitt suggested to Ms Harton that it might be prudent

to slow the process down until after the Claimant's appeal. Ms Harton sought HR advice. She gave evidence, which the Tribunal accepted, that she spoke to Mr Barker and to Mr Charity and was told that they had to get the new structure in place "ASAP" because the service was losing so much money. The aim was to have it in place before the end of the financial year. The restructure was therefore implemented and the Claimant was not given a role because he was not an employee at the time.

- 3.9 The Claimant's appeal against his dismissal was heard by a panel of elected members on 27 March and 11 April 2018. The panel agreed that the events of 17 May 2017 legitimately gave rise to a management concern. They considered that at the very least there was a pattern of behaviour that might reasonably be described as insubordination, which could and should be challenged and checked. By a majority, the panel decided that because of procedural concerns, the level of seriousness and the Claimant's length of service, dismissal was not a proportionate sanction and that the Claimant should be returned to work with arrears of pay but with a disciplinary warning.
- 3.10 Ms Harton therefore started the process for reintegrating the Claimant into work. She wrote to him explaining that his substantive post no longer existed following the restructure. He was therefore at risk of redundancy. She had arranged a meeting for 3 May 2018 between the Claimant, Mr Chard, herself, Mr Barker, Mr Charity and Mrs Lee at which consideration would be given to any vacant roles in the department. Her letter listed the currently available roles and referred the Claimant to the council's jobs website.
- 3.11 The Claimant had a period of absence with stress and for that and other reasons no meeting took place until 25 May 2018. In the event only the Claimant, his union representative and Mrs Lee attended. Mrs Lee is the District Manager in the Facilities Management Service. She is MC's partner in her personal life. At the meeting the Claimant was offered a post as a caretaker but declined it on the basis it was not suitable. There was discussion of the Claimant's skills and experience and what roles might be suitable.
- 3.12 Ms Harton continued to communicate with the Claimant and his trade union representative. Eventually a redundancy consultation meeting took place on 26 June 2018, between the Claimant, Mr Chard and Mrs Lee. In a follow-up letter Mrs Lee explained arrangements for helping the Claimant to complete his skills matrix on 5 July 2018. She noted that he had not expressed an interest in any of the vacancies he had been told about. She confirmed that he therefore remained at risk of redundancy and that a redundancy dismissal hearing would be convened. She told him that she had emailed her redeployment team with his details and asked him to look online at the council website too. Emails in the Tribunal file showed that Mrs Lee personally emailed a number of people asking if they had a suitable role for the Claimant.
- 3.13 A redundancy consideration meeting took place on 6 August 2018. It was conducted by Mr Charity. The Claimant attended with Mr Chard, and Mrs Lee and Ms Harton also attended. In a letter dated 7 August 2018 Mr Charity wrote to the Claimant with the outcome. He said that he had decided that the Claimant should be dismissed by reason of redundancy. Mr Charity noted that the Claimant had

been sent details of 32 vacant posts but had not expressed an interest in any of them. He recorded Ms Harton's advice that pay protection would apply to the rate of pay but not the hours of work in any new role. Mr Charity noted that the Claimant had indicated that he might be interested in the post of unit manager at Marchbank school. That was a term time job, 30 hours per week on band 5. Mrs Lee was to arrange a work trial for the Claimant to see if it might be suitable. The Claimant would be paid his substantive hours and pay during that trial. Mr Charity referred to the Claimant's entitlement to 16 weeks' redeployment support and said that he was to be given two extra weeks. He concluded, "... unless there is any change in circumstances which opens up alternative employment opportunities your employment with the council in this post will end on 10 December 2018. We will, however, continue to seek suitable alternative employment for you until your termination date."

- 3.14 The Claimant submitted a lengthy appeal against his dismissal on 24 August 2018.
- 3.15 On 29 August 2018 he started a trial for the post of Unit Manager at Marchbank school. That trial was successful. He was therefore interviewed for the post in early December and was offered and accepted it on 3 December 2018. He carried on working in the role and being paid for it, although he was not given a written contract straightaway. The evidence before the Tribunal was that a written contract had been sent out the week before the Tribunal hearing, although the Claimant said that he had not received it.
- 3.16 Mr Middleton heard the Claimant's appeal against dismissal and wrote to him on 18 December 2018 rejecting that appeal giving detailed reasons. Mr Middleton also referred to the fact that the Claimant had now secured a permanent position and said that he was really encouraged by the positive feedback Mrs Lee had received about his performance in that role. Mr Middleton added that the Claimant would be given five hours of training per week during term time for the next 12 months, which as well as providing training would go some way towards mitigating his financial loss.
- 3.17 Having outlined the chronology, we make specific findings about the redundancy process. The Claimant's case is that his position was removed from the CPU structure and a sham redundancy process was pursued against him because of his role as a GMB shop steward, in particular assisting with complaints against Mrs Lee's partner, MC. He said that the reason he was dismissed, which he said was Mrs Lee's decision, was because of his union activities. The Respondent's evidence was that this was a genuine re-structure and redundancy process, carried out properly and in consultation with the GMB. The Claimant was not singled out or targeted; rather his role was properly deleted as part of a cost-saving exercise. For the reasons set out below, the Tribunal found as a matter of fact that this was a genuine re-structure and redundancy process and that the Claimant was not singled out or targeted:
- 3.17.1 The Claimant referred to the fact that six serious complaints had been made about MC, five of them upheld at least in part, despite which MC had never been suspended. By contrast, when very generalised allegations were made about him by MC, he was immediately suspended and remained so for four months. The Tribunal's attention was drawn to Mr

Middleton's letter of 23 October 2017 dismissing the Claimant's appeal against the outcome of his grievance relating to his suspension. In that letter Mr Middleton concluded that it had not been unreasonable for Mr Sheard to suspend the Claimant, although he did not explain why MC had not been suspended when concerns were raised about him. The Tribunal could understand the Claimant's feeling that there was an unexplained difference between his treatment and that of MC.

3.17.2 In his grievance appeal outcome letter Mr Middleton went on to deal with concerns about the Claimant's treatment in his role as a trade union representative. These were matters that Mr Charity had apparently investigated following MC's raising of concerns. The first such matter referred to by Mr Middleton was a concern that management did not know when the Claimant was taking time off work acting as a trade union representative and when he was undertaking his normal day job as a supervisor. Mr Middleton expressed the view that it was wholly inappropriate to consider taking disciplinary action against the Claimant on this issue, when the situation had been allowed to continue by his managers apparently without any attempt to implement a request/approval arrangement for such time off. The second matter that Mr Charity had investigated was that the Claimant had been associated with a number of formal grievances that managers thought had been resolved informally. The managers were concerned that the issues had been raised again formally and suggested that this was at the Claimant's behest. Mr Middleton suggested that Mr Charity had misunderstood the respective roles and responsibilities and the nature of grievance resolution. He acknowledged that employees did not have to accept an informal resolution of their concerns and that their trade union representatives had the legitimate right to advise and support them in raising a formal grievance. Management had incorrectly assumed that the Claimant had acted inappropriately by supporting and, in management's view, encouraging formal grievances. Mr Middleton recorded that this was clearly wrong. He said that there might have been cause for concern if all of the grievances had been unfounded but noted that all of them were upheld in some respect. He said that neither the employees nor the Claimant could be criticised in any respect for raising them formally. However, he was of the view that this was not a case of unfair treatment of a trade union representative but a simple lack of understanding. The matters referred to by Mr Middleton plainly indicated that the Claimant's managers had concerns about the way he was fulfilling his role as a trade union representative and that those concerns were in most respects misplaced.

3.17.3 The Claimant also referred to the fact in November 2017, shortly before he was put at risk of redundancy, acting in his role as a GMB shop steward he had raised serious concerns about Mr O'Brien wasting thousands of pounds of Council money investigating and developing a new "burger-mix" (including foreign travel) and concerns about management at Laisterdyke changing dates on burger mix and placing it into different containers. Mrs Lee accepted that she had been asked to investigate this by her line manager. She went round with the Claimant and found that a quantity of burger mix had been decanted into storage tins. Further, the date on the lid did not match the date on the packaging. She said that she fed back to

her line manager. The Tribunal was not told what, if anything, happened as a result.

- 3.17.4 The fact that the Claimant was promptly suspended in contrast to MC, that his local managers were obviously unhappy with the way he was carrying out his trade union activities, and the fact that he had, in his trade union capacity, very recently raised another serious concern about Mr O'Brien all clearly raised the possibility that the Claimant was being targeted for dismissal in the redundancy process because of his trade union activities. Further, on a complaint of trade union detriment, it is for the Respondent to show the reason it acted as it did. The Tribunal therefore carefully considered the evidence about the redundancy process. Having done so, we had no hesitation in concluding that this was a genuine restructure and redundancy process that affected a number of employees and was in no way targeted at the Claimant. We were satisfied that the matters set out above did not play a part in that decision making process.
- 3.17.5 Mr Charity was responsible for planning and carrying out the proposed restructure. Mr Charity gave detailed evidence about the reasons for the restructure and the process followed. His evidence was supported by detailed contemporaneous documents. He referred the Tribunal to a business case for the proposed restructure produced by him in January 2018. That explained the significant decline in demand for halal food and school meals from the CPU over recent years. It explained that in 2013/14 income from schools to the CPU balanced expenditure levels. Since then volumes and income had declined by almost 30% while staffing costs had only declined by 16%. This had led to an operating cost shortfall of £130,000 in the last financial year. It was therefore proposed in the short term to remove 10 out of 32 posts, which would equate to an approximate saving of £130,000 per annum. Mr Charity confirmed in evidence that this was the position. Mr Charity had alerted the OJC level 3 meeting on 28 November 2017 to the fact that there were likely to be reductions in the CPU. At that time the Respondent was about to issue notices of potential redundancies to a large number of staff as required by the Trade Union and Labour Relations (Consolidation) Act because the need for budget cuts meant that they might be at risk of redundancy. The specific potential redundancies in the CPU were therefore to be included in those letters. All staff at the CPU, including the Claimant, were therefore sent a notice putting them at risk of redundancy on 29 November 2017.
- 3.17.6 There was brief discussion of the potential redundancies at the OJC meeting on 10 January 2018. Mr Charity then put together the Project Plan and Business Case, referred to above. The business case set out the current and proposed organisational charts. The existing structure entailed a CPU General Manager, below that an Assistant Production Manager, and below that three Section Supervisors. One of the Section Supervisor roles was vacant; one was responsible for 14 posts at bands 1A, 2A and general kitchen assistant; and the third was responsible for a porter and six band 2A roles. The third role was the Claimant's. Under the proposed new structure there would be no Section Supervisors. There would be a Food Production Supervisor, responsible for 10 posts at band 2A or general kitchen assistant. One porter and three band 2A roles would then report directly to the Assistant Production Manager. This information was presented at the OJC Level 3 meeting on 24 January 2018.



- 3.17.7 A staff briefing took place on 26 January 2018 and there was further discussion at an OJC meeting on 30 January 2018.
- 3.17.8 There then followed a process of individual consultation with the affected staff and the trade unions. The Claimant was not included in that process because he had been dismissed by this point. Following the consultation no changes were made to the proposed structure relating to Section Supervisor posts. The three Section Supervisor posts were therefore to be deleted and the remaining supervisor was to be a Food Production Supervisor.
- 3.17.9 As mentioned above Mr Charity, Ms Harton and Mr Nesbitt formed an assimilation panel. They applied the Respondent's assimilation procedure to determine whether roles were sufficiently similar that staff should be appointed straight into them or whether they fell into some other category. They concluded that no individual or group had assimilation rights to the new Food Production Supervisor post and that it should be ring-fenced for all CPU staff by open competition. Employees were informed of the outcome of the assimilation process in letters sent out on 21 February 2018. The Claimant was not included, following his dismissal.
- 3.17.10 Nobody appealed against assimilation decisions. A number of staff took voluntary redundancy and interviews for the remaining posts took place in early March 2018.
- 3.17.11 The person appointed to the Assistant Production Manager position had previously been working as a porter. He was a former convenor for Unite the Union. Ms Harton's oral evidence was that he had experience at a more senior grade from a different role. The Claimant believed that if he had not been dismissed he would have been successfully appointed to that role. That is not a question for the Tribunal to decide.
- 3.17.12 The contemporaneous documents, including evidence of consultation with the GMB throughout, are entirely consistent with Mr Charity's evidence and the Tribunal accepted it. The Tribunal accepts that the CPU was losing very substantial sums of money for the reasons outlined and that there was an urgent need to restructure it. That is what took place. All staff in the CPU, including the Claimant, were initially put at risk. However, the Claimant's dismissal for unrelated reasons took him out of the process. By the time he had been reinstated following appeal the process had concluded.
- 3.17.13 There was no evidence to suggest any manipulation of the disciplinary process. The Claimant drew attention to the fact that Mr Nesbitt's suggestion of delaying the restructure until the Claimant's appeal had been concluded was not followed. However, the Tribunal accepted Ms Harton's evidence about the reason for that. She took advice and was told that the process needed to be concluded before the end of the financial year. That was consistent with the timeline set out in Mr Charity's project plan drawn up in January 2018.
- 3.17.14 The Tribunal therefore accepted that the Claimant was not targeted or singled out. We were reinforced in that conclusion by the evidence of what took place after the Claimant was reinstated. Although the Claimant made criticisms of the process, the documentary evidence indicated that real effort was made to identify an alternative role for the Claimant. Indeed, that led to his successful placement into the role at Marchbank school. Mrs Lee played a key role in that process. That is wholly inconsistent with the

suggestion that she or the Respondent more generally were targeting the Claimant with this redundancy process.

3.17.15 By the time it came to August 2018 the restructure of the CPU had concluded more than four months ago. The Claimant's role had been removed and he had not been appointed into any of the remaining roles because he was not an employee at the time. That was the factual position facing Mr Charity. The Claimant had been provided with details of numerous alternative roles and had not expressed an interest in any of them prior to the redundancy consideration meeting. There was no evidence to suggest that Mr Charity's decision to give the Claimant notice of dismissal for redundancy at that meeting had any conceivable connection with the Claimant's trade union activities in November 2016 or at all. The fact that Mr Charity had investigated concerns raised by MC and other managers about the Claimant's trade union role the previous year, having been asked to do so by his manager, did not lead the Tribunal to a different view. The Claimant's dismissal (subsequently overturned) was not related to that investigation, but to separate allegations of misconduct relating to an incident with Mr O'Brien. The Tribunal accepted Mr Charity's evidence that the reasons for his decision were as set out in his letter, i.e. because the Claimant was redundant.

## Legal Principles

4.1 So far as unfair dismissal is concerned, the Employment Rights Act 1996 provides, in s 98, so far as material as follows.

### **98 General**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

...  
(c) is that the employee was redundant, or

...  
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

...

4.2 Under s 152 Trade Union and Labour Relations (Consolidation) Act 1992 a dismissal is to be regarded as unfair if the reason or principal reason was that the employee had (among other things) taken part in the activities of an independent trade union.

4.3 Redundancy is defined by s 139 of the Employment Rights Act 1996. Under s 139(1)(b), an employee is dismissed by reason of redundancy if his or her

dismissal is wholly or mainly attributable to the fact that the requirements of his employer's business for employees to carry out work of a particular kind have ceased or diminished.

- 4.4 The reason or principal reason for dismissal is a question of fact to be determined by a Tribunal as a matter of direct evidence or by inference from primary facts established by evidence. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge. Under the Employment Rights Act 1996, it is for the employer to show the reason or principal reason for the dismissal. If the employee disputes the reason put forward, there is no burden on him or her of disproving them, nor of positively proving a different reason. However, if an employee positively asserts that there was some different and inadmissible reason, he or she must produce some evidence supporting the positive case: see *Kuzel v Roche Products Ltd* [2008] ICR 799 CA.
- 4.5 If the employee was dismissed for a potentially fair reason, the Tribunal will consider whether the employer acted reasonably in dismissing for that reason. In considering the reasonableness of the employer's decision to dismiss for redundancy, the Tribunal will have regard to whether the employer warned and consulted the employees or their representatives, adopted a fair selection decision and took reasonable steps to find suitable alternative employment: see *Williams v Compair Maxam Ltd* [1982] ICR 156.
- 4.6 The right of a worker not to be subjected to detriment by his or her employer done for the sole or main purpose of (among other things) penalising him or her for taking part in the activities of an independent trade union is provided by s 146 Trade Union and Labour Relations (Consolidation) Act 1992. The worker may complain to the Tribunal of being subjected to such a detriment, provided that the detriment in question is not dismissal. Under s 148 it is for the employer to show what was the sole or main purpose for which it acted.

### **Application of the law to the facts**

- 5.1 Against the detailed findings of fact set out above, we can deal much more briefly with the issues in this case.
- 5.2 We start with the unfair dismissal claim. The first question is whether the Claimant was dismissed with effect from 10 December 2018. We have found that he was not. He was given notice of dismissal on 7 August 2018, to take effect on 10 December 2018 unless circumstances changed and he had secured an alternative role by that date. The role at Marchbank school was advertised internally. The Claimant knew in August that it had different hours and pay. He had a lengthy trial period in the role. That was successful so he applied for the role and was interviewed for it. He was offered the role verbally on 3 December 2018 and accepted it on that date. He has carried on doing the role and being paid for it. In those circumstances, the Tribunal found that the Claimant was not dismissed. Before the expiry of his notice period on 10 December 2018, he was offered and accepted an alternative role. The dismissal never took effect.
- 5.3 The fact that the Claimant was not immediately given a written contract for the new role does not alter the position. He still had a contract; it was simply a verbal one.
- 5.4 That means that the Claimant's unfair dismissal claim cannot succeed. If he was not dismissed he cannot have been unfairly dismissed.

- 5.5 As set out in the findings of fact above, even if the Claimant had been dismissed the Tribunal was satisfied that the Claimant's trade union activities had no connection with Mr Charity's decision to give him notice in August 2018. The reason for giving him that notice was redundancy. His previous post no longer existed and at that stage no suitable alternative employment had been identified.
- 5.6 The Tribunal did not address the remaining issues relating to unfair dismissal in the light of our finding that the Claimant was not dismissed.
- 5.7 Turning to the claim of being subjected to a detriment related to trade union activities, the Claimant's role was plainly removed from the CPU structure in spring 2018. However, he was not an employee at that time, having been dismissed and not yet reinstated. It is difficult to see how the removal of his role from the structure in those circumstances can have been detrimental treatment of him. In any event, as the findings of fact above make clear, the Tribunal accepted the evidence put forward by the Respondent that this was not done to penalise the Claimant for taking part in the activities of the GMB union. It was done as part of a wholesale restructure of the CPU affecting all 32 posts for sound financial reasons. The Respondent has shown why it deleted the Claimant's role from the CPU structure and the reason was unrelated to his trade union activities.
- 5.8 Equally, as the findings of fact above indicate, the Tribunal did not find as a matter of fact that this was a sham redundancy process. Following his reinstatement by the panel of members in April 2018 the Claimant was taken through a consultation and redundancy process because his post no longer existed. He was given notice in August 2018. Those things might be characterised as detrimental treatment. However, again the Respondent has shown why it took the Claimant through a redundancy process after April 2018 and that the reason was unrelated to his trade union activities. The Tribunal has made clear findings that this was not done to penalise the Claimant for taking part in the activities of the GMB union. There was no evidence to suggest that the decision to dismiss the Claimant was taken by Mrs Lee. Indeed, despite her personal connection with MC, the documentary evidence supports the view that she was trying to help the Claimant to secure an alternative role. The decision was taken by Mr Charity and it was wholly unconnected with the Claimant's trade union activities.

**Employment Judge Davies**

**6 February 2019**

**Public access to Employment Tribunal judgments**

Judgments and written reasons for judgments, where they are provided, are published in full online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the parties in the case.