Case Number: 2500234/2021

2500524/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Emmerson**

Respondent: **Northern Gas Networks Limited**

Heard at Newcastle CFCTC **On: 28 to 31 March 2022 and 1 April 2022**

Before: **Employment Judge Loy**
Members: **Mrs S Don**
Mrs P Wright

Representation

Claimant: **Mr Crammond, Counsel**
Respondent: **Miss Brewis, Counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:

1. The complaints of detriments contrary to section 146(1)(a), (b) and/or (ba) of the Trade Union and Labour Relations (Consolidation) Act 1992 set out at paragraph 198 below are well-founded and succeed.

2. All other complaints of detriment contrary to section 146(1) (a), (b) and/or (ba) of the Trade Union and Labour Relations (Consolidation) Act 1992 are not well-founded and are dismissed.

3. All complaints of detriment contrary to section 44(1)(b) and (e) of the Employment Rights Act 1996 are not well-founded and are dismissed.

4. The respondent shall pay to the claimant the sum of £15,000.

5. The respondent shall pay to the claimant 8% interest in the sum of £2,160.

6. The total amount that the respondent must pay to the claimant is £17,160

REASONS

The claimant's claims

1. By claim forms presented on 11 February 2021 and 27 April 2021 the claimant brings the following claims:

    i. Detriments contrary to section 146(1)(a)(b) and/or (1)(ba) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRA 1992"); and

    ii. Detriments contrary to sections 44(1)(b) and (1)(e) of the Employment Rights Act 1996 ("ERA 1996").

The hearing

2. At a preliminary hearing before Employment Judge Green on 6 May 2021 claim forms 2500234/2021 and 2500524/2021 were consolidated with the consent of the parties.

3. This hearing was conducted in person at the Newcastle Civil Family Courts and Tribunal Centre on the dates referred to above. Both of the claims were heard as consolidated.

4. The claimant gave evidence first. He gave evidence on his own behalf and called no further witnesses.

5. The respondent called the following witnesses:

    (a) Mr James O'Brien – TOTEX Site Manager.

    (b) Mr Nigel Chambers – Operations Manager (North Tyne), now retired.

    (c) Mr Alan Robley – TOTEX Site Manager.

6. The parties produced a bundle of documents consisting of pages 1 to 618. No additional documents were produced by either party.

7. The first day of the hearing was taken up as reading. The evidence finished on day three of the hearing and the Tribunal heard submissions on day four. Both parties provided written submissions supplemented orally at the hearing. We deliberated on 1 April 2022.

The issues

8. A list of issues was agreed between the parties prior to the commencement of the hearing. The agreed list of issues is at pages 74 to 78 of the bundle. It is in the following terms:

List of Issues

Introduction

1. The claimant has brought claims of detriment related to the claimant's trade union membership or activities contrary to section 146(1)(a)(b) and/or (ba) TULRA 1992 and/or health and safety under section 44(1)(b) and (1) (e) of the ERA 1996 as applicable.

2. The Employment Tribunal is asked to determine the following issues:

Preliminary issues – jurisdiction time limits

2.1. What were the date(s) of the detriments complained of?

2.2. Has there been a continuing act of detriment?

2.3. Are any of the claimant's complaints out of time?

2.4. If so, was it reasonably practicable for the claimant's complaints to be submitted within the statutory time limit?

2.5. If not, were they presented within such further period as the Tribunal considers reasonable?

Substantial issues

Detriment on grounds related to union memberships or activities

Issue 1. Was the claimant subjected by the respondent to any detriment by any act or deliberate failure to act in respect of the following:

Issue 1.1. On 8 June 2020, James O'Brien (and Mr Chambers) told the claimant verbally that he could no longer swap or give away standby shifts without management approval?

Issue 1.2. The claimant sought management approval through the My Time App to admin to swap or give away weekend standby shifts allocated to the claimant between 8 June 2020 and March 2021 and every request was refused by Mr O'Brien and/or Alan Robley?

Issue 1.3. On 4 September 2020, Mr O'Brien moved the claimant from his wagon/HGV driving role to a support van driving role?

Issue 1.4. The respondent failed to implement the recommendations outlined in the grievance outcome letter dated 14 October 2020, as set out below?

Issue 1.4.1. That management is given full visibility of all standby change requests;

Issue 1.4.2. That a full team/depot briefing is held on management expectations of either carrying out contractual standbys or swapping like for like;

Issue 1.4.3. That a rota is created for the claimant and the other contractual wagon driver in relation to driving the Grab Wagon;

Issue 1.4.4. That there should only be one reporting manager for colleagues who do not have one direct line manager (including the claimant) to provide a clear line between manager and operative;

Issue 1.4.5. To ensure that everyone within the room during a meeting understands what has been discussed, so that comments are not misconstrued in the future.

Issue.1.5. After returning to his substantive wagon/HGV role in February 2021, on 4 March 2021 Mr O'Brien refused the claimant's request for a Banksman to accompany him on two jobs that same day which required the claimant to use the hydraulic grab arm on the wagon's rear and instructed the claimant to work alone?

Issue 1.6. After the claimant raised concerns with Nigel Chambers verbally on 4 March 2021 that Mr O'Brien's instruction to work alone was unsafe and sought further clarification from Christopher Broad in the respondent's health and safety department verbally and by email on 4 March 2021, Mr O'Brien:

Issue 1.6.1. Became angry towards the claimant;

Issue 1.6.2. Immediately removed the claimant from his wagon/HGV role and returned him to support driving duties;

Issue 1.6.3. Told him he must see occupational health, insisting that he was stressed; and

Issue 1.6.4. Accused the claimant of *"only doing all this to strengthen your case."?*

Issue 1.7. The respondent continued to make swapping standby shifts difficult for the claimant by imposing new caveats, namely:

Issue 1.7.1. By Alan Robley telling the claimant on or around 11 January 2021, 14-19 February 2021 and 14 March 2021 by email and/or by WhatsApp message that

(a) He must swap a "*like for like shift*" namely that any weekend standby shift must be swapped with another weekend standby shift; and

(b) Any accompanying main shift must also be the same (so that the claimant could only swap with two out of five colleagues who shared his same shift pattern);

Issue 1.7.2. By Alan Robley telling the claimant by email on or around 19 February 2021 and/or 14 March 2021 that if the claimant did not comply with paragraphs 1.7.1(a) and (b) above, he had to take five days or more holiday which included the day of the standby shift being swapped.

Issue 2. If so:

Issue 2.1. Did such an act or any deliberate failure to act (in respect of paragraphs 1.1 – 1.7), take place for the sole or main purpose of:

Issue 2.1.1. Preventing or deterring the claimant from being a member of an independent trade union (the GMB) or penalising him for doing so – section 146(1)(a) TULRA 1992.

Issue 2.1.2. Preventing or deterring the claimant from taking part in the activities of an independent trade union (the GMB) at an appropriate time, or penalising him for doing so – section 146(1)(b) TULRA 1992, namely the following activities:

(a) It is the claimant's case that in March/April 2020, the respondent's site managers proposed a shift change which the claimant says would have resulted in a loss of pay for staff. In his capacity as shop steward for the GMB, the claimant took part in successfully challenging

this. The respondent does not agree with the claimant's account. The respondent contends that in April 2020, its site managers proposed a temporary shift change. The claimant notified the GMB of the proposal which raised an issue with the respondent about the lack of consultation, which was subsequently resolved; and/or

(b) Advising/assisting members in his capacity as shop steward (he was told by Mr O'Brien that his "union matters" were "*getting in the way*" on 4 September 2020.

Issue 2.2. Did such an act or any deliberate failure to act (in respect of issues 1.5 – 1.7), take place for the sole or main purpose of:

Issue 2.2.1. Preventing or deterring the claimant from making use of trade union services at an appropriate time, or penalising him for doing so – section 146(1)(ba) TULRA 1992 namely in relation to the following trade union services:

(a) The GMB's support and assistance in raising concerns and challenging the respondent's actions in relation to the matters set out at issues 2.2a and 2.2b internally by way of a formal grievance; and/or

(b) The GMB's support and assistance in his bringing and pursuing an Employment Tribunal claim against the respondent.

Detriment on grounds related to health and safety representative position or activities

Issue 1. Was the claimant subjected by the respondent to any detriment by any act or any deliberate failure to act in respect of the following:

Issue 1.1. After the claimant raised concerns with Nigel Chambers verbally on 4 March 2021 that Mr O'Brien's instruction to work alone was unsafe and sought further clarification from Christopher Broad in the respondent's health and safety department of verbally and by email on 4 March 2021, Mr O'Brien:

Issue 1.1.1. Became angry towards the claimant;

Issue 1.1.2. Immediately removed the claimant from his wagon/HGV role and returned him to support driving duties;

Issue 1.1.3. Told him he must see occupational health insisting that he was stressed; and

Issue 1.1.4. Accused the claimant of "*only doing all this to strengthen your case"*.

Issue 1.2. The respondent continued to make swapping standby shifts difficult for the claimant by imposing new caveats, namely:

Issue 1.2.1. By Alan Robley telling the claimant on or around 14 March 2021 by email and/or WhatsApp message that:

(a) He must swap a *"like for like shift*" (namely that any weekend standby shift must be swapped with another weekend standby shift; and

(b) That any accompanying main shift must also be the same (so that the claimant could only swap with two out of five colleagues who shared his same shift pattern); and

Issue 1.2.2. By Alan Robley telling the claimant by email on or around 14 March 2021 that if the claimant did not comply with issues 2.1(a)(b) above, he had to take five days or more holiday which included the day of the standby shift being swapped.

Issue 2. If so, was any such act or any deliberate failure to act done on the ground that:

Issue 2.1. Being a health and safety representative or a member of such a committee, the claimant performed (or proposed to perform) functions as such a representative in so far as he raised concerns with Nigel Chambers verbally on 4 March 2021 that Mr O'Brien's instruction to work alone was unsafe and sought further clarification from Christopher Broad in the respondent's health and safety department verbally and by email on 4 March 2021 – section 44(b) ERA 1996; and/or

Issue 2.2. In circumstances of danger which the claimant reasonably believed to be series and imminent, he took, (or proposed to take) appropriate steps to protect himself or other persons from the danger, namely:

Issue 2.2.1. On 4 March 2021, he refused to carry out work without a Banksman;

Issue 2.2.2. On the same day, he raised concerns with Nigel Chambers verbally that Mr O'Brien's instructions to work alone was unsafe, challenged the instruction and the respondent's position; and

Issue 2.2.3. Sought further clarification directly from Christopher Broad in the respondent's health and safety department on 4 March 2021.

Remedy

1. If successful, what injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

2. Is it just and equitable to award the claimant any other compensation?

3. Did the ACAS code of practice on disciplinary and grievance procedures apply?

3.1. If so, did the respondent or the claimant unreasonably fail to comply with it?

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

Findings of fact

9. It is not our function to set out every piece of evidence or to make findings on every issue or dispute between the parties. Our factual findings are therefore limited to those which we considered to be necessary for the purposes of determining the issues and complaints.

The parties

10. The respondent is a Licensed Public Gas Transporter with a gas distribution network connected to millions of homes and business in the North East, North Cumbria and much of Yorkshire. The respondent undertakes significant replacement works to gas mains in the region as well as carrying out emergency repairs and providing a rapid response service for customers who suspect they may have a gas leak.

11. The claimant remains employed by the respondent. He has been employed by the respondent continuously (through a number of TUPE transfers) since around 30 March 1998. The claimant's precise date of commencement of employment with the respondent has no bearing on the issues or remedies to be determined in these proceedings. For the previous 15 or so years before the issues to which this claim relates took place, the claimant was employed as an HGV driver.

12. The claimant is employed in the respondent's operational support department and is based at the respondent's North Tyne Depot at Burradon. The claimant is licensed to drive a Grab Wagon which is a vehicle using a hydraulic grab arm and bucket to collect and clear away large quantities of waste. The Grab Wagon is also used to deliver larger equipment such as pipes, road plates and back fill material.

13. Neither the claimant nor the respondent has been able to locate a copy of the claimant's contract of employment, which the parties attribute to the numerous TUPE transfers that have taken place during the significant period of the claimant's employment to date. It was, however agreed, that the claimant was employed as an HGV driver working Monday to Friday 37.5 hours per week and that the claimant was employed on "legacy terms" under which his working days were Monday to Friday. Employees of the respondent who were employed more recently are on new terms and conditions of employment under which their working days can be scheduled on any day Monday to Sunday.

14. The respondent's North Tyne region currently leases the Grab wagon. The number of wagons used by the respondent's direct employees has reduced due to the progressive reduction in the number of gas escapes. The respondent balances its commercial requirements for HGV/Grab Wagon between its own hired wagon and engaging external contractors where the company's wagon is already utilised or otherwise unavailable.

15. Any hours that the claimant works in excess of seven hours and 45 minutes per day are paid at a rate of time and a half and double time on a Sunday. The claimant is also contracted to work standby shifts on a one in five frequency. His standby shifts fall on weekdays (4pm to 8am), and on weekends 8am to 8pm. The claimant is not required to attend the depot on standby shifts but to be available if required. The claimant carries out

support driver duties if called out while on standby. This involves driving a transit van to deliver and collect equipment from sites across the region.

16. The majority of the respondent's employees are engaged on the new terms and conditions of employment. Employees on the new terms work 41.5 hours per week, seven days a week on a shift pattern that can be rostered at any time between 7am and 10pm. Overtime for those employed on new terms is paid at a rate of time and a quarter for any hours worked in excess of 41.5 hours per week. Colleagues employed on new terms are also contracted to work standby shifts on different frequencies depending on their contract.

17. The only other employee of the respondent in the Region who is licensed to drive a Grab Wagon is Mr Tinson. It was common ground that Mr Tinson's substantive role was that of a Support Driver in which capacity Mr Tinson's role required him to drive a transit van to collect equipment needed for sites such as barriers and cones. There are three such transit vans used by the Support Drivers whereas (as noted above) there is only one Grab Wagon. It follows that although Mr Tinson was licensed to drive the Grab Wagon, at the time prior to the issues that arose in these proceedings, Mr Tinson was employed solely as a Support Driver. Prior to the events leading to these proceedings, the claimant was the only employee in the Region operating the Grab Wagon.

18. In 2014, the claimant was elected to the positions of:

    A GMB workplace trade union representative; and

    A health and safety representative.

19. It was also common ground that before the events that gave rise to these proceedings, the relationship between the claimant and Regional/site management had been a constructive one with little in the way of tensions arising out of the claimant's employment, his role as a trade union representative or his role as a health and safety representative.

20. The matters that give rise to these proceedings started in March 2020 in the context of the Coronavirus pandemic.

The ballot issue

21. The respondent's workforce was given keyworker status during the lockdown in March 2020. At that point, the engineering team at the respondent was sent home and put on call for emergency work only. Any call out for the emergency work would be classified as overtime pay.

22. Head Office management at the respondent tasked site management with making cost savings due to the financial impact of the pandemic and lockdown. Mr O'Brien, (TOTEX Site Manager) explained that the principal way in which the site management could achieve cost savings was through exercising the respondent's contractual right to change shift patterns on seven days' notice. This would have the effect, particularly in relation to the employees on new terms and conditions, of reducing the number of hours worked as overtime. This was the case since immediately before the pandemic employees on new terms and conditions on the late shift finished at 8pm. Anyone who was asked to work after 8pm would receive overtime.

23. Mr O'Brien told us that Mr Richie Manuel, Business Operations Lead – North Tyne, looked at ways of delivering cost savings without changing the shift pattern to a 10pm finish. Changing the shift pattern to a 10pm finish would have the effect of reducing overtime payments and Mr Manuel was mindful of the need to maintain the morale of the workforce while saving costs.

24. Mr Manuel was the most senior manager initially involved in the measures to achieve cost savings. In terms of the management hierarchy, the claimant reported to Mr O'Brien as his principal line manager up until mid-2021 when Mr Robley (TOTEX Site Manager) took over the role of the claimant's principal line manager. As TOTEX Site Managers, Mr O'Brien/Mr Robley reported to Mr Nigel Chambers (Operations Manager - North Tyne) who in turn reported to Mr Manuel. The respondent's most senior levels of management (including the Director of Human Resources, Lindsey Filer) were located at the respondent's head office near Leeds.

25. On 7 April 2020, the respondent held a telephone conference call with colleagues (including the claimant) to discuss working arrangements during lockdown and to obtain feedback on Mr Manuel's idea that as a temporary arrangement work that would otherwise have been paid overtime between 8pm and 10pm would instead generate time off in lieu. Any overtime after 10pm would then be paid at the normal overtime rate.

26. It was the respondent's position that the generality of the workforce attending the telephone conference call were positive about Mr Manuel's proposal. The respondent considered the proposal to be relatively attractive to the workforce given that the respondent retained the contractual right to change the shift pattern on seven days' notice with the effect of treating the hours between 8 and 10pm as plain time which would give rise to neither overtime pay nor time off in lieu.

27. The claimant did not work a shift pattern so Mr Manuel's proposal did not affect him personally. The claimant's interest in the proposal was in his capacity as a GMB trade union representative. Given the claimant's status as a workplace trade union representative employed by the respondent, Mr O'Brien spoke to the claimant to get his advice and thoughts about the proposal separately. Mr O'Brien was also aware that the claimant was a workplace health and safety representative. We were told that in the other regions of Respondent, the desired cost savings had been implemented simply by changing the shift pattern. It was Mr Manuel who brought up the proposal to convert time between 8pm and 10pm from overtime to time off in lieu which he saw as less impactful on the operatives.

28. On 8 April 2020, Mr O'Brien spoke to the claimant in his capacity as a GMB workplace representative. Mr O'Brien wanted the claimant to run a formal vote to establish whether or not the majority of colleagues were in favour of Mr Manuel's proposal. At pages 269-270 of the bundle there is a copy of an email from Mr O'Brien to the workforce seeking clarification before making a final decision. Mr O'Brien says in that email that site management proposed to "go to a majority vote" which was to be organised by Paul Emmerson (the claimant). Mr O'Brien's email explains that the proposal is that rather than change the shift pattern and put all teams on a 10pm finish, time worked between 8 and 10pm would be

converted to time off in lieu rather than attract overtime pay. That proposal was to come to an end once the lockdown was over. The claimant is copied into this email.

29. A dispute arose between Mr O'Brien and the claimant about the mechanism by which site management proposed to introduce Mr Manuel's proposal. In particular, the claimant's position was that change could not be effected by way of a majority vote and that there would need to be voluntary agreement by each individual.

30. From the claimant's perspective, the respondent's approach would involve breaking the workforce's terms and conditions of employment and as such the claimant as a trade union representative wanted nothing to do with any ballot (claimant's witness statement paragraph 8). The claimant also says that he asked Mr O'Brien whether there was any "higher management" involvement in the proposal. Since the claimant was aware that Mr Manuel was closely involved with the proposal, the claimant's reference to higher management must be a reference to yet more senior management based at the respondent's head office. The claimant then made it clear to Mr O'Brien that he would need to get someone else to run the ballot and left it at that.

31. From the perspective of site management, including Mr O'Brien, the mechanism to introduce Mr Manuel's proposal did not involve a breach of the workforce's contracts of employment. The site management regarded the proposal as not being a change to the terms and conditions of the workforce. That view was based on the fact that the proposals were to be introduced only if a majority of the workforce voted in favour of the proposal in which case the respondent's site management did not consider there to be a change to terms and conditions at all.

32. We prefer the claimant's analysis. Although we have not seen a copy of the claimant's contract of employment, it appeared to be common ground that changes to terms and conditions of employment, including the development of policies, was undertaken by collective agreement in the industrial negotiating forum (INF). We considered there to be at least three errors in the site management's analysis: first, a change by way of agreement is nevertheless a change to terms and conditions of employment; secondly, individual contracts of employment can only usually be changed with the consent of each individual concerned and there is no provision whereby a majority vote of a group of employees on similar terms and conditions effects change in respect of the minority who vote against or who don't vote at all; and, thirdly, the mechanism by which contracts of employment in this workplace were changed appears to have been by way of negotiation with the trade union the effect of which would be to change all of the contracts of employment upon collective agreement between the management and the union in the negotiating forum.

33. In the circumstances, we found it easy to understand why the claimant distanced himself from the voting process. The respondent maintained that the only error in its proposals was to call the "vote" a "ballot". For the reasons set out above, we do not agree with that assessment.

34. On 9 April 2020, Mr O'Brien sent a further email to the workforce indicating that Mr Ray Bramley rather than the claimant would be "taking the ballot"

and would be setting up a group for the purposes of doing so. It was in that email that Mr O'Brien used the terms "ballot" which he candidly accepted in his evidence was a mistake. Mr O'Brien had never intended there to be a ballot in the sense of a trade union ballot. He intended that there was to be a vote, in Mr O'Brien's words, *"to survey colleagues' appetite for the proposal"*. However, it was rather more than that. The respondent's site management's intention was that in the event of a positive vote by the majority in relation to Mr Manuel's proposals it would as a result be introduced for everyone. That would be to effect contractual change notwithstanding the objection (or lack of consent) of some of the members of the workforce. We do not agree that this is accurately described as simply surveying the appetite of colleagues.

35. In any event, the vote/ballot went ahead 9 April 2020. The time of Mr O'Brien's first email of 9 April 2020 was 07:45. By 10:30 on 9 April 2020, Mr O'Brien again emailed the workforce to say that 31 votes out of a total constituency of 47 colleagues had been received, 29 of which were in agreement with Mr Manuel's proposals and two of which were against them. Since that represented a bare majority of all of those eligible to vote, Mr O'Brien goes on to say in his email that *"we will go with the majority",* bundle pages 271-272. The terms of that email fortify our view that the vote/ballot was in effect treated by the respondent as consent to a change to the terms and conditions of employment of all 47 employees.

36. On the morning of 10 April 2020, the claimant took a number of calls from GMB members who, the claimant said, were *"unhappy about the ballot"* and what was happening. The claimant's evidence (witness statement paragraph 10) was that the GMB members were asking whether the union were going to *"do something about it".* The claimant escalated matters to his GMB senior shop steward, Mr Kevin McKewan, who in turn escalated the matter to the level of full time GMB regional officials.

37. At 12:17 on 9 April 2020, a letter was emailed from three GMB regional officials to the respondent's HR director, Lindsey Filer (bundle pages 191 to 192). It is plain from the terms of this GMB letter that the respondent's recognised trade union was taking this vote/ballot issue extremely seriously. The email is headed *"Industrial Dispute".* The letter is under the hands of three regional GMB Organisers: Andrew Aldwinkle (GMB Organiser, Yorkshire and North Derbyshire); Gail Johnson (GMB Organiser, Northern Region) and Shaune Clarkson (GMB Organiser, Midlands and East Coast). The union take issue with the respondent's management having held *"a ballot of our members to change their Terms and Conditions surrounding overtime payments"*, which the letter terms *"unacceptable".* The letter goes on to assert the GMB's sole right to ballot members after full consultation by the respondent with the union in relation to any proposed changes to terms and conditions. The letter also points out the lack of any consultation with either GMB full time officials or shop stewards. The email informs Ms Filer that the GMB will, if the company proceeds with Mr Manuel's proposed changes, be *"left with no alternative but to enter into a trade's dispute and we will be left with no choice but to re-ballot our members for industrial action."* The union end their letter by asking the respondent to deal with the situation as a matter of urgency.

38. The matter was indeed dealt with by the respondent urgently. By an email timed at 15:35 on 9 April 2020, Ms Filer responded to the union in measured and conciliatory terms. In her email, Ms Filer confirms that discussions have been had with management and no proposed changes to terms and conditions will now be actioned. Ms Filer goes on to acknowledge the need to consult trade unions and/or colleague consultation groups in advance of any proposed changes to terms and conditions. Ms Filer goes on to make clear that the respondent does have the right, which it is reserves, to adjust working patterns in line with the employee's existing contracts of employment. It is also acknowledged that the term "ballot" had been inappropriate but that Mr Manuel's proposal has not and will not be taking place.

39. During the course of 9 April 2020, there had therefore been significant industrial unrest. The respondent had made a proposal which was potentially unlawfully by seeking to introduce contractual change without involving the trade union and/or any consultation as well as imposing change on individuals who had not voted in favour of the proposal. The GMB had responded in a letter sent by email to the respondent's HR director and the respondent's HR director had provided reassurances that the proposals would not take place and acknowledging that consultation ought to have taken place and the term "ballot" ought not to have been used.

40. Shortly thereafter, another telephone conference call with the workforce was arrange by site management to explain what happened. The claimant says that during this telephone conference call Mr Manuel was *"very angry and unhappy about the union's involvement".* The claimant says that the meeting became increasingly heated to the extent that the claimant intervened and said that it was not appropriate for Mr Manuel to *"have a go"* at the union (claimant's witness statement paragraph 12) in front of the rest of the workforce and asking Mr Manuel to have a separate meeting with the claimant which Mr Kevin McKewan (GMB senior shop steward) would attend with the purpose of clearing the air.

41. The day following the heated telephone conference call, Mr Manuel made a further call to which he also invited Mr Chambers. This was a more private call between the most senior levels of site management and the workplace trade union representatives. The claimant says that Mr Manuel told the union *"in no uncertain terms"* (witness statement paragraph 13) that he was not happy that the claimant had taken things further with the union and not talked to him first. The claimant said that he had already asked Mr O'Brien (who was not on the current telephone conference call) whether he had spoken to senior management before approaching the workforce with the proposal.

42. The claimant also says that during this telephone conference call Mr Manuel said that because of the union's involvement *"we [site management] got our bollocks chewed off"* by higher management which was presumably a reference to the more senior management, including Ms Filer, at the respondent's head office.

43. We accept the claimant's account of the two telephone conference calls arranged by Mr Manuel after the events of 9 April 2020. In particular, we

accept that Mr Manuel did say during the second telephone conference call that because the union had reacted to his proposal *that "we got our bollocks chewed off"* by higher management. Mr Manuel did not give evidence to the Tribunal and Mr O'Brien was not on that call. Mr Chambers, who was on the call, did not seek in his evidence to contest that Mr Manuel made that particular remark during the second of the two conference calls on 9 April 2020 and nor was it challenged in cross-examination. It is from that stage that the claimant says things changed and that he began to suffer detriments for having stood up to the site management's proposal to change terms and conditions.

44. Both Mr O'Brien and Mr Chambers sought in their evidence to downplay the significance of the exchange between the trade union and the respondent's HR director on 9 April 2020. Both Mr O'Brien and Mr Chambers in cross-examination effectively said that the events of 9 April 2020 were no big deal and had no influence on any subsequent events. We do not accept that evidence.

45. The events of 9 April 2020 were far from business as usual. Mr Manuel's proposal, in particular the mechanism by which the respondent's site management sought to introduce it, had an incendiary effect on employee relations to the extent that on the very same day that Mr O'Brien announced the outcome of the vote, three regional organisers had written to the respondent's HR director essentially threatening industrial action if those proposals were not removed. This led to Ms Filer having to act immediately and having to reassure the union organisers that the proposals would not proceed. In a carefully worded email, Ms Filer affirmed the respondent's obligations to consult in advance of any proposed change to terms and conditions of employment as well as referencing the contractual flexibility that was already contained within the existing terms and conditions that had been negotiated between the company and the union.

46. We also find it impossible to reconcile Mr O'Brien and Mr Chambers' evidence that the events of 9 April 2020 were of no great significance to them with the comment by Mr Manuel that *"we got our bollocks chewed off"* by higher management. We find that the executive director level of management was extremely annoyed by the approach of site management and made their views clear to them. The fact that the company could achieve a cost saving through changing the shift pattern was not in our view to the point. The issue of substance was that, through a misreading of the situation, site management had stepped firmly on the toes of the trade union to such an extent that it led to a threat of industrial action and the need immediately for Ms Filer to pour oil on the troubled waters in the form of her email of 9 April 2020 at 15:35 (bundle page 192).

47. We find that Mr Manuel was the architect of the proposal and that both Mr Chambers and Mr O'Brien (in particular the latter) had also attracted the disapproval of executive level management on 9 April 2020 as a result of the way in which they went about implementing Mr Manuel's proposal.

The management of the claimant after the ballot issue of April 2020

48. As at April 2020, the respondent's operatives (including the claimant) were contractually required to be available on a standby rota which was

arranged several months in advance. There had also been an arrangement in place for some time whereby operatives would swap standby shifts with or give them away to another colleague on an informal basis. The swapping/giving away process was operated in two formats: the WhatsApp group organised by Sarah Charlton, Customer Operations Support; and the MYTIME app which recorded the time that individual members of staff were actually working. MYTIME is an online system.

49. We heard no evidence that the claimant's own approach to working, swapping or giving away standbys was causing any actual operational problem for the respondent. We refer to this because it is the claimant's case that he became more and more scrutinised in respect of a number of aspects of his employment after the ballot issue. Put simply, the claimant's case is that certain of his working practices that had not been treated as a significant problem before the ballot issue in April 2020 became a significant problem for him after it.

50. The claimant says that the same applied to the way in which the claimant was using the Grab Wagon. The claimant says that his approach to picking up surplus "spoil" in the Grab Wagon was exactly the same after the ballot issue as it had been before it. However, after the ballot issue he was scrutinised and criticised for working practices that had never before been challenged let alone scrutinised or criticised.

51. The respondent's position on standbys was that if a swap of a standby shift was undertaken between two colleagues then this both guaranteed that shifts were covered and that the overall number hours worked would remain neutral – thus not endangering the safety of workers doing an excessive number of working hours. If a shift was given away, particularly if given away to the same people, the working hours of the individual who is receiving the give-away shift will increase.

52. On 22 April 2020 (bundle page 281), Mr Chambers sent an email to his site managers asking *"what are we paying the Grab Wagon driver for if we are not picking up surplus*" (i.e. spoil left over from excavation). The claimant was the sole Grab Wagon driver and therefore must have been the person to whom Mr Chambers was referring in this email.

53. On 23 April 2020 (bundle page 193), Sarah Charlton emails Mr Chambers regarding the claimant having *"got rid of three standbys in a row now, not sure if you needed to know about this*". This is the first record we have of the claimant's approach to giving away his standby shifts being a problem that required active management by the respondent. Ms Charlton did not give evidence so we have not been able to learn, what, if any, instructions Mr Chambers might have given to her in relation to monitoring of standby shifts in general and the claimant's standby shifts in particular. Nor did we hear any evidence about what instructions may have been given to the respondent's employees who were in a position to monitor the spoil that had not been collected by the claimant and had to be collected by the external contractors USSL at an additional cost to the respondent. In short, there was no hard data regarding the working practices of giving away standby shifts or the monitoring of uncollected spoil.

54. On 30 April 2020, Mr Chambers emails a site manager, Mr Dennison, letting Mr Dennison know that an operative, Mr Gray, is giving "<u>all</u> his

standbys away" and Mr Dennison (presumably the site manager with line management responsibility for Mr Grey) stopped this happening so that he (Mr Grey) swaps but does not give away standbys. We noted that this email came from Mr Chambers regarding Mr Grey's standbys whereas Ms Charlton was the person who informed Mr Chambers about the claimant getting rid of three standbys in a row. It is also noteworthy that in respect of Mr Grey it is said that he is giving all his standbys away whereas the claimant is the subject of some scrutiny because of giving three standbys away in a row. We were not shown any documents and heard no witness evidence to suggest that standbys that had been given away in this manner had previously been an issue requiring formal management action. The claimant's evidence was that a number of his colleagues were giving away standbys. We accept this evidence from the claimant.

55. We also note that there was no suggestion from Mr Chambers or any other site manager that the claimant giving away his standby shifts was leading to work not getting done or any breach of the working time regulations. The respondent has a collectively agreed policy in relation to the operation of standbys. This is at pages 477 to 483 of the bundle. That policy was and remains in the process of being re-negotiated with the union at its Industrial Negotiating Forum with a view to it being updated. However, we note that there is nothing in the existing Joint Guidelines for Standbys & Call Outs which regulates how standby shifts should be swapped or given away other than for it to be done as far in advance as possible. The claimant says that he was being scrutinised after the ballot issue in a way that he was not scrutinised before and in respect of working practices that applied equally to other colleagues in a similar situation but who were not being scrutinised or managed in the same way. We accept that evidence.

56. On 8 June 2020, a meeting took place between the claimant, Mr Chambers and Mr O'Brien. The claimant was given no advance indication as to what this meeting was about. At that meeting, Mr Chambers told the claimant that he had noticed that the claimant was exhibiting a pattern of giving away his standby shifts. The claimant accepted that explaining that the weekends are the only days he has off work. Mr Chambers instructed the claimant to swap standby shifts and not to give them away. At this stage, there was no evidence that Mr Chambers, Mr O'Brien or any other member of management gave an instruction similar to that given to the claimant to any other employee who was regularly giving away shifts. That included Mr Grey who it had been noticed was giving away all of his shifts as evidenced at page 194 of the bundle. There was also no evidence that Mr Grey was called to a meeting either just with his line manager or also with Mr Chambers who was the more senior manager at a second level above the general operatives in the management chain.

57. The claimant's position was that he had for 15 years, including all the time that he had been managed by Mr O'Brien, been giving away his standby shifts with no problem or concern being raised. The claimant also pointed out at the meeting on 8 June 2020 that the claimant was himself aware that others such as Mr Tinson (the other licensed Grab Wagon driver) was also giving away shifts on a regular basis without management intervention. In Mr Tinson's case this was attributable to the fact that he had adopted his daughter's baby and had in those circumstances not done

a standby shift for approximately one year. The respondent gave no explanation to the claimant as to why his giving-away of standbys was being proactively managed but other operatives in the same or similar circumstances were not being spoken to. Equally, we heard no evidence from the respondent to explain why other operatives were not being systematically looked into in the same way as the claimant. The claimant also pointed out that as a legacy contract holder the number of colleagues with whom he could swap directly was a relatively limited pool.

58. We were provided with documents setting out the shifts that were done, given away and swapped in respect of Mr Tinson (pages 238 to 240) and in respect of the claimant (pages 241 to 244). This information was provided on the basis that Mr Tinson was in a broadly analogous position to that of the claimant. The analysis of the information regarding the claimant and Mr Tinson shows that there is a very similar pattern in each case. Between 3 September 2019 and 21 September 2020 the claimant did 40 standby shifts, swapped four and gave away 22. Mr Tinson did 43 standby shifts, swapped one and gave away 23. After the ballot issue, Mr Tinson gave away 10 standby shifts during this period whereas the claimant only gave away four.

59. The claimant raised the different treatment of Mr Tinson by Mr Chambers and Mr O'Brien at the meeting on 8 June 2020. Following that meeting Mr Chambers does address with Mr Tinson the issue of giving away standby shifts. However, it is notable that the trigger for him doing so is not information given to him by Ms Charlton or information he (or any other site manager) has discovered by their own enquiries, but as a result of the claimant himself pointing out that he was being treated differently by Mr Chambers and Mr O'Brien and that the claimant thought this difference in treatment was attributable to his trade union activities in relation to the ballot issue.

60. The respondent seeks to use the fact that Mr Tinson was followed up about the number of standby shifts he was giving away as if that tended to show that the claimant was not being singled out. It was difficult for the respondent to sustain that position since it was only at the claimant's instigation that Mr Tinson was spoken to at all by site management regarding his standby shifts.

61. The email in which Mr Chambers addresses Mr Tinson's standby give-aways is at page 197 of the bundle. It is dated 8 June 2020 at 12:02 which came shortly after Mr Chambers' meeting with the claimant on the same day. In that email Mr Chambers says that the *claimant "seems to think that this [giving away standby shifts] is a regular occurrence with people, he mentioned Jimmy Tinson who is not doing weekends."* Again, if Mr Chambers was genuinely concerned by the number of standbys being given away, it is difficult to understand why he appears only to be aware of the claimant's pattern while remaining seemingly unaware of the pattern of other operatives' give-aways (including Mr Tinson) until the claimant points it out to him. We find that Mr Chambers was taking a particular interest in the claimant's standby shifts and subjecting him to a degree of scrutiny and corrective management action to which he was not subjecting other operatives in similar circumstances.

62. It is also revealing that in the outcome of the claimant's first grievance, Mr Grey, Network Maintenance and Project, made a recommendation that Mr O'Brien and Mr Chambers communicate the management position on swapping and giving- away standby shifts to all operatives as a group. At that stage Mr Chambers had little choice other than to cascade the regulation of standby give-aways he was applying to the claimant to the operative group as a whole. Mr Chambers does this in his email of 3 November 2020 (bundle at page 264). This comes as surprise to Mr McKewan, GMB senior shop steward, who pushes back against it. Mr McKewan challenges the description of the current policy on standbys given by Mr Chambers in his email of 3 November 2020 because Mr McKewan considered that description to be a change of approach by site management to the detriment of the union members employed by the respondent. This fortifies our view that different standards (however desirable they may have been) were being applied to the claimant than were being applied to others in a similar situation.

63. Furthermore, after the April 2020 ballot issue a number of the claimant's give-aways were rejected. We heard no evidence from the respondent that it had been rejecting the claimant's give-aways before the ballot issue or that it had been rejecting requests for give-aways by any of the claimant's colleagues either before or after the ballot issue in similar circumstances.

64. Darren Arrowsmith, TOTEX Site Manager, was interviewed as part of the claimant's grievance (bundle page 220). It is clear from his evidence to the grievance investigation that the management approach to giving away and swapping standby shifts had been very much a "light touch" such that Mr Arrowsmith was not concerned if an operative gave-away a standby shift provided that the shift was covered. Certainly, there is no concerted attempt by the respondent's managements to enforce any de facto rule against give-aways except in relation to the claimant. Arguing that the claimant was an outlier in the way in which he gave-away standby shifts is simply not supported by the albeit limited comparative evidence that we have had put before us. If anything, the evidence was to the opposite effect.

65. On 3 September 2020, Mr O'Brien asked the claimant to attend a meeting with Mr O'Brien and Phil Crow (Emergency Officer). The claimant was told by Mr O'Brien that the claimant seemed stressed; secondly, that the claimant appeared to be carrying out *"too many trade union duties"* while working; and thirdly that the claimant was to be immediately removed from his HGV Grab Wagon role (a role he had held exclusively in the region for over 15 years) and moved to a Support Driver position. The respondent's evidence was that the proposed move was to have been temporary.

66. The respondent did not take any steps to investigate the extent to which any mobile telephone calls being taken by the claimant were related to trade union work as opposed to work colleagues contacting him in relation to operational requirements. The issue of the claimant's unavailability which becomes a theme of the respondent's management of the claimant is not raised by Mr O'Brien at this stage. Nor are subsequent matters which Mr O'Brien raises in the context of the investigation of the claimant's grievance raised at this stage. In particular it is not raised by Mr O'Brien

that the claimant is sitting around having *"cuppers"* rather than working. The claimant says that he has been employed for 20 years and has been doing trade union duties since 2014 and this has never been a problem between 2014 and the period after the ballot issue in April 2020. The claimant's position is that he has been subjected to aggressive management in relation to his ability to give away/swap standby shifts and subsequently by removing him from his Grab Wagon driver role which he had continuously undertaken for 15 years.

67. Mr O'Brien made no attempt to consult or warn the claimant before he was told he was to be removed from the Grab Wagon. Although the claimant is a GMB elected workplace representative, his full time officer, Miss Gail Johnson, was again not invited to the meeting or given any advance notification that the claimant's job duties were to be changed as a result of (at least in part) the amount of trade union work the claimant was perceived to be carrying out during working hours. Similarly, in relation to the comment that the claimant was stressed, there was no attempt by Mr O'Brien or any other site manager to risk assess the claimant; to refer him to occupational health; to direct him to the respondent's Employee Assistance Programme; or to take advice from HR.

68. Even if Mr O'Brien was right and the Grab Wagon was a *"cushy job"* it would still be a detriment to be taken off it. At page 221 of the bundle. during Marc Grey's investigation into the claimant's first grievance, Mr O'Brien says that the claimant *"thinks it is a cushy number*" and that the claimant "*sits there for an hour, having an hour having cuppas, then doing union duties."* None of this is said to the claimant at the meeting on 3 September and nor is it in Mr O'Brien's witness statement. The claimant is clear that there had been no increase in his trade union duties over the period since the ballot issue, an assessment Gail Johnson agreed with at the claimant's second grievance appeal.

69. There are a number of ways in which the respondent could have managed the perceived problems with the claimant's use of the Grab Wagon other than to take him off it without notice or consultation. This must have been a very visible change to the claimant's working life. We accept the claimant's evidence that it came as a significant blow to him, not least because he lost the prestige which attached to being the sole driver of the biggest vehicle in the depot's fleet.

70. The following morning (4 September 2020), the claimant asks to see Mr O'Brien. The claimant objects to being removed from the Grab Wagon. The claimant says he is not stressed. The claimant says he is not particularly busy with trade union duties and that he believes he has been taken off the Grab Wagon as a payback for his trade union activities earlier in April 2020 when he successfully challenged the management's attempts to change terms and conditions of employment of the workforce. When interviewed, Mr Arrowsmith (bundle page 220 to 226) did not consider the claimant to be stressed. Mr Arrowsmith was for certain purposes the claimant's manager at that stage and Mr Arrowsmith expresses no concern about the claimant's level of trade union duties and has no work performance concerns. At this stage, the productivity of the Grab Wagon has not been raised at all with the claimant. Indeed, there is no clear

measurement of anything whether it be trade union duties, collection of spoil or the alleged taking of excessively long breaks.

71. On 3 September 2020 the claimant had ben told that it was a *"suggestion"* that he move away from the Grab Wagon for a period. The following morning, Mr O'Brien describes the proposal as a *"reasonable management instruction"* with the clear indication that if the claimant does not agree to come off the Grab Wagon he would be instructed to do so. This change of position shows that it had been Mr O'Brien's intention all along (approved by Mr Chambers) to remove the claimant from the Grab Wagon rather than simply to make a helpful suggestion.

72. On 5 September 2020, the claimant raises a formal grievance in respect of four matters. First, bullying and harassment. Secondly, being singled out for detrimental treatment in relation to giving away his standby shifts. Thirdly, being removed from the Grab Wagon driver role. Fourthly, that this is all a vendetta for his trade union activities. The claimant requests the status quo to be respected in accordance with the grievance procedure That was not agreed to by the respondent. We heard no evidence from the respondents why that was the case.

73. On 16 September 2020, the claimant attends his first grievance hearing which is considered by Marc Grey (bundle pages 213 to 218).

74. On 17 September 2020, Mr Arrowsmith is interviewed by Mr Grey. It is at this meeting that Mr Arrowsmith says in relation to standby giveaways that he is *"quite happy as long as covered";* and that he confirms he does not have any concerns that the claimant is stressed.

75. On 17 September 2020, Mr Chambers is interviewed by Mr Grey. Mr Chambers says that he is not singling out the claimant in relation to standby shifts since he also spoke to Mr Tinson. As we have already said, this does not rest easily with the fact that it was the claimant himself who had to tell Mr Chambers that Mr Tinson was giving away a lot of his standby shifts. This suggests that Mr Chambers had not carried out an even-handed appraisal of all the different operatives before he spoke to the claimant and that Mr Chambers was not monitoring others with or without the assistance of Ms Charlton in the same was as the claimant was being monitored. Mr Chambers also acknowledges the potential detriment to the claimant when he says *"I know he's aggrieved cos there's someone else now to drive the Grab Wagon"* (bundle page 229).

76. Mr Chambers' interview also casts a doubt on whether or not there was any previous consideration being given before 4 September 2020 to whether the claimant's removal from the Grab Wagon would be temporary. Mr Chambers (who we remind ourselves is Mr O'Brien's line manager not the claimant's) says at page 299 of the bundle *"… if that's the case [Mr Tinson collecting more spoil than the claimant] I'll keep Jimmy on. If not I'll share it out … Jimmy is picking up more than Paul was".* This is far from a proposal to share the Grab Wagon between Mr Tinson and the claimant. It envisages the permanent removal of the claimant in favour of Mr Tinson.

77. On 17 September 2020, one of the claimant's colleagues, Alan Ross, spoke up on the claimant's behalf regarding the treatment of the claimant

and the restrictions being placed on him giving-away standby shifts. Mr Arrowsmith was present at this meeting.

78. On 18 September 2020, Mr Ross was called to a meeting with Mr Chambers to discuss the fact that he had spoken up on behalf of the claimant.

79. At page 316 of the bundle it is confirmed that it was Mr Chambers (not Mr O'Brien) who took the decision to restrict the claimant's ability to give away his standby shifts. At page 316 of the bundle Mr Chambers says *"and that he made the management decision to put Jimmy [Tinson] on the Grab Wagon … because sometimes Paul was unreachable …"* … and because the claimant was stressed … *"not Paul's god given right to be on the Grab Wagon".*

80. On 18 September 2020, Mr Manuel was interviewed in connection with the claimant's first grievance. At page 234, Mr Manuel says that the decision to remove the claimant from the Grab Wagon was *a "purely commercial decision"* and that the Grab Wagon needs to be used every day *"not parked in a bay".* Mr Manuel also says that he was 100% supportive of the decision to remove the claimant from the Grab Wagon which makes clear that his opinion was sought before Mr O'Brien – two levels of management junior to Mr Manuel – told the claimant that he was coming off the Grab Wagon. This contrasts with Mr Crow at the meeting on 4 September 2020 (bundle page 236) at which he refers to Mr O'Brien saying that the claimant would have *"a month off the grab"*.

81. It is noticeable that behind the scenes the position of senior management was that there was no intention as of 4 September 2020 for the claimant to be reinstated to the Grab Wagon after a period allowing him to catch up with trade union duties or become less stressed. The most senior manager directly involved (Mr Chambers) is very clear with Mr Grey during Mr Grey's interview in relation to the claimant's first grievance. Mr Chambers says that if Mr Tinson is proved more effective on the Grab Wagon that the Grab Wagon duties will not be shared. At the meeting on 4 and 5 September 2020, at no stage did Mr O'Brien raise the issue of sharing or a rota. The claimant has been the sole Grab Wagon driver at the North of Tyne depot in excess of 15 years. The idea of the rota is simply not raised with him until much further down the line.

82. On 14 October 2020, Mr Grey provided his outcome letter to the claimant's first grievance. That letter also contains certain recommendations (pages 253-259). Mr Grey rejects the grounds of the claimant's grievance. He concludes (bundle page 256) that the claimant's trade union role is referred to only in a *"positive way".* We are unable to see how Mr Grey arrived at this conclusion, not least because it was Mr O'Brien's express position that the claimant had too much trade union work to do consistent with operating the Grab Wagon effectively.

83. Although Mr Grey rejects the claimant's grievance that he has been victimised on account of his trade union representative duties, Mr Grey makes the following recommendations:-

(1) Since management prefer for standbys to be swapped rather than covered, Mr Grey recommends that management should be given full

visibility of all standby change requests. This would enable requests to be managed effectively and would grant management the ability to have the final say on all matters regarding standby.

(2) I would recommend a full team/depot briefing on management expectations of either carrying out their contractual standbys or swapping like for like and that if a colleague wishes to give away a standby this will need line management approval.

(3) Mr Grey recommends that since there are two contractual Grab Wagon drivers within North Tyne but only one wagon, that a rota is created that suits the needs of both individuals along with the business to provide both individuals a structure along with a break from the increasing challenging role of a Grab Wagon driver.

(4) There is a lack of clarity around who the claimant's line manager is and what line management responsibilities they have. The claimant should therefore have only one reporting manager to provide a clear reporting line between manager and operative.

(5) Mr Grey recommends that care is taken to make sure that everyone within the room understands what has been discussed at meetings so the comments are not misconstrued in the future.

84. On 19 October 2020, the claimant appealed Mr Grey's grievance outcome.

85. On 3 November 2020, Mr Chambers emailed the general operatives as a group implementing the first recommendation from Mr Grey about improving the visibility to management of the regulation of standby swaps/ giveaways.

86. By an email of 14 October 2020 at 12:47, Hayley Greenwood, HR Advisor – North, sets out the recommendations made by Mr Grey in his grievance outcome letter and asks Mr Chambers and Mr Manuel whether they should *"work through [the recommendations] in our catch up next Tuesday."* Ms Greenwood was therefore trying to schedule a meeting to discuss the implementation of all five of Mr Grey's grievance recommendations.

87. If the management of standby giveaways had become such a problem, it is surprising that Mr Chambers had not already issued an instruction to all operatives not to give-away standby shifts but to swap them. If it was really a problem that had been noticed in June 2020 (when the claimant was first spoken to) it is unclear why it took until November 2020 and the implementation of a grievance recommendation for Mr Chambers to put into action a management plan applying equally across the group as a whole.

88. The reaction to the email of 3 November from Mr McKewan is instructive. Mr McKewan, GMB senior shop steward, responds within an hour to Mr Chambers' email in which Mr McKewan asks *"why this is being changed?"* Mr McKewan goes on to say that *"we've always been able to give standbys away when swapping wasn't possible without needing any prior authorisation by a manager."* Mr Chambers replies to Mr McKewan the following morning, maintaining that his email the previous day was not a change of approach. Mr Chambers explains there have been incidents where people have been giving away standbys "*for no reason other than*

not wanting to do them." He also says that HR has asked for the procedures to be briefed out.

89. There is plainly a difference of opinion between Mr Chambers and Mr McKewan about whether the position set out in Mr Chambers' email of 3 November 2020 was a change to the status quo. It is also unclear why, if giving away standby shifts was a problem per se for Mr Chambers, Mr Chambers refers to the reason why standbys are being given away in his explanation to Mr McKewan. This again suggests that Mr Chambers is focusing on the claimant.

90. On 26 November 2020, the claimant's first grievance appeal meeting is held by Mr Andrew Worth, Business Operations Lead. Mr Worth's letter dismissing the claimant's appeal is at pages 341 to 343 of the bundle. The claimant's grounds of appeal were two-fold: first, that he was treated unfairly and; secondly that the claimant's initial grievance meeting was held by a manager subordinate to the position within the hierarchy held by those that Mr Grey was investigating. Mr Worth supplements Mr Grey's recommendations by suggesting that the definition of swapping and giving away standbys is clarified and that there should be an improvement in the way that North Tyneside management team communicates with the whole team about the way standbys are managed.

91. On 3 December 2020, the claimant's early conciliation notification is made in respect of the first claim.

92. Mr Worth dismissed the claimant's grievance appeal by a letter of 8 December 2020.

93. On 16 December 2020 (bundle page 349), Mr Chambers expresses the view to Mr O'Brien, Ms Greenwood, Ms Charlton and Mr Manuel that the claimant *"is not trying to swap and is going out of his way to be awkward".*

94. On 14 January 2021, the claimant's EC certificate for the first claim is issued.

95. On 1 February 2021, a colleague anonymously raises a grievance about Mr Chambers' 3 November 2020 email in which Mr Chambers asserts that it has always been the case that management approval is required for giving away a standby shift (bundle pages 357 to 359). In Mr Worth's outcome letter he suggests that the caveats in Mr Chambers' email of 3 November 2020 do not apply more broadly.

96. On 7 February 2021, Mr Tinson (who is still at that time driving the Grab Wagon) reversed the Grab Wagon into shutter doors in the respondent's yard. On 8 February 2021, Mr Chambers verbally suggested introducing a rota regarding the Grab Wagon. On 9 February 2021 the Grab Wagon is sat idle for the day.

97. On 10 February 2021, the claimant is requested by Mr Robley (who is by now taking a more active role in the claimant's management) requesting the claimant to go back on the Grab Wagon. The reason why Mr Robley asks the claimant to do so is that Mr Tinson had begun a period of sick leave after the accident on 7 February 2021. The claimant underwent a stress risk assessment before being placed back on the Grab Wagon. There was a dispute as to whose suggestion it was. The Tribunal prefers

the evidence of Mr Robley that it was the claimant's own suggestion. During the risk assessment, which is set out in the bundle at page 363, the claimant requests that a banksman is appointed and that there is proper training for a banksman.

98. On Wednesday 10 February 2021, the claimant went back on the Grab Wagon. Not, as we have already said, because of the rota, but because Mr Tinson had taken sick leave.

99. Mr Robley provides the claimant with a banksman (Martin Savoury) for a short period after 10 February 2021. A banksman is a person who guides and directs the driver of a vehicle into the correct place avoiding any hazards or causing any personal injury or property damage,

100. On 11 February 2021 the claimant's first claim form is submitted to the Tribunal.

101. On 21 February 2021, Mr O'Brien asks the claimant whether he is stressed again.

102. A dispute took place on 4 and 5 March 2021 about whether the claimant could attend a particular site with the Grab Wagon without the help of a banksman. Mr Savoury had by then returned to his normal duties and the claimant was being asked by Mr O'Brien to attend job sites using the Grab Wagon without a "permanent" banksman. The claimant insisted that he needed a banksman before it would be safe to go to the site. A dispute arose as to whether or not the claimant was asking for a permanent banksman to accompany him on the Grab Wagon at all times or whether he was asking for a banksman in respect of the specific jobs that he was being asked to do on 5 March 2021.

103. The claimant had for approximately 15 years carried out the role of Grab Wagon driver without the assistance of a permanent banksman. That much was common ground. The claimant says that he was aware that the 5 March 2021 jobs required a banksman because he knew there would be no gangs at the sites. Frequently when the Grab Wagon arrives at a site to collect spoil or deliver equipment, there will already be a gang from the respondent working at the site. In these circumstances, a member of the gang could act as banksman for the Grab Wagon driver if required. Mr O'Brien's position was that the claimant should go to the sites and risk assess whether or not the jobs required a banksman and if they did and if there was no gang on site, for the claimant to contact his manager at the depot who would arrange for a banksman to be supplied. If no one was available, the claimant could drive off and leave the spoil collection for the external contractor or to be collected by the claimant at a later date when a banksman was available.

104. On 4 March 2021, Mr O'Brien again takes the claimant off the Grab Wagon, on this occasion due to the dispute about whether a banksman is required for the jobs on 5 March 2021. Mr O'Brien asked the claimant whether he is stressed and refers the claimant to occupational health, ostensibly because of his concern that the claimant was stressed. Mr O'Brien told the claimant that he can return to the Grab Wagon on 8 March 2021 if he agrees that he will only ask for a banksman after risk assessing each given job.

105. On 5 March 2021, the claimant is sent in the Grab Wagon to a job in Berwick by Mr O'Brien because Mr O'Brien knew that there would be a gang on site at Berwick who would be able to provide a banksman if required. Mr O'Brien uses this time to consult the respondent's Health and Safety department about the requirements for a banksman both in relation to specific jobs requiring the crane to be used and also when reversing the Grab Wagon .

106. The claimant's position (bundle page 420) was that it was "unsafe to operate the crane without a banksman". At page 421 of the bundle, the claimant says that *"[he] should not be operating a crane without someone to watch over us as the situation changes."* The site management position of Mr O'Brien and Mr Chambers is that a permanent banksman has never been provided and that a member of a gang can always act as banksman if one is required on site. If there is no gang on site and the job is risk assessed and if a banksman is needed then a banksman would be provided and if one cannot be provided then the wagon driver can simply drive off.

107. On 5 March 2021, the claimant said to Mr O'Brien that *"[he] would need a second man on every job"* because he "*did not want to kill anyone"* (bundle page 434).

108. On 25 March 2021, (bundle 467) Christopher Broad, Environment, Health and Safety Specialist, summarises the health and safety requirements regarding banksmen in the context of both reversing and attending sites. Mr Broad's view, based on the company documents, is that it is not necessary for a banksman to accompany the Grab Wagon driver every time on every job. What is required is a site specific risk assessment to identify whether a second person is needed in any given situation. If a clear site of the crane can be maintained when using it, it is not necessary for a banksman to accompany the Grab Wagon driver. Equally in relation to reversing, Mr Broad confirmed that, although there is some ambiguity in the company's documentation, it is not necessary for a banksman to be present every time the Grab Wagon is being reversed provided the driver has clear visibility throughout the reverse manoeuvre.

109. On 4 March 2021, Mr Chambers sent an email (bundle page 373) in which he describes an *"ongoing problem regarding the union representative who is also the Grab Wagon driver*".

110. When Mr O'Brien realises that the claimant is not going to drive the Grab Wagon he asks for the keys to be returned to him.

111. On 5 March 2021, Mr O'Brien emails Hayley Greenwood (bundle page 382) saying *"… it feels like Paul has caused all this drama to help his case …"*

112. On 18 March 2021, the claimant raises a second grievance in which he complains of:

(1) Being removed from the Grab Wagon again.

(2) Being accused of stress on a number of occasions and

(3) That the recommendations from Mr Grey and Mr Worth's first level grievance outcome letters have not been actioned. Mr Stuart Armin,

Operations Manager (Wear) is appointed to consider the claimant's second grievance. On 21 April 2021, Mr Armin conducts the claimant's second grievance meeting (bundle pages 414 to 426).

113. On 26 March 2021, the occupational health report was received (bundle page 389-90) which confirms that the claimant is fit for his role and is not stressed.

114. On 10 June 2021, the claimant's second grievance is reconvened by Teams (bundle pages 473-475) to consider "whether it is all based on me being a union rep and what happened earlier in the lockdown."

115. On 21 June 2021, Mr Armin provides his outcome letter to the claimant's second grievance (bundle pages 484-492). Mr Armin did not uphold any of the claimant's grounds of grievance.

116. On 25 June 2021, the claimant appealed by email Mr Armin's outcome (bundle pages 544-545). The claimant had four points of appeal:

(1) Being accused of stress.

(2) Being singled out regarding standbys.

(3) Being removed from the Grab Wagon for the second occasion.

(4) That the grievance 1 recommendations have not been implemented, in particular management have not been given visibility of standby giveaways; a rota for the Grab Wagon was recommended on 14 October 2020 and the claimant went back on the Grab Wagon on 10 February 2021, not because of a rota, but because Mr Tinson went on sick leave; and that the claimant still has two line managers.

117. On 20 July 2021 (bundle pages 557-573), the claimant's second grievance appeal is carried out by Mr Steven Piggott, Business Operations Lead (Tees).

118. In July/August, Mr Robley becomes the claimant's sole line manager.

119. On 3 September 2021 the claimant is interviewed by Mr Piggott in relation to his second grievance appeal (pages 546-603).

120. On 6 September 2021, Mr Piggott's outcome letter does not uphold any of the claimant's grounds of appeal (bundle pages 624-641).

The relevant law

The statutory provisions – detriment on grounds related to union membership or activities

121. Section 146(1)(a) and (b) TULRA provides that:

(1) [a worker] has the right not to [be subjected to any detriment as an individual by any act or any deliberate failure to act, by his employer if the act or failure takes place] for [the sole or main purpose] of –

(a) preventing or deterring him from being or seeking to become a member of an independent trade union or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, …

[(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or] …

Detriment

122. When considering whether an employee has been subjected to a detriment, tribunals should have regard to the Judgment of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R.337, where it was held that a detriment exists *"if a reasonable worker would take the view that the treatment was to his detriment"*. It was further held in that case that an "unjustified" sense of grievance cannot amount to "detriment". The word "detriment" is one of wide import. Essentially, an employee that is put to a disadvantage will also have been subject to a detriment. Detriment falls to be considered subjectively pursuant to the claimant in question. Detriment can include physical discomfort or disadvantage. It is not necessary to show economic or physical damage. It may also include requiring a worker to work in an environment which has been made uncongenial or unpleasant by the attitude or actions of fellow employees particularly where the employer has failed to take steps which could and should reasonably have been taken to avoid, remove or reduce the unpleasantness to the affected employee under the employer's control.

Time limit for proceedings

123. Section 147 TULRA 1992 provides as follows:

[(1)] an [employment tribunal] shall not consider a complaint under section 146 unless it is presented –

(a) before the end of the period of three months beginning with the date of the [act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures [or both] the last of them], or

(b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

[(2)] for the purposes of subsection (1) –

(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

(b) a failure to act shall be treated as done when it was decided on.

Burden of proof

124. Section 148 TULRA 1992 provides as follows:

(1) on a complaint under section 146 it shall be for the employer to show [what was the sole or main purpose] for which [he acted or failed to act].

(2) In determining any question whether [the employer acted or failed to act, or the purpose for which he did so], no account should be taken of any pressure which was exercised on him by calling, organising, procuring or financing a strike or industrial action, or by threatening to do so; and that question shall be determined as if no such pressure had been exercised.

125. The effect of section 148 TULRA 1992 is to place the burden of proof on the respondent to show what the sole or main reason for which they acted or failed to act in respect of any established detriment. **Dahou v Serco Ltd** [2016] EWCA Civ 832 provides that the approach the Tribunal should take to determine the employee's sole or main purpose is to examine the factors that operated on the mind of the relevant decision-makers.

Remedies

126. Section 149 TULRA 1992 provides for remedies. Where an employment tribunal finds that a complaint under section 146 is well-founded, the Tribunal shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant. The amount of such compensation shall be such as the Tribunal considers just and equitable in all the circumstances having regard to the infringement complained of and to any loss sustained by the complainant which is attributable to the [act or failure] which infringed the right. Remedy may therefore include injury to feelings in respect of which **Vento** guidelines will be applicable.

Health and safety detriment

127. Section 44 of the ERA 1996 provides a right not to suffer detriment on health and safety grounds. Section 44 provides as follows:

> *Section 44(1) an employee has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –*
>
> *(a) Having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *(b) Being a representative of workers on matters of health and safety at work or member of a safety committee –*
>
> > *(i) In accordance with arrangements established under or by virtue of any enactment, or*
> >
> > *(ii) By reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee.*

128. The Tribunal notes the amendment to section 44 ERA 1996 with the effect from 31 May 2021. We agree with counsels' position that those amendments took place after the presentation of the second claim form in these proceedings and that it therefore seems likely that the unamended provisions were applicable the time the alleged detriments in these proceedings took place. In any event, the amendments refer to worker status and given that it was accepted that the claimant was and remains an employee of the respondent the amended provisions are again of no application to this matter.

129. The law relating to what amounts to a detriment is considered to be the same or similar to the law relating to detriment referred to in the context of trade union detriment discrimination.

Burden of proof

130. Section 48(2) ERA 1996 provides that "it is for the employer to show the ground on which any act, or deliberate failure to act, was done"; essentially reversing the burden of proof in relation to establishing the grounds upon which any act or omission occurred.

Time Limits

131. Section 8(3) provides as follows:

Section 48(3) an [employment tribunal] shall not consider a complaint under the section unless it is presented –

(a) Before the end of the period of three months beginning with the date of the act or failure to act which the complaint relates or, where the act or failure is part of a series of similar acts or failures, the last of them, or

(b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

132. The claimant is not required to show that there was an intention to discriminate against him/her in that it does not matter whether the employer intended to subject him to a detriment **Birmingham City Council v Equal Opportunities Commission** [1989] AC 1155. It is for the respondent to prove on the balance of probabilities that any acts or failures to act established by the claimant were not done on the grounds that the employee had done the protected act. In the light of **Fecitt v NHS Manchester** [2012] IRLR 64 whether or not something is done or not done "on the grounds of" a protected act means that the protected act does not "*materially influence (in the sense of being more than a trivial influence) employer's treatment of the employee."* If the respondent fails to establish that the act or deliberate failure to act is not on the protected grounds that issue should be determined in favour of the employee (**Edinburgh Mela Ltd v Purnell** UK EAT/0041/19).

133. Section 44(1A) provides as follows:

Section 44(1A) a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act, by his or her employer done on the ground that –

(a) In circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or

(b) In circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.

134. The danger in question may be to the claimant him or herself or to others, including members of the public: **Masiak v City Restaurants (UK) Ltd** [1999] IRLR 780, EAT.

Remedies

135. Section 49 provides that an employment tribunal shall or may make an award. An employment tribunal which finds a complaint under section 48 well-founded, must make a declaration to that effect and may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates. The amount of such compensation (which may include injuries to feelings) shall be such as the Tribunal considers just and equitable in all the circumstances having regard to the infringement to which the complaint relates and to any loss which is attributable to the act or failure to act which infringed the complainant's right.

Discussion and conclusion

Substantial issues

I**ssue 1: Detriment on grounds related to union membership or activities**

Was the claimant subjected by the respondent to any detriment by any act or any deliberate failure to act in respect of the following:

Issue 1.1. On 8 June 2020, James O'Brien and Nigel Chambers told the claimant verbally that he could no longer swap or give away standby shifts without management approval?

136. We have found that the claimant was not told verbally by either Mr O'Brien (who was not at the meeting on 8 June 2020) or Mr Chambers that he needed management approval to give away standby shifts. The claimant's witness statement at paragraph 17 deals with the meeting of 8 June 2020 and does not say that he was told by either Mr Chambers or Mr O'Brien that he needed management approval. He was told at the meeting on 8 June 2020 that he needed to swap shifts rather than give them away, not that he needed management approval before giving them away. It was only with Mr Chambers' email of 3 November 2020 (bundle page 264) which was cascaded team-wide that formal management approval to give-away shifts was introduced.

137. The claimant was therefore not subjected to this detriment.

Issue 1.2. The claimant sought management approval through the MYTIME App to admin to swap or give away weekend standby shifts allocated to the claimant between 8 June 2020 and March 2021 and every request was refused by Mr O'Brien and/or Alan Robley

138. The claimant was allowed to give away standby shifts on 3 June 2020 and 31 May 2021. At pages 189 to 190 of the bundle, it is recorded that the claimant was allowed by management to swap certain shifts in August, September and October 2020 and was allowed to give-away a shift in January 2021. On two occasions in February 2021 - 14 February 2021 and 20 February 2021 – the claimant's request to give-away shifts were declined by management. The claimant was also allowed to give three shifts away in April 2021 all of which were attributable to holiday leave.

139. The comparison with Mr Tinson is at pages 238-240 of the bundle. Mr Tinson was allowed to give away shifts between 8 June 2020 and March

2021 on seven occasions. However, three of these occasions were to cover holidays.

140. We have no information for anybody other than Mr Tinson and the claimant and no information for Mr Tinson after 24 September 2020.

141. This claim for detriment is partially upheld. On two occasions the claimant was not allowed by site management to give-away shifts but there were also two occasions when the claimant was permitted to do so.

Issue 1.3 On 4 September 2020, Mr O'Brien moved the claimant from his Grab Wagon/HGV driving role to a support van driving role.

142. It was common ground between the parties that the claimant was so moved. We have found that Mr O'Brien effectively instructed the claimant on 5 September 2020 to move from the Grab Wagon in favour of Mr Tinson despite the claimant's clear objections.

143. The respondent denies that moving the claimant from the Grab Wagon was a detriment. The Tribunal disagrees. The reduction in status and the visibility of the claimant in the driving role was such as to render the claimant's removal after some 15 years on the Gab Wagon as sufficient to amount to a detriment. A reasonable worker would have considered this removal as a detriment.

144. The claimant was therefore subjected to this detriment.

Issue 1.4 The respondent failed to implement the recommendations outlined in the grievance outcome letter dated 14 October 2020, as set out below.

Issue 1.4.1. **That management has given full visibility of all standby change requests.**

145. This was a difficult recommendation to implement and we find that the respondent did take reasonable steps to provide full visibility of standby changes to management. Mr Chambers email of 3 November 2021 is in direct response to this recommendation. In that email, Mr Chambers says that standbys should be swapped not given away and that any give-aways should be in emergency situations only in which case management approval would be needed. Such was the prevalence of swapping standbys it was difficult for Mr Chambers to go further than he did. We therefore find as a fact that this recommendation was implemented.

146. The claimant was therefore not subjected to this detriment.

Issue 1.4.2. **That a full team/depot meeting briefing is held on management expectations of either carrying out contractual standbys or swapping like for like.**

147. At page 552 of the bundle, the claimant and his regional trade union official, Ms Johnson, both accepted that this recommendation had been complied with. The accuracy of that concession was not challenged at the hearing. In any event, we find that Mr Chambers' email of 3 November 2020 was sent out as a direct response to the recommendations 1 and 2 of the claimant's first grievance.

148. This claimant was therefore not subjected to this detriment.

Issue 1.4.3. That a rota is created for the claimant and the other contractual wagon driver in relation to driving the Grab Wagon

149. Since 4 September 2020 Mr Tinson had replaced the claimant on the Grab Wagon. The respondent says a rota of three months on and three months off the Grab Wagon to be shared between Mr Tinson and the claimant was verbally introduced on 8 February 2021. That was some five months after the recommendation was made.

150. We have also found that it was Mr Tinson's sickness and not the grievance outcome recommendation which was the real cause of the verbal rota that was intended to be introduced on 8 February 2022. Furthermore, there are clear inconsistencies in the evidence of Mr O'Brien and Mr Chambers about their intention to share the Grab Wagon between the claimant and Mr Tinson from the moment he was first taken off the wagon for, amongst other things, being perceived by management as having too many trade union duties to undertake compatible with the effective commercial use of the Grab Wagon.

151. In fact, this rota was never implemented. The claimant was taken off the Grab Wagon effectively on a permanent basis when the dispute arose on 4/5 March 2021 about whether the claimant should be given (as the respondent understood it) a permanent banksman. Mr Tinson replaced the claimant and has remained on the Grab Wagon ever since.

152. The claimant was therefore subjected to this detriment.

Issue 1.4.4. That there should only be one reporting manager for colleagues who do not have one direct line manager (including the claimant) to provide a clear dividing line between manager and operative.

153. It was the evidence of Mr Robley that he became the claimant's respondent's sole line manager in or around July/August 2021. Mr Robley says he had some involvement in the line management of the claimant from early 2021. Mr Chambers, at paragraph 37 of his witness statement, explains the significant delay in Mr Robley becoming the claimant's only line manager on the grounds that there was at the time a "*shortage of full-time managers".*

154. We find that this recommendation was implemented albeit after a significant delay. The extent of any detriment suffered by the claimant is limited therefore to delay and we accept the respondent's evidence that it was the lack of available managers that led to that delay not any deliberate failure to implement the recommendation. We noted that it was common for general operatives in this area to have a number of managers due to the cross-functional nature of their work.

155. The claimant was therefore partially subjected to this detriment in the form of the delay that elapsed between the recommendation being made on 14 October 2020 and its full implementation in July/August 2021.

Issue 1.4.5. To ensure that everyone within the room during a meeting understands what has been discussed, so that comments are not misconstrued in the future

156. We find that this recommendation was aspirational and a sensible plea for clarity in meetings and other communications. To that extent it was not a

recommendation capable of being implemented by specific management steps or identifiable management action.

157. The claimant was therefore not subjected to this detriment.

Issue 1.5. **After returning to his substantive wagon/HGV role in February 2021, on 4 March 2021 Mr O'Brien refused the claimant's request for a banksman to accompany him on two jobs that same day which required the claimant to use the hydraulic grab arm on the wagon's rear and instructed the claimant to work alone.**

158. The respondent accepts that on 4 March 2021 Mr O'Brien refused the claimant's request for a banksman.

159. However, there is a significant dispute about precisely what the claimant was asking of Mr O'Brien. Mr O'Brien says that the claimant was asking for a permanent banksman on all jobs at all times. Immediately before 4 March 2021, for a period of some nine days or so in what the respondent says was only ever intended as a temporary measure, the claimant had been given a full time assistant (Mr Savoury) to travel with him on every job. Mr Savoury during this period would have acted as the claimant's banksman. This is in contrast with the previous 15 years where there was no such permanent assistant provided to the claimant (or to Mr Tinson) when he was driving the Grab Wagon. Mr O'Brien says that it was this request that was refused and that he had the support of Mr Broad whose health and safety advice he said had confirmed that there was no need for a banksman on every Grab Wagon job, whether to operate the crane or to reverse.

160. The claimant says he was not asking for a permanent banksman on 4 March 2021. The claimant says he was asking for a banksman for that day as he knew he was going to go to two housing estates to collect spoil where there could be members of the public and where he knew there were no gangs. The respondent does not accept that the claimant ever referred to housing states on 4 March 2021 and says that the claimant has added this matter to his account of events only during the litigation phase.

161. We find that the claimant did not refer to the housing estates at the time of this disagreement. The claimant makes no reference to housing estates at his grievance hearing (bundle page 419) which he surely would have done if that had been the context in which his request for a banksman on 4 March 2021 had been made. Moreover, it was unclear how the claimant could have known in advance that there would be no gangs on site without visiting them first. Mr Broad's health and safety advice was clear: a site specific risk assessment should be carried out at the site to establish whether or not a banksman was needed and, if so, from where one could be sourced.

162. Mr O'Brien says, and we accept, that he was not instructing the claimant to work alone, rather he was instructing the claimant to visit the sites and then do a site specific risk assessment to establish whether or not a banksman was required at all and, if so, whether a colleague was on site to assist. If not, the claimant could then request a banksman to be sent from the depot or, alternatively, leave the site for spoil to be collected at a

later date whether by an external contractor or by the claimant with a banksman.

163. We find that by this stage the relationship between Mr O'Brien and the claimant was such that disagreement began to find itself. Nevertheless, we could not make any sense of the claimant's insistence that he be given a banksman for this job if he was not effectively also saying he wanted one all the time. The references in the claimant's risk assessment with Mr Robley show that the claimant wanted a banksman to be appointed and trained. We find that Mr O'Brien reasonably understood the claimant to be asking for a permanent banksman and that his decision to refuse the claimant's request must be assessed in the light of that finding.

164. In any event, the claimant was not instructed to work alone. He was asked to make a site specific risk assessment to establish whether a banksman was required and at no stage was it being suggested by Mr O'Brien that a banksman would not be made available if the job warranted one upon inspection.

165. The claimant was therefore not subjected to this detriment.

Issue 1.6. After the claimant raised concerns with Nigel Chambers verbally on 3 March 2021 that Mr O'Brien's instruction to work alone was unsafe and sought further clarification from Christopher Broad in the respondent's health and safety department verbally and by email on 4 March 2021, Mr O'Brien:

Issue 1.6.1. Became angry towards the claimant

166. We find that Mr O'Brien did get frustrated with the claimant which the claimant may have taken as an indication of anger. By this stage, the relationship between the claimant and Mr O'Brien had deteriorated to a significant extent. However, we do not find that Mr O'Brien's frustration in fact spilled over into anger. We find that Mr O'Brien was exasperated at what he considered to be the claimant's intransigence.

167. The claimant was therefore not subjected to this detriment.

Issue 1.6.2. Immediately remove the claimant from the wagon/HGV role and return him to support driving duties

168. It was accepted by the respondent that the claimant was taken off the Grab Wagon and returned to support driving duties as a consequence of the exchange that took place on 4 March 2021.

169. The claimant was therefore subjected to this detriment.

Issue 1.6.3. Told him he must see occupational health insisting that he was stressed;

170. The respondent accepts that Mr O'Brien requested the claimant go to occupational health for an assessment and that the claimant consented to do so.

171. The claimant was therefore subjected to this detriment albeit with his consent.

Issue 1.6.4. Mr O'Brien accused the claimant of "only doing all this to strengthen your case"

172. We take the reference to "case" as a reference to the claimant's legal proceedings in this Tribunal. On 4 March 2021, the claimant's first grievance (including his appeal) had ended. Specifically it ended on 1 February 2021 with the appeal outcome letter from Mr Worth.

173. The claimant's second grievance commenced in April 2021. Early conciliation commenced in the first set of proceedings in December 2020 and ended on 14 January 2021. The claim form was presented to the Tribunal on 11 February 2021.

174. On Mr O'Brien's own account in his email of 5 March 2021 of the exchange that he had with the claimant on 4 March 2021 (bundle page 381) Mr O'Brien says in terms that *"Paul kept on shouting saying he was taking North Tyne Management to court and this was great for his case."* Also in Mr O'Brien's email of 5 March 2021, he provided his opinion (bundle page 382) that, "*it feels like Paul has caused all this drama to help his case …"*.

175. Against that background it makes logical sense that Mr O'Brien did express an opinion that he plainly held on 4 March 2021 that the claimant was, when raising the issue of needing a banksman, trying *to "strengthen [the] case which he had presented to the Tribunal on 11 February 2021."*

176. The claimant was therefore subjected to this detriment.

Issue 1.7.

177. The respondent continued to make swapping standby shifts difficult for the claimant by imposing new caveats, namely:

1.7.1. By Alan Robley telling the claimant on or around 11 January 2021, 14-19 February 2021 and 14 March 2021 by email and/or WhatsApp message that:

(a) He must swap "*like for like shift"* [namely any weekend standby shift must be swapped with another weekend standby shift] and

(b) Any accompanying main shift must also be the same so that the claimant could only swap with two out of five colleagues who shared his shift pattern];

178. Mr Robley does tell the claimant in his emails to him of 11 January 2021(bundle page 353) and of 19 February 2021 that the claimant must swap *"like for like shifts"* which meant in practice that the claimant must swap weekend standby shifts for another weekend standby shift. Given the claimant's position as a legacy contract holder this would have the practical effect of limiting the number of people with whom the claimant could swap shifts relative to the operatives who were on the new terms and conditions.

179. Also in his email to Mr Robley of 11 January 2021, Mr Robley does tell the claimant that if he does not swap standby shifts on a like for like basis he must "take a full weeks' (sic) holiday". We did however accept Mr Robley's evidence that this was a genuine misunderstanding of the position on his

behalf. In those circumstances, we find that the matters complained of at paragraph 1.7.1(a) and (c) did take place.

180. The claimant was therefore subjected to these detriments.

Issue 2. "Did any such acts or any deliberate failure to act in respect of issues 1.1 to 1.7 take place for the sole or main purpose of" … - the reason(s) why

181. We have found that the claimant was subjected to the detriments relied upon by the claimant in respect of the following Issues:

i. Issue 1.2 in that the claimant was required to get management approval for two give-away standby shifts but was denied that approval.

ii. Issue 1.3 in that the claimant was removed from the Grab Wagon by Mr O'Brien on 4 September 2020.

iii. Issue 1.4.3 in that no rota was in fact implemented sharing Grab Wagon duties between the claimant and Mr Tinson as had been recommended Mr Grey on 14 October 2020. Mr Chambers' "verbal rota" of 8 February was occasioned by Mr Tinson's sickness absence and was in fact never implemented because of the events of 4/5 March 2021.

iv. Issue 1.4.4 in so far as there was a delay of 9 months before the claimant was formally given only one line manger (Mr Robley).

v. Issue 1.6.2 in that the claimant was removed from the Grab Wagon on 4/5 March 2021.

vi. Issue 1.6.3 in that Mr O'Brien did refer the claimant to Occupational Health.

vii. Issue 1.6.4 in that we have found that Mr O'Brien did say to the claimant *"you are only doing all this [insisting on a banksman] to strengthen your case"* on 4 March 2021.

viii. Issue 1.7.1 in that Mr Robley did tell the claimant that he must swap *"like for like"* shifts and that any accompanying main shift must also be the same.

182. We have also found that all of the matters complained of in these issues do amount to a detriment to which the claimant was subject. Further scrutiny and active management of the claimant's standby shifts and removal from the Grab Wagon can both reasonably be considered detriments and it was plain from the claimant's evidence that he perceived it as such. The only marginal case was the referral to occupational health given that the claimant consented, but on balance and in context we consider a reasonable worker would have seen it as disadvantageous and therefore as a detriment.

183. We have found that the remainder of the alleged detriments did not take place. Accordingly, all claims based on the alleged detriments at Issues 1.1; 1.4.1; 1.4.2; 1.4.5; 1.5; and 1.6.1 are not well-founded and therefore fail.

184. In relation to the Issues/detriments that we have found took place we must determine what the respondent's reason was for that treatment bearing in mind that the burden is on the respondent to show what the sole or main reason was for its treatment of the claimant.

185. We have found that it was the ballot issue which was the essential reason why the respondent began to subject the claimant's swapping/giving-away of standby shifts to greater scrutiny and proactive management leading to tighter restrictions being placed on him. It is not to the point that the respondent may have had good operational reasons for addressing how operatives were giving-away standby shifts. The point of substance is why they were doing that and we have found that it was because of the ballot issue that led the spotlight to be shined in the claimant's eyes.

186. There was no change to the claimant's approach to giving-away standby shifts before and after the ballot. What changed was the respondent's appetite to manage how the claimant was approaching give-aways. The pivotal factual finding is our rejection of the respondent's evidence from Mr Chambers in particular that the ballot issue on 9 April 2020 was not a big deal and had no bearing on its subsequent treatment of the claimant. It plainly was a big deal since it led to industrial unrest including a threat of industrial action from three GMB regional organisers.

187. It also led to the involvement of the respondent's Director of Human Resources who had to act immediately to pacify the union by the unequivocal withdrawal of Mr Manuel's proposal to treat certain additional hours as attracting time off in lieu rather than overtime. The important point was not whether Mr Manuel's proposal was more generous to the operatives than exercising a contractual right to change the shift patterns, it was that the union's presence in the workplace that was being undermined through the direct "balloting" of staff on a perceived change to terms and conditions which the union regarded as their prerogative.

188. Furthermore, the respondent's witnesses (Mr Chambers and Mr O'Brien) never adequately explained how they could both accept that Mr Manuel had said in a telephone conference in April 2020 that *"we got our bollocks chewed off"* by higher management over the ballot issue while also maintaining that the events of April were of minor significance. Mr Manuel was plainly irritated that the claimant and others involved in the union had raised matters with their full time officials rather than coming to him or Mr Chambers first. The effect was that site management, including Mr Manuel and Mr Chambers) had been exposed to criticism from the respondent's most senior tier of management which for obvious reasons was not a welcome occurrence.

189. We also had the evidence of the treatment of the claimant both before and after the ballot issue on the management of standby shifts. We did not accept that the claimant was being treated after the ballot issue the same as other operatives regarding giving-away standby shifts. Significantly, it was the claimant himself who identified Mr Tinson as someone who was giving away shifts regularly which led us to conclude that it was the claimant who was being singled out for greater scrutiny. In this way, the claimant was being treated less favourably than he had been before the ballot issue and was (at least initially) being treated less favourably after

the ballot issue than other operatives in the same or similar situation. We also regarded it as significant that Mr Chambers was personally involved in the management of the claimant. Mr Chambers was at the level above the claimant's tier of line management. It was in fact Mr Chambers who took the decision to restrict the claimant's ability to give away his standby shifts (bundle page 316) which was intervention of a senior manager in the day-to-day affairs of the claimant.

190. We therefore find that the respondent has failed to show that the reason for the claimant's treatment on standbys was (as they sought to suggest) purely operational and a matter of day-to-day management. We find that the main reason was because of the claimant's activities in relation to the ballot issue. It was not contested that those activities were legitimate trade union activities carried out at an appropriate time. We have come to the conclusion that the detrimental treatment of the claimant regarding his standby shifts was for the purposes of penalising the claimant for carrying out those activities and as a deterrent to prevent him from doing so in the future.

191. We have reached essentially the same conclusion in relation to the removal of the claimant from the Grab Wagon on 4 September 2020. We do not accept that operational reasons – whether productivity of the wagon, the claimant appearing stressed, the claimant having too many trade union duties to do – was the main reason for Mr Chamber's decision to remove the claimant from the Grab Wagon. There was no attempt to manage any perceived problems with the claimant's productivity, the difficulties that the respondent said it was experiencing getting hold of the claimant on the wagon or to assess the time the claimant needed for his union duties. Rather, the claimant was asked to attend a meeting without any notice of what was to be discussed or proposed and essentially told that he was to be removed from a role that he had carried out for in the region of 15 years.

192. We have again concluded that the main reason that the claimant was removed from the Grab Wagon was the irritation that the claimant's trade union activities had caused site management and that the claimant was subjected to the detriment of removal to penalise him from having carried out those activities and to deter him from doing so in future.

193. In respect of three of the detriments that we found to have occurred, we were satisfied that the respondent's sole or main purpose was the operational reasons provided by the respondent. In particular, we were satisfied the delay in Mr Robley becoming the claimant's sole line manger was attributable to the lack of availability of TOTEX mangers at the site and we were satisfied that Mr O' Brien wanted advice from occupational health on the claimant's fitness to return to the wagon for safety reasons, a referral that the claimant consented to at the time. Lastly, we were satisfied that the removal of the claimant from the Grab Wagon on 4/5 March 2021 was attributable to the confusion surrounding the claimant's request for a banksman. We accepted that Mr O'Brien both genuinely and reasonably understood that as a request for a permanent banksman which would have meant allocating additional resource that had not been

necessary over the course of the previous 15 years that the claimant had been operating the Grab Wagon.

Health and Safety Detriments

194. This case was largely pursued as a case of trade union related detriment. Of the detriments we have found took place, we have found that the reasons for such treatment was either solely or mainly trade union activities in the form of the claimant's role in the April 2020 ballot issue or we have accepted that reason for the treatment was the operational considerations put forward by the respondent. It follows that by necessary implication we do not find that the claimant's position as a health and safety representative or any circumstances of danger brought to the respondent's attention by the claimant were on any of the prohibited grounds in section 44 ERA 1996.

195. It follows that all claims under section 44 ERA are not well-founded and fail.

Time limits

196. It was the respondent's position that claims in the first proceedings occurring before 4 September 2020 were potentially out of time and in the second proceedings claims before 23 January 2021 were potentially out of time.

197. Given our findings on which detriments we accepted did occur, only one detriment fell in the period that was identified as potentially out of time – the refusal of a give-away shift by Mr Robley on 11 January 2021. However, the Mr Robley also refused a give-away request from the claimant in time on 19 February 2021. In the circumstances, we did not consider it proportionate to consider the timeliness of the refusal on 11 January 2021, not least because it added little if anything to our finding in respect of the refusal on the later date of 19 February 2021.

The claims that we find are well-founded and succeed

198. We find that the claimant was subjected to the following detriments on an unlawful basis contrary to section 146 TULRA:

    i. Issue 1.2 in that the claimant was required to get management approval for two give-away standby shifts but was denied that approval.

    ii. Issue 1.3 in that the claimant was removed from the Grab Wagon by Mr O'Brien on 4 September 2020.

    iii. Issue 1.4.3 in that no rota was in fact implemented sharing Grab Wagon duties between the claimant and Mr Tinson as had been recommended Mr Grey on 14 October 2020. Mr Chambers' "verbal rota" of 8 February was occasioned by Mr Tinson's sickness absence and was in fact never implemented because of the events of 4/5 March 2021.

    iv. Issue 1.6.4 in that we have found that Mr O'Brien did say to the claimant *"you are only doing all this [insisting on a banksman] to strengthen your case"* on 4 March 2021.

v. Issue 1.7.1 in that Mr Robley did tell the claimant that he must swap *"like for like"* shifts and that any accompanying main shift must also be the same.

Remedy

199. We accepted the claimant's evidence at paragraphs 56 to 61 of his witness statement which concerns the impact on the claimant of the treatment the received from the respondent.

200. We find the following aggravating factors: multiple detriments; the claimant was singled out because he stood up to senior management on 9 April 2020 to protect what he saw as the interests of union members; and the treatment continued over a considerable period starting in April 2020.

201. We also had regard to the importance of trade union representatives to the employee relations of the respondent. We noted that the claimant had been reconsidering his position as a trade union representative in the workplace. The claimant confirmed in evidence that he remains a trade union workplace representative as at the date of this hearing.

202. There were also mitigating matters. Mr Robley struck us as a straightforward and truthful witness who appeared to have a good relationship with the claimant. Senior management has changed with Mr Fuller replacing Mr Chambers after Mr Chambers' retirement. Further, Mr Fuller has been seconded into Mr Manuel's role upon Mr Manuel's departure from the business. The claimant is now able to swap and give away standby shifts without like for like swapping or taking five days' holiday (which we accept was a mistake and never a requirement in the first place). The claimant was not stressed at work or at home on his own evidence and, accordingly, the impact on his mental health and wellbeing whilst real was nevertheless restricted. Furthermore, his grievances were considered carefully and whereas we have taken a different view in relation to a number of the points of grievance that were not upheld by the respondent during the management phase, we do not find that any of the grievance managers were directly influenced by any unlawful matters.

203. In terms of the level of injuries to feelings award we have considered the Vento bands and come to the conclusion that looking at all the detriments as a whole and their cumulative effect on the claimant that we consider an award for injury to feelings to fall within the lower range of the middle band. It is not in our discretionary judgment neither a less serious case or an upper band case.

204. In the circumstances, we consider an award for injury to feelings in the amount of £15,000 to be just and equitable given the nature of the detriment, its seriousness, the time over which they occurred and the effect on the claimant. We considered whether this was a case to which interest should be awarded and concluded that it was merited. An award of interest at the rate of 8% per annum on the award of £15,000 is therefore made starting with the date of the last detriment and ending on 30 December 2022.

205. The claim for aggravated/exemplary damages is either not well-founded or not pursued. There was no claim for an Acas uplift in the Schedule of Loss. There is no claim in respect of consequential financial losses. The

claimant on his own case remains employed and has suffered no financial detriment as a result of any unlawful treatment he received in the workplace.

_____

Employment Judge Loy

_____

Date: 30 December 2022

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