



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Rice

**Respondent:** North West Ambulance Service NHS Trust

**HELD AT:** Manchester

**ON:** 3 and 4 January 2018  
18 January 2018  
(In Chambers)

**BEFORE:** Employment Judge Feeney

## REPRESENTATION:

**Claimant:** Mr L Bronze, Counsel

**Respondent:** Ms K Jeram, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claim that he suffered a detriment due to his trade union activity succeeds. His claim in respect of trade union services fails and is dismissed.

# REASONS

1. The claimant brings a claim of trade union discrimination following the respondent's failure to offer him a role at his previous level following his decision to retire. The claimant believes this was connected with the fact that he was a full time union official as it was his belief that the only people who had been refused re-employment at their current grade were himself and another trade union officer. He relied on the failure of his grievance appeal as the actionable detriment in relation to activities and services.

## The respondent's submissions

2. The respondents submitted that they had valid reasons for refusing the claimant the Band 6 role that were unconnected with his trade union activities

namely that there was a re-organisation progressing which originally meant AOM posts (the claimant's deemed role) were to be reduced, even when this was revised to a merged Senior Paramedic role the claimant would not be qualified to undertake the merged role due to his lack of clinical practice in the past and his inability to complete the required B.Sc course which required ongoing clinical practice.

### **Witnesses and Bundle**

3. I heard for the claimant from the claimant himself and from the respondent from Mick Forrest, Head of Human Resources. There was an agreed bundle. There was some additional documents, the meaning of which was not clear unless Mr Forrest were allowed to introduce and explain them. It was agreed due to the claimant's objections that these documents would not be relied on.

### **Tribunal's Findings of Fact**

4. The claimant worked for the respondents from 1976, for a considerable number of years now he has been a full time trade union official. The first event of note and of relevance to the claimant's claim occurred in 2011. Before becoming a full time union official the claimant had occupied the role of Team Leader but due to a re-organisation that post was being deleted. A letter was sent to the claimant on 26 August by Bob McGowan, Sector Manager which was somewhat confusing but the import of which was that he wanted the claimant to relinquish his substantive post in order that that could be filled by somebody on an operational basis and he guaranteed him a Band 6 Team Leader role on his return.

5. The letter said "as you are aware the Trust is currently undergoing a review of all the Band 6 positions and staff who have a substantive post have been asked to state their preference for either a Senior Paramedic or a Team Leader post. I am informed you have indicated you would like to be a Team Leader post based at Anfield Ambulance Station. I understand you have recently secured a further term as the full time Branch Secretary for ASU/GMB. In our recent discussion we spoke about the feasibility of you relinquishing your current position and line as a Team Leader to allow for this position to be filled permanently by another member of staff. If you are in agreement to this I will make a guarantee that should you return to your full time operational role either during your term as ASU/GMB Branch Secretary or at the end of this period then a Team Leader post would be allocated to you within the North Sector within a reasonable distance of your home address I note your preference would be to be based at Anfield Ambulance Station. I would be grateful if you could confirm in writing that you are in agreement for all your posts to be filled on the basis that there is a guarantee of a Band 6 Team Leader in the North Sector on your return to operational duties".

6. The claimant did not dispute this letter, what he did dispute that he had ever received a letter asking him to choose between Paramedic and Team Leader posts. On checking the respondents agreed that for some reason he had not been sent this letter (which all other Team Leaders had received), probably because he was by then in a full time union role. Accordingly the claimant never made an election.

7. The respondents further said the election was not between Senior Paramedic and Team Leader post but between Senior Paramedic and Assistant Operations Manager. That latter role being less "hands on" than a Senior Paramedic role and that Mr McGowan's reference to Team Leader post in this letter was an error for Assistant Operations Manager. We accept that there was clearly a choice between a Senior Paramedic and another post and that following the review that other posts became Assistant Operation Manager.

8. Nothing further happened until July 2015 when the respondents started considering making improvements to its line management structure due to the Care Quality Commission raising some concerns. They needed to make their line manager structure clearer and their first suggestion was to reduce the number of AOM's and increase the number of Senior Paramedics. The report to the Executive Management Team on 3 July noted that there were 260 Band 6 first line manager posts which included 113 Senior Paramedics and 147 Assistant Operational Manager. Every staff member was supposed to have an SP and an AOM but the disparity in numbers meant that the Senior Paramedic would be responsible for a larger team than an Assistant Operational Manager. It was explained that an AOM is allocated 10% of their monthly working cycle to assist with operational administration and outside of this time they had a shift on an ambulance as part of a double crew where they operate clinically at Paramedic level i.e. Band 5.

9. In November 2015 the claimant commenced a fixed term Band 7 role undergoing a joint project with the respondent. The claimant accepts that at no time was he permanently made a Band 7.

10. On 6<sup>th</sup> March 2016 the claimant submitted an application to "retire and return" in the form of a flexible working request. The request was based on a return after retirement to a band 6 Team Leader post. There was a verbal discussion between the claimant and Dave Kitchin where he confirmed that he could return to a Band 6 post.

11. Dave Kitchin, Deputy Director of Operations replied to his request on 31<sup>st</sup> May. It was headed "application to retire and return" and stated that "it is clear from the contents and your accompanying letter that you are not requesting flexible working but you are requesting to terminate your current employment on the basis of age retirement. You have also confirmed that it is your intention to then seek re-employment in a part time position. I confirm that your substantive post with the Trust as Band 6 Assistant Operations Manager (Team Leader)". He said "as we are currently considering re-employment following your planned retirement date of 31 August we need to confirm your understanding that the post you are seeking re-employment to is your substantive Band 6 as Assistant Operations Manager (Team Leader) role. This will be necessary so we can consider your application in that context". The claimant was at the time seeking re-election into his trade union post but that had not been completed at this stage.

12. On 15 June 2016 the claimant replied to Mr Kitchin by email stating that "I have now received your letter and would like to clarify some of the issues you raised, firstly I did make a request on 6 March under the flexible working procedures to retire

and return on flexible arrangements. You have said that you would require me to be flexible with the days worked, it is covered under that procedure in paragraphs 4.2 and 7.4.3 that talks about continuity of service regarding the break required however it does not raise the issue of re-employment and pre-employment checks which as I am now in my 40th year I think you should know my character traits by now, and it is interesting to know that other staff members have not had to go through this process in the same circumstances, to be clear on what I am applying for I wish to return as a Paramedic Team Leader for 24 hours per week which I would prefer to be on weekend nights if possible. I am currently GMB Branch Secretary and as such receive full time release, as you know each union has so many hours release per week based on membership numbers. The GMB/AGM is tomorrow and it will be for the branches democratic process to decide who gets that facility time at that meeting". The claimant on 24 June confirmed that he had been re-elected.

13. On 13<sup>th</sup> July Mr Kitchin wrote to the claimant again. The letter thanked him for clarifying he wanted to return as a Band 6 AOM manager although there was nothing confirming that in the bundle, which we found, coupled with the late reply to the claimant, unusual. He went on "in your email you have queried why pre-employment checks will need to be completed and I am seeking to clarify this in the letter so that you can fully understand the implications of your request, the request is not a flexible working request as you suggest because you are not seeking to change to change or vary your existing employment contract, what you are requesting to do is terminate your existing contract by reason of resignation/retirement and to be re-employed on a new employment contract. Just to be clear this will mean that your will lose your continuity of service but you will of course retain recognition of reckonable service under the agenda for change. The decision on the part of the Trust to offer a new employment contract is discretionary .... the Trust is required to comply with the NHS employment check standards and as a result it is necessary under our policies, national guidance and CQC registration for full employment checks to be completed prior to re-employment as advised in my previous correspondence. Your request is to be considered for re-employment in the role of AOM, I have considered this request but you will be aware that we are just about to commence consultation on a restructure of the Band 6 roles within the Emergency Service. This proposal includes the plan to reduce the numbers of AOM positions in the structure, given this position I cannot offer re-employment into an AOM position as it may have a detrimental impact on existing employees and their opportunities to remain in the role. I can however offer you re-employment to the post of a Band 5 Paramedic".

14. On 13 July a further report went to the Executive Management Team on the restructuring. The paper of 13 July revised the staffing ratios increasing the proposed number of AOM's from 48 to 78 which would mean the Senior Paramedics having 15 to 1 ratio compared to 12 to 1 ratio as proposed in the original paper. It was also noted in that paper at 3.13 "for those who opt to move into an SP role they will be required to undertake the Band 6 Clinical Assessment currently used by the Trust, the reason for this is to ascertain what the potential developments needs are from a clinical perspective and rank them on that basis. Unlike the current

assessment for appointments it will not be used as a pass/fail scenario". There was discussion about the need for further training due to AOM's not operating as Senior Paramedics in their operational role but as Band 5 "ordinary Paramedics".

15. It was identified that insufficient AOM's would volunteer to move into the Senior Paramedic roles and that an agreed position on how to manage this was required. The options were:-

(1) Leave all current AOM's who do not want to move in post and manage through turnover. This will increase the ratios outlined above on the observational shift as outlined above. Worst case scenario is that there are too few SP's to make the model work.

(2) Given that the AOM establishment is reducing, resulting in "work of a particular kind reducing or diminishing in a particular location" the Trust would deem the SP role as suitable alternative employment under the Employment Rights Act 1996 and move staff on this basis. The outcome likely to be of this result in employee relations issues.

(3) move the affected staff into Band 5 Paramedic positions on protection and recruit the vacant SP roles, until the results of the consultation and preference exercise it is difficult to put any costing to this scenario however it is a likely question arising from the consultation exercise.

(4) write to the AOM's with a revised JD to advise them that the Trust will be reducing the AOM establishment and informing them that they will be required to undertake an informal assessment process and the Trust will advise who has been selected to move into an SP role. This ensures that all posts are filled, the Trust position is that the SP is a suitable alternative and therefore no redundancy applies. The outcome may result in a lack of engagement and ownership in the process as staff may feel that these changes are being enforced without their choice.

16. Mr Kitchin met with the claimant on 18 July and confirmed the outcome in the letter of 21 July. This recorded at the meeting "you disputed that you are currently substantively employed in a AOM role or that you have been afforded the opportunity to express a preference when the original restructure of the supervisory positions was undertaken in 2011. We have been back through the records and we are satisfied that process was followed at the time and you were offered the choice between an Assistant Operations Manager and a Senior Paramedic role. It would appear that you did not respond formally in writing to that offer but I have attached a copy of the letter sent to you by your Sector Manager which records that you verbally indicated your preference and this was confirmed back to you in writing. It is the case that the role was referred to in correspondence as Team Leader but it clearly differentiates the position from a Senior Paramedic role so it is clear that you are substantively appointed in the role which is now entitled Assistant Operations Manager. It is also the case which you referred to in the meeting that you discussed and agreed in the light of your release from operational duties for a period of time to undertake trade union duties that you would relinquish your line while holding still a

substantive position for an AOM in the North Sector". (of course the respondent now agree the claimant was not offered the choice when everyone else was)

17. He then went on to confirm that everyone was subject to the pre-employment checks. He explained them in making an offer of re-employment the Trust had to consider whether there was a suitable vacancy available to be offered in the location requested and he was aware that the respondent had been working in partnership with the trade unions for a number of months to review the Band 6 positions and the proposal had been developed which altered the two roles and sought to reduce the establishment of AOM's from 138 to 78. There were currently 130 staff holding substantive AOM positions and the claimant was one of them. He said that although consultation had not started the intention was clear and in these circumstances it would be inappropriate of the Trust to employ someone into an AOM position when they were seeking to reduce the roles in the organisation. It would also be a potential detriment to other staff in that role. In these circumstances he said the respondents could not offer the claimant re-employment into this role and he went on to offer the claimant the Band 5 Paramedic position. He acknowledged that the claimant "also raised concerns regarding clarity with other staff who had been re-employed citing a number of managers who had returned to their previous position following retirement on reduced hours. There are certainly a range of examples of this but the post they requested to return to were not subject to a restructuring and this is the sole reason for the decision not to offer you a position as AOM". He acknowledged that he had raised an allegation that the decision not to offer him the AOM position was on the grounds of his trade union activities and he said this was strongly refuted, the rationale for decisions was an objective one as set out above.

18. It was noted that the claimant had raised the situation with another trade union representative who also had had to return to a Band 5 position following retirement, Mr Kitchin suggested that in that situation the request had been made by the individual to return on the lower band. In respect of this example the claimant was referring to Dave Robb, a UNISON official who had also been a Band 6 but had to return on a Band 5. We were provided with the management statement of case for a grievance that Mr Robb brought on 1 December. He had retired and returned in 2013 and therefore this was three years after the event. In the management statement of case it was recorded that he felt singled out and discriminated against due to his trade union activities and he also pointed out that managers had been afforded the opportunity to return to their management posts although no specific names were mentioned. IT was acknowledged that there was "a lack of a robust paper trail", but Mr Kitchin stated that it was recommended that he could be re-employed on a Band 5 position and it appears to be that the reason for this was "at the time of his request in 2013 it was clear that no AOM positions were of a part time nature due to service needs". The statement of case goes on to say "in relation to other managers who had been allowed to return to their substantive posts on reduced hours the grievance does not specifically name any individuals and therefore it is not possible to provide any explanation of those particular cases however there have been managers in C and M who have retired and been re-employed on a job share basis meaning that the full time hours of the post are covered.

19. The claimant gave evidence to us that although initially he thought the grievance was unsuccessful he understood now from Mr Robb that he had withdrawn the grievance because he had reached an amicable settlement of it with the respondent.

20. On 26 July the claimant agreed to take up the conditional offer of the Band 5 role under protest whilst his appeal was ongoing and the letter was notice of the appeal. He stated the reasons for the appeal were as follows:-

(1) length of time to hear the original application that was submitted on 7 March 2016;

(2) the application was to return to my current role which has been denied by yourself due to the proposed reduction in AOM's. I was never given the choice nor the required notice that my title, job description and contract had been changed to that of an AOM. Your actions are again denying me the choice that will be afforded to all other staff during this proposed restructure.

(3) you also appear to be denying me the choice of an SP role because I am now current in my clinical practice, that is because I am released full time under the partnership agreement to carry out trade union duties, and as such have been excluded for any and all clinical development. I think in the ten years the Trust has been in existence I have had one KSF which was with John Warren as the AP assigned to carry out this task thought it was unfair on him and refused.

(4) you also appear to be saying I would not be competent enough to attain the B.Sc that is now the requirement. I find this insulting particularly when you refer to the need to have mentoring skills which I attained my first mentoring qualification in 1994 being the first within the service at that time.

(5) I was also instrumental in the development of ECP's with the MRAS as Treat and Refer Project Manager facilitating, delivering training to staff, many of whom are now AP's. If you would have bothered to check my P file you will have noticed this along with letters of thanks from the previous CEO and other visitors to the Trust from the Department of Health.

(6) You are right when you say there are a number of managers that have retired and returned to their current roles, some on reduced hours and some just returning to their substantive full time position. It seems that all applications are not considered fairly and reasonably as the procedure states as it should.

(7) Finally I believe that your actions in refusing my request have caused me to suffer a detriment due to my trade union duties.

21. The fourth report to the EMT of 10 August stated that at 3.4 that while the trade unions have been engaged in the re-design of the Band 6 workforce there remain concerns regarding their understanding of what they believe is an organisational restructure and therefore protection should be offered to those who do

not wish to move across to an SP role. It was now suggested that there would be a one role model, i.e. there would just be a Senior Paramedic role. It was noted that B.S.c's (i.e. an Undergraduate Degree) would be needed by all members of staff in the merged role" and it was stated at 3.13 "in order to achieve this we will need to provide a development framework for our SP's to acquire the necessary competencies, a number of AOM's already have the appropriate academic qualification to fulfil the role of SP and those that don't will be developed over the next five years, in the meantime those AOM's will be provided with the appropriate support and development through their nominated Advance Practitioner". The title of the new role was Senior Paramedic/Team Leader.

22. The claimant's new role was confirmed on 30 September, at a point at the top of the scale for Band 5 and would be eligible for an unsocial hours payment. The claimant's grievance hearing took place on 17 October with Mr Forrest, Director of Organisational Development and Jed Blezzard, Director of Operations with HR Manager Rebecca Powell and Rebecca Williams. On the management side was Dave Kitchin, Interim Deputy Director of Operations and Lisa Ward Deputy Director of Organisational Development. The claimant attended with Michael Buoey from the GMB.

23. The claimant opened by saying that Dave Kitchin had said that he could return to a Band 6 role and was later told that he could not and would have to return as a B5 Paramedic. He felt time was running out as he had to retire at the end of August, he had applied under the flexible working procedure and therefore he was applying the time scales within that. He had been told that he was an AOM but that had never actually happened. He had never received a letter offering him the option of SP or AOM. He was declined the Senior Paramedic role as he hadn't had any clinical development due to his union duties. He said he felt like managers who want to retire and return did not have this problem. He said "I have been jumping through hoops with OH and Registration for the role I have been doing for twenty plus years and I feel it is because of the union duties".

24. Mr Kitchin clarified that the claimant was not denied the role of SP as he was not competent enough. He wanted to clarify that he had never said that the claimant did not have the capability. The claimant said that Mr Kitchin said that the SP role required commitment to undertake a B.Sc in Paramedic Practice and that the claimant would not be able to undertake the modules as he did not have recent up to date clinical practice therefore he could not offer him that position. It was also discussed that two other union reps had continued with some clinical practice and the claimant could have done that. Lisa Ward confirmed that all the modules required some kind of practical experience and there needed to be some responsibility for your own development. They then moved on to the AOM question. Ms Ward stated that the claimant's contract was terminated, there was a new recruit and they do not have any suitable vacancies to offer, with the restructure it was not certain if there would be a vacancy. Mr Rice pointed out that the role he vacated then became available and that managers retired and returned to their roles without any problems.

25. She said "in the context of the restructure how could we be certain that offering you an AOM post would not be detrimental to current employees". He said it



was no different from when managers retired. He said he was suggesting that managers did not go through the same process and gave the example of a manager whose job description required that the post holder be a registered Paramedic but the manager was not actually on the register but this seemed to be acceptable as they were a manager not a trade union representative. Lisa Ward then went back to the fact that AOM's were subject to a restructure. Mr Blezzard also agreed he would investigate the examples given by the claimant in respect of managers who had been allowed to return to their previous band and although the minutes did not record that the names of these two managers were given we accepted the claimant's evidence that they were, as it is improbable that Mr Blezzard would consider investigating without their names.. However there was no evidence that Mr Blezzard completed any investigation and indeed Mr Forrest did not see the need to as he thought the issues were clear. In cross examination Mr Forrest also said he believed it would take three to five years for the claimant to complete the B.Sc however we had no evidence about whether any reduction in studying time was available as a result of a past experience or qualifications and of course there was always the possibility that an AOM who was by then 56 would not have sufficient time to complete the BSc. In any event it was described as 'working towards a B.Sc.' rather than completing it. Further in evidence Mr Forrest said that he could not see how he could overturn Mr Kitchin's decision and he did not see the need for any investigation

26. There were questions about what training the claimant had received. Mr Kitchin confirmed that the claimant was not offered a B6 role due to the restructure, in respect of other trade union representatives the individual the claimant referred to had requested a downgrade from his B6 role, although he produced no evidence of that either at the time or at tribunal. He was asked whether he compared any managers when he was making the decision, Ms Ward said that that was irrelevant. Mr Buoy stated that they were segregating trade union representatives. Mr Buoy said in the statement of case you said after consideration the claimant was unable to obtain the role as he could not complete the required study but what support did you offer?. Ms Ward simply said that Mr Rice did not meet the criteria for the role. She said you could argue that we could consider him for any post with support, Mr Rice has not practised clinically for a long time and he does not meet the criteria for the role. The claimant said he could have worked at Walk In Centres or A and E but he was never asked about his suitability for any roles.

27. With reference to the "retire and return" guidance there was a reference to the post of Operations Manager but Lisa Ward said they did not have the job description with them, this was a referral to an issue the claimant had raised, the issue of managers in this role being required to have a Paramedic registration but not having that and still being re-appointed to the role after retirement. Lisa Ward gave the example of the manager whose request was denied however that manager that she referred to was requesting to work full time which was not allowed under the retire and return rules anyway. We find it disingenuous of Ms Ward to put that example forward.

28. The claimant said he felt he had been treated appallingly after forty years service and that the Trust were looking for loopholes in relation to his job title. He feels he has suffered an injustice and Mr Boyd pointed out that they believed amongst other things that he was being discriminated against as a trade union

employee. Mr Kitchin said that the decision reached was that was because SR had voluntarily terminated his employment he was welcomed back to the Trust but following the guidance there had to be a suitable role, he was unsuitable for SP due to his lack of clinical practice and therefore they could not offer him that role. The meeting was then adjourned for the panel to consider their decision.

29. In this management statement of case Mr Kitchin did acknowledge that changes had been made since the decision was originally made mainly that the current proposals were to merge the roles of Senior Paramedic and AOM, and existing AOM's would be required to complete a B.Sc to support their transition into the new role. He didn't believe that made any difference to the rationale which was:-

- (i) Band 6 restructuring still makes it inappropriate to offer a post to a new entrant which may adversely impact on existing post holders;
- (ii) The criteria for consideration of the new Senior Paramedic role remains that individuals have current clinical practice and that they are able to commit to the completion of the BSC.
- (iii) By terminating his employment Steve is no longer assessed as an existing post holder and has to be considered for appointment alongside the criteria for the role.

30. However the original rationale had suggested that as there would be a reduction in the number of AOMs the claimant being included in their number would be affect the chances of existing AOMs retaining their role. Clearly that was no longer an issue.

31. On 21 October the claimant received the outcome of his Stage 3 grievance appeal. Mr Forrest's letter stated that the panel agreed to the following conclusion:

"(1) the panel takes the view that although you submitted your request to retire and return to Band 6 position on a flexible working application form it was correct not to process it under the flexible working policy, you had announced your intention to retire from the Trust and obtain your pension and as such your request was one of re-employment, therefore whilst it is agreed that your application could have been considered in a more timely manner the process was not subject to statutory time scales.

(2) your former Team Leader role does not exist in title and from the documentation available the panel agree that it is reasonable to associate your former role with that of the AOM position, as the AOM position is currently the subject of restructuring exercise the panel support the management view that it would be appropriate to offer re-employment to that position therefore the exercise has been concluded as all existing post holders must first be considered.

(3) by your own admission you do not have the current clinical practice that would enable you to meet the essential criteria of the new SP role, we heard that your mitigation for this is associated with your trade union duties

however the panel are satisfied that there are opportunities available within the Trust to support trade union representatives, maintain develop clinical practice and there is personal responsibility to participate with this. The Trust would not offer this Band 6 role to someone who has been out of practice for the length of time that you have not practised. It is the view of the panel that the Trust has not caused you financial detriment, you resigned from the Trust in order to obtain your pension and apply to be re-employed, as an offer to re-employ you as a Band 5 Paramedic was made to you and you have accepted this position.

32. On 9 February 2017 a letter was sent round to relevant staff and in this relevant staff were advised that if they did not wish to take up a Senior Paramedic post they had the option of moving into a Paramedic role at Band 6. In addition Mr Forrest gave evidence that at around the time of the August proposal it was clear that it was likely that the respondents would offer pay protection to any AOM who did not want to take up a Senior Paramedic role, and they would be appointed to an ostensibly Band 5 Paramedic role but their pay would be protected, it appears this would be at least five years but possibly permanently. Band 5 Paramedics were re-branded to Band 6 after a job evaluation in January 2017 in any event.

33. In addition we looked at the rules on flexible working requests and they did not unequivocally rule out the possibility of applying in a retirement situation.

### The Law

34. The claimant brings his claim under 146, this states that:-

(1) a worker has the right not to be subject to any detriment as any individual by any act or any deliberate failure to act by his employer if the act or failure to act takes place for the sole or main purpose of ...

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

(b(a) preventing or deterring him from making use of trade union services at an appropriate time or penalising him for doing so.

35. Under Section 148 it says consideration of complaint:

(1) on a complaint under Section 146 it shall be for the employer to show that the sole or main purpose for which he acted or failed to act.

36. In **Gallagher -v- Department of Transport Court of Appeal 1994** it was established that it is important to distinguish between the purpose of the employer's action and its effect. In Gallagher the claimant failed to get a promotion because the panel was not confident that he had improved his management style, he had been manager before he had become a full time trade union official and therefore the only way in which he could acquire further management experience and establish an

improvement was by relinquishing some or all of his trade union duties, he therefore brought a case on that basis but the Court of Appeal stated that the focus is on the employers purpose, in other words the object the employer desires or seeks to achieve and that was not to stop him operating as a trade union official but to ensure the candidates for the role were properly qualified. In **Dahou -v- Serco Limited 2017 Court of Appeal** the fact that a Decision Maker may be pleased about the outcome is insufficient if the main purpose was unrelated to the claimant's trade union activities such as a lack of merit in a grievance.

37. Section 148 places the burden of proving an admissible reason on the employer but it is not a statutory reversal of the burden of proof such as in discrimination cases. In **Dahou -v- Serco Limited** it was said to be cast in terms which are more akin to whistle blowing claims and that although a decision to reject the employer's reasons did not absolutely lead to a conclusion that the reason was as asserted by the employee "usually no doubt it will". Further in **Kuzul -v- Roche Products Limited CA ( 2008)** the Court of Appeal stated this means if an employer fails to show an instant ground or purpose the Tribunal may draw an inference on liability in favour of the claimant but it is not legally bound to do so.

### Conclusions

38. We find that the failure of the grievance appeal to allow the claimant to return following retirement on a Band 6 was a detriment to the claimant because of his trade union activities. The Tribunal does not accept the reasons put forward by the respondent for the rejection of the request to return on a Band 6 at the appeal.

39. We reject the respondent's reason that the claimant's grievance to be returned on a Band 6 was because of an ongoing re-organisation for the following reasons:-

- (1) The respondent failed to properly investigate the case the claimant put forward, in particular Jed Blezzard had said he would investigate the two managers the claimant had cited but he failed to do so.
- (2) That once the reduction in AOM's was abandoned for the merged post there was no detriment to any other employee at that level if the respondent had provided the claimant with an AOM post particularly as it would have been a part time post.
- (3) That ex AOM's were required under the new system to work towards a B.S.c, some of them would have been unable to complete it in the time depending on their proximity to retirement themselves but this would not have been a barrier for them continuing in the new post.
- (4) That the respondents were undertaking a gap assessment of all the AOM's with a view to identifying what skills they needed to update in order to perform the new role and they could have done that in respect of the claimant.

(5) The claimant was never asked if he was willing to undertake some operational shifts in order to qualify for new posts.

(6) That the respondents made no effort to consider how the claimant could achieve the new Band 6 post role.

(7) That the claimant had been promised a Band 6 role by Mr McGowen when he relinquished his establishment post and by Mr Kitchin that was completely discounted in the grievance process but the claimant had made arrangements on the basis of those promises.

(8) That there was no evidence of managers being required to return on a demoted role under the retire and return policy whereas there was evidence that the two trade union officers had been required to and although Mr Kitchin asserted that the other trade union example was someone who wished to stand down there was absolutely no evidence of that and the management case in respect of Mr Robb did not evidence that at all. Further, that Mr Kitchin had accepted in deciding his grievance that there was evidence that managers did return to their normal roles.

(9) That Operations Manager (a management grade) were allowed to continue in their role despite not maintaining their Paramedic registration as required by the role, therefore there was evidence the respondents were willing to bend the rules in relation to other management employees.

(10) That it was known that AOMs who could not immediately meet the requirements of the new merged post would be put on a protected salary. Mr Forrest said indefinitely yet that was never offered to the claimant.

(11) Ultimately there was no cogent reason why the claimant could not be offered a AOM post then treated the same as the AOMs in the reorganisation which at the stage of the appeal was in its early stages.

(12) That the claimant's experience was good enough to be promoted temporarily and to assist in drafting standards for Paramedics operational duties.

(13) The misleading example given by the Ms Ward to head off a comparison with managers and the impression of hostility from her from the appeal minutes.

(14) The fact the claimant was not sent the election letter for AOM./SP in 2011 points to differential treatment because he was a Trade Union officer

(15) Mr Kitchin's eagerness to assume the claimant had agreed he was an AOM and his inordinate delay in June/July in responding to the claimants email.

40. In rejecting the respondents reasons we find that his trade union activities could be the only plausible explanation for his treatment.

41. We have taken into consideration the following. We did not hear from Lisa Ward and we find that her conduct and attitude at the appeal was hostile to the claimant, in particular she put forward a misleading comparison. We could not question her on whether she was motivated by any antipathy to trade unions. We did not hear from Mr Kitchin so he could not be questioned about his delay in June/July and the AOM assumption as to whether this was deliberate or not – for example to put pressure on the claimant to accept the offer of a band 5 before his retirement in August and because for the contents of the review to be relevant to rejecting the claimant's request it had to be established his position was that of a AOM.

42. As some of the reasons for rejecting the respondent's explanation are tainted or linked to the claimant's trade union status and the only two individuals who had their requests rejected were trade representatives we find that is sufficient to make a finding the reason was his trade union activities and we have not supplied a different reason, particularly as none has been suggested or occurs to us, or was tested in cross examination at the hearing.

#### Trade Union Services

43. We find that the claimant's claim does not come within the definition of services under Section 146(1)(b)(a) as he was the provider of services rather than being penalised for availing himself of services and accordingly that claim is dismissed.

Employment Judge Feeney

15<sup>th</sup> February 2018