Appeal No. UKEAT/0152/18/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 30 January 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

NORTH WEST AMBULANCE SERVICE NHS TRUST — APPELLANT

MR S RICE — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SEAMUS SWEENEY (of Counsel) Instructed by: Hempsons Solicitors 16th Floor City Tower Piccadilly Plaza Manchester M1 4BT
For the Respondent	MR PAUL GILROY (One of Her Majesty's Counsel) Instructed by: Simpsons Solicitors 3rd Floor Thorne House 36 Station Road Cheadle Hulme Cheshire SK8 7AB

SUMMARY

TRADE UNION MEMBERSHIP

The Respondent below appealed against the Judgment of the Employment Tribunal ("ET") upholding the Claimant's claim that he was subjected to a detriment for the sole or main purpose of penalising him for his trade union activities contrary to section 146(1)(b) of the **Trade Union and Labour Relations (Consolidation) Act 1992**.

The appeal was upheld. The ET had erred in its application of section 146 in that it did not set out the correct test of "sole or main purpose", and its analysis did not focus on the factors operating on the minds of the relevant decision-makers; instead it based much of its analysis on the acts and omissions of others. Furthermore, several of the key findings of fact relied upon by the ET were unsupported by the evidence and/or were based on irrelevant considerations. For these reasons, it was concluded that the ET reached a decision as to the motivation of the Respondent that was not supported by its own findings of fact.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. I shall refer to the parties as Claimant and Respondent as they were below. The Respondent appeals against the Decision of the Manchester Employment Tribunal upholding the Claimant's claim that a grievance he had lodged had been rejected for the purposes of penalising him for his trade union activities.

Factual Background

2. The background to this matter is as follows. The Respondent is an NHS Trust providing ambulance services in the North West. The Claimant has worked for the Respondent since 1976. For a number of years he has held a full-time role as a trade union official. As such, he does not engage in clinical practice.

3. The Respondent operates a policy, referred to here as a "retire and return" policy, which, as the name would suggest, provides retiring employees with the opportunity to be considered for re-employment whilst retaining their pension. The policy does not afford any automatic right to retire and obtain re-employment, but is based on the needs of the service at the time.

4. On 6 March 2016, the Claimant submitted a "retire and return" application. He did so in the form of a flexible working request and asked to return after retirement to a Band 6 Team Leader post. There was a verbal discussion between the Claimant and a Mr Kitchin, the Deputy Director of Operations, during which Mr Kitchin said that the Claimant could return to a Band 6 post.

5. Sometime later on 31 May 2016, Mr Kitchin wrote to the Claimant stating that it was clear that his request was not a flexible working request, but a request to terminate his current employment due to retirement and to be re-employed on a part-time basis at the same band.

6. On 15 June 2016, the Claimant requested that he be permitted to retire from his then role of Team Leader and to be reappointed to the same role for 24 hours a week; that is to say on a part-time basis. Although the Claimant refers to his role as that of Team Leader, it does not appear to be in dispute, and the Tribunal so found, that in fact the Claimant's title as from 2011 onwards was that of Assistant Operations Manager ("AOM").

7. Mr Kitchin wrote to the Claimant on 13 July 2016, making it clear that any decision to offer a new employment contract would be discretionary and that the Trust would be required to comply with the usual NHS employment check standards prior to re-employment. He further mentioned that the Respondent was just about to commence consultation on a restructure of the Band 6 roles within the emergency service. He noted that the proposal includes a plan to reduce the numbers of AOM positions in the structure and that, given that proposal, he could not 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. Mr Kitchin did go on, however, to offer the Claimant re-employment to the post of Band 5 Paramedic.

8. The restructure to which Mr Kitchin referred was a result of a review into the AOM role that had been ongoing since about July 2015. The Respondent considered that the structure as it was did not provide for appropriate supervision of Paramedics. The Respondent sought to reduce the number of AOM posts and increase the number of Senior Paramedic ("SP") posts.

9. The Respondent was in consultation with the relevant unions, including the GMB of which the Claimant was a member. The SP role required the post holder to have up to date clinical skills, and to be responsible for the clinical leadership and the clinical supervision of a group of staff. The AOM role, on the other hand, was one in which 10% of the monthly working cycle was allocated to operational administration work with the rest of the time being spent on clinical duties at the Band 5 Paramedic level.

10. Mr Kitchin's offer of a Band 5 Paramedic role was confirmed by letter dated 21 July 2016, following a meeting with the Claimant on 18 July in which Mr Kitchin said it would be inappropriate to employ someone into the AOM position when they were seeking to reduce the number of AOMs in the organisation. Mr Kitchin noted that the Claimant had raised concerns that other staff, in particular two managers, had been re-employed following retirement to their previous position and he considered that he was being treated differently because of his trade union activities. Mr Kitchin denied that the Claimant's trade union activities had anything to do with the offer of a Band 5 Paramedic position.

11. On 26 July 2016, the Claimant agreed to take up the offer of the Band 5 Paramedic role but did so under protest pending the outcome of his grievance against the Respondent's stance.

12. By 10 August 2016, the Respondent's thinking on the restructure had developed such that it was now suggested that there would be a single Senior Paramedic role in respect of which an undergraduate degree would be a necessary requirement. The title of the new role was Senior Paramedic/Team Leader, although the Tribunal referred to this as 'the merged post'.

13. The Claimant retired on 31 August 2016. He returned to employment on 1 October 2016 as a Band 5 Paramedic. He did so, as already mentioned, under protest.

14. The Claimant's grievance hearing took place on 17 October 2016. It was chaired by Mr Mike Forrest (Director of Organisational Development) and Mr Jed Blezzard (Director of Operations). Support was provided by HR Managers, Ms Powell and Ms Williams. The management side was represented by Mr Kitchin and Ms Ward (Deputy Director of Organisational Development). The Claimant attended the meeting accompanied by Mr Michael Buoey from the GMB.

15. Mr Forrest and Mr Blezzard's decision in respect of the grievance was set out in a letter dated 21 October 2016. The Claimant's grievance was not upheld. The Tribunal referred to the grievance decision as follows at paragraph 31 of its Reasons:

> **"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.""**

16. The Claimant lodged his claim with the Tribunal on 14 February 2017. At that stage, his claim was that Mr Kitchin had, in July 2016, subjected him to a detriment by reason of his trade union activities by refusing his request to return to work in a Band 6 post. At a Preliminary Hearing on 7 July 2017, before Employment Judge Holmes, the Claimant withdrew his claim in respect of Mr Kitchin's refusal to accede to this request. Instead, the Claimant sought and was granted permission to amend his complaint to add a claim that he was subjected to a detriment by the grievance panel dismissing his grievance on 21 October 2016. The issue for the Tribunal at the Full Hearing was therefore whether the Respondent's rejection of the Claimant's grievance was for the sole or main purpose of penalising the Claimant for taking part in trade union activities at an appropriate time.

The Tribunal's Decision

17. The Tribunal's conclusions are set out in paragraphs 38 to 42 of the Reasons:

> **"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 claimant[']s email.

40. In rejecting the respondent[']s 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 is [sic] 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."

Legal Framework

18. Section 146 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("the 1992 Act"), so far as relevant, provides:

> **"146. Detriment on grounds related to union membership or activities**
>
> **(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 -**
>
> **…**
>
> **(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, …"**

19. Section 148 of the **1992 Act** provides:

> **"148. Consideration of complaint**
>
> **(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.**
>
> **…"**

20. These provisions were considered by the Court of Appeal in the case of **Serco Ltd v Dahou** [2016] EWCA Civ 832, [2017] IRLR 81. In that case, Laws LJ held as follows in paragraphs 29, 30, 34 and 35 of that Judgment:

> **"29. It is plain that both the purpose of an employer's act or omission (sections 146 and 148) and the reason for dismissal of an employee (section 152) consist in the factors operating on the mind of the relevant decision-maker: see, for example, The Co-operative Group Ltd v Baddeley [2014] EWCA Civ 658, per Underhill LJ at paragraphs 41 and 42. Both under section 146 (see Yewdall) and section 152 (see Kuzel), it is for the employee to raise a prima facie case. In the dismissal case it is perhaps more accurate to say that it is for the employee to show 'only that there is an issue warranting investigation and capable of establishing the prohibited reason': Simler J (paragraph 52) referring to Maund v Penwith District Council [1984] IRLR 24.**
>
> **30. If the prima facie case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker. It follows, of course, that in such a case a critical element in the task of the employment tribunal consists in their reasoned**

> **assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors.**
>
> **…**
>
> **34. At paragraphs 68-70 Simler J addressed the additional factors identified at paragraph 1.5.1-1.5.3 of the employment tribunal decision. She had set these out at paragraph 54E, and again she pointed out the absence of necessary findings. She said this at paragraph 71:**
>
> > **'What was required was for the tribunal to determine what the main purpose was of each relevant decision-maker, as a matter of fact, on the basis of evidence and permissible inferences. It was not enough that the claimant was linked to the threatened strike; or that it was convenient to have him out of the way. It did not do this. For all these reasons, I am persuaded that the tribunal erred in law in its approach to the burden of proof. It was not entitled to conclude that the burden of proof had not been discharged by the respondent in this case, without first considering the explanations given by the respondent as identified in its own findings of fact. Nor was it entitled to proceed from that conclusion without more, to a conclusion that the respondent had an improper purpose.'**
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> **35. The reference to burden of proof is perhaps infelicitous, but the central point that the tribunal should have 'first consider[ed] the explanations given by the respondent' is at the heart of the case. Then at paragraph 82 Simler J said this:**
>
> **'In light of my conclusions on grounds 1-5 above, and given the tribunal's conclusion that for substantially the reasons given at paragraph 144-146 the respondent had failed to prove the reason or principal reason for the dismissal on which it relied, the tribunal's conclusion that the dismissal was automatically unfair cannot stand.'"**

21. It is clear from these passages that the well-established approach in other areas - such as discrimination and whistle-blowing - of considering the factors operating on the mind of the decision-maker, also applies to the application of the provisions relating to detriment on grounds related to trade union activities. It should be noted that whilst the title of section 146 uses the terminology of "grounds related to", the actual requirement is for the "sole or main purpose" of the impugned act or failure to act to be the penalisation of the Claimant for taking part in the activities of an independent trade union at an appropriate time. That is a far stricter requirement than the requirement that matters be on "grounds related to" trade union activities.

The Grounds of Appeal

22. Following a Preliminary Hearing before His Honour Judge Shanks, the Respondent was permitted to proceed on the basis of five grounds of appeal as amended. These are as follows:

(1) The Tribunal erred in its application of section 146(1)(b) in that it failed to consider whether the sole or the main purpose of the grievance decision-makers was to penalise the Claimant for taking part in the activities of a trade union at an appropriate time.

(2) The Tribunal erred in that it relied upon matters which were not pleaded, not set out in any witness statement, and not put to any of the Respondent's witnesses.

(3) The Tribunal reached a perverse conclusion in that no reasonable Tribunal could properly infer improper purpose based on the findings of fact that it made.

(4) The Tribunal erred in making certain findings which are unsupported by the evidence.

(5) The Tribunal failed to explain or give adequate reasons in relation to its findings about the treatment of another trade union representative, Mr Robb.

I shall deal with each ground in turn.

Ground 1 - misapplication of section 146

Submissions

23. Mr Sweeney, on behalf of the Respondent, submits that it is clear that the Tribunal applied the wrong test because the key question - that is, whether or not the Respondent's sole or main purpose was to penalise the Claimant for his trade union activities - is not set out anywhere in the Judgment. He further submits that, given the scope of the issue before the Tribunal, the starting point of its analysis ought to have been the reasons stated in the letter rejecting the grievance. However, the Tribunal, he says, failed to analyse critically the central matters relied upon in that letter in rejecting the grievance.

24. Mr Sweeney further submits that the two critical factors relied upon by the Respondent were those that operated on the mind of the relevant decision-makers and should therefore have been the focus of the Tribunal's analysis. Instead, he says, the Tribunal wrongly relied upon Mr Kitchin's acts or omissions and that of others such as Ms Ward and another manager, Mr McGowan, acting as far back as 2011, in assessing the purpose of the grievance panel in rejecting the grievance.

25. Mr Gilroy QC, for the Claimant, submits that the Tribunal did have in mind the correct question. He refers in particular to paragraph 38 of the Judgment. He further submits that it is wholly artificial to take an approach which involves focusing solely on the position of the decision-makers - Mr Forrest and Mr Blezzard - when it was clear that they had inherited the position as determined by Mr Kitchin.

26. In any event, submits Mr Gilroy, this is not the kind of case where it is necessary to concentrate on factors operating on the minds of particular individuals, and that a holistic approach based on all the factors in the case is just as valid. Furthermore, he submits that the Tribunal did consider Mr Forrest's and Mr Blezzard's reasons for rejecting the grievance and found that those reasons did not withstand scrutiny. This was, submits Mr Gilroy, a clear case of the employer failing to discharge the burden of showing that the sole or main purpose of his acts was not the Claimant's trade union activities.

Discussion

27. The proper application of section 146 requires, as confirmed by the Court of Appeal in **Serco Ltd v Dahou**, that the Claimant first makes out a *prima facie* case warranting an

explanation for its actions; see **Serco** at paragraph 26 citing **Kuzel v Roche Products Ltd** [2008] IRLR 530. There must be some evidence supporting the positive case.

28. Mr Sweeney did not submit that there was no *prima facie* case here. Indeed, it would have been difficult for him to do so given that the case below was not pursued on the basis that there was no *prima facie* case. Furthermore, the Claimant has for some time been a trade union official. He was, at around the time of this request, seeking and obtaining re-election, and had asserted that the only two people who had not been permitted to return to the same grade following retirement were trade union representatives. Although not expressly stated by the Tribunal, it seems to me that such matters would probably suffice to establish a *prima facie* case.

29. The Tribunal's task then moves to the consideration of the employer's reasons for acting as it did. This involves considering whether the employer's sole or main purpose in acting as it did was to penalise the Claimant for his trade union activities. It is significant, in my judgment, that that question is not set out in those terms anywhere in the Judgment, save for the section reciting the statutory provisions.

30. Whilst the failure to set out the question in terms does not of itself indicate a failure to apply the right question, there are at least three paragraphs of this Judgment which raise considerable doubt as to the correctness of the question which the Tribunal had in mind. The first is paragraph 1 of the Judgment. Here, the Tribunal summarises the Claimant's claim and notes that the Claimant believes that this was "connected with the fact that he was a full time union official". Albeit that that is a summary of the Claimant's claim, it is clear from the provisions of section 146(1)(b) that it is not enough for the act merely to be 'connected to' a link to a trade union activity in order for the claim to be made out; what is required is that the

employer's sole or main purpose in acting was for the prohibited reason. That imposes a considerably higher threshold than one which merely involves an act which is connected or linked to the Claimant's trade union activities.

31. The Tribunal makes a similar reference to the Respondent's explanation being "tainted or linked to the claimant's trade union status" in paragraph 42 of the Judgment. That would again appear to be an incorrect application of section 146. I note in passing, although this was not raised as a separate ground, that the Tribunal here refers to trade union 'status', whereas the section requires that there be penalisation for trade union 'activities'.

32. The third paragraph which causes concern is paragraph 38 where the Tribunal concludes that the failure of the grievance amounted to a detriment to the Claimant "because of his trade union activities". The term "because of" appears in the discrimination legislation. It is well-established that in cases of discrimination, the protected characteristic need not be the only, or even the main, reason for acting in order for the act to be unlawful. That is to be contrasted with the statutory provision in the present case where in order for the claim to be made out the prohibited reason must be the sole or main purpose for the employer acting as it did. I, therefore, do not accept Mr Gilroy's submission that the Tribunal has directed itself properly in relation to section 146.

33. In this case, the impugned act is that of dismissing the grievance raised by the Claimant and not the initial refusal by Mr Kitchin of the Claimant's request to return to a Band 6 role. That follows from the fact that at the Preliminary Hearing, the Claimant expressly withdrew the claim of detriment arising from Mr Kitchin's refusal. Mr Sweeney is correct, therefore, to say that the

A focus of the Tribunal's analysis - in terms of determining whether the sole or main purpose of the employer's impugned act was unlawful - must be on the grievance decision.

B 34. It is not in dispute that that decision was taken by Mr Forrest and Mr Blezzard. Accordingly, it is the factors operating on the minds of those individuals that must be given particular consideration. That is not to say, of course, that the acts or omissions of others are entirely irrelevant. The acts and omissions of others may provide relevant background but the C focus of the analysis must remain on the factors operating on the minds of the relevant decision-makers.

D 35. The Tribunal's analysis at paragraph 39 appears, however, to rely upon several factors which cannot be said to be relevant to Mr Forrest's or Mr Blezzard's motivation or purpose. Thus, for example, we see that at paragraph 39(7) the Tribunal refers to matters occurring in 2011 E and on the decision made by Mr Kitchin arising out of those matters. At paragraph 39(13) there is reference to the hostility of Ms Ward. At paragraph 39(15) there is, once again, reference to Mr Kitchin's eagerness to assume the Claimant had agreed he was an AOM, and his delay in responding to Claimant's correspondence. At paragraph 41 there is reference again to Ms Ward F and to Mr Kitchin, but none whatsoever to the actual decision-makers in this case.

36. Given these references, this court cannot be satisfied that the Tribunal's focus was and G remained on the decision-makers whose decision was relevant and the factors upon which those decision-makers relied. The Tribunal certainly does not seek to explain why, if it is the case, it concluded that the motivation of Mr Forrest and/or Mr Blezzard was affected by the acts and H omissions of those others referred to.

37. What were the factors relied on by the Respondent? These would appear to be very clearly set out in the decision letter dated 21 October 2016. The question is whether the Tribunal grappled with those reasons sufficiently in coming to its conclusion. This is fundamental to the Tribunal's analysis. If it is to be found that the sole or main purpose was to penalise the Claimant for his trade union activities, then the Tribunal would have to conclude not only that the Respondent had failed to establish its stated reasons were true, but also that the real reason operating on the decision-maker's mind was the desire to penalise.

38. I agree with Mr Sweeney's submission that the Tribunal's reasons here do not indicate that there was an adequate attempt to grapple with the employer's reasons, and nor is it clear why the Tribunal went on to reach the further conclusion as to detriment under section 146.

39. The first of the employer's reasons to be considered is that the AOM position was currently the subject of a restructuring exercise and that it would not be appropriate to offer re-employment to that position at that stage because of the effect that it would have on other employees affected by the restructure. The Tribunal's analysis of this reason is at paragraph 39(2) of the Reasons. There the Tribunal states that once the reduction in the AOMs was abandoned for the merged post, there was no detriment to any other employee at that level. It seems to me that there are at least two difficulties with that analysis. The first is that as at the date of Mr Kitchin's decision - which is the subject matter of the grievance - no decision had been taken to abandon the re-organisation of the AOM role in favour of a merged role. The Tribunal's Decision makes it clear that the change to the merged role came later and certainly not before 10 August 2016, when the merged role was suggested in the fourth report to the EMT: see paragraph 21. Given that chronology, there was no proper basis for rejecting this aspect of the reason given by Mr Forrest for rejecting the grievance.

40. The Tribunal did not reject the assertion that there was a restructuring, which at one stage proposed a reduction in the number of AOMs. As at the date of Mr Kitchin's decision, that would appear to be a valid reason for the refusal to accede to the Claimant's request to be re-employed in that role. It is right to note that the position had changed, or was in the process of being changed, by the time of the grievance decision. However, the restructuring had not ceased and was still ongoing. Insofar as it might be said that the Respondent's task on the grievance was not simply to consider the decision of Mr Kitchin, but to consider the Claimant's overall contention that he was not being treated fairly, there does not appear to me to be any real basis for simply rejecting the reasoning in the grievance decision letter.

41. The second main reason in the decision letter was that in relation to the merged role the Claimant did not possess current up to date clinical skills; that being an essential requirement for the role. The Tribunal did not find anywhere that this was not a legitimate or a proper requirement for the Respondent to impose. Instead, the Tribunal found at paragraph 39(3) that "ex AOM's were required under the new system to work towards the B.S.c qualification … but this would not have been a barrier for them continuing in the new post". This reasoning fails to grapple with the full import of the Respondent's reasons as set out in the grievance decision letter. That states that not only does the Claimant lack the current clinical practice that would enable him to meet the essential criteria of the new SP role, but also that the Trust would simply not offer this Band 6 role to someone who has been out of practice for the length of time that the Claimant had been out of practice. The Tribunal's analysis focuses only on the attainment of the BSc qualification and fails entirely to consider the further obstacle to the Claimant's re-employment as a SP, which is that his clinical skills were considerably out of date. I should note here that the undisputed evidence before the Tribunal was that the Claimant had not engaged in any clinical practice since 2006. Mr Gilroy suggests in his skeleton argument that the clinical skills requirement was not a

genuine requirement of the job. However, that is not something which was found by the Tribunal, and there would also appear to be no evidence to that effect.

42. It seems to me that for those reasons the Tribunal has erred in law in that it has failed sufficiently to grapple with the Respondent's reasons for acting as it did. The importance of properly assessing the employer's reasons in a case under section 146 and under section 152 (dismissal for trade union activities) cannot be overstated. The consequence of rejecting those reasons is the possibility of an inference being drawn that the sole or main reason was a prohibited one or that, in other words, the employer has sought to put a false reason to the employee and subsequently sought to rely upon that false reason before the Tribunal.

43. Even if the Tribunal had been correct to reject the Respondent's reasons for rejecting the grievance, it does not automatically follow that the Claimant's alleged reason for the treatment is correct. There would need to be some evidential basis for concluding that the factors operating on the decision-makers' minds involved penalising the Claimant for his trade union activities. However, it is clear from the Tribunal's analysis at paragraphs 40 and 41 that the only matters identified by the Tribunal as giving rise to trade union hostility or antipathy were in relation to the activities of Ms Ward and Mr Kitchin.

44. It is pertinent to note that the Tribunal stated that it was not able to question Ms Ward on whether she was motivated by any antipathy to trade unions, and nor could Mr Kitchin be questioned as to whether his actions were deliberate or not. By contrast, Mr Forrest did give evidence, but there is nothing to suggest that the Tribunal made any attempt to question him about whether he was motivated by any antipathy to trade unions; nor was there any finding that he was.

45. In the absence of such finding or anything that could give rise to an inference of such antipathy (and I note here that as a matter of context that there was no ongoing industrial strife) it seems to me that the Tribunal's conclusion (paragraph 40) that the "only plausible explanation" for the Claimant's treatment was his trade union activities is one without any proper evidential foundation.

46. Finally under this ground, at paragraph 42 the Tribunal states that "some of the reasons for rejecting the respondent's explanation are tainted or linked to the claimant's trade union status". The Tribunal has not sought to identify which of the 15 factors set out in paragraph 39 were so tainted or linked. Given the analysis in paragraph 41 as to Ms Ward's and Mr Kitchin's attitude and conduct, it might be inferred that it is the factors arising out of their conduct that were considered to be tainted. None of the factors with which Mr Forrest and Mr Blezzard might be said to have been associated have been shown to be similarly tainted. This further underlines, in my judgment, the Tribunal's failure to focus on the motivations and factors operating on the minds of the relevant decision-makers in this case.

47. Mr Gilroy submitted that an employer could have mixed motives for acting as it did and still be liable. He refers me to the decision of the EAT in **Kostal UK Ltd v Dunkley** [2018] ICR 768 where at paragraph 61 the EAT said as follows:

> **"61. There is an infinite spectrum of facts that might have to be considered in a section 145B case: at one end of the spectrum there may be cases where the employer has sought to change collective bargaining arrangements and then, without entering into collective negotiations or acting precipitately in the midst of such negotiations, and absent some pressing business aim, makes offers that would have the effect that all employment terms will be agreed directly if accepted. At the other end of the spectrum will be employers who have engaged in lengthy and meaningful collective consultation and reached an impasse before considering making direct offers; or who can demonstrate a strong history of operating collective bargaining arrangements with the union and/or have no wish to avoid entering into such arrangements when the offers are made; and there will be cases where employers can show genuine business reasons (unconnected with collective bargaining) for approaching workers directly outside the collective bargaining process. There may also be difficult cases in the middle where the employer has mixed aims or objectives it seeks to achieve, or the evidence is unclear. The question in each case is a question of fact and degree. As**

> **with other detriment cases, where an employer acts reasonably and rationally and has evidence of a genuine alternative purpose, tribunals are likely to be slower to infer an unlawful purpose than in cases where the employer acts unreasonably or irrationally or has no credible alternative purpose."**

48. It does not seem to me that this passage assists Mr Gilroy. The test remains one of sole or main purpose. That will of course involve a question of fact and degree, but that does not mean that it is sufficient that trade union activities form *a* reason for the employer's actions rather than amounting to the sole or main reason. For these reasons, ground 1 of the appeal is upheld.

Ground 2 - procedural irregularity and unfairness

Submissions

49. The Respondent's submission here is that the Tribunal reached certain conclusions which were not based on any evidence or which related to matters not put to the Respondent's witnesses. The legal basis for the submission is the case of **NHS Trust Development Authority v Saiger** [2018] ICR 297 in which His Honour Judge Hand QC said as follows in paragraphs 80, and 99 to 102 of that Judgment:

> **"80. An appeal lies to this tribunal on any question of law: see section 21(3) of the Employment Tribunals Act 1996. In the civil jurisdiction, by what is now CPR r 52.21(3)(b), an appeal can be allowed where the decision in question was "unjust because of a serious procedural or other irregularity in the proceedings in the lower court". There is no equivalent provision in any statute, rule or practice direction relating to this tribunal but, in my view, it cannot be doubted that a serious procedural irregularity will amount to an error of law and, thus, within this jurisdiction provide a basis for an appeal being entertained by this tribunal. I am also the view that in order for an appeal to succeed on the basis that there has been a serious procedural irregularity this tribunal must be able to conclude that it would be "unjust" to allow the decision of the employment tribunal to stand.**
>
> **…**
>
> **99. So it is the conduct of the tribunal (in the above scenario that conduct was a failure by the tribunal to indicate concern that the point had not been put) upon which the procedural irregularity rests and not on the conduct of the parties or the nature of their evidence. In *Secretary of State for Justice v Lown* [2016] IRLR 22 … the conduct of the tribunal was drawing an inference of bad faith on the part of the prison governor without that matter having been put to him and the opportunity to put it having been given or even required by the tribunal. All that said, it will not usually be a fair procedure for a tribunal to reach conclusions about a factual scenario if that factual scenario has not been put. If conclusions of dishonesty are to be reached, it will usually be unfair to reach them unless the person likely to be condemned has had an opportunity to deal with them. If a tribunal is minded to reach a conclusion that**

is purely inferential and such a conclusion is neither obvious nor has it been advertised in that form at any point in the proceedings, then the tribunal must give the parties an opportunity to address the matter.

100. Sometimes the error of the tribunal will be one of reaching a conclusion, which cannot be supported by, or is contradicted by, the evidence. This seems to me to be one way of characterising the underlying error in *Browne v Dunn* [1893] 6 R 67. The evidence of the neighbours not having been challenged, the jury had no evidence upon which they could have reached the conclusion they did. Alternatively, the error might be that of reaching a perverse conclusion; one can also look at *Browne v Dunn* in that way. Sometimes the error will be that of inadequate reasoning, which is the way Underhill LJ characterised the error in *Co-operative Group Ltd v Baddeley* [2014] EWCA Civ 658 at paragraphs 58 to 60 judgment. But these are all different species of errors of law. They might also be serious procedural irregularities but they are not only serious procedural irregularities.

101. Also it seems to me important to recognise that, in this jurisdiction at least, the so-called rule in *Browne v Dunn*, if it is a "rule" at all, is most naturally both a rule of evidence and a rule of professional conduct but, in so far, as it is a "rule of procedure", it is flexible and subject to exception. The fact that evidence has not been challenged specifically will not always preclude a tribunal from reaching a particular conclusion. This was recognised by Lord Morris in his speech over a century ago and, nowadays, as Latham LJ pointed out in *Deepak* [2002] EWCA Civ 1396, the evidential process is subject, in the civil jurisdiction, to control of the court imposed by CPR Part 32.1 and the combination of rules 41 and 45 of the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237) creates in the employment tribunal roughly equivalent powers of controlling the hearing.

102. I recognise that the editors of *Phipson on Evidence* suggest that the "rule" is not altered by the CPR. But it seems to me some recognition of the modern context is necessary. Lord Herschell LC may have believed it was better to have too much cross-examination rather than too little but we are now in an age where that kind of expansive luxury has to be avoided in the interest of fulfilling the overriding objective. When it is clear from the variety of written material that nowadays attends a civil trial or a hearing in the employment tribunal what the issues in a particular case are, it may not be necessary for each matter to be expressly put. Whether it would be erroneous for the tribunal to reach a particular conclusion in the absence of any particular matter being put will depend on the circumstances of the case. The extent to which there has been procedural unfairness is not necessarily a matter of simply scrutinising what actually was put. It will involve a consideration of all of the evidence, how the matter stood at the end of all of the evidence and what the parties and the tribunal should have recognised from that material was still in issue in the case. I do not accept that every failure to put every particular aspect of a case amounts to a serious procedural failure. The context may suggest that looked at overall it was perfectly fair, everybody knew where they were heading, what was at issue, what the case being put forward was and what the answer to it should be."

50. It is clear from that analysis that in relation to certain types of allegation, such as those involving bad faith or improper purpose, it may amount to a serious procedural irregularity if that allegation is not expressly put to a witness so as to be given an opportunity to respond. Mr Sweeney places reliance upon three matters under this ground.

51. The first is the conclusion at paragraph 25, which is that Mr Blezzard agreed to investigate examples given by the Claimant of managers who have retired and returned. Mr Sweeney submits that there is no reference to this in the minutes of the meeting or the Claimant's witness statement on the pleaded case. It appears that this assertion arose for the first time in the Claimant's oral evidence and was not put to Mr Forrest by either the Claimant or the Tribunal. However, names had been given by the Claimant's at the grievance hearing that Mr Blezzard had agreed to investigate.

52. The second matter is at paragraph 39(9). This states that there was evidence that the Respondent was willing to "bend the rules" in relation to other managers. Once again, this appears to be something that was asserted in oral evidence and was not put to the Respondent's witnesses.

53. The final matter is that contained in paragraph 41. This relates to the conclusion that Ms Ward appeared to the Tribunal to be hostile to the Claimant.

54. Mr Gilroy submits that each of those findings of fact was open to the Tribunal on the basis of the material placed before it. He also says that it was incorrect to suggest that these matters were not put to the Respondent's witnesses. He submits that Mr Forrest's unambiguous evidence was that he did not undertake any further investigation and that, given that there was no evidence presented to the Tribunal that Mr Blezzard undertook an investigation, it was entirely reasonable for the Tribunal to rely on those facts. Similarly, in relation to the allegation that there was evidence that the Respondent was willing to bend the rules in relation to other management employees, Mr Gilroy relies upon the fact that Mr Forrest was consistent in not knowing what had happened to other people subject to the "retire and return" policy. Finally, in relation to Ms

Ward's hostility, Mr Gilroy submits that the Respondent's challenge amounts to nothing more than an attempt to pray in aid its own failure to call a witness to support its case.

Discussion

55. In my judgment, Mr Gilroy's response does not adequately address the difficulties identified by Mr Sweeney. The Tribunal's clear conclusion at paragraphs 25 and 39(1) was that Mr Blezzard had agreed to investigate examples given by the Claimant of managers who had retired and returned, and that he had failed to do so. However, it is one thing to conclude that there was no investigation by the Respondent into the position of other managers, it is quite another to conclude, as this Tribunal did, that there was a failure to conduct such an investigation having agreed that one would be conducted. The latter conduct could denote a degree of culpability, or antipathy towards the Claimant, which the former does not.

56. I have not been taken to any material to suggest that there was any evidence that Mr Blezzard had agreed to conduct an investigation or to suggest that this was a matter put to the Respondent's witnesses. Similarly, I have not been taken to any evidence to suggest that the Respondent 'bent the rules' in relation to other managers.

57. As a matter of fairness, one can expect such an allegation to be put to the Respondent's witnesses and for them to have an opportunity to deal with it before the Tribunal proceeds to rely upon the allegation. That is not to say that the Tribunal is required to note down every allegation made by the Claimant and the Respondent's witnesses' responses thereto. However, where the Tribunal takes the express step of relying upon an allegation - and a serious one at that, given that it involves an allegation of bending the rules in relation to one group but not in respect of the

A Claimant - the parties are, it seems to me, entitled to expect that the evidential basis for the finding relied upon exists and is set out. That was not done in this case.

B 58. I take a different view, however, in relation to the conclusions expressed by the Tribunal as to Ms Ward's apparent hostility. It seems to me that the Tribunal could reach a conclusion on that matter based on the notes of the meeting. The absence of Ms Ward at the hearing means that there was no opportunity for the inference of hostility to be put to her. The Tribunal was entitled C to reach the conclusion that it did on that issue on the limited material before it.

59. That leads me to conclude that in respect of two of the three matters relied upon by the D Respondent, there was unfairness. Given the seriousness of the allegations underlying those matters, it does seem to me that this did reach the threshold of a serious procedural irregularity within the meaning of the **Saiger** case. The Tribunal' s conclusions in respect of those matters E contributed to its overall conclusion that trade union activities were the only plausible explanation for the Claimant's treatment. As such, it seems to me that the Tribunal has erred in law and ground 2 of the appeal is upheld to that extent.

F *Ground 3 - perversity*

Submissions

60. Under this ground Mr Sweeney submits that each of the sub-paragraphs in paragraph 39 G of the Reasons demonstrates that the Tribunal took into account irrelevant considerations and/or failed to take account of relevant ones. He submits that the inference of improper motive was not justified by those findings and that no reasonable Tribunal would have concluded that Mr H Forrest's sole or main purpose in rejecting the grievance was to penalise the Claimant for his trade union activities.

61. Mr Gilroy submits that the complaints made by the Respondent get nowhere near to crossing the high hurdle of a perversity appeal. He reminds me of the leading authorities in this area, including that of **Yeboah v Crofton** [2002] IRLR 634. Mr Gilroy further submitted that the sort of scrutiny to which Mr Sweeney subjected paragraph 39 of the Reasons is inappropriate and he did not consider it necessary to respond in the same level of detail. It was said that even if it could be said that the Tribunal's analysis of some of those factors was incorrect or unsatisfactory, one could not stand back from the decision overall and conclude that something certainly went wrong so as to declare it to be perverse.

Discussion

62. Some of the sub-paragraphs of paragraph 39 have been considered above. The deficiencies identified above in respect of those sub-paragraphs mean that the Tribunal's reliance upon the subject matter of each in reaching its overall conclusion was flawed. As to the remaining sub-paragraphs the position appears to me to be as follows. (In undertaking this analysis, I am conscious of the need not to subject the Tribunal's Decision to a fine tooth combed analysis or to a nit-picking approach. However, given that this paragraph of the Reasons sets out the main basis for the Tribunal's conclusion, it does not seem to me to be inappropriate in the circumstances of this case to consider those Reasons very carefully.)

- Paragraph 39(2) - There appears to be an inconsistency in this paragraph in that the Tribunal acknowledges that the AOM position had been replaced by the merged post and at the same time considers that the Claimant could be provided with the AOM post upon his return. The AOM post would not be available as the restructure progressed.
- Paragraph 39(3) - The rejection of the grievance is not based on any requirement to complete the BSc, as discussed above. It is based, at least in part, on the Claimant's outdated clinical skills.

- Paragraphs 39(4), (5) and (6) - I agree with Mr Sweeney's submission that the matters considered in these paragraphs are not relevant to Mr Forrest's or Mr Blezzard's motivation or purpose in rejecting the Claimant's grievance. None of them is relied upon as a factor in rejecting the Claimant's grievance.
- The Tribunal's finding at paragraph 39(5) that the Claimant was never asked if he was willing to undertake some operational shifts would appear to be a matter of limited or no relevance, given the undisputed evidence that the Claimant had no intention of undertaking any operational shifts.
- Paragraph 39(7) - It is difficult to see how Mr McGowan's promise in 2011 and Mr Kitchin's conduct arising out of that are relevant to Mr Forrest's and Mr Blezzard's rejection of the Claimant's grievance in October 2016. It is not in dispute that Mr Forrest joined the Trust in 2012.
- Paragraph 39(8) - Here, the Tribunal appears to consider that the treatment of another trade union officer was relevant. However, there are no findings of fact to establish the comparability of this officer. Mr Kitchin's evidence was that the other trade union officer example was that of an officer who had wanted to return at a lower grade. The Tribunal rejected Mr Kitchin's assertion because of the lack of evidence. However, there appears to be an equal lack of evidence to support the assertion that the demotion was involuntary. The trade union officer in question appears to be Mr Robb. His request and re-employment had occurred some three and a half years earlier following his retirement in 2013. There was no ongoing restructuring exercise at that time. The mere fact that Mr Kitchin had accepted that there was evidence that managers did return to their normal roles does not give rise to an inference that the treatment of the Claimant was, of necessity, because of his trade union activities.

- Paragraph 39(9) - Once again there were insufficient findings of fact for the Tribunal to be in a position to regard the treatment of this Operations Manager as being comparable.
- Paragraph 39(10) - This is yet another factor which is relied upon by the Tribunal which appears to have played no part whatsoever in Mr Forrest's or Mr Blezzard's decision. There is nothing to indicate that pay protection was part of the "retire and return" policy or that the Claimant had claimed that he was entitled to or should have received pay protection.
- Paragraph 39(11) - The conclusion here was that there was no cogent reason why the Claimant could not be offered an AOM post. The Tribunal appears to be basing this conclusion on the fact that the Respondent had by the time of the grievance abandoned the proposal to reduce the number of AOMs. However, if one considers the position at the time of Mr Kitchin's decision, which is what the grievance panel was considering, then of course the fact that AOMs were being reduced in number could provide a cogent basis for not redeploying somebody to one of those positions. The Tribunal does not address the cogency or otherwise of the Respondent's other reason for not re-employing the Claimant to the Band 6 role; namely the lack of up to date clinical skills. That reason could amount to a cogent reason for not the re-employing the Claimant. There is nothing in the Tribunal's Reasons indicating why it concluded that it was not.
- Paragraph 39(12) - The relevance of the Claimant's ability to assist in drafting standards is not explained.
- Paragraph 39(13) - The relevance of Ms Ward's position or the lack thereof is considered above.
- Paragraph 39(14) - This is a further reference to matters in 2011.
- Paragraph 39(15) - This is once again a reference to Mr Kitchin's position, which is considered above.

63. Based on the above, it would appear that the Tribunal in this case took into account a number of irrelevant considerations and, as mentioned above, failed to ensure that its focus remained on the decision-maker in question. This, it seems to me, is one of those rare cases where one can say that the conclusion, which must be that the Claimant was penalised for the sole or main reason that he was engaging in trade union activities, is one that simply cannot stand with the findings of fact made by the Tribunal, and it is possible to say that something has clearly gone wrong. For these reasons ground 3 is upheld.

Ground 4

64. This is a short point. Mr Sweeney submits that there are several findings that are not supported by evidence. The first is the finding at paragraph 6 of the Reasons. This provides that:

> **"The Claimant did not dispute this letter. What he did dispute was that he had ever received the letter asking him to choose between Paramedic and Team Leader posts. On checking, the Respondent agreed that for some reason he had not been sent this letter, which all of the Team Leaders had received, probably because he was by then in the full-time union role. Accordingly, the Claimant never made an election."**

65. The Respondent takes objection to that last two sentences of that paragraph. I was taken to the agreed notes of evidence which would appear to show that there is no basis for reaching the conclusion that the Respondent had agreed that for some reason the Claimant had not been sent this letter. Furthermore, the further inference drawn by the Tribunal that this was "probably because he was *by then* in a full-time union role" (emphasis added) is not supported by the evidence. The Claimant had been in a full-time union role since far earlier than the date of this letter, and the basis for that conclusion on the part of the Tribunal remains unexplained.

66. The second matter relied on is that in paragraph 16 of the Judgment, where once again the Tribunal refers to the Respondent agreeing that the Claimant was not offered a choice in respect of job titles, which other people had been. Having been taken to the agreed notes of evidence

and statements before the Tribunal, this does appear to be a further conclusion that was unsupported by the evidence. For those reasons ground 4 is also upheld.

Ground 5

67. This is a **Meek** Reasons challenge in respect of the Tribunal's conclusions relating to Mr Robb. In my judgment, it does not add to the overall thrust of the appeal and I reach no conclusions on it. In any case, I have already considered the position of Mr Robb in relation to ground 3 above.

Conclusion

68. For all those reasons this appeal is allowed in respect of grounds 1 through to 4.

Disposal

69. There is an issue as to whether the matter should be remitted to the same or to a freshly constituted Tribunal. This is clearly a case where it would not be appropriate for this Appeal Tribunal to substitute its decision in place of that of the Tribunal. There are findings of fact which need to be made before that can be undertaken. The question then is whether it should be remitted to a freshly constituted Tribunal.

70. I have had regard to the factors to be taken into account as set out in the well-known case of **Sinclair Riche & Temperley v Heard** [2004] IRLR 763. The factors which are relevant in deciding whether a case should be remitted back to the same Tribunal include: proportionality (whether sufficient money is at stake and the additional cost to both sides of a fresh hearing are factors relevant to proportionality), the passage of time (the matter should not be sent back to the same Tribunal if there is a real risk of it having forgotten about the case), bias or partiality (it will

not be appropriate to send the matter back to the same Tribunal where there is a question of bias or the risk of pre-judgment or partiality), totally flawed decision (it would normally not be appropriate to send the matter back to the Tribunal where the first hearing was wholly flawed or completely mishandled), second bite (the EAT should only send the matter back if it has confidence that, with guidance, the Tribunal would be prepared to look fully at further matters and thus be willing to come to a different conclusion), and Tribunal professionalism (in the absence of clear indicators to the contrary, it should be assumed that the Tribunal is capable of a professional approach to dealing with the matter on remission).

71. Whilst I have no doubt this Tribunal would be able to undertake the task - if remitted - with due professionalism, it does appear to me that the errors of law in this case were quite fundamental and also involved an approach to the question of motivation which was more based on presumption and assumption rather than the facts. It is one of those cases which can be said to be wholly flawed and there would be some concern about remitting to the same Tribunal for that reason. I do note that some of the other factors are either neutral or might favour the same Tribunal (including proportionality and the amount of money at stake, the passage of time and the absence of bias). However, for the reasons set out, this is, in my judgment, one of those cases where remission to a freshly constituted Tribunal is the proper course.