

**Reserved judgment**



**Claimant:** Mr M Richardson  
**Respondent:** Esso Petroleum Company Limited

**Heard at London South Employment Tribunal on 26-28 February & 1 March 2018**

**Before Employment Judge Baron**

**Lay Members:** Ms C Bonner & Mr G Mann

**Representation:**

**Claimant:** *Paul Livingston*  
**Respondent:** *Olivia-Faith Dobbie*

**JUDGMENT**

It is the judgment of the Tribunal that the claim be dismissed.

**REASONS**

*Introduction*

- 1 This is a claim by the Claimant in broad terms that he suffered detriments because of his having been involved in trade union activities. The details are set out with more precision below.
- 2 The Claimant gave evidence himself and did not call any other witnesses. We heard evidence on behalf of the Respondent from those individuals listed below. We set out their respective roles in connection with this claim below.  
Bala Aliyu  
Jo Dyer  
Greg Hall  
Patrick O'Reilly  
Rory Snell  
Simon Vaughan  
Alex Warren
- 3 We were provided with a bundle of documents and have taken into evidence those documents to which we were referred.

*The issues and the law*

- 4 The issues for determination by the Tribunal had helpfully been agreed between the parties and are as follows:

- I. Was the Claimant subjected to a detriment by any of the following alleged acts or failures to act by the Respondent for the purposes of s.146(1) TULRCA:
- a. Moving the Claimant to Day Work on 06 October 2016, which the Claimant alleges subjected him to a detriment for one or more of the following reasons:
    - i. The Claimant was not able to meet his family commitments for the reasons set out in paragraph 26(a)(i) of the Claimant's Grounds of Claim;
    - ii. The Claimant was not able to meet his trade union commitments for the reasons set out in paragraph 26(a)(ii) of the Claimant's Grounds of Claim;
    - iii. For the reasons set out in paragraph 26(a)(iii) of the Claimant's Grounds of Claim, the Claimant incurred financial detriments because:
      - 1. he was less able to work overtime,
      - 2. he was less able to carry out paid work as an Employment Tribunal panel member; and
      - 3. he had increased travel costs by not being able to lift share with his colleague, and/or
    - iv. The Claimant suffered stress and disruption for the reasons set out in paragraph 26(a)(iv) of the Claimant's Grounds of Claim;
  - b. Did the Respondent fail to follow the advice of Occupational Health, of 02 December 2016?
  - c. Giving the Claimant a "Below" performance grade for his interim appraisal for the period 01 July 2016 to 31 December 2016?
2. If the Tribunal finds that the Claimant was subjected to a detriment by any alleged act or failure to act, was the sole or main purpose of the Respondent's alleged act or failure to act to prevent or deter the Claimant from taking part in the activities of an independent trade union at an appropriate time, or penalise him for doing so, contrary to s.146(1)(b) TULRCA?

- 5 Section 146(1) of the Trade Union & Labour Relations (Consolidation) Act 1992 is as follows:

**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-

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, . . .
- (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

6 Thus the question before the Tribunal is whether the sole or main purpose of the employer's action was one or more of the referred to in the subparagraphs of that subsection.

7 There is a provision in section 148 concerning the burden of proof in such a claim.

**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.

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

8 This provision was considered by the Employment Appeal Tribunal in *Yewdall v. Secretary of State for Work & Pensions* (UKEAT/0071/05), and then in *Dahou v. Serco Ltd* both in the Employment Appeal Tribunal and the Court of Appeal.<sup>1</sup> The following is an extract from the judgment of Burton P in *Yewdall*:

23. We nevertheless find that, although clearly this is not necessarily a binding way for a tribunal to approach this statute, a very sensible way to do so would be to follow this structure which, in effect, follows the route of the Act as we see it to be:

(i) Have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus;

(ii) Have those acts or deliberate failures to act caused detriment to the employee?

We then interpose a cross-reference to s147 because it appears to us that this is a sensible time to do so:

(iii) Are those acts in time?

(iv) In relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises. We are satisfied that Mr Russell was right to concede - and, in any event, this is our judgment - that there must be establishment by a claimant at this stage of a *prima facie* case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146(1)(b).

24. This gives the same mechanism to sections 146 and 148 of TULR(C)A as is provided, for example, by section 63A of the **Sex Discrimination Act 1975**, where the onus of proof only passes to the employer after the establishment of a *prima facie* case of unfavourable treatment on discriminatory grounds by the employee which requires to be explained. Once it requires to be explained, then the burden passes to the employer. Plainly that, in our judgment, is correct in this case. Otherwise the employer will have the burden of giving some explanation in a case where it is not clear what it is he has to explain. It must be clear, and we agree with Mr Russell's concession and with Mr Powell's submission, that there is a case made out at the *prima facie* stage that the acts complained of, with the resultant detriment, were on the case for the claimant for the purpose of preventing or deterring or

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<sup>1</sup> [2015] IRLR 30 & [2017] IRLR 81 respectively

penalising in respect of trade union activities. Once that *prima facie* case is established, then the burden passes to the employer under s148.

- 9 In this case there is no issue as to time limits but we have included the reference for the sake of completeness.

*The facts*

- 10 This matter relates to part of the Respondent's refinery at Fawley near Southampton. We are grateful to the witnesses for seeking to avoid technicalities as far as possible, and we are at least reasonably confident that we have understood those matters insofar as is necessary for the purposes of this claim.
- 11 In 2007 Unite was recognised by the Respondent. The Claimant was a representative of the union from 1996 until the middle of 2010. He was the local shop steward and Branch Secretary in 2009 and 2010. He then ceased to undertake those roles. The Claimant became Branch Chair from January 2015, and he remains in that position. Mrs Dyer is a member of the union and had been Branch Secretary from 2007 until 2009 when she stood down for family reasons.
- 12 The Recognition Agreement provided to us dated 9 December 2016 contains in section 13 provisions allowing Unite representatives reasonable time off for the annual JNC review relating to pay, hours and holidays, and also meetings 'relating to consultation on Training, the Business Outlook and Pensions'. Further, a specified number of Facility Days were provided for the Branch Chairman and the Branch Secretary. A union official does, of course, have a statutory right to reasonable time off in order to carry out union duties.
- 13 The Claimant had been involved in representing union members at grievance and disciplinary hearings, and in the annual pay negotiations. He had been particularly involved in difficult negotiations relating to pay and TOIL in 2015. A summary produced by Mr Aliyu for the purposes of this hearing showed the Claimant as having had periods of paid time for union activities during 2015 and 2016 of 188 and 154 hours respectively. There was no evidence that the Claimant had ever been refused time off in order to carry out union duties.
- 14 The Claimant became employed by the Respondent as long ago as January 1992 as a Process Operator Trainee. He was initially employed in the Distillation & Lubes Business Team and in 2000 he successfully applied for a post as a Laboratory Technician. Although we were not provided with details it is common ground that there were some personal difficulties between the Claimant and some other members of staff in the laboratory.
- 15 The Claimant then transferred to the Offsites Business Team in February 2013 as a Process Operator or Process Technician. The Offsites Team consists of five shifts of ten operatives each. Those operatives have different functions. Of particular importance is that there must be a Panel Operator on duty at all times for each of the Black Oil and White Oil functions. The Claimant was allocated to D Shift. The Claimant and his

colleagues worked on the basis of two twelve hour day shifts, then a day off, then two twelve hour night shifts, and then four days off.

- 16 Each shift has a shift leader called a Process First Line Supervisor - 'PFLS'. The Claimant's PFLS was initially Mr Crouch (from whom we did not hear) and then Mr Hall from July 2014. The PFLSs report to Process Operating Supervisors – 'POS'. For the purposes of this claim the relevant POS was Mrs Dyer until the Spring of 2016 when Mr Snell took over. Mrs Dyer was the POS who had responsibility for personnel matters in the Offsites Team. The POSs reported to the Business Team Leader who was Mr Vaughan at all material times.
- 17 In addition to the five Shift Teams there was a Day Team, also of ten individuals. It is the Claimant's assignment to this Team which is one of the main issues in this case. The Respondent had agreed a document with the union(s) entitled 'Fawley Refinery Shift Rules'. The copy in the bundle was stated to have been updated in August 2016 but it was not suggested that it was materially different from any earlier version. It is a substantial document of 24 pages. In the Introduction it is stated that the 'rules are for the 5 shift system worked by the majority of the Process workforce on site.' Section 10 of the document states that the 'Business Team Leader will be responsible for appointing individuals to day positions.' It states that the normal appointment will be for 12 months. There are then provisions set out as to various practical matters. The only point which need concern us is that the working hours are 37.5 per week, typically from 06:30 to 14:45, Monday to Friday.
- 18 It had been a longstanding practice at the refinery, including the Offsites Team, to fill day roles by rotating technicians from their ordinary day/night shift roles onto day roles, usually on a 12 month basis, as recognised in the Shift Rules mentioned in the preceding paragraph. Sometimes individuals volunteered but such a move was generally not welcomed, at least initially, because of the disruption to lifestyle and a change of colleagues. Mrs Dyer had herself not wanted to move when requested to do so in the past, but she had then become used to it. In the Offsites Team two or three individuals a year were rotated onto the Day Shift.
- 19 When he transferred to the Offsites Team the Claimant was only qualified in one skill or technique, that of Gauger 1.<sup>2</sup> He was the only technician in all of the five shifts to have only one qualification. The Respondent expects that individuals will train to be qualified in at least two categories, referred to as 'Field Positions'. In order to progress to the level of Process Technician from Process Operator an individual has to be qualified in three Field Positions. Further qualifications were necessary to progress to being a Panel Operator. The fact that the Claimant only had one qualification caused a difficulty in training others because he could not be moved from the Gauger 1 role to another role in order to allow a trainee to be trained in the Gauger 1 role.

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<sup>2</sup> We heard some evidence as to whether that was in reality two categories, but we find for practical purposes it was one.

- 20 Mrs Dyer met those who reported to her on an approximately quarterly basis to discuss various matters, including in particular the resourcing of the various shifts. Mrs Dyer produced spreadsheets for each such meeting (referred to as 'Crew Make Up' sheets) showing who was allocated to each day/night shift, and to the Day Shift. Details of Shifts A-E were set out along the top of the sheet, and the Day Shift details were in the bottom left corner. The bottom right section of the document was left free for notes. Many of the details were redacted on the copies in the bundle, and so we were not able to make as much sense of the documents as might have been the case otherwise.
- 21 The first document provided to us was dated April 2014. The notes record, for example, that certain individuals whose names were redacted were retiring, others were to be trained as Panel Operators, an individual was due to join Shift A on 1 May, and so on. We mention those simply to give a flavour of the document, which was clearly a working document. More relevant to this claim is that there was the following entry: 'Richardson? Days?'. There was also a heading of actions outstanding from the meeting in January 2014, which all related to other members of staff moving to, or staying on, days.
- 22 There was a similar spreadsheet dated July 2014. That shows '????' against the P18 role on the Day Shift being the role which the Claimant ultimately filled. There is also a note that a '1C' technician was needed and the Claimant's name was suggested, followed by '(or days)'. The Claimant would have had to be trained at a material cost if he were to have undertaken the technician role.
- 23 The next document is somewhat confusing. It appears that there are two copies of the same document in the bundle at pages 247 and 248 and the correct date is September 2014, although dated August 2014. That also shows '????' against the P18 role on the Day Shift. There are also two notes relating to the Claimant, one apparently referring to the Claimant moving to the Day Shift, and the other one has question marks added. There is also a heading of 'Days volunteers' but the names were redacted.
- 24 At those meetings those reporting to Mrs Dyer put forward their own views, requests from members of their respective teams and so on. The decision as to what was to happen was that of Mrs Dyer, which was then formally approved by Mr Vaughan. He did not ordinarily involve himself in detailed discussions about the resourcing of shifts.
- 25 Mrs Dyer was initially confused in her evidence as to the relevance of the '????' entries. Although we cannot be certain of the exact dates we find that during 2014 and 2015 approximately Lee Haskell and then Mo Singh filled the P18 role on the Day Shift each on a 12 month basis, and that the question marks were to indicate that a decision had to be made as to the next occupant of the role.
- 26 The Respondent has an appraisal system based upon an appraisal year of 1 July to 30 June. There is also an interim appraisal for the period to 31 December in each year. An employee could be marked as 'exceeds', 'meets' or 'below'. We deal with earlier appraisals below, and start with an

interim appraisal stated to be for the period from July to November 2014. Mr Hall referred to 'a good performance on what has been a steep learning curve'. There were some criticisms, the details of which are not relevant. Of importance it was noted that the Claimant did not wish to work on a day assignment, wished to stay on D Shift, and also that he was considering retiring in 2017.

27 Towards the end of 2015 it was becoming clear to Mrs Dyer that she would have to ask the Claimant to move to the Day Shift on a temporary assignment. Mr Singh was due to complete his 12 month stint. Mrs Dyer asked Mr Hall to raise the matter with the Claimant again.

28 The year-end review for 2014/15 took place in about October 2015. The Claimant commented that he had carried out various union activities, and he specifically mentioned the pay and TOIL issues. Mr Hall commented on a 'steady safe year', and then said the following:

For 2016 we need to look at that second operating area or the option for a day assignment that will benefit the [Business Team] and your own requirements in-line with your skill set.

Thanks for your support shown to myself and the team and your ongoing work through the Union.

29 Mrs Dyer added:

Next year offers some challenges for our Business Team, and shift resource and skill set is on area that remains difficult until our 2016 trainees qualify. We may therefore come and talk to you about some potential opportunities within our [Central Control Room] team – please be open minded about considering any such move should we come and talk to you.

Also, please reflect on your overtime coverage for shift. I appreciate that you do work O/T when covering Union duties, but shift coverage remains a key commitment and we need everyone to play their part covering R/O, sickness and other off-shift activities, and not relying on an ever decreasing, fatigued population of the team.

The Claimant was marked with a 'meets'.

30 Around this time the Claimant raised a grievance about decisions made by Mrs Dyer concerning non-payment for overtime, and a difficulty with the Claimant being able to sit as a Magistrate. There was a discussion with Mr Vaughan, and the Claimant considered that Mr Vaughan was 'very irritated by [the Claimant] exercising [his] legal entitlement' to sit as a Magistrate. This issue arises later also.

31 The next review was an interim review stated to be for the period from 1 July 2015 to 4 January 2016. The Claimant stated as follows:

I am pleased with my performance this cycle. The likely conclusion of the TOIL dispute will be the end of a long piece of work and I feel I have been very prominent in achieving a resolution to this emotive issue.

32 Mr Hall noted that the Claimant was planning to retire in 2017/18 and was not interested in working days. It was also noted that the Claimant was willing to train. The Claimant was apparently marked as 'meets / exceeds'.

33 At a routine meeting on 31 January 2016 between Mrs Dyer and those reporting to her a decision was made that the Claimant was to be moved on a temporary assignment to the P18 role on the Day Shift. That decision

was formally approved by Mr Vaughan. On 25 February 2016 Mrs Dyer sent an email to the Claimant stating as follows:

I would like to confirm that you will be required to join Offsites Day-team as Process 18 (Sampler) on a Temporary Assignment that is expected to last no more than a year. This period may be extended at you request.

- 34 Mrs Dyer added that the assignment would start at the end of April 2016, and that a formal assignment letter would be issued. The terms of the email had been discussed between Mrs Dyer and Mr Aliyu, Employee Relations Supervisor. The exchange of emails between them is illuminating because there was no reason for the authors to think that they would be made public. Mrs Dyer told Mr Aliyu that the Claimant could only undertake one role on Shift D, and therefore other roles had to be covered by overtime and not by the Claimant. That was, of course, at an extra cost to the business. In his reply Mr Aliyu asked about training the Claimant for other roles. Mrs Dyer replied saying, as we understand it, that the priority was to train people as Panel Operators, and that the Claimant did not have sufficient knowledge to undertake that training. She added that they had not pushed any training for the Claimant as he had indicated he would be retiring in 2016, which was later changed to 2017.
- 35 The Claimant went to see Mr Vaughan on 30 March. We accept that the record of the conversation as set out in an email from Mr Vaughan to Mr Aliyu of that date is an accurate summary of what was discussed. The Claimant made six points. He was concerned about having interaction with the Laboratory in the light of earlier difficulties. The Claimant had an 'outside business' which would be adversely affected, and which he wished to continue after retirement. We understand that that reference is to the Claimant's appointment as a lay member of the Employment Tribunal. Next the Claimant said that the change would affect a car sharing arrangement he had. The Claimant also said that his contract did not allow for working days.
- 36 The Claimant then said that he was being victimised because of his union stance on the pay offer, and Mr Vaughan explained the reason for the decision and the Claimant's union activities were not relevant. The issue of days for sitting as a Magistrate was then raised. Mr Vaughan refused to change the decision and the Claimant said he would take out a grievance, and go to the Tribunal, and things could get messy.
- 37 The Claimant did then take out a grievance on 1 April 2016. He objected to the assignment, and not having been consulted about it. The Claimant listed his concerns under six headings. He said that four colleagues were keen to volunteer for the role. The Claimant alleged that he was being singled out because of his role as a Magistrate, and he added that he was acutely aware that his union role was disliked by management and that that could also have been a factor.
- 38 Mrs Dyer gave evidence to us about the four colleagues named by the Claimant. One had just come back from a long absence due to sickness, and it was not thought appropriate for him to work unsupervised. Two were Panel Operators, and there was a shortage of individuals with those skills on the day/night shifts. The fourth individual was on the Day Shift already,



but was needed to be reallocated to A Shift effectively to replace a member of staff who was due to retire.

- 39 The grievance was heard by Mr Warren on 3 May 2016. Mr Warren was a Business Team Leader from another part of the Respondent's business. The purpose was to explore the Claimant's grievance before Mr Warren interviewed others. It is not necessary to go into great details, but our attention was drawn to several points. The Claimant told Mr Warren he thought it unfair to move him when he only had a short time left until retirement. He said that four named individuals were keen to move to days. The Claimant said that he was concerned about his ability to undertake responsibilities as a Magistrate and as a lay member of the Tribunal, and informed Mr Warren that he had had a disagreement with Mr Vaughan about time off for sitting as a Magistrate. The Claimant said he saw the move as a punishment for carrying out union duties.
- 40 Mr Warren interviewed Mr Vaughan. Mr Vaughan explained why the four individuals named by the Claimant were not suitable, and said that the only disagreement with the Claimant was about an 'entitlement' to a number of days sitting as a Magistrate. Mrs Dyer was also interviewed. She said that she had the impression that the Claimant would not like working days, but that that was no different to any others. She had not been aware of the other issues the Claimant had raised.
- 41 Mr Warren provided the outcome of his grievance investigation to the Claimant in a letter dated 30 June 2016. Mr Livingston drew our attention to the fact that Mr Warren's summary of the grievance at the beginning of the letter referred to the Claimant's role as a Magistrate, but not as a union official. The letter recorded that Mr Warren had been informed that the reason none of the other technicians had been moved was as follows:
- The Business team leadership confirmed that moving any of these other individuals from Shift to days would be a less optimal solution, as it would lead to concerns over skill balance on shifts, additional overtime requirements and a possible impact on progression plans. Consequently I find that the Business Team did consider alternatives including those willing to move to days but decided your move was in the best interests of the business.
- 42 The Claimant appealed against that decision. The appeal was heard by Mr O'Reilly. Mr O'Reilly is currently based in Singapore, but was at the time a Process Manager for an associated business also based at Fawley. The Claimant was interviewed by Mr O'Reilly on 16 August 2016. Our attention was drawn to a passage in the notes of the meeting where the Claimant said that he had not pressed to be trained further, that the panel job was demanding and that as he planned to retire by April 2018 it made no economic sense to train him.
- 43 There is then a heading 'Decision made by Simon Vaughan because of my magistrate duties' followed by a substantial passage relating to that point, and also including mention of his sitting as a lay member of the Tribunal. The Claimant then also said that it was either Mr Vaughan or 'someone else within senior management . . . who want to punish [him] for [his] prominent union role.'

- 44 Mr O'Reilly interviewed Messrs Vaughan and Hall and also Mrs Dyer. The appeal was unsuccessful and the Claimant was informed of the outcome by a letter dated 9 September 2016. The letter was of four pages and was very detailed. The following is the paragraph relevant for the purposes of this claim:

You also suggested that the move was driven by other members of Company Management, due to your role in the Union. I do not see any correlation between your move to a day position with your Union role. You will still be able to discharge your Union activities, and your move to another role is consistent with how other employees in your group are moved to alternative roles from time to time. Your role as a union official is recognised and supported by the company.

- 45 We now complete the picture concerning the move. Mr Vaughan wrote a formal letter dated 23 September 2016 confirming that the move would take place with effect from 6 October 2016. The letter was handed to the Claimant on 29 September, and he transferred as instructed.

- 46 The Claimant was signed off from work on 23 November 2016 and returned to work on 3 January 2017. The Claimant underwent an Occupational Health assessment in accordance with the Respondent's normal procedures on 2 December 2016. The relevant parts of the report are as follows:

Summarily, he explained that he has been signed off work for the past 11 days due to stress at work. I discussed this further with him and he described that he had an imposed change in his role which changed his working pattern (from shifts to days) and this is the cause of his stress.

....

The key issue in cases of work related stress is to try and address the underlying cause of the stress and this is done via managerial rather than medical intervention. This is normally best managed through a stress risk assessment and there is further information on this (and stress in general) on the 'managing pressure positively' section on the HR online for managers website.

The success to which you are able to address his perceptions of stress will ultimately influence his return to work timescales and if you are able to surmount his concerns quickly, then I anticipate he will be able to return to work rapidly. Conversely, if the situation is left unchecked, then there remains an ongoing risk of absence.

- 47 There is no formal procedure in the Respondent for a 'stress risk assessment', such as a form to be completed, or a prescribed specific procedure. Mr Snell had by now taken over from Mrs Dyer as the POS responsible for the Claimant. He received a copy of the OH report. He took advice from Mr Aliyu to the effect that Mr Snell should seek to ascertain from the Claimant what support was needed to enable him to carry out his new role. Mr Aliyu did not interpret the report as advising that the Claimant be moved back to D Shift. Mr Snell and the Claimant spoke on 19 December 2016. The Claimant immediately asked if a decision had been made that he was to be moved back to a shift role, to which Mr Snell replied that that was not an option. Mr Snell also reminded the Claimant of the AXA PPP Helpline service provided by the Respondent if he wished to have a discussion with an independent person. There is no need to mention any further matters discussed. Mr Snell emphatically denied in cross-examination the suggestion by Mr Livingston that he had been coached by Mr Aliyu not to refer to the Claimant's union activities, and the

further suggestion that Mr Snell did not move him from the Day Shift was due to such activities.

- 48 The claim was presented to the Tribunal on 22 December 2016.
- 49 The third factual allegation in this claim is that the Claimant was given a 'below' performance grade for the interim appraisal to 31 December 2016. That is a specific allegation, but the evidence expanded to cover gradings given to the Claimant over a significant period. In his witness statement the Claimant said that he regularly received 'exceeds' or 'meets' gradings but that when he was an active union representative he was given four 'below' gradings. That is not borne out by the documentary evidence. Mr Aliyu had prepared a table summarising the position, the accuracy of which was not challenged. The table showed that for the assessment years from 2000/01 to 2005/06 the Claimant was graded as 'meets' while at the same time being a union representative in the Joint Forum. He was then graded as 'below' for the years 2006/07 to 2009/10 when he remained a representative and then became a shop steward. Mr Aliyu summarised the reasons given for the grading. For 2010/11 to 2015/16 the Claimant was then graded again as 'meets' although for the final 18 months he was the Branch Chair of the union. He was then downgraded for the interim appraisal with which we are concerned.
- 50 There was an incident on 19 August 2016 when the Claimant left a valve open causing a leakage of 25 litres of crude oil. The incident was investigated under the Loss Prevention System. The papers concerning the investigation and recommendation are detailed and not entirely clear to those not familiar with the technicalities. At the beginning of the investigation report was a two page form. Under the heading of 'Recommended solutions' it was recommended that there be coaching for the operator. There were then notes of an interview with the Claimant and a field visit accompanied by Mr Hall. In the summary it was said that the incident 'must feature in the individual's performance assessment'. Mr Hall provided details of the investigation to Mr Snell, who was then the POS in respect of the Claimant, and to Mr Crouch who was to take over as the PFLS when the Claimant moved to the Day Shift.
- 51 There was a discussion involving Mr Aliyu and Mr Vaughan on 5 October 2016 concerning the matter. Also involved were Stuart Kelly, the Process Manager, and Adam Willis, the Process Support Manager. The discussion was summarised recorded in an email of 5 October 2016 from Mr Aliyu. It was noted that it had been agreed that coaching would be provided to the Claimant, and that the incident would have an impact on his performance assessment for the first half year so that the Claimant would be rated as 'below'. Disciplinary action had been considered but one of the reason was that that action was not taken was because of his 'cooperation with the incident and indications that he is taking full responsibility for his actions.' The email records that management had strongly considered disciplinary action, but took into account factors which are mentioned in the appraisal completed by Mr Hall which we set out below. Mr Aliyu specifically stated that it must be made clear why disciplinary action was

not taken. There was also reference to his 'sharing learnings within the group.'

- 52 Mr Aliyu set out details of comparisons with action taken following incidents involving others. He was concerned that there be consistency of treatment. Mr Aliyu made a file note setting out the rationale for the decisions. There was one case where disciplinary action had previously been taken, and Mr Aliyu made a file note that the Claimant had admitted his errors, was very contrite, had cooperated fully with the investigation, and did not have a history of similar mistakes.
- 53 There were two interim appraisals prepared for the Claimant for the first half of the 2016/17 year because of the Claimant's move on 6 October 2016. It has to be the first one about which the Claimant is complaining because his claim form was presented on 22 December 2016 before the second one had been completed. That appraisal was undated. It was completed by Mr Hall, and his summary for the period from 1 July to 5 October 2016 was as follows:

Mark, a steady performance for the start of the appraisal year, marred only by Tk398 VLO incident. Disappointing team and I know for yourself on a personnel level in your failure to meet expectations on this occasion.

Following an investigation to look at the option for disciplinary action, all factors were considered including single valve isolation practice for Crude tanks and your cooperation with the incident investigation. A decision has been made that the best course of action going forward is individual coaching and you to share your learnings within the Offsites team.

Mark, on a more positive note, I am aware of your frustrations on your assignment to days, but I would like to think the changes we are making to the Process 18 role, a clear understanding of role and expectations, and reporting directly back to shift PFLS, you will see the positives not only in what you could bring to the role, but also on a personnel level around flexibility and time off. There is a real opportunity to develop the Process 18 role in ownership and what the role can deliver for shift, now and in the future.

- 54 We add for the sake of completeness that there was the second interim appraisal form in the bundle completed by Mr Crouch marked as being for the period from 6 October to 31 December 2016. The Claimant was also marked as 'below' on that form because of the spillage incident.

*Submissions, discussion and conclusion*

- 55 Each of Miss Dobbie and Mr Livingston provided the Tribunal with most helpful and clear written submissions to which they spoke. We agree with the approach suggested by Mr Livingston that in these circumstances the questions to be asked are as follows:
- 55.1 Did the acts alleged by the Claimant in fact happen?
- 55.2 Was the main purpose of that act to prevent or deter him from taking part in trade union activities, or penalise him for doing so?
- 55.3 Was the Claimant subjected to any detriment by that act?
- 56 For the reasons set out below we do not need to consider the question as to whether what occurred to the Claimant constituted a 'detriment' (or detriments) within section 146(1).

57 The case for the Respondent was succinctly put by Miss Dobbie in paragraph 3 of her submissions:

The Respondent's case is straightforward. The Claimant's claim must fail at the first hurdle since he has wholly failed to demonstrate even a *prima facie* case. There is simply no evidence whatsoever to even raise an inference that any of the decisions makers' actions were in any way influenced by the Claimant's activities with Unite. Still less is there anything to suggest that their *purpose* was to thwart or punish such activities.

58 We will deal with each of the three matters before us in turn, starting with the move to the Day Shift, which was clearly the principal concern of the Claimant. Mr Livingston listed various factors from which the Tribunal should conclude that this element of the claim should succeed which we summarise. He said firstly that the Claimant had been involved in negotiations with the Respondent on behalf of Unite in 2015/16, and that that had caused strained relationships. He added that Mrs Dyer and Mr Vaughan were aware of the Claimant's involvement. He correctly did not go on to say that either of them had themselves been involved in any negotiations on behalf of the Respondent. Secondly, the P18 role had been vacant since 2014, and yet the decision to move the Claimant was only made towards the end of the negotiations. Thirdly, the Claimant was moved against his will when there were volunteers who were willing to move. Fourthly, there was no contemporaneous written rationale for the decision. Fifthly, the issue was raised in the grievance and Mr Warren did not specifically deal with it in his letter of 30 June 2016 providing the outcome to the grievance.

59 It was accepted by the Respondent's witnesses that the Claimant was involved to a significant extent in the negotiations which took place in 2015/16. That is wholly insufficient to create a connection between those activities and the move to the Day Shift. Mrs Dyer made the decision to move the Claimant, although that had to be approved by Mr Vaughan. Mrs Dyer was a member of the union, and had herself been Branch Secretary working with the Claimant in the union in 2007/09. It is simply not credible that she would then seek to penalise the Claimant for being involved in union activities. Further, although not involved in the decision himself, in the appraisal for 2014/15 Mr Hall specifically thanked the Claimant for his 'ongoing work through the Union'. There was simply no evidence before us to enable us to conclude that there was any antagonism towards the Claimant by any of those involved.

60 The second point was that it was said that the P18 role had been vacant from 2014. There was some confusion in Mrs Dyer's evidence initially, but she was reminded by Mr Vaughan's evidence that Mr Haskell had filled the role in 2014 and then Mr Singh in 2015. The role had not been vacant since 2014.

61 The third point was that there were volunteers. We have accepted the evidence of Mrs Dyer that none were suitable, as found by Mr Warren during his grievance investigations. The fourth point was that there was no written rationale. As a fact that is absolutely correct. Detailed minutes were not taken of the discussions which Mrs Dyer had with those reporting to her. Only the outcome of the discussions was recorded. With respect

to Mr Livingston it really is going too far in these circumstances to be able to draw the inference he is suggesting from the absence of such a record. No reasons (or at least no detailed reasons) were recorded for any of the decisions made.

- 62 The fifth point was that Mr Warren did not deal specifically with the Claimant's reference to his union activities. When asked about this in cross-examination Mr Warren replied that the Claimant had placed emphasis upon sitting as a Magistrate rather than his work as a union representative. Indeed, although not an issue before us, that was the thrust of the Claimant's grievance appeal.
- 63 On this element of the claim we agree entirely with Miss Dobbie. No *prima facie* case has been established. The basic elements of the Respondent's evidence are clear. There was a need to rotate individuals onto the Day Shift. Generally there was a resistance to such a move. Who was chosen to move depended on the requirements on each shift from time to time, and the skill sets available. The decision made to move the Claimant to the Day Shift was made solely for proper business reasons.
- 64 The second allegation is that the Respondent failed to follow the recommendation of the Occupational Health report. There was in fact no specific recommendation that the Claimant be moved back to the day/night shift. It is not necessary to decide whether the wording of the report impliedly contained such a recommendation. Mr Aliyu advised Mr Snell to seek to ascertain how to reduce any stress being caused to the Claimant by working on the Day Shift, and that he did. Again, we fail to see how we could rationally conclude that there was any link between the Claimant's union activities, and the approach of Mr Aliyu and Mr Snell to the report. Neither of them were of a sufficient seniority to have been involved in any negotiations with the union.
- 65 The final matter is the marking of the Claimant as 'below' for the period from 1 July to 5 October 2016. Mr Kelly was involved to a limited extent. He was involved in the discussions in October 2016 mentioned above as to any sanction to be imposed on the Claimant. He had also led the negotiations with the union which we have mentioned. We did not hear from him.
- 66 There was some uncertainty in the evidence as to the circumstances for the decision to mark the Claimant as 'below' in the two interim appraisals, and in particular whether Mr Snell was instructed by Mr Kelly or other member of senior management to give that rating to the Claimant in the second one. The appraisal for the period to 5 October 2016 was prepared by Mr Hall. We accept his evidence that any other person in the same circumstances would have been marked in the same way. Insofar as the second appraisal which was marked by Mr Snell we accept his evidence that he was not instructed by Mr Kelly (or anyone else) to mark the Claimant as 'below'. Mr Hall had informed him of the outcome of the investigation, and Mr Snell may have seen the file note prepared by Mr Aliyu following his discussions with Mr Kelly and others in October 2016.

- 67 Our conclusion in respect of this claim is also straightforward. The Claimant made an error, which he admitted. It was investigated and the conclusion was that he should be coached, and also that a 'below' mark be awarded. The discussions in October 2016 recorded by Mr Aliyu obviously involved consideration as to whether disciplinary action should be taken, and it was decided that there were various factors justifying not taking that action. Thus it appears that the Claimant was, if anything, being treated leniently rather than being treated severely because of his union activities.
- 68 For the above reasons this claim is dismissed.

**Employment Judge Baron  
Dated 07 March 2018**