EMPLOYMENT TRIBUNALS

Claimant: **Mr S Fleming**

Respondent: **North Bristol NHS Trust**

Heard at: **Bristol** **On:** **1st and 2nd August 2019**

Before: **Employment Judge R Harper MBE**
Mrs G A Meehan
Mr E Beese

Representation
Claimant: **Ms A Macey, Solicitor**
Respondent: **Mr A Allen, Counsel**

JUDGMENT

1. All claims succeed.

2. The parties are to send their availability for a half day remedy hearing to the tribunal by 13th September 2019 to be listed before the same panel if possible.

REASONS

1. The claimant commenced employment with the respondent in 2010. Since 13th July 2012, he has been a Band 2 porter at Southmead Hospital. The claim was filed in time on 4th April 2018.

2. A previous case management order was made on 25th June 2018, which clarified the issues save that the claimant does now not pursue the so called "split" issue.

3. This is a claim under Section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992 and Section 169 of the same Act and Section 13 of the Employment Rights Act 1996. The expression "working hours" in Section 168 is defined in Section 173(1) of the 1992 Act.

4. We have considered and applied the following cases:

   (a) Howlett v Royal Mail UKEAT/0318/13 a case which was specifically brought under the safety representative and safety committee Regulations 1977 and a decision specific to those Regulations which we did not find of much assistance in relation to the present case.

   (b) Hairsine v Kingston Upon Hull City Counsel 1992 ICR Page 212 which is a case which is not on all fours with the present case and the panel did not find it of much assistance.

   (c) Yewall v The Secretary of State for Work and Pensions UKEAT/71/5 which sets out the following four questions for the tribunal to ask itself in such cases under Section 146 namely:

      (1) Have there been acts or deliberate failures to act on the part of the employer?

      (2) Have those acts or omissions caused detriment to the claimant?

      (3) Were those acts or omissions in time?

      (4) In relation to those acts proved to be within the time limit and which caused detriment, has the claimant established a prima facie case that they were committed for a purpose proscribed by Section 146?

   That case is authority for stating that it is only after the last question has been answered in the affirmative that the onus transfers to the employer to show the purpose behind its acts or omissions.

5. The tribunal had regard to the ACAS Code of Practice on time off for trade union duties and activities 2010 in particular paragraphs 18 and 19 of that Code.

6. We heard evidence on oath or affirmation from Mr S Fleming, Ms C Cook, Mr A Jeanes and G Dickson. The tribunal considered all the oral and written evidence of the witnesses. The tribunal considered all the documents in the bundle to which our attention was drawn, making the point that if our attention was not drawn to a document then we have not considered it. The tribunal has also considered the closing submissions and the cases referred to therein.

7. The tribunal, having heard the closing submissions then asked the parties to return at 2.00pm, when Judgment would be given. At approximately 11.45am the two representatives sent a message via the clerk that they needed urgently to see the panel. They returned to the tribunal room where the Judge was sitting on his own since the two members had been released by him because a decision had been reached. It was explained that unfortunately Mr Allen's mother had just died and he was clearly upset and asked for the panel to produce a Reserved Judgment. Ms Macey agreed that this was the correct approach. At this point Mrs Meehan one of the

members returned to the court room. The Judge explained to the two representatives that the panel had reached a decision which was that the claimant won on all claims and invited the parties to try to reach an agreement. The Tribunal were, of course ,in the circumstances, prepared to do a Reserved Judgment

8. There are two distinct consequential areas to resolve in the light of the claimant succeeding. Firstly, the arithmetical calculation of the amount of money owing to the claimant as a result of our decision and secondly the decision whether or not to impose an award of injury to feelings and, if so, what level. In the event that the parties are unable to agree remedy, then as set out above, the parties are to contact the tribunal for a half day remedy hearing. These reasons are the reserved reasons as agreed to be sent out to the parties.

9. The claimant became the Unison Branch Secretary in February 2018 but had been acting in that role since about November 2017. In that role, he is the Unison Lead Representative at the respondent's workplace. The Partnership Working Agreement and Trade Unions Facilities Agreement permit the Unison Lead Representative up to three days of paid release a week. The claimant's hours and working arrangements changed from 1 December 2017. Prior to that date he worked a rotating shift pattern involving a mixture of early (6.00am – 2.00pm) and late (2.00pm – 10.00pm) shifts over seven days.

10. The Partnership Working Agreement and Trade Unions Facilities Agreement permits paid time off on the following basis to be found at page 45 of the bundle:

> "where time with pay has been approved the payment due will equate to the earnings the member of staff would otherwise have received had she/he had been at work (this includes travel expenses in accordance with the Trust's expenses policy)".

11. The claimant worked under a contract of employment and this is to be found on page 37 of the bundle and in terms of the hours of work/shifts it is described as follows:

> "37.5 hours per week pro rata to 37.5 hours per week for part-time posts".

12. On page 40 of the bundle under the heading "Time off and Facilities for Trades Union Representatives" paragraph 25.3 records as follows:

> "It is for employers and representatives of locally recognised trades unions to agree in partnership local arrangements and procedures and time off and facilities that are appropriate in local circumstances. Local arrangements are expected to be consistent with the principles set out below".

13. One of those principles to be found at paragraph 25.11on page 42 of the bundle states:

> "Where time with pay has been approved the payment due will equate to the earnings the employee would otherwise have received had they been at work".

14. Page 44A of the bundle under the heading "Supporting staff who work evenings, at night, weekends and on general public holidays. Paragraph 2.1 on that page states as follows:

> "The NHS delivers patient services around the clock where staff are required to work to cover services in the evening, at night, over weekends and on general public duties the NHS staff Council has agreed that they should receive unsocial hours payments".

15. On page 44B part of the same document is the sub heading "Unsocial hours payments." The claimant was on pay band 4 so all time on Saturday midnight to midnight and any week day after 8.00pm and before 6.00am would be paid on the basis of time plus 30% and all times on Sundays and public holidays midnight to midnight would be paid on a time plus 60% basis.

16. On page 45 which is part of the facilities agreement under the sub heading "paid time off" the provision is exactly the same as the payment arrangements in paragraph 25.11 of the agenda for change.

17. Page 48 under the heading "Appendix 2" sets out the days per week for union work and is to be read with the helpful table set out in paragraph 22 of Mr Dickson's statement.

18. When the claimant was working from 2016 onwards he was paid for a full-time 37½ hour week. This was on the basis of a mixed shift pattern on a 4 week roster so that in some weeks he would work more than 37½ hours and in other weeks less. He was paid a basic salary which was £20,551 as of October 2017 but he also received enhancements for Saturdays and Sundays and any hours worked after 8.00pm at night. Those enhancements were worth around £150 per calendar month depending which weekends he worked. This represented about 8% of his total monthly pay of £1,833.

19. The claimant has been active within Unison since the start of his employment. Around April 2017, the now previous Branch Secretary, Daly Lawrence, went off on sickness absence and the claimant assumed significant responsibility within the main Unison branch acting as the de facto Branch Secretary.

20. In October 2017, the Unison Regional Organiser, Christina Cook, took the decision to appoint the claimant to the role of acting Branch Secretary pending a vote at an annual general meeting in February 2018 when he could be formally elected to the role. The claimant is an active trade unionist and as he describes in paragraph 4 "this has led me into conflict with the respondent's senior management most notably in the joint trade union campaign to stop the privatisation of Facilities Management Services". Partly as a result of the claimant's actions the Trust was forced to backdown on that proposal in February 2018.

21. Ms Cook approached the claimant's line managers in 2017 to discuss the terms of his union secondment. The case largely turns on the meeting in November which took place either on 10 November or 20 November 2017. It is immaterial which date is correct. The attendees at the meeting were the claimant, Ms C Cook, Mr A Jeanes and Ms Fiona Ross who was the Assistant General Manager. The tribunal have not heard from Ms Ross as she has now retired and lives in Italy but she could have been called by the respondent. The respondent asserts that there were discussions at that meeting but that nothing was agreed specifically. In paragraph 11 of Mr Jeanes statements it states

> "I am very clear that we did not reach any agreement".

22. The claimant and Ms Cook are very clear that there was an agreement and, indeed, the claimant took up the post on 1 December 2017 with the full knowledge of Ms Ross who did nothing to prevent that appointment taking place. The tribunal has not seen the minutes of that meeting; it appears highly likely that there were no minutes taken of that meeting which is regrettably slapdash as far as the respondent was concerned. Indeed, the respondents share that concern because in an email dated 21 December 2017 from Mr Dickson to Mr Jeanes on page 67 of the bundle, it states:

> "I have seen no record or minutes of this meeting".

23. The agreement that was reached according to the claimant, and Ms Cook, was that the claimant would have facilities time within the core business hours of the Trust from Tuesday to Thursday from 9.00am to 5.00pm. This made sense to both the claimant and his union representative as the majority of the union business in terms of meetings and hearings is scheduled during the core business hours. This is when other union representatives have their release time. It was agreed that the claimant would work his remaining hours on Mondays and Fridays and that his rate of pay would be his normal pay as calculated by an average of his earnings in the preceding twelve month period. There was some discussion as to whether or not that was the correct period. There was no challenge to the claimant's assertion in paragraph 5 of his statement where he states:

> "The meeting was amicable and there was no suggestion from Andy Jeanes or Fiona Ross that what was agreed was in any way unusual or gave them any difficulty".

24. Very shortly after taking up his post on 1 December the claimant designed posters as part of his campaign in relation to the privatisation proposal. Some of those posters he describes as having been torn down.

25. Towards the end of December, the claimant had still not received any formal confirmation of the allegedly agreed new terms. On 18 December 2017 the claimant emailed Mr Dickson to chase matters up. In response he received an email from Mr Dickson which attached a letter dated 22 November which he had never seen before. However, the arrangements stated in that letter differed from what the claimant understood he had agreed in several respects. For example, firstly the pay protection would

end on 26 October 2018 and secondly, the claimant would be paid enhancements only on any late shifts worked on Monday and Friday with Facilities Management. As the claimant states in paragraph 8 of his witness statement:

> "The effect of these terms would be that I would lose out in two different ways. I would lose out in the short term as I would not receive the value of the enhancement payments that I had previously received to 1 December 2017 for working at weekends after 8.00pm and the 15 minutes at the start of each shift. This was not what was agreed at 20 November when it was agreed that I would receive my normal pay based upon a twelve month average. I would also lose out in the longer term as I would cease to lose any pay protection after 26 October 2017. There was no discussion of any end date for my pay protection at the meeting on 20 November 2017 and my assumption and that of Christina was that my protection would continue with each cost of living award so I would not have any financial detriment in real terms".

26. The claimant asserts in paragraph 9 of his statement:

> "This was entirely in contradiction of what we had agreed on 20 November 2017 and the Agenda for Change states, under paragraph 25.11, that "where time with pay has been approved for trade union representatives the payment due will equate to the earnings the employee would otherwise have received had they been out of work".

27. Since it was clear that the claimant had taken the very proactive stance in relation to the privatisation issue the claimant concludes in paragraph 23 of his statement:

> "I have no doubt that the Trust made an issue of my pay because I have made life difficult for senior management by legitimately challenging their decisions".

28. After the meeting in November, Fiona Ross emailed Mr Jeanes on 21 November (page 56A of the bundle) which is very clearly indicative of an agreement having been reached since it states as follows:

> "I have written a first draft letter to Shawn re the terms of his release to Unison and how we will administer his leave going forward. I do not have the pay figures yet so the greyed area will be amended depending on what they are".

29. The letter to which the reference was made was the letter of 22 November 2017 which, on the second page (page 56C of the bundle states as follows:

"Your pay will be protected at a level based on your previous twelve month work pattern until increments awarded under the agenda for change bring your band 4 pay to a comparable level. Payroll have confirmed that your previous twelve month salary with enhancements is £££££ putting you at a point £££££ on the band 4 scale".

30. The actual document which was sent was slightly different, to be found at page 57, which makes it very clear that there was reference to managing working time and "pay moving forward". There was further reference to:

> "This new arrangement begins on 1 December 2017 rather than the greyed area following two paragraphs appear "your pay will be protected at a level based on your previous three months work pattern until increments awarded under the agenda for change to bring your band 4 pay to a comparable level. Your increment date is 26 October. Pay protection will end automatically when your normal pay reaches this comparable level which in your case is expected to be 26 October 2018. You will be paid enhancements on any late shifts worked on Monday and Friday with FM. The fifteen minutes of overtime currently claimed and worked at the beginning of your team leader shifts will no longer apply until you have worked 37½ hours on your FM contract….
>
> Finally, can we take this opportunity to congratulate you on your new appointment and wish you every success in the role".

31. The email on page 59 of the bundle from Mr Jeanes to Ms Cook gives the distinct impression that Mr Jeanes was concerned about what may have been agreed between the claimant and Ms Ross, even although as far as the claimant was concerned Ms Ross had the ostensible authority to reach an agreement with him.

32. The claimant was at pains to stress in his evidence that he had not asked to work Monday to Friday. He was also at pains to stress in his evidence that he would not have excepted any financial package which would have resulted in him being worse off since he was a low paid employee. He and his partner were hoping to buy a house and any reduction in his income would have been particularly significant to him.

33. Very surprisingly in his evidence, Mr Jeanes said that he had not read the letter of 22 November at the time, although he has now read it, due to pressure of work. Although we commend him for being forthright in such admission there is no excuse that justifies him not having read the letter of the 22 November at the time. It was a slapdash approach.

34. On 61B of the bundle is an email from Fiona Ross to Ruppee Dogra in HR making it clear again that the parties had reached an agreement in November. She commented that to insist on twelve months earnings would have been a mistake by Unison as the claimant's enhancements would have been higher if based on three months rather than twelve months.

35. On 21 December 2017, there was a large workplace meeting involving over 150 staff. At the end of that meeting Mr Dickson spoke to the claimant and gave him three options. The claimant was not happy with any of them. There was then a meeting on 5 January 2018 between the claimant, Ms Cook, Mr Dickson and Mr Jeanes. The claimant's not unreasonable interpretation of the discussions was that the only way that he could keep his enhancement would be if he worked at the weekend. As a result of the

meeting a letter was written by Mr Dickson on 9 January 2018 and that letter appears between pages 75 – 79 of the bundle where the three options are clearly set out in paragraph 16. Option C clearly envisaged the claimant would step down from his trade union role even although he had not been formally elected into it until February 2018. Given the claimant's role in challenging privatisation the suggestion in option C could only be described as naïve in expecting the claimant to step down from his trade union role in order to preserve his financial package. It clearly demonstrates that the respondent found the claimant's union activities to be difficult to handle.

36. There was evidence, in relation to paragraph 15 of the same letter, where in the second line there is reference to the 20 November (or 10 November). It was clarified that the reference in the third line from the bottom of the paragraph to 20 November is clearly an error and should be 5 January 2018. This was an unfortunate error by Mr Dickson. This is a third example of the respondent being slapdash.

37. The same letter on page 79 of the bundle sets out how the working arrangements for option B would look.

38. On 16 January 2018, at pages 85 – 86, the union on behalf of the claimant, raised a formal dispute with the respondent. However it is true to say that no external investigation was undertaken, the claimant was not interviewed, and Ms Cook was not interviewed. A response was received from Liz Perry who is the Deputy Director for People who wrote a letter on 23 January 2018 pages 96 – 98. This is a clear acknowledgement, in the last few lines of the letter,that the claimant was likely to be disadvantaged financially. An interim arrangement was paid to ensure that the claimant was not disadvantaged which is a further acknowledgment that there had originally been an agreement in November. The panel find it disingenuous, given the subsequent entries after the November meeting highlighted in this Judgment, for the respondent to seek to deny that no agreement had been reached.

39. There is then a further letter from Liz Perry on 2 February 2018 and a reply from Unison dated 8 February 2018, clarifying that the dispute was about payment for time not a dispute about working hours.

40. On 12 March 2018, there was a further letter received from Ms Ross.

41. Since 26 February 2018 the evidence supports the contention that the claimant has been suffering financial detriment of about £150 per month which presumably increased when his pay protection ended.

42. As Ms Cook says in paragraph 15 of her statement, against a backdrop of agenda for change providing for trade union representatives to receive their normal pay she states:

> "This principle is an extremely important one and if the Trust were to fail to respect this principle it would deter shift workers from becoming union activists by automatically putting them at risk of financial detriment this would be extremely problematic for Unison as we have the largest number of low paid women shift workers

amongst our membership and it would be extremely difficult for them to come forward as trade union representatives if there is any suggestion that their pay may be affected".

43. Those are the tribunal's findings of fact. Following the EAT guidance in the Yewall case the tribunal poses the four questions:

(1) Have there been acts of deliberate failures to act on the part of the employer? The tribunal find as outlined above that an agreement was reached in November 2017. The correspondence following that meeting, and the actions of the claimant in starting work on 1 December 2017, are a clear demonstration that an agreement was reached. Minutes should have been kept, but were not. The respondent has chosen not to call Fiona Ross to give her view as to what occurred at the November meeting. The respondent failed to deal properly or at all with the formal dispute raised by the Union on the claimant's behalf.

(2) Have those acts or omissions caused detriments to the claimant? The answer is yes for the reasons set out above.

(3) Were these acts or omissions in time? Yes.

(4) In relation to those acts proven to be within the time limit and which caused detriment as the claimant established the prima facie case that they were committed for a purpose proscribed by Section 146? The answer, for the reasons given above, yes.

44. Therefore, the onus transfers to the respondent and evidence for the reasons set out above has not satisfied this tribunal. Where we had a dispute on the evidence we preferred the evidence of the claimant and Mrs Cook. We did not find that the claimant's credibility was undermined with regard to the issue of the pay of the JUC Chair but simply that he was mistaken. In contrast Mr Jeanes had not read the letter of 22 November 2017 at the time which was most regrettable. Mr Dickson came late into the situation suggested as one of the options that the claimant should step aside from his Union roles. The respondent also did not appoint an independent investigator in relation to the registered dispute. We were therefore not very impressed with the two witnesses for the respondent. Therefore, whenever there was an evidential dispute to resolve, we prefer the evidence of the claimant and his supporting witness.

45. It follows therefore for all the reasons set out above in relation to the claims under Section 146 and 169 that those claims succeed and that in relation to the claim under Section 13 of the Employment Rights Act 1996 it follows that there has been a series of unauthorised deductions which presumably continue to date. Therefore all claims succeed.

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Employment Judge R Harper MBE
Date 27th August 2019