



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100649/2019

5

Held in Glasgow on 8 and 9 May 2019

**Employment Judge:
Members:**

**Robert King
Mrs J Ward
Mr D Frew**

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Mr R Nelson

**Claimant
Represented by:
Mr P Deans -
Solicitor**

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The State Hospitals Board For Scotland

**Respondent
Represented by:
Mr C Reeve -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent did not act in
25 breach of sections 168, 169 or 170 of the Trade Union and Labour Relations
(Consolidation) Act 1992, or in breach of section 50 of the Employment Rights Act
1996 in its treatment of the claimant, and that his claim is therefore dismissed.

REASONS

1. The claimant's claims to be determined by the Tribunal were (1) that the
30 respondent had failed to permit him paid time off during working hours for the
purpose of carrying out official trade union duties (a) on 10 September 2018,
in respect of (i) a joint staff side meeting and (ii) a capital group meeting and
(b) on 27 September 2018, for a member's dignity at work investigation
meeting, and it had thereby acted in breach of sections 168 and 169 of the
35 Trade Union and Labour Relations (Consolidation) Act 1992, or (2)
alternatively that it had thereby failed to permit the claimant time off for the

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purpose of taking part in trade union activities in breach of section 170 of the Trade Union and Labour Relations (Consolidation) Act 1992.

2. *Esto*, the claimant's case was that the respondent had failed to permit the claimant time off during working hours for public duties on 27 September 2018
5 in breach of section 50 of the Employment Rights Act 1996.
3. The claimant gave evidence on his own behalf. For the respondent evidence was led from Brian Paterson, Clinical Operations Manager and Jacqueline Garrity, 'Skye Centre' Manager. A joint bundle of documents was lodged and both parties' representatives made submissions at the conclusion of the
10 hearing.

Findings in fact

4. Having heard evidence, the Tribunal considered the following facts to be admitted or proved.

Background

- 15 5. The respondent is a Special Health Board and is one of four high security hospitals in the UK. It provides conditions of maximum security for the assessment, treatment and care of men who, as a result of mental illness, have committed criminal offences. Many of its patients are potentially violent and dangerous. By virtue of the service it provides and the characteristics of
20 the individuals for whom it provides that service, it always requires to ensure safe staffing levels.
6. The respondent has employed the claimant at the state hospital in Carstairs for 18 years. His regular working hours are Monday to Thursday, 8.30 am until 5 pm and 8.30 am until 4 pm on Fridays. He currently works as a
25 rehabilitation instructor in the Therapies Activity Unit of the hospital's Health Centre.
7. The Health Centre is part of the Skye Centre for Patient Therapy and Activity (the 'Skye Centre'), which provides patients in the hospital with access to a structured programme of off-ward therapeutic, learning and recreational

activity. The Skye Centre has three distinct parts; (1) Health and Well-being (which includes the Health Centre and Sports Centre), (2) Vocational Learning and (3) Crafts, Garden and Animal Assisted Therapies. Approximately 40 staff work within the Skye Centre, providing a range of occupational and rehabilitation support services to patients.

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8. The claimant is one of five employees based in the Health Centre. In addition to the claimant there is a practice nurse, a mental health nurse, a nursing assistant and an administrator. The service they provide is supplemented by visiting clinicians, including a GP, dentist, chiropractor and a practice nurse.
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9. As a rehabilitation instructor, the claimant is responsible for assisting with the co-ordination and delivery of clinics that support patients' physical and mental needs. His job includes supporting the visiting clinicians who are not trained in dealing with patients' violent tendencies. The claimant is also a qualified phlebotomist and conducts blood clinics within the Health Centre. In addition, he has access to and updates patients' electronic records. He also has a role promoting the work of the Health Centre throughout the wider hospital community. There are no other employees within the Skye Centre with a matching skill set to his.
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The claimant's trade union and public roles

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10. The claimant is a trade union representative for the Scottish Prisoner Officers Association ('SPOA'), for whom he is the health and safety representative at the state hospital. Since May 2017, he has also been an elected local councillor for the Larkhall ward of South Lanarkshire Council. He requires to take time off work regularly in order to carry out the duties and activities of those roles.
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11. The respondent's Special Leave Policy provides as follows: -

"Civic and Public Duties

It may be necessary to refer to the Employment Rights Act 1996 for specific statutory rights that employees have to take leave under this broad grouping.

Single days up to one working week per annum can be allocated as paid leave by the manager taking into consideration the amount of time reasonably required to devote to the issue. In exceptional circumstances the manager can extend this period for up to a further working week and in discussion with HR, has the discretion to determine whether this should be on a paid or unpaid basis. It may however be considered appropriate for the member of staff to utilise annual or unpaid leave.”

12. The policy also provides in its Policy Rationale that: -

“As always, the extent and duration of such leave must be balanced by service needs accepting the emergency and unforeseen nature of requests particularly in the early stages”

13. The respondent has a separate written agreement with its recognised trade unions, entitled ‘Facilities Arrangements for Trade Unions and Professional Organisations Policy’, which sets out the framework for facilities and time off for trade union duties for accredited representatives of independent trade unions and professional organisations recognised in accordance with NHS terms and conditions.

14. That agreement does not set out detailed guidance about the handling of requests for time off for trade union facility time, but instead provides at paragraph 4.1 that -

“It is not possible to be prescriptive about all the roles that require to be undertaken within The State Hospital or to be exact about the time required to carry them out. It is agreed that requests for paid time off will not be unreasonably refused”

The claimant’s election as a local councillor

15. On 8 May 2017, the claimant sent an e-mail to Jacqueline Garrity (the Skye Centre manager) and Robert Alexander (the General Manager of the hospital), informing them that he had been elected as a local councillor. On 16 May 2017 Ms Garrity and Mr Alexander met with the respondent’s temporary HR director John White, to discuss their future management of the

claimant's time off to carry out the public duties associated with that role. Mr White's advice was they should show flexibility in their approach to his requests for time off, but to keep under review the amount of time off taken and the consequent impact on patient care.

- 5 16. Based on information provided by the claimant on 31 May 2017 the respondent calculated that he would likely require one and a half or two days off in total each week to carry out his public duties and his trade union duties.
17. Throughout the remainder of 2017 and early 2018, all the claimant's requests for time off for trade union and public duties were granted and his absences
10 were covered by male employees from different parts of the Skye Centre. As she had been advised to do, Ms Garrity also monitored the amount of time off he had taken, the timing of his requests and the impact of his time off on primary care within the Health Centre and the Skye Centre generally.
18. It is the respondent's policy that the primary health care provided by the
15 Health Centre is never cancelled. It is the one part of the Skye Centre that will always operate because it offers GP clinics, dental clinics, podiatrist clinics and other services provided by visiting medical professionals. At the material time the respondent had no budget for overtime to cover the claimant's duty during his time off, so it always had to redeploy other staff. As a result, the
20 impact of that policy was felt by the department that released an employee to cover the claimant's absence, which often had to cancel its own patient activities. Any such cancellation therefore had a detrimental effect on the patients who were unable to take part in those activities.
19. It is essential for the safety and security of all staff and patients (for example,
25 for rub down searches) that there is always at least one male member of staff present in each department. As the claimant is the only male employee in the Health Centre the respondent had to cover his time off with a male employee from another part of the Skye Centre – usually from the Sports Centre where most of the male employees are based.
- 30 20. Patients derive great benefit from visits to the Sports Centre because of the physical activity and by virtue of the positive effect of spending time off ward.

The Sports Centre has a sports hall and a gym, one of which had to close whenever a male employee was required to cover the claimant's duty when he was on leave. That had a significant impact on patients who would otherwise have been using the sports facilities and who would be confined to their ward as a result.

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21. Ms Garrity noted that over the period in question the claimant had in some weeks taken up to three days off as special leave and that some of his absences had been based on last-minute requests. She concluded that the amount of time off the claimant had taken for public duties and trade union duties since his election as a councillor, and the timing of some of his requests, had impacted adversely on primary care within the Health Centre because his duty was never fully covered. His time off had also impacted more widely within the Skye Centre in circumstances where the activities of other departments, most notably the Sports Centre, had often had to be cancelled to allow his duty to be covered.

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22. As a result of her concerns Ms Garrity met with Mr White in April 2018 to discuss the amount of time off work that the claimant had been allowed in order to attend to his public and trade union duties since his election as a councillor. Ms Garrity explained to Mr White that she believed that the amount of time that the claimant had taken off to attend to those duties was having a detrimental impact on clinical service to patients.

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23. Mr White's advice to Ms Garrity was that she should speak to the claimant about her concerns and explain that he would in future be allowed up to two days off each week within which he would be expected to manage both his trade union duties and his public duties.

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24. On 22 April 2018, Brian Paterson was appointed as Clinical Operations manager, replacing Mr Alexander and adopting this new title in place of that of General Manager. Soon after he took up his post, Ms Garrity met him to express her concerns about the amount of time off the claimant was taking to carry out his public and trade union duties and the resultant impact on the delivery of services to patients within the Skye Centre. Mr Paterson agreed

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that since his appointment as a local councillor the amount of time off that the claimant had taken had been significantly in excess of the provisions of the special leave policy.

25. Following her meetings with Mr White and Mr Paterson, Ms Garrity met with the claimant on 7 May 2018 to discuss the situation. The following day she sent him an e-mail setting out her understanding of their discussion, as follows: -

"Hi Richard,

Thank you for meeting with me yesterday to discuss your Public Duty commitments and your recent request for time off to attend planned meeting dates in June 2018. As agreed I have sent this email as a record of our discussion.

It has been almost a year since you were elected to the post of Local Councillor and back in May 2017 you met with myself and Robert Alexander to discuss how we could support you in your new role and how much time could be allocated for this. At this meeting, we agreed that 1 ½ days per week would likely be a reasonable amount of allocated time off to enable you to full fill (sic) this role.

During our discussion I made you aware that I had recently reviewed the amount of time made available for you to attend your Public Duty commitments. It is apparent that this often goes beyond the original agreement of 1 ½ days and there has been an increasing requirement for you to attend planned meetings over 2 or 3 days. In addition to this it has been noted that there are a number of unscheduled Public Duty meetings that you have requested to attend which increase your time away from the department at times up to 4 days throughout the week.

You shared your opinion that if the time was viewed as an average over the past year, the number of hours spent away from the department would be significantly less. However my response to this was that the increased amount of time you required to attend public duties has a direct impact on the

service provision at that time, on the given day(s) you are not available to carry out your role. Therefore an average would not provide an accurate picture of the impact as it occurs.

5 *In response to your recent request to attend planned meeting dates in June, I made you aware that going forward you would be granted up to 2 days per week. Whilst I acknowledge the challenges you have in balancing your Public Duties with your day to day work commitments, as the manager of the service I also have a responsibility to ensure that the workload is balanced across the staff group and that we are meeting the needs of the patients accessing our*
10 *service.*

Any future requests for time off related to Public Duties should now be made directly to myself as agreed with Brian Paterson, Clinical Operations Manager.

I also made you aware that I have been advised that it is reasonable to expect that you will manage your commitments related to Staff Side Facility Time within the 2 days of time being made available to you.
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You responded to this stating that 2 days would not always be sufficient time for you to carry out your Public Duties as required and you did not agree that you should potentially be limited from fully participating in your Staff Side role. You went on to state that you would be seeking further guidance on both
20 *matters.*

We concluded our discussion and I made you aware that the dates that were previously agreed for the month of May would remain unchanged.”

26. The claimant replied to Ms Garrity’s e-mail on 10 May. He asserted that he did not agree with her proposal, that it did not reflect his previous agreement
25 with the respondent and that it was unreasonable. He also took issue with the respondent’s proposed treatment of union facility time and public duty time, which he asserted should be managed separately.

27. During the week commencing 7 May 2018 Mr Paterson met with Allan Connor, SPOA branch secretary to discuss the claimant’s time off for public

and trade union duties. On 11 May 2018, Mr Connor then e-mailed Mr Paterson in the following terms: -

“Brian,

Following our earlier discussion, are you able to provide me with the detail around Richard’s future time off for his role as a councillor and for facility time in his role as union rep for the POA(s).”

28. Mr Paterson responded by e-mail on 15 May 2018, as follows:

“Dear Allan

Following our meeting last week, I write to confirm the agreement for special leave for Richard Nelson to enable him to undertake his Councillor duties and also his Union duties.

We discussed the impact of Richard’s absence when we met and I explained to you that this was immediate in terms of the service that is provided to patients. As you know, there is no backfill in place to support Special Leave absence from the Skye Centre so any absence must be absorbed by the service.

In view of this, I believe that it is reasonable that Richard can have up to two days of Special Leave per week, in line with the need to attend to his Council duties. These two days should only be requested when there are Council duties to be undertaken and, when the Council is not in session, or meetings are not taking place during session time, these days should not be requested.

Within these two days, there is also an expectation that Richard should use this time to undertake his Union duties. However, there may be some flexibility with this if you are able to demonstrate that no other POA representative is available to attend specific meetings. When we met, we discussed the need to be flexible with meeting attendance and look for Richard to attend meetings outwith patient attendance at the Skye Centre and to use other non patient time to do any admin associated with the meeting. An example of this is the Capital meeting. We have agreed Richard will

attend this as it will finish by 9.30am and he can take time later that day after the patients have left the Skye Centre to complete admin task. This arrangement will have no impact on patient attendance at the Skye Centre and can be more easily accommodated. Outwith Council sessions, Facility Time will be requested and managed in line with all other union reps.

I believe the arrangements proposed are reasonable however should Richard require further time off, this can be negotiated.

If you would like to discuss this further, I am happy to meet with you.”

Mr Paterson subsequently sent the claimant a copy of that email on 1 June 2018, because he did not believe that Mr Connor had fully explained the detail of their conversation to him.

29. On 22 May 2018, the claimant raised a grievance against the respondent in which he alleged that he had been unfairly discriminated against in his roles as a trade union representative and as an elected councillor as a result of alleged failures to provide him with reasonable time off to carry out the duties of both roles and by failing to treat the time off required for each as distinct from each other.

30. Mr Paterson met with Mr White in late May/early June 2018. Mr Paterson had been appointed at the end of a difficult previous financial year and at a time when finances for the following year would therefore be scrutinised closely. Part of his remit therefore was to monitor levels of spending across the hospital and to apply an additional level of scrutiny that had not existed hitherto. In respect of the claimant’s situation, there was no financial budget available to pay for overtime cover for his time off, either for his public duties or his trade union duties, and therefore it had to be managed by redeployment of staff.

31. During their meeting Mr Paterson and Mr White agreed that the claimant’s requests for special leave should be looked at in the context of clinical impact, but always with an appreciation of the claimant’s statutory right to take time off for those purposes. They concluded therefore that it would be reasonable

in future to allow the claimant two days special leave each week in order to carry out both his public duties and his trade union duties and that he would be required to manage both duties within those two days. It was also agreed that any requests for additional time over and above two days per week would be considered on their merits.

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32. During the week commencing 28 May 2018, the claimant spoke to Mr Paterson by telephone to request an extra half day leave for the week beginning 4 June 2018 in order to fulfil his councillor role. Mr Paterson informed him that he was not willing to grant that in circumstances where he had already granted the claimant two days paid leave for that week.

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33. Mr Paterson explained to the claimant that he believed that allowing two days each week within which to manage his public and trade union duties was a reasonable and appropriate provision in circumstances where his overriding priority was to ensure that services were delivered to the patients within the hospital.

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34. On 1 June 2018, the claimant sent an e-mail to Mr Paterson in the following terms:-

"Brian,

Thanks for taking my call regarding my requirement to have 2.5 days approved leave next week to enable me to fulfil my public and civic duties in my role as a Local Councillor.

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Whilst I recognise your willingness to provide 2 days, I do not consider my request for the additional .5 a day to be unreasonable and is an accurate reflection of what time I require.

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Unfortunately your answer to why it cannot be given, i.e. "cause I said so" is neither helpful nor informative. However I do understand why you were not willing to write it down as a reason for refusing my request.

Nonetheless, without wishing to be difficult, I am formally requesting again that you reconsider your decision not to provide the reasonable time off that I

have requested for next week and provide me with a written reason for refusal, if you won't accommodate this request."

35. Mr Paterson replied on 4 June 2018, as follows:

"Dear Richard,

5 *It would appear your recollection of our conversation differs from mine in that I do not, at any point, recall saying "cause I said so". If you are going to send an email of this nature, I would ask that you are accurate in your reflections of our conversation.*

10 *My recollection of the discussion is that I indicated the routine allocation of up to two days **Special Leave** per week to support your civic duties. I consider this to be a reasonable and appropriate provision. I also stated that should you require additional time on occasion, a request would be given full consideration.*

15 *My overriding priority is to ensure that services are delivered to the patients within the State Hospital, within the resources allocated to me. This includes the management of all staff leave including special leave.*

It remains my view that two days paid special leave per week, with an option to apply for additional time (occasionally) is entirely reasonable."

20 36. Mr Paterson's e-mail of 4 June 2018 contained a true and accurate account of his conversation with the claimant.

37. On 5 June, Mr Paterson emailed the claimant reminding him of the terms of the e-mail that he had previously sent Alan Connor on 15 May and also explaining that:-

25 *"To clarify the specific issue raised in your e-mail about notice for leave, I would ask that additional requests are made at the start of the previous week so that consideration can be given to the impact on the Skye Centre staffing. For routine time off or Public Duties, I would ask that you advise Jacqueline Garrity, and in her absence Alex MacLean, a week in advance to allow for resource planning to take place on Thursdays. Whilst I appreciate the need*

for your time off to attend to your public duties, my overriding responsibility is to ensure safe staffing levels in the hospital so I would ask that you afford us a degree of flexibility around your requests and acknowledge that they may not always be able to be granted, particularly if staffing in the hospital poses a significant challenge.

I hope this clarifies arrangements for you and I am happy to discuss further if required.”

The claimant’s requests for time off during September 2018

38. On 1 August 2018, the claimant sent an email to Ms Garrity requesting time off for public duties on 3 September (half day), 4 September, 6 September (half day), 10 September (half day), 12 September (half day), 14 September, 19 September, 20 September, 26 September and 28 September. As these requests were for 2 days off each week, Ms Garrity approved all those requests in an email to the claimant dated 8 August 2018.

39. On 14 August 2018, the claimant emailed Ms Garrity asking to change his days off for the week commencing Monday 10 September, by dropping his request for a half day on 10 September and converting his 12 September time off to a full day rather than a half day. Ms Garrity duly approved that amended request as it remained in line with the respondent’s decision that the claimant would normally be entitled to two days special leave each week.

40. On 27 August 2018, Allan Connor emailed Mr Paterson in the following terms:

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“Brian,

I am seeking facility time from 1300hrs until 1600hrs on Monday 10th of September for Bobby Hunter, Richard Nelson, Hazel Harrison, Alan Blackwood, Chris Slavin, Garry McKendrick and Laura McCafferty in order to order to attend a JSS meeting.”

41. The ‘JSS’ meeting referred to was a Joint Staff Side meeting. This is a regular meeting between representatives of all the unions who represent the various

groups of employees at the state hospital and allows them to work collaboratively in their dealings with management.

42. Mr Paterson replied by e-mail on 3 September as follows: -

“Allan,

5 *I am unable to authorise R Nelson as he already has two special leave days that week for his public duties. I am happy to authorise other staff to attend.”*

43. In rejecting the request on behalf of the claimant, Mr Paterson fully considered its merits. He took account of the two days' time off the claimant had already been allowed that week. He took account of the operational impact of the claimant's absences and the impact on patients, which had already been discussed repeatedly and at length with the claimant and Mr Connor. He took account of the fact that the application had been a blanket application made on behalf of seven trade union representatives without any justification for the claimant to attend the meeting personally.

15 44. As a result of this refusal, Bob Hunter, Branch Chair, POAS Carstairs, e-mailed Mr Paterson asking him to reconsider his decision, in response to which Mr Paterson responded in an e-mail of 4 September as follows: -

20 *“Richard Nelson is as you know, a local councillor and as such is allowed time off work to attend to his public duties. Richard also requires time to attend to his union duties. As a reasonable employer, the State Hospital would wish to support these activities. In order to enable Richard to manage his time to attend to his public duties, he has been granted two days paid Special Leave per week. Richard has been advised that this special leave is to accommodate both his union duties and his public duties and it is Richard's responsibility to manage his time accordingly. I am of the view that two days special leave per week is reasonable to attend to both union duties and public duties.*

25 *I have not said that Richard cannot attend a union meeting. I have merely not authorised additional leave on top of the already approved leave. Richard was previously approved time off on the afternoon of Monday 10th September*

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and changed this to a full day off on Wednesday 12th September. If Richard would prefer to revert to his original request of Monday afternoon, and Wednesday afternoon, he only needs to discuss this with Jacqueline Garrity and we will do our best to accommodate this.”

- 5 45. The claimant did not revert to his original request. However, on 5 September 2018, he e-mailed Jacqueline Garrity as follows: -

“Hi Jacqueline,

I am seeking facility time to attend the capital group meeting on Monday 10th September from 2pm - 3.30pm”

- 10 46. The ‘capital group meeting’ referred to is a meeting of the Capital Sub Group. This is a committee of the hospital’s senior management team, which oversees capital expenditure within the hospital, onto which the management team invite a representative from the various trade unions who represent the workforce. At this point in time, the claimant was the trade union
15 representative on the committee.

47. Ms Garrity replied in the following terms on 6 September 2018: -

“Hi Richard,

*I am unable to authorise your request for facility time on this occasion as you have already been approved for 2 special leave days next week to attend to
20 your Public Duties.*

This is consistent with the feedback you have received in response to the request for facility time already made for the same date.”

48. In rejecting this request, Miss Garrity fully considered its merits as well as the fact that an earlier request for facility time for that same day had been refused.
25 She considered the impact on clinical services. She took into account that the requested time off was in the middle of scheduled clinical activity when patients would be in the department and that staff would have to be reallocated from another department to cover the claimant’s absence because there was no budget to replace him. She considered that this would

have a direct impact on the operational efficiency of the health centre and the Skye Centre generally. She took into account that the claimant had already been granted two days special leave for the week commencing 10 September and that in all the circumstances, having regard to the operational impact of that already approved request and the additional operational impact of this latest request that it would not be reasonable to grant it.

49. The claimant subsequently emailed Mr Paterson on 6 September, asking if he agreed with Ms Garrity's decision to reject his request. Mr Paterson replied on 6 September, as follows: -

"Dear Richard,

You have been approved for two days Special Leave next week and that is in line with the previous discussions that have taken place about your need to undertake both Public and Union duties. To clarify, you have two days Special Leave and it is for you to decide how you manage this time. You are not being refused your request for Facility Time, the position is that your request for additional time off, over and above the agreed two days, has not been approved.

If you wish to use your two days flexibly next week to enable you to attend the Capital Meeting and to undertake your Public Duties, can I ask you to discuss that with Jacqueline today to allow the Skye Centre to plan for next week?"

50. In response, the claimant emailed Mr Paterson on 6 September as follows: -

"Brian,

In response to your email below and as you are no doubt aware of the grievance that is still waiting to be heard in regards to the decision you have made previously. You have rightly said that I have two days special leave to carry out Public Duties, which in my opinion is reasonable at times, this is evidenced within the Employment Rights Act 1996 (section 50). What I am requesting sits totally separate from this and is evidenced from the piece of legislation for carrying out Trade Union Duties under section 168 of the Trade Union and Labour Relations (Consolidation) Act 1992. It is therefore in

whichever way you have refused me my right to access time off for Trade Union Duties and that a further grievance will be submitted to this effect.”

51. In response, Mr Paterson emailed the claimant on 6 September, as follows: -

“Dear Richard

5 *I do not wish to prolong our email dialogue as this can be unhelpful however; I need to formalise my position regarding your request for Facility Time. You have two days of Special Leave next week and you have the option to use a half day to undertake Union duties. I am not refusing your time off for union duties, I am offering you flexibility to use your Special Leave to deliver your commitments to Union and Public duties.*

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If you opt to use a half day for union duties and you feel that you need more than the remaining 1.5 days to undertake your Public Duties, additional time off can be negotiated, on this occasion, and this would be unpaid leave.”

15 Mr. Paterson’s suggestion of unpaid leave was in line with the respondent’s special leave policy.

52. The claimant made no further request for time off for the week commencing 10 September 2018 and instead sent his apologies to those organising the Capital Sub Group meeting.

20 53. On 11 September 2018, the claimant sent an e-mail to Mr Paterson, as follows: -

“Brian,

I am seeking facility time in order to represent a member as part of a DAW investigation on Thursday 27 September from 9am to 11am.”

25 54. The reference to a ‘DAW’ investigation was to a meeting that the respondent’s Human Resources department had arranged in order to interview one of the claimant’s SPOA union members in relation to an issue related to its Dignity at Work policy.

55. In response, Mr Paterson e-mailed the claimant on 12 September, as follows:

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“Dear Richard,

*In line with previous discussions, I will approve this however; you will need to
5 reduce the amount of Public Duty time you take that week. Please advise
the revised timings for the Wednesday and Friday of that week.”*

56. Mr Paterson fully considered the merits of this request. In his response he considered the operational and clinical impact of the claimant’s absences on the health centre. He took account of the fact that the claimant had already
10 been granted two days’ time off for public duties that week, which would have a clinical and operational impact on the Health Centre and the Skye Centre generally because another employee would have to be redeployed from the Sports Centre to cover his absence. Mr Paterson’s belief was that If the claimant intended to attend the dignity at work meeting, he would have to
15 manage his two days special leave to accommodate his attendance at it, rather than being allowed additional time off to attend it.

57. On 13 September, the claimant replied to that e-mail, as follows: -

“Brian,

*I am unable to reduce my public duties and it is your decision on whether you
20 grant facility time in order for this investigation to go ahead or not.”*

58. Mr Paterson did not reply to that email and the claimant did not further pursue the matter internally. As a result of this impasse, the union member’s Dignity at Work meeting was delayed for several months.

59. The claimant’s internal grievance was upheld on 10 October 2018. Since
25 then, the respondent has followed its special leave policy in relation to the claimant’s requests for time off for trade union duties and public duties. As a result, he now has five paid days special leave per annum in order to carry out those duties.

60. In turn this provides the respondent with more financial flexibility to cover his absences, the majority of which are now unpaid, by paying overtime. As a result, it does not have to rely on redeploying staff from the Sports Centre and the impact of his absence on patients has therefore diminished.

5 **Observations on the evidence**

61. The Tribunal found that all of the witnesses gave their evidence in a credible and reliable fashion, albeit each party had become entrenched in its own view of the situation. There was little factual dispute between the parties, except for the disputed issue as to whether Mr Paterson had told the claimant he could only have two days special leave '*because I said so*'. The Tribunal
10 accepted Mr Paterson's account of that conversation.

Claimant's submissions

62. On behalf of the claimant, Mr Deans submitted that the respondent had unlawfully refused the claimant trade union facility time on two occasions for
15 10 September 2018 and on one occasion for 27 September 2018. He submitted that the respondent had failed to have regard to the provisions of section 168 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 or the relevant provisions of the ACAS Code of Practice on "*Time off for trade union duties and activities*". The respondent's approach had also
20 been in breach of its own policy on handling request for time off for facility time, which stated that requests would not be unreasonably refused.

63. In Mr Dean's submission, the respondent's approach to the disputed requests had been predetermined, because they had been rejected on the basis that there was a two-day limit on special leave and that no more than two days
25 would be allowed in any circumstances. In starting from a position whereby any request for time off was subject to predetermined limits, the respondent had fettered its own discretion and had not considered each request on its merits, as it was required to do.

64. Mr Deans invited the Tribunal to approach with caution the approach set out
30 in **Ministry of Defence v Crook and Irving 1982 IRLR 488** in which the EAT

had applied a “*band of reasonableness*” approach to the determination of whether an employer had acted reasonably in dealing with an application for time off for trade union duties.

- 5 65. Mr Deans submitted that such an approach distorted the text of TULR(C)A and that the Tribunal should make its own objective assessment of what was reasonable, in line with the later EAT decision in **Chloride Technical Limited & Others v Cash & Others EAT 37/84**. The decision in Crook impermissibly applied the band of reasonableness approach, an approach that was significantly more favourable to an employer but applied an unnecessary gloss that did not reflect the statutory language.
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66. Mr Deans also referred to several first instance cases. One of those was **Gething v Hampshire County Council ET Case 17210/80**, in which the Tribunal had found that that each application for time off in such circumstances as these should be treated on its own merits and that adopting a rigid policy on time off may make it more difficult to show that a particular employee’s request was reasonably refused. It was submitted that the present case was similar in that the respondent had unreasonably refused time off due to his adoption of a rigid two days special leave policy.
- 15
67. The claimant’s *esto* case was that in his e-mail dated 12 September 2018, Mr Paterson had failed to permit the claimant time off for public duties in breach of section 50 (4) of the Employment Rights Act 1996. Reference was made to the EAT case of **Riley-Williams v Argos Limited 2003 WL21161594** where the EAT had held that an employer should consider all relevant factors in considering such a request and not simply rely on its own business reasons to justify a refusal to grant time off.
- 20
- 25
68. It was submitted that the respondent had failed to have proper regard to the statutory provisions and had not considered all the relevant factors within section 50(4). It had failed to engage properly with the statutory test and had failed to consider how much time was truly required in order to carry out his public duties on 26 and 28 September. Instead the respondent had simply relied simply on its own business reasons to justify its refusal.
- 30

69. In relation to remedy, Mr Deans accepted that the claimant had not suffered financial loss but invited the Tribunal to make a declaration that the claimant had been treated unlawfully and to award such compensation as it deemed just and equitable in all the circumstances. No suggestion was made as to the appropriate amount of compensation to be awarded.

Respondent's submissions

70. On behalf of the respondent, Mr Reeve submitted that it had acted in accordance with the relevant statutory provisions and with the ACAS Code of Practice.

71. In relation to the first request for time off for union duties 10 September 2018, its response to the claimant's request was reasonable and in line with the statutory position. It had considered the claimant's request in the light of the surrounding circumstances. These included the overall effect on patient services and staffing of the 2 days paid special leave that the claimant had already been granted for that week. The respondent had also made its decision in the context of a specific need to ensure absolute security within the context of a highly secure hospital setting.

72. In respect of that first request, Mr Paterson had subsequently informed Robert Hunter, branch chair of POAS Carstairs, that he had not refused the claimant time to attend the union meeting. Rather he had not authorised additional leave on top of the two days special leave that had already been approved. Mr Paterson had invited the claimant to consider reverting to the original request of the Monday afternoon and Wednesday afternoon that week for public duties, which may then have accommodated the claimant's request for time for trade union facility time. The claimant had not made such a request.

73. TULR(C)A provided that the amount of time off which an employee was permitted to take and any conditions subject to which time off may be so taken are those that are "*reasonable in all the circumstances*". The respondent's handling of this request was within the bounds of what a reasonable employer could impose having regard to the guidance in **Ministry of Defence v Crook and Irving 1982 IRLR 488**

74. Mr Reeves referred to paragraph 55 of the relevant ACAS Code of Practice which provides that: -

5 *“Employers need to consider each application for time off on its merits; they should also consider the reasonableness of the request in relation to agreed time off already taken or in prospect”.*

75. He submitted that this was exactly what the respondent had done.

76. The second request for union facility time for 10 September 2018 had also been considered in the context of the surrounding circumstances, including the overall effect on patient services and staffing of the 2 days paid time off
10 already granted for that week, the respondent’s need to ensure absolute security within the context of a highly secure hospital setting and the fact that this request had been made with only one working days’ notice before the proposed time off.

77. Mr Paterson’s suggestion that the claimant could convert a half day of his
15 already approved two days leave in order to carry out his trade union duties had been reasonable and within the range of reasonable responses available to the respondent.

78. Per **Wignall v British Gas Corporation 1984 ICR 716, EAT**, the respondent had been entitled to take into account the nature and extent of the time off
20 already granted and, per **Thomas Scott and Sons (Bakers) Limited v Allen and Others 1983 IRLR 329, CA** that it was paid time off. Mr Paterson’s proposal that the claimant’s time off for trade union duties would be granted if he took some of his time off for public duties as unpaid leave was a perfectly reasonable condition.

25 79. In relation to the request for union time on 27 September 2018, Mr Reeve submitted that the respondent’s actions were, again, within the band of reasonable responses. A trade union representative is not entitled to take whatever time off is necessary to discharge his duties. This request fell within working hours and was at an inconvenient time for the health centre. The
30 respondent considered it on its merits and in the context of time already taken

off or in prospect. Mr Paterson's condition that the claimant reduce his public duties time as a condition of having this trade union time off was a reasonable one in all the circumstances and the respondent had acted within the range of reasonable responses.

5 **The relevant law**

80. The relevant law is contained firstly in the Trade Union and Labour Relations (Consolidation) Act 1992, which provides that: -

"168 Time off for carrying out trade union duties

10 (1) *An employer shall permit an employee of his who is an official of an independent trade union recognised by the employer to take time off during his working hours for the purpose of carrying out any duties of his, as such an official, concerned with-*

...

15 (3) *The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.*

20 (4) *An employee may present a complaint to an employment tribunal that his employer has failed to permit him to take time off as required by this section.*

...

170 Time off for carrying out trade union activities

25 (1) *An employer shall permit an employee of his who is a member of an independent trade union recognised by the employer in respect of that description of employee to take time off during his working hours for the purpose of taking part in-*

(a) any activities of the union, and

(b) any activities in relation to which the employee is acting as a representative of the union.

...

5 *(3) The amount of time off which an employee is to be permitted to take under this section and the purposes for which, the occasions on which and any conditions subject to which time off may be so taken are those that are reasonable in all the circumstances having regard to any relevant provisions of a Code of Practice issued by ACAS.*

10 *(4) An employee may present a complaint to an employment tribunal that his employer has failed to permit him to take time off as required by this section.”*

81. A similar provision is in section 50 of the Employment Rights Act 1996, which provides: -

’(50) Right to time off for public duties

...

15 *(2) An employer shall permit an employee of his who is a member of -*

(a) a local authority

...

To take time off during the employee’s working hours for the purposes specified in subsection (3)

20 ...

(4) The amount of time off which an employee is to be permitted to take under this section, and the occasions on which and any condition subject to which time off may be so taken, are those that are reasonable in the circumstances, having regard, in particular to -

25 *(a) how much time off is required for the performance of the duties of the office or as a member of the body in question, and how much time off is required for the performance of the particular duty,*

(b) how much time off the employee has already been permitted under this section or sections 168 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (time off trade union duties and activities), and

(iii) the circumstances of the employers' business and the effect of the employee's absence on the running of that business."

5

82. In determining whether an employer's treatment of requests for such time off is reasonable, the Tribunal should not set its own standard but should consider whether the employee had acted within the range of reasonable responses available to it - **Ministry of Defence v Cook & Irving 1982 IRLR 488**.

10

83. In that case, it is not for the Tribunal to substitute its own opinion with that of the employer as to whether the respondent had acted reasonably or not. Rather its job is to determine whether the employer had acted in a manner which a reasonable employer might have acted even though the Tribunal, left to itself, would have acted differently.

15

Discussion and Decision

84. Neither party sought to assert whether the time off sought had related to trade union duties in terms of section 168 of TULR(C)A 1992 or trade union activities in terms of section 170. In any event the Tribunal concluded that it did not require to resolve that question as the test that it ultimately had to apply was the same in either case.

20

85. In reaching its decision, the Tribunal had regard to the statutory provisions and to the relevant provisions of the ACAS Code of Practice on "Time off for trade union duties and activities". The Tribunal paid particular attention to the following paragraphs of the ACAS Code:

25

"42 The amount and frequency of time off should be reasonable in all the circumstances. Although the statutory provisions apply to all employers without exception as to size and type of business or service, trade unions should be aware of the wide variety of difficulties and

operational requirements to be taken into account when seeking or agreeing arrangements for time off, for example:

- *the size of the organisation and the number of workers*
- *the production process*
- *the need to maintain a service to the public*
- *the need for safety and security at all times*

...

51. *Union representatives should minimize business disruption by being prepared to be as flexible as possible in seeking time off in circumstances where the immediate or unexpected needs of the business make it difficult for colleagues or managers to provide cover for them in their absence. Equally employers should recognise the mutual obligation to allow union representatives to undertake their duties.*

...

53. *When deciding whether requests for time off should be granted, consideration would need to be given as to their reasonableness, for example to ensure adequate cover for safety or to safeguard the production process or the provision of service.*

...

54. *For their part line managers should be familiar with the rights and duties of trade union representatives regarding time off. They should be encouraged to take reasonable steps as necessary in the planning and management of representatives' time off and the provision of cover of workload reduction, taking into account the legitimate needs of such union representatives to discharge their functions and receive training efficiently and effectively.*

55. *Employers need to consider each application for time off on its merits; they should also consider the reasonableness of the request in relation to agreed time off already taken or in prospect.”*

5 86. The Tribunal noted the claimant’s concern that there had been a failure to treat each application on its merits and that a two-day per week cap had been imposed irrespective of the merits of a request for additional time off. However, the Tribunal was satisfied that the respondent had considered each application on its merits.

10 87. In reaching this conclusion the Tribunal accepted the evidence of Ms Garrity and Mr Paterson that when each application was made, they had regard to the time off the claimant had already been allowed, the clinical impact on the Health Centre, the operational impact on the Skye Centre generally and the impact on patients. The Tribunal found that they had reasonably concluded that the requests should not be granted in all the circumstances.

15 88. The Tribunal rejected the claimant’s submission that a blanket policy had been imposed, which had resulted in a predetermination to automatically reject any requests for additional time off over and above two days paid special leave each week. Mr Paterson had made it clear in his dealings with the claimant and his representatives that this was not an inflexible limit and
20 that consideration would be given to any application for additional time off according to its merits.

89. The Tribunal was satisfied that the respondent had not been inflexible in its approach and had indeed considered each application on its merits. The fact that two days special leave had already been granted in each case had only
25 been one factor in its overall determination of the rejected requests.

90. Furthermore, the respondent had not acted unreasonably in suggesting that the claimant could take unpaid leave for some of his public duties if he elected to convert some of his paid time off for public duties to paid time off for trade union duties. The respondent’s approach in treating such applications
30 ‘interdependently’ had been fair and reasonable and had been compliant with the ACAS Code.

91. That was not an unreasonable suggestion in circumstances where the Tribunal found that the respondent's policy to allow two days paid special leave per week was an extremely generous allowance, having regard to the operational impact of his time off from a small specialist unit, which is keenly felt by his colleagues and ultimately by patients.
92. The Tribunal also had regard to **Borders Regional Council v Maule 1993 IRLR 199** in which the EAT held, obiter dicta, while dealing with a claim under section 29 of the Employment Protection (Consolidation) Act 1978 (a claim for time off for public duties under previous legislation) that: -
- "It would normally be expected that where an employee is undertaking duties of the kind to which s.29 applies, there would be discussion between employer and employee in order to establish, by agreement, a pattern for the absences from work required by the duties. An employee who is undertaking a variety of public and other duties may have some responsibility to plan the absences from work, and to scale down the level of commitment which such public duties involve so as to produce a pattern which can be regarded as reasonable in the circumstances"*
93. The Tribunal observed with some disapproval the lack of co-operation that had crept in between the parties, which had ultimately led to a lengthy delay in the member's Dignity at Work meeting. It also considered it unhelpful that Mr White's original advice had overlooked the respondents' special leave policy, which was clear in its terms and would have permitted the claimant's requests to be managed within an existing and established framework.
94. The Tribunal was also concerned that the claimant's approach betrayed a sense of entitlement to whatever time he requested and an inflexibility to find alternative solutions, as borne out by the cancellation of the dignity at work meeting on 27 September 2018 when the respondent had tried unsuccessfully to work with him to accommodate that request and his public duties time. The Tribunal also found that the claimant had failed to recognise the goodwill the respondent had shown him, in circumstances where he must surely have

appreciated the profound operational impact on clinical services of his regular absences from the health centre.

5 95. In all the circumstances the Tribunal finds that the respondent acted within the band of reasonable responses when it refused the claimant's applications for time off for trade union duties or activities on 10 and 27 September 2017 and this claim is therefore dismissed.

10 96. So far as the claimant's *esto* case is concerned the Tribunal finds that in all the circumstances the claimant's request for reasonable time off for public duties on 27 September 2018 was ultimately allowed and that he subsequently took that day off as paid special leave. As a result, there was no breach by the respondent of section 50 of the Employment Rights Act 1996 and the claimant's claim in that regard is also dismissed.

15 Employment Judge: Robert Gall
Date of Judgement: 28 June 2019

Entered in Register,
Copied to Parties: 07 July 2019