Case Number: 3202205/2018
3334247/2018
3200581/2019
3312386/2019
3320826/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
1. Mr Stuart Bird	**v**	**Morrison Data Services (Water) Limited**
2. Mr Sikander Rashid		

Heard at: Watford **On**: 7, 8, 9 10 and 11 September 2020

Before: Employment Judge Alliott
Members: Mrs J Smith
Mrs A Brosnan

Appearances
For the First and Second Claimants: Mr T Roper (Lay representative)
For the Respondent: Mr R Dennis (Counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The First and Second Claimants' claims are dismissed.

REASONS

Introduction

1. The First and Second Claimants are employed by the respondent as Sales Investigators ("SIs"). The First Claimant is a Trade Union Representative/Workplace Organiser for the GMB Trade Union. He has held this position for about seven years. The Second Claimant is a Trade Union Representative for Unison. He has held this position for about 20 years. He has served as Chair of his branch and has sat on the Unison National Committee.

2. By five claims presented on 19 and 20 October 2018 (First and Second Claimants), 10 and 11 March 2019 (First and Second claimant) and 10 July 2019 (Second Claimant), the First and Second Claimants bring claims of detriment for trade union activities.

The issues

3. A preliminary hearing was heard before Employment Judge Smail on 2 September 2019. The claim and issues were identified as follows:

> "The claims and issues
>
> 1. By these claims the claimants claim detriment for trade union activities. They say that they represented union members at the respondent and thereafter were subject to the following detriments:
>
>   (a) Mr Bird says he was subject to undue scrutiny of his work in December 2017.
>
>   (b) Claire Bishop refused to hear his grievance dated on or about 4 November 2018.
>
>   (c) Mr Rashid says he was subject to undue scrutiny in or about September and December 2017.
>
>   (d) Claire Bishop refused to hear his grievance dated on or about 4 November 2018; and
>
>   (e) Simon Millwood (sic: Millward) refused to deal with grievances promptly;
>
>   (f) Work was allocated to Mr Rashid that was not contractually obliged to be done without consultation.
>
> 2. The claimants seek declarations and compensation for what amounts to injury to feelings. It is assumed also by the respondent that such a head of loss may be awarded. There is no other financial loss."

4. Having heard the evidence, the issues as defined need two refinements. Issues 1(a) and (c) refer to undue scrutiny in December 2017. Both claimants refer to being investigated on a single day and the emails disclosed reveal that the enquiry was actually made on 30 November 2017. It was in early December that the claimants became aware that the two of them had been enquired about on that day. Issue 1 (c) also refers to undue scrutiny in September 2017. The claim form refers to this scrutiny as being the Second Claimant's telephone conversation being investigated and monitored. In fact, this refers to a telephone call made on 8 January 2018. In his opening note Mr Dennis, for the respondent, (at paragraph 7(c)) accepts this and we will treat issues 1(c) as including a reference to the 8 January 2018 telephone call rather than September 2017.

Time and early conciliation certificate issues

5. The issues as defined do not include time and early conciliation certificate issues.

6. The responses to the First and Second Claimant's first claims do, in general terms, take a time point in paragraphs 26 and 28 respectively. In addition, the response to the Second Claimant's second claim does point out that the early conciliation certificate number is that of the First Claimant and not the Second Claimant. There the matters have rested until the morning of the first day of this hearing.

7. On Day 1, Mr Dennis presented us with a 14 page opening note, backed with six authorities, taking a number of time and early conciliation certificate issues. This is somewhat unsatisfactory, not least as it will have taken the claimants by surprise.

8. However, time limits go to jurisdiction and jurisdiction cannot be conferred by agreement or waiver. Given the number of potential satellite issues raised, we declined to deal with these matters as preliminary issues and got on with hearing the evidence on the merits, putting these matters over to the conclusion of the case. Having determined on the merits that the First and Second Claimant's claims should be dismissed, our conclusions on these preliminary issues should be read in that light.

9. The points arising are as follows:

<u>The First and Second Claimants' first claims</u>

9.1 The First Claimant's claim, number 3334247/2018, was presented on 19 October 2018. The Second Claimant's claim, number 3202205/2018, was presented on 20 October 2018. The early conciliation certificates in support show that the date of notification was 7 August 2018 (Day A) and the certificate was dated 21 September 2018 (Day B). Thus, events that predated 8 May 2018 would be, prima facie, out of time.

9.2 The alleged undue scrutiny relied upon in the list of issues took place on 30 November 2017. Three months from that date would expire on 29 February 2018. Three months from the Second Claimant's claim in relation to the 8 January telephone call would expire on 7 April 2018. The respondent contends that the claims are out of time. The claimants' grievances arising out of the 30 November 2017 alleged undue scrutiny were heard on 9 February 2018, the outcome was delivered on 27 February 2018, the appeal was made on 8 May 2018 and the outcome delivered on 27/30 July 2018.

9.3 Hence, the satellite issues arising are:

9.3.1 (1) Was the act complained of a continuing act or a one-off act with continuing consequences?

9.3.2 (2) If out of time was it reasonably practicable to be presented in time?

9.3.3 (3) If not, was it presented in such reasonable time thereafter?

The First and Second Claimants' second claims

9.4 The First Claimant's second claim, number 3312386/2019, was presented on 10 March 2019. The Second Claimant's second claim, number 3200581/2019, was presented on 11 March 2019. Both claimants obtained new early conciliation certificates. The early conciliation certificate of the First Claimant shows the date of notification was 13 January 2019 (Day A) and the date of the certificate was 13 February 2019 (Day B). It is assumed that the Second Claimant's early conciliation certificate has the same dates, but we have not seen it. The substance of both claims is the allegation that Claire Bishop refused to hear their grievance dated 4 November 2018. The Second Claimant's claim had the First Claimant's early conciliation certificate number on it. Authority is clear that that claim must be rejected.

9.5 Thus, if the period of early conciliation stands to be disregarded, events that pre-dated 14 October 2018 are, prima facie, out of time. However, if the early conciliation certificates are invalid then the time is not disregarded and events that pre-dated 11 and 12 December 2018 are, prima facie, out of time.

9.6 The Second Claimant can apply for reconsideration to rectify the defect. If rectified the claim is treated as presented on the day the defect is rectified. The respondent takes points that the second early conciliation certificates are invalid as they relate to the same "matter" as the first early conciliation certificates and consequently, further time points arise.

9.7 Hence the satellite issues arising are:

9.7.1 (4) When did the claim for refusal to hear the grievance claim dated 4 November 2018 crystallise?

9.7.2 (5) Should the rejection of the Second Claimant's second claim be reconsidered? What early conciliation certificate number should be entered?

9.7.3 (6) Does the substance of the second claims relate to the same matter as the first claims?

9.7.4 (7) If the substance of the second claims relate to the same matter then was it reasonably practicable to bring the claim within time and if not, has the claim been brought in such further time as is reasonable?

The Second Claimant's third claim

9.8 The Second Claimant's third claim, number 3320826/2019, was presented on 10 July 2019. The early conciliation certificate in support shows the date of notification was 17 May 2019 and the certificate was dated 16 June 2019. Thus, if the period of the early conciliation certificate is disregarded, prima facie, events that pre-dated 18 February 2019 would be out of time. However, if the early conciliation certificate is invalid due to the first early conciliation certificate covering he same matter, events that pre-dated 11 April 2019 would be out of time. The Second Claimant's third claim related to being allocated work on 21 February 2019 and Mr Millward not dealing with a grievance made on 20 February 2019 promptly.

9.9 Hence, the satellite issues are:

9.9.1 (8) When did the claims for not dealing with the grievance crystallise?

9.9.2 (9) Does the substance of the third claim relate to the same matters as the first claims?

9.9.3 (10) If so, was it reasonably practicable to bring the claim in time and if not, has it been brought in such further time as is reasonable?

9.10 Hence it is that there are at least 10 satellite issues going to jurisdiction, most arising out of early conciliation certificates.

10. In the case of Drake International Systems Limited and others v Blue Arrow Limited [2016] ICR445, Langstaff J commented on the desirability of avoiding satellite litigation in relation to the early conciliation procedures and the need "to avoid formalities fettering a fast and fair process of justice". More recently, in E.ON Control Solutions Limited v Caspall [2020] ICR 552, Eady J has expressed that aspiration again, referring to the satellite disputes to which the requirements of early conciliation are giving rise and suggesting that the time has come for a review of the procedures relating to early conciliation.

11. We respectfully agree. In circumstances where there is a continuing relationship between the employer and the employee and subsequent matters of complaint arise, it seems to us unsatisfactory that an employee has to decide either to rely on an existing early conciliation certificate number or to obtain a new one. Whichever course an employee takes, the employee runs the risk of the employer arguing in due course that the subsequent matters of complaint do or do not arise from the same matter as the original certificate depending on its interests. Prudence suggests that the employee should put both an existing and a new early conciliation number on a subsequent claim form. In our view, this is not a satisfactory state of afffairs.

12. In the First and Second Claimants' first claims, reference is made to a second investigation by Ms Randall on 24 May 2018. We have little doubt that, had time issues been raised at the preliminary hearing on 2 September 2019, these matters would have been included as issues as they are within the three month limitation period and are part of a series of similar acts connected to the alleged undue scrutiny in December/January 2018. Consequently, we find that issues 1 (a) and (c) had been presented within time. Further, we find that the alleged undue scrutiny formed the substance of the grievance that was determined on appeal, in time and we find that the act complained of was a continuing act.

13. As regards the First and Second Claimants' second claims and the Second Claimant's third claim, we find that the claimants have at all times endeavoured to comply with the requirements of the early conciliation certificate regime and time limits and that it would be manifestly unjust to exclude their claims on procedural grounds due to the unsatisfactory state of the law. Consequently, we have decided to allow amendments to the First and Second Claimants' first claims to include the matters raised in the second and third claims. As such, they are all in time and covered by early conciliation certificates.

14. In making these decisions we are quite clear that the defendant has not been prejudiced in any way.

The law

15. Mr Dennis has made submissions on the law which we accept. We set them out here: -

    15.1 Section 146 of the 1992 Act provides, in so far as relevant to this case as follows:

    > "(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,

…

(2) In sub section (1) "an appropriate time" means –

(a) A time outside the worker's working hours, or

(b) A time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a Trade Union …;

(c) And for this purpose, "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work."

15.2 The purpose of an employer's act or omission "consists in the factors operating on the mind of the relevant decision maker": See Serco Limited v Dahou [2017] IRLT 81 at 29.

15.3 In respect of the burden of proof, s.148(1) of the 1992 Act provides that:

"(1) On a complaint under s.146 it shall be for the employer to show what the sole or main purpose for which he acted or failed to act."

15.4 However, the courts have held that the claimant must still prove a prima facie case before the burden will shift to the respondent. In Serco, the judgment of Burton J in Yewdall v Secretary of State for Work and Pensions (UK EAT/0071/05//TM, unreported, 19 July 2005) held that:

"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?

(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…. 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 ie the illegitimate purpose prohibited by s.146(1) (b).

24. … once it requires it 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… 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 penalising in respect of Trade Union activities. Once that prima facie case is established, then the burden passes to the employer under s.148."

15.5 In respect of what constitutes a detriment, in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, Lord Hope held that:

"34. … The court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

34. But once this requirement is satisfied, the only other limitation that can be read into the word is that… one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment" … but… it is not necessary to demonstrate some physical or economic consequence."

The evidence

16. We have been provided with a hearing bundle running to 595 pages. During the hearing we were provided with a clip of documents concerning a disciplinary hearing against the First Claimant in September 2020. We have wholly disregarded this clip of documents as irrelevant.

17. We were provided with witness statements and heard evidence from the following on behalf of the respondent:

17.1 Ms Sasha Randall, Planning and Reporting Manager/Senior Reporting Analyst at the respondent.

17.2 Mr Matt Barnes, Senior Operations Manager at the respondent at the time.

17.3 Mr Sven Siddle, Head of Protect My Property, an associated division within the Morrison Data Services Limited Group. At the time he sat on the respondent's Executive Committee.

17.4 Mr Simon Millward, Human Resources Business Partner at the respondent at the time.

17.5 Ms Claire Bishop, HR Director at the respondent.

18. We were provided with witness statements and heard evidence from the First and Second claimants. In addition, we heard evidence from the following on behalf of the claimants:

18.1 Mr Adrian Bigwood, an Area Manager for Thames Water.

18.2 Mr Martin Smith, SI Team Leader for the respondent.

Both of these witnesses spoke to letters which they signed.

They also gave additional evidence in supplementary questioning.

19. In addition, we were provided with letters/emails from the following:

19.1 Ms Helen Gardiner
19.2 Ms Fiona Brooking
19.3 Mr Jonathan Beeke
19.4 Ms Teresa Cook
19.5 Ms Caroline Tizard
19.6 Mr Kevin Adams
19.7 Mr Christopher Berry

The facts

<u>Our overview</u>

20. It is very clear to us that both claimants are committed and active Trade Unionists. Although members of different Unions, we gained the clear impression that they worked closely together as far as Trade Union activity was concerned. Many communications to the respondent we have seen are jointly signed and the claimants also often took action in tandem.

21. Thames Water Utilities recognised the Unions. Vennsys Limited partially recognised the Unions through workplace forums. Meter U and the respondent respectively did and do not recognise Trade Unions in the Water

Division. The respondent does, however, recognise Trade Unions in the Electricity and Gas Divisions.

22. It is clear to us that the claimants wanted to improve Trade Union involvement in the respondent's Water Division business.

23. Prior to December 2017, the claimants had brought 20 grievances since 2015. None of these grievances had been upheld. Obviously enough, we have no details of those grievances and the rights and wrongs of them. No doubt the claimants consider that every grievance was warranted, made in their capacity as Union Representatives and not upheld due to anti-union bias on the part of the respondent's management. Indeed, during the course of this hearing, Mr Roper went so far as to refer to the respondent having institutional anti-union views. Equally, we have no doubt that the respondent's management considered that every grievance was not warranted and that they had involved a significant amount of management time and resource to deal with. For example, we have seen an email dated 8 January 2018 from HR to the First Claimant setting out the arrangements for dealing with one grievance hearing (the grievance arising from the alleged undue scrutiny in this case) along with three other grievance appeal hearings dealing with unrelated grievances.

24. As a result, it is not hard to conclude that there was and is antipathy on both sides.

25. For example, on 29 December 2017, the First Claimant sent an email concerning the grievance outcome stating: -

> "On a more sombre note please see the email trail below.
>
> I have to say that as a Union Rep and employee that I am sick and tired with the performance of Meter U HR and having to step on eggshells.
>
> The continual aggravation towards employee's rights and double standards from HR are much of the cause of the constant battle between Meter U and employees."

26. Another example is the Second Claimant being recorded in a phone call (albeit, to be fair, one he did not know was being recorded) to Fiona Brooking (a Union Member bringing a grievance) in which he states: -

> "… I don't want someone tapping on my shoulder, especially when Sasha is fucking investigating me the bitch."

27. On the other hand, an indication of the respondent management's views can be gleaned from the following examples: In an email dated 11 June 2018, Mr Sven Siddle (who heard the claimant's grievance appeal), when asked to respond by another manager to an email complaint from the First Claimant wrote: -

> ".. this email and his "suspicions" help to strengthen our position that maybe if they both weren't so awkward to deal with then perhaps they wouldn't have been victimised in the first place.
>
> I know it won't change them as individuals but the point needs making all the same."

28. Further, an email dated 4 September 2018 from Mr Graham Titherington, who took over as Business Development Director from Mr Matt Hardcastle, states: -

> "There are a few legacy issues in the business that need to be resolved –
>
> One of the areas I would welcome your support to resolve is Syd and Stuart – they've been allowed to dictate terms in Thames Water for far too long."

29. The claimants raised a grievance arising out of the alleged undue scrutiny on 30 November 2017. Initially, that grievance was rejected but was partially successful on appeal. In short, it was found that the claimants had been victimised but not on the grounds of Trade Union activity.

30. Following the appeal, one of the recommendations made was as follows: -

> "An employee forum should be established to facilitate better communication, working practices and relations between the field, office and management:"

31. It became apparent to us during the course of the hearing that this recommendation was very important to the claimants in the furtherance of their desire to promote Trade Union input into the running of the respondent's operation. It emerged that the claimants were expecting to sit on the proposed Employee Forum and the First Claimant told us candidly in evidence that had such an Employee Forum been set up then he would probably not have pursued this claim. The complaints in relation to Claire Bishop not hearing the claimant's grievances dated 4 November 2018, were related to the failure to set up the Employee Forum.

32. We gained a very clear impression that these proceedings constituted the latest battle in a prolonged campaign by the claimants to promote Trade Union activity in the running of the respondent's business. We, of course, express no view on the issue of Union recognition and Trade Union participation in the running of any business. That is not what this case is about. However, much of the evidence we heard strayed well beyond the confines of the issues as defined. We have, however, limited ourselves to determining the issues as defined.

33. Against that background, the facts are as follows:

<u>Issues 1(a) and (c)</u>

34. The First Claimant was employed by Thames Water Utilities Limited on 27 July 1998. The Second Claimant was employed by Thames Water Utilities

Limited on 4 July 1985. The claimants were TUPE transferred to a company called Vennsys Limited in 2011 and further TUPE transferred to a company called Meter-U in 2015. Meter-U was acquired by the respondent on 1 August 2017.

35. By 2017 both claimants were employed as SIs.

36. The role of a Sales Investigator is to visit domestic customers and commercial properties, to identify and resolve high billing issues and leakages and investigate supply related queries and, sometimes, deal with customer complaints.

37. There were 24 SIs. Each SI had a geographical area of responsibility, referred to as a polygon. The First Claimant worked in the Thames Valley area and the Second Claimant covered Essex and parts of North London. The claimants worked remotely from home. They had a hand-held device which allowed them to access the appointments that they had to visit each day. We have seen evidence of appointments being allocated up to three weeks in advance, but the Second Claimant told us that he generally looked at his itinerary the day before or on the morning. Appointments were allocated in two-hour windows which could overlap. Start times varied. The First Claimant told us that he generally began at 08.00 and the Second Claimant told us that he generally began at 06.30. Both claimants were paid from the moment they left their homes in their vans. The vans were equipped with trackers which meant that management could monitor their movements. In the event that an SI had a gap in his/her itinerary, there were a lot of "fillers" which they could attend to. Fillers were jobs that needed investigating without a pre-arranged appointment.

38. Ms Randall began work with the respondent in April 2014 in the role of Business analyst. At some point in 2017 she began her role as Planning and Reporting Manager/Senior Reporting Analyst. She had three analysts reporting to her. Initially, she thought that she took over the Planning Team in March 2017 but in evidence conceded that it could have been as late as November 2017. We have seen documents which suggest that she was probably in post by at least June 2017. (see: Helen Gardiner's letter).

39. Ms Randall's job as Senior Reporting Analyst was a desk based role. Her main responsibilities included the management of productivity and performance of field based teams, ensuring high levels of activity were maintained in all operational areas, including the sales investigation workstream. Ms Randall monitored the number of appointments including peaks and troughs of appointments for the Meter Readers/Sales Investigators and would be contacted where bottlenecks occurred and where appointments were difficult to schedule.

40. The respondent had a system called Temetra which was predominantly used as a meter reading tool. In 2017 the system was adapted to make

appointments and investigate work. Mr Matt Barnes told us that the Temetra system could report on the whereabouts of employees, make appointments and look at employees on a daily basis to see how they were performing against their targets. Both Ms Randall and Mr Barnes told us that they ran hundreds of reports and analysed the performance of all employees. In addition, Ms Randall had access to the Van Tracker Logs. It seems that the adaptation of the Temetra system did not go without teething problems but it is clear to us that it was an effective management tool in that it allowed greater scrutiny of the workforce, especially those working remotely. Ms Randall had responsibility for managing and monitoring the KPIs for the Thames Water contract. One such KPI was, for example, a 30-day time limit from customer call to appointment. Ms Randall's team produced daily, weekly and monthly reports on productivity and performance. In addition, the system allowed monitoring of overtime.

41. Ms Randall told us that her role was to analyse the data available and, in the event of identifying any anomalies, to raise it with the relevant line manager. In the case of the SIs, including the claimants, the relevant line manager was Mr Martin Smith.

42. The First Claimant told us that in or around November 2017 he was asked if he would include the area around Marlborough in his polygon. The First Claimant lived near Didcot. The claimant told us that due to the distance and time to travel to the Marlborough area, he had a meeting with Martin Smith, Wendy Adams and Jon Beeke to discuss the problems that that posed. He told us that it was agreed that he would not have any early appointments in the Marlborough area and that he could lose an appointment time slot in order to provide flexibility in terms of getting to the next appointment. If he had a gap in his itinerary then he could pick up a filler. The First Claimant told us that this was agreed.

43. On 10 October 2017, Ms Helen Gardiner raised a grievance against Ms Sasha Randall. The grounds of the grievance were repeated harassment and bullying in the workplace. The First Claimant became involved in supporting Ms Gardiner as her trade union representative. We had only sketchy details of how that grievance was dealt with but Ms Randall accepted that she was aware that the First Claimant was assisting Ms Gardiner with her grievance. When asked about her reaction to having a grievance raised against her, Ms Randall told us that she disagreed with what Ms Gardiner was saying but was not upset about it. It would appear that the grievance was dealt with informally in that all parties were instructed to communicate better by telephone rather than email. Apart from this, Ms Randall was not sanctioned as a result of the grievance.

44. On 20 November 2017, Ms Fiona Brooking raised a grievance against her manager, Claire Pile, for bullying and intimidation. Claire Pile reported to Ms Randall. The Second Claimant supported Ms Brooking as her trade

union representative. Ms Randall told us that she only became aware after the grievance had finished but we would find it surprising if a line manager was unaware in general terms that a grievance had been raised against one of her direct reports.

45. We have been provided with some examples of Ms Randall investigating SIs. On 30 October 2017, Ms Randall initiated an investigation into all the SIs in relation to the large amount of overtime logged for September 2017. Also on 30 October 2017 Ms Randall requested an update on the SI Van Logger Timesheets for the last two weeks. Attached to that document appears to be a chart of all the SIs and their Van Logger times.

46. On 2 November 207, Ms Randall sent to Ms Pile an analysis of all the appointments by all the SIs, presumably for that date. That chart reveals some of the SIs (but neither of the claimants) had gaps in their appointments. Ms Randall was enquiring about whether anyone had done anything to get the gaps filled.

47. On 6 November 2017, Ms Randall requested a check be made to see if two SIs (Olu and Aman) had completed any fillers. On 8 November 2017 Ms Randall escalated the issue to line managers indicating that they needed to be more active with the SIs. This was because Olu, in circumstances where he had no appointments but some fillers, in fact did nothing. Ms Randall suggested that some form of performance report should be put in place to deal with the issue and concludes by stating, “This is naughty”. This indicates to us that Ms Randall’s role did in fact involve monitoring the performance of the SIs and drawing it to management’s attention when things were going wrong.

48. On 13 November 2017, Ms Randall sent an email to Jonathan Beeke and Kevin Adams as follows:

> “Morning!
>
> After our meeting with Craig on Friday, it has come about that there are not enough appointment slots open for SI. TW [Thames Water] have committed to giving at least 32,000 SI jobs (for both appointments and SMO1’s), but believe that this will not be achieved as they slots are not there… The quality of the SI work has also come into question, along with the lack of input and interest in the SI delivery meeting.
>
> I will advise Claire to get the SI ladies to plan slightly under their headcount, so that if anyone is sick, there is adequate cover. If there isn’t any sick, then we can proactively manage the guys to do SMO1’s and metering appointments.
>
> In the meantime, I believe that Martin needs to be taken away from covering the guy’s work and actively work on micro managing the guys in the field. Their hours, the quality of their work and their performance. I am working on setting up a report so that Martin can see what his team has achieved, and will hopefully

get something in place this week. If there is ANYTHING you need from me, please let me know."

49. This email confirms to us that Ms Randall was being proactive in monitoring and detecting less than optimum performance by the SIs. It has been suggested by the claimants that this was not her role. We disagree and find that it clearly was her role.

50. On 27 November 2017, Thames Water requested that an appointment be made for an address in Kidlington, Oxfordshire. Email exchanges demonstrate that Ms Randall was having difficulties in finding an appointment prior to January 2018. Such an appointment would not have complied with the Thames Water KPIs.

51. We have an email dated 28 November 2017 reporting on an SI meeting of that day. This email was sent by Ms Randall to the members of her team. This further confirms to us that Ms Randall was proactively addressing the less than optimum number of appointments being achieved and how matters could be improved.

52. On 30 November 2017 in an email timed at 12.39, sent by Mr Jon Beeke to Martin Smith, the following was said.

> "Hello Martin,
>
> It has been brought to my attention via the office that the following is happening.
>
> Stuart Bird – no appointments are raised in Marlborough between 8 and 11am.
>
> Syd Rashid – starts work at 6am every day although he may not an appointment/job to deal with until 8am onwards.
>
> Can you look into this and discretely and advise why/if this is happening and for what reasons."

53. In an email sent at 12.48 on 30 November 2017, Martin Smith replied to Jon Beeke as follows:

> "Hi Jon,
>
> I wasn't aware of any issue with Marlborough for those times? It may be that the time Stuart starts work any appointments in that particular area may be a risk because of the travelling time involved. Stuart tends to start work between 8.15 and 8.30.
>
> Syd doesn't start at 6am as far as I am aware.
>
> He logs on with me between 6.30 and 6.45 normally. This he has always done and he will never change his working arrangements.

> Martin",

54. In an email on 30 November 2017 timed at 13.09, Mr Beeke replied, "Thank you."

55. The email chain ends with an email on 30 November 2017 timed at 14.30 from Martin Smith to Jon Beeke as follows:

> "Jon,
>
> I have since spoken with Stuart about this and my original response was correct along with the fact closing slots allows the guys to get fillers. This was brought up at the meeting we attended with Stuart present and this was discussed and encouraged as an option if you recall.
>
> Stuart is also happy to discuss with you if you want to call him.
>
> Martin".

56. Mr Smith told us that later in the same day he spoke to the First Claimant. That would tie into his last email in the chain which refers to speaking to the First Claimant.

57. The First Claimant told us that he found it strange to have someone of Sasha Randall's status looking into his working practice. As we have already found, it was Ms Randall's job to make such enquiries.

58. Martin Smith told the First Claimant to contact Jon Beeke for an explanation. The First Claimant told us that he contacted Jon Beeke who informed him that Sasha Randall was looking into his work. Mr Bird asked him what was the purpose and Mr Beeke apparently replied, "I don't know". Mr Bird also asked Mr Beeke "who else was being looked into?" and received the reply "Only you and Syd Rashid".

59. 30 November 2017 was a Thursday.

60. On Monday 4 December 2017 the First and Second Claimants separately put in grievances. The First Claimant's, timed at 17.03, reads as follows:

> "Please accept this email as my formal request to raise a grievance against Office Manager Sasha Randall for potential union victimisation against myself as an employee and specifically as a Trade Union workplace rep.
>
> This is on the grounds that she has been investigating my hours of work and working time slots and asking questions. I understand that this enquiry was made about both myself and my Unison Union colleague.

I should point out that this appears to be intimidation and victimisation of Union Reps.

I would like to discuss this at a formal level asap the reasons behind her investigation, on whose orders this was initiated considering she has no place in my line management chain."

61. The Second Claimant's grievance, timed at 17.16, was in the following terms:

> "I wish to raise a formal grievance against Sasha Randall as above for the reasons outlined below.
>
> I believe that I have, and being, investigated on my working days, hours and the jobs that I complete each day.
>
> I believe that this is a consequence of being a Unison TU Rep in my duty to represent Union members employed by Meter-U.
>
> Can you please acknowledge the grievance and arrange for the hearing by a senior MDS manager and not by any manager from Meter-U."

62. In due course, the grievance hearing was arranged for 9 February 2018. It was held by Mr Matthew Barnes. We have a handwritten note of what was said at the grievance hearing which is difficult to decipher. The transcript does not help as it has "unknown" recorded in many places. However, it would appear that the First Claimant outlined his complaint relating to enquiries being made as to his working in the Marlborough region and indicated that he had suspicions as it appeared that himself and Mr Rashid were the only two SIs that were being looked into on that day.

63. On 26 February 2018, Mr Barnes interviewed Sasha Randall. Again, we have handwritten notes of the interview which are not the easiest to read. Again, the transcript does not really help. Ms Randall describes her role and there is the following exchange:

> "Ms Randall (SR)… "Putting a lot of time into Martin to give him the support to manage and get KPIs met.
>
> CG: How Martin taking on
>
> SR: Not very well, he made clear "?" not want job. He won't do/say lot to team to not upset Syd and Stuart. Could get into financial penalty for not doing role. Me and 300 people out of job for not managing. If they say to Martin 6am-5pm/overtime, I would question but Martin doesn't. Lieu days-1 employee 2 weeks lieu- not even do overtime, only 6 hour days.
>
> 23 SIs, lieu days just on ? – 1 ? services on ? in last few months."

64. Ms Randall explains her input to this meeting in greater detail in paragraphs 18-26 of her witness statement. She describes in general her investigations into all SIs.

65. We find that the adjustments to the Temetra system had facilitated greater scrutiny of the working patterns of all the SIs. We find that Ms Randall, as part of her job, had identified a number of working practices of the SIs that were potentially detrimental to the business in terms of profitability and productivity. We find the reference to 300 people out of a job refers to the importance of retaining the Thames Water contract by achieving the agreed KPIs. The exchange in the interview with Ms Randall demonstrates to us that she had concerns that Martin Smith was not managing the SIs to best effect. We find that it appeared to Ms Randall that Martin Smith was agreeing certain work practices and tolerating certain behaviour as he did not wish to confront the issues which might upset the First and Second Claimants.

66. The grievance outcome letters are dated 27 February 2018. The claimants' grievances were rejected by Mr Matt Barnes, essentially on the basis that: -

> "Having spoken at length to Sasha Randall and being given a full understanding of her role in the business, Matt is satisfied that both you and Stuart have been, and continue to be, treated in the same way as other operatives who carry out identical "sales investigation" and similar "meter reading" activities. Matt finds that you are not being victimised for your Union Representative roles."

67. On 15 March the claimants both appealed the outcome of the grievance and raised a new grievance against Matt Barnes.

68. A grievance appeal and grievance hearing was held with the claimants on 8 May 2018. The manager dealing with it was Mr Sven Siddle.

69. As part of that appeal process Sasha Randall was interviewed on 23 May 2018. Her answers indicate that Sales Investigators went in to the Temetra System in August 2017. She reiterates that it is her job to analyse the whereabouts and productivity of Sales Investigators. The following questions and answers are recorded: -

> " Q: Were you instructed to investigate Stuart and Syd and if so, why?
>
> A: NO because investigating isn't Sasha's job.
>
> Q: Did you intend on investigating Stuart and Syd to manipulate a situation whereby action could be taken against them?
>
> A: No, investigating isn't Sasha's job.
>
> Q: Do you believe the questioning or investigating you do is genuine, and for business use only?

> A: Sasha doesn't investigate and all reports she generates and the question raised by these reports are fed onto Team Leaders."

70. We find that those answers are somewhat disingenuous in that Sasha Randall clearly did investigate the SIs and drew any anomalies in their working practices to the relevant Line Manager.

71. We consider that a more accurate reflection of Sasha Randall's role was provided in answers given by Mr Kevin Adams in his investigatory meeting where the following exchange is recorded: -

> "Does Sasha look at the performance and productivity of all Meter Readers and Sales Investigators?
>
> A: Yes, everybody, but only investigates an individual where there is something flagged as an issue. She reviews a team's performance first then drills down to individual level. "

72. Further, it is notable that in his interview, Mr Martin Smith, Team Leader for the SI Team, the following is recorded in his interview: -

> "Do you believe Sasha, or any other manager, has deliberately targeted Stuart or Syd for negative reasons?
>
> A: Stuart and Syd have caused a lot of grief. Martin could see why they could be targeted. Other than this instant Martin can't think of any other examples. For example in this instance Stuart and Syd were the only people asked about. Martin thinks this is because of the perceptions created within the office of Stuart and Syd."

73. An appeal interview outcome meeting was held on 18 July 2018. Mr Sven Siddle informed the claimants as follows: -

> "I have found that you have been singled out and SR (Sasha Randall) looked into your activities but can't find a correlation between you being a TU Rep – no business directive (?) just one individual but a clash of personality."

74. The claimants were sent grievance appeal outcome letters on 27 July 2018. That letter sets out the following conclusions: -

> "I went on to elaborate by saying that I had established, through interviewing all the relevant parties that Sasha appears to have overreached her management responsibilities in relation to you. However, I did not find any correlation between this and you being a Trade Union Representative. Furthermore, there was no evidence to suggest that Sasha's activities were directed by the business and nor could I find any evidence that Sasha's activities were intended to or resulted in any detriment to you.
>
> …

> I explained to you that I could find no evidence to support any of those contentions. I explained that whilst I see that you are passionate, other people see that passion as aggression, particularly when communicating over the phone which is why, rightly or wrongly, they have this perception. This has nothing at all to do with Trade Union activities. I explained that I did however believe that the actions of Sasha were due to a personality clash following a number of strong conversations which have happened around the office and other parties and there was evidence of unprofessionalism within the office. I went on to say that there is a perception in the office at Swindon that you are loud and generate a lot of noise which has become apparent to Sasha."

75. Mr Siddle went on to make four recommendations, one of which was the establishment of an Employee Forum as already referred to.

76. We have carefully considered why it is that on 30 November 2017 Ms Sasha Randall caused Mr Beeke to make discreet enquiries concerning the working practices of the First and Second Claimants.

77. Ms Randall suggested that the reason she looked into Mr Bird was due to the problems in arranging an appointment for Kidlington, Oxfordshire, within the KPI. Mr Bird told us that his polygon did not stretch as far as Kidlington, to the North of Oxford as his polygon ended at Abingdon, South of Oxford. We are unconvinced that enquiries as to why Mr Bird would not work 8-10am appointments in Marlborough would have any relevance to why he could not cover an appointment in Kidlington. Further, although it may well be that issues relating to Mr Rashid starting at 6am when he had his first appointment at 8am had been raised before, we have had no satisfactory explanation as to why he was included in the same enquiry on 30 November on the same day as Mr Bird.

78. Thus it is that we have examined why it should be that Mr Bird and Mr Rashid, both trade union representatives, should be investigated on 30 November 2017 in circumstances where no other SIs were similarly investigated on that particular day.

79. It is a central part of the claimants' case that the investigation was prompted because of their respective roles in representing members in advancing grievances shortly before. This is, no doubt, so that they can come within the protection of section 146 by virtue of taking part in the activities of a trade union at an appropriate time. We find that Ms Randall was not motivated to act as she did due to the claimants representing their members at grievance hearings. We accept Ms Randall's evidence on this point that whilst she was aware of their involvement she was not particularly concerned.

80. It is clear to us that as far as management was concerned, the First and Second Claimants were very difficult employees. Over the years they must

have generated a lot of management time being spent dealing with their 20 previous grievances. We find that the First and Second Claimants were potentially seen to be responsible for maintaining some of the unsatisfactory working practices of the SIs that had been allowed to become established by weak management. We find that the First and Second Claimants had developed a reputation within management as being difficult and obstructive employees and that they were perceived as being part of the problem in reforming the working practices of the SIs. From all that we have seen, it is clear to us that the First and Second Claimants operated together most of the time, signing correspondence jointly or acting in conjunction with each other.

81. We have, of course, considered whether the reason the claimants had acquired this reputation was because of their Trade Union activity.

82. We find that in about August 2017 the SIs had been included in the Temetra system for the first time and that this had allowed far greater scrutiny of their working practices. We find that Sasha Randall's job was to investigate the working practices of the SIs and that quite a few issues arose with unsatisfactory working practices being identified. We find that these investigations were entirely legitimate management of the SIs. We find that the claimants were very well known to management as not only Trade Unionists but also as two individuals who acted together in raising a very large number of grievances. We find that Miss Randall, in all probability, looked at the work practices of the First and Second Claimants due to their reputation for being awkward and bringing grievances. We have found that her motivation was not because of the First and Second Claimants acting in a representative capacity for Union Members advancing their own grievances. We find the enquiries were made in a wider context of looking into whether two vociferous employees were doing their jobs properly.

83. The acts complained of relate to "undue scrutiny". The claimants have established that enquiries were made on 30 November 2017 into their work practices as SIs. However, we find that that scrutiny was not undue in that anomalies had been identified in their work practices and legitimate questions were raised of their Line Managers.

84. We find that the enquiries made did not constitute a detriment. Questions were raised and answers given. The issue does not appear to have been taken any further.

85. As regards time, we are dealing with these complaints on the basis that they are in time.

86. For the purpose of thoroughness, we go on to consider whether, even if the acts complained of constituted undue scrutiny and caused a detriment, then what was the purpose? In those circumstances given that both the claimants were Trade Union activists, a prima facie case would be made out

and consequently the burden of proof would lie on the respondent to show what the sole or main purpose for the action was. We find that the respondent has discharged that burden of proof in establishing that the reason the claimants were investigated was that as well-known individuals Sasha Randall looked to see if there were any anomalies in their working practices. Such anomalies were found. We do not find that the scrutiny was in order to prevent, deter or penalise the claimants from being members of an independent Trade Union or for taking part in the activities of an independent Trade Union.

87. As regards the Second Claimant's complaint about the monitoring of his telephone call, we have an email from Claire Pile dated 10 January 2018 which states as follows:-

> "Hi all,
>
> I have been quality monitoring Planner's calls yesterday I pulled a call made to Fiona from Syd Rashid.
>
> I think you will need to listen to this as Syd said the below comment:-
>
> I know I am being f ****** investigated by Sasha the bitch.
>
> Can you look into this.
>
> FYI Sasha is not aware on this.
>
> I have attached the call for you to listen. If you not able to you can listen from my desktop."

88. The respondent's pleaded case is that calls to the Swindon office where the claimant worked were recorded and audited. Apparently, this was a requirement of Thames Water whose site it was. Miss Randall's evidence on this was as follows: -

> "As calls to the Planners were being monitored at that time as there was a concern that the Planners were not providing the relevant or accurate information to the Sales Investigators/Meter Readers in the field, also there was some concern that the customers were not receiving the right information either. As a consequence of this monitoring Mr Rashid's conversation was picked up."

89. We accept Ms Randall's evidence on this issue and that the routine monitoring of telephone calls had indeed identified the Second Claimant's derogatory remarks about Ms Randall. The Second Claimant subsequently apologised to Ms Randall. It is understood that no further action was taken due to the fact that the Second Claimant was unaware that the telephone calls were being monitored. We find that the monitoring of this telephone call was not undue scrutiny in that it was warranted. Further, we find that the Second Claimant was not subjected to detriment by making an apology

for his derogatory remarks. Finally, we find that the monitoring of the calls was wholly unrelated to the Second Claimant's Trade Union activity.

Issues 1(b) and (d)

90. The alleged detriments relate to Claire Bishop refusing to hear the claimant's grievance dated 4 November 2018.

91. The claimants did lodge a grievance on 4 November 2018. The main grounds of the grievance were as follows: -

> "The business has shown no duty of care under its legal obligations or regard for the wellbeing of two of its employees, this is further evidence of continued victimisation of us, as Trade Union Reps.
>
> Therefore, we have no option but to raise a further grievance against the business on the grounds of breach of trust, potentially a breach of contract whereby the business fails to deal with grievances in a reasonable timeframe, fails to ensure that recommendations are actioned and monitored, fails to engage with Acas guidelines, fails to treat us with fairness or dignity, or in a manner that fosters trust and respect and fails to communicate in any meaningful way.
>
> MDS have completely ignored the Acas conciliation process, a policy encouraged by the government to engage employers and employees with mediating disputes in the workplace, rather MDS have tried to manipulate the situation finally calling off a meeting, when they realised they wold not be allowed to dictate the terms.
>
> No consideration has been given to our health, wellbeing, welfare, stress and anxiety levels and as previously stated a total lack of duty of care, again a legal obligation."

92. At the time the claimants had already presented their first claims to the employment tribunal.

93. Miss Bishop responded on 5 November 2018 indicating that since discussions with Acas were confidential the respondent would not consider a grievance arising out of an Acas meeting which did not go ahead.

94. On 6 November 2018 the claimants asserted that their grievance was not arising out of a cancelled Acas agreement and consequently they wished to proceed with it.

95. On 15 November 2018 Miss Bishop replied as follows:

> "There appear to be six broad points to which your "further grievance" relates.
>
> 1. Breach of trust.
> 2. Potential breach of contract whereby the business fails to deal with grievances in a reasonable timeframe.
> 3. Failure to ensure that recommendations are actioned and monitored.

> 4. Failure to engage with ACAS guidelines.
> 5. Failure to treat us with fairness or dignity or in a manner which fosters trust and respect.
> 6. Failure to communicate in any meaningful way.
>
> If there is to be a grievance hearing you will need to be a lot more specific. It is just not realistic to arrange a grievance hearing to consider vague allegations."

96. On 22 November 2018 the claimants responded but did not give further details of the grievance.

97. On 14 December 2018 Ms Bishop reiterated that she needed full particulars.

98. On 17 December 2018 the claimants asserted that they had provided sufficient information.

99. On 25 January 2019, Ms Bishop reiterated that the respondent could not proceed with the grievance whilst it was characterised in such vague terms. On that occasion she offered to arrange for a HR Representative to meet the claimants to take a written note of their grievances in order to identify the matters to be investigated. Instead, the claimants notified Acas and on 31 January 2019 stated: -

> "Therefore it would no longer be appropriate for you to take part in this process."

100. We find that Claire Bishop did not refuse to hear the claimants' grievance dated 4 November 2018. We find that the claimants' grievance was in extremely general terms, lacking in any particularity and that Miss Bishop's attempts to understand what had to be investigated as part of their grievance was entirely justified.

101. We find that Miss Bishop's actions in seeking clarification of the details of the claimants' grievance did not constitute a detriment.

102. We find that Miss Bishop's actions were wholly unrelated to the claimants' activities as Trade Union Representatives.

<u>Issue 1(f)</u>

103. Issue 1(f) is dealt with prior to Issue 1(e) as Issue 1(e) was a grievance raised as a result of Issue 1(f).

104. The second claimant was rostered to work on 21 February 2019. We have been provided with printouts that demonstrate that the claimant's work schedule for 21 February 2019 was entered into the system by Ms Georgia Ruffell on 31 January 2019. The claimant was allocated appointments outside his normal area and was allocated appointments in the afternoon which would have involved him in working overtime.

105. The claimant's 60th birthday was on 21 February 2019. Apparently, the reason the claimant was allocated appointments outside his area was to cover another SI who was on annual leave.

106. Although the appointments had been on the system since 31 January 2019, it would appear that the Second Claimant only raised an issue on 20 February 2019, presumably because that was the first time he had looked on his hand-held device. The Second Claimant had not requested time off for his birthday. It would appear that the Second Claimant's complaint is not that he had to work on his birthday, work outside his own area or work overtime but that he was not consulted about this in advance, which he states should have happened in accordance with his contract of employment.

107. No contract of employment has been produced before us. Assuming it was part of his contract to be consulted if he would work overtime, on 21 February 2019 the Second Claimant indicated to Martin Smith that he would not work the afternoon appointments and this was agreed.

108. Consequently, we are prepared to find that the claimant was allocated work that he was not contractually obliged to do without consultation.

109. We find that this was not a detriment as, when the claimant complained, he was not required to work those hours.

110. In any event, we find that the treatment of the claimant was wholly unrelated to his Trade Union activities.

Issue 1(e)

111. On 20 February 2019 the Second Claimant presented yet another grievance concerning being allocated work on 21 February 2019. The issue identified is that Simon Millward refused to deal with the grievance promptly.

112. On 20 February 2019 the grievance was referred to Mr Millward.

113. On 20 February 2019 the Second Claimant was emailed as follows:

> "Having discussed the below email briefly with Simon in order for this to be progressed we would ideally need you to help us understand what the grievance relates to.
>
> Providing the email from one of your managers and expressing that you would like to raise a grievance does not help us to determine what the issue is, nor who might be appropriate to take the matter forward with you. With this in mind, I would be grateful if you could elaborate on the issues you wish to be investigated so we can take the necessary steps."

114. On 22 February 2019 the second claimant provided further information.

115. The second claimant was on leave from 25 February to 4 March 2019.

116. On 4 March 2019 Mr Millward emailed the Second Claimant stating: -

> "I'd be grateful if we could have a brief discussion to help me understand how the actions may have impinged your employment contract, could you confirm the best number and time to speak to you?"

117. On 13 March 2019 Mr Millward emailed the Second Claimant to ask if the matter was still live.

118. On 19 March 2019 the Second Claimant replied that it was still live and reiterated this on 20 March 2019. Mr Millward asked if the grievance was still live as he had had no contact with the Second Claimant following his invitation to discuss the matter.

119. Thereafter, Mr Millward progressed the issue identifying two managers and seeking to establish their availability to hear the grievance.

120. On 15 April Mr Millward emailed the Second Claimant indicating that an independent chair had been approached to hear the grievance and enquiring what dates he was available for.

121. On 18 April Mr Millward wrote to the Second Claimant inviting him to attend a grievance hearing on 10 May 2019. Unfortunately, the Second Claimant was then signed off work from 22 April to 30 May so that meeting could not go ahead.

122. The Second Claimant returned to work on or about Friday 31 May 2019. Between 6 June and 10 July (the date of the Second Claimant's third claim) Mr Millward sought to arrange a stress risk assessment which he felt should be conducted before the grievance hearing went ahead. We find that this was entirely reasonable given that the second claimant had been off work with stress. The Second Claimant did not agree to this proposal and consequently the meeting did not go ahead prior to the claimant lodging his third claim.

123. We find that Mr Millward did not refuse to deal with the claimant's grievance either promptly or at all. We find that Mr Millward's actions in seeking to clarify the nature of the grievance and to arrange its hearing were entirely appropriate given the circumstances.

124. We find that the alleged conduct did not in any event constitute a detriment.

125. In any event we find that Mr Millward's actions were wholly unrelated to the Second Claimant's Trade Union activities.

126. For the above reasons the judgment of the tribunal is that the claimant's claims are dismissed.

____
Employment Judge Alliott

Date: …24.11.2020…………..

Sent to the parties on: 25.11.2020.........
T Henry-Yeo
....
For the Tribunal Office